

**AN APPRAISAL OF THE PRINCIPLES AND APPLICATION OF
PLEA BARGAIN AND SENTENCE INDICATION**

Ifeanyi Maxwell Okobia*
Enemhinye Ehigiator**
Onosemare Blessing Ibhawoh***

Abstract

Plea bargain is a principle of law usually adopted in high-profile criminal matters, and most times, society at large either misunderstands this principle or its true objectives. In the Delta State Administration of Criminal Justice Law of 2022, there is also a similar kind of principle: sentence indication. Using doctrinal methodology, we shall critically examine these principles, their similarities and differences, and further examine how these principles meet the ends of justice. The researchers recommend a proper application and slight modification of these principles, and ensure that, through these principles, justice should not just be done but be seen by all to be done.

Keywords: *Justice, Plea Bargain, Sentence Indication, Delta State*

* * Ifeanyi Maxwell Okobia, Esq. Principal Partner, I.M. Okobia and Associates (Legal Practitioners & Arbitrators), Asaba, Delta State, and LLM Candidate, Faculty of Law, Chukwuemeka Odumegwu University, Igbariam, Anambra State. Email: okobiaifeanyi@gmail.com

** Enemhinye Ehigiator, PhD, JP, Notary Public; LL. B (Hons), BL, LL.M, FC Arb, FCTI, FIMC, CMC; ACIS, ANIPR, CPM, KSJI, Senior Lecturer, College of Laws, Western Delta University Oghara, Delta State, Nigeria, enemhinyeehigiator@gmail.com

*** Onosemare Blessing Ibhawoh, Esq. Managing Partner, I.M. Okobia and Associates (Legal Practitioners & Arbitrators), Asaba, Delta State

1.0 INTRODUCTION

With particular reference to the Delta State Administration of Criminal Justice Law, 2022, the two similar principles of Plea Bargain and Sentence Indication were spotlighted in this article. There are few distinctions in these principles; however, the aim is the same. It is noteworthy that even stakeholders in the criminal law sector, prosecution, defence attorneys, and victims regularly misunderstand and misinterpret these principles, which trickle down to society at large.

Most political/economic fraud cases usually adopt the principle of plea bargain, and the outcome usually leaves the question begging in the mind of the general public: what justice was done?

2.0 THE PRINCIPLE OF SENTENCE INDICATION

A sentence indication is a statement by the Court that, if the Defendant pleads guilty to the offence alleged in the charge, or any other specified offence, at that time the Court would or would not, as the case maybe, be likely to impose any of the following on the defendant:

- a. A sentence of a particular type or types or;
- b. A sentence of a particular type or types within a specified range (for example, periods of time or monetary amounts) or;
- c. A sentence of a particular type or types and of a particular quantum (for example, periods of time or monetary amounts)¹.

It is noted that this is not a sacrosanct procedural step in criminal proceedings in Delta State. The Court may take this step only upon the request of the defendant before trial²

¹ Delta State Administration of Criminal Justice Law 2022 (ACJL), s 41

One of the factors the court considers before accepting a defendant's request for a sentence indication is the Court satisfaction that he has sufficient information available at his disposal³.

The two information the Court must have especially if the sentencing has to be in monetary terms, are;

- a. A summary of the facts on which the sentence indication is to be given, agreed on by the prosecution and the Defendant.
- b. Information as to any previous conviction on the Defendant.⁴

The Judge or Magistrate is generally not entitled to relent from a given sentence indication.⁵ It is also not binding on a judicial officer other than the Judge or Magistrate who gave the indication.⁶

However, when a new information becomes available to the court after the sentence indication was given but before sentencing and the Judge or Magistrate is satisfied that the information materially affects the basis on which it was given, the court can rightfully relent on a given sentence indication.⁷ The Court may also on the basis of the new information give a second or subsequent sentence indication⁸

This leaves a loophole. What happens when this information become available after sentencing? It is our submission that the court will become

² ACJL 2022, s 42

³ Ibid s 42

⁴ Ibid s 42 (4)(a)(b)

⁵ Ibid s 43 (2)

⁶ Ibid s 43(3)

⁷ ACJL 2022, s 43(2)(a)(b)

⁸ Ibid s 44(3)

ordinarily functions officio. However, it is our further submission that this may be viable ground of appeal to set aside the sentencing and an order of re-hearing made by the appellate Court.

