

LAW AND PRACTICE OF BAIL IN THE MAGISTRATE'S COURTS*

Abstract

Bail is the element of administration of Criminal Justice in the society which is constitutional right of an accused person. In granting an accused person to bail, Magistrate is being faced with limited powers regarding the nature of the offence, the jurisdiction to entertain the bail of an accused person and Magistrate is ceased with the power to admit an accused person to bail if the Magistrate has no power to try substantive matter. It is mandatory that the magistrate shall grant bail to an accused person in simple offence punishable by not more than three years in imprisonment, and can exercise discretion in admitting an accused person to bail for noncapital offences while the Magistrate has no power to grant bail for capital offence punishable with death. The problems associated with Magistrate in granting the accused person to bail are lack of Jurisdiction, nature of offence and the exercise of discretionary power to grant bail. This research looked at the laws guiding the practice of bail in Nigeria, the lack of Jurisdiction of the magistrate to grant bail in some offences but can order for remand of an accused person and the constitutional presumption of innocence of an accused person. In solving this problem, the writer adopted analytical method of research and sourced material from primary and secondary sources such as statutes, decided cases, text books and seminar papers. The research having been faced with the issues above recommended for the Criminal Justice reform which included enactment and constitution of authority to be in charge of drafting of charge and filing of information to the appropriate court and Magistrate should grant bail to all charges before it pending the legal advice or filing of information or alternatively strike the charge out

Keywords: Bail, Law and Practice, Magistrate's Court, Nigeria

1. Introduction

Bail is the key element of administration of Criminal Justice in the society. When a person commits an offence and the person is arrested, ideally the suspect or an accused person is to remain in police custody until he is charged to court¹ or when charged to court the accused person should remain in prison custody until the final determination of the guilt of the accused person. The reason for the detaining of the suspect or an accused person in the custody is to ensure that he appears in court at certain day, time and place to answer criminal charge or allegation made against him². It is of note that in practice of criminal justice administration in Nigeria, good period of time elapses between the arrest of the person suspected of having committed crime and the determination of the case in court. The concept of bail is essential in the administration of criminal justice in Nigeria, since the law and or/ Constitution considers an accused person to be innocent until he has been found guilty in a court of law. Hence, where any person is arrested on the allegation that the person has committed an offence, such person must be charged to court within a reasonable time. It is the law that any person alleged to have committed an offence must not be unduly or detained in police custody as a way of punishment since it should be reasonable to deduce that the mere fact that a person is alleged to have committed a crime is not a conclusion that the person is guilty of the offence³.

Bail is a constitutional basic right of any person alleged to have committed offence or crime, and hence, there is a need to preserve that freedom or liberty of people in the society. In the Nigerian case of *Comptroller of Nigerian Prisons v. Adekanye*⁴, the court held thus:

Freedom is no doubt the greatest gift or heritage of man. Omnipotence created man and accorded him with divine freedom. Men are born free with liberty to think what he will, to say what he will and to go where he likes, all in a lawful manner, without let or hindrance from any other persons, private or governmental authorities. It therefore follows that, generally, detention of man by a fellow man is a violation of the law of God and man. I am not oblivious of the fact that there are checks and balances to the series of freedom given to man. To extent to which a man must not do his things in a way calculated to injure or adversely affect the exercise of the freedom of another man, his own freedom is limited. The whole of Article 7 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap 10LFN1990 is in tune with the court and even to the highest court is guaranteed to the citizen whose fundamental rights are threatened; his right to presumption of innocence until he is proved guilty by a court of competent jurisdiction is defended by a counsel of his choice is offered to him on a time by an impartial court or tribunal remains sacrosanct. That came into force on the 17th day of March 1983

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² *Ibid.*

³ [Http://abdusalaemabbasandco.com/blog-details](http://abdusalaemabbasandco.com/blog-details). Ph.D? Title UNDERSTANDING-THE-CONCEPT-OF-BAIL-IN-NIGERIA-accessed on 20/01/2017

⁴ (1996)3 NWLR (pt 436)323

In order to prevent the liberty of an accused person especially with the presumption of the law in Nigeria, an accused person is innocent until he is proved guilty by a court of competent jurisdiction, a legal instrument called bail was evolved in tune with the universal concept of criminal law, in a civilized society that practices the rule of law as a way of life⁵. The Court of Appeal in *Pius Ozo Anaekwe v. Commissioner of Police*⁶ held that unless the right to bail before trial preserved, the presumption of innocence secured after centuries of struggle, would lose its meaning. And the constitutional presumption of innocence enshrined under section 33(5) of the 1979 constitution can be invoked in a capital offence where a *prima facie* case has not been established against the accused⁷. The administration of criminal justice in Ebonyi State is guided by the Constitution of the Federal Republic of Nigeria, Criminal Procedure Law⁸ and the Practice Direction Rules⁹ among others. The granting of bail of an accused person in the Magistrate Courts depends on power or jurisdiction of the magistrate court to entertain the case. The various laws regulation criminal administration in Nigeria gives a trial magistrate power to grant bail to an accused person charged before him for offence pending the determination of the case the accused person is charged for.¹⁰

Bail may be granted pending trial or during trial or after conviction pending appeal. An application for bail pending trial can only be made after the process of arraignment of the accused person in court has been completed and the accused person take his plea to the charge except when the accused person is insane and the offence is bailable. An application for bail may be brought at my stage of the proceeding from after the completion of arraignment to before judgment is delivered.¹¹ There are conditions that attach to admission of an accused person to bail which will depend basically on the nature of the offence and the circumstances of the offence or case and not excluding the ground upon which the bail application is brought and the ground upon which it is opposed. The nature and circumstances of the offence the accused person is charge may be capital offence, felonies other than capital offence and misdemeanor or other simple offences. This issue of nature and circumstance of offence borders on the jurisdiction of the Magistrate Court to assume power to trail the offence and admit the accused person to bail. In the case of capital offences, the Magistrate Courts lack jurisdiction to entertain the offence because Magistrate Court is not given power by law to grant bail to a person charged with capital offence and capital offences carry death penalty upon conviction.¹² The felonies other that capital offences are offences that are not punishable by death penalty but carry a term of not less than three years imprisonment and the Magistrate Court has power to exercise its discretionary powers to grant bail to a person charged with a felony other than capital offence. Misdemeanor and other simple offences are offences punishable with penalty of less than three years imprisonment. In considering the bail of an accused person, there are factors the court considers before exercising its discretion to grant or refuse to bail an accused person such as the proper investigation of the offence will be prejudiced, that no serious risk of the accused person escaping from justice will be occasioned, no ground exists for believing that the accused person if released on bail would not commit an offence among others. In the application for bail at the magistrate court, there is no laid down or specified procedure, the application for bail is often made only by the counsel for the accused person immediately after the conclusion of arraignment while the Magistrate enquires from the prosecutor if he has any objection and the court will finally consider whether to admit the accused person to bail or not.¹³ The Magistrate Court states the terms and conditions for admitting an accused person to bail. The purpose of tying bail to terms is to put safeguard for ensuring the attendance of the accused person at his trail while his bail is subsisting.¹⁴ When the terms and conditions of bail are stringent, the accused person has to apply to court for review of bail and the court may consider same and redress terms of bail to more liberal terms.

