IN THE COURT OF APPEAL
IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
ON TUESDAY THE 22ND DAY OF MARCH, 2016
BEFORE THEIR LORDSHIPS:

HARUNA SIMON TSAMMANI	**JUSTICE, COURT OF APPEAL**
OBIETONBARA DANIEL-KALIO	**JUSTICE, COURT OF APPEAL**
NONYEREM OKORONKWO	**JUSTICE, COURT OF APPEAL**

CA/IB/228/2015

BETWEEN:

OYEBAMIJI AKEEM .... APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA .... RESPONDENT

JUDGMENT
(DELIVERED BY HARUNA SIMON TSAMMANI, J.C.A.)

This appeal is against the Ruling of the Federal High Court, Ibadan Division, delivered by A. O. Faji, J on the 19th day of June, 2015.

The brief facts have been stated by learned counsel for the Respondent in paragraphs 2.01 – 2.02 of the Respondent's Brief of arguments as follows:

> "The Appellant and other Accused Persons before the lower court were officials of the Deposit Money Bank (First Bank of Nigeria Plc.) and Central Bank of Nigeria (CBN) respectively, who were saddled with the responsibilities of coordinating the transfer and the transfer of mutilated notes to CBN, receiving

deposits from Deposit Money Banks (DMB), boxing of currency, payment of withdrawals by the DMB, classification of cash into Counted Audited Clean (CAC) notes or Counted Audit Dirty (CAD) notes for eventual evaluation through Briquetting exercise, at the Ibadan branch of First Bank of Nigeria and Central Bank of Nigeria respectively.

The Appellant herein was the Vault Officer at the Ibadan branch of First Bank of Nigeria Plc at the material time, and coordinated the transfer of mutilated currencies from branches of First Bank to Central Bank of Nigeria. In the performance of that duty, the Appellant conspired with Isaq Akano (the 4th accused at the trial), who was a casual labourer at the First Bank and with other casual labourers to supply signed First Bank Packing Slips to certain Staff of CBN (all accused persons at trial) which were originally meant to be placed on boxes filled with mutilated currencies of specific denominations, meant for briquetting. These packing slips, they placed on either boxes of currencies interleafed with lower denominations or on boxes with neatly cut newspapers. The Appellant and the other accused at trial, would then share the proceeds thereafter among themselves."

Based on the above stated alleged facts, the Appellant was arrested and arraigned with other accused persons on a 28 counts charge of offences allegedly committed under the Advance Fee Fraud and other Fraud Related Offences Act, No.14 of 2006; Bank Employee etc (Declaration of Assets) Act, Cap.131, Laws of the Federation of Nigeria 2004; the Criminal Code Act, Cap.38, Laws of the Federation of Nigeria and Miscellaneous Offences Act, Cap. M17, Laws of the Federation, 2004. The charges are contained at pages 2 – 13 of Vo.1 of the Record of Appeal.

The Appellant pleaded not guilty to the charge but filed an application for bail. The application was dated the 01/6/2015 and filed on the 2nd of June, 2015. The Motion was supported by an affidavit of 18 paragraphs deposed to by one Mrs. Ajoke Oyebamiji, who is the Appellant's wife; together with a Written Address as the Rules of the court below required. The Respondent filed a 15 paragraphs Counter-Affidavit and a Written Address in opposition to the application. The Motion was argued on the 11/6/2015 and in a consolidated Ruling delivered on the 19th day of June, 2015, the learned trial Judge of the Federal High Court dismissed the Motion, thereby denying bail to the Appellant. It is against the Ruling of the trial court refusing him bail that the Appellant has filed this appeal.

The Notice of Appeal, which is contained in pages 1739 – 1741 of the Record of Appeal, was dated and filed on the 07/9/2015. It consists of three (3) Grounds of Appeal as follows:

"**GROUNDS OF APPEAL**

(1) The learned trial Judge erred in law when he held that:

"As regards the strength of evidence, it seems to me that as regards charge 31C/15 the evidence against all the Defendant is very strong."

PARTICULARS

(1) The Appellant's case was not independently considers (sic) by the learned trial Judge.

(2) The evidence against the other accused persons influenced the decision of the learned trial Judge.

2. The learned trial Judge erred in law when he held that:

"As regards all the Defendants in $31^{C}/15$ therefore there are statements made by them which seem to suggest some involvement in the alleged offences."

PARTICULARS

(1) The statements made by the Appellant does not in any way suggest any criminal involvement in the alleged offences as charged.

3. The learned trial Judge erred in law when he refused to admit the Appellant to bail on the grounds that the offences and punishment are all grave.

PARTICULARS

(1) Judicial discretion in considering bail application is mostly influenced by the availability of the Accused person to stand trial.

(2) It is not the nature of the offences and the punishment that should guide the court but the evidence with which the offences are tied."

The parties then filed and exchanged briefs of arguments in compliance with the Rules of this court. The Appellant's Brief of Arguments was dated the 05/10/2015 and filed the 12/10/15. Therein, one issue was raised for determination as follows:

"Whether or not given the facts and circumstances of the case, the learned trial Judge was right in refusing the appellant's application for bail."

The Respondent's Brief of Arguments dated the 26/10/2015 was filed on 27/10/2015. Like the Appellant, the Respondent raised a lone issue for determination as follows:

> "Whether having regard to the materials placed before the lower court, the learned trial Judge did not exercise his discretion judicially and judiciously in refusing the Appellant's application for bail as to warrant an interference with the exercise by this Honourable Court."

Upon being served the Respondent's Brief of Arguments, the Appellant filed a Reply Brief of Arguments. It was dated and filed the 10/11/15 but deemed filed on the 19/11/2015.

Now, arguing on the sole issue raised for determination, the learned counsel for the Appellant, drew our attention to the fact that the Appellant was charged along with others on counts 1, 3 and 4 for offences under the Advance Fee Fraud and Other Related Offences Act, No.14 of 2006, which attracts a punishment of not less than 7 years and not more than 20 years imprisonment. On counts 6, 7 and 16, he was charged with offences punishable under the Bank Employees etc (Declaration of Assets) Act (supra), which attracts a punishment of 10 years plus forfeiture of excess assets or its equivalent in money to the Federal Government; and on counts 9 and 11, he was charged with offences under Sections 435(1) and 438(4) of the Criminal Code Act (supra), which punishment attracts a maximum of 7 years imprisonment respectively. That on Counts 19, 20, 24, 25, 26, 27 and 28, he was charged for offences punishable under the Miscellaneous Offences Act (supra), which attract a punishment not exceeding 14 years and 20 years imprisonment respectively. It was

therefore contended by learned counsel that, all the counts for which the Appellant was charged attract terms of imprisonment for terms exceeding three (3) years imprisonment.

Learned Counsel for the Appellant therefore cited and relied on Section 162 of the Administration of Criminal Justice Act (to be referred herein as "the ACJA, 2015") to submit that, all an applicant for bail need do, is to make an application, for him to be entitled to bail. That it is so because, the phrase "shall an application to the court, be released on bail", is mandatory. That the Appellant, having made an application had satisfied the requirement of Section 162 of the ACJA, 2015 and therefore ought to be granted bail, except where the Respondents have by clear and positive affidavit evidence shown that the Appellant's case falls within any of the exceptions to the said Section 162. The case of **Olayiwola v. F.R.N. (2006) All FWLR (pt. 305) p.667 at 689 paragraphs G - H** and **at p.690 paragraphss B - C** was also cited to further submit that in considering Section 162 of the ACJA, 2015, the court is only to rely on the hard facts and law in order to determine whether or not to grant bail.

Learned Counsel for the Appellant went on to submit that, the use of the word "shall" does not permit of a discretion on the part of the court, but expresses a command or exhortation, based on the hard facts and the law. The cases of **Amokeodo v. IGP (1996) 6 NWLR (pt. 607) p.467 at 481 paragraph F** and **Bakoshi & Ors v. Chief of Naval Staff (2005) All FWLR (pt.248) p.1719 at 1737 paragraphs E - F** were cited in support. It was therefore submitted that, the Respondents ought to have brought the Appellant's case within the parameters of the

exception stipulated in Section 162 of the ACJA, 2015. The case of **Adams v. Attorney-General of the Federation (2007) All FWLR (pt.355) p.429 at 445 paragraph C** was then cited to submit that, the onus was on the Respondent to bring the Appellant's case within the exception to Section 162 of the ACJA, 2015.

