

COURT OF APPEAL  
ENUGU JUDICIAL DIVISION  
8TH JUNE, 1995. CA/E/67/95  
CORAM:- N. TOBI, S. A. AKINTAN, D. ADAMU

CHRISTIAN DIOGU	.....	APPELLANT
V.		
COMMISSIONER OF POLICE	.....	RESPONDENT

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***APPEALS*** - New facts - Counsel - Cannot hide under the forum of brief  
- To introduce new facts.

***BAIL*** - Murder - Right to Bail - Although the constitution generally provided for the right - It is the general practice to refuse bail to person charged with the offence of murder.

***BAIL*** - Murder - Special circumstance - A situation where there is no material before the trial court - To show that the accused is facing a charge of murder - qualifies as a special circumstance - In which the court can grant bail.

***BAIL*** - Principle of Law - The most important principle of law in the bail decision - Is whether the accused person will return to take his trial - Every other principle is dependent on it.

***BAIL*** - Public interest - Refusal of application for bail - Based on ground of public interest - There is no such principle of law.

***CRIMINAL PROCEDURE*** - Prosecution - Function of the State - As the chief prosecutor of criminal matters - Is to ensure that the accused person has a fair deal in the judicial process.

***WORDS & PHRASES*** - "Holding charge" - Is not known to Nigeria's criminal law and jurisprudence.

### **FACTS**

The appellant was charged for conspiracy and murder before the chief Magistrate's Court, Onitsha. The Chief Magistrate remanded the appellant in prison. He applied to the High Court for bail and contended that his detention in prison custody was not founded on any prima facie case made out against him as there was no information and proof of evidence before the court.

The application was refused because according to the learned trial judge "it will not be in the public interest to admit the applicant to bail". It was after the refusal of the application that the proof of evidence was filed. Aggrieved by the ruling, the appellant has appealed to the Court of Appeal, Enugu Division, raising two issues.

### **ISSUES FOR DETERMINATION**

"(i) *Whether the learned trial judge was right in dismissing the applicant/appellant's application for bail when there was no information and/or proof of evidence and/or a formal charge preferred against him in any court.*

(ii) *Whether the aforesaid ruling of the learned trial judge shall be allowed to stand when same was based on non (sic) or improper appreciation/evaluation of the evidence placed before her."*

**HELD** (Unanimously allowing the appeal per lead judgment of **TOBI JCA**)

### ***Bail - Public interest***

1. It would appear that the major reason advanced by the learned trial Judge for refusing the appellant's application for bail was that "it will not be in the public interest" to do so. I know of no such criterion or principle of law in the bail decision. Public interest is not only a large term but also a very vague term which is not capable of a precise legal definition and a fortiori legal meaning. If courts of law are to consider or determine bail applications before them on the rather nebulous and imprecise term of "*public interest*", they will not make much progress in the bail decision in favour of applicants. The final result is that more persons than now will be in incarceration. That is certainly not in the

interest of both the government and the accused. (pp. 183 H)

***Bail - Principle of law***

2. The most important criterion or principle of law in the bail decision is whether the accused person will, in the light of the offence and the circumstances of the case, return to take his trial. Every other criterion or principle is parasitic on the above major one. For instance where the alleged offence is one of the gravest magnitude, like murder, then the law presumes that the accused person is likely to jump bail if granted. (p. 184 A)

***Murder - Bail***

3. Although the Constitution generally provided for the right to bail, the pre-trial freedom is restricted, particularly in capital offences. Under our Criminal Procedure Law, a person charged with any offence punishable with death shall not be admitted to bail, except by a Judge of the High Court, (see section 73 (1) of the Criminal Procedure Law, Cap 37, Laws of Anambra State, 1986). Although the subsection apparently, confers such a right to a Judge of the High Court, it is the general practice to refuse bail to person charged with the offence of murder. See Olugbusi and Other v. Commissioner of Police (1970) 2 All N. L. R. 1; Oladele v The State (1993) 1 NWLR (pt. 269) 294. (p. 184 E)