Flowing from the above background of the study, bail is a constitutional right of the accused person since the Constitution of Nigeria presumed an accused person to be innocent until the contrary is proved in the court of law. The same constitution provides that no person should be deprived of his liberty except as stipulated by the constitution or statue. A bail being a security by a court for the release of an accused person or prisoner as a guarantee for his or her future appearance. The accused person enters into recognizance in the sum of money by way of security if the accused person fails to appear in court, instead of recognizance the accused person may be

⁵ <https://akintundeesan.blogspot.com/2015/04/the-right-to-bailasconstitutional.html?m=1> accessed on 10/01/2017

⁶ (1996)3 NWLR (pt 436)323

⁷ O. Okafor, The Constitutional Framework for Bail in Nigeria in Nigeria: A Critical Appraisal, *Nigeria Law and Practice Journal* Vol.8 (Enugu: Council of Legal Education, Nigeria Laws of School, (2007) p.65

⁸ Laws of Ebonyi State 2009

⁹ *Ibid*

¹⁰ Y.D.U Hambail, *Practice and Procedure of Criminal Litigation in Nigeria* (Lagos: Feat Print and Publish Limited, 2013) p. 539.

¹¹ *Ibid*

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid*

required to provide a surety. In granting an accused person to bail in the magistrate court, court is always encountered by jurisdiction to bail in the matter. This occurs when the offence upon which the accused person is charged is capital in nature. At times, the police who frame a charge, charge an accused person on bogus offence which will lead the magistrate to decline jurisdiction to entertain the charge, hence the magistrate will decline jurisdiction to grant or admit the accused person to bail. Whereas the offence the accused person commits may not necessarily be capital offence, but the police officers may charge the accused person for capital offence in order to punish the accused person. In the criminal administration system, at times the law enforcement agencies rush an accused person to magistrate court while investigation is still on. There are some offences which do not have punishment by death like arson, breach of security and others, but Magistrate Court decline jurisdiction to entertain same. The magistrate is robbed of power not admit the accused person charged of capital offence or any serious offence to bail at the magistrate court level, but rather the accused person is reminded in prison and the prosecutor will be asked to transfer the case file to Director of Public Prosecutor. So this case file takes Director of Public Prosecution some weeks, months and years to look into, while the accused person will be in person custody, thereby breathing the provision of the constitution that presumed an accused person to be innocent. At times the accused person may be exonerated from the offences, thereby making the accused person suffer for offence he did not commit. At times trial of an accused person last for some years or long time. Some accused persons after being admitted to bail jump bail.

There are some problems which the magistrate court encounters in consideration of the bail of the accused person which this research will try to look into. Some of the problems include the power of the magistrate court to order for remand of the accused person to prison in some offences like capital offences but the magistrate has no power to admit the accused person to bail on such offences without taking into cognizance the constitutional presumption of innocence of the accused person. In granting bail to the accused person, the conditions for bail are at times very difficult for the accused person to meet. The society and the accused person think that when an accused person is admitted to bail, that is the end of the case. The major problem is how to reconcile the constitutional provisions of people and the jurisdiction of the Magistrates' courts to admit a person to bail. The general objective of the research is to make a case study of the bail application in the Magistrates' Court of Ebonyi State. This study is designed to benefit the administration of criminal justice especially the court and law enforcement agents, Practicing Lawyer, Litigants and Students of Law, among others. In the course of this research the study looked and appraised the concept of bail, the constitutional provisions of bail and the other or laws on bail, the holding charge doctrine and the magistrate court's powers in administration of criminal justice on bail in Nigeria and elsewhere. Its scope looks at the law and practices of bail generally in the Magistrates' Court of Ebonyi State bail and in the administration of criminal justice. The work used analytical method of research and material from primary and secondary sources such as statutes, decided cases, textbooks, journals, articles and internet materials.

2. Conceptual Framework and Literature Review

Black's Law Dictionary defined bail as a security such as cash or a bond required by a court for the release of a prisoner who must appear at a future time or as the process by which or on his own recognizance¹⁵. Abdul Salaam defined bail as the process through which an accused person who is arrested on the allegation of committing an offence is released by a constituted authority upon the provision of adequate security guaranteeing that the accused person would report at the Police Station or in court for his trial wherever his presence is required¹⁶. Bail is a conditional freedom by which a person arrested for an offence is released on condition that he/she report on the day and place certain whenever his presence is required¹⁷. Nweke defined bail as arrangement whereby an accused person is granted a temporary release from custody pending the determination of the case against him¹⁸. Kawu defined bails as the process by which a person who is arrested or imprisoned is released temporary from state custody to sureties on personal recognizance on security taken for his appearance in court whenever he is required, until the determination of the case against him¹⁹. This is the practical definition of bail in Nigeria's courts. This definition has the following features: (a) A person is arrested or imprisoned (b) A person is released temporarily from custody (c) The authority must be state and not individual or private corporate body (d) The person must be released to surety or base on personal recognizance on security being taken (e) The person must appear I court when required till the charge/offence the person is arraigned is determined by the court (f) There must be a pending charge of crime against the person released on.

There are three types of bail, they are: (a) *Police bail*: The law empowers the police to admit any person suspected of committing a crime to bail pending the arraignment of such person to court²⁰. 'Interlocutory Applications, Pertinent

¹⁵ B.A Garner, Black's Law Dictionary, 8th Edition: (Dellas Texas USA: West Publishing Co, 2004), p.150

¹⁶ HHP//abdu-salaam abbas and co.com/blog-details. Phd?Title-Understanding-the-concept-of-bail-in-Nigeria-accessed on 20/01/2017.

¹⁷ hpp//rhodieswprld.com/know-your-right-all-you-need-to-know-about-bail-in-Nigeria-part accessed on 20/01/2017.

¹⁸ S.A. N. Nweke, *Principles of Crime: Prevention and Detection 2nd Edition* (Enugu: Ebenezer Productions Nig.Ltd,2006) p.232.

¹⁹ S. D. Kawu a paper titled: Auditorium National Judicial Institute Abuja on Wednesday 20th of April 2016.

²⁰ Sections 17 of the Criminal Procedure Act, Cap C 41 Laws of the Federation of Nigeria 2010 and 27 of the Police Act and the Administration of Justice Law of States of Federation.

Issues for Consideration' in a theme Promoting Performance through Innovations and Reforms being a Seminar for the Refresher Course for Magistrates on Current Trends in Law and Administration of Justice at Andrews Otutu Obaseki; (b) *Government agency bail*: This is the power given to any government agency to admit any person to bail upon beach of any law which the said agency has power to exercise administratively; (c) *Court bail*: This is the constitutional, fundamental and inherent power conferred on the court by the law and societal norms and traditional to admit any person to bail in the course of discharging or administering or exercising judicial powers. Our main concern in this research is the court bail. Nweke said that bail is a basic right of a person accused of crime other than capital offence. The issue of bail arises in three categories in criminal administration system which depends on the circumstances of each particular case, the nature of the offence in issue and the state of proceedings: (a) Bail pending police investigation (b) Bail pending trial in the court of law (c) Bail pending appeal. The Law gives the police officer in-charge of a police station to release the suspect on bail while the investigation of allegation of crime against the suspect is going on, if the suspect is arrested without a warrant and taken to a police station²¹. The police officer in-charge of a police station has power to release any person in his custody provided that it is a not capital offence and the person or suspect was arrested without a warrant, the police may release that person on bail upon entering into a recognizance with or without surety for a reasonable amount to attend or appear at the police station in such time as may be required by police. The reason for bail is to secure the attendance of the person alleged to have committed crime at the police station in connection with the investigation²². A trial court may have power to grant a person charged of crime or offence to bail pending the determination of the case the accused person is charged. A court may admit a person who is alleged to have committed crime to bail²³. The court's power to admit an accused person to bail depends on the nature of the offence the accused person is alleged to have committed. In Nigeria, the Magistrate Courts have no power to admit any person charged of capital offence to bail²⁴. The Magistrate Court may admit any person charged with felonies other than capital offence (offences punishable with imprisonment for a term of three years or more) to bail and the grant of bail of an accused person is at the discretion of the court²⁵. The Magistrate Court has power to admit any person charged with misdemeanor and simple offences to admit except there are good reasons for refusing to admit the accused person to bail²⁶.