It was further submitted by learned counsel for the Appellant that, the Respondent admitted in paragraphs 8(e) and (f) of the Counter-Affidavit that investigation into the case had been concluded. Furthermore, that in an application for bail, the paramount consideration or factor is the availability of the accused person to stand trial. The cases of **Bamaiyi v. State (2007) 4 SCNJ p.103 at 126 line 25** and **Ogedengbe v. Balogun (2007) 30 W.R.N. p.1 at 42** were cited in support. Furthermore, that in considering whether or not an accused must be available for trial, the nature and gravity of the offence, the severity of the punishment upon conviction and the quality of the evidence with which the offence is to be proved are necessary factors. It was then contended that, where the accused has by his conduct and antecedents demonstrated that he would not jump bail, if released on bail, he would be favourably considered for bail. That the learned trial Judge was aware of the antecedents of the Appellant as evidenced in pages 1724-1725 of the Records, and therefore should have granted bail without the need to consider other criteria, such as the nature and gravity of the offence and the evidence with which the offences are to be proved.

Learned counsel for the Appellant also submitted that, the learned trial Judge failed to dispassionately and independently consider the

Appellant's application in the joint Ruling delivered, when considering the issue of the nature and gravity of the offence. He then cited the case of **Ikhazuagbe v. C.O.P. (2005) All FWLR (pt. 166) p.1323 at 1337 paragraph B** to submit that, if the evidence against the accused is not strong, the severity of the offence will remain just what it is, mere allegations. That, though the learned trial Judge did observe and stated the law, he failed to dispassionately consider the proof of evidence, but only looked at the excerpts of the statement reproduced by the prosecution without considering the entirety of the Appellant's statements as contained in the proof of evidence. Learned counsel then reproduced a portion of the Appellant's statement to submit that, the learned trial Judge should have considered the exculpatory portion of the Appellant's statement as well. The case of **Garba v. The State (1997) 3 S.C.N.J. p.68 at 86 para 40** was cited in support. The case of **Olayiwola v. F.R.N. (supra) at 697 paragraphs E-F** was further cited to submit that the failure of the learned trial Judge to dispassionately and independently consider the Appellant's case in the joint Ruling, seemed to have been influenced by the case against the other accused persons, thereby occasioning miscarriage of justice to the Appellant. We were accordingly urged to set aside the Ruling delivered on the 19/6/2015, and to admit the Appellant to bail.

In response, learned counsel for the Respondent, contended that, in determining the issue in this appeal, it is necessary to understand that, the power of a trial court to admit an accused person to bail is discretionary, which must be exercised judicially and judiciously. That, an appellate court must not interfere with the exercise of such discretion simply because, if

faced with a similar application, it would have exercised the discretion differently. The case of **Minister, P.M.R. v. E.L. (Nig.) Ltd (2010) 12 NWLR (pt.1208) p.201 at 202** was then cited to further submit that, it is the duty of the Appellant who has appealed against the exercise of such discretion to satisfy this court, that the lower court did not exercise its discretion judicially and judiciously. That, the duty of this court is to look at the records, review same and determine whether the lower court properly exercised its discretion, having regards to the facts and circumstances of the case. The case of **Ali v. State (2012) 10 NWLR (pt. 1309) p. 589 at 609 paragraphs A-D** and **Sappeddine v. C.O.P. (1965) 1 All N.L.R. p.54** were also cited in support. That, in the instant case, the learned trial Judge was quite conscious of his role in determining the Appellant's application and clearly demonstrated so in the Ruling.

Learned Counsel for the Respondent, further contended that, the parameters which the court will keep in focus in determining an application for bail are as stated in Section 162 of the ACJA, 2015, and also some judicial decisions. Learned counsel then reproduced Section 162 of the ACJA, 2015, to submit that paragraph (f) of the Section is very wide, so a trial court may consider other factors which may undermine or jeopardize:

(a) Efficient management of criminal justice institution.

(b) Speedy dispensation of justice.

(c) Protection of society from crime.

(d) The protection of the right of the suspect and the victim.

Furthermore, that the requirements set out in Section 162 of the ACJA, 2015, has neither changed the position of the law with regard to the factors that a court would consider in granting or refusing bail nor removed the discretionary power of the court to grant or refuse bail. That, rather the Act has merely codified the existing judicial principles on the issue.

Learned Counsel for the Respondent then contended that, by Section 162 of the ACJA, 2015, the court may exercise its discretion to refuse bail where any of the factors listed under the section is present, and therefore, it is not the requirement of the Law that all the factors must co-exist before the court can refuse bail. That Section 162 of the ACJA, 2015 is in line with the decision of the Supreme Court in **Bamaiyi v. State (2007) 8 NWLR (pt.715) p.270 at 291** where the relevant factors the court is enjoined to consider in exercising its discretion to grant or refuse bail were set out, as:

(i) The evidence available against the accused.

(ii) The availability of the accused to stand trial.

(iii) The nature and gravity of the offence

(iv) The likelihood of the accused committing another offence while on bail.

(v) The likelihood of the accused interfering with the course of justice.

(vi) The criminal antecedents of the accused.

(vii) The likelihood of other charges being brought against the accused.

(viii) The probability of guilt.

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(i) The evidence available against the accused.

(ii) The availability of the accused to stand trial.

(iii) The nature and gravity of the offence

(iv) The likelihood of the accused committing another offence while on bail.

(v) The likelihood of the accused interfering with the course of justice.

(vi) The criminal antecedents of the accused.

(vii) The likelihood of other charges being brought against the accused.

(viii) The probability of guilt.

(ix) Detention for the protection of the accused; and

(x) The necessity to procure medical or social report pending final disposal of the case.

The cases of **State v. Akaa (2002) 10 NWLR (pt.774) p.157 at 173**; **Dantata v. The Police (1958) N.R.N.L.R. p:3**; **Olatunji v. F.R.N. (2003) 3 NWLR (pt.807) p.406 at 425** and **Nwude v. F.G.G. (2004) 17 NWLR (pt.902) p.306**, were further cited in support. It was then submitted that, the learned trial Judge considered above listed factors presented by the prosecution. Furthermore, that the learned trial Judge left no one in doubt, that it considered the proof of evidence before coming to the conclusion that, having regard to the evidence placed before it by the prosecution, in the proof of evidence, a *prima facie* case was disclosed against the Appellant. The cases of **Bamaiyi v. State (supra) at p.292**; **Anajemba v. F.G.N. (2004) 13 NWLR (pt.890) p.267 at 84** and **Ikhazuagbe v. C.O.P. (2005) ALL FWLR (pt.266) p.1323 at 1337** were further cited to buttress the point.

Learned counsel for the Respondent went on to submit that, it is the law that, the more cogent the evidence before the court, the greater the possibility that the accused may attempt to face his trial or refuse to appear to stand trial. That, the requirement of cogency of evidence and gravity of the offences are usually connected to the probability of the accused not being available to face his trial or evading his trial. The case of **Anajemba v. F.G.N. (supra) at p.284** was cited in support. On that score, learned counsel contended that, the argument of the Appellant that, since he had earlier been granted administrative bail, the court below

ought to have admitted him to bail is misconceived. That the parameters to be considered in the grant of administrative bail are not the same as the parameter as the court would consider in an application for bail pending trial. That, in any case, the prosecution explained that, the administrative bail was granted in order to avoid breaching the constitutional provision which forbids detaining the Appellant beyond the period of 24 hours without his being charged to court. Furthermore, in considering administrative bail, the accused is yet to be charged as the evidence against him has not been assembled, while after arraignment, the proof of evidence is available and the charges known. That, the learned trial Judge rightly observed so in page 1724 of the records.

Learned Counsel for the Respondent also contended that, one other factor which the learned trial Judge considered is the nature and gravity of the offences alleged against the Appellant. That, the learned trial Judge considered that some of the offences for which the Appellant was charged attract a maximum sentence of 21 years imprisonment and therefore grave offences against the economy of the nation. Furthermore, that the learned trial Judge carefully considered the processes filed by the Appellant, including the counter-affidavit, and also the submissions of counsel before arriving at the decision to refuse bail. It was accordingly submitted by learned counsel for the Respondent that, it is clear from the Ruling that, the learned trial Judge exercised his discretion both judicially and judiciously, and therefore the approach adopted by the learned trial Judge cannot be said to have occasioned a miscarriage of justice as contended by the Appellant. We were then urged to discountenance the arguments of

the Appellant, dismiss the appeal and affirm the Ruling of the learned trial Judge.

