

A new lease on bails, sureties as Lagos reforms Criminal Law

By Prof. Taiwo Osipitan

IT is common knowledge that prior to the introduction of the Administration of Criminal Justice Law, the Criminal Procedure Law (CPL) was applicable in Lagos State. The provision of the C.P.L. is based mainly on the Criminal Procedure Act, which was introduced to Nigeria on 1st June 1945 by its imperial overlords. Therefore, the Criminal Procedure Act evidently qualifies to be described as one of the relics of colonial Administration in Nigeria. Incidentally, until the introduction of the Administration of Criminal Justice Law, there was no major review of the Criminal Procedure Act.

A noticeable pattern in our legal system is tardiness on the part of Law making arm of Government to constantly review Laws in order to reflect developments in the society. It is trite that Society is never static. The organisation of this interactive workshop by the Lagos State Ministry of Justice under the able leadership of the Attorney-General of the State Oluşun Shasore (SAN) is not timely but a right step in the right direction.

Bail defined

Bail can simply be defined as an assurance or undertaking given by an authorised person that a suspect would appear at a certain place on a particular day and at a given time in response to a request that he should be present to respond to criminal allegations levelled against him. In Kenny's Outline of Criminal Law bail is defined as contract whereby a person is delivered to a third person called surety on the understanding that the surety would ensure that the person is produced whenever his presence is needed.

It is not unusual to experience delay between the time a suspect is arrested and his arraignment. Since the suspect enjoys a presumption of innocence and also has a right personal liberty under the Constitution such an accused person would normally be temporarily released pending arraignment and throughout the duration of his trial.

Nwadialo rightly observed that, "There is, therefore, a device whereby an accused person is granted a temporary release from police custody while he is awaiting his trial. The accused person is required to give an undertaking by recognisance that in return for being granted a temporary release he will appear in the court at any specific time and if he does not so appear he will pay a certain sum of money fixed by the court. This undertaking of the accused is usually guaranteed by another third party produced by him and acceptable to the Court. Such a person is known as a surety. He binds himself to pay a sum of money also fixed by the Court if the accused person fails to appear in Court when required. More than one surety may be required where the offence is a serious one."

There are reasons to support granting bail to accused persons by our Courts. Apart from giving practical effect to the accused persons' constitutional right to personal liberty, there is the need to avoid congestion of our prisons which are designed for convicts and not for persons awaiting trial. As rightly observed, a judge should avoid

"being counted as one of the Courts of Law being responsible for the perennial prison congestion in the country."

Basically, there are three types of bail. These are; police bail or pre-arraignment bail, which is usually, granted by the police and law enforcement agencies pending the arraignment of a suspect in Court. Court bail consists of pre-trial bail and post conviction bail. This paper examines pre-trial bail against the backdrop of the relevant provisions of the Administration of Justice of Law of 2007.

Bail and administration of Justice Law

Administration of Justice Law preserves the principles governing Court's discretion to grant or refuse bail as provided in the Criminal Procedure Law. Like Section 118 of the Criminal Law of Lagos State, Section 115 of the Administration of Criminal Justice Law, preserves the principles governing the granting of bail in capital offences, Felonies and other offences. Section 118(1) of the Criminal Procedure Law provides that when a person is charged with a capital offence (that is, offence punishable with death penalty) bail can only be granted by the High Court. The Section 115(1) of the new law retains the exclusion of non High Courts from granting bail in capital offences. Section 115(2) of the new law is similar law to Section 118(2) of the Criminal Procedure Law. It stipulates that where a defendant is charged with a felony other than a felony punishable with death, the Court has discretion to grant such a defendant bail pending his trial.

Pending trial

A Defendant who is standing trial for non capital and non felonious offences shall by virtue of Section 115(3) be admitted to bail unless the Court sees good reason to the contrary.

