

**SUPREME COURT OF NIGERIA**  
FRIDAY 1ST MARCH, 2002. SC. 290/2001  
**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,**  
**S. O. UWAIFO, A. O. EJIWUNMI, E. O. AYOOLA, JJSC**

MOHAMMED SANI ABACHA ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Bail - Exercise of discretion - Considerations that determines grant of bail - Often depend on the stage of criminal proceedings (H1)

CRIMINAL PROCEDURE - Bail - Grant - Conditions - Fawehinmi v. The State - Ill health is consideration that justifies - Grant of bail on special circumstances (H2)

CRIMINAL PROCEDURE - Bail - Grant - Conditions - Allegation of ill health - Sustainability - Mere allegation of bad health will not be sufficient - As discretion is exercised based on facts of each case (H3)

CRIMINAL PROCEDURE - Bail - Grant - Medical ground - The law does not grant right to medical facility of choice - Since the State has duty to provide same (H4)

**FACTS**

Accused/appellant and three others were arraigned before the High Court of Lagos State on two-count charge of conspiracy to commit murder and murder of one Kudirat Abiola contrary to sections 324 and 319(1) of the Criminal Code Cap 32 Laws of Lagos State 1994. Appellant alone was also arraigned on other counts charge of accessory after the fact to murder contrary to section 322 of the same Code. Appellant had by motion on notice sought for an order quashing the charge against him on the ground that no prima facie case was disclosed against him and that the charge was an abuse of process.

The learned trial judge dismissed the application. The decision prompted appellant to file an appeal at the Court of Appeal Lagos

Division. The court also dismissed the appeal. Being aggrieved, appellant appealed to Supreme Court. Meanwhile, appellant filed application seeking for an order of Supreme Court admitting him to bail on health ground pending the determination of the appeal.

## **HELD** (Unanimously dismissing the application per **AYOOLA JSC**)

### *Bail - Exercise of discretion*

**1. It suffices to note that the considerations that may determine the exercise of discretion to grant bail will often depend on the stage of the criminal proceedings at which bail is sought. Different considerations may apply where bail is sought before conviction in the trial court from those which may apply where bail is sought in the appellate court after conviction. In this case bail is sought not at the trial court but in an appellate court before conviction.** (p. 488 H)

### *Bail - Grant - Conditions*

**2. However, it does seem accepted that whatever the stage at which bail is sought by an accused person, ill-health of the accused is a consideration weighty enough to be reckoned as special circumstance. In *Fawehinmi v. The State* (1990) 1 NWLR (part 127) 486 one of the circumstances accepted by the Court of Appeal as justification for grant of bail on the ground of special circumstance is ill-health.** (p. 489 A)

### *Bail - Grant - Conditions - Allegation of ill health*

**3. *Rex v. Gott* 16 Cr. App R 86 is authority for the view that mere allegation of bad health will not be sufficient as special circumstance for the grant of bail. In matters of discretion previous decisions can only offer broad guidelines. Each exercise of discretion depends on the facts of each case. There is thus nothing before this court, beyond the exaggerated and unsubstantiated claims of learned counsel for the applicant in his oral address, to show that the state of health of the applicant at the time the motion was filed on 28<sup>th</sup> De-**

***cember, 2001 up to the time of the hearing of the application on 7<sup>th</sup> December, 2002 was anything but satisfactory. No reasonable tribunal exercising its discretion responsibly and judiciously will on the facts as stated exercise a discretion to grant bail on the ground of special circumstances.***

***The special medical need of an accused person whose proven state of health needs special medical attention which the authorities may not be able to provide is a factor that may be put before the court for consideration in the exercise of discretion to grant bail to the accused person. Such need is not brought before the court by the mere assertion of the accused or his counsel, but on satisfactory and convincing evidence. Such has been absent in this case.*** (pp. 489 C/491 E492 B)