In a brief reply to the Respondent's Brief of arguments, learned counsel for the Appellant contended that, Section 162(1)(f) of the ACJA, 2015 was not considered by the learned trial Judge in reaching his decision. That, an appeal is a challenge against the decision of trial court and not predicated on what the court did not pronounce upon in the judgment. We were accordingly urged to disregard the arguments of the Respondents on the issue, and to allow the appeal.

Now, it is clear from the record of appeal that several other persons were arraigned together with the Appellant. Each of the accused persons filed a separate application for bail. The Appellant's application for bail which is contained at pages 1550 – 1559 of the Records was dated the 01/6/2015 and filed the 02/6/15. It was supported by an affidavit deposed to by the wife of the Applicant and filed on the 2nd June, 2015. A Written Address was also filed along with the application. The said application was then consolidated with those of the other accused persons and moved on the 8/6/2015; and the learned trial Judge gave a joint or consolidated Ruling denying bail to the Appellant.

In considering the various applications, including that of the appellant, the learned trial Judge reproduced the provisions of Section 162 of the ACJA, 2015 to hold that:

> "Section 162 therefore seems to be the middle ground in the sequence. It also seems to me that Section 162(b) on attempting to evade trial has codified the main consideration in the grant of bail as laid down in the various authorities cited supra,

the availability of the Defendant for his trial. It is under that sub-section that the factors laid down in **BAMAIYI v. STATE (Supra)** can be considered. Indeed BAMAIYI's case also envisaged Section 162(a), (d) and (e). Section 162 would thus seem to be a codification of existing judicial principles for the grant of bail. The ground on attempt to evade trial is however in my view the centre-piece of considerations for the grant of bail."

The learned trial Judge went on to observe that:

"The common position of all the Defendants would seem premised on: the presumption of innocence, the need for the Defendants to be free to enable them have adequate facilities for their defence, the offences are bailable, the court should not rely on sentiments, the Defendants did not jump administrative bail and are thus not likely to jump bail, the evidence against the Defendants are statements which have not been taken through the test of voluntariness or admissibility, the prosecution is being sentimental and the Defendants are entitled to bail under Section 35(4) (b) of the 1999 Constitution (as amended)."

The learned trial Judge then observed, rightly so, that in an application for bail, the material the court is to consider are; the charge and its proof of evidence, affidavits filed for and against the application. Having considered those materials, vis-à-vis the nature of the offence and the severity of punishment; the likelihood of the Appellant interfering with the prosecution witnesses, the strength of the evidence against him, and the probability of the Appellant to appear in court to face his trial, the

learned trial Judge refused bail to the Appellant. On that premise, the learned trial Judge found that:

> "As regards the strength of the evidence, it seems to me that as regards charge 31C/15, the evidence against the Defendants is very strong."

The learned trial Judge when considering the factor of administrative bail held that:

> "All the Defendants have relied on the fact that they never jumped administrative bail granted by EFCC. Even if that is so, the considerations in bail pending trial differ from administrative bail. In bail pending trial, A Defendant now knows that he has a case to face with the possibility of imprisonment would however seem to me that compliance with administrative bail shows some good faith on the part the Defendant which can tilt the scale in favour of an Applicant in a border-line case. This ground therefore favours avails all the Defendants in all four charges."

The learned trial Judge however found that the offences committed by the Appellant and his co-accused have a lot to do with the national economy, the sum of over ₦7 billion naira being involved and therefore grave offences. Accordingly, having considered the nature of those offences, the punishment they attract and the proof of evidence presented by the prosecution; and refused bail to the Appellant.

Now, by Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. That is why the constitution in Section 35 guarantees to every person the

right to personal liberty. To that end Section 35(1)(c) of the 1999 Constitution (Supra) stipulates that:

> 35:- (1) 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 –
>
> (a) .....
>
> (b) .....
>
> (c) For the purpose of bringing him before a court in execution of the order of court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence."

It is clear therefore that, though the constitution guarantees to every person the right to his personal liberty, there are instances or circumstances where such right may be taken away or derogated from. Those instances are as stated in paragraphs (a) – (f) to Section 35(1) of the Constitution. One of such instances where the right to personal liberty may be derogated from, is for the purpose of bringing him before a court in execution of the order of court or where he is reasonably suspected of having committed a criminal offence. In any of such instances as enumerated under Section 35(1) of the 1999 Constitution therefore, the authorities have been constitutionally empowered to take away or derogate from such persons right to personal liberty. See **Ezeadukwa v. Maduka (1997) 8 NWLR (pt.518) p.635**. Thus My Lord, **I. T. Muhammad**:

JSC clearly stated the position in the case of **Dokubo – Asari v. F.R.N. (2007) All FWLR (pt.375) at 586 – 587**, as follows:

> "The above provisions of Section 35 of the Constitution leave no one in doubt that the Section is not absolute personal liberty of an individual within the contemplation of Section 35(1) of the Constitution is a qualified right. In the context of this particular case and by virtue Subsection 1(c) thereof which permits restriction on individual liberty in the course of Judicial inquiry or where, rightly as in this case, the Appellant was arrested and put under detention upon reasonable suspicion of having committed a felony. A person's liberty, as in this case, can also be curtailed in order to prevent him from committing further offence(s). It is my belief as well, that if every person accused of a felony can hide under the canopy of Section 35 of the Constitution to escape lawful detention then an escape route to freedom is easily and richly made available to persons suspected to have committed serious crimes and that will not augur well for the peace, progress, prosperity and tranquility of the society I find support in so saying from **Irikefe's, JSC** (as he then was) earlier pronouncement in the case of **Echeazu v. Commissioner of Police (1974) NLR. 308 of page 314**."

It is therefore beyond dispute that, the fundamental right to personal liberty guaranteed by Section 35(1) of the 1999 Constitution is not absolute, as its existence is subject to certain exceptions as stipulated in Subsections (a) – (f) of the Section. As stated earlier, one of the exceptions as stipulated in Subsection (c) thereto is that, a person may be lawfully arrested and/or detained upon suspicion of having committed a criminal offence. However, even at that, the Constitution has put in place

certain safeguards, so that a person may not be arrested and/or detained indefinitely or for an indeterminable period. Thus, the proviso to the said Section 35(1) of the Constitution has enshrined that:

> "Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence."

This proviso therefore enjoins that a person who has been lawfully arrested and detained, shall not be so detained for a period longer than the maximum term of imprisonment prescribed for the offence for which he has been detained. The proviso therefore envisages that, such person is entitled to be released on bail, either conditionally or unconditionally. In my view, it is in recognition of this fact that the Constitution has strengthened and solidified the right to bail under Section 35(4) of the 1999 Constitution (Supra) which stipulates that:

> "35:- (4) Any person who is arrested or detained in accordance with Subsection 1(c) of this Section shall 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;

He shall (without prejudice to any further proceedings that may be brought against him) be released either conditionally or upon such conditions as are reasonably to ensure that he appears for trial at a later date."

To my mind, the proviso to Section 35(1) and Section 35(4) have effectively guaranteed that, though the personal liberty of a person may be taken away in certain circumstances, such person should not be unreasonably incarcerated especially where his guilt has not been ascertained or proven. It would be seen therefore, that the fundamental right to personal liberty is very sacrosanct and should not be unreasonably violated. In other words, the fundamental right to personal liberty is one that should be construed in favour of the citizen or person accused.

I am of the considered view that Section 162 of the ACJA, 2015 upon which the learned trial Judge decided the application of the Appellant was promulgated in order to actualize and further give effect to the fundamental right to personal liberty. The said Section 162 of the ACJA, 2015 stipulates that:

"162. A Defendant charged with an offence punishable with imprisonment for a term exceeding three years shall on application to the court, be released on bail except in any of the following circumstance:

(a) Where there is a reasonable ground to believe that the Defendant will, where released on bail, commit another offence;

(b) Attempt to evade his trial;

(c) Attempt to influence, interfere with, intimidate witnesses and or interfere in the investigation of the case;

(d) Attempt to conceal or destroy evidence;

(e) Prejudice the proper investigation of the offence; or

(f) Undermine or jeopardize the objectives or the purpose or the functioning of the criminal justice administration, including the bail system."

