IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY THE 15TH DAY OF MAY, 2017
BEFORE HIS LORDSHIP, THE HON. JUSTICE G.O. KOLAWOLE
JUDGE

CHARGE NO.:FHC/ABJ/CR/24/2017

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA ::::::: COMPLAINANT

AND

ABDULAZIZ UMAR ::::::::::::::::::::::::: DEFENDANT

RULING

On 13/4/17, the Defendant was arraigned before this Court on a two (2) Count *indictments* contained in the Charge dated 6/2/17 and filed on 7/2/17. The said Counts read thus:

COUNT I:

*"That you **ABDULAZIZ UMAR**, male, 32 years of Chika Aleita Airport Road, FCT Abuja, on or about the 1st day of February 2017, at Chika Aleita Airport Road, FCT, Abuja within the jurisdiction of this Honourable Court without lawful authority, **possessed** 108.5 grams of Cocaine, a narcotic drug similar to Cannabis, Heroin and LSD, and*

thereby committed an offence contrary to and punishable under Section 19 of the ***National Drug Law Enforcement Agency Act*** *CAP N30, Laws of the Federation of Nigeria 2004."*

COUNT II:

"That you ***ABDULAZIZ UMAR****, male, 32 years of Chika Aleita Airport Road, FCT Abuja, on or about the 1st day of February 2017, at Chika Aleita Airport Road, FCT, Abuja within the jurisdiction of this Honourable Court without lawful authority,* ***dealt*** *in 108.5 grams of Cocaine, a narcotic drug similar to Cannabis, Heroin and LSD, and thereby committed an offence contrary to and punishable under Section 11(c) of the* ***National Drug Law Enforcement Agency Act*** *CAP N30, Laws of the Federation of Nigeria 2004."*

The Defendant pleaded not guilty to both Counts and the Defendant's Counsel later in the proceedings, introduced the Defendant's pending "Motion on Notice" dated 10/3/17. It was filed on the same date. It reads thus:

(a) *"**AN ORDER** of the Honourable Court admitting the Defendant/Applicant on bail pending trial before this Honourable Court."*

(b) *"**AND** for such Order or Orders as the Honourable Court may deem fit to make in the circumstance."*

The Defendant's "Motion on Notice" is supported by a nine (9) paragraphed Affidavit deposed to by one Chimela Ejime who in paragraph 1 states that he is "*a Litigation Secretary in the Law Firm of Anjurin, Abikuye and Asake*". In paragraph 2(c), (d) and (e) of the said Affidavit, the deponent states facts in relation to the health of the Defendant which he said was "*deteriorating while in detention*". The Defendant had been arrested since 1/2/17, while the Charge against him was filed on 7/2/17. It appears that the said Charge was assigned by the Hon. The Chief Judge on 13/2/17 – i.e. within a week after it was filed.

The Defendant's Counsel, Victor Edem, Esq. filed a written address to argue the Defendant's "Motion on Notice" dated 10/3/17 and in paragraph 2.01 of the address, set down two (2) issues for determination. These are: *(i) "Whether the Court can exercise his (sic) discretion in favour of the Defendant;" and (ii) "Whether the offences for which the Defendant is charged are bailable offences."*

Issue one was argued by the Defendant's Counsel in paragraphs 3.01 – 3.08 of the address filed, and legal submissions were *canvassed* on the *judicial principle* that the *grant* or *refusal* of an application for bail, is at the *discretion* of the Court. It was contended that the *discretion* must be exercised *judicially* and *judiciously* with due regard "*to the right of the Accused person to his liberty until he is proven guilty of the crime alleged against him*". The Defendant's Counsel also enumerated some of the

