

1. YAHAYA FAROUK CHEDI
2. ABUBARKAR RABO ABDULKAREEEM

V

ATTORNEY GENERAL OF THE FEDERATION
COURT OF APPEAL
(ABUJA DIVISION)

CA/A/75/2006

IBRAHIM TANKO MUHAMMAD, J.C.A (President and Read the Leading Judgment)
MARY PETER ODILI, J.C.A.

TUESDAY, 9TH MAY, 2006

APPEAL – Evaluation of evidence – Primary duty of trial court in respect of – When appellate court will interfere therewith.

BAIL – Bail pending trial power of court to grant or refuse- Discretionary nature of.

BAIL – Bail pending trial – Prosecution opposing on ground of police interference – Onus thereon – Relevant facts to place before court.

BAIL – Bail pending trial-prosecution opposing same on ground of further police investigation – Duty thereon- What must show Corresponding duty of court.

BAIL – Bail pending trial – Meaning of – Grant or refusal of – Principles guiding – Law applicable thereto.

CONSTITUTIONAL LAW – Judicial powers – Duty on court to protect citizen from excesses of executive and police.

COURT – Judicial powers – Duty on court to protect citizen from excesses of executive and police.

CRIMINAL LAW AND PROCEDURE – Bail pending trial – Application for bail – power of court to grant or refuse- Discretionary nature of.

CRIMINAL LAW AND PROCEDURE – Bail pending trial – Application for bail – Prosecution opposing same on ground of further police investigation – Duty thereon – What must show Corresponding duty of court.

CRIMINAL LAW AND PROCEDURE – Bail pending trial – Prosecution opposing on ground of police interference – Onus thereon – Relevant facts to place before court.

CRIMINAL LAW AND PROCEDURE – Bail pending trial – Meaning of – Grant or refusal of – Principles guiding – Law applicable thereto.

CRIMINAL LAW AND PROCEDURE – Offences – Unlawful society – Membership of – Management of – Punishment therefor.

EVIDENCE – Evaluation of evidence – Primary duty of trial court in respect of – When appellate court will interfere therewith.

NOTABLE PRONOUNCEMENT – On need for court not to shy away from its constitutional responsibility to protect citizen from excesses of executive and police.

PRACTISE AND PROCEDURE – Evaluation of evidence – Primary duty of trial court in respect of – When appellate court will interfere therewith.

WORDS AND PHRASES – Bail pending trial – Meaning of.

Issue:

Whether the trial court was right and exercised its discretion properly when it failed to admit the appellants to bail on the unproved grounds that they would impede police investigations and would continue with their unlawful activities

Facts:

The appellants were charged before the Federal High Court, Abuja, on three counts of conspiracy to commit felony that is managing, assisting in the management and membership of an unlawful society known and called Hisbah Board Organisation in Kano State. The offences alleged to have been committed by the appellants are punishable under sections 63 and 64 of the Criminal Code Act.

The appellants filed a motion on notice for an order of the trial court admitting them to bail pending the hearing and determination of the charge against them. After considering the affidavit evidence placed before it and the submissions of counsel for the parties, the trial court held that it would not be in the interest of national security to release the appellants on bail, and therefore refused the application for bail.

Dissatisfied with the ruling of the trial court, the appellants appealed to the court of Appeal and contended, *inter alia*, that an accused person standing trial for any criminal offence in any court enjoys presumption of innocence by virtue of section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999. Also that an accused standing trial for an offence that does not earn death penalty is constitutionally entitled to bail as of right. On the other hand, the respondent contended that the averment in the counter-affidavit that the appellants would impede police investigation and continue with their unlawful activities if released on bail, were not controverted by the appellants.

In determining the appeal, the Court of Appeal considered the provision of section 341(2) of the Criminal Procedure Code, Cap. 30, Laws, of Northern Nigeria, 1963, which states thus:-

"341(2) Persons accused of an offence punishable with imprisonment for a term exceeding three years shall not ordinarily be released on bail, nevertheless the court may upon application release on bail a person accused as aforesaid if it considers:

- (a) that by reason of the granting of bail the proper investigation of the offence would not be prejudiced, and
- (b) that no serious risk of the accused escaping from justice would be occasioned; and
- (c) that no grounds exist for believing that the accused if released, would commit an offence."

Held (*Unanimously allowing the appeal*):

1. *On Meaning of bail pending trial –*

Bail pending trial is where a trial court may admit an accused person to a bail while he is awaiting trial or during his trial. It is a bail sought by the accused after arraignment. (P. 322, para. E)

2. *On applicable law for grant or refusal of bail in Northern States -*

The general provisions dealing with an offence committed within the Northern States including the Federal Capital, Abuja are, in the main, governed by the Criminal Procedure Code. Thus, the grant or refusal of bail in the language of section 340(1) of the Criminal Procedure Code, that is where bail is sought in respect of an offence which is ordinarily bailable, that is where punishment provided by law is a sentence of imprisonment for a period not exceeding three years with or without fine, suggests mandatoryness in granting such an accused person bail, (P. 323, paras. C-E)