An application for bail of an accused person is made upon arraignment in the court of first instance, once the accused person pleads not guilty to the charge, the court is bound to consider the bail of an accused person has not applied for his bail²⁷. The application for bail is made orally by counsel if the accused person is represented by a lawyer and the court has power to decide whether to grant an accused person to bail or not after hearing from the prosecution and the response of counsel if any concerning the charge and where the bail of an accused person is refused at the Magistrate Court the accused person may apply for his bail at the High court²⁸. An accused person may be admitted to bail based on his own recognizance or on bond for a fixed amount, or to a surety who will execute a bond for a stated amount of money²⁹. If the accused person failed to meet up with the terms and conditions of bail imposed for this bail, the accused person will remain in prison till he fulfills the conditions. The bail is free in court and there is no requirement for payment of money as a precondition to admit an accused person to bail. A woman has right to stand as surety, and in practice, a counsel for an accused person is not allowed to stand as surety.³⁰

The court or police officer in charge of a station may permit an accused person to deposit a sum of money or such amount as the court or officer may deem fit in lieu of executing such bond other than bail bond other than bail bond which must be at the request of the accused³¹. If an accused person jumps bail and fails to appear as ordered by the court, the court has power to issue warrant of arrest of the said accused person. The surety maybe ordered to appear in court to show cause why the surety will not forfeit the bail bond. If the surety fails to satisfy the court with good cause, the bail bond should be forfeited and the surety will pay the amount in the bond before he will be discharged³². If and accused person fails to appear before the court on the sitting day(s) without a prior written notice or genuine excuse from the accused person, the court will issue a bench warrant for the arrest of the accused person and consequently, revoke the accused persons bail and commit the accused person to prison³³. Shaija³⁴ sees bail as the act of setting at liberty a person arrested a detained in custody on security for his production on a certain date and time by his surety, to enable him appear before the court to answer to an allegation or charge brought against him. The concept of bail in the

²¹ *Ibid*, p.23

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ S.N. Nweke *Op. cit*, P.243.

²⁸ *Ibid*.

²⁹ *Ibid*, pp.244 & 245

³⁰ *Ibid*

³¹ *Ibid*

³² *Ibid*

³³ *Ibid*

³⁴ *Ibid*

magistrate's court came into existence from the³⁵ Constitution of the Federal Republic of Nigeria 1999 as amended which provides every person is entitled to his personal liberty which cannot be denied from him except in accordance with the procedure allowed by organized by the National Judicial Institute Abuja delivered on 19th day of April, 2016 at Andrews Otutu Obaseki auditorium, National Judicial Institute Abuja. By virtue of Section 35 (1) of the Constitution. A person's liberty may be deprived on the following grounds³⁶.

- a. The execution of a sentence or order of a court in respect of criminal offence which the person is found to be guilty.
- b. To compel any person to comply with the order of a court.
- c. To secure a person to fulfill any obligation imposed on him by law.
- d. To bring a person to court upon reasonable suspicion of his having committed a criminal offence.
- e. To prevent a person from committing a criminal offence to such extent as may be reasonable.
- f. To deprive a person who is under 18 years for education or welfare.
- g. To isolate person or persons suffering from contagious or infectious disease, or unsound mind or addicted to drugs for the purpose of treatment or protection of the community and
- h. A person may be deprived of liberty for the purposes of prevent unlawful entry and removal of persons from Nigeria.

The main reason for bail is to secure the presence of accused person for his trial and to ensure that a person who is charged of committing crime or keep in awaiting trial is not kept in detention longer than the maximum period of imprisonment as stipulated by the law for such an offence. The main consideration for admission of an accused person to bail is whether the accused will appear to take his trials³⁷. A person charged of having committed a crime is required by law to be arraigned in court within a reasonable time which if the person has been in detention from 3 months and above shall be released on bail either conditional or unconditionally or upon such conditions as are necessary to ensure that he appears for trial on any date as maybe fixed by court. The law imposes a duty on the prosecution to arraign a suspect accused of committing offence before a court of law within 24 hours or 48 hours depending on the nearness of the magistrate court to the place where the suspect is denied³⁸. A Magistrate was discretionary power to grant or refuse bail of an accused person arraigned in court before the magistrate. Discretionary power of a magistrate is the secret power inherent in him to decide cases on way or the other which the magistrate must exercise judicially and judicially in his decision and to act in the overall interest of justice³⁹. A magistrate is said to have exercised his power judicially and judiciously in an application for bail when the judicial and judicious power of magistrate is predicated on the sound principles of law based on the sufficient facts and in the consideration of the nature of each particular case. The magistrate considers many factors and conditions before exercising discretionary power to grant or refuse bail which include⁴⁰

- a. The nature of the offence or charge;
- b. The gravity of the punishment prescribed by law;
- c. The previous record of the accused person;
- d. The probability that the accused may or may not present himself for trial;
- e. The likelihood of the accused interfering with the investigations;
- f. The likelihood of the accused committing other offence or offences;
- g. The high prevalence of the offence within the community;
- h. The accused person has reasonable sureties to take him on bail;
- i. The health condition of the accused person

The above conditions or factors are not exhaustive but act as some guidelines to aid the court in the exercise of his discretion to grant or refuse bail.

In the Southern Nigeria, a magistrate can admit an accused person to bail upon oral or written application of the accused person's counsel on the offence which the magistrate has jurisdiction to entertain, especially when there is no objection for bail from the production, but if the magistrate does not have jurisdiction to trial the offence the accused person is remanded in prison pending his application for bail at the High Court. This procedure is known as holding charge in most jurisdiction of the court. In Lagos State, any person charged with any offence of felony other than punishable by death may be admitted to bail, while bail of an accused person is compulsory if the offence is not punishable with death. Magistrates Court does not have power to admit an accused person to bail in capital offences in Southern Nigeria, and thus, will not grant the accused person to bail. In the Northern Nigeria, the magistrate does not have power to trial capital offences, but the magistrate has power to look at the first information report alleging that the accused person committed offence to know the following:

- a) Whether there are no reasonable grounds for further inquire

³⁵ Justice of High Court of Benue State in a topic titled 'Considering of Application for Bail and No Case Submission in the Magistrate Court' on Lecture Theme for Promoting Performance through Innovations and Reforms at the Refresher Course for Magistrates

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ *Ibid*

³⁹ *Ibid*

⁴⁰ *Ibid*

- b) There are sufficient grounds for further inquiry; and
- c) Such person may, pending such inquiry be admitted to bail.