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factors which the Court must take into consideration in the exercise of its *discretion* – which have been laid down over the years by extant *judicial* decisions of the appellate Courts. When I read the submissions made in paragraph 3.06 of the address filed, to the effect that where the Defendant is not granted bail, it will amount to "*the imprisonment of an accused person prior to the determination of guilt deprives the affected individual of his constitutional freedom and liberty*". I found it a little bit *incongruous* as the Defendant's Counsel ought to realize, that based on the provision of the **Constitution**, the only occasion when interference with the *personal liberty* of a citizen is permissible, is when there is "*a reasonable suspicion that he must have committed an offence known to law*". A suspect who has been charged to Court as a "Defendant", by the event of the initiation of the criminal proceedings, already has his *freedom to personal liberty* being as it were, *judicially curtailed* and as such, until he is *tried* and possibly *discharged* or *acquitted*, he can no longer enjoy as it were, an *unfettered freedom to personal liberty* because, even where bail is granted, it is usually subject to prescribed terms and conditions which will not pertain to a citizen who is not involved in alleged commission of any offence. A citizen who has not committed any offence or alleged to have done so, in the eyes of the law, an "*innocent and law abiding citizen*" and he is not to be *presumed innocent*. *Presumption of innocence* pertains to a suspect who has been arrested for having committed an offence, and also by virtue of Section 36(5) of the **Constitution of the Federal Republic of Nigeria (CFRN), 1999 As Amended**, to a Defendant who is already charged to a Court of competent jurisdiction. It is against these analyses,

that I found the submissions in paragraph 3.06 of the written address filed, a little bit too "hard" to "swallow" in relation to the jurisprudence of bail in the administration of criminal justice.

The Defendant's Counsel also made submission in paragraph 3.07 of the address filed, as to the period between when the Defendant was arrested and the length of time he had stayed in custody. I had at the beginning of this Ruling, *prefaced* my consideration of the Defendant's "Motion on Notice" by reference to the calendar of the Defendant's arrest and as to when he was arraigned. The criminal Charge against the Defendant was filed within a week after he was arrested, whilst his arraignment only held on 13/4/17. The "Motion on Notice" for his bail was filed on 10/3/17, whilst the Charge was assigned by the Hon. The Chief Judge on 13/2/17. So, if there was any delay, it is my view that it's partly the fault of the Federal High Court's Registry who did not bring up the assigned case filed on time to this Court, and it was also due partly to the Defendant's Counsel's delay in filing the "Motion on Notice" for Bail which he did on 10/3/17 – over one month after the Charge was filed, and almost one month after it was assigned to this Court for hearing. A more diligent defence Counsel would have, as soon as the case file was assigned, file the "Motion on Notice" for bail which *invariably* will trigger the immediate attention of the Court to fix it for hearing and force the Defendant to be arraigned on the Charge as a prelude to the hearing of the bail application.

On issue two (2), it was submitted that the offences for which the Defendant was charged with, are bailable and that the Defendant is

entitled to be admitted, by the provision of Section 162 of the **ACJA, 2015** to bail pending his trial.

The Respondent when served with the Defendant's "Motion on Notice" dated 10/3/17, on 23/3/17, responded to it by a "Counter-Affidavit" deposed to by one Rifkatu Philip Barde – who in paragraph 1 of the said deposition, avers that she's "*the Assistant Litigation Officer*" with the NDLEA. The said "Counter-Affidavit" runs into nine (9) paragraphs and in paragraph 6, the deponent contradicted the claim in the "Affidavit in Support" that the Defendant's health was deteriorating whilst in custody of the NDLEA. The deponent also in paragraph 7 of the "Counter-Affidavit", proffered the reason why the arraignment of the Defendant who has been charged to Court since 7/2/17 was delayed and only took place on 13/4/17. I had made remarks on this issue based on facts which I was able to gather from the Court's file and record. The Prosecution, by the said "Counter-Affidavit", states its preparedness to embark on the trial of the Defendant who is alleged to have made extra-judicial statement attached as Exhibit "NDLEA-1".

The learned Prosecutor, Mike Kassa, Esq. filed a "Respondent's Written Address in Objection" to the Defendant's "Motion on Notice" and in paragraph 3.01 of the address, erroneously "*adopts the sole issue for determination as formulated by the Defendant/Applicant's Counsel*". It was erroneous because, the Defendant's Counsel formulated two (2) issues which I had earlier set out in this Ruling. But, it's my view that the two (2) issues can be collapsed into one and should simply have been "*whether or not the Court ought to exercise its discretion in granting the Defendant's*

"Motion on Notice" for bail pending his trial on the basis of the Charge filed against him which discloses offences which are bailable".

As was done by the Defendant's Counsel, the Prosecution also submitted, that the grant of bail, is at the *discretion* of the Court. It was submitted, that it is the duty of the Applicant, to "*place some form of materials before the Court to enable it to exercise discretion in his favour*".