Section 116 (1) of the Administration of Criminal Justice Law retains the principle stated in Section 120 of C.P.L. with respect to the security for bail. It vests the Court with the discretion to fix the amount of security for bail. The Court exercises its discretion in fixing security for bail in the light of the circumstances of cases and such security shall not be excessive.

Section 116(2) of the Administration of Criminal Justice Law is evidently innovative. It has no equivalent in the C.P.L. It introduces the deposit of money as a condition for granting bail. There are similar provisions in the Advanced Fee Fraud Act and Failed Banks Recovery of Debt and Financial Malpractices in Banks Act.

It reads: "The court may require the deposit of money or any other security as specified by the Court from the applicant and/or his surety before the bail is approved."

A point to note is that the above provision does not destroy the existing arrangement on imposition of bail conditions where the surety or the accused enters into recognisance to pay specific amount of money in the event of the accused not showing up for his trial. What the above provision does, is to give the Court the additional power, to insist that certain sum of money or security in the form of a bank guarantee or guarantee from a reputable insurance company or financial

institution be deposited with the Chief Registrar of the Court before the accused is released on bail.

The above provision introduces financial consideration in pre-trial bail in Courts within Lagos State. There are no guidelines on when the Court would or would not invoke the provision. All that the provision does is to leave its application to the discretion of the court. There is also no guideline on the relationship between the amount to be deposited or guaranteed and the relevant offences. This is unlike the provision of Section 16 of the Advance Fee Fraud Act, which stipulates that the accused person shall be requested to deposit two per cent of the amount involved in the crime and Section 21 of Failed Banks Recovery of Debts) and Financial Malpractices in Banks Act which stipulates a deposit of 25 per cent of amount involved in the offence, as one of the bail conditions.

If it is as contended above, the Defendant enjoys the presumption of innocence then a requirement of deposit of money strikes at the foundation of presumption of innocence which exists in favour of all accused persons. The constitutionality of the deposit of money as a condition for bail was however approved by the Court of Appeal in *Udeh v. F.R.N.* where *Olagunju, J.CA* justified the approach in Advanced Fee Fraud cases as "a variant of criminal manifestations that have made advert on the psyche of this country as a component of the world community with tendency to lower or undermine the self esteem of the country. With the strict bail conditions stipulated in sub-section 18(1) of the decree considered to be the accomplishment of a goal of that special legislation it will be a disservice to hide under the constitutional provisions designed for the protection of personal liberty to undermine the efficacy of substantive legislation. The sanctity of constitutional right to personal liberty cannot be vindicated under a cloak or cover nor is the right meant in the words of *Iriekefe, JSC* (as he then was) to provide an accused with gratuitous escape route to freedom: See *Echezazu v. Commissioner of Police (1974) NWLR. 308 at 314.*"

In the above case, *Mohammed JCA* (as he then was) in his lead judgment, also upheld the constitutionality of the pecuniosity test embraced by the Advanced Fee Fraud Act thus:

"The imposition of bail condition by a Court as provided by the decree was not a negation of the appellant's right to personal liberty. S.35 clearly allows for such provisions. If any thing, the Court only ordered the resumption of this liberty on the occurrence of some specified events - the conditions imposed. The right to liberty had, in a most palpable and lawful manner, only been exposed for what it has always been. The right had always been conditional rather than the absolute one, which the appellant's counsel would want us to believe. No organised society can afford the luxury in the concept and the danger in the existence of absolute rights. It is for orderly existence of societies that constitutions provide for such suspension or even complete deprivation of those rights which appeared to the appellant's Counsel absolute."

Section 116(3) of the Administration of Criminal Justice Law will definitely weaken the potency of arguments on the unconstitutionality of the pecuniosity test adopted by Section 116 (2) of the Law. Section 116(3) ensures that the money paid by the defendant or his surety is invested in interest yielding account by the Chief Registrar of the Court. And by virtue of Section 116(4) the invested sum and the accrued interest therein are to be given back to the defendant or his surety when the case is

concluded or upon the discharge of the surety upon his application to discharge the recognisance as the case may be.