The Law curiously gives room for the court to propose to give a sentence indication.⁹ However, when the court takes this route, there is a requirement to give the prosecutor and the defendant an opportunity to be heard, though not a compelling one.¹⁰

A sentence indication has a limited lifespan.¹¹ The law provides that the Court specifies the life span or in the absence of a specified date, until the expiration of 5 working days after the date on which the sentence indication was given¹²

3.0 THE PRINCIPLE OF PLEA BARGAIN

The Delta State Administration of Criminal Justice Law defines Plea Bargain in the following terms:

Means an agreement entered between the prosecutor (not including a Private Prosecutor) and defendant setting out the terms and condition and the criminal charges on which the defendant will enter a plea of guilty¹³

The courts have also in several decisions described/defined plea bargain. In the case of *PML (NG) Ltd v FRN*¹⁴ the court on the meaning of Plea Bargain stated thus:

⁹ Ibid s 44(1)

¹⁰ Ibid s 44(1)

¹¹ Ibid s 45(a)(b)

¹² Ibid s 45

¹³ Ibid s 2

¹⁴ (2017) LPELR – 43480(SC)

Plea bargain boils down to a negotiation between an accused and the prosecution, in which the accused agrees to plead guilty to some crimes in return for reduction of the severity of the charges, dismissal of some of the charges and the prosecutor's willingness to recommend a particular sentence or other benefit to the accused.

The Black's Law Dictionary¹⁵ defines plea bargain thus:

A negotiation agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concern by the prosecutor, usually a more lenient sentence or a dismissal of other charges

The Court of Appeal in *Abiodun v FRN*¹⁶ offered the following as the definition of plea bargain;

Plea bargaining is a negotiation process that takes place between the prosecution and the defence in a criminal case. It involves the defendant agrees to plead guilty or no contest to a lesser charge or to receive a reduced sentence in exchange for certain concessions from the prosecution.

The court held further thus;

Plea bargaining is a voluntary process, and both the prosecution and the defence must agree to the terms of the plea deal. The trial Judge does not participate in the agreement negotiation but will be notified of the plea

¹⁵ 9th edition, P. 1270

¹⁶ (2023) LPELR 61007(CA)

agreement as the agreed upon term will be implemented, the plea bargain agreement may include agreement as to restitution or compensation... It must be reduced into writing”

The Court of Appeal per Uchechukwu Onyemenam JCA in *Albert v FRN*¹⁷ held thus on Plea Bargain;

Plea bargain is the process whereby a criminal defendant and prosecutor reach a mutually satisfactory disposition of a criminal case, subject to the court’s approval. Plea bargaining is expressly authorized in statutes and in court rules

The court further opined that plea bargain can be by way of charge bargain or sentence bargain. Furthermore, the court held thus:

The essence of the principle of plea bargain is to enable the prosecutor and the defendant to enter into a plea bargain agreement that is mutually beneficial to the interest of the prosecutor and the defendant in a criminal trial

The Delta State ACJL specifically referred to plea bargain as ‘an agreement’.¹⁸ The process of arriving at this agreement is defined by the law as a ‘plea discussion’.¹⁹ Most authorities cited above did not make this distinction. But for the purpose of this research, we will use the distinction as proffered by the Delta State ACJL 2022, which is plea

¹⁷ (2021) LPELR 56144(CA)

¹⁸ ACJL 2022, s 2

¹⁹ *ibid* s 2; s 214(1)

bargain as the agreement, while the process of arriving at the agreement, a plea discussion.

The Courts do not participate in any form or manner in plea discussion/bargaining.²⁰ The active participants are the prosecutor and defendant or the defendant's legal representatives.²¹ However, a Prosecutor other than the Attorney- General is not permitted to conclude a plea discussion unless the prosecutor first obtains the Attorney-General's written permission.²² A private Prosecutor is not even allowed by law to get involved in plea discussions or bargains.²³

The Law requires that the victim be consulted before concluding a plea discussion, though the requirement is not mandatory.²⁴ Neither is the requirement to inform the victim of the substance and reasons for the agreement/plea bargain.²⁵ The Law requires the plea bargain agreement to be written or in a particular format²⁶ and must be signed by the prosecutor, the defendant's legal practitioner and the defendant²⁷ and when the defendant is unrepresented by counsel, to be signed by the defendant in the presence of the court's registrar²⁸.