3. *On Principles guiding grant or refusal of bail pending trial -*

By virtue of section 341(2) of the Criminal Procedure Code, persons accused of an offence punishable with imprisonment for a term exceeding three years shall

not ordinarily be released on bail, nevertheless the court may upon application release such a person on bail if it considers:

- (a) that by reason of the granting of bail the proper investigation of the offence would not be prejudiced; and**
- (b) that no serious risk of the accused escaping from justice would be occasioned: and**
- (c) that no grounds exist for believing that the accused, if released would commit an offence.**

Thus, the section leaves the issue of bail at the discretion of the trial court. The discretion has to be exercised judicially and judiciously as it is part of law of equity. (P. 323, paras. E-H)

On Principles guiding grant or refusal of bail pending trial –

In an application for grant of bail, the following, factors or criteria may be taken into consideration by the trial court:

- (a) the evidence available against the accused;
- (b) availability of the accused to stand trial;
- (c) the nature and gravity of the offence;
- (d) the likelihood of the accused committing another offence while on bail;
- (e) the likelihood of the accused interfering with the course of justice;
- (f) the criminal antecedents of the accused person;
- (g) the likelihood of further charge being brought against the accused;
- (h) the severity of the punishment;
- (i) the probability of guilt;
- (j) detention for the protection of the accused;
- (k) the necessity to procure medical or social report pending final disposal of the case.

These factors are not exhaustive and may not all be relevant in all cases. To succeed in opposing bail, the affidavit of the respondent must be very detailed and condensed on facts in line with the foregoing considerations. In this case, the trial court said nothing about the presumed innocence of the appellants, non-availability of any criminal record against the appellants, the way and manner the appellants would impede police investigation, and whether there has been any evidence to suggest that the appellants would escape justice. [*Dantata v. Police* (1958) NRNLR 3; *Olabanji v. FRN* (2003) 3 NWLR (Pt. 807) 406; *Ekwenugo v. FRN* (2001) 6 NWLR (Pt. 708) 171; *Banunyi v. State* (2001) 8 NWLR (Pt. 715) 270; *Eyu v. State* (1988) 2 NWLR (Pt. 78) 602; *Olugbusi v. COP* (1970.) 2 All NLR 1 referred to (*Pp. 325-326, paras. G-E; 331, paras. G-H*)

5. *On Whether non-completion of police investigation enough to deny bail to accused person –*

Police investigation in a criminal matter is a term of relative application. It is that inquiry into a criminal matter systematically with the suspect/accused as the main subject of the inquiry. It is that inquiry into a criminal matter systematically with the suspect/accused as the main subject of the inquiry. It may be wide or narrow, depending on the nature and extent of the accused's involvement in the crime. In a criminal charge, the offence of which is ordinarily bailable subject to some exceptional circumstances, the trial court should not allow itself to

be blind-folded by the prosecution by hiding under the canopy of non-completion of investigation to deny a citizen of his constitutional right to liberty of his person and movement. (P. 327, paras. E-G)

On Onus on prosecution opposing bail application on likelihood of interference with police investigation –

Where there is a claim of interference/impediment to investigation being conducted by the police in a criminal matter, the prosecution which is opposed to the release of accused person on bail matter, in a precise manner the following:

- (a) whether investigation has at all commenced when the accused was brought to court and at what stage;
- (b) the approximate time investigation is to take;
- (c) the proposed witnesses/other vital exhibits, whether they are the kind the accused will have access to/influence on;
- (d) whether there is a serious risk of the accused jumping bail thereby escaping from justice.

Thus, where the respondent opposes bail on the ground that the accused would not return to face trial or would interfere with police investigations, the respondent's counter affidavit ought to be full and frank stating how the accused would interfere and whether there are antecedents of the applicant by causing to face trial or being difficult to trace. (Pp. 327, paras. G-B; 331; paras, H-A)

6. *On Need for prosecution opposing bail to provide proof of evidence –*

For the prosecution to oppose vehemently the grant of bail to an accused, there must be produced before the trial court proof of evidence. This is, what will enable the trial court to form its view on the strength of the evidence to be called, and whether a *prima facie* case is maintainable against the accused person. In the instant case, the prosecution failed to produce its proof of evidence. The trial court was certainly deprived of the opportunity to peruse, at that stage, legal or factual basis which would entitle it to grant or refuse bail. [Ukatu v. COP (2001) 6 NWLR (Pt. 710) 765; Musa v. COP (2004) 9 NWLR (Pt. 879) 483 referred to and followed.] (P. 329, paras. A-D)

7. *On Punishment for offence of managing an unlawful society –*

By virtue of section 63 of the Criminal Code Act. any person who manages or assists in the management of an unlawful society is guilty of a felony and is liable to imprisonment for seven years. (P. 322, para. H)

8. *On Punishment for offence of being a member of an unlawful society-*

By virtue of section 64 of the Criminal Code Act, any person who is a member of an unlawful society or knowingly allows a meeting of an unlawful society to be held in any house, building or place belonging to, or occupied by him over which he has control, is guilty of felony and is liable to imprisonment for three years. (Pp. 322 – 323, paras. H-B)

