

EXERCISE OF JUDICIAL DISCRETION IN BAIL APPLICATIONS IN NIGERIA: ISSUES EMERGING

By

Worlu Chibroma Apple*

Abstract

The right of a defendant to be admitted to bail except when charged with a capital offence is predicated on the constitutional right to be presumed innocent until the prosecution proves guilt as well as on the exercise of discretion of the court faced with application for bail; thus, there is an interplay of constitutional right and exercise of discretion by the court. This paper, adopting the doctrinal methodology appraised judicial authorities on the guiding principles for grant of bail, the constitutional right of a defendant to be presumed innocent and the exercise of discretion to grant or refuse bail applications. This work found among other facts that the constitutional right of a defendant in a criminal litigation to be presumed innocent until the contrary is proved is not at large, that there is no conflict between the presumption of innocence and exercise discretion. The administration of bail in the Nigerian criminal justice system has been discussed within the context of certain contemporary issues and challenges underlying the administration of bail. The issues discussed includes Right to Bail and the Presumption of Innocence, Seriousness of the offence and the Right to bail, Grant of bail in the absence of Proof of evidence, whether excessive bail conditions defeat the grant of bail, Bail pending appeal. The paper made recommendations for the regulation of exercise of discretion in granting or refusing application for bail, among which is the need to approach the issue of bail liberally.

1.0 Introduction

Judicial discretion is the power or right to make official decisions using reason and judgement to choose from acceptable alternatives. Judges are charged with exercising judicial discretion in the discharge of judicial functions.¹ Judges as human beings are prone to human weaknesses.

*LL.B(RSU) BL. Email: appleworlu@gmail.com.

Hence, whenever the courts are exercising their judicial discretion on matters before them, the outcome of such actions cannot be totally free from the personal prejudices, whims and caprices of the judge. No wonder, the law is ultimately a product of what a judge deems right under different situations.²

The exercise of judicial discretion extends to the grant or refusal of bail applications. The courts have the discretionary powers to grant or refuse an application for bail pending before it. The main function of bail is to ensure the presence of the accused at the trial. This is because the gravity of the offence and the subsequent punishment is directly proportional to the probability of the accused person absconding. However, the court still has the discretionary powers to grant or refuse bail application for capital and non-capital offences.³

2.0 Meaning of Bail

Bail means the process by which a person who is arrested or imprisoned is released temporarily from State custody to sureties or on personal recognizance on security taken for his appearance in court whenever he is required, until the determination of the case against him.⁴ Bail is the process through which an accused person who is arrested on the allegation of committing an offence is released by the court upon the provision of adequate security guaranteeing that the accused person would report at the police station or in court for his trial whenever his presence is required.⁵

The effect of granting bail is not to set the accused free for all times in the criminal process but to release him from the custody of the law and to entrust him to appear at his trial at a specific time and place. The freedom is temporary in the sense that it lasts only for the period of the trial and it stops on conviction of the accused or upon acquittal of the accused person. The grounds for refusing bail must be upon facts on record. The trial

¹ K C Davis, *Discretionary Justice: A preliminary inquiry Champaign* (Illinois: University of Illinois Press, 1971) 5.

² J Paquette and D Allison, 'A Decision-Making and Discretion: the Agony and Ecstasy of Law and Administration' [1997](8)(9) *Education and law Journal*, 161.

³ *Dokubo-Asari v FRN* (2007) 12 NWLR PT.1048) 331; *State v Okafor* (1964) ENLR 96.

⁴ *Chukwuebuka v FRN* (2015) ALL FWLR (Pt. 769) 1093.

⁵ S E Barkan and G J Bryjack, *Fundamentals of Criminal Justice* (Boston: Pearson Publishers, 2004) 296.

judge must not act on his instinct on which there is no evidence in support. The prosecution would always be in the best position to advise or suggest to the court on the antecedent or probability or even the tendency of the applicant to escape from being tried.⁶ However, the grant or refusal to grant bail is that it lies at the discretion of the court and as such the issue of grant of bail by a court calls for due exercise of discretion based on a given set of facts and attendant circumstances in accordance with justice. By discretion, it means that even though, the law recognizes bail as a right yet, the grant of bail to a person charged with a criminal offence is not automatic.⁷

3.0 Right of an Accused Person to Bail

Bail is a basic right of every citizen of Nigeria who is charged with a criminal offence by virtue of section 35 (1) of the 1999 Constitution of the Federal Republic of Nigeria. Thus, every person is entitled to his personal liberty and no person is to be deprived of his liberty except as stipulated by the constitution or statute. And in furtherance of that right, section 35 (4) of the 1999 constitution provides that any person who is arrested or detained in accordance with subsection 1 (c) of this section must be brought before a court of law within a reasonable time and if he is not tried within a period of:

- a. Two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
- b. Three months from the date of his arrest or detention in the case of a person who has been released on bail.