***Appeals - New facts***

4. The law is trite that counsel cannot hide under the forum of brief to introduce facts which do not, under our adversary system of adjudication, belong to him. Counsel qua advocate is an expert of the law and the facts of the case belong to his client. Counsel for the respondent is therefore not competent to introduce new facts on appeal, just like that. He certainly knows the procedure for introducing new facts his client wants to rely upon on appeal. And he ought to have followed that procedure. That he did not do so is not helpful to the case of the respondent. I am not even quite sure that the proof of evidence allegedly filed on 15th March 1995 could have helped the situation, by way of salvaging it in

favour of the respondent. The Ruling was given on 23rd February, 1995. How can a court process filed after the Ruling retrospectively affect the legal regime on which the appeal is based? Can that be a fair hearing to the appellant who in the course of preparing the grounds of appeal, did not anticipate the allegedly filed proof of evidence? That will be clear injustice and this court cannot be a party to it. (185 B)

***Criminal procedure - Prosecution***

5. What the respondent did here is rather unfortunate. Litigation is not a game of chance where one party cleverly outsmarts the other party. That is what has happened in this case. The function of the State as the chief Prosecutor of criminal matters is to ensure that the accused person has a fair deal in the judicial process. All that is expected of the prosecutor is to place all relevant materials before the court and not to find ways to punish the accused outside the law and the known traditions of the profession. A prosecutor cannot oppose bail merely as a routine procedure. There must be a valid cause or reason for opposing bail. Where bail is opposed without any valid reason, then the prosecutor has not helped in the dispensation of criminal Justice. It is clear on the Record that the appellant was charged to the chief Magistrate's Court on 7th December, 1994. The appellant applied to the High Court for bail and the application was heard on 15th December, 1994 and ruling delivered. The proof of evidence was allegedly filed on 15th March 1995. What was the prosecution waiting for all that period, I ask? Is it fair to an accused person with a murder charge hanging on his head to be treated with this uncertainty? I think not. (p. 185 F)

***Words & Phrases - Holding charge***

6. It is not, in my humble view, the function of the prosecution to rush a charge to a Magistrate's Court, a court which has no Jurisdiction to try murder cases, and play for time, while investigation is in progress. I have said it before and I will say it again that the uniquely police phraseology of a "holding charge" is not known to our criminal law and jurisprudence. It is either a charge or not. There is nothing like a "holding

charge". If the prosecution is not ready, it should do the proper thing and the laws of the land provide for the proper thing. Learned counsel for the respondent, in his brief, referred to the charge preferred against the appellant in the Magistrate's Court. Can he really do that in law? How can he refer to a charge before a court without jurisdiction in a court with jurisdiction but is asked to take a bail application without a formal charge by way of information? The so-called charge No. Mo/844c/94 before the chief Magistrate, Onitsha is moribund and the law treats it so. (pp186 C/186 H)

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***Bail - Special circumstance***

7. The six letter word of 'murder' comes with it so much fear as the law prescribes the death penalty. But like every other offence in our criminal system, there is nothing magical in the word per se; but there is so much to fear in the offence of it because of the death penalty. Therefore, where the prosecution merely parades to the court the word 'murder' without tying it with the offence, a court of law is bound to grant bail. And the only way to intimidate the court not to grant bail is to prefer an information and proof of evidence to show that there is *prima facie* evidence of commission of the offence. In my view, although bail is not normally granted a murder accused, a situation where there is no material before the trial court to show that the appellant is facing a charge of murder, including proof of evidence, certainly qualifies as a special circumstance in which this court can grant bail. (pp. 186 E/187 G)

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**NOTABLE POINT OF INTEREST**

**AKINTANJCA**

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*1. It is against public interest to detain a person against whom there is no prima facie evidence*

There is definitely clear evidence that the learned Judge failed to exercise his discretion judiciously in the matter. This is because it is definitely against public interest to detain or incarcerate any body against whom the court is satisfied that there is no prima facie evidence, from the proof of evidence, to support the charge preferred against the person and upon

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which the application for the remand is founded. (p. 189 B)

### **REPRESENTATION**

Chief Chimezie Ikeazor, SAN with Mrs. Ikeazor and Oguji for appellant  
B O. C. Iloanya, DDPP with Mrs. L. N. Umeh Legal Officer, for respondent