9. *On Principles governing exercise of discretionary power by trial court –*

Judicial discretion must be exercised according to common sense, and according to justice. And if there is any miscarriage of justice in the exercise of such discretion, it is within the competence of the Court of Appeal to have it reviewed. A judicial

and judicious discretion which is well exercised is one which is marked by fairness under (be circumstances of any given case, and guided by the rules and principles of law. Thus, where a trial court fails to exercise sound and reasonable decision, the appeal court will review such a decision. In the instant case, the trial court refused to grant the appellants bail in the interest of "national security". This expression was never used by any of the parties to the bail proceedings. It was the trial court that manufactured the phrase to justify its exercise of discretion. [Odusote v. Odusote (1971) 1 All NLR 219; Williams v. Hope Rising Voluntary Funds Society (1982) 1-2 SC 145; Adejumobi v. Ayantegbe (1989) 3 NWLR (Pt. 110) 417 referred to.] P. 330, paras. C-F)

10. NOTABLE PRONOUNCEMENT:

On Need for court of law not to shy away from its constitutional responsibilities to protect citizen from excesses of executive and police -

Per I.T. MUHAMMAD JCA at pages. 330-331. Para G-B:

"It is my belief that a court of law properly established by the Constitution of the Federal Republic of Nigeria must not shy away from carrying its responsibilities placed upon it by the Constitution and other statutes. The plenitude of the judicial powers of courts under the 1999 Constitution especially sections 6(a)(b), 34 and 35, including the provisions of section 118 of the Criminal Procedure Act and its corresponding section in the Criminal Procedure Code provide the necessary checks and balances for undue or imagined excesses of the executive, so that where the circumstances warrant, any citizen who is arbitrarily incarcerated will, by force of law, regain his liberty. The humble understanding of the general law is that where the police or the executive arbitrarily detains a citizen in questionable circumstances, and refuses him the liberty to his person and movement, whereas the law so permits, then that is derogatory to due process of law and an antithesis to our nascent democracy. That will of course signal a head-on romance with anarchy and a slate of despondency."

11. On Duty on court to take judicial notice of enactments or legislations –

By virtue of section 74 of the Evidence Act, once a law is cited by a party in a dispute (without the necessity of pleading the law itself or tendering it in evidence), a court of law is bound to take judicial notice of that law as forming part of laws, enactments or subsidiary legislations having the force of law in Nigeria. In the instant case, the fact that there was a law in existence under pretext of which the appellants were operating should alone have worked on the mind of the trial court, to consider it as exceptional circumstance which warrants the grant of bail to the appellants. (P. 327, paras. C-F)

12. On Duty on trial court in evaluation of evidence -

A trial court is a court of law and facts. It has no other sources of generating its decision except from the solid facts established before it. It has therefore as its primary role to even-handedly evaluate the evidence placed before it by the parties not only through witnesses, but including evidence by affidavits. A trial court, in other

words, has the primary duty to fully and consciously consider the totality of the evidence proffered by affidavits. A trial court in other words, has the primary duty to fully and consciously consider the totality of the evidence proffered by all the parties before it in whatever way, ascribe probative value to it and put it on the imaginary scale of justice in order to determine the party in whose favour the balance tilts.

Certainly, where a trial court has creditably done that, no appeal court has as business to tamper with its evaluation. (*P. 325, paras. E-G*)

13. *On When appellate court will interfere with evaluation of evidence by the trial court –*

In civil and criminal proceedings, where there is a failure by a trial court to properly appraise the evidence placed before it, the result is that whatever findings and conclusions arrived at by it could be perverse. It is on this premise that the appeal court finds itself in the inescapable position of rendering the duty omitted to be done or which was wrongly done by the trial court. In the instant case, the trial court did not give any consideration to the affidavit evidence placed by the appellants. It had done so it would have found that the appellants were by law performing a statutory duty. The statutory duty was created by a law which must be presumed to be valid until declared otherwise by a court of competent jurisdiction. (*P. 326. Paras. E-H*)

Nigerian Cases Referred to in the judgment:

Adejumo v. Ayantegbe(1989) 3 NWLR (Pt 110)417

Anaekwe v. C.O.R (1996) 3 NWLR (Pt. 436) 320

Anajemba v. FGN(2004) 13 NWLR 267

Bamaiy iv. State (2001) 8 NWLR (Pt. 715)270

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

Datata v. Police (1958) NRNLR 3

Ekwenugo v. F.R.N. (2001) 6 NWLR (Pt.708) 171

Eyu v. Slate (1988) 2 NWLR (Pt. 78) 602

Musa v. C.O.P. (2004) 9 NWLR (Pt. 879) 483

Odusote v. Odusote (1971) 1 All NLR 219

Olatunji v. F.R.N. (2003) 3 NWLR (Pt. 807) 406

Olugbusi v. C.O.P. (1970) 2 ALL NLR 1

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

R.E.A.N. v. Aswani Textile Ind. Ltd. (1992) 3 NWLR (Pt. 227) 1

Ukatu v. C.O.P. (2001) 6 NWLR (Pt. 710) 765

University of LAGOS. Olaniyan (1985) 1 NWLR (Pt. 1) 156

Williams v. Hope Rising Voluntary Funds Society (1982) 2SC 145

Nigeria Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria , 1999, Ss 6, 34, 35, 36

Criminal Code Act, Cap. 77, Laws of the Federation of Nigeria, 1990, Ss 62, 63, 64, 516.