By the provision of Section 35(1) of the 1999 Constitution any person charged to magistrate's court in Nigeria for non-capital offence is entitled to bail depending on the nature and severity of the offence which the only reason for refusal of bail is when the prosecution has adduced or place enough facts before the court gearing to show that justice of the matter will be jeopardized if the accused person is admitted to bail⁴¹. The accused person has the onus to place before the court the facts that he did not commit the crime and there is no need for further inquiry which should convince the court to grant the accused person to bail. The application for bail under Section 341 (3) of the Criminal Procedure Code shall be by way motion supported by an affidavit with convincing fact why the court should call for further inquiry and it is immaterial that the prosecution has not file a counter affidavit. The most import consideration is that the accused person/ or applicant must adduce enough and convincing facts or materials to move the court to exercise his discretion in favour of the accused person/applicant⁴². If the prosecution is opposing the bail application of the accused person, he must provide the court with concrete evidence to show that if the accused person is granted bail, he will not likely to stand his trial or that the accused person will commit the same or similar offence. And failure of the prosecution to provide concrete and strong reasons in challenging the bail of the accused person will lead the court to grant an accused person to the bail.

Generally, in practice, if the magistrate has no jurisdiction to try an offence, the accused person is remanded in prison while the case is transferred to the office of the Attorney General of the Federation or State, the Attorney General will act on the matter by issuing a legal advice or any other directive in respect of the offence to any officer or agent of government. The law did not provide how long the legal advice of the Attorney General should be waited, while the accused person will be remanded in prison indefinitely without admitting the accused person on to bail for so long as the prosecution may wish on the reason that either that the investigation has not be completed or on the wait of the legal advice of the Attorney General or that an information has not been filed in a court that has jurisdiction to try the offence⁴³. The ideas of holding charge, awaiting legal advice or opinion of the Attorney General or Director of Public Prosecution, or information is not yet file in a court of competent jurisdiction are contrary to the constitutional right of an accused person for fair hearing, personal liberty and the presumption of innocent of an accused person. Even though the powers of the magistrate are contained in the exercise of power to grant or refuse bail, the prosecution has to take into cognizance the public interest, the interest of justice and prevention of abuse of the legal process to ensure investigation and evidence adduced by the prosecution are given attention in order to decongest the courts and quick dispensation of justice⁴⁴. If the magistrate does not have power to grant the accused person to bail, the court should remind the prosecution that the accused person should not be kept in prison custody more than necessary. If the magistrate strikes out case in same rarely cases, magistrates were called to produce and accused person after the information has been filed in some cases that the magistrates/have no jurisdiction to try an offence and in some cases, magistrates were accused or blackmailed by the prosecution for encouraging crime in the society, above hence, these should not discourage the magistrate to urge the prosecution to live up to expectation⁴⁵. When an accused person is convicted, the accused person loses the constitutional right to bail which the court has discretionary power to grant bail pending appeal upon the accused person showing exception or special circumstance which previous conviction of the accused person is a barrier for admission to bail. The exceptional circumstances are:⁴⁶ (a) The hearing of the appeal is likely to be unduly delayed and application would have served the whole sentence or a considerable portion of the sentenced imposed; (b) The health of the applicant; (c) The applicant is of good character; (d) Where appeal is likely to succeed. In Lagos state, there are 3 categories of person upon conviction that cannot be granted bail except on the court's discretion, which include⁴⁷: (a) An appellant who has previously served a sentence of not less than six months imprisonment and he has been released (b) Likely commit some other offences (c) Likely evade or attempt to evade justice by not standing for his trial. The accused person is required to produce a surety who will stand for his bail upon entering into a bond of fixed sum which the surety will forfeit if the accused person jumps bail. The court admits an accused person to bail on self-recognition upon satisfied that the accused person lives within jurisdiction and he is assessable. The qualifications to stand as surety are⁴⁸: (a) The financial resources of the surety (b) The nearness the surety to an accused person which may be relation and the defined residential address (c) The surety must be a person of integrity. The law has breached the handle of baring a woman to stand as surety⁴⁹ and a child shall not execute recognition for himself but a parent or legal guardian or any other fit person or without a surety⁵⁰. The procedure to be followed for forfeiture of bail bond it the accused person jumps bails are:⁵¹

- a) The surety must be asked to show what steps he took to bring the accused to court.

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ *Ibid*

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ Section 58 (2) of the Magistrate Court, Laws of Lagos State 1994 in *Ibid*.

⁴⁸ *Ibid*

⁴⁹ Sections 167 (3) of the Administration of Criminal Justice Act 2015 and 118 (3) of the Lagos State Law of 2011 respectively

⁵⁰ Sections 166 of the Administration of Criminal Justice Act 2008 in *Ibid*

⁵¹ *Ibid*

- b) The bail bond must be exhibited
- c) The surety is called upon to pay the penalty or show cause why bail bond should not be forfeited. In Lagos State if the surety is dead, the bond shall be recovered from his estate.

A magistrate has power to cancel or mitigate forfeiture of bail bond. If an accused person is unable to provide surety for his bail the court may commit him to prison and discharge order for surety or meet such other conditions that is just and proper in circumstances or order to give security for behavior, or an order committing him to prison until he finds sufficient sureties⁵². The magistrate should ensure that nobody frustrate the administration of justice or unduly deprive the accused person to bail. The Magistrate should ensure that bail is true while the bail forms are not sold court. Prosecutors and workers of court should not exploit sureties and accused person while female sureties are to be allowed to stand as sureties for the bail of their spouse and family members. The Magistrates should ensure that justice is done to all manner of persons without fear or favour according to court⁵³. The above work did not reconcile the constitutional provisions of rights of an accused person to be innocent, to personal liberty and fair hearing as it concerns the magistrate's power to assume jurisdiction over case before the court coupled with the time framework for waiting for legal advice or opinion of Director of Public Prosecutions or Attorney General

3. Legal Framework for Bail in Nigeria

Bail is the constitutional right of an accused person since the accused person is presumed to be innocent unless the contrary is proved. Hence, if an accused person has not been convicted of any offence, the accused person is presumed to be innocent. Section 35 (1) of the Constitution⁵⁴ guarantees the right of personal liberty of every person in Nigeria. Section 35(1) of the Constitution⁵⁵ provides thus:

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law:

- a. In execution of the sentences or order of a court in respect of a criminal offence which he has been found guilty;
- b. By reason of his failure to comply with the order of a court in respect of a criminal offence which he has been found guilty.
- c. For the purpose of bringing him before a court in execution of the order of a 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;
- d. In the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare;
- e. In the case of a person suffering from infectious or contagious disease, persons of unsound mind, person addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
- f. For the purpose of preventing the unlawful entry of any person into Nigeria or for effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.

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 for the offence.