In the instant case, the offences for which the Appellant was arrested attract heavy punishment of upto twenty (20) years imprisonment. At the time the Motion for bail was heard and determined, the Appellant was in prison custody and has since been in such custody. The ACJA, 2015 has therefore been enacted to regulate the administration of criminal Justice in all Federal Courts and the Federal Capital Territory. By this Act therefore, the application of the Criminal Procedure Act and the Criminal Procedure Code in those Federal Courts have been repealed. The Administration of Criminal Justice Act, 2015 is therefore now the main legislation to be applied in all criminal trials in all Federal Courts. Before then, most, if not all, decisions of the courts in relation to bail were governed by the provisions of the Criminal Procedure Act or the Criminal Procedure Code as the case may be. Thus, with the promulgation of the ACJA, 2015, uniformity has been achieved in the administration of Criminal Justice in all Federal Courts and the Federal Capital Territory.

Now, Section 162(a) – (f) has enumerated instances when bail may be denied an accused person. Aside those instances, it appears to me that, in recognition of the Constitutional Right to bail, Section 162 of the ACJA, 2015 requires that upon an application by person charged with the commission of an offence punishable with imprisonment for a term exceeding three years, such person shall be released on bail. By the use of the word "shall", I am of the view that the Law mandates the court to grant bail, save where it is shown that the exceptions mentioned under the section exist. This is because, it is a general rule of construction of statutes that words used in a statute be given their ordinary or literal meaning except where there is something in the statute which dictates or suggests otherwise. Generally however, our courts have in most times construe the word "shall" in mandatory terms. It is almost always construed to denote an obligation or command. However, whether or not the word "shall" is used in mandatory or directory sense would depend on the circumstances of the case. See **Ifezue v. Mbadugha (1984) 1 S.C.N.L.R. p.427**; **INEC v. Iniama (2008) 8 NWLR (pt.1088) p.182 at 199 paragraphs E – F**; **Bamaiyi v. A.G; Federation (2001) 12 NWLR (pt.727) p.468) at 480** and **Nwankwo v. Yar'adua (2010) 12 NWLR (pt.1209) p.518**.

In the instant case, I am of the view that, save where the circumstances or factors enumerated in Section 162(a) – (f) of the ACJA, 2015 have been shown to exist, where an accused person makes an application, the court is enjoined and mandated or commanded to grant bail. This is in view of Section 35(4) of the 1999 Constitution (Supra).

Thus, a combined reading of Section 35(4) of the 1999 Constitution and Section162 of the ACJA, 2015 makes bail a right and therefore mandatory were an accused person applies for same. All that an accused person need do is to file an application for bail stating why he is entitled to bail. Once that is done the onus would be on the prosecution to present before the court reasons why the accused person should not be granted bail, in such a way as to bring the accused person's case within any of the exceptions enumerated in Section 162(a) – (f).

It appears to me that the exceptions stipulated in the said Section 162 of the ACJA, 2015 are not the only circumstances where an accused person may be denied bail. This is because Subsection (f) of Section 162 stipulates that any circumstance which may:

> "Undermine or jeopardize the objectives or the purpose or the function of the Criminal Justice Administration, including the bail system;"

may operate as a factor in denying bail to an accused person. This sub-section is therefore a broad and general or minimum ground giving the courts a large latitude in the consideration of whether or not to grant bail. By that subsection therefore, the discretionary powers for the courts have been imparted in the consideration of whether or not to grant bail. Furthermore, that provision leaves room for the general principles to be applied in determining whether or not to grant bail, as determined by the Supreme Court and indeed this court in a plethora of cases decided pre-enactment of the ACJA, 2015.

It appears from the decided cases however, that the most important consideration in deciding whether or not to grant bail is whether or not, if

granted bail the accused person would appear to face his trial. What has always agitated the mind of the courts is how to determine whether a particular accused person would appear to face his trial in a given case. To that end various criteria have been applied or invoked in granting or refusing bail. Thus, in the case of **Suleiman v. C.O.P: Plateau State (2008) 8 NWLR (pt.1089) p.298 at 322-323 paragraphs H - B**, the Supreme Court held that:

> "The most important consideration in the bail decision is the determination of what criteria the court should use or invoke in granting or refusing bail. The bailability of the accused depends largely upon the weight the court attaches to one or several of the criteria open to it in any given case. The determination of the criteria is quite important because the liberty of the individual stands or falls by the decision of the court. In performing the judicial function, the court wields a very extensive discretionary power, which must be exercised judicially and judiciously.
>
> In exercising its discretion, the court is bound to examine the evidence before it without considering any extraneous matter. The court cannot exercise its whims indiscriminately. Similarly, there is no room for the court to express its sentiments. It is a hard matter of law, facts and circumstances which the court considers without being emotional, sensitive and sentimental."

Though there is no room for the exercise of the court's discretion in a whimsical or capricious manner, it is my view that, any factor or circumstance which the court justifiably and reasonably finds as one which will likely undermine or jeopardize the objectives or the purpose or the functioning of the criminal justice administration, would suffice. Thus, any

factor which would shield an accused person from being tried within a reasonable time or give room for an accused person to escape his trial or justice would operate to deny bail to an accused person. Generally however, the following factors should be considered by the courts:

(a) The nature or gravity of the charge;

(b) The strength or cogency of the evidence against the accused;

(c) The severity of the punishment prescribed for the offence;

(d) The criminal record of the accused;

(e) The likelihood of the accused committing a similar or other offence;

(f) The likelihood of the accused interfering with the witnesses or tampering with the evidence, if granted bail; and

(g) Whether there is the need to keep the accused in protective custody.

(h) Whether there is the need to procure medical or social report on the accused pending final determination of the case;

(i) The likelihood of additional or further charge(s) being brought against the accused.

As stated earlier, in view of paragraph (f) of Section 162 of the ACJA, 2015 the factors which would operate against the grant of bail are not

closed. Furthermore, all the above stated factors need not co-exist as anyone of those factors would suffice to refuse bail. See **Onyirioha v. I.G.P. (2009) 3 NWLR (pt.1128) p.34**; **Adeniyi v. F.R.N. (2012) 10 NWLR (pt.1281) p.284**; **Ali v. State (2012) 10 NWLR (pt. 1309) p.589**; **Ahmed v. C.O.P; Bauchi State (2012) 9 NWLR (pt.1304) p.104** and **Uwazurike v. A-G Federation (2009) 10 NWLR (pt.1096) p.444**.

In the instant case, the Appellant had deposed in the affidavit in support of the motion for bail as follows:

> "8. That after about two weeks he was taken by the operatives of the EFCC from Iyaganku, Ibadan to Abuja.
>
> 9. That he was again detained at Abuja until the 23rd day of December, 2014 when he was granted bail by the EFCC operatives.
>
> 10. That he was asked to produce two substantial suretees which he did and he was released on bail.
>
> 11. That the EFCC operatives as part of the condition of bail requested the 6th accused person/Applicant to be reporting to its Abuja office once every month.
>
> 12. That the 6th Accused person/Applicant deligently kept to the condition of bail, as he visited the Abuja office of the EFCC in January, February, March, April and May, 2015 when he was again detained on the 27th May, 2015.
>
> 13. That for the period the 6th Accused per/Applicant was on bail which was given by the EFCC, he did not abuse the bail condition.

14. That I was informed by the 6th Accused person/Applicant and I verily believed him as follows:

(a) That the EFCC operatives informed him that he was detained to ease the process of his arraignment before the Federal High Court, Ibadan.

(b) That it will not be easy to move him from Abuja to Ibadan before 9.00 o'clock in the morning where the court usually sit for the purpose of his arraignment.

(c) That he knows nothing of the allegations made against him.

(d) That he will not jump bail or abuse the bail conditions this Honourable Court will impose if he is released on bail.

(e) That he has suitable, qualified and substantial suretees that can stand as surety for him if bail is granted by this Honourable Court.