### **CASES REFERRED TO**

C Olugbusi v. Commissioner of Police (1970) 2 All N. L. R. 1  
Oladele v . The State (1993) 1 NWLR (pt. 269) 294  
Commissioner of police v. Okoye (1979) 6 ECSLR 69 at 73  
Enwere v Commissioner of Police (1993) 6 NWLR (pt.299) 333 at 34 -  
342  
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### **LEAD JUDGMENT BY NIKI TOBI JCA**

The appellant was charged for conspiracy and murder on 17th December, 1994 before the Chief Magistrate's Court, Onitsha. The Chief  
E Magistrate remanded him in prison custody. He applied to the High Court for bail. The application was refused. In the Ruling of 23rd February, 1995, the learned trial Judge said:

F *"I have given full consideration to this application and I am satisfied that it will not be in the public interest to admit the applicant to bail. This application accordingly fails and the same shall be and is hereby dismissed."*

Aggrieved by the Ruling, the appellant has come to us. He filed a  
G brief of argument and formulated two issues for determination:

"(i) Whether the learned trial judge was right in dismissing  
the applicant/appellant's application for bail when there was no information and/or proof of evidence and/or a formal charge preferred  
against him in any court.

H (ii) Whether the aforesaid ruling of the learned trial judge shall be allowed to stand when same was based on non (sic) or improper appreciation/evaluation of the evidence placed before her."

Respondent also filed a brief. He adopted the first issue formu-

lated by the appellant and added the following as a second issue:

*"Whether the ruling of the learned trial judge was based on non (sic) or improper appreciation/evaluation of the evidence placed before him."*

Chief Chimezie Ikeazor, learned Senior Advocate for the appellant, submitted that the learned trial judge was in serious error in making an order dismissing the appellant's application for bail, particularly so, when there was no evidence placed before the court that an information and/or proofs of evidence and/or formal charge had been filed/preferred against the applicant/appellant in any court so as to justify his continued incarceration at the Awka prisons. In the absence of such information which the prosecution was duly bound to supply so as to justify the applicant/appellant's continued incarceration at Awka prisons for so long, the learned trial judge ought to have made an order admitting the applicant/appellant to bail, learned Senior Advocate submitted. This is particularly so when a continued detention of the applicant/appellant in such circumstances will not only be unconstitutional but will amount to a flagrant abuse of power by the police and/or the executive, he argued. He cited Enwere v Commissioner of Police (1993) 6 NWLR (pt.299) 333 at 34 - 342 and Emmanuel Chinemelu v. Commissioner of Police. Appeal No. CA/E/22/95 delivered on 13th March, 1995 (Unreported). Learned counsel quoted what my learned brothers (Achike, Ejiwunmi and Adamu JJ.C.A) said in the Chinemelu's case and urged us to follow it. He submitted that the learned trial judge misapplied the principle of law enunciated in Enwere v. Commissioner of police (supra) where it was held that the document with which the applicant/appellant was arraigned at the Magistrate Court constituted a "valid charge or information" before the court and that same supplied sufficient material justifying the continued detention of the accused in custody. Referring the court to section 153 (b) (iii) of the Criminal procedure law, Cap.37, Laws of Anambra State, 1986, learned Senior Advocate submitted that the nature of information contemplated is as provided in the above subsection.

It was also the submission of learned Senior Advocate that the learned trial Judge neither properly evaluated the evidence nor considered

the principles guiding the application before giving the Ruling. Enumerating three of such principles, learned counsel referred the court to paragraphs 33 and 34 of the affidavit in support of the application, paragraph 15 of the counter affidavit, and submitted that the learned trial Judge was wrong in coming to the following conclusion:

*"In the light of the above quoted paragraphs of the counter affidavit which are not controverted and coupled with strong prima facie evidence against the applicant and the offence being one punishable with death, it is my view that there will be greater temptation for the applicant to jump bail."*

Referring to the findings of this court in Emmanuel Chinemelu v. Commissioner of Police (supra) learned Senior Advocate submitted that the conclusion reached by the learned trial Judge was wrong in all respects in that same was based on non-appreciation and / or improper evaluation of the affidavit evidence placed before the court. Learned Senior Advocate urged the court to interfere with the findings of the learned trial Judge as they are against the weight of evidence and / or against the relevant applicable principles of law.