*Bail - Grant - Medical ground*

***4. Were it the law that an accused person remanded in custody to await trial is entitled to be granted bail pursuant to a right to have access to a medical practitioner or medical facility of his choice, hardly would any accused person remain in custody to await trial. There is no general principle of law affording that right to an accused person remanded in custody. The duty of the state to ensure that the medical needs of persons in custody are met does not create such extravagant right as claimed that a person is entitled to be treated by a doctor of his own choice.*** (p. 491 G)

## NOTABLE POINTS OF INTEREST

### **AYOOLA JSC**

#### ***1. Proper court to bring application for bail is trial court***

However, before I part with this matter, it is expedient to point out that the fact that this application has been held considered on its merits should not be seen as an indication that it has been held, albeit by implication, that this court is the proper and competent venue for applications such as this, brought when the charge is still before the trial court which had made an order remanding the accused in custody. The order remanding the accused in custody still subsists and has not been appealed from nor discharged. There is nothing to show

than an application has been made to the trial court for bail. The appeal before this court is an interlocutory appeal. In these circumstances at the appropriate time, should the matter be raised, the true ambit of section 31(1) of the Supreme Court Act which empowers this court, if it thinks fit, on the application of an applicant to admit the appellant to bail pending the determination of his appeal, will be determined in view of subsections (2) and (3) of that section which seemed to envisage the exercise of power to grant bail upon conviction. (p. 492 D)

C      **UWAIFO JSC**

***2. Refusal of bail - Factor to consider***

There is always the discretion to refuse bail if the court is satisfied that there are substantial grounds for believing that the applicant for bail pending trial would abscond, or interfere with witnesses or otherwise obstruct the course of justice. The crucial factor is the existence of substantial ground for so believing, strict rules of evidence are inappropriate. It is enough if the facts related to the court at secondhand are reasonably reliable from what is known to have taken place or is being planned or has been done by or on behalf of an applicant for bail. (p. 500 G)

**EJIWUNMI JSC**

F      ***3. Need for doctor's reports to be in understandable language***

However, it seems clear from that letter that the applicant went through certain tests, but without any evidence in plain simple language of the nature of the test. I do not think that his view on the condition allegedly ascribed to the applicant is of any assistance to the case presented for him. Medical language of the kind used in that letter may be useful in a medical conference among doctors but it is hardly of any use in the court without any explanation of such language in plain and understandable language of the Court. (p. 511 C)

H      **REPRESENTATION**

J. B. Daudu, SAN, Y. U. Usman, SAN, A. B. Mahmood, SAN, with M. Bulama, K. T. Turaki, I. Adamu, S. T. Ologunorisa, U. N. Agomo, S. T. Amobeda, Mrs. Z. Y. UMAR, and M. K. Umar for the Appellant. Professor Oshinbajo, Attorney-General, Lagos State with Mrs. M.

Asumah (Principal State Counsel) and Miss T. Shitta-Bey (Principal State Counsel) for the State

**CASES REFERRED TO**

- Obaseki v. Police (1959) NRLR 149  
 R v. Mansfield Justices ex p. Sharkey (1985) 1 All ER 193 B  
 Oladele v. The State (1993) 1 NWLR (Pt. 268) 249  
 Bamaiyi v. The State (2001) NWLR (Pt. 715) 270  
 Chinemelu v. Commissioner of Police (1995) 4 NWLR (Pt. 390) 467  
 Bello v. A-G Oyo State (1986) 5 NWLR (Pt. 45) 288 C  
 Ani v. State (2001) 2 FNLR (Pt. 7) 2  
 Gani Fawehinmi v. State (1990) 1 NWLR 486  
 Mamudu Dantata v. Police (1958) NRNL 3  
 Re Moles (1982) Crim. L.R. 170

D

**STATUTES REFERRED TO**

- Criminal Code Cap 32 Laws of Lagos State 1994, ss. 319(1), 322, 324  
 Criminal Procedure Law Cap 3 Laws of Lagos State, ss. 167, 221(4), 340(3) E