The Prosecution submitted that the drug involved in this case "*is a dangerous drug being tracked (sic) in Abuja and environs*", and that if the Defendant is "*convicted, the punishment is fifteen years imprisonment or more*".

The Court was urged to refuse the application and that "*mere possession of sureties by the Applicant without more will not qualify him for bail*". The Court was urged to "*refuse this application and instead order for accelerated hearing of the case*".

When the Defendant's Counsel was served with the Prosecution's "Counter-Affidavit" and "Written Address" filed thereon, the Defendant's Counsel on 5/4/17 filed a "Defendant/Applicant's Reply on Points of Law". The said "Reply on Points of Law" is almost, if not longer than the Defendant's Counsel's main written address filed to argue the Defendant's "Motion on Notice". It seems most Counsel these days just wouldn't want to bother themselves about the fact that a "Reply on Points of Law" must be what the law says it is. I have expressed this view because, when I reviewed the written address filed by the Prosecution, I asked myself as to what are the points of law which it has argued and which will necessitate the

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Defendant's Counsel in filing a "Reply Address on Points of Law" which is much longer than the main address filed by him. The "Reply on Points of Law" filed by the Defendant's Counsel is nothing other than a re-argument of the Defendant's "Motion on Notice". It should not have been so because, I really cannot find any of the issues which he has re-argued in the Prosecution's written address which I will describe, against the provision of Section 162(a) – (f) of the **ACJA**, supra. as rather poor, and perhaps *anaemic*. I have said this because, by the new provisions, the *burden* to refuse bail in all *indictable felonies* such as in this instance which are punishable by terms of imprisonment, are virtually entitled to bail except the Prosecution was able, on points of facts and perhaps, law, to furnish the Court with materials which on the strength of the provision of Section 162(a) – (f) of the **ACJA**, supra, can be used to persuade the Court to decline the exercise of its *judicial discretion* in favour of the Defendant. The address of the Prosecution to which a "Reply on Points of Law" was filed by the Defendant's Counsel, is in my view, too casual as its underlying tenor seems to be that the *burden* to persuade the Court to grant bail in instances such as this for bailable offences, still lay on the Defendant. The provisions of the new Act have in my view, shifted the "*burden*" on the State when it intends to oppose applications for bail in cases in which the offences charged are *prima facie* bailable because, they are non-capital offences.

In so far as the "Reply on Points of Law", was intended to take an unwanted advantage which the law and procedure do not allow, I have advisedly decided to discountenance the said "Reply on Points" by which

the Defendant's Counsel attempted as it were, to have a "*second bite at the cherry*".

On 8/5/17, I listened to both the Defendant's Counsel, A. Olanrewaju, Esq. and the Prosecutor, Mike Kassa on the Defendant's "Motion on Notice" dated 10/3/17.

I had in the course of this Ruling, expressed certain views and made certain findings which are bound to tell on the decision which I will reach on the Defendant's "Motion on Notice" dated 10/3/17.

When I read the Charge dated 6/2/17, it has two (2) Counts which except with regard to the provision of the **NDLEA Act**, Cap.N.30, LFN 2004 which the Defendant's conduct of 1/2/17 contravened, the said two (2) Counts are virtually the same except for the words "**possessed**" and "**dealt with**" used in the two Counts. I was wondering why the Charge was drafted in that manner in which the same offence allegedly committed by the Defendant when he was "bursted" in his house and arrested on 1/2/17 was split into two (2) separate Counts with such minute distinction. Sections 19 and 11(c) of the **NDLEA Act**, supra. by the way they are *legislatively couched*, deal with two (2) different situations which pertain to the same offence. Whilst Section 11 of the **NDLEA Act**, generally deals with "*importation, etc of cocaine, or similar drugs, etc*" by its heading, Section 19 of the same Act deals with "*Unlawful possession of cocaine, etc.*" It is my view, that having regard to the two (2) Counts when read vis-à-vis Exhibit "NDLEA-1" attached to the Prosecution's "Counter-Affidavit", the *apposite* question any reasonable and independent 3rd party will ask is:

how did the Complainant come about Count II in the Charge dated 6/2/17? Section 11(c) of the **NDLEA Act** prescribes a maximum of life imprisonment where the Charge against the Defendant was proved *beyond reasonable doubt* in line with Section 135 of the **Evidence Act, 2011**, while Section 19 of the said Act, prescribes a minimum of 15 years and not exceeding 25 years imprisonment where a conviction is secured by the State. I must have read the two (2) Counts a couple of times in order to ascertain whether there is any material difference in law, between both Counts except for the use of the words "**possessed**" and "**dealt with**". I was unable to find any beyond the facts contained in Exhibit "NDLEA-1" attached to the Respondent's "Counter-Affidavit", it remains a *mystery* how the Defendant was confronted with Count II on the Charge dated 6/2/17 punishable pursuant to Section 11(c) of the **NDLEA Act**, supra by life imprisonment which as I had said, relates to "*importation*" of cocaine into Nigeria.

In the exercise of my inherent jurisdiction pursuant to Section 6(6)(a) of the **CFRN, 1999 As Amended**, it is in the interest of justice, that Count II in the Charge dated 6/2/17 be struckout as it constitutes, against the facts in Exhibit "NDLEA-1" produced by the Prosecution as a Respondent to its "Counter-Affidavit", a gross abuse of criminal process.

By the provision of Section 36(5) of the **CFRN, 1999 As Amended**, the Court can hardly use the contents of *extra-judicial Statements* allegedly made by the Defendant whilst in the custody of the NDLEA to make any finding that may be adverse to the Defendant's right to be *presumed innocent* until the contrary is proved. The limited use, to which such *extra-*

judicial Statement can be put, is in relation to the finding which I have made and which informed the decision I have taken to summarily strike out Count II in the Charge. It is not permissible for a Court, to accept such *extra-judicial Statement* which is yet to be tendered as a tested statement duly made in accordance with the provision of Section 29(1) of the **Evidence Act**, supra in reaching a decision to deny a Defendant bail. To do so, will amount to a denial of fair hearing to the Defendant and to also undermine his right to be *presumed innocent* as it's *guaranteed* by Section 36(5) of the **Constitution**.

At the proceedings of 8/5/17, both learned Counsel adopted their respective written addresses and I reserved the Ruling till today. The decision to do so, was to enable to do the analysis which I have done in this Ruling and for the benefits of the Law Students who are currently on internship/attachment programme to the Courts.

The grant of bail pending trial as was mutually argued by both the Defendant's Counsel and the learned Prosecutor is at the discretion of the Court and this is a fact borne out by which a communal reading of the provisions of Sections 158 – 163 and 165 and 167(1) of the **ACJA**, supra. But as I had earlier remarked with regard to the poor address filed by the Prosecutor in response to the Defendant's Written Address, that the burden, going by the provision of Section 162(a) – (f) of the **ACJA**, supra as to when bail should or should not be granted, has been shifted on the Prosecution in all cases of *indictable felonies* which are not *capital offences*. The Prosecutor who genuinely desires to oppose bail, must be able to work on the issues which Section 162(a) – (f) of the **ACJA**, supra. has raised in

order that a Defendant be denied bail pending his trial. The new Act has changed the colouration of the jurisprudence of bail as it hitherto was pursuant to Section 118(1) – (3) of the **Criminal Procedure Act**, Cap.C.41, LFN 2004 which 493 of the **ACJA**, supra has repealed wherein the burden to prove that a Defendant be admitted to bail in cases of *indictable felonies* not being capital offences, lay with the Defendant as "Applicant".

Although, the Defendant through the Affidavit of his deponent, raised the issue of ill health, but the said issue, when viewed against the deposition in paragraph 6 of the "Counter-Affidavit" of Rifkatu Philip Barde, was unproved as no medical report of any ill health was produced by the deponent who says that he is a "*Litigation Secretary*" in the Law Firm of the Defendant's Counsel.

I took into consideration, the *guidelines* already laid down by the appellate Courts in several of their decisions on issues of bail, and which are meant to provide a Court of first instance with an objective "compass" to navigate the tortuous "waters" of bail pending trial. See the Supreme Court's decision in **ABACHA v. STATE (2002) 5 NWLR (pt.761) S.C. 638 @ 676**. The Defendant's Counsel and the Prosecution alluded to some of the factors, but the law is that in relation to exercise of *judicial discretion*, the said *guidelines* are never *exhaustive*. The Court must exercise its *discretion judicially* and *judiciously* based on the materials placed before it by both parties.