Learned Senior Advocate contended that the findings of the learned trial Judge overlooked the legal presumption that the appellant, not having been tried and convicted by a competent court for an offence know to our law, is presumed innocent and as such entitled to his liberty as of right, unless, however, there were some other circumstances militating against the admission of the appellant to bail. Counsel urged the court to allow the appeal and admit the appellant to bail.

Learned counsel for the respondent, Mr. O. C. Iloanya, DDPP, Ministry of Justice, Awka, Anambra State submitted that the learned trial Judge exercised the discretion Judiciously and correctly when the appellant was known to the law, and as such the Judge exercised the discretion Judiciously and correctly when the appellant was refused bail. He cited Oladele v. The State (1993) 1 NWLR (pt. 269) 294 at 308 and Emordi v. Commissioner of Police (1995) 2 NWLR (pt. 376) 244 at 256.

He claimed that charge No. MO/844/94 against the appellant is in accordance with sections 235 to 250 of the Criminal procedure Law,

Cap. 37, Law of Anambra State, 1986; particularly sections 241, 243, 247 and 249 thereof. Making reference to the judgment of this court in Emmanuel Chinemelu v. Commissioner of Police (supra) learned counsel submitted that the detention of the appellant is not unconstitutional more so now that proofs of evidence viz charge No. o/5c/95 has been filed against him in the High Court Registry, Onitsha and assigned to High Court No. 4 for trial." A citizen's right to personal liberty can be deprived upon reasonable suspicion of his having committed a criminal offence, learned counsel argued. He relied on section 32 (i) (c) of the Constitution.

Learned counsel submitted that Enwere v. Commissioner of Police (supra) cited by learned Senior Advocate does not apply in the instant case in that the prosecution in that case did not oppose bail and did not file a counter affidavit. But in the instant case, there is a counter affidavit and proofs of witnesses evidence, learned counsel contended. He also distinguished the case of Emmanuel Chinemolu v. Commissioner of Police (supra) from the instant case in that at the time of hearing the appeal in Chinemelu's case the prosecution had not filed proofs of evidence but the proofs of evidence were filed in this case on 15th March, 1995.

Learned counsel contended that the fact that the learned trial Judge found that there is a strong prima facie evidence against the appellant and that the offence is punishable with death is enough for the Judge to hold that there will be greater temptation for the appellant to jump bail. He relied on Commissioner of police v. Okoye (1979) 6 ECSLR 69 at 73. Learned counsel did not agree that the trial Judge overlooked the legal presumption that the appellant is presumed innocent; rather the Judge had to consider the presumption with facts placed before the court by the prosecution justifying the detention. He claimed that there is evidence before the trial court that the crime is of the highest magnitude, the evidence in support of the charge strong and the punishment the highest known to the law, and as such the Judge exercised the discretion judicially and correctly. He urged the court to dismiss the appeal.

**It would appear that the major reason advanced by the**

learned trial Judge for refusing the appellant's application for bail was that " it will not be in the public interest" to do so. I know of no such criterion or principle of law in the bail decision. The most important criterion or principle of law in the bail decision is whether the accused person will, in the light of the offence and the circumstances of the case, return to take his trial. Every other criterion or principle is parasitic on the above major one. For instance where the alleged offence is one of the gravest magnitude, like murder, then the law presumes that the accused person is likely to jump bail if granted.

Public interest is not only a large term but also a very vague term which is not capable of a precise legal definition and a' fortiori legal meaning. If courts of law are to consider or determine bail applications before them on the rather nebulous and imprecise term of " *public interest*", they will not make much progress in the bail decision in favour of applicants. The final result is that more persons than now will be in incarceration. That is certainly not in the interest of both the government and the accused.

Although the Constitution generally provided for the right to bail, the pre-trial freedom is restricted, particularly in capital offences. Under our Criminal Procedure Law, a person charged with any offence punishable with death shall not be admitted to bail, except by a Judge of the High Court, (see section 73 (1) of the Criminal Procedure Law, Cap 37, Laws of Anambra State, 1986). Although the subsection apparently, confers such a right to a Judge of the High Court, it is the general practice to refuse bail to person charged with the offence of murder. See Olugbusi and Other v. Commissioner of Police (1970) 2 All N. L. R. 1; Oladele v . The State (1993) 1 NWLR (pt. 269) 294.