There is however the need to clear guidelines to the Chief Registrar on the Banks and Financial Institutions, which the money deposited, can be invested. The Chief Registrar should not have absolute discretion on where to invest the money. The possibility of bad investments should be minimised if not totally eliminated.

Section 118(3) is a gender sensitive and friendly provision. It expressly abolishes discrimination hitherto experienced by women who desire to act as sureties. It gives practical effect to rights against discrimination on account of sex guaranteed by Section 42(1) of the 1999 Constitution. It provides:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person -

"(a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) Be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or ' advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions."

Section 118(3) of the Administration of Criminal Justice Law provides that no person shall be denied or prevented or restricted from entering into any recognisance or standing as a surety or providing any security on ground that the person is a woman. The above provision has evidently put an end to the issue of discrimination against women in the practice of bail in Nigeria.

Section 138 of the Law is also innovative. It authorises the licensing and registration of Bondsperson by the Chief Judge of the State. Section 138 (1) empowers the State Chief Judge to register and license individuals or corporate bodies or persons to act as Bonds person within the jurisdiction of the Court in which they are registered. The issue with the above provision is whether the licence granted to a bondsperson by the Chief Judge covers all Courts exercising criminal jurisdiction in the State or whether it is restricted to particular Courts such that a person or organisation can only register as a bondsperson in either a Magistrate or High Court and not both. Again there is the problem of whether the activities of such bondsperson are territorially restricted to areas/division where his/her office is located or he has state-wide jurisdiction. Put in other words, can a bondsperson with registered address in Ikorodu Judiciary Division stand as "surety for an accused person arraigned before the Lagos Judicial Division of the High Court of Lagos State?

The inclusion of the phrase 'to act as a bondsperson within the jurisdiction of the Court in which they are registered' suggests restriction in the area of operation of a bonds person. The provision is capable of being construed as paving way for multiple registrations by bondsperson as in various Courts of various jurisdictions/and/various judicial divisions in the state.

Happily, Section 138(1) enables the Chief Judge to make appropriate regulations on registration) and licensing of bondsperson. It is hoped that advantage would be taken of the regulatory powers of the Chief Judge to clarify the likely ambiguities in Section 138(1) of Administration of Justice Law of 2007.

Section 138(5) empowers a registered Bondsperson to undertake recognisance, act as surety or guarantee the deposit of money as required by the bail condition of any person granted ban by the Court within the jurisdiction in which the Bondsperson is registered.

Section 138 (3) insists on due registration and licensing of a person as a condition precedent for engaging in the business of bond services. Accordingly, by virtue of Section 138 (4) any person who engages in bail bond services without registration and license or who violates the terms of his license is liable to a fine of N500,000 or 12 months imprisonment or both.

Registration as Bondsperson is not just for asking. Section 138 (6) stipulates that no person or organisation shall be registered as a Bondsperson unless the person or organisation is composed of persons of character and integrity. The Bondsperson is also expected to deposit with the Chief Judge of the State Bank guarantee in such amount as may be determined by the Chief Judge in the regulation which shall be such sum of money as ' registered class or limit of the Bondspersons recognisance shall determine.

Section 138 (7) further stipulates that every registered bondsperson shall maintain with a bank or insurance company designated in his license, such fully paid deposit to the limit of the amount of bond or recognisance to which the license permits him to undertake.

Finally, Section 138 (8) empowers every bondsperson to arrest any defendant or suspect who is absconding or who he believes is trying to evade or avoid appearance in court; if he cannot bring person arrested within 12 hours of the arrest before a court, he shall hand the person arrested over to the police who shall produce such person before the appropriate court.

The foregoing provisions evidently legitimise the activities of persons, though not related to suspects have been allowed in the past by some courts to stand as sureties to accused persons. In some cases, both the accused and the sureties have disappeared without the accused standing trial and without the surety being made to forfeit his recognisance. Interestingly, some of these sureties appear and still guarantee other suspects using the same title deed, which had been previously utilised to secure the bail of other suspects in the same court.