The right to personal liberty means that a person has a right not to be subject to imprisonment, arrest and any other physical coercion in any manner that is not legally justified⁵⁶. Lord Denning⁵⁷ sees right to personal right thus: 'The freedom of every law-abiding citizen to think what he will, to say what he will on his lawful occasions without let or hindrance from any other persons'. The constitutional guaranteed right to person liberty is not absolute but there are restrictions⁵⁸. In *Ekenugo v. Federal Republic of Nigeria*⁵⁹ The Court of Appeal held thus; The right to personal liberty guaranteed under section 35(1) of the 1999 Constitution is not absolute hence can be impugned upon temporarily by agents of the state for the purpose of preventing a person from committing an offence or if there is a reasonable suspicion that he has committed one. For an authority to interfere with a person's liberty due process of law must be followed and strictly complied with. By virtue of Section 36(5) of the Constitution⁶⁰ every person who is charged with committing an offence is presumed to be innocent unless the contrary is provided. By virtue of this subsection the onus is on the prosecution to prove to the court that an accused person's application for bail is one that should be refused and tying the enforcement of an accused person to bail for the accused person to first deposit a certain amount stated in the charge to have been stolen by the accused person is contrary to the constitutional provision of presumption of innocence of the person⁶¹. In *Okoronkwo v. FRN*⁶² the Court of Appeal held thus: 'However, there is no doubt that by virtue of our

⁵² *Ibid*

⁵³ *Ibid*

⁵⁴ The Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁵⁵ *Ibid*

⁵⁶ Okpara, *Human Rights Law and Practice in Nigeria* (Enugu: Chenglo Limited, 2005), p.1404 *Ibid*.

⁵⁷ *Ibid*

⁵⁸ Hon, *Constitutional Law and Jurisprudence in Nigeria* (Port Harcourt: Pearl Publishers, 2004), p.926(2001)

⁵⁹ NWLR (pt.708)117

⁶⁰ *Ibid*

⁶¹ S.T. Hon, *Op. cit.*, p. 113

⁶²(2015)44 WRN 156 at 165 r.9

adversarial system of administration of justice and Section 36(5) of the Constitution of the Federal Republic of Nigeria (as amended), an accused presumed to be innocent until he is proved guilty, no matter the nature of offence for which he is alleged'. The burden of prove lies on the person who alleged to be unlawfully arrested to prove particular facts and once there is prove that a person is on the person that did the arrest and detention. Hence, the onus is on the person who admits arrest and detention of a person to prove that such arrest and detention is lawful⁶³. By virtue of Sections 35(4) of the Constitution⁶⁴, any person who is arrested or detained in accordance with the law shall be brought before a court of law within a reasonable time, and this acts as a safeguard for the protection of the liberty and right to fair hearing of any person in Nigeria⁶⁵. Section 35(4) (c) of the Constitution⁶⁶ provides thus: '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 unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

Section 35 (5) of the Constitution⁶⁷ provides in subsection (4) of this section, the expression 'a reasonable time' means;

- (a) In the case of an arrest or detention in any place where is a court of competent jurisdiction within a radius of forty kilometers, 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.

Section 35 (7) of the Constitution⁶⁸, excluded the protection of Section 35 (4) of the Constitution for people who are charged for capital offence and members of Armed Forces and Nigeria Police Force who bare detained in the course of serving sentences imposed on them by their forces.

In *Obekpa v. Cop*⁶⁹ where the accused person was charged to Magistrate Court Grade II and the accused person's bail was refused at the said magistrate on the ground that if the accused person is released it will be very difficult to arrest other suspects at large. On the application for bail of the accused person at the High Court was opposed by the prosecuting counsel on the ground that since the accused person has not stay up to 2 months in detention as constitutional was required was rejected by Justice Idoko J. and stated thus;

A it appears the spirit behind the provisions in Section 32 (4)(a) and (b) of the Constitution is to keep an accused person out of incarceration until found guilty through the process of court trial. It is a conditional privileges which he is entitled to under the escape punishment which any period of imprisonment would inflict while awaiting trial; the stay of prison guarantees easy accessibility to counsel and witnesses and ensures unhampered opportunity for preparation of the defence at much further advantage in this regard is this preserved, protected and allowed the presumption of innocence constitutionally guaranteed to every individual accused a criminal offence would lose its meaning and force.

In *Bamaiyi v. State*⁷⁰, it was held that the provisions of subsection 35(4) of the constitution are not absolute in terms; neither do they deprive the court of discretion in bail matters and that the provisions are only meant to complement the court's power in dispensing bail

4. Discretionary Powers of Magistrate to Grant Bail and Factors to be Considered by Court to Grant or Refuse Bail.

By virtue of constitutional provision, the accused person is presumed to be innocent of any offence until contrary is proved and moreso, as the personal liberty of every person is guaranteed. In the court to exercise its discretionary power to admit an accused person to bail, which discretionary power must be exercised judicially and judiciously in overall interest of justice. A magistrate is said to have exercised its power judicially and judiciously when the magistrate applies the sound principles of law based on available and sufficient facts presented before the magistrate and taking into

⁶³*First Bank of (Nig.) Plc v. A.G Federation* (2013) 30 WRN 94 p.102. Court of Appeal; *Director of State Security, Kwara State v. Nuhu* (2014) 14 WRN 117 p.126 v.8.

⁶⁴*Op.cit*; *Okoronkwo v. FRN. Op.cit.*

⁶⁵*Ukatu v. COP* (2001) FWLR (pt.66)755; *Oshinaya v. COP* (2005)4 ACLR 342; *Ugwuda v. COP* (2005)1NQLR 107; *Jimoh v. COP* (2007)5 ACLR 275

⁶⁶*Op.cit*

⁶⁷*Ibid.*

⁶⁸*Op.cit*

⁶⁹(1982) NCLR 420 in *O. Okpara, Op. cit* p.157

⁷⁰(2001) 2 NWLR (pt. 698) 435

consideration the type and nature of each particular case³⁰. In *Anajemba v. FGN*⁷¹, the Appeal Court held that in application for bail pending trial, a trial judge is being called upon to exercise his discretion judicially and judiciously on the materials placed before him both in the proof of evidence and respective affidavits of the parties. Discretion in general, is the exercise of power or right to act in certain circumstance according to personal judgment and conscience. Judicial discretion in particular is the exercise of judgment or decision making by a judge or court based on what appears fair under the circumstances and guided by the rules and principles of law. It is a court's power to act or refuse to act when a litigant is not entitled to demand the act as a matter of right. In the exercise of such powers, discretion is normally that of the trial court and not of the appellate court hence the latter cannot substitute its own discretion. The conditions that the court must take into consideration to admit an accused person to bail include:⁷²

- (a) The nature and seriousness of the offence;
- (b) The nature and strength of the evidence against the accused person;
- (c) The gravity of the punishment;
- (d) The criminal record of the accused person if any;
- (e) The likelihood of the accused attending his trial;
- (f) The possibility of the accused interfering with witness or further investigation;
- (g) Detention for the protection of the accused person;
- (h) The necessity to procure medical or social report pending final disposal of the case;
- (i) The likelihood of further charge being brought against the accused person;
- (j) The probability of guilty of an accused person.

5. The Terms of Bail

The right of bail being a constitutional right is contractual in nature which last for only the period of the trial and elapse on the conviction or acquittal of the accused person⁷³. The reason of tying bail to terms is to ensure the attendance of the accused person to his trial when he is on bail. The terms of bail should not be stringent and where the terms of bail are stringent or excessive it amounts to refusal of bail and the accused person is entitled to approach the court for variation⁷⁴. Bail being contractual in nature is provided in Criminal Procedure Code. Section 345 of the Criminal Procedure Code⁷⁵ provides that:

before any person is released on bail, he must execute a bond for such sum of money as determined by the police or the court on the condition that such a person must attend at the time and place mentioned therein until otherwise directed, and if a person is released on bail, the sureties must execute the same or another bond or other bonds containing conditions to the same effects.

