

# **USE OF DIVERSION AND PLEA BARGAIN IN CRIMINAL TRIAL**

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**By**

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## ***COURTESIES...***

I wish to begin by expressing my profound gratitude to his lordship Hon. Justice Salisu Garba Abdullahi, the dynamic administrator of this great Institute for the invitation to deliver this paper on Use of Diversion and Plea Bargain. I consider this a rare privilege and I am deeply grateful, sir.

I also thank his lordship the Hon. Chief Judge of Kwara State Hon. Justice S.D. Kawu for granting me the permission to be here today. My lord, you have been a great father and mentor. May God bless you, sir.

May I seize this opportunity to welcome participants to this august assemble and I urge you all to pay full attention to all papers slated for presentation at the workshop as they will assist in the discharge of your duties.

Let me to also seize this opportunity to convey my gratitude and appreciation to the management and staff of the National Judicial Institute and in particular, the Director of Studies, Mr. Abdulazeez Olumo. More grease to all your learned elbows.

## ***ABSTRACT***

This paper which examines the use of diversion and plea bargain in criminal trials is divided into five major parts. It briefly explains diversion and plea bargain as practical aspects in the criminal justice system followed by critical analysis of their evolution in the Nigerian legal system. Afterwards, it discusses the merits and demerits of the use of diversion plea bargain and ends with key recommendations for improvement in diversion and plea bargain in criminal trials.

## **1 INTRODUCTION**

It is now common knowledge that the court is the last hope of the common man. What is more, a fundamental feature of the criminal trial in Nigeria legal system is the provision of right of appeal from the lowest courts i.e. Magistrates/Area/Customary Courts to the highest court of the land i.e. the Supreme Court. You will agree with me that the right of appeal usually leads to a situation where certain cases continue for as long as a minimum of 3 to 10 years before they are finally disposed of in the courts.

Consequently, the courts and prisons are congested and the time frame for justice to be attained is exhausted in many instances as a result of the arduous/long journey taken by aggrieved parties in the exercise of their rights of appeal. To avoid deplorable administration of justice, alternative options have been innovated in the criminal justice system, notable among which are the options of diversion and plea bargain.

## 2 THE CONCEPT OF DIVERSION

The concept of diversion consists of variety of strategies employed to resolve legal disputes without necessarily taken the offender through the formal trial process. In other words, diversion refers to an alternative measure taken by a person who has been accused of a crime, without subjecting such a person to the rigors of the criminal prosecution and imprisonment.

More explicitly, diversion is a term used to describe intervention approaches that redirects youths away from formal processing in the juvenile justice system, while still holding them accountable for their actions bearing in mind that one of the objective of criminal justice system in Nigeria is that a person should be punished for his actions or inactions to serve as deterrent to others.

The goal of diversion is to remove youths as early as possible from juvenile justice to avoid future negative outcomes associated with formal processes such as increased odds of recidivism, stigmatization and criminal justice costs.

Distinguished Chairman, your worships and your honors, permit me to cite the case of **Kachi V. State** (2015) 9NWLR (Pt 1464) Pp 226 – 227 paragraph G-A) on the need to reform or rehabilitate young offenders, where the court stated:

*'Young offenders should be given opportunity for correction, reformation and rehabilitation to be restored into society as useful law abiding citizens. Thus, prosecutions and adjudication should not claim ignorance of or deliberately side track the provisions of the Child's Rights Act, 2003 in the course of administration of criminal justice in respect of a child or juvenile under 14.*

It is thus pertinent to note that diversion programmes involve juvenile courts, restorative justice, interventions, truancy prevention, mentoring programs etc.

Basically, some forms of diversion (pre-trial diversion), do not require a person to plead guilty. It allows a person to be removed from judicial process and in its place, enter into a series of rehabilitation exercises such as counseling, community service and show of good behavior. This is in line with Part 44 of the Administration of Criminal Justice Act (ACJA) 2015 and Part II of the Nigeria correction Act 2019 which lay emphasis on non-custodial measures that includes (but not limited to) probation, parole, community service and restorative justice (which promote reformation, rehabilitation and re-integration of offenders).