Under the Nigerian Law, bail is a right of an accused person. An accused person is not usually denied bail, except where the offence is a capital offence.⁸ An accused who has not been tried and convicted by a competent court for an offence known to law is entitled to be admitted to bail as a matter of course, unless some circumstances militating against his admission to bail are shown to exist.⁹ It is the constitutional right to be presumed innocent that necessitates the right to bail, hence the right to bail acts as a safeguard to the presumption of innocence until the contrary is proved. In granting an application for bail to an accused person, the

⁶ *Omodara v State* (2004) 1 NWLR (Pt. 853) 83.

⁷ *Alaya v State* (2007) 16 NWLR (Pt.1060) 487.

⁸ *Bolakale v State* (2006) 1 NWLR (Pt. 962) 511.

⁹ *Ani v State* (2002) 1 NWLR (Pt.747) 217

court will not overlook the seriousness of the offence as alleged by the prosecution as that will determine the bail terms. Conditions attached to grant of bail must not be suffocating, unbearable, unworkable and unduly burdensome. A court may properly consider denying a citizen of his liberty if it is satisfied on cogent evidence that there is a *prima facie* case against the accused person. Conversely, the liberty of a citizen should not be fettered on the basis of unsubstantiated allegations.¹⁰

The relevant criteria to be considered in the grant or refusal of an application for bail are: the nature of the charge; character of the evidence; severity of the punishment; criminal record of the accused; likelihood of the repetition of the offence; whether the witness for the prosecution may be interfered with or prevented from appearing to testify; if the applicant would attend court to face trial, evidence available against the accused; nature and gravity of the offence; likelihood of the accused committing another offence while on bail; likelihood of the accused interfering with the course of justice; criminal antecedents of the accused person; likelihood of further charge being brought against the accused and detention for the protection of the accused. These factors are not exhaustive in guiding any trial court in granting or refusing bail pending trial. Also, it is not necessary that all or many of these factors must apply in any given case. Even one factor may be applied in a particular case to guide a trial court in granting or refusing bail in a case pending before it.¹¹

4.0 Exercise of Discretion in Grant or Refusal of Bail: Issues Emerging

The grant or refusal of an application for bail is at the discretion of the court. Like all other discretions, it must be exercised judiciously and judicially. And before it can be said that a court properly exercised this discretion, the court must examine all materials placed before it and consider the applicable laws. The discretion must be based on facts and not in vacuo.¹² The exercise of the discretionary powers of the court in the grant or refusal of bail does not call for the judge jettisoning the constitutional right of a defendant to be presumed innocent until the contrary is proved or the fundamental right to personal liberty of every citizen. In exercising the jurisdiction to grant or refuse bail, the trial court

¹⁰ *Orji v FRN* (2007) 13 NWLR (Pt.1050) 65

¹¹ *Bamaiyi v State* (2001) 8 NWLR (Pt.715) 270; *Nwude v FGN* (2004)17 NWLR (PT.902) 306; *Jimoh v COP* (2004) 17 NWLR (PT.902) 389; *Likita v COP* (2002) 11 NWLR (Pt.777) 145; *Ozougwu v State* (2006) 9 NWLR (Pt.985) 243; *University of Lagos v Aigoro* (1985) 1 NWLR (Pt.1) 143;

¹² *Uwazurike v AG Federation* (2008) 19 NWLR (Pt.1096) 450.

is bound to consider the weight of the facts deposed to in the affidavit evidence placed before it.¹³ The law enjoins a court of law in exercising discretion to weigh all the circumstances of a particular case in the interest of justice. Thus, whether or not a court meticulously complied with this requirement it would still be regarded as having exercised its discretion. A proper exercise of discretion would be considered as having taking into cognizance the constitutional safeguards of a defendant in a criminal trial. The following are some of the issues emerging in judicial exercise of grant or refusal of bail applications in Nigeria courts:

a. Right To Bail And The Presumption Of Innocence

Under the Nigerian Constitution there are guarantees for personal liberty as well as presumption of innocence of the accused person.¹⁴ Section 35 (1) of the Constitution provides thus: 'Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law'. Section 36 (5) of the same Constitution also provides thus: 'Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty: Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.'