15. That I know as a fact that the 6th Accused person/Applicant does not have any criminal record whatsoever."

The summary of the case put forward in his application for bail is that, he was granted bail by the prosecution (EFCC) pending his arraignment in Court. That, he kept faith with the terms of the bail and did not jump bail. The deponent then assured that reasonable and substantial suretees are available, ready and willing to stand surety for the Appellant. Furthermore, that the Appellant is a first offender as he has no criminal record. By those depositions therefore, I am of the firm view that, the

Appellant had made out a ***prima facie*** case for him to be released on bail. This is especially so as the Appellant only needed to file an application for bail which by virtue of Section 162 of the ACJA, 2015 would take him out of the exceptions stipulated in that section. That having been done, to deny him bail, the prosecution had a duty to depose to facts which would squarely place the Appellant's motion within any of the exceptions enumerated in the Law, i.e. Section 162(a) - (f) of the ACJA, 2015. To do that, the prosecution (Respondent's) filed a Counter-Affidavit of 15 paragraphs, deposed to by one Olapade Adaran, a Senior Detective Superintendent with the EFCC. Specifically it was deposed that:

> "4 (g) That the Applicant knowingly conspired with other Accused persons to accept interleafed currency boxes wherein ₦1000.00 Currency notes were mixed with either ordinary papers or currency of lower denomination such as ₦100, ₦10, and ₦5, at the expense of the Central Bank of Nigeria.
>
> (h) That the Applicant offered huge sums of money to Kolawole Babalola, Olaniran Muniru and Toogun Philip Kayode, share of the fraud in other to (sic) allow mutilated, interleafed or corroded bank notes to be accepted by the Central Bank of Nigeria, Ibadan Branch.
>
> (i) That the Applicant acquired a Bungalow of 2 flats of 3 bedrooms at No. 8, Wale-Alli Oke Avenue, Fodacis Area, New Ring Road, Adeoyo-Ibadan, an uncompleted Building fenced with 5 shops built by the fence at Ajobo Close, elewura Challenge By Glo Office, Ibadan; 2 Bungalows of 3 bedrooms and 1(2) Bedrooms flat at No. 6 Ore-Ofe, Oluyole Extension, by Car Wash Junction, Opp., Zawak Golden Petrol Station, New Akala Road, Ibadan, a Storey Building comprising of 2 flats upstairs and 8

self-conftained rooms downstairs and at Elewunmi Street, Off Frigo Glass Road, Sanyo, Ibadan; an uncompleted Roofed 3 bedroom flat at Lade Owo Area, Omi-Adio, Ido Local Government Area Ibadan, a 3 Bedroom Bungalow used as school in the name of Eagle wings Group of Schools at No. 5, Lane 4, Femidire Zone, Aioliwa Sector, Olunde Olomi, Ibadan, which assets are in excess of his legitimate, known and provable income and assets.

(j) That the Applicant also induced the Central Bank of Nigeria to deliver an aggregate sum of ₦1,070,000,000.00 (One Billion and Seventy Million Naira) as against the actual sum of ₦296,902,680.00 (Two Hundred and Ninety Six Million, Nine Hundred and Two Thousand, Six Hundred and Eighty Naira) on the false pretence that the 107 boxes containing supposed mutilated ₦1,000 notes which the Applicant took to the Ibadan branch of the Central Bank of Nigeria on behalf of the said First Bank of Nigeria Plc contained a total sum of ₦1,070,000.000.00 (One Billion and Seventy Million Naira).

(k) That the 6th Accused/Applicant induced the Central Bank of Nigeria to deliver the sum of ₦180,000,000.00 (One Hundred and Eighty Million) to the First Bank of Nigeria Plc against the actual sum of ₦92,393,855.00 (Ninety Two Million, Three Hundred and Ninety Three Thousand, Eight Hundred and Fifty Five Naira) on the false pretence that the 36 boxes containing supposed mutilated ₦500 notes which they took to the Ibadan branch of the Central Bank of Nigeria on behalf of the said First Bank of Nigeria Plc contained a total sum of ₦180,000,000.00 (One Hundred and Eighty Million).

(l) That the Applicant being an employee of First Bank Plc and other Accused persons owned monetary asset to wit: the sum of ₦773,097,320.00 (Seven Hundred and Seventy Three Million, Ninety Seven Thousand, Three Hundred and Twenty naira) which they shared amongst yourselves being money forwarded by the First Bank of Nigeria Plc to the Central Bank of Nigeria as mutilated currencies and which sum was in excess of their legitimate, known and provable income and assets.

(m) That the 6th Accused/Applicant being an being employee of First bank owned a monetary asset in the sum of ₦87,606,145.00 (Eighty Seven Million, Six Hundred and Six Thousand, One Hundred and Forty Five Naira) which he shared with other Accused persons herein and which sum formed part of the money forwarded by the First Bank of Nigeria Plc to the Central Bank of Nigeria as mutilated currencies and which sum was in excess of the Applicant's legitimate, known and probable income and assets.

(n) That the Applicant conspired with other Accused persons herein to forge a document to titled First Bank of Nigeria Plc Specie Packing Slip dated 10th February, 2011 knowing same to be false to the prejudice of the Central Bank of Nigeria in the believe that it is genuine that a total sum of ₦10,000,000.00 (Ten Million Naira) of mutilated ₦1,000 notes was forwarded by them to the Central Bank of Nigeria on behalf of the First Bank of Nigeria.

(o) That the Applicant in conjunction with other Accused persons herein with the intention to destroy defaced with water, a box deposited by First Bank of Nigeria Plc with the Central Bank of Nigeria, of

₦1,000 denomination mutilated notes with a supposed value of ₦10,000,000.00 (Ten Million Naira), the property of Central Bank of Nigeria, when the said box was mixed with polymers, ordinary brown papers and some genuine bank notes as against ₦1,000 mutilated notes.

7. That I know as fact which I verily believed that the depositions in the affidavit in Applicant's summons for bail are mostly untrue and grossly a misrepresentation of fact of this case as presently constituted.

8. That contrary to paragraphs 4 – 18 of the Affidavit in Support of the Applicant's Motion on Notice, I know as a fact which I verily believed as follows:

   (a) That the facts deposed to in paragraph 6 herein are the true state of affairs.

   (b) That the Applicant himself in his own handwriting voluntarily confirmed most of the facts stated above.

   (c) That the Applicant made a voluntary confessional statement admitting the facts as stated above.

   (d) That the aforementioned properties acquired by the 6th Accused/Applicant were traced, attached and temporarily forfeited/attached by a valid court order.

   (e) That the Applicant was merely admitted on administrative bail to enable us conclude our investigation and to avoid infringing on his fundamental right since the charges were not ready.

(f) That immediately the culpability of the Applicant was established and the charges filed by our Prosecutors, the said administrative bail was revoked and the Applicant was consequently re-arrested and taken back to custody.

9. That releasing the Applicant will aid him to commit a further offence and/or temper with the already traced, attached and forfeited which he acquired with the proceed of these alleged offences.

10. That it will be in the interest of justice to refuse this Application, more so when the proof of evidence before this Honourable court clearly linked the Applicant to the alleged offence.

11. That the Applicant will interfere with our witnesses in view of the facts that some of the proposed prosecution witnesses are officer of the bank who had at one time or the other worked with the Applicant herein and will be intimidated if invited to give evidence whilst the Applicant is not in the custody of the State.

As stated earlier in the course of this judgment, the learned trial Judge considered the nature or gravity of the offences for which the Appellant and the other accused persons were arraigned, and the severity of the punishment which those offences will attract in case of a conviction. He therefore was of the view that, on the face of those circumstances, there is a likelihood that the Applicant would run away from justice if granted bail. Upon careful reading of the proof of evidence filed along with the charges preferred against the Appellant and the pungent facts deposed to in the Counter-Affidavit, which facts have not been controverted nor challenged by the Appellant by way of a Further Affidavit, I am inclined to

agree with the learned trial Judge. The fact that the Appellant was granted Administrative bail pending his arraignment will not change the situation. This is because, as rightly pointed out by the learned trial Judge, on administrative bail is usually an extra-judicial act done by the body charged with the investigation, at a time when evidence is yet to be gathered, while bail at this stage is considered after arraignment when evidence to proof the case stares the accused person in the case. Before arraignment, an accused person may yet entertain the hope that certain evidence which may nail him may not be discovered, but after investigation has been concluded, such evidence may have been exposed. Thus, the attraction to escape justice may be higher after evidence to proof the case has been unearthed. I am therefore of the view, which I hold that the learned trial Judge was right when he declined to exercise his discretion in favour of bail to the Appellant.

Having held as above, I am of the view that this appeal has no merit. It is accordingly dismissed. Accordingly, I hereby affirm the Ruling of the court below, delivered on the 19th day of June, 2015

HARUNA SIMON TSAMMANI
JUSTICE, COURT OF APPEAL

COUNSEL:

Oritsuwa Uwawah; **Esq** for the Appellant.