The provisions are also with accordance with international framework related to restorative justice worthy of note here is the United Nation Basic principles of the use of restorative justice programme in criminal matters 2000. Other rules which support or promote restorative justice are;

- United Nations declaration of Basic Principles of Justice for victims of crime and abuse of power, 1989 – which includes the value of informal dispute resolution processes to enhance conciliation and redress.

- United Nations standard minimum Rule for the administration of Juvenile Justice; 1985 Beijing Rules
- The United Nations Standard Minimum Rules for Non-Custodial Measures; Tokyo Rules 1990

There are two types of Diversion:

(i) *Informal Diversion*: These consist of correction and warning programs aimed at diverting youths out of court system with little or no further action. This is usually the approach of the law enforcement units such as the police, FRSC, NCDSC, NDLEA and others for simple offences and usually for first timers.

(ii) *Formal Diversion*: This usually occurs after an arrest and involves:

- a justice component (police decisions, probation, supervision and court processes)
- a service component (serving of a sanction or a form of treatment/programme that will justify the end of the justice). Once this is satisfied, the original case will be closed.

As noted earlier, there are many strategies to diversion and it ranges from simple warn and release to programs requiring intensive treatment services, to check in with court systems, referral to mental homes, rehabilitation centers, correctional/borstal homes, restriction and prohibition for certain period of time, mentoring centers, vocational centers and other educational training institutes. These are all usually under the watchful eyes of responsible individuals, officials of Ministry of Social Welfare and other agencies of the government (such as Office of the Public Defenders and Legal Aid Council) who will ensure that the directives of the court are complied with to the letter for the reformation and re-integration of the offender. The parents of the offenders can also be the useful link between the offender and supervision agencies. I should quickly point out that FIDA had also been observed as having positive impact in juvenile cases.

Diversion therefore provides an opportunity for rehabilitating offenders, and tackling the root causes of their misdemeanor. The offender benefits from diversion as a form of rehabilitation, reformation and re-integration unlike the psychological, moral and financial burden that comes with criminal proceedings.

Also worthy of note is that restorative justice as obtainable in Nigeria, represents a paradigm shift in criminal justice by involving the offender, the victim and the community as a whole, to ensure a balance between offender's punishment and protection of victim's right. Therefore, the concept of restorative justice is woven around four major themes namely; Restoration, Accountability, Community Protection and Skill Development.

Therefore for diversion, it is pertinent to note the following:

- The Judge has final say over whether diversion can proceed
- The victim of a crime may have veto or power over diversion
- A person may have to waive certain protection to be offered diversion

- Diversion period may last longer than expected as it is the discretionary power of the court.

### **3 THE CONCEPT OF PLEA BARGAIN**

Plea bargain allows an offender to negotiate the charges against him or her in the terms of his or her statement. In other words, plea bargain is an arrangement between the prosecution and the defence wherein, in exchange for a plea of guilty by the defence, the prosecutor offers some reliefs to the defendants. These Reliefs may be in the form of reduction in the number of charges in a multiple charge case or recommendation of lesser punishment. Normally, plea bargain usually occur prior to trial but it may be permitted anytime during the trial but before judgement is delivered.

Plea Bargain emanates from the United States Supreme Court and it is considered an essential component of administration of justice, involving the disposition of criminal charges by agreement between the prosecutor and the accused. Plea bargaining is encouraged because if every criminal charge were subjected to full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Plea bargain is not as punitive as the conventional criminal trial because it allows defendants access to prompt and final disposition of their cases. The defendant is saved from horror of victimization and the many anxieties and uncertainties of criminal trial as well as maximum penalties that comes with the scourge of the law. The decision to accept or decline a plea bargain is based on a combination of prosecution discretion, defence option and judicial discretion.