Criminal Procedure Act, s. 118.

Criminal Procedure Code, s. 340(1)

Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, Ss 74, 135, 136

Appeal:

This was an appeal against the ruling of the Federal High Court dismissing the appellants application for bail. The court of Appeal, in unanimous decision, allowed appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal.
Abuja

Names of Justices that sat on the appeal: Ibrahim Tanko Muhammad, J.C.A. (*Presided and Head tin Reading Judgment*); Mary Peter Odili. J.C.A.: Olubode Rhodes-Vivour. J.C.A.

Appeal No.: CA/A/75/C/2006

Date of Judgment: Tuesday. 9th May. 2006

Names of Counsel: Mr. Y. O. All. SAN (with *him*. S. A. Oke. M. I. Komolafe, A. A. Muhammad and N. A. Aliu) -for tin¹ Appellants

Mrs G. E. Odegbaro (C.L.O. FMO.I) (in//; *he*:: I. P. Hamman [L.O]) - for the Respondent

High Court:

Name of the High court: Federal High Court, Abuja

Date of Ruling: Friday, 17th March, 2006

Counsel:

*Mr. Y.O. Ali, SAN(with him, S.A. Oke, M.I. Komolafe, A.A. Muhammad and N.A.Aliu)
– for the Appellants*

*Mrs. G.E. Odegbare (C.L.O FMOJ) (with her, I.P. Hamman [L.O])- for the
Respondent*

I.T. MUHAMMAD, J.C.A. (Delivering the leading judgment):

At the Federal High Court holden at Abuja (the lower Court), the Hon. Attorney-General of the Federation preferred the following charges against the appellants:

“Count 1

That you Yahaya Faruk Chedi ‘m’ 47 years old, Abubakar Rabo Abdulkareem ‘m’ 33 years old, both of No. 37, Chedi Quarters, Kano, Kano State between 2003 and 2006 in Kano within the jurisdiction of the Federal High Court with intent to subvert or promote the subversion of the Government or of its officials did conspire among yourselves to commit felony to wit:

Managing, assisting in the management and membership of an unlawful society known and called HISBAH BOAARD ORGANISATION and you thereby committed an offence contrary to section 516 of the Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria, 1990.

Count 2

That you Yahaya Faruk Chedi ‘m’, 47 years old, Abubakar Rabo Abdulkareem ‘m’ 33 years old both of No. 37, Chedi Quarters, Kano, Kano State with the jurisdiction of the Federal High Court are members of an unlawful society called HISBAH BOAARD ORGANISATION and you thereby committed an offence contrary to section 516 of the Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria, 1990.

Count 3

That you Yahaya Faruk Chedi ‘m’, 47 years old, Abubakar Rabo Abdulkareem ‘m’ 33 years both of No. 37, Chedi Quarters, Kano, Kano State between 2003 and 2006 in Kano, Kano State within the jurisdiction of the Federal High Court managed and assisted in the management of an unlawful society of more than ten persons known and called HISBAH BOAARD ORGANISATION contrary to section 62(2)(1) and punishment under section 63 of the Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria, 1990.”

Meanwhile, the appellants/accused persons/applicants filed a motion on notice for an order of the lower court admitting them to bail pending the hearing and determination of the criminal case against them.

Having considered the affidavit evidence placed before him and the submissions of learned counsel for the respective parties, the learned trial judge refused the application for bail. That was on the 17/03/06. On the 1st day of April, the appellants, through their Counsel, Yusuf O. Ali, Esq., SAN, filed notice and grounds of appeal in respect of the lower court's decision.

In response to the affidavit of urgency filed by the learned SAN of the appellants, this court head the application filed by the appellants for department from the Rules to deem bundle of papers complied to form the record of appeal and for abridgment of time within which to file and exchange briefs of argument by the respective parties. These reliefs were granted on 11/04/06 to wit: the appellants were granted 24 hours to file and exchange briefs argument and the respondent was granted 7 days after service of appellants' brief compiled and filed their brief within time. The respondent however, had to ask for extension of time to file its brief of argument. This court extended the time by one hour within which to file the said respondent's brief. This is because the respondent did not come up with a formal application for the extension of time sought but on the very day appeals was listed for hearing. As the appellants accepted service and indicated that they intended not to file any replied brief, this court went ahead and heard the appeal.

The brief filed by the appellants formulated single issue for determination which leads:

“Whether the learned trial Judge was right and exercise (sic) his discretion properly when he failed to admit the appellants to bail on the unproved grounds that they will impede police investigations and will continue with their unlawful activities.”

Learned counsel for the respondent on the other hand, formulated the following issue:

“Whether the lower court did not judicially and judiciously consider the appellants application for bail in the light of the various affidavit evidence before it.”

Learned SAN for the appellants adopted and relied on the submissions contained in the appellants' brief. Learned counsel for the respondent adopted and relied on the submissions made in the respondent's brief.

