

# **BAIL AND PRE-TRIAL DETENTION: PERTINENT CONSIDERATIONS UNDER THE ADMINISTRATION OF CRIMINAL JUSTICE LEGISLATION**

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## **1.0 INTRODUCTION**

The Criminal Justice framework, exhibits severe tension with rights and liberty with particular reference to the right to liberty and fair hearing enshrined in sections 35 and 36 of the 1999 Constitution. An Arrest and detention restricts free movement of a person especially where it is not done pursuant to a court order. Although arrest without a warrant is justified by the Constitution, section 35(6) of the same constitution requires that a person who is arrested or detained in such circumstances 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 unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

The Constitution further elaborates on what amounts to “reasonable time” in these words –

- (a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and
- (b) in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be

reasonable.

It is instructive that the above provisions are expressly qualified in cases where a person is arrested or detained upon reasonable suspicion of committing a capital offence. However this should not be construed as conferring a power to detain suspects indefinitely and without bringing the suspect to court in any case. These constitutional provisions set the parameters for detention and bail and the thrust of this lecture. There is evidence nationwide of weak or non-compliance with these constitutional provisions. This situation has worsened since March 2020 on account of COVID-19 protocols as well as the spate of demonstrations and violence during the END SARS protest which prevented the courts from functioning normally. In April 2020, the Nigerian Correctional Service reported that over 51,983 out of the total number of 73,726 inmates in Correctional facilities were awaiting trial inmates. This is 70% of the total numbers of inmates in correctional facilities across the nation. This report is supported by another report of the Nigeria National Bureau of Statistics showing that throughout 2011 – 2015, a total percentage of 72.5% of inmates in Nigeria were persons who were yet to be sentenced by courts.

## **2.0 ARREST AND RELATED POWERS**

Unlawful arrest and detention are major problems in the criminal justice system resulting in overcrowded detention facilities such as police stations and prisons. The ACJA 2015 attempts to tackle this menace firstly by curtailing subjective or arbitrary bases for arrest and also subjecting the exercise of the power of arrest to judicial moderation. For example Section 10(1) of the Criminal Procedure Act (CPA) which authorizes the police to arrest without a warrant any person who has no ostensible means of sustenance and who cannot give a satisfactory account of himself has been deleted. Section 7 of the ACJA 2015 also prohibits arrest of family and friends of a suspect in order to get the suspect to surrender.

### **3.0 JUDICIAL MODERATION OF ARREST AND DETENTION PROCEDURES UNDER THE ACJA**

#### **3.1 Returns and Records**

Section 33 provides that the Police shall compile a report at the last working day of every month to the nearest magistrate the cases of all suspects arrested without warrant within the limits of their respected stations or agency whether or not bail was granted

Likewise the Inspector General of police (IGP) is expected to make quarterly returns to the Attorney General of the Federation (AGF) on all arrested persons within the period. This data is to be maintained electronically by the AGF. The Comptroller General of Correctional Institutions is also expected to make a report of all awaiting trial inmates for a period of 6 months from the date of arraignment to the Chief Judge and the AGF. These reports are meant to help the necessary institutions carry out measures to ensure that the objectives of ACJA 2015 are achieved.

#### **3.2 Visitation**

**By virtue of** section 34 of the ACJA The Chief Magistrate shall visit at least every month the police stations and other detention centres apart from Correctional Institutions within its jurisdiction for the purpose of conducting an inspection of detention centers. Visitations are important functions to supervise police powers of arrest with a view to ensuring compliance with section 35(6) of the CFRN

By virtue of subsection (3) An officer in charge of a police station or official in charge of an agency authorised to make an arrest shall make available to the visiting Chief Magistrate or designated Magistrate exercising his powers under subsection (1) of this section:

(a) the full record of arrest and record of bail;

(b) applications and decisions on bail made within the period;

and

(c) any other facility the Magistrate requires to exercise his powers under that subsection.

Visitations facilitate recourse to section 32 of the ACJA, which applies to cases where a suspect is not released on bail after 24 hours on a non-capital offence. When conducted with legal aiders who by dint of such arrangements like the Police Duty Solicitors scheme are aware of such suspects, an application for bail can be made to the visiting magistrate court on behalf of the suspect in detention. The magistrate may where the offence is within jurisdiction admit the suspect to bail at its discretion.