The history of plea bargain in Nigeria is not far fetched and there is a dearth of authorities on plea bargain in Nigerian court as against other justifications. For instance, the first legislation to bring in plea bargain into Nigeria criminal jurisprudence is the Administration of Criminal Justice Law of Lagos State, 2011. The second is the Administration of Criminal Justice Act, 2015 which provides in section 270(1)(a) that *notwithstanding anything in the Act or in any other law, the prosecution may receive and consider a plea bargain from a defendant charged with an offence directly from that defendant or on his behalf or offer a plea bargain to a defendant charged with an offence.* Plea Bargain agreement must be reduced into writing.

I commend you to:

- Agbi V. FRN (2020) 15 NWLR (Pt. 1748) 416 (Pp. 454 – 455, paragraph D-B 457.
- PML (Securities) Co. Ltd. V. FRN (2018) 13 NWLR 16.
- Section 270(3) of the ACJA 2015 which further provides that where the prosecution is of the view that the offer or acceptance of a plea bargain is in the interest of justice, the public interest, public policy and the need to prevent abuse of legal process, he may offer or accept the plea bargain.

#### **4 CONDITIONS TO BE MET OR PRESENT FOR PLEA BARGAIN**

By S.270 (1) of ACJA, prosecutors may receive and consider a plea bargain from a defendant either directly or on his behalf or may himself offer a plea bargain to the defendant charged with an offence.

S.270(2) – this provides conditions which must be present at plea bargain. They are;

- a. Evidence of prosecution is sufficient and beyond reasonable doubt.
- b. The defendant has agreed to make restitution.
- c. Where in the case of conspiracy, the defendant has fully co-operated and made useful information on other offenders.

Therefore, by these Sections and for the purpose of emphasis the factors to be considered in plea bargain are;

- The defendant's willingness to cooperate in the investigation or prosecution of others;
- The defendant's history with respect to criminal activity(ies),
- The defendant's remorse or contribution and his willingness to assume responsibility for his conduct;
- The desirability of prompt and certain disposition of the case; the likelihood of obtaining a conviction at trial and the probable effect on witnesses;
- The probable sentence or other consequence if the defendant is convicted;
- The need to avoid delay in disposition of other pending cases and the expenses of trial and appeal as well as the defendant's willingness to make restitution or pay compensation to the victim where appropriate.

#### **5 FORMS OF PLEA BARGAIN:**

- (i) *Charge plea bargain*: this is where the prosecutor agrees with the defendant to press a lesser charge than the one originally filed against the defendant.
- (ii) *Count plea Bargain*: this arises where the accused person agrees to plead to one or fewer number of charge counts as filed by the prosecution in exchange for a concession.
- (iii) *Sentence plea bargain*: this is pleading guilty to a charge in exchange for a lenient sentencing. Here, the prosecutor need not reduce the charges or count charge filed against the defendant, rather, the prosecution would, based on the agreement of parties recommend a lighter sentencing of the defendant.
- (iv) *Fact plea bargain*: Here, the defendant agrees to admitting to certain facts in return for the prosecution not introducing other facts into evidence. It appears in very specific cases for specific purpose and it is not allowed in some jurisdiction. The consent of the prosecutor and the defendant or his representative must by agreement be reached. The different forms of plea bargain are applied by will at the discretion of the court and what matters most is that the defendant is likely to get a

lighter sentence for the offence he has committed in exchange for the plea of guilty.

## **6 PARTIES TO AND PROCEDURE FOR PLEA BARGAIN AGREEMENT**

Ordinarily, steps to criminal case/trial are – Investigation, Charging, Initial Hearing/ Arraignment, Discovery, Preliminary Hearing, Pre-trial matters and trial.

It is pertinent to note that before a defendant takes his plea in a normal criminal trial, he shall be informed of his right under S.269 of ACJA.

- The defendant shall also be brought to the court unfettered until the court sees cause otherwise.
- He shall be called upon to take his plea.
- The court shall record that it is satisfied that the defendant understands the information read over and explain to him in a language that he understands.