It is common ground in this appeal that the learned trial Judge had the application of the appellant without an information and proof of evidence. It was after the refusal of the application that the Judge ordered the filing of the proof of evidence " *within the next 75 days .*" Both counsel relied on the decision of this court in Emmanuel Chinemelu v.

Commissioner of Police (supra). While learned Senior Advocate submitted that the decision is applicable to this appeal, learned counsel for the respondent took the opposite view.

I have carefully examined the decision and I do not see any material or meaningful difference between the two cases. Learned counsel for the respondent submitted in his brief that proof of evidence in the instant case was filed on 15th March, 1995, which was not the situation in Chinemelu's case. **The law is trite that counsel cannot hide under the forum of brief to introduce facts which do not, under our adversary system of adjudication, belong to him. Counsel qua advocate is an expert of the law and the facts of the case belong to his client. Counsel for the respondent is therefore not competent to introduce new facts on appeal, just like that. He certainly knows the procedure for introducing new facts his client wants to rely upon on appeal. And he ought to have followed that procedure. That he did not do so is not helpful to the case of the respondent. I am not even quite sure that the proof of evidence allegedly filed on 15th March 1995 could have helped the situation, by way of salvaging it in favour of the respondent. The Ruling was given on 23rd February, 1995. How can a court process filed after the Ruling retrospectively affect the legal regime on which the appeal is based? Can that be a fair hearing to the appellant who in the course of preparing the grounds of appeal, did not anticipate the allegedly filed proof of evidence? That will be clear injustice and this court cannot be a party to it.**

**What the respondent did here is rather unfortunate. Litigation is not a game of chance where one party cleverly outsmarts the other party. That is what has happened in this case. The function of the State as the chief Prosecutor of criminal matters is to ensure that the accused person has a fair deal in the judicial process. All that is expected of the prosecutor is to place all relevant materials before the court and not to find ways to punish the accused outside the law and the known traditions of the profession.**

**A prosecutor cannot oppose bail merely as a routine proce-**

B dure. There must be a valid cause or reason for opposing bail. Where bail is opposed without any valid reason, then the prosecutor has not helped in the dispensation of criminal Justice. It is clear on the Record that the appellant was charged to the chief Magistrate's Court on 7th December, 1994. The appellant applied to the High Court for bail and the application was heard on 15th December, 1994 and ruling delivered. The proof of evidence was allegedly filed on 15th March 1995. What was the prosecution waiting for all that period, I ask? Is it fair to an accused person with a murder charge hanging on his head to be treated with this uncertainty? I think not.

D It is not, in my humble view, the function of the prosecution to rush a charge to a Magistrate's Court, a court which has no Jurisdiction to try murder cases, and play for time, while investigation is in progress. I have said it before and I will say it again that the uniquely police phraseology of a "holding charge" is not known to our criminal law and jurisprudence. It is either a charge or not. E There is nothing like a "holding charge". If the prosecution is not ready, it should do the proper thing and the laws of the land provide for the proper thing.

F The six letter word of 'murder' comes with it so much fear as the law prescribes the death penalty. But like every other offence in our criminal system, there is nothing magical in the word per se; but there is so much to fear in the offence of it because of the death penalty. Therefore, where the prosecution merely parades to the court the word 'murder' without tying it with the offence, a court of law is bound to grant bail. And the only way to intimidate the court not to grant bail is to prefer an information and proof of evidence to show that there is prima facie evidence of commission of the offence.

H Learned counsel for the respondent, in his brief, referred to the charge preferred against the appellant in the Magistrate's Court. Can he really do that in law? How can he refer to a charge before a court without jurisdiction in a court with jurisdiction but is

**asked to take a bail application without a formal charge by way of information? The so-called charge No. Mo/844c/94 before the chief Magistrate, Onitsha is moribund and the law treats it so.**

Learned counsel for the respondent relied on Oladele v. The State (supra) The facts of Oladele are inapposite and therefore the case is not authority for what the learned trial Judge did in the instant appeal. So also is the case of Emordi v. Commissioner of Police (supra). I think the recent decision of this court in Emmanuel Chinemelu v. Commissioner of Police (supra) is much more relevant. In his leading judgment, Achike, J.C.A. said:

*"..... the appellant says that even though there is an insinuation or allegation of murder of certain persons, neither has any formal charge of murder as required by law preferred against the appellant nor have the proofs of evidence been prepared as prescribed by law. In such circumstances, the further detention of the appellant would appear unreasonable and unjustified .... To now allow the respondent to continue the detention of the appellant, as it were, in perpetuity, in these circumstances would unreasonably deprive a citizen of his right of liberty and unwillingly sow the seed of improper use, or abuse, of power by the police or the executive to the chagrin of a citizen whose innocence in relation to certain sordid acts of murder is yet to be disproved. Such posture, the courts must of necessity, roundly condemn."*

Adamu, J. C. A., in his contribution, said:

*"..... I think it is fair to, at this stage, admit him to bail despite the seriousness or gravity of the alleged offence he is charged with. There is nothing as yet before the lower court to show prima facie that the appellant can be held for the offence of murder for which he was charged at the Magistrate Court (which had no power to try the case)."*

I am bound by the above pronouncements which are relevant to this appeal. **In my view, although bail is not normally granted a murder accused, a situation where there is no material before the trial court to show that the appellant is facing a charge of murder, including proof of evidence, certainly qualifies as a special circumstance in which this court can grant bail.** In Enwere v. Commissioner of Police

(supra), Onu, J. C. A. (as he then was) said at page 341:

*"In the case of Dogo v. Commissioner of Police (1980) 1 NCR 14 at page 17, it was emphasized that it is the duty of the court to consider whether to grant bail once an accused person has pleaded not guilty to a charge, such a situation clearly arises where an information or charge is laid before the trial court. Not so in the case in hand where no information or charge was laid by the prosecution. Hence, in the absence of facts which prosecution was duty bound to supply justifying the appellant's detention in police cell, the trial judge was bound to let appellant go from the police cell*

In the light of the foregoing, I have no alternative than to set aside the 23rd February, 1995 Ruling of the lower court. I admit the appellant to bail upon the following conditions:

- (a) *In the sum of N500,000.00 with two sureties in the sum of N250,000.00 each; and*
- (b) *The sureties must swear to satisfactory affidavit of means and must be owners of landed property situate in Enugu State or Anambra State.*

### AKINTAN JCA

The main issue raised in this appeal is whether the learned trial judge exercised his discretion to grant or refuse the application for bail made before him judiciously, having regards to the facts placed before him. The brief facts before the court are that the applicant was brought before the Onitsha Chief Magistrate Court on a charge of murder, an offence which causes death penalty. The chief Magistrate court had no jurisdiction to try such a serious offence and as such the applicant ought not to have been taken to that court in the first place. Similarly, the chief Magistrate had no power to grant the applicant bail. The main purpose of taking the applicant before that court therefore, was to use the machinery of Justice to get the man clamped into prison detention.

The only avenue open to the applicant by which he could secure his freedom by being granted bail was to apply to the high court for bail.

The applicant did so in the instant case. He made out a case that his detention in prison custody was not founded on any prima facie case made out against him as in fact no proof of evidence was then made available to him (applicant) or the court. The court ignored this very important point made by the applicant and went ahead to refuse the application. The reason given to justify the refusal of the application was that the court was "satisfied that it will not be in the public interest to admit the applicant to bail." There is definitely clear evidence that the learned Judge failed to exercise his discretion judiciously in the matter. This is because it is definitely against public interest to detain or incarcerate any body against whom the court is satisfied that there is no prima facie evidence, from the proof of evidence, to support the charge preferred against the person and upon which the application for the remand is founded.

I had the privilege of reading the draft of the leading judgment written by my learned brother, Niki Tobi, J. C. A. He has fully set out the facts and issues raised in the appeal. I agree with his conclusion that the appeal should be allowed. I too allow the appeal and make similar orders as are contained in the leading judgment.

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**ADAMU JCA**

I had the opportunity of reading the leading judgment of my learned brother, Niki Tobi, JCA, in advance. I agree with the reasons and conclusions reached in the said judgment. I too allow the appeal and admit the appellant to bail under the same conditions as set out in the leading judgment.