²⁰ *ibid* s 214; s 219; *Abiodun v FRN (Supra)*, *Albert v FRN (Supra)*

²¹ *ibid* s 214; s 217(1); s.219

²² *ibid* s 214(2)

²³ *ibid* s 2

²⁴ *Ibid* s 218(1)

²⁵ *Ibid* s 218(2)

²⁶ Form 26A or form 26B

²⁷ ACJL 2022, s 19(1); *Abiodun v FRN (Supra)*

²⁸ *Ibid* s 219(2)

Beside the requirement of being in writing and signed, same must be filed in the registry of court.²⁹ In as much as the court does not participate in a plea discussion/bargain, the court is not compelled to accept a plea bargain³⁰ The court must be fully briefed on the substance of and reasons for the agreement and whether any previous agreement has been disclosed to another judge or magistrate in connection with the same matter and, if so, the substance of that agreement.³¹ Even with the briefing, the court must further determine to his satisfaction that:

- a) No improper inducement was made to the Defendant to enter the agreement.
- b) The defendant understands the nature, substance and consequences of the agreement.
- c) The offence to which the agreement relates adequately reflects the gravity of the provable conduct of the defendant, unless in exceptional circumstances the agreement is justifiable in terms of the benefits that will accrue to the administration of justice or the protection of society.³²

The court is further given the discretion to at this point in open court seek the views of the victim(s) or a relative of the victim.³³ When is not proper to do so in open court, same can be done in chambers but in the presence of the Prosecutor and the defendant's legal practitioner or when the Defendant is unrepresented in the presence of a fully guarded defendant.³⁴

²⁹ Ibid s 219(1) (2) & (3)

³⁰ ibid s 220; *Albert v FRN (Supra)*

³¹ Ibid s 220(1) (a)(b)

³² ACJL 2022, s 220(2)(a)(b) & (c)

³³ Ibid s 221 (1)

³⁴ ibid s 221(2)

Any time before the Plea Bargain is entered as judgment of the Court, the law entitles the defendant to withdraw from that agreement³⁵ The Law also makes a judgment based on a Plea Bargain appealable.³⁶ But to succeed on appeal, the Defendant must show:

- a. It was entered into because of an improper inducement.
- b. It was entered into because of misrepresentation as to the substance consequence of a Plea Bargain; or
- c. The prosecutor has breached the terms of the plea bargain.³⁷

Same right of appeal is available to the prosecution also.³⁸ Before the prosecutor can succeed on appeal it must be shown that

- a. The Defendant received a sentence that does not accord with or is within the range anticipated by the plea bargain
- b. The prosecutor, during a plea discussion was willfully misled by the Defendant in some material respect; or
- c. The Court in passing sentence, was willfully misled in some material respect³⁹

Generally, in the public interest, the court may reject a plea bargain entered between the prosecutor and the Defendant.⁴⁰

³⁵ Ibid s 223

³⁶ Ibid s 223

³⁷ Ibid s 223 (a) (b) & (c)

³⁸ Ibid s 224 (2)

³⁹ ACJL 2002, s 224 (2)(a)(b)

⁴⁰ Ibid s 226

4.0 NOTABLE DIFFERENCES BETWEEN SENTENCE INDICATION AND PLEA BARGAIN

- a. The prosecutor generally plays no role in sentence indication. It is either proposed by the defendant or the Court.⁴¹ The only time the prosecutor may get involved if it is proposed by the court and the court offers him the opportunity to be heard on the matter.⁴² In the case of a plea bargain/ discussion, the prosecutor plays a dominant role and conversely the Court never gets involved until is time to approve or apply same.⁴³
- b. The Attorney General of the State can only get involved in a plea discussion and his role is limited to giving a writing permission for the conclusion of a plea discussion.⁴⁴
- c. Sentence Indication must be given before commencement of trial⁴⁵ for plea bargaining there is no such limitation.⁴⁶
- d. The binding effect of a sentence indication on the court.⁴⁷ A plea bargain generally is not binding on the Court. The Court can reject same even under an omnibus reason of not “in the public interest”⁴⁸
- e. Involvement of the victim may be allowed in plea discussion/bargain both by the court and the prosecutor⁴⁹.