Courts are more often than not prepared to grant bail by anchoring their decisions on these twin constitutional safeguards. Thus, there are quite many judicial authorities¹⁵ where these rights have been clearly affirmed as basis of granting bail to accused persons. An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. The presumption of innocence ordinarily means that every man is presumed to be innocent until he is proved guilty.¹⁶ Under the criminal justice system therefore, it is part of the requirement of fair hearing, a bye product of due process of law that a person is not condemned until he has

¹³ *Olatunji v FRN* (2003) 3 NWLR (Pt.807) 406;

¹⁴ Sections 35 (1) and 36 (5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011)

¹⁵ *Okoro v State* (1988) 12 SCNJ; *Okopodagie v C.O.P* (2004) All FWLR (Pt. 192) 86 at 95; *Olawoye v C.O.P* (2006) All FWLR (Pt. 309) 1483.

¹⁶ *Ani v The State* (2002) I NWLR (Pt. 747) 217 at 230

been given the reasonable opportunity to defend the allegations made against him. The notion of presumption of innocence is therefore the bedrock of any fair trial, more so in criminal justice system that is accusatorial as it is being practiced in Nigeria.¹⁷

The presumption in criminal proceedings is a factor that determines and allocates the burden of proof, but put in the context of bail applications, the cumulative impact of the presumption of innocence and the right to freedom before conviction, permits the unhampered preparation of defence and serves to prevent the infliction of punishment prior to conviction. It must be added that the presumption does not however, invalidate any law which may require the accused person to establish particular facts.¹⁸ The place of the right to personal liberty of an accused person and the presumption of innocence, until he is found guilty as alleged, is emphasized through bail applications.

b. Seriousness of the Offence and the Right to Bail

One of the conditions for the grant of bail is the seriousness of the offence. It has been held that where the offences alleged against an accused person is serious, the discretion may not be exercised in favour of the defendant.¹⁹ This is because the presumption of innocence does not make the grant of bail automatic or absolute since the court is given the judicial discretion either to grant or refuse bail; if the court is of the view that there are substantial grounds to consider before the determination of bail application.²⁰ An accused person standing trial for a capital offence like murder is not ordinarily entitled to bail for the simple reason that murder is regarded as the highest crime under the law, and attracts the most severe punishment.²¹ The grant of bail in murder cases is at the discretion of a High Court and no judge will grant bail as a matter of course since his unfettered discretion in the grant of bail will depend on a number of factors.

¹⁷ E Azinge and B Owasanoye *Rule of Law and Good Governance* (Lagos: Nigerian Institute of Advanced Legal Studies, 2009) 401

¹⁸ *Air Force v James* (2003) FWLR (Pt. 143) 257

¹⁹ *Ekwenugo v FRN* (2001) 6 NWLR 6 NWLR (Pt.708) 171

²⁰ J N Aduba and E I Alemika, 'Bail and Criminal Justice Administration in Nigeria' [2009](161) *Institute for Security Studies Publications*, 86.

²¹ *Omodara v State* (2004) 1 NWLR (Pt. 853) 80

In *Anaekwe v C.O.P*²² the Court of Appeal held that, although the Constitution generally provided for the right to bail, pre-trial freedom is restricted particularly in capital offences, a person charged with any offence punishable with death shall not be admitted to bail, except by a judge of the High Court. It is the general practice to refuse bail to a person charged with the offence of murder. The most important criteria in the exercise of the bail discretion is the availability of the accused to stand trial. This becomes more crucial where the offence attracts capital punishment. It is believed that the more serious the offence, the greater the incentive to jump bail.

Section 161 of the Administration of Criminal Justice Act, 2005 makes specific provisions on bail where a person is charged with a capital offence. Such a person can only be admitted to bail by a High Court Judge under exceptional circumstances. Such circumstance may include: Ill health of the applicant, extra ordinary delay in the investigation, arraignment and prosecution for a period exceeding 3 years and any other circumstances that the judge may in the particular facts of the case. Although ill-health of an applicant for bail is a special circumstance for grant of an application for bail, a mere allegation of ill-health will not be sufficient justification for admitting a person to bail.²³ In Nigerian criminal justice administration, the following guidelines are relevant in the consideration of an application for bail pending trial on account of ill-health. There are:

- a. Everyone is entitled to be offered access to a good medical care whether he is being tried for a crime or has been convicted or is simply in detention and when in detention or custody, the responsibility of affording him access to proper medical facility rests with those in whose custody he is; invariably, the governmental authorities;
- b. Whatever the stage at which bail is applied for by an accused person; ill-health of the accused is a consideration weighty enough to be reckoned as special circumstance, although mere allegation of bad health will not be sufficient as special circumstance for the grant of bail;

²² (1996), 3 NWLR (pt. 436) at p. 320.