Shola Obaribirin; **Esq** for the Respondent.

CA/IB/228/2015

OBIETONBARA DANIEL-KALIO, J.C.A

I have had the privilege of reading the draft judgment of my learned brother **Haruna Simon Tsammani JCA**.

My lord comprehensively considered the issues in the appeal. I agree with both the reasoning and the conclusions of my lord. By way of a modest comment or contribution, I wish to say that the decision of the trial court to grant or refuse bail is a discretionary one. Unless this court comes to the conclusion that the exercise of the discretion was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice, it cannot interfere even if it might have exercised the discretion differently if the discretion were that of this court to exercise. ***See Imonikhe v. AG Bandel State (1992) NWLR part 248 p 396***. I am of the firm view that the exercise of discretion by the lower court did not come within the negative parameters that will make the exercise of the discretion improper. I therefore see no reason to disturb the exercise of the discretion of the lower court in refusing to grant bail.

For this reason and the fuller reasons given by my learned brother, I find no merit in the appeal. I affirm the Ruling of the lower court.

HON. JUSTICE OBIETONBARA DANIEL-KALIO
JUSTICE, COURT OF APPEAL

APPEAL NO: CA/I/228/2015

NONYEREM OKORONKWO, JCA)

BETWEEN:

OYEBAMIJI AKEEM **===** **APPELLANT**

AND

FEDERAL REPUBLIC OF NIGERIA **===** **RESPONDENT**

DISSENTING JUDGMENT
(BY NONYEREM OKORONKWO, JCA)

This appeal arose from the decision of the Federal High Court per A.O. Raji J in charge No.FHC/IB/31C/2015 delivered on 19th June, 2015 whereby the court refused bail for the appellant and his co-accused person.

The appellant, dissatisfied with the decision appealed to this court on 7/9/15. As stated in paragraph 2.01 – 2.03 of the appellant's brief, the appellant .....

> *The appellant was arraigned on 3rd of June, 2015 before the Federal High Court Ibadan Judicial Division alongside seven (7) other persons on a 28 count charge, under the Advance Fee Fraud, and other fraud related Offences Act No. 14 of 2006, Bank Employee etc (Declaration of Assets) Act Cap. B1 Laws of the Federation of Nigeria 2004, the Criminal Code Act Cap. C38 Laws of the Federation of Nigeria Miscellaneous Offences Act, Cap. M17 Laws of the Federation, 2004; See pages 2-13 of*

the Records. The appellant pleaded not guilty to the charge. See pages 1586 – 1599.

The appellant filed a motion for bail dated the 1st of June, 2015, but filed on the 2nd of June, 2015 as well as Written Address dated and filed on the 4th day of June, 2015. See pages 1550 – 1559 of the Records.

The respondent in opposition to the bail application, filed a 15 paragraph Counter Affidavit, and a Written address, both dated and filed on the 5th day of June, 2015. See pages 1560 – 1585 of the Records.

The background of the fact of the case which I have compared with the record is as given by the respondent. I therefore adopt same and reproduce hereunder.

The issues raised by the parties are as follows:

For the appellant, it is:

"Whether or not given the facts and circumstances of the case, the learned trial judge was right in refusing the applicant's application for bail."

For the respondent it is;

WHETHER HAVING REGARD TO THE MATERIALS PLACED BEFORE THE LOWER COURT, THE LEARNED TRIAL JUDGE DID NOT EXERCISE HIS DISCRETION JUDICAILLY AND JUDICIOUSLY IN REFUSING THE APPELLANT'S APPLICATION FOR BAIL AS TO

WARRANT AN INTERFERENCE WITH THE EXERCISE BY THIS HONOURABLE COURT.

In arguing the issue raised, the appellant seem to bring out the distinction or contrast between section 118(2) of the Criminal Procedure Act and section 162 of the Administration of Criminal Justice Act 2015.

In 4.06 and 4.07 of his brief of argument, appellant argues thus:

> *"A defendant charged with an offence punishable with imprisonment for a term exceeding three years shall on application to the court, be released on bail except in any of the following circumstances:*
>
> *(a) Where there is reasonable ground or believe that the Defendant will, where released on bail, commit another offences;*
>
> *(b) Attempt to evade his trial;*
>
> *(c) Attempt to influence, interfere with, intimidate witnesses, and or interfere in the investigation of the case;*
>
> *(d) Attempt to conceal or destroy evidence;*
>
> *(e) Prejudice the proper investigation of the offence; or*
>
> *(f) Undermine or jeopardize the objectives or the purpose or the functioning of the Criminal Justice Administration, including the bail system." (emphasis supplied).*

*We submit with respect that all an applicant for bail need to do, is to make an **"application"** and no more; for him to be entitled to bail; this is because the phrase **"shall on application to the court, be released on bail"** is mandatory.*

The appellant in my view is construing section 162 of Criminal Justice Administration Act 2015 given above as a mandatory provision which enjoins an applicant charged with an offence to merely apply for bail and automatically such applicant is granted bail except the court sees reasons under section 162 a, b, c, d, e and f to refuse bail under those ground.

Against this assumption of innocence appellant further argue following ***Bamaiyi vs. State (2001) 4 SCNJ 103 at 126*** that:

*"It would well be that it is the likelihood of the accused making himself available to stand trial in any given case that may be of paramount concern. There is authority for saying that it is a proper and useful test whether bail should be granted or refused to consider the **Probability** that the accused will appear in court to take his trial."*

In this case, appellant contend that the trial court having tacitly approved of the conduct of the appellant in keeping to the terms of the administrative bail granted him when the learned trial judge observed thus:

"It would however seem to me that compliance with administrative bail shows some good faith on the part of the Defendant which can tilt the scale in

favour of an Applicant in a border-line case. ***This ground therefore avail all the Defendants in all four charges"*** *(emphasis supplied)*

We submit further that assuming but without conceding that the court ought still consider these factors, it is our humble submission that the learned trial judge failed to dispassionately and independently consider the appellant's application in the joint ruling delivered by the learned trial judge while considering the issue of the nature and gravity of the offence at page 1716 of the records the court said the applicant faces a punishment of not more than 20 years, but not less than 7 years, if convicted under the advance fee Fraud Act, 10 years in addition to forfeiture of Assets under the banks employee etc. Declaration of Assets Act and ***between 14 and 20 years without option of fine under the miscellaneous offences Act,*** *and consequently concluded that the offences are severe.*

That court ought to on that basis have granted bail to the applicant since the antecedent favour the grant of bail.

This consideration alone, appellant argue, should have weighed heavily on the lower court than considerations of evidence and severity of punishment citing ***Garba vs. the State (1997) 3 SCNJ 68 at 86*** and that in considering nature of evidence proposed, regard ought be had to the defences disclosed in the proposed statements.

Appellant charges that the trial court was selective in dispensing the grace of bail whereas in considering the case of the accused person the trial court varied the measure even when the defences appear similar. Appellant argue at paragraph 4.28 – 4.32 thus:

> *Incidentally the learned trial judge considered the issue of denial of the actual knowledge of the commission of the offence while considering the application of other defendants. In charge 32C/15, the court said: "**As regard 6th defendant, the prosecution could only show that he allegedly collected some money from 5th defendant. He did not know what the money was meant for. ...I must find that the case against 6th defendant is not strong.**" See page 1722 of the record. In 33C/15, while considering the case of the 5th defendant, the learned trial judge said:*
>
> *"**As regards 5th Defendant, he denied knowledge of the offence but signed packing slips and was also charged with forgery. I do not think there is a strong case against the 4th and 5th Defendants in 33C/15.**" See page 1723 of the record. Whole considering 34C/15, the court said:*
>
> *"**As regard 34C/15, the 4th Defendant being a contract staff stated that he merely followed his superior and never signed any papers. He however gained N160,000 which is not his salary. Viewed against the amounts of money involved in the charge however, it seems that there is no strong case***

against 4th Defendant." *See page 1724 of the Record.*

We submit that in the instant Appeal the same criteria, which the learned trial judge considered in favour of other Defendants in other charges features in the case of the appellant; yet the learned trial judge did not consider it in favour of the Appellant.

In the statement of the Appellant, the Appellant said: "I was informed it was proceed of sales of mint..." "...I did not realize that the money was a stolen money and they did not open up the source of the money to me initially." The court said 6th defendant collected money but he did not know what the money was meant for' same as what the Appellant said yet the court said the case of the 6th Defendant in Charge No. 32C/15 is not strong while that of the Appellant is strong.