However, the parties and procedure for plea bargain are that:

- (i) There must be a prosecutor and a defendant;
- (ii) A negotiation between the prosecutor and defendant;
- (iii) A negotiation which must have ended in an agreement with concessions and compromises from the prosecutor and defendant;
- (iv) The plea bargain agreement must be in writing and presented before the court who must not participate in the agreement;
- (v) The Judge/Magistrate will confirm the terms of the agreement to ensure that the rights of the defendant were not compromised or infringed upon;
- (vi) The court may or may not give approval for plea bargain where it notices an anomaly or is not satisfied that the agreement conforms to the terms and admissions made by the defendant;
- (vii) Also a Judge or Magistrate is entitled to examine, consider and evaluate the sentence agreed upon to ensure that it is commensurate with the gravity of the offence;
- (viii) Where the court does not give its approval, the court shall inform the prosecutor of its reservation and the trial will then commence *denovo* before another judge or defendant may waive his right to be tried by another judge.

After being informed by the prosecutor of the agreement, the judge or magistrate is not permitted to disregard the plea bargain agreement reached by the parties and impose a heavier punishment on the defendant than that stated in the agreement – **Agbi V. FRN (Supra)**. The defendant also has the right to withdraw

from the plea bargain agreement so as not to occasion a miscarriage of justice –  
**Kelly V. FRN (2020) 14 NWLR (Pt. 1745)**

- (ix) Where however the court is satisfied, that the defendant had admitted a plea of guilty to the charge, the judge or magistrate shall sentence the defendant according to the sentence agreement as informed by the prosecutor.

**Note:** That Section 270 (18) of ACJA which purportedly restricts the right of appeal in cases of plea bargain except where fraud is alleged – had been declared void on account of its being inconsistent with the constitution. See Section 241 and Section 257 of the constitution of the Federal Republic of Nigeria, 1999 (As Amended). **Agbi V. FRN (Supra)** Other States have now avoided this pitfall by not including this section in the domesticated law of their respective states.

As earlier noted, the concept of plea bargain originates from American jurisprudence but other countries that have formally adopted plea bargain include India and Germany. Even though the arrangement has been used in the resolution of a handful of cases in Nigeria, there still remains a big lacuna in the laid down procedure to be followed by parties in a plea bargain arrangement.

I should add that Plea Bargain cannot be taken or entered into in absentia or by proxy. The defendant must be present personally to negotiate plea bargain agreement.

For comprehensive procedure on plea bargain as presently practiced, see section 270 (1-22) of Administration of Criminal Justice Act 2015, Section 276 (1-22) of Kwara State Administration of Criminal Justice Law 2018, Section 75 of the Administration of Criminal Law of Lagos State and other relevant Sections of States that have domesticated the ACJA. And for arraignment of a defendant for plea bargain; see S.271 of ACJA.

## **7 APPRAISAL OF DIVERSION AND PLEA BARGAIN**

### **Advantages of Diversion**

- (i) Diversion is one of the programmes that reduce the burden of the states and local courts in that it saves time and cost.
- (ii) Diversion guarantees that a person is given a minimum action by being removed from judicial process but instead enter into education and rehabilitation exercise which includes counseling, treatment, community service which invariably ensures restorative and reformatory justice to the defendant.
- (iii) The defendant is made to be answerable for his action or inaction in a way which will not affect his future. In other words, it redirects youths from usual Juvenile Justice.
- (iv) Diversion removes negative outcomes of formal judicial process with the attendant stigmatization and labeling.



- (v) In this world of digitalization where social vices are on the rise, leaving parents and the society at the mercy of that which seems to be beyond their capability, diversion ensures that the negative effects of crimes and peer influences are curbed early in life, so that underlying causes of criminal behavior are addressed.
- (vi) It is favoured for its efficiency in dealing with first time offenders by ensuring that the offenders have no criminal record of conviction.
- (vii) In a diversion programme, the victim by the intervention gets Justice in form of restitution.
- (viii) In a diversion programme, it is the recommendation of the judge or magistrate for reformation, restoration and reintegration that determines the length of action.
- (ix) It reduces the case load of Justice system
- (x) It reduces recidivism i.e. the habitual relapse of the defender into crime.
- (xi) For adults, diversion allows non-violent, first time offenders opportunity to resolve offenses outside judicial process diversion.