### **3.3 Remand Proceedings under section 294**

An important innovation in the ACJA is the provisions on remand proceedings.<sup>1</sup> Section 293 provides that a suspect arrested for an offence for which a magistrate court has no jurisdiction to try shall, within a reasonable time of arrest, be brought before a magistrate court for remand. The application for remand under this section shall be made *ex parte*. This process enables a yet to be charged suspect to be kept in custody pending his bail, trial or release or pending when the legal advice from the Attorney General is issued. There must be some probable cause justifying the remand order, which in the first instance should not be more than fourteen (14) days renewable for another fourteen days up to a maximum of 56 days.

The effect of this is that there is a time frame in which the AG should provide legal advice as to whether there is a prima facie case against the accused or not. (s. 376 prescribes 14 days) The legal advice of the Attorney-General of the Federation shall in all cases be copied to the court, and the court may act solely on the copy of the advice to make any order that may be necessary in the circumstances.

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<sup>1</sup> Section 294 ACJA

Probable cause can be deduced from a consideration of the following factors:

- (a) the nature and seriousness of the alleged offence;
- (b) existence of reasonable grounds to suspect that the defendant has been involved in the commission of the alleged offence;
- (c) existence of reasonable grounds for believing that the suspect may abscond or commit further offence where he is not committed to custody; and
- (d) any other circumstance of the case that justifies the request for remand.

The tension over these provisions as evinced from some recent cases relates first to the fact that the order of remand proceeds from a court without jurisdiction and the propriety of that court granting bail and secondly the need for courts to carefully consider the factors outlined above in exercising the powers of remand. With regard to the first concern, the power to grant bail is statutory and these provisions will not be the first to grant powers of bail to courts or administrative bodies which are not seised of a matter. As to the second, it must be borne in mind that section 292 seeks to eliminate the unbridled recourse to holding charge by the police by ensuring that the court supervises the remand process of Awaiting Trial Inmates.

### **3.4 Remand and Pre-trial Detention**

It is not in all cases that bail can be granted. As a matter of fact the ACJA 2015 also provides for judicial orders remanding suspects into custody. The ACJA provisions on remand orders are novel and flow from section 35 (4) and (5) of the Constitution which requires that a person arrested for an offence should be brought to court within a reasonable time. Thus in *Joshua Idokoiji v Nigeria Police Force & 7 Ors*<sup>2</sup> the applicant was arrested and detained for 5 days. The court stated that steps to keep a suspect further in custody pending investigation must of necessity be

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<sup>2</sup> FCT/HC/M/2167/16.

done in strict compliance with the provisions of sections 293 and 294 of the ACJA by approaching the court within one day of the suspects' arrest, for leave to keep him in custody as regulated by the Act; and that any other contrary act must be viewed as and declared a breach of the suspects fundamental right to personal liberty. The court held the detention of the suspect was illegal, unlawful and a violation of the right to personal liberty guaranteed under section 35 of the Constitution.

### **3.4 How are Remand Proceedings Different From The Holding Charge?**

#### ***LUFADAJU V JOHNSON, (2007) 8 NWLR (Pt. 1037) 535***

..... the charge is not read to the accused and therefore no plea taken. That makes the difference between remand and arraignment. Once an accused person is brought under Section 236(3) ACJL (Lagos) for remand, the Magistrate orders his remand without arraignment. By the subsection, the Magistrate can do one of two things. He can remand the accused in prison. He can also grant bail pending arraignment." Per NIKI TOBI ,J.S.C ( Pp. 28-29, paras. G-B )

#### ***AG LAGOS STATE v. KEITA (2016) LPELR-40163 (CA)***

A Magistrate shall have powers to remand such a person after examining the reasons for the arrests exhibited in the request form filed by the Police, and if satisfied that there is probable cause to remand such person pending legal advice within the time limits stated in the Act. As set out in section 293 ACJA, a suspect arrested upon reasonable suspicion of an offence may be brought before a Magistrate regardless of whether such magistrate has jurisdiction over the offence expressly for the purpose of determining whether to remand the suspect into custody or release the suspect on bail. There is no need for any make up or holding charge but the application shall be made *ex parte*.