In arguing the sole issue for determination, learned SAN for the appellants submitted that it also fairly settled that an accused person standing trial for any trial for any criminal offence in any court enjoys presumption of innocence by virtue of section 36(5) of the Constitution of the Federal of Republic of Nigeria, 1999. An accused person standing trial for an offence that does not carry death penalty is constitutionally entitled to a bail as of right. The conditions or principles that guide the court in granting bail are also fairly settled. Learned SAN cited the cases of *Omodara v. The State* (2004) 1 NWLR (Pt. 853) 80 at 93 H – E; *Anaekwe v. C.O.P.* (1996) 3 NWLR (Pt. 436) 320 at 331.

Learned SAN submitted further that the prosecution failed woefully to dislodge all the potent dispositions in the affidavit in support of the application for bail whereas the appellants met all the conditions for bail stipulated in Omodara's case.

Another point argued by the learned SAN is that there was no proof of evidence attached to the charge sheet so there was no base for the the trial court to refuse bail. He cited and relied on *Musa v. C.O.P.* (2004) 9 NWLR (Pt. 879) 483 at 499.

Learned SAN argued that the depositions in paragraph 5(g) and (i) of the counter affidavit that the appellants will impede police investigation and would go back to their unlawful activities were unproved, bland and general depositions. The learned trial judge failed to exercise his discretion judicially and judiciously. He urged this court to interfere with the learned trial judge's exercise of discretion. He cited the case of *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt. 1)156 at page 162. Learned SAN urged this court to allow the appeal and grant bail to the appellants.

The Chief Legal Officer of the Federal Ministry of Justice, Mrs G.E. Odegbare, on the sole issue raised, submitted in the respondent's brief of argument, that the appellants' being applicants failed to place sufficient and weighty materials for the consideration of the court in their application for bail as to shift the onus of proof. She cited sections 135 and 136 of the Evidence Act. The learned counsel argued further that the charges against the appellants carry a sentence of imprisonment for 7 years. The lower court considered all the relevant criteria for the grant for bail as asset out in plethora of judicial authorities on the subject and rightly found that all requisite conditions for grant of bail did not co-exist. She cited the case of *Anajemba v. FGN* (2005) 1 NCC 390 at 398-400; (2004)13 NWLR 267. Learned counsel referred to and relied on the uncontroverted evidence shown on pages 8-10 of the records which showed that there was likelihood of the accused persons interfering with the course of justice and what there was a strong probability of guilt of the accused persons.

Further submissions by the respondent's learned counsel were that under section 83(2) of the Federal High Court Act, all the criminal cases or matter before the court shall be tried summarily. The prosecution was thus not under any duty to attach a proof of evidence. The trial court was entitled to make a prima facie presumption of the criminal responsibility of the accused persons from the set of facts before it upon which evidence will be led by the prosecution. The exercise of judicial discretion by the trial court was on just and legal reasons. Learned counsel cited the case of *Royal Exchange Assurance (Nig.) Ltd. v. Aswani Textile Ltd.* (1992) 3 NWLR (Pt. 227) at page 5.

The learned Chief Legal Officer, finally, urged this court to dismiss the appeal and affirm the lower court's ruling.

This appeal is on bail pending trial. This is where a trial court may admit an accused person to bail while he is awaiting trial or during his trial. It is a bail sought by the accused after arraignment.

As quoted above, the appellants were taken to the Federal High Court, Abuja, on the counts of conspiracy to commit felony i.e. society known and called Hisbah Board

Organisation in Kano State and that the appellants were members of the said Hisbah Board. They were alleged also to have managed and assisted in the management of an unlawful society of more than ten persons known and called Hisbah Board Organisation. The offences alleged to have been committed by the appellants are punishable under sections 63 and 64 of the Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria, 1990. (The Act). Sections 63 and 64 of the Act provide as follows:

“63. Any person who manages or assists in the management of an unlawful society is guilty of a felony and is liable to imprisonment for seven years.

64. Any person who –

- (a) Is a member of an unlawful society; or
- (b) Knowingly allows a meeting of an unlawful society, or of members of an unlawful society, to be held in any house, building, or place belonging to, or occupied by, him or over which he has control, is guilty of a felony and is liable to imprisonment for three years.”

Thus, the maximum punishment to be imposed on the appellants, if found guilty of the offences charged, would be seven years imprisonment.

I think it is pertinent to make it clear from outset that the provisions of the Act shall take effect subject to the provisions of the Penal Code (Northern States) Federal Provisions Act. The general provisions dealing with an offence committed within the Northern States and now including the Federal Capital, Abuja, are in the main, governed by the Criminal Procedure Code. Thus, the grant or refusal of bail in the language of section 340(10) of the Criminal Procedure Code i.e. where bail is sought for in respect of an offence which is ordinarily bailable i.e. where punishment provided by law is a sentence of imprisonment for a period not exceeding three years, with or without fine, the section suggests mandatory in granting such an accused person bail.

Section 34(2) of the Criminal Procedure Codes provides as follows:

“341(2) Persons accused of an offence punishable with imprisonment for a term exceeding three years shall not ordinarily be released on bail a person accused as aforesaid if it considers

- (a) That by reason of the granting of bail the proper investigation of the offence would not be prejudiced; and
- (b) That no serious risk of the accused escaping from justice would be occasioned; and
- (c) That no grounds exist for believing that the accused, if released would commit an offence.”