²³ *Abacha v State* (2002) 5 NWLR (Pt.761) 638.

- c. The mere fact that a person in custody is ill does not entitle him to be released from custody or allowed bail unless there are really compelling grounds for doing so.²⁴

Where an accused relies on ill-health as a ground for bail; the following must be considered:

- i. The ill-health must be such that will affect other inmates of the detention places;
- ii. There must be positive, cogent and convincing medical report issued by an expert in that field of medicine to which the accused person suffering the ill-health is referable;
- iii. The authorities have no access to such medical facilities as are required in treating the accused's ill-health.²⁵

c. **Grant of Bail in the Absence of Proof of Evidence**

Bail pending trial is not ordinarily granted especially where the offence is capital in nature. However, court may grant bail pending trial in special circumstances i. e. where prosecution fails to present proof of evidence to justify continued detention of accused person.

In *Chinemelu v Commissioner of Police*,²⁶ the Court of Appeal granted bail pending trial to a murder suspect, in the light of the special circumstances of the case. And the special circumstances were the absence or lack of facts justifying the continued detention of the accused. The position of the law is that a bail applicant must place some form of material for consideration of the court in dealing with the application.²⁷ The onus placed on the applicant is not the ultimate one; it is not beyond reasonable doubt, but on a balance of probabilities.

It is when the applicant has done so that the onus will shift to the door step of the prosecution to show cause why bail should not be granted. It is the duty of every applicant to present the necessary materials before the court in support of his application to enable the court exercise its discretion. In *Ojo v FRN*²⁸ the applicant discharged this onus by showing

²⁴ *Ofulue v FGN* (2005) 3 NWLR (PT.913) 577.

²⁵ *George v FRN* (2010) 5 NWLR (PT.1187)259; *Jammal v State* (1996) 9 NWLR (PT.472) 352.

²⁶ (1995) 4 NWLR (Pt.390) 467

²⁷ *Abiola v. Federal Republic of Nigeria* (1995)1 NWLR (Pt. 370) 155, *Ani v State* (2002) 11NWLR (Pt. 747) 212.

²⁸ *Alaya v. State* (2007) 16 NWLR (Pt. 1061) 483.

in his affidavit evidence that he was a first offender and that he had previously been of good behaviour when granted bail by the High Court. Proof of evidence is very important in deciding on a bail application. It becomes even more crucial where the case is a murder case. It is from the proof of evidence that a court will be persuaded to grant or refuse bail by ascertaining whether there is prima facie evidence of the commission of the offence.

Where the accused person has been in detention for a long time without the prosecution filing proof of information, the courts have normally granted the accused person bail because the prosecution has not placed anything before the court evidencing its intention to prosecute the accused.²⁹ The court declared in *Musa v C.O.P*³⁰ that a situation where there is no material before the court to show that an accused person is facing a charge of murder including proof of evidence, certainly qualifies as a special circumstance in which the court can grant bail. The Court of Appeal in that case, proceeded to grant the appellant bail.

The courts have ruled that where the prosecution merely parades the word murder without tying it with the offence, a court of law is bound to grant bail. The courts have in several instances condemned this attitude, which it terms flagrant abuse of power by the police.³¹ The only way to convince the court not to grant bail is to proffer information and proof of evidence to show that there exists prima facie evidence of commission of the offence. The courts have consistently granted bail in murder cases where the prosecution failed to bring to the notice of the court, facts of the alleged murder.³²

d. Whether Excessive Bail Conditions Will Defeat The Grant Of Bail

The condition which may be attached to bail is always at discretion of the court having considered the facts and circumstances open to the court. However, the court is expected to attach liberal terms to bail and such should not be excessive. Section 165. (1) of Administration of Criminal Justice Act 2015 provides that: "The conditions for bail in any case shall be at the discretion of the court with due regard to the circumstances of the case and shall not be excessive". It is well settled that, the nature of offences committed determines the bail conditions, therefore, a great

²⁹ *Enwere v. C.O.P.* (1993) 6 NWLR (Pt. 299) 333

³⁰ (2004) 9 NWLR (Pt. 879) 483

³¹ *Anaekwe v. C. O. P.* (1996) 3 NWLR (Pt. 436) 320.