In *Okoronkwo v. FRN*⁷⁶ the Court of Appeal held thus: the terms and conditions upon which bail is granted cannot be at the whims and caprices either the Court or an accused person, the Court can only exercise its discretion judicially and judiciously by taking into consideration the facts and circumstances of a particular case and the applicable law, in this case Sections 120 and 122 of the Criminal Procedure Act and 35 (4)(b) of the Constitution. The provisions of Section 120 and 122 of The Criminal Procedure Act are very clear and unambiguous, a surety must enter into a bond for the amount of money set for the bail of an accused person, the surety must be prepared to forfeit that amount to state if the accused jumps bail. It is a contract between the state and the surety. The court must be satisfied that the surety has the means to fulfill that statutory term of contract, any term of variation proposed by the applicant is therefore, unacceptable in law. The terms or conditions for grant of bail are: -

- a. Bail on self recognizance: an accused person or convict is said to be granted bail on his self recognizance when the accused person or convict is not required to enter into bond or to provide a surety. Bail based on self recognizance is rarely granted to an accused person except the alleged offence is a minor offence and the accused person is a reputable and responsible member of the society⁷⁷
- b. Bail on a bond for a fixed amount. An accused person or convict may be admitted to bail upon his executing a bond for a fixed amount of money without surety, that he will attend court on a specified date to stand his trial. The bail bond is a written undertaking entered by the accused person that he will be religious to attend court while he is admitted to bail. The execution of fixed amount money need not be entered before the court,⁷⁸ if the accused person absconds his attendance when required he will be liable to pay the amount of money stated on the bond⁷⁹ or he will be committed to prison⁸⁰.
- c. Bail on bond with surety. The court can admit an accused person to bail upon production of surety (ies) who will enter into recognizance.

⁷¹ *Amagu v. State* (2015) 41 WRN 123 CA; *Suleman & Anor v. Cop, Plateau State* (2008)21 WRN SC.

⁷² Y.D.J Hambail, *op.cit.*, pp. 546 & 347

⁷³ Okora o y. *FRN* (2015) 44 WRN 156 at pp. 163 & 1645

⁷⁴ Section 120 of the Criminal Procedure Law of Ebonyi State 2009

⁷⁵ Laws of the Federation of Nigeria C.41 vol. 4 2010

⁷⁶ *Op. cit*

⁷⁷ B. Osamor *Op. cit.*, P.98

⁷⁸ Section 126 of the Criminal Procedure Law *Op. cit*

⁷⁹ *Ibid*

⁸⁰ Section 130 of the Criminal Procedure Law of Ebonyi State 2009

Section 122 of the Criminal Procedure Code⁸¹ provides: 'An accused admitted to bail may be required to produce such surety or sureties as in the opinion of the court admitting him to bail, will be sufficient to ensure his appearance as and when required and shall with him or them enter into a recognizance accordingly'. The surety makes undertaking with the state that the accused person will attend or stand for his trial for the alleged crime the accused person is being charged when needed. The amount of money which the surety enters into recognizance need not be entered before the said court, but may be entered into by the parties before any other court or before any registrar or before any superior officer of police or officer in charge of a police station or before superintendent of prison or any person in charge of such prison if the party is in a prison and the provisions of law with respect to recognizance before a court shall apply as if the recognizance has been entered into before the said court⁸². If any person bound by recognizance to appear before a court wants to evade justice or has evaded justice by moving out of the geographical area, the court will cause him to be arrested and may commit him to prison until the trial and unless the court shall think fit to admit him to bail upon further recognizance⁵. This means that any person who enters into recognizance with the court is not enjoined to leave outside the jurisdiction for the purpose of residence. In order to ensure the attendance of any accused to his trial or to ensure that an accused does not jump bail, an accused is usually released on bail to a surety or sureties who would enter into a bond to produce the accused whenever he is needed and would usually undertake to forfeit a certain sum of money if the accused jumps bail. The Court of Appeal held in *Okoronkwo v. FRN*⁸³ said thus: In order to ensure that a surety has the means or the financial capacity up to the amount of bail granted, the proposed surety is required to swear to an affidavit of means and sometimes required to submit documents of property within the jurisdiction of the court which is worth the amount set for the bail that is the spirit and intentment of the provisions of section 120 and 122 of the Criminal Procedure Act. The court has power to vary recognizance if the surety is unsuitable and can order the accused person to execute a fresh recognizance with other surety.⁸⁴ A surety may apply to court to be discharged recognizance either wholly or so far as it applies to the applicant, and the court will issue a warrant of arrest of the principal being the accused person directing him to be brought before the court and on the appearances of the principal or the accused person, the surety is discharged of recognizance either in wholly or in so far relate the surety, the accused person shall be asked to look or find sufficient surety to enter into a fresh recognizance and if he fails he will be treated as if he has no surety.⁸⁵ Section 136 of the Criminal Procedure Law provides⁶: where a surety to a recognizance dies before the recognizance is forfeited his estate shall be discharged from all liability in respect of the recognizance. The qualifications to stand as surety for an accused person include:⁸⁶ a) The financial resources of the surety; b) The relationship between the surety and an accused person; c) The social status of the surety in the society like the position the surety is holding in the society, business, religion, place of work among others; d) The surety must be a person of integrity. An accused person is said to have jumped bail when the accused person fails or refused to attend the court on the date fixed by the bail bond. If the accused person jumps bail, the court may:⁸⁷ a) Revoke his bail; b) Issue a bench warrant for his arrest; c) Order for the forfeiture of the bail bonds and upon forfeiture of the bond, order the surety to pay the sum stated in the bond into the court registry. The court has power to order for an arrest of any person who enters into recognizance with him to appear before him for breach of recognizance⁸⁸. There are procedures for forfeiture of bail bond which must be strictly followed. These include:⁸⁹ i) The surety must be given an opportunity to show cause why the bail bond should not be forfeited, and the steps the surety has taken to bring the accused person to court; ii) That bail bond must be exhibited⁹⁰; iii) The bail bond eventually executed by the surety must be executed. In Ebonyi State and most jurisdiction in the Southern Nigeria, once the offence is within the jurisdiction of the Magistrate, bail can be granted on oral application from the counsel representing the accused, especially where the prosecution has no objection to the application. Where however, the court has no jurisdiction to try the offence, the accused person is remanded in prison custody for awaiting trial.

6. Jurisdiction of Magistrates Courts in Criminal Offence

The Magistrate's Court is established⁹¹ and divided into district,⁹² for the purpose of exercising all the Jurisdiction and powers as may be conferred upon it by the law. The magistrates can be grouped as:⁹³ a) Chief Magistrates; b) Senior Magistrate; c) Magistrates. A person shall be appointed as a Chief Magistrate and Magistrate if the person is qualified to practice as an advocate or solicitor in a court having unlimited Jurisdiction in civil and criminal matters in same part of the commonwealth for not less than seven years and three years respectively or has served as the Chief Magistrate or Senior Magistrate or magistrate before the coming into operation of this Magistrate's Courts Law.⁹⁴ The Chief Magistrate has power or jurisdiction in criminal causes for the summary trial and determination of criminal cases

⁸¹ Section 122 of the Criminal Procedure Act cap. C41 volume 4 Laws of the Federation of Nigeria 2010

⁸² Section 126 of the Criminal Procedure Act *Ibid*.