This section leaves the issue of bail at the discretion of the trial judge. This discretion as interpreted by the Superior Courts is that it has to be exercised judicially and judiciously as it is part of law of equity.

After evaluating the affidavit evidence placed before him by the parties, the learned trial Judge refused to admit the appellants to bail and ordered the prosecution to commence trial of the case in earnest. But, what are the reasons of the learned trial Judge for refusing the appellants bail? In his ruling, the learned trial Judge stated *inter alia*.

“The charges against the applicants are bailable by nature but in view of paragraphs G and I of the counter affidavit wherein the deponent deposed to the fact that the appellants will impede police investigation and that the applicants will continue with their unlawful activities if released on bail, as these averments remain interest of National Security to release the applicants to bail *for now*. (Italics supplied for emphasis)

The counter affidavit referred to above was sworn to by one Mr. Columbus Okaro, a Deputy Commissioner of Police of Nigeria Police Force Headquarters, Abuja, F.C.T. He traced his source of information to the Hon. Attorney General and Minister of Justice of the Federation and he believes the Attorney General that:

“5(g) that the accused/appellants will impede Police investigation which is still ongoing if they are released on bail.

(i) That if the accused/applicants are released on bail, there is a strong possibility that they will continue with their unlawful activities.”

Earlier on however, one Abubakar Mahraz, Director General and Chief Administrative Officer of the Kano State Hisbah Board, swore to an affidavit in support of the motion on notice. This affidavit was equally and firstly placed before the trial court. In that affidavit the respondent stated *inter alia*:

“2. That I know as a fact that there is a Kano State Hisbah Law No.4 of 2003 and an amendment to the law known as Kano State Hisbah (Amendment) Law No. 6 of 2005.

3. That I know as a fact that it was pursuant to the law and its amendment that the 1st applicant was in 2004 appointed as the Chairman and Commander General of Hisbah Board and Corps, while the 2nd applicant was appointed as the Deputy Commander General.
10. That I know as a fact that all the actions of the applicants as the Commander General of the Hisbah and Deputy Commander General of Hisbah were done under the law that set up the organization.
11. That I know as a fact that there is no order of any court in Nigeria that has declared the said Hisbah Law as unconstitutional.
12. That I have seen the applicants after their arraignment in court and they told me and I verily believed them that they are innocent of the allegations contained in the charges against them.
13. That they told me further and I believed them that they will not commit any offence nor impede police investigation if released on bail and they will attend to their trial at all times

14. That I know as a fact that the applicants are law abiding and patriotic Nigerians without any criminal record anywhere in the World.
15. That I know as a fact that they applicants are ready and willing to provide credible sureties and fulfill other conditions of the bail the court may impose on them.”

Having quoted so much of the affidavit above, it is only with a view to having a bird's eye-view on the affidavit evidence placed before the trial court. A trial court, no doubt, is a court of law and facts. It has no other sources of generating its decision except from the solid facts established before it and from the law governing the subject matter of litigation before it. It is its primary role therefore to even handedly evaluate the evidence placed before it by the parties not only through witnesses but including evidence by affidavits. A trial court, in other words, has the primary duty to fully and consciously consider the totality of the evidence proffered by all the parties before it in whatever way, ascribe probative value to it and put it on the imaginary scale of justice in order to determine the party in whose favour the balance tilts. Certainly where a trial court has creditably done that, no appeal court has any business to tamper with its evaluation.

In an application for grant of bail, the following factors or criteria may be taken into consideration by the trial Judge:

- (a) The evidence available by the trial judge;
- (b) Availability of the accused to stand trial;
- (c) The nature and gravity of the offence;
- (d) The likelihood of the accused committing another offence while on bail;
- (e) The likelihood of accused interfering with the accused person;
- (f) The criminal antecedents of the accused person;
- (g) The likelihood of further charge being brought against the accused;
- (h) The probability of guilt;
- (i) Detention for the protection of the accused;
- (j) The necessity to procure medical or social report pending final disposal of the case.

The factors are not exhaustive and may not all be relevant in all cases. See *Dantata v. Police*(1958)NRNLR 3; *Olatunji v. F.R.N* (2003) 3 NWLR (Pt. 807)406 at 425; *Ekwenugo v. F.R.N.*(2001)6 NWLR (Pt. 708) 171; *Bamaiyi v. State* (2001) 8 NWLR (Pt. 715) 270 at 291.

From a careful perusal of the learned trial judge's ruling it is clear that nothing has been said on;

- i. The presumed innocence of the appellants;
- ii. Non-availability of any criminal record against the appellants;
- iii. The way and manner how the appellants will impede the 'police investigation';
- iv. Whether there has been any evidence to suggest that the appellants will escape justice.

It is trite law in civil and criminal proceedings that where there is failure by a trial court to properly appraise the evidence placed before it, the result is that whatever findings conclusions arrived at by that trial court would be perverse. It is on this premise that the appeal court finds itself in the inescapable position of rendering the duty omitted to be done or

which was wrongly done by the trial court. In the present appeal and as shown above it appears the learned trial Judge did not give any consideration to the affidavit evidence placed by the appellants. If he had done so he would have found that:

Firstly, the appellants were by law, performing a statutory duty. This statutory duty whether rightly or wrongly assigned to the appellants was created by a law which must be presumed to be valid until declared otherwise by a court of competent jurisdiction.