⁴¹ Ibid s 42(1) 44(1)

⁴² Ibid s 44(1)

⁴³ *Albert v FRN (Supra)*; ACJL 2022, s 226, s 220

⁴⁴ ACJL 2022, s 214(2)

⁴⁵ Ibid s 42(1)

⁴⁶ Ibid s 222(1) (3); s 412(1)

⁴⁷ ACJL 2022, s 43(2)

⁴⁸ Ibid s 226; *Abiodun v FRN (Supra)*

⁴⁹ ACJL 2022, s 218; s 221

Generally, for sentence indication, the victim(s) are not involved or consulted.

- f. Generally, in sentence indication, the defendant can act for himself.⁵⁰ There is a strict requirement to involve a defendant's legal representative in a plea bargain.⁵¹

5.0 STATUTORY SAFEGUARD AGAINST ABUSE OF BOTH PRINCIPLES UNDER THE ACJL, 2022.

- i. The law excludes a private prosecutor from engaging in a plea discussion/bargain⁵²
- ii. The law compulsorily requires the Attorney General's written permission for a plea bargain⁵³
- iii. The law forbids any kind of improper inducement which includes coercion of a defendant and fraudulent misrepresentation of material facts⁵⁴
- iv. The court has the ultimate discretion in both sentence indication and plea bargain⁵⁵
- v. Sentence indication must be given in open court and recorded⁵⁶
- vi. The fact that a defendant made a request for a sentence indication is not admissible in evidence in any proceeding⁵⁷ same applies to the evidence of a plea bargain later withdrawn or for an offer to

⁵⁰ Ibid s 42(1)

⁵¹ Ibid s 216 (1)(2)(4)

⁵² Ibid s 2

⁵³ Ibid s 214(2)

⁵⁴ Ibid s 215

⁵⁵ Ibid s 42(1); s 226; *Albert v FRN (Supra)*

⁵⁶ Ibid s 44(2)

⁵⁷ Ibid s 46

- enter into a plea bargain or of a statement made in connection with any such agreement or offer⁵⁸
- vii. Involvement of the victim in plea discussion/bargain⁵⁹
 - viii. Restrictions on engaging a plea bargain with a defendant not represented by counsel⁶⁰
 - ix. A prosecutor restrained from engaging in a plea bargain of an offence or charge that is not disclosed by the evidence available or that inadequately reflects the gravity of the provable conduct of the defendant.⁶¹
 - x. The end of every plea bargain or sentence indication is for the defendant to plead guilty, be convicted and sentenced and not to be acquitted.⁶²
 - xi. Voluntariness of the process.⁶³
 - xii. Must be in writing, signed, filed and/or recorded by the Court.⁶⁴
 - xiii. The court's involvement must be in open Court generally.⁶⁵
 - xix. Right to withdraw and appeal available to the defendant⁶⁶

⁵⁸ Ibid s 225

⁵⁹ ACJL 2022, s 218; s 221; *Abiodun v FRN (Supra)*, though not a mandatory requirement.

⁶⁰ ACJL 2022, s 216 (2)(3)(4) .

⁶¹ Ibid s 217

⁶² Ibid s 2; s 43(1)

⁶³ *Abiodun v FRN (Supra)*, ACJL 2022, s. 215, s.41

⁶⁴ ACJL 2022, s 219; s 44(2)

⁶⁵ Ibid s 44(2); s 220(2); s 221(1)

⁶⁶ ACJL 2022, s 223

6.0 OBJECTIVES OF THE THESE PRINCIPLES GENERALLY⁶⁷

- a. The defendant pleads guilty timely, thereby avoiding the time and cost of defending himself at trial, the risk of higher punishment and the publicity of trial.
- b. No room for justice to be defeated on technicalities or incompetence of the prosecutor to prove the guilt of the defendant, which gives room for him to be discharged and acquitted. That is to say, it eradicates the uncertainty of trial.
- c. Saves judicial time and resources
- d. Gives the victim a right to determine how they want to be compensated for the wrong done to them.

7.0 WHAT IS JUSTICE?

The pertinent question is whether the application of these principles meet the end of Justice?