⁸³ *Supra*

⁸⁴ Section 133 of the Criminal Procedure Law *Op. cit*

⁸⁵ Section 134 *Ibid*

⁸⁶ T.M. Shija *Op. cit*, p.19

⁸⁷ B. Osamor *Op. cit*, p. 102

⁸⁸ Section 143 of the Criminal Procedure Law *Ibid*

⁸⁹ *Ibid*

⁹⁰ *Tea v. Cop* (1963) NWR 77; *Cop v. John & Anor* (1981) NLR 139 in T.M Shija *Op. cit*, p. 20

⁹¹ Section 4 of the Magistrates' Courts Laws of Ebonyi State cap. 110 vol. 4 Laws of Ebonyi State 2009

⁹² Section

⁹³ Section 6 (1) *Ibid*

⁹⁴ Section (2) and (3) *Ibid*

charged with committing an offence or with doing any act or with omitting to do any act required by law punishable either by fine not exceeding fifty thousand naira or by imprisonment not exceeding fourteen years or by both.⁹⁵ Where the offence is not punishable on summary conviction for omission or act which punishment exceeds fifty thousand naira or imprisonment exceeding fourteen years, the Chief Magistrate may try the offender and will not punish the offender for more than fourteen years imprisonment or fine of exceeding fifty thousand naira provided the accused person consent to be tried by the Chief Magistrate, and where the consent of the accused person is not obtained before trial, the trial shall be null and void *ab initio*.⁹⁶ The Senior Magistrate and Magistrate have power or jurisdiction to summarily try and determine criminal charges or cases with committing an offence or with doing any act or with omitting to do any act required by law punishable either by fine not exceeding thirty thousand naira, twenty thousand naira, ten thousand naira or five thousand naira or imprisonment for not more than twelve years, ten years, five years or one year respectively. The Senior Magistrate or Magistrate may try an offence where the offence is not punishable on summary conviction exceeding twelve years, ten years, five years, or one year or fine not exceeding thirty thousand naira, twenty thousand naira, ten thousand naira or five thousand naira respectively but the Senior Magistrate or Magistrate cannot impose penalty more than twelve years, ten years, five years or one year or fine not exceeding thirty thousand naira, twenty thousand naira, ten thousand naira and five thousand naira respectively provided the accused person consent to be tried by the Senior Magistrate or Magistrate and failure to obtain the consent of an accused person before being tried by the Senior Magistrate lead to null and void of the trial.⁹⁷

7. The Practice Direction in Criminal Trial and Holding Charge

Ebonyi State Practice Direction⁹⁸ provides that the Practice Direction shall, save to the extent and as may otherwise be ordered by the Honourable Chief Judge, apply *mutatis mutandis* to all cases before the High Courts and Magistrate Courts of Ebonyi State considering the rules of each respective court and to the extent reasonably possible. By virtue of Section 3(2)(1) of the Ebonyi State Practice Direction,⁹⁹ the prosecution is under a mandatory duty to deposit all required evidences the prosecution shall rely on during trial of an accused person to the court before a suspect is charged to court. These include: (a) The extra judicial statement of parties and other witnesses; (b) Police Investigation Report; (c) List of Exhibits. The above provision is to ensure that trial of an accused person is not unduly delayed and this will aid the Director of Public Prosecutions to prefer information or charge. It is to be noted that the provision is compulsory or an order command which does not give court or Magistrate room to exercise discretion. But the problem with this provision is that it does not provide how long the case file will be with Director of Public Prosecutions before the information is filed preferred. Time protocol for remand orders in the Magistrates Courts are:

- a. Where an order of remand of the person is made, such order shall be for period not exceeding 60 days in the first instance, and the case shall returnable within the said period of 60 days¹⁰⁰.
- b. Where, on application in writing, good cause is shown why there should be an extension of the remand period, the court may make an order for further remand of the person for a period not exceeding 30 days and make the proceedings returnable within the said 30 days¹⁰¹.
- c. At the expiration of the remand order made pursuant to *subsection (1) or (2)* of this section, and if the person is still remanded with his trial having not commenced, or charge having not been filed at the relevant court having jurisdiction, the court shall issue a hearing notice on the Inspector General of Police and the Director of Public Prosecutions of the Federation, or the Commissioner of Police of the State or the Director of Public Prosecutions of the State, as the case may be, and adjourn the matter within a period not exceeding 30 days of the expiration of the period of remand order made under *subsection (1) or (2)* of this section, to inquire as to the position of the case and for the Inspector General of Police, Commissioner of Police and/or the Director of Public Prosecutions to show cause why the case should not be struck out¹⁰²

The court may exercise power of remand of an accused person in on the following grounds¹⁰³: a) Whether the person remanded is present in court or not; b) On its own motion or on application, including an application by a person in charge of the person or other place of custody where the person remanded is detained. The legal advice of the Director of Public Prosecutions shall in all cases be copied to the court and the court may not only on such copy of the advice to make any order that may be necessary in the circumstances. ¹⁰⁴ Where the legal advice of the Director of Public Prosecutions indicates that the person remanded has no case to answer, the court shall release the person forthwith¹⁰⁵. A person is only to be deprived of his personal liberty in certain circumstances and procedures permitted by law. A holding charge is not permitted to hold, like a sword of Damocles, over a person. These phenomenon of 'holding charge' 'awaiting legal advice' and so on completely offend the constitutional right to fair hearing, presumption of innocence

⁹⁵ Section 20 (a) and (b) *Ibid*

⁹⁶ Section 20 (c) *Ibid*.

⁹⁷ Section 22 (c) *Ibid*.

⁹⁸ Section 1 of Ebonyi State Practice Direction 2013

⁹⁹ *Op.cit*

¹⁰⁰ Section 9(c) *Ibid*.

¹⁰¹ Section 9(2) *Ibid*.

¹⁰² Section 9(3) *Ibid*.

¹⁰³ Section 10(1) *Ibid*.

¹⁰⁴ Section 10(2) *Ibid*.

¹⁰⁵ Section 10(3) *Ibid*.

and personal liberty of the accused. Although it is not ideal to unduly rush in investigation or to grant bail unduly in capital offences or in noncapital, but grievous offences, but the constitutional right of every accused person to a presumption of innocence and trial within reasonable time must be upheld. Courts should be discouraged from taking up cases on a holding charge because it is an illegal system whose bad effect is to deny personal liberty guaranteed by the Constitution and defeat to presumption of innocence.