³² *Chinemelu v. C. O. P.*, (1995) 4 NWLR (Pt. 390) 467

offence attracts great condition and vice versa. However, the gravity of offence should not call for oppressive or stringent bail conditions, since it is discretionary power of court to grant or refuse bail. In *Obiana v FRN*³³ the court held that: "It is however settled that conditions of bail must not be unreasonable or oppressive. They must not amount in effect to punishment. Once the conditions of bail are so stringent, its effect amounts to refusal."

Application for variation of the bail conditions may be of help to vary the bail conditions, but, before the hearing of the said application the accused remains in custody suffering continued detention. Therefore, a court granting bail by exercising its discretion should carefully look at the circumstances of the case before admitting the accused to bail. Bail is a basic constitutional right which should be granted on liberal terms except in capital offences. Therefore, a court should not attach excessive conditions to bail. In this vein, it will be contrary to the tenets of justice that when bail is granted, it is surreptitiously retrieved by stringent conditions. Hence, Courts must always be conscious and approach the issue of grant of bail with an element of the liberalism and circumspection. Thus, by extension, conditions attached to grant of bail must not be suffocating, unbearable and unduly burdensome.³⁴

e. Bail Pending Appeal

An accused person who has been tried, convicted and sentenced has lost the presumption of innocence in his favour under Section 36 (5) of the constitution and consequently his freedom, until the expiration of his prison term or payment of fine. Where, however such a convict files an appeal, he may apply to the court for bail pending the determination of his appeal. While bail pending trial of an accused is as of right by virtue of Section 35 (4) and (5) of the Constitution, bail after conviction pending appeal is often at the discretion of the court. The application for bail by a convict is made by motion on notice supported by affidavit sworn to by the convict or any person familiar with the facts of the case. In the case of *Adamu v IGP*³⁵, it was held that bail after conviction is usually granted upon the applicant:

³³ (2005)13 WRN 167

³⁴ *Danbaba v State* (2000) 14 NWLR (Pt. 687) 396.

³⁵ (1957) NNLR 5

- (i) Showing some unusual or exceptional circumstances for granting it;
- (ii) The fact that the appeal will not come up until the sentence has expired will on its own afford ground for granting bail after conviction.

Before an application for bail after conviction is considered, the applicant must have filed an appeal which is pending. What constitutes special circumstances for grant of bail pending appeal have been stated in judicial decisions to include the followings.

1. Where the sentence is manifestly contestable. In the case of *Fawehinmi v The State*³⁶ it was held that: "Where a sentence is manifestly contestable as to whether or not it is a sentence known to law, it constitutes a special circumstance for which bail should be granted to an applicant pending the determination of the issue on appeal"
2. If the duration of the appeal will likely out last the duration of the sentence or the convicted person may have served the sentence before his appeal is determined, then bail may be granted.³⁷
3. If the appellant's health is in serious jeopardy.
4. Where the appellant is a first-time offender, if the appellant shows that he is a first-time offender and that he has previously been of good behaviour, his application for bail pending appeal may be more favourably considered.³⁸

5.0 Conclusion

The Nigerian legal system recognizes the presumption of innocence of an accused person as a constitutionally entrenched provision. The seriousness of the alleged offence does not remove the presumption of innocence. In criminal trials an accused is entitled to protection under the constitutional provisions, which includes freedom of movement and presumption of innocence. There is no conflict in principle between the rights to personal liberty, presumption of innocence and exercise of discretion by court in bail matters. This is because the right of a suspect or defendant in a criminal litigation to regain his liberty pending trial is

³⁶ (1990) 1 NWLR (Pt. 127) 486 at 498

³⁷ *Madike v The State* (1992) 8 NWLR (Pt. 257) 85; and *Doris Obi v The State* (1992) 8 NWLR (Pt. 257) 76.

³⁸ *Buwai v State* (2004) ALL FWLR (Pt. 227) 540.

conditional; the idea being to ensure that the defendant attends his trial. The law enjoins a court of law in exercising discretion to weigh all the circumstances of a particular case in the grant or refusal to grant bail. A proper exercise of discretion in bail application would be considered as having taking into cognizance the constitutional safeguards of a defendant in a criminal trial.

6.0 Recommendations:

The following are the proposed recommendations: -

- a. Courts in Nigeria should approach the question of bail liberally.
- b. In consideration of bail applications, recourse should be had to the constitutional right to freedom of movement and presumption innocence.
- c. The basic condition for granting bail is and should remain the need to have a defendant attend court to stand his trial.
- d. Courts in granting bail should avoid imposing stringent bail conditions that will defeat the bail granted.
- e. Where special circumstances exist such as the ill-health of the accused person, bail should not be unreasonable refused.