#### **Disadvantages of diversion**

- (i) There is less severe punishment for offences and this negatively affects deterrence
- (ii) The victim of a crime has the power to consent to diversion and he/she in some cases may not give his/her consent or may challenge the recommendation in the regular court.
- (iii) A person may have to waive certain protection to be offered diversion. e.g. the offender may need to admit to the crime before being availed of this intervention. He may also be precluded from severance from wrongful prosecution or arrest.
- (iv) Where diversion programme fail, individual suffer, victimization is increased and the system loses credibility.
- (v) The cost of community-based services, education, borstal home and other restorative order are significantly less than the cost of incarceration.
- (vi) It is a non-conventional criminal justice system which has no legal backing (not codified) for it is a form of pre-trial sentencing which remedies the behaviour leading to original arrest of the offender it therefore carries the burden of constitutionality/legality.
- (vii) Diversion programme requires commitment and dedication from mentorship, rehabilitation/community centers to which the offender may be referred as otherwise the purpose will be defeated.
- (viii) Parents and guardians may hire lawyers to advocate for diversion to enable their wards have soft landing and appropriately escape the long arm of the law.
- (ix) Diversion oftentimes consider the needs of the offender over those of the victims.
- (x) Diversion programme in juvenile justice system gives young offenders a second chance but studies have shown that it does not reduce recidivism.

### **Advantages of Plea Bargain**

- (i) It saves the time and expense(s) of parties, the court and the public. Trials in Nigeria usually take a considerable length of time. More so, when the rulings or judgments of the trial courts are appealed against, it takes a far longer time to conclude. During this period, there is every likelihood that the defendant will be remanded in prison custody which would have been avoided in situation where a plea bargain arrangement is made. With plea bargain both the prosecutor and the defence are spared the uncertainty associated with trials. If the state decides to prosecute every offence as alleged, the courts will be greatly overburdened and this would hamper the efficiency of the judiciary in the discharge of its constitutional role.
- (ii) Plea Bargain agreement may give exponentially less severe penalties than conviction at trial.
- (iii) For Plea Bargain, the defendant, his family and the victim are spared the rigours of public trial and accompanying emotional trauma.
- (iv) The prosecution also benefits from Plea Bargain as he is fettered of the burden of proving guilt beyond reasonable doubt, a task which is frequently difficult in view of constitutional restraints.
- (v) The Plea Bargain agreement may include a promise by the defendant to testify against a co-defendant or to assist the government in the discovery of others engaged in criminal activities.
- (vi) Plea Bargain assists in dealing with the case load of the court by alienating the need for the judge to schedule and hold long trial and delivery of ruling/judgment.
- (vii) Plea Bargain enables the defendant to take responsibility for his action by pleading guilty.
- (viii) It reduces the population of awaiting trial inmates.

### **Disadvantages of Plea Bargain**

- (i) Plea Bargain may have adverse impact on the defendant for there may be waivers of his constitutional right which would have been assessed in a trial.
- (ii) Judge must be assured that the plea was made knowingly and without coercion before he accepts it.
- (iii) Prosecutors cannot guarantee the sentence which is determined by the judge and this is influenced by factors such as the severity of the offence, the victim's impact statement, state policy, public interest, et cetera.
- (iv) It does not necessarily reduce recidivism
- (v) It may lead to poor investigatory procedure.

## **8 ISSUES WITH DIVERSION AND PLEA BARGAIN**

- (i) Diversion is often times criticized for prioritizing the needs of the offender over those of the victims.