The Criminal Procedure Act, makes provisions which control bail for the preservation of liberties. Section 17 of the CPA¹⁰⁶ states that where a person is arrested without a warrant for non-capital offence, the police may release him on bail, where it is not practicable to take the person to court within 24 hours. In this case, the police may require the suspect in question to execute a recognizance to appear before a court at a time and place therein stated. Where the investigation cannot be immediately concluded in respect of an alleged crime the police may also release the suspect on bail subject to recognizance¹⁰⁷. Section 19 of the Criminal Procedure Act¹⁰⁸ enjoins the release by the police of all persons in custody against whom there is no enough evidence to warrant a prosecution. Many judicial authorities condemned the practice of holding charge in Nigerian criminal jurisprudence. In *Enwere v. COP28* the appellant was first arrested and remanded in police custody on 11th of May 1992 on charges of conspiracy to commit a felony, to wit: murder, and the unlawful killing of a member of the Abia State House of Assembly. On the same day, Calabar High Court released him on bail upon an application under the Fundamental Rights (Enforcement Procedure) Rules, He was again denied his liberty because he was re-arrested by the police on the 21st of May, 1992. On the 27 of May, 1992, the appellant was arraigned before the Isuikwuato Magistrate Court which refused him bail for want of prosecution and rather ordered his remand in the Isuikwuato Police Station. On 31st of December 1992, he applied to Abia State High Court for bail which though unopposed was rejected. There was no charge before the High Court. Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal. The Appeal Court held that:

- (1) An accused person who has not been tried and convicted by a competent court is entitled to bail as a matter of right unless there are special circumstances that prevent the court from granting it. This is because a person who has not been found guilty of an offence is *prima facie* entitled to his liberty.
- (2) A 'holding charge' is unknown to Nigerian law and an accused person detained there under is entitled to be released on bail within a reasonable time before trial more so in non-capital offence.
- (3) As the Constitution of the Federal Republic of Nigeria 1979 or any other existing law in force in this country does not provide for a 'holding charge,' an accused ought to be released on bail within a reasonable time before trial although such a situation is admittedly more relevant to non-capital offences.

In *Onagoruwa v. State*¹⁰⁹ the Court of Appeal condemned the holding charge when it held that;

It is an elementary but most vital requirement of our adjectival law that before the prosecution takes the decision to prosecute, which is a forerunner or precursor to the charge decision, it must have at its disposal all the evidence to support the charge. In a good number of cases, the police in this country rush to court on what they generally refer to as a holding charge, even before they conduct investigations, although there is nothing known in law as a 'holding charge.' Happily, that was not the situation in this matter. Whenever the investigation does not succeed in assembling the relevant evidence to prosecute the accused to secure conviction, the best discretion is to abandon the matter and throw in the towel. That to me is a commendable decision of courage and that is the best decision. On no account should the prosecution go out of its way in search of evidence to prosecute when it is not there. When it degenerates to such a situation of hunting down, the prosecution is no more regarded as the prosecutor but as a persecutor. And that is not consistent with the philosophy of our adversary system of adjudication. The court went further to state that the criminal law is predicated on the commission of an offence. It is not predicated on some assumption or speculation that an offence has been committed.

8. Conclusion and Recommendations

Bail is a constitutional right of an accused person charged of committing offence. The Constitution of the Federal Republic of Nigeria guarantees the liberty of every person except as may be stipulated by the Law¹¹⁰. The same Constitution of Nigeria presumed every accused person to be innocent unless the contrary is proved. The purport of this section is that the accused person has not committed the offence he is alleged or accused, which in the circumstance entitle the accused person to every right and freedom that is being accorded to every citizen of the country, hence, the bail of an accused person pending the trial of the offence or charge.

The Magistrate is enjoined to exercise discretion Judicially and Judiciously in admitting the accused person to bail for offences that are not capital offence punishable by death, while the Magistrate is mandated to grant bail to an accused person charged of simple offences that a punishable by not more than three years imprisonment. The power of the Magistrate to grant bail is limited in some cases such as issues of jurisdiction of the Magistrate Court to entertain the

¹⁰⁶ *Op. cit.*

¹⁰⁷ O. Okpara, *Op. cit.*, p.16927

¹⁰⁸ *Ibid*

¹⁰⁹ (1993)4 NWLR (pt.299)3393

¹¹⁰ Section 35 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

case which robs the court jurisdiction to pronounce on the accused person's bail and the law provided that the Magistrate has no power to admit an accused person to bail for capital offences punishable with death. Nigeria in the bid to ease trial of Criminal Cases enacted Administration of Criminal Justice Act¹¹¹, and some States of the Federal enacted State's Law¹¹² to complement the Administration of Criminal Justice Act, which Ebonyi State Chief Judge established Ebonyi State Practice Direction¹¹³ to wit: for fair and impartial administration of criminal cases and to eliminate unnecessary delay and expenses, and to eliminate totally all traces of holding charge in our legal jurisprudence¹¹⁴. In Ebonyi State, prosecution¹¹⁵ is required to deposit all evidences to be relied to the Registrar of the court before a matter is charged to court including exhibits. This has arrested the issue of case file being missing at the police while the accused person will be remanded in prison custody for awaiting trial for long period not conceived in Law. The accused person is ordered by the Magistrate to be remanded in prison custody for awaiting trial where the Magistrate has no jurisdiction to try an offence the accused person is being charged and the burden of prosecuting the accused person is transferred to the Attorney General of the Federation or the State or Director of Public Prosecution as the case may be for legal advice or for any other directive or to file information¹¹⁶ which has no limited time to file information or opinion of the Attorney General or the Director of Public Prosecution to be sought. This is totally contrary to the constitutional provisions¹¹⁷ of right to personal liberty, hearing and presumption of innocence of the accused person. The non-grant of bail of an accused person has made innocent people to suffer in prison custody over cases or unknown to them or hatred or false alarm as the Magistrate always decline jurisdiction to entertain the bail of an accused person who is charged with offence the magistrate has no jurisdiction to entertain. Once an accused person is convicted, he does not have constitutional right for bail unless the accused person proved special circumstance before a court can admit the convict to bail.

The Magistrate has a discretion to exercise judicially and judicious to admit the accused person to bail since bail is the constitutional rights of an accused person. The Magistrate in exercising power to grant an accused person to bail has limited power as regarding the jurisdiction of the court. The recommendations made herein will aid the administration of criminal justice in Ebonyi State and a Nigeria in general, if the recommendations are to be abode. There is need to work and amend the Nigerian criminal jurisprudence to empower the that Magistrate being the first court a suspect is arraigned for trial to have jurisdiction to grant bail to an accused person pending the time the information is filed or the legal advice of the Attorney General or Director of Public Prosecution is obtained. There is need to enact an act or law and constitute an authority attached to Ministry of Justice or Office of the Attorney General to be in charge of drafting charge or charging a suspect to court and filing of information to the appropriate court that has Jurisdiction to avoid a suspect being charged on a bogus or unwarranted and ill-conceived charge and the court that has no jurisdiction in order to curtail breach of constitutional provisions of right of a person. There is need to employ lawyers and to be well paid who will be in charge of drafting of charges and filing of information to the appropriate court to avoid inducement and delay in the administration of criminal justice. The Magistrate in exercising discretion to grant bail shall exercise its power judicially and judicious anchoring on the sound principles of law based on sufficient facts and consideration of each particular case taking into cognizance public interest, the interest of justice and prevention of abuse of the legal process which good faith shall be at the mind of the magistrate as the watch word.

¹¹¹ 2015

¹¹² Administration of Criminal Law of Lagos State 2011

¹¹³ 2013

¹¹⁴ Section 2 *Ibid*

¹¹⁵ Section 3(2)(1) of the Ebonyi State Practice Director *Op. cit*

¹¹⁶ Sections 174 (1) and 211 (1) of the constitution *Op. cit*; 105 of the Administration of Criminal Justice Act *Op.cit*

¹¹⁷ Section 2 35, and 36 of the Constitution *Op. c.t*