The Supreme Court in *Akaninwo & Ors v Nsirim & Ors*⁶⁸ on administration of justice held thus;

...and the final consideration is the justice of the case. Justice, which generally means fairness, the quality of being just and the disposition of disputes in Court to render every party his due, is the barometer on which the case revolves or rotates in the judicial process

The Court of Appeal in *LEM v ACHA*⁶⁹ held thus:

⁶⁷ See generally ACJL 2022, s 3; *Yakubu v FRN (2022) LPELR 57749(SC)*

⁶⁸ (2008) LPELR – 321(SC)

⁶⁹ (2021) LPELR – 55795(CA)

The term justice means proper administration of laws; the constant and perpetual disposition of legal matters or disputes to render every man his due

The fact that justice must not only be done but must be seen to be done was re-echoed in *Obajimi v Adediji*.⁷⁰ In a way that fits the context of this discourse, the Court of Appeal in *Philips & Anor v Ogbanne*⁷¹ held thus:

The concept of justice is said to be a three-way process: justice to the accused or appellant in the case, justice to the victim, and justice to society. A court of law must balance this concept from the perspective of all the parties and the society

As discussed in the preceding paragraphs, the statutory safeguards against abuse and the general aim of the principles of law examined are all aimed at justice. In practice, it is perceived that defendants try to circumvent and apply these principles to get the least possible punishment for huge crimes that ordinarily deserve more severe punishments.

As opined earlier, politicians and persons involved in economic frauds usually engage these principles to weave their way out of a more severe punishment, and the victims who are onlookers are wondering if indeed justice was served. The good thing is that it all lands at the doorstep of the Judge/Magistrate, the final and ultimate deciding authority.

The Court with the ultimate mantle to do justice has the duty to look deeply into every agreement of plea bargain and ensure justice will be manifestly done by applying same. When it is obvious that justice has

⁷⁰ (2008) 3 NWLR (Pt. 1073) 1

⁷¹ (2024) LPELR – 62392(CA)

been circumvented by the clear terms of the bargain, the Court must rise and decline, reject and discard such agreements. The importance of this duty and an effective exercise of this duty was highlighted in the case of *Yakubu v FRN*⁷² where the Supreme Court held emphatically thus:

The application of a plea bargain should be in such a way that it will not defeat the attainment of substantial justice. Justice must flow in a three-way street in criminal matters. It must lead to justice to the defendant, the victims and the society... it is true that upon his plea of guilty and consequential conviction, the appellant forfeited about thirty-two properties as well as the sum of three hundred and twenty-five million, one hundred and eighty-seven thousand, eight hundred and sixty-seven naira, eighteen kobo and also paid the cumulative sum of seven hundred and fifty thousand naira as fine instead of the two year imprisonment sentence imposed by the trial court. I must say that the forfeiture of proceeds of crime, the payment of a fine do not constitute sufficient punishment for the heinous crime committed by the appellant. It is the law that a criminal must not be allowed to benefit from the proceeds of his or her crime; the criminal must be stripped of all perceived proceeds of crime in his or her possession. It is reckless, outrageous and immoral to allow a criminal filling plea bargain as an instrument for retaining the proceeds of crime. I think the time has come for us as a nation to embark on meticulous scrutiny of proceeds of crime in the hands of offenders to ensure that they go home

⁷² (2022) LPELR – 57749(SC)

dry with nothing, this will show that there is no incentive in stealing public funds”.

8.0 CONCLUSION AND RECOMMENDATIONS

We cannot close our eyes to the gains of sentence indication and plea bargaining. The law has also proceeded to provide safeguards to prevent abuse and wrongful use of these principles.

Also, we cannot also close our eyes to the fact that these principles are constantly being wrongly applied by defendants and their attorneys to get away from worthy punishments.

We recommend that the Courts should regularly refrain from applying a plea bargain when the same is shown not to meet the ends of justice or against public interest.

We further recommend for stricter punishments for any form of inducement or a prosecutor who, for financial gain, succumbs to through the medium of plea bargain to circumvent the cause of justice.

Above all, we recommend the restrictions on the use of plea bargains in financial crimes and public mismanagement of funds cases, or in the absence of this, for the courts to insist on full public trials.

As succinctly put by my Lord, Tijjani Abubaker, JSC,⁷³ ‘as a nation, we must continue in our efforts to show that crime does not pay... even where there is a contraption in the name of plea bargain.’

⁷³ *Yakubu v FRN (Supra)*