- (ii) It could lead to indolence on the part of prosecutors and could be abused or be forced on the defendant.
- (iii) Although the state has the power to prosecute where there is a crime against a person, victims, sometimes may not feel that justice has been done in their case where the courts accept the plea Bargain of the defendant.
- (iv) Plea Bargain has become one of the most needful means of quick disposal of criminal trials worldwide, and is prone to abuse if not well regulated. For example, tactical pleas might be offered to evade commensurate justice.
- (v) Some argued that the plea negotiation process is both unnecessary and degrading to the criminal justice system. This is where there is the feeling that the process is irrational, unfair and secretive, practice that facilitates the manipulation of justice system by allowing offenders to receive lenient sentences. People who hold this view cite as examples, influential politicians facing corruption charges in Nigeria.
- (vi) In the lower courts, it is only the Family Courts in states where they are in existence with jurisdiction to try juvenile cases of offenders not less than 16 years while offenders of 18 years and above can be tried in the regular court. It is therefore not in all cases that diversion and plea bargain is applicable.
- (vii) The high probability of dropped charges through regular proceedings has led lawyers to advise their clients to opt for trial of their cases instead of plea bargain.

## **9 WAY FORWARD/RECOMMENDATIONS**

Despite the criticisms and issues associated with diversion/plea bargain, practical instances have revealed that these approaches to justice remain constitutional and cardinal to effective administration of justice. They are also in consonance with global best practices. In Nigeria, anti-graft agencies have employed the instrument of plea bargain where necessary to tackle corruption and recover proceeds of economic crimes. This does not imply that the properties or money involved will not be forfeited or that the victim will be left to go scot free. The court will still convict and sentence accordingly but with less rigour involved in high scale criminal proceedings. Therefore:

- (i) Diversion/Plea Bargain must be in the interest of the public and must commensurate with the offence committed.
- (ii) The Plea Bargain must be well regulated i.e. it must be in writing and must go before the court. Also, it must not be shielded from judicial review.
- (iii) Plea negotiation should only be considered where there exists insufficient evidence to prove the offences charged. Both plea bargain and diversion should be codified.
- (iv) Judges should have statutory sentencing guidelines for utilizing plea bargain and there must be training in assessment of multiplicity of scenario that may likely call for diversion and plea bargain.

- (v) Victims need to be involved in the diversion process so as to understand reasons behind decision taken on the offender.

## **10 CONCLUSION**

This paper has explored the meaning, practice and procedure associated with diversion and plea bargain. The paper juxtaposed the advantages as well as issues associated with the practice and procedure.

However, in spite of issues raised and appraised, it is evident that diversion and plea bargain have come to stay as alternatives to rigorous criminal proceedings and are of great benefit to the criminal justice system. On the part of the offender, diversion offers a rehabilitating influence and plea bargain, when well regulated, guarantees effective disposal of cases without compromising justice. Therefore, there is need to improve on the practice and procedure associated with diversion and plea bargain, as the improvement will have multiple benefits for the entire criminal justice system.

I thank you for your kind attention.

## END NOTE

1. Tafa Balogun vs FRN – Unreported Suit No FHC/AB/CR/14/2005
2. Dieprieye Alamaishiga vs FRN (2006) 16 NWLR (Part 1004) 1
3. FRN vs Lucky Igbinedion (2014) All FWLR Part 734, 101 At 144
4. FRN vs John Yusuf – Unreported Suit No FHC/L/297C/2009
5. FRN vs Cecilia Ibru – Unreported Suit No FHC/L/296C/2009
6. FRN vs Sarah Ochepeke – Unreported Suit No FHC/141C/2017
7. Abdul Rasheed Maina – Unreported Suit No FHC/KD/C/112/2017. Appeal NOCA/K/628C/2018.
8. Federal Republic of Nigeria v. Nkechi Carline Amadi (Alias Onyemachi Uchechi) FCT/HC/CR/16/2018
9. Federal Republic of Nigeria v. Micheal Ogun FCT/HC/CR/15/14
10. Federal Republic Nigeria v. Ran – Yaks Nigeria LTD. FHC/MKD/CR/33/2010
11. Digest of Cases on the Administration of Criminal Justice Act (2015) AdeDeji Adekunle Page 78
12. NIALS Compendium of State Administration of Criminal Justice Law Analyses Page 257 and 263
13. Administration of Criminal Justice Act. (ACJA) 2015 with Explanatory Notes and Cases Prof. Yemi Akinseye-George, SAN Page 305 – 312