It is hoped that if proper regulations are put in place by the Chief Judge of the State, it would be easy to track down absconding suspects and their professional bondspersons, where such suspects jump bail. The requirement of registration and licensing of bondsperson, the use of banks and financial institutions as deposit taking bodies to keep the amount of money which the bondsperson is expected to operate will definitely ensure that bondspersons become stakeholders, and would make adequate arrangements to ensure that suspects are around to undergo their trials. In this respect, it is necessary for the Chief Judge to rely on the experiences of other jurisdictions and adopt them with modification in order to meet our local situation.

Lessons from other jurisdictions

Some jurisdictions have embraced the bail piece, which is a certificate, which states that an accused person is on bail for a particular amount in respect of specific offence. Upon demand by the court, a magistrate or clerk issues to the bail bondsman a bail piece. Thereafter, any officer authorised to execute a warrant of arrest shall assist the bondsperson holding such bail piece to take the accused into custody and produce him before the court or magistrate. The bail bondsperson may also take the accused into custody and surrender him or her to the magistrate without such bailpiece.

Where the bail piece cannot be accessed/procured on account of the non-availability of the Court's Circuit Clerk or Magistrate, the bail bondsperson, or his or her designee may take the offender to a regional or county jail without bail piece and the jail (person) would accept the offender provided the bail bondsperson, or his or her designee, delivering "an offender to jail without a bail piece issued by the Court's Circuit Clerk or Magistrate appears on the registered list maintained at the jail or approved by the Court of original jurisdiction. The bail bondsperson is expected to sign an agreement provided by the jail indicating that the offender has been booked in lieu of bail piece. Such agreement shall contain a clause indicating that the incarceration of such offender is lawful and that the jail accepting the offender shall be held harmless from any claims of illegal incarceration or other relative charges. The bail bondsperson thereby assumes the risk and liability of such incarceration.

Bail piece must be applied for by the bail bondsperson or his or her designee from the Circuit Clerk or Magistrate and hand-delivered by the bail bondsperson or his or her designee to the jail housing such offender on the next judicial day following the initial intake.

Under the West Virginia Bail Laws, a bail bond enforcer is any person who on behalf of a bail bondman enters the State or is present in the State for the purposes of (1) Assisting a bail bondsman in presenting the defendant in Court when required (2) Assisting in the apprehension and surrender of the Defendant to a Court; (3) Keeping a defendant under surveillance; or (4) Executing bonds on behalf of a bail bondsman when a power of attorney has been duly recorded.

The bail Laws of West Virginia State further stipulate that no person may act in the capacity 'of a bail bond enforcer within the State or perform any of the functions, duties or powers prescribed for bail bond enforcers unless registered with the West Virginia State police.

Under Bail Laws of Georgia State, a professional bondsperson is one who holds himself or herself out as a signer or surety of bonds for compensation. A professional bondsman must comply with the following:

- (1) Be 18 years or over, be resident of the State of Georgia for at least one-year before making application to write bonds.
- (2) Be of good moral character and not have been convicted of a felony or any crime involving moral turpitude.
- (3) Be approved by the Sheriff and remain in good standing with respect to all applicable federal, state and local laws and rules and regulations established by the Sheriff in the county where the bonding business is conducted,
- (4) Submit to a criminal

background check (5) Submit two sets of finger prints and (6) He must have completed eight hours of approved continuing education. .

Conclusion

A modest attempt has been made above to examine the Administration of Justice Law against the backgrounds of the new provisions on bail, recognisance and Registration of Bondsmen. The adoption of the pecuniosity test in granting of bail, the abolition of discrimination against women as sureties, the registration and licensing of bondspersons as well as investment of money deposited by defendants and their sureties in interest yielding accounts are the major highlights of the law. It is hoped that these provisions will assist the defendants and the prosecution in the administration of criminal justice in Lagos State.

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