The appellants averred that they were appointed under a law enacted by Kano State as Kano State Hisbah Law No. 4 of 2003 and an amendment to the law as Kano State Hisbah (Amendment) Law No. 6 of 2005. But the respondent in paragraph 5(b) of the counter affidavit known as deposed to the fact that there was no law in existence known as Kano State Hisbah Law No. 4 of 2003 and an amendment to the said law known as Kano State Hisbah (amendment) Law No. 6 of 2005. Reacting to the counter affidavit, the appellants through their counsel, on whose behalf one Mariam Kawu swore to a further affidavit in support of the application for bail, deposed as follows:

“3. That I know as a fact that there exist in fact the Hisbah Law and its amendment as published in the gazette of Kano State. The principal Hisbah Law and its amendment are attached herewith as exhibits 1 and 11 respectively.”

I think, the general proposition of the law is that once a law is cited by a party in a dispute (without the necessity of pleading the law itself or tendering it in evidence), a court of law is bound to take judicial notice of that law as forming part of laws, enactments or subsidiary legislations having the force of law in Nigeria. (Section 74(1)(a)-(c) of the Evidence Act). Thus, the fact that there was a law in existence under the pretext of which the appellants were operating that alone should have worked on the mind of the learned trial judge to consider it as exceptional circumstance which warrants the grant of bail to the appellants.

Secondly, the learned trial judge refused the appellants bail because they will impede police investigation. Police investigation in a criminal matter appears to me to be a term of relative application. It is that inquiry into a criminal matter systematically with the suspect/accused as the main subject of the inquiry. It may be wide or narrow depending on the nature and extent of the accused's involvement in the crime. I think a criminal charge, the offence of which is ordinarily bailable or bailable subject to some exceptional circumstances, the trial court should not allow itself to be blind-folded by the prosecution by hiding under the canopy of non-completion of investigation to deny a citizen of this country his constitutional right to liberty of his person and movement. It is my view that where there is a claim of interference/impediment to investigation being conducted by the police in criminal matter the prosecution, who is opposed to the release of the accused person on bail should be able to inform the court handling the bail matter in a precise manner, the following:

- i. What is the exact nature of the investigation;
- ii. Whether investigation has at all commenced when accused was brought to court and at what stage;
- iii. The approximate time investigation is to take;

- iv. Proposed witnesses/other vital exhibits: whether they are the kind the accused will have access/influence on.

In the instant appeal there is nothing to suggest in what manner the appellants will impede police investigation.

Further, another factor which is cognate to interference is whether is a serious risk of the accused jumping bail thereby escaping from justice. The appellants herein, have deposed to the following facts in their affidavit in support:

“13. That they told me further and I believed them that they will not commit any offence not impede Police investigation if released on bail and they will attend to their trial at all times.

14. That I know as a fact that the 1st applicant is over 50 years of age, with 2 wives, 8 children and other dependants for whom he is responsible.
15. That I know as a fact that the 2nd applicant is over 30 years of age married to a wife, has a child, aged parents and other dependants for whom he caters.
16. That I know as a fact that the applicants are ready and willing to provide credible sureties and fulfill other conditions of the bail the court may impose on them.”

In the counter affidavit of the respondent it was averred that:

“5(h) That there is likelihood that the accused/applicants will not attend their trial at all times if they are released on bail.”

I think, the prosecution should have gone further to support the above averment by more solid facts e.g. instances where the appellants ever jumped bail if at all granted either by the Police or any court. To suggest that the appellants will not attend their trial at all times must, at most, be regarded by the trial court as mere conjecture which has no place in our courts, as there is nothing to convince the trial court that the appellants will not attend their trial at all times if released on bail.

Another factor to be considered by the learned trial judge was the strength of the evidence against the appellants. This, the learned trial judge could do only by looking at the proof of evidence.

Although the learned trial judge was of the view that as a Federal High Court, which has summary jurisdiction in criminal matters and trials may proceed with or without the proof of evidence once the charge is filed, it is the general law that for the prosecution to oppose vehemently the grant of bail to an accused, there must be produced before the trial High Court proof of evidence. It is the one that will enable the learned trial judge to form his view on the strength of the evidence to be called and whether a prima facie case is maintainable against the accused person. See: Ukatu v. C.O.P. (2001) 6 NWLR (Pt. 710) 765 at 772 F-H. Although the learned trial judge has not stated the section which obviates the necessity of filing of proof of evidence at Federal High Court in criminal matters, my belief is that the Federal High Court is guided by the Criminal Procedure Act when considering criminal matters. In this case it is clear that the prosecution failed to produce its proof of evidence. Here is another

exceptional circumstance. The trial court was certainly deprived of the opportunity to peruse at that stage, at legal or factual basis which would entitle it to grant or refuse bail. My learned brother Akpabio, JCA (of blessed memory) once made the following observations on the absence of information and proof of evidence, thus:

“What is the position in a situation where no information has been filed before the Onitsha High Court, and therefore no proof of evidence whatsoever placed before the Judge of the High Court? Can he entertain the application? Can he release or refuse to release the accused on bail. One is minded to say that the case should be struck out for absence of materials to enable the Judge exercise his discretion. But to do so will not help the accused in any way, as he would continue to be kept in the prison custody in which he has been kept under the “holding charge” at the Magistrate Court. As far as anybody knows he could be there “ad infinitum”. See the dictum of Achike, JCA(as he then was) in the case of Emmanuel Chinemelu v. Commissioner of Police (1995) 4 NWLR (Pt. 390) 467 in which the facts were similar, and the court had to grant the accused bail for want of a better thing to do.