The Appellant denied knowledge of the commission of the offence, just like the 5th defendant in 33C/15 and the court agreed that; ***"that shows the case against the 5th Defendant is not strong"*** *but considered that of the Appellant as strong.*

The Appellant said he was given money which he was told was proceeds from the sales of mint; and that he did not know that what he was told was not the truth, the learned trial judge found that the 4th Defendant in 34C/15 like the Appellant gained money which was not his salary, yet the learned trial judge concluded that the case against the 4th

Defendant in 34C/15 is not strong while that of the Appellant is strong.

In this regard appellant submit that the lumping together of the various applications and delivering composite rulings each varying from the other had occasioned a miscarriage of justice to the appellant as was held in ***Olayiwola vs. Federal Republic of Nigeria (2006) All FWLR (pt. 305) 666 at 697 E – F*** where the counsel was given thus:

> ***"It is needful to further emphasize that each accused's trial is distinct and independent of the other, with the individual having to plead to a distinctive charge against him. By analogy and with each having applied for bail, there is every reason to have considered each application on its own merit therefore. By lumping same together and delivering a joint ruling did not satisfy "the adequate consideration of all materials placed before the court." Every application, no matter how stupid it might be deserves a constitutional legal place of consideration. The lumping together and without such individual due consideration, had certainly occasioned a serious miscarriage of justice to the 1st accused/appellant's appeal must also succeed on this ground." (emphasis supplied).***

For the respondent, a good starting point would be to restate the submission of the respondent at paragraphs 4.01, 4.02, 4.03 and 4.04. They are herewith reproduced.

> *In arguing the sole issue for determination, it must be reiterated that the power of the lower court to admit the appellant to bail in respect of the offences for which he is standing trial, is discretionary,*

although the discretionary power must be exercised judicially and judiciously.

It must also be borne in mind that usually, an Appellate Court will not interfere with an exercise of discretion by a lower court simply because if faced with a similar application, it would have exercised the discretion differently. See ***Minister, P.M.R. vs. E.L (Nig.) Ltd*** *(2010) 12 NWLR (pt. 1208) 261 at 292. It is the duty of the appellant herein who has appealed against the exercise of discretion by the lower court to satisfy this Honourable Court that the lower court did not exercise its discretion judicially and judiciously.*

Also, in a situation such as the instant appeal, which borders on the exercise of the discretion of a lower court, the duty of this Honourable Court is simply to look at the record, review same and determine whether the lower court exercised it discretion judicially and judiciously having regards to the facts and circumstance of the case. See ***Ali vs. State (2012) 10 NELR (pt. 1309) 589 @ 609, paragraphs A –D*** *and* ***Sappeddine vs. COP (1965) 1 All NLR 54.***

The onus is on the appellant to show that the lower court did not exercise the discretion judicially and judiciously. This onus is not discharged by merely representing the same argument before the Appellate Court in the hope that it would exercise its discretion differently.

The respondent is well aware of the provision of section 162 of the Administration of Criminal Justice Act which of the expense of repetition, I reproduce again.

> *"(1) A defendant charged with an offence punishable with imprisonment for a term exceeding three years shall on application to the court, be released on bail except in any of the following circumstances.*
>
> *a. Where there is a reasonable ground to believe that the defendant will, where release on bail commit another offence;*
>
> *b. Attempt to evade his trial;*
>
> *c. Attempt to influence, interfere with, intimidate witnesses, and or interfere in the investigation of the case;*
>
> *d. Attempt to conceal or destroy evidence;*
>
> *e. Prejudice the proper investigation of the case; or*
>
> *f. Undermine or jeopardize the objectives or the purpose of the functioning of the criminal justice administration, including the bail system." (emphasis supplied).*

At paragraphs 4.08 and 4.09 of his brief, learned respondents counsel submitted thus:

It is submitted that contrary to the submission of appellant at paragraph 4.09 of his brief, the requirements set out under section 162 of the ACJA has not changed the position of the law with regard to the factors that the court would consider in refusing or granting bail. It has also not removed the discretionary power of the court to refuse or grant bail. It can at best be said that the new Act, merely codified existing judicial principles. The learned trial Judge rightly stated this when he held at page 1713 of the record thus:

> ***"Section 162 would thus seem to be a codification of existing Judicial Principles for the grant of bail."***

Having regards to the provision of section 162 of the ACJA reproduced above. It is clear that the court can exercise its discretion to refuse bail where any of the factors listed under the section is present. By the wordings of the section, it is not the requirement of the law that all the factors must co-exist before the court can refuse bail. It is important to note that the provision of section 162 ACJA is in line with the decision of the Supreme Court in ***Bamaiyi vs. State (2001) 8 NWLR (pt. 715) 270 at 291*** *where the Supreme Court set out the relevant factors that the court ought to consider in exercising its discretion on whether or not to grant bail. The factors set out by the Supreme Court are as follows: (1) evidence available against the accused. (2) Availability of the accused to stand trial. (3) The nature and gravity of the offence. (4) The likelihood of the accused*

committing another offence while on bail. (5) The likelihood of the accused interfering with the course of justice. (6) The criminal antecedent of the accused. (7) The likelihood of other charges being brought against the accused. (8) The probability of guilt. (9) Detention for the protection of the accused. (10) The necessity to procure medical or social report pending final disposal of the case. See also ***State vs. Akaa (2002) 10 NWLR (pt. 774) 157 @ 173,; Dantata vs. The Police (1958) NRNLR 3; Olatunji vs. F.R.N. (2003) 3 NWLR (pt. 807) 406 @ 425. Nwude vs. F.G.N. (2004) 17 NWLR (pt. 902) 306.***

Learned respondent's counsel argues that the law in relation to bail has not changed with the coming into force of the Criminal Justice Administration act.

On the evidence, it was argued that the trial court considered the proof of evidence and was of the view that the evidence preferred against the appellant is formidable. Citing ***Bamaiyi vs. State (2001) 8 NWLR (pt. 715) 270 at 292.***

At page 4.13 the learned senior Advocate for the respondent submitted thus:

It is the law that the more cogent the evidence before the court, the greater the possibility that the accused person may attempt to evade his trial or may refuse to appear at his trial. In other words, in determining the likelihood of an Accused evading his trial, the court would take into consideration the

> *cogency of the evidence in the proof of evidence and the gravity of the offence being alleged. This is the requirement under section 162 (1) (b) of the ACJA. The requirement of cogency of evidence and gravity of the offences are usually connected to the probability of the accused not being available to face his trial or the possibility of him evading his trial.*

Stressing that at 4.14 that:

> *It must be noted that the likelihood of an accused making himself available to stand trial in any given case is usually of paramount concern to the court. See* ***Anajemba vs. F.G.N.*** *(supra) at page 284.*

And in paragraph 4.15, learned senior counsel offered some reasons why administrative bails are granted which is to ensure that the constitutional restrictions of not holding a suspect beyond 24 hours are not contravened and also to give time for the prosecution to prepare its charges and proof of evidence.

In this case, learned counsel argued, the trial judge gave much consideration to the nature and gravity of the offence alleged against the appellant some of which attract a punishment of 21 years.

Learned senior counsel thinks if probable that this court might have decided the issue differently from the way the trial judge did, but contends that, that is no reason to interfere with the exercise of discretion by a trial court.

The above is the essential argument of the parties in this appeal.

In his consideration of bail at pages 1722 – 1724 of the record, the learned trial judge said in respect 32C/15.

"As regards 6th defendant, the prosecution could only show that he allegedly collected some money from 5th defendant. He did not know what the money was meant for -----**I must find that the case against 6th accused is not strong**

At 1722 in 33C/15 while considering the case of the 5th defendant the learned trial judge said:

"As regard 5th defendant, he denied knowledge of the offence but signed packing slips and was also charged with forgery. ***I do not think there is a strong case against the 4th and 5th defendants*** in 33/15.