### **3.4.1 Probable cause (s. 294)**

The court shall in considering an application for remand must be satisfied that there is probable cause to remand the suspect pending (i) the receipt of legal advice from the Ministry of Justice and (ii) arraignment of the suspect before the appropriate court. It is equally open to the court to grant bail to the suspect brought before it. The court must consider the following in determining whether probable cause exists for the remand of the suspect –

- (a) the nature and seriousness of the alleged offence;
- (b) reasonable grounds to suspect that the suspect has been involved in the commission of the alleged offence;
- (c) reasonable grounds for believing that the suspect may abscond or commit further offence where he is not committed to custody; and
- (d) any other circumstance of the case that justifies the request for remand.

### **3.4.2 Time and Remand Protocol (s. 296).**

The steps and period outlined under section 296 of ACJA can be abridged only upon the fulfillment of the requirements under each protocol. The timelines vary according to jurisdiction. Some states for example prescribe one week for each of the protocols while some like Kaduna State stipulate 21 days !

- (a) An order of remand made by a court shall not exceed a period of fourteen (14) days in the first instance.
- (b) The court may make an order for further remand of the suspect for a period not exceeding fourteen days, on application in writing, showing good cause why there should be an extension of the remand period or otherwise grant bail.
- (c) After the expiration of the 14 days extension, the court shall order the release of the person remanded unless good cause is shown

why there should be further remand order for a period not exceeding 14 days.

- (d) At the expiration of the further order, the court is to issue a hearing notice to the IGP and AGF to show cause why the suspect remanded should not be unconditionally released.
- (e) The exception is in terrorism related cases where suspects are remanded for a period of 90 days in the first instance, renewable until the conclusion of the matter. See **ACHEM v. FRN (2014) LPELR-23202 (CA)** –

*It should be mentioned that the applicant was convicted and sentenced for offences relating to terrorism, which in recent times have grown in intensity and magnitude and have become a threat to our national security. Courts should therefore be very circumspect in granting bail pending appeal to a person convicted for any offence relating thereto.*

See also **MOHAMMED V. STATE(2015) 10 NWLR (pt. 1468) 496 at 512**

By virtue of section 297 the court can exercise the power of remand *suo motu* or on the application of a person in charge of a facility where the detained suspect is. The court can exercise these powers whether the suspect is present or not. Where legal advice is issued a copy must in all cases be forwarded to the court and the court shall release the suspect immediately if the legal advice of the Attorney-General of the Federation shows that the suspect has no case to answer.

#### **4.0 Bail**

Bail is the freeing or setting at liberty of a person arrested or imprisoned, upon others becoming sureties by recognizance for his appearance at a date and place certainly assigned, he also entering into self-recognizance. The defendant is delivered into the hands of sureties and is accounted by law to be in their custody though they may free themselves from further responsibility if they surrender him to the Court before the date assigned. **SHONEYE v. STATE (2015) LPELR-25862 (CA)**

The ACJA is very elaborate on the issues of bail, recognizances and surety and also introduced the use of bondsperson in criminal jurisprudence. The ACJA envisages that suspects who are held for offences other than a capital offence should be entitled to bail and where bail is not granted the Act further provides for an application to be made either in writing or orally on behalf of the suspect.<sup>3</sup> It also classified when bail can be granted into different classes such as offences with less than three<sup>4</sup> or more than three years<sup>5</sup> imprisonment and in capital offences<sup>6</sup>.

In proceedings for offences carrying a prison term of 3 years or less, bail is generally available unless the court sees reason to the contrary. In cases where the imprisonment exceeds 3 years, the defendant must apply to court and should be released on bail except in the following circumstances – where there is reasonable ground to believe that the defendant will, where released on bail -

- (a) 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. (s.162)

Bail pending trial is a basic constitutional right with respect to bailable offence(s) such as the offences for which the appellant is standing trial at the Court below. The burden of proof is on the respondent to establish that the appellant is not entitled to bail pending his trial in

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<sup>3</sup> Section 32(3) ACJA

<sup>4</sup> Section 163 ACJA

<sup>5</sup> Section 162 ACJA

<sup>6</sup> Section 161 ACJA

respect of the bailable offences at stake. ***THEOPHILOUS v. FRN & ORS (2015) LPELR-25984(CA)***