In the instant case therefore, I am of the considered view that the since on information had been in the High Court, nor proof of evidence filed for the court to know how serious (or frivolous) the charge may be, this court really has no alternative than to send the case back to the Magistrate’s Court (not High Court) where a charge was filed for the accused applicant to be released on bail pending such time as the police may decide to commence his trial as was done in *Anaekwe and Chinemelu case (supra)*.”

On this principle of law alone, the learned trial judge would have admitted the appellants into bail. See also the case of *Musa v. C.O.P. (2004) 9 NWLR (Pt. 879) 483 at 499*.

The only issue remaining now is the exercise of discretion in the grant of bail by the learned trial Judge. Grant of bail, certainly, is discretionary in situations like in this appeal. Authorities are however judicious. However, judicial discretion must be exercised according to common sense and according to justice and if there is any miscarriage of justice in the exercise of such discretion it is within the competence of the Court of Appeal to have it reviewed. See *Oduote v. Oduote (1971) 1 All NLR 219*; *Williams v. Hope Rising Voluntary Funds Society (1982) 1 – 2SC 145*; *Adejumo v. Ayantegbe trial judge (1989) 3 NWLR (Pt. 110) 417 at 445*. It appeared that the learned trial judge refused to grant the appellants bail in the interest of “National Security”. These expressions were never used by any of the parties to the bail proceedings before the learned trial judge. It is the trial Judge’s manufacturing of the phrase to justify his exercise of discretion. But a judicial and judicious discretion which is well exercised is one which is marked by fairness under the circumstances of any given case and guided by the rules and principles of law. Thus, where a judge fails to exercise sound and reasonable decision, the appeal court will review such a decision. See: *Oduote v. Oduote (Supra)*.

It is my belief that a court of law properly established by the Constitution of the Federal Republic of Nigeria must not shy away from carrying its responsibilities placed upon it by the Constitution and other Statutes. The plenitude of the judicial powers of courts under the 1999 Constitution especially section 6(a)(b); 34 and 35, including the provisions of

section 118 of the Criminal Procedure Act and its corresponding section in the Criminal Procedure Code provide the necessary checks and balances for undue or imagined excesses of the executive, so that where the circumstances warrant any citizen who is arbitrarily incarcerated will, by force of law, regain his liberty. My humble understanding of the general law is that where the police or the executive arbitrarily detains a citizen in questionable circumstances, and refuses him the liberty to his person and movement, whereas the law so permits, then that is derogatory to due process of law and antithesis to our nascent democracy. That will, of course signal a head-on romance with anarchy and a state of despondency.

In the final analysis, I find merit in this appeal and I allow same. I set aside the order of the lower court which refused bail to the appellants and I substitute it with an order admitting the appellants to bail pending the hearing and determination of the criminal case against them on the condition that each is admitted to bail in the sum of N50,000.00 and surety in the like sum. Each of the sureties to be resident Abuja.

ODILI, J.C.A.: I agree.

RHODES-VIVOUR, J.C.A.: I have read the judgement of my learned brother, Hon. Justice I.T. Muhammad, JCA in draft and entirely agree with him. I wish to add my own contribution by way of emphasis.

This is an application for bail pending trial, and in the exercise of his Lordship's discretion whether to grant or refuse bail, some of the considerations that guide the court are:

1. The nature of the charge,
2. The severity of the punishment,
3. The character of the evidence
4. The criminal record of the accused,
5. The likelihood of the accused interfering with the course of justice. See: *Eyu v. State* (1988) 2 NWLR (Pt. 78) p. 602; *Olugbusi v. COP* (1970) 2 All NLR p. 1; *Ekwenugo v. FRN* (2001) 6 NWLR (Pt. 708) p.171.

To succeed in opposing bail the affidavit of the respondent must very detailed and condensed on facts in line with the considerations listed above. It would not suffice to make bare assertions

Where the respondent opposes bail on the ground that if admitted to bail the accused person would not return to face trial or he would interfere with police investigation or obstruct the course of justice, the respondent's counter affidavit would be expected to be full and frank stating how the accused would interfere or obstruct investigations or whether there are antecedents of the respondents of the application not coming to face trial or being difficult to trace his whereabouts.

Counter affidavits not exhaustive on these vital facts are unhelpful to a judge in such application.

Finally, since admitting an accused person to bail is entirely at the discretion of the Judge, it is very important that the proof of evidence is attached to the counter affidavit as an

annexure to enable the Judge examine the nature of the charge, and character of evidence against the accused person.

Where this is not available it would be almost impossible to say that the trial judge exercised his discretion judicially and judiciously.

For this and the fuller reasons in the lead judgment, I also admit the appellants to bail and endorse the terms therein.

Appeal allowed.