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The *judicial guidelines* are to be used as they were, to interrogate the facts on which bail is sought and by which it is being opposed by the State. But as I had remarked, the burden as to when bail should be refused, has by the reading of the provisions of Sections 158 – 163 and 165 and 167 of the **ACJA**, supra. being shifted on the State. Whilst the facts presented by the Prosecution, which largely were dependent on the likely acceptability of the contents of Exhibit "NDLEA-1" – which as an *extra-judicial Statement*, was allegedly volunteered by the Defendant whilst in the custody of the NDLEA as a *suspect*, it can hardly be used at this stage of the proceedings to his *detriment* to deny the Defendant/Applicant's right to bail as it would amount to taking from him, the *presumption of his innocence* which the provision of Section 36(5) of the **Constitution** has *guaranteed*. The Prosecution by my estimation, presented an arguably *weak* case as its opposition as to why bail should be refused in relation to this *indictment*. Having regard to the tenor of the written address filed vis-à-vis the "Counter-Affidavit" of Rifkatu Philip Barde, it is my view, that the Prosecution, perhaps is yet to be conscious of the fact that the jurisprudence as to bail pending trial in relation to *indictable felonies* punishable with terms of imprisonment in contrast to capital offences, has been *fundamentally altered* under the new Act, and it was a bit casual, perhaps *lethargic* in its response to the Defendant's "Motion on Notice" dated 10/3/17 as if the burden to persuade the Court to exercise its *discretion* still rests on the Defendant.

Whilst I agree that the issue of ill health, even where and when it is *bona fide* raised and *proved*, may not be a ground to grant bail pending trial, it

is my view, that the Defendant on his part, has not provided any material by which the Court can come to a decision, that the Defendant is entitled to a favourable exercise of the Court's *discretion*. When I read paragraphs 2(a), (b), (c), (d) and 3 of the "*Affidavit of Chimela Ejime filed in Support of the Defendant's Motion on Notice dated 10/3/17*", it is my view, that the Defendant has not provided this Court, even when the provisions of Section 162(a) – (f) of the **ACJA**, supra. are read against the poor presentation by the Prosecutor, with facts which can give any Court or tribunal, a *reasonable degree of assurance*, that the Defendant if granted bail, will be available to stand his trial. In common law or commonwealth jurisdictions, it is the *prospect* that the Defendant will be available to face his trial as one of the *judicial guidelines* laid down by the apex Court in the decision which I have just cited, that will determine the success or otherwise of an application as was filed by the Defendant in the instant matter. This application is in my view, a classical, yet uncommon example where if it had been a civil suit, both parties would have been *non-suited*. The concept of *non-suit* is strange to the criminal justice system. Whilst the Prosecution fails to address the *obligations* imposed on it by reason of Section 162(a) – (f) of the **ACJA**, supra, the Defendant on his part, has not furnished this Court with such facts or materials which can give reasonable assurance that the Defendant if granted bail, will be available to stand his trial. The depositions in paragraphs 3, 4, 5, 6 and 7 of the "Affidavit in Support", are not in my view, sufficient to give this Court the kind of assurance it requires, that if its *discretion* is exercised in favour of the Defendant, the Defendant who is standing trial on *indictment*, the

conviction of which attracts a *severe punishment* of a minimum of 15 years and maximum of 25 years term of imprisonment, will be available to stand his trial.

In conclusion, the Defendant's "Motion on Notice" dated 10/3/17 is refused. The Court, will in this event, be opened to accelerate the trial of the Defendant who has pleaded not guilty to Count I in the Charge dated 6/2/17.

I shall listen to the both Counsel as to their convenience for the commencement of trial which the Prosecution, by paragraphs 7(b) and 8 of the "Counter-Affidavit" filed, expressed its readiness to "*conclude the trial of this case without delay*".

This shall be the Ruling of this Court which was reserved on 8/5/17 after both learned Counsel for the Defence and Prosecution were heard in their oral submissions. The application is refused.

HON. JUSTICE G.O. KOLAWOLE
JUDGE
15/5/2017

COUNSEL'S REPRESENTATION:

1. **MIKE KASSA, ESQ. for the PROSECUTION.**
2. **A. OLANREWAJU, ESQ. with him is MRS. R. ASAKE for the DEFENDANT.**

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Registrar