#### **4.1 Capital Offences**

A judge of the High court may under exceptional circumstances, admit a suspect arrested, detained or charged with an offence punishable with death to bail. (s.161)

For the purpose of exercise of discretion in subsection (1) of this section, “exceptional circumstance” includes:

- (a) ill health of the applicant which shall be confirmed and certified by a qualified medical practitioner employed in a Government hospital, provided that the suspect is able to prove that there are no medical facilities to take care of his illness by the authority detaining him;
- (b) extraordinary delay in the investigation, arraignment and prosecution for a period exceeding one year; or
- (c) any other circumstances that the Judge may, in the particular facts of the case, consider exceptional.

In some respects also the ACJA liberalises the bail process. For example the ACJA eliminates the discrimination against women especially as it has to do with women standing as surety for suspects,<sup>7</sup>

#### **4.2 Child Suspects – Administrative Bail**

Often children come into conflict with criminal law in respect of petty offences like street-trading and sanitation offences. Section 160 of the ACJA provides that where a child is arrested with or without warrant and cannot be brought forthwith before a court, the police officer in immediate charge for the time being of the police station to which the child is brought, shall inquire into the case and shall except–

- (a) the charge is one of homicide;

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<sup>7</sup> Section 167(3) ACJA

(b) the offence charged is punishable with imprisonment for a term exceeding three years;

(c) it is necessary in the interest of the child to remove him from association with any reputed criminal or prostitute,

release the child on a recognizance entered into by his parent or guardian, with or without sureties.

The parents or guardian of the child shall execute a bond for such an amount as will in the opinion of the officer secure the attendance of the child for the hearing of the charge. (Similarly in cases where the court is disposed to granting bail to a child suspect, the parent or guardian is required to enter into a recognizance that the child will comply with the courts directives. (s. 166))

#### **4.3 Bail Conditions**

Section 165 of the ACJA provides that the conditions for bail in any case shall be at the discretion of the court with due regard to the circumstances of the case and shall not be excessive. The main purpose of bail conditions is ensure that the defendant's presence at trial is assured. Such conditions may be incorporated in a recognizance entered into by the defendant or surety.

In **UDUESEGBE v. FRN (2014) LPELR-23191(CA)** the court of Appeal enjoined courts to be liberal in their approach to grant of bail and the conditions thereof in non -capital offences. They are thus to grant bail on favorable and affordable conditions. It has held that it is against the spirit of the law to impose excessive and stringent conditions for bail as that would amount to a refusal of bail.

Aside from the admonition against excessive bail conditions, there is no statutory parameter for determining how stringent the terms of bail and recognizance should be. The gravity of the offence is not the sole consideration. The court may in addition to other conditions require deposit of a sum of money or other security as the court may specify from the defendant or his surety before the bail is approved. Any such

money or security deposited shall be returned to the defendant or his surety or sureties, as the case may be, at the conclusion of the trial or on an application by the surety to the court to discharge his recognizance. In appropriate cases the High court can direct a magistrate to vary bail conditions or review or revoke conditions imposed by it for bail.

#### **4.4 Professional bondsmen**

if as has been canvassed bail is contingent on the payment of a deposit, it is unlikely that if bail is then granted in self-recognisance the suspect would evade justice. A further suggestion is the use of professional bondsmen in order to address widespread reluctance on the part of citizens to stand as bail surety. ACJA empowers the Chief Judge to regulate the registration and licensing of corporate bodies or persons to act as bondspersons within the jurisdiction of the court in which they are registered. A person shall not engage in the business of bail bond services without being duly registered and licensed in accordance with the subsection (1) of this section. (s.187). This provision formalizes the rampant and unregulated practice of “professional” sureties that is currently found in many jurisdictions.

#### **5.0 Conclusion**

The ACJA presents an opportunity to entrench common standards and principles in Criminal justice Administration. Need for the criminal justice system to work as an integrated system.

State, Zonal and National Criminal Justice coordinating Strategies aimed at Streamlining the criminal justice process and removing bottlenecks and administrative obstacles.

The objectives of the Act will be considerably realised with the introduction of subsidiary rules to standardise practice and protocols in criminal proceedings.