At 1723 of the record while considering charge 34C/15 the trial court again said:

"As regards 34C/15, the 4th defendant being a contract staff stated that he merely followed his superior and never signed any papers. He however gained ₦160,000 which is not his salary. Viewed against the amount of money involved in the charge however, ***it seems there is no strong case against 4th defendant***. At 4.31 and 4.32 of appellant it was posited thus:

> *The appellant denied knowledge of the commission of the offence, just like the 5th defendant in 33C/15 and the court agreed that; "**that shows the case against the 5th defendant is not strong**" but considered that of the appellant as strong.*

The appellant said he was given money which he was told was proceeds from the sales of mint; and that he did not know that what he was told was not the truth, the learned trial judge found that the 4th defendant in 34C/15 like the appellant gained money which was not his salary, yet the learned trial judge concluded that the case against the 4th defendant in 34C/15 is not strong while that of the appellant is strong.

While a trial court is perfectly entitled to peruse the proof of evidence proffered by the prosecution, it is only intended to give an idea or semblance of the case the prosecution is likely to lead. It is a proposal. Some time it is withdrawn or changed or amended and even when led in actual evidence, it may crumble or succumb under the rigours of cross examination. It is never used to pronounce upon the guilt or otherwise of an applicant for bail.

Giving the findings of the learned trial judge like "I must find that the case against 6th defendant is not strong or" I do not think there is a strong case against 4th and 5th in 33C/15 ---or "it seems there is no strong case against 4th defendant" ------see 1724 of record.

Those comments of the trial judge were, of an interlocutory stage definite findings of not guilty and acquittal in respect of some and definite findings of guilty in respect of the appellant whose case the judge considered strong. Strong and not strong are value judgments which a trial court cannot rescile from and which will influence the entire conduct of

the proceedings including trial? It means that before trial, the trial court had an acquitted or convicted the suspect/applicant.

In this case charged in relation to FHC/IB/31C/15; FHC/IB/32C/15; FHC/IB/33C/15 and FHC/IB/34C/15 were lumped together as the trial judge commented in;

> *This Ruling relates to applications for bail filed on behalf of all the Defendants in four charges pending before this court to wit:*
>
> *– Charge No: FHC/IB/31C/2015*
> *FRN – VS. – KOLAWOLE BABALOLA & 7 ORS. (31C/15)*
>
> *– Charge No: FHC/IB/32C/15*
> *FRN – VS. – KOLAWOLE BABALOLA & 5 ORS. (32C/15)*
>
> *– Charge No: FHC/IB/33C/15*
> *FRN – VS. – KOLAWOLE BABALOLA & 4 ORS. (33C/15)*
>
> *– Charge No: FHC/IB/34C/15*
> *FRN – VS. – KOLAWOLE BABALOLA & 4 ORS. (34C/15)*

In ***Olayiwola vs. FRN (2006) All FWLR 305 at 666 – 667*** the following admonition was given:

> ***"It is needful to further emphasize that each accused's trial is distinct and independent of the other, with the individual having to plead to a distinctive charge against him. By analogy and with each having applied for bail, there is every reason to have considered to have considered each application on its own merit therefore. By lumping same together and delivering a joint ruling did not satisfy "the adequate consideration of all materials placed***

before the court." Every application, no matter how stupid it might be deserves a constitutional legal place of consideration. <u>The lumping together and without such individual due consideration, had certainly occasioned a serious miscarriage of justice to the 1st accused/appellant's appeal must also succeed on this ground." (emphasis supplied).</u>

Such lumping together or "consolidation" as it were of different cases of different persons is very likely to confuse a trial court and be cloud his vision and make it possible to transfer feelings derived from one case or one person to another. Such lumping together and the danger associated therewith is enough to carry this appeal through.

Another consideration in this appeal is the provision of section 162 of the New Administration of Criminal Justice Act 1915 which provides, I will quote again for emphasis that:

"(1) A defendant charged with an offence punishable with imprisonment for a term exceeding three years shall on application to the court, be released on bail except in any of the following circumstances.

g. Where there is a reasonable ground to believe that the defendant will, where release on bail commit another offence;

h. Attempt to evade his trial;

i. Attempt to influence, interfere with, intimidate witnesses, and or interfere in the investigation of the case;

j. Attempt to conceal or destroy evidence;

k. Prejudice the proper investigation of the case; or

l. Undermine or jeopardize the objectives or the purpose of the functioning of the criminal justice administration, including the bail system." (emphasis supplied).

My view of the section is that it makes bail in every circumstance where it applies, a right except where the case comes under the exceptions in (a) (b) (c) (d) (e) and (f). If it is a right, the onus to show that in a given case, an applicant is not entitled to such statutory right because his case or circumstance comes under the exceptions in a, b, c, d and e is on the prosecution and not the applicant as learned Senior Advocate for the respondent herein has argued.

Section 162 of the Criminal Justice Administration Act did not merely codify principles relating to bail as learned counsel for the respondent argued in 4.08 and 4.09 of his brief. The section i.e. 162 ACJA properly placed the burden of proof where it customarily should be – on the prosecution. It thereby gives meaning to the solemn and enshrined provisions of the constitution in section 36 (5) which pontifically declare –

"Every person who is charge with a criminal offence shall be presumed to be innocent until he is proved guilty" what is presumed? What does it mean? To "Presume", the Oxford Dictionary tenders as (1) suppose to be true; take for granted. It is the same as assumed which the same dictionary defines as take or accept as being true, without proof. Such powerful adjective is used for section 36 (5) of the constitution.

It is this section of the constitution that section 162 of the Administration of Criminal Justice Act 2015 came to give meaning to and reverse the burden of proof in matters of bail. Indeed the court in ***Adams vs. Attorney-General of the Federation 2007 All FWLR (pt. 355) 429 at 445*** seem to have had this principle in mind when it declared.

> *"Since the court presumes in favour of the liberty of the subject and his innocence until found guilty, the onus is on the prosecution to show in a given case, that an accused or applicant for bail is one that should be refused bail" (emphasis supplied).*

The discretion the court has in the matter of bail is a circumscribed type directed only to those exceptional cases as listed in section 162 of the ACJA Act 2015.

In this case, it is obvious that by the comment of the trial court that the evidence to be led (not led) against the appellant is strong, which the learned counsel for the respondent described as Formidable the presumption in section 36 (5) is already displaced and the appellant is thereby presumed guilty. This in my view is a negation of a vital Constitutional Provision.

In Appeal No. ***CA/I/198/2015 ONI ADEMOLA DOLAPO VS. FEDERAL REPUBLIC OF NIGERIA*** Court of Appeal Ibadan delivered 29/1/2016; I said of section 36 (5) thus:

> *My view of section 36(5) of the Constitution is that because of the presumption of innocence upon an*

accused person it is for the prosecution to show exceptional circumstance why bail should be refused or denied a person presumed to be innocent and not otherwise. This should be the case invariably. I am aware of the considerations outlined in ***Bulama vs. F.R.N.*** *(citation) particularly the dicta at page 509 thus:*

> *"The exercise of discretion by the Judge, in the grant or refusal of bail to an accused, is governed by several factors which are not necessarily constant as they do change with changing circumstances and time. They cannot be regarded as immutable and applicable for all times. It must be borne in mind that it is not only the parties in any dispute before a court that are interested in the outcome but also the larger society of which these parties, biological or artificial, have a stake in every decision of a court of law; and societal fortune may often be determined by such court decision."*

In making such considerations, extreme care must be taken not to throw overboard the presumption of innocence in section 36 (5) of the Constitution and caution must also be taken not to weigh the scales unevenly against such an accused person in favour

of the larger society. That is not the import of the utilitarian principle.

For all the reason given above, I think the learned trial judge was largely misconceived in the consideration that led to his decision and consequent refusal to the appellant. The Appeal shall be allowed. The decision of the trial court as it affects the appellant is hereby set aside. Appellant shall be and is hereby granted bail in the same terms as the trial judge granted the other suspects in the same charges lumped together. i.e.

- *Bail in the sum of ₦20 million.*
- *Two sureties each in the said sum*
- *The two sureties to have landed property cover by certificate of occupancy within Oyo State.*
- *Sureties to be resident within Oyo State.*
- *Sureties to swear to affidavit of means and of residence and deposit two recent passport photographs each in court.*
- *Sureties to produce three years current taxi clearance certificates.*
- *Defendant to report at the EFCC office in Abuja or where there is an office in Oyo State at the said office once every three weeks, on a Monday.*
- *Defendant shall upon realize produce two recent passport photographs each.*

The title documents to the landed properties of the sureties to be verified by the Deputy Chief Registrar Federal High Court, Ibadan.

– *Defendant to deposit their international passport in court.*

NONYEREM OKORONKWO,
JUSTICE, COURT OF APPEAL.