**BOOK REFERRED TO**

- Merach's Manual of Diagnosis and Therapy 1987 Ed pp. 147 & 157

F

**LEAD JUDGMENT BY AYoola JSC**

This is an application by Mohammed Sani Abacha (“*the applicant*”) for an order admitting him to bail pending the determination of an appeal now pending before this court. The appeal has been fixed for hearing on 9<sup>th</sup> May, 2002 upon an application for accelerated hearing made by the Attorney-General of Lagos State. G

The applicant is one of four persons standing trial in the High Court of Lagos State on an information containing four counts charging him and three others in the first and second counts, respectively, with conspiracy to commit murder and murder contrary, respectively, to sections 324 and 319(1) of the Criminal Code, Cap. 32 Laws of Lagos State, 1994; and, charging the applicant alone in the third and fourth counts with accessory after the fact to murder contrary to section 322 of the said Code. H

By a motion on notice dated 10<sup>th</sup> December, 1999 said to be brought pursuant to sections 167, 340(3) and 221(4) of the Criminal Procedure Law, Cap. 3 Laws of Lagos State and under the inherent jurisdiction of the court, the applicant sought an order quashing the information as regards him on the grounds that the proof of evidence did not disclose prima facie case against him and that the entire information was an abuse of process, On 1<sup>st</sup> February, 2000 the trial judge, Kekere-Ekun, J., dismissed the application. The appeal of the applicant to the Court of Appeal from that decision was itself dismissed on 11<sup>th</sup> December, 2000. Now pending before us is an appeal from the decision of the Court of Appeal.

In the mean time the applicant seeks an order admitting him to bail pending the determination of that appeal on the ground of exceptional circumstances constituted by the facts, as stated in the motion paper that: (i) there is an order staying proceedings in the charge; (ii) this court is “*the only court currently seized of charges No. ID/43C/99 by virtue of the pending appeal*”; and (iii) “*the applicant is seriously ill and is on admission at the National Hospital, Abuja and cannot receive the desired medical attention while in detention.*”

It is evident that in relation to the question whether discretion should be exercised to grant the prayer of the appellant or not, only the third of the facts stated above is capable of constituting exceptional circumstance. The first two merely attempted to explain why in the opinion of counsel for the applicant this court is the appropriate venue. Whatever comment may be made hereafter on the appropriateness of the venue, that question should not be of any importance since the respondent had not raised any such issue. The only question that needs be addressed, therefore, is whether sufficient facts have been put before this court to justify the grant of bail.

At the hearing of the application, learned counsel for the applicant emphasized that the application was based on ill-health. It is thus not necessary to range all over the field to consider the multifarious circumstances in which bail may be granted to an accused person. ***It suffices to note that the considerations that may determine the exercise of discretion to grant bail will often depend on the stage of the criminal proceedings at which bail is sought. Different considerations may apply where bail is sought before conviction in the trial court from those which***

**may apply where bail is sought in the appellate court after conviction.** In this case bail is sought not at the trial court but in an appellate court before conviction and not by way of appellant review of a discretion exercised by the Court of Appeal. **However, it does seem accepted that whatever the stage at which bail is sought by an accused person, ill-health of the accused is a consideration weighty enough to be reckoned as special circumstance.** **In Fawehinmi v. The State (1990) 1 NWLR (part 127) 486 one of the circumstances accepted by the Court of Appeal as justification for grant of bail on the ground of special circumstance is ill-health. Rex v. Gott 16 Cr. App R 86 is authority for the view that mere allegation of bad health will not be sufficient as special circumstance for the grant of bail. In matters of discretion previous decisions can only offer broad guidelines. Each exercise of discretion depends on the facts of each case.** Notwithstanding that fact, it is right to note that, as a matter of judicial attitude, in the case of Oladele v. The State (1993) 1 NWLR (Part 268) 249 this court did say (per Olatawura, JSC) at page 308:

*“It is very unusual for a person accused of murder to be on bail pending trial. Murder is a very serious offence.”*

Against the broad statement of principles as above, I turn to a consideration of the facts on which the applicant relies.

There have been filed two affidavits in support of the application and two against. In support, Mr. Simon Amobeda, a legal practitioner on 28th December, 2001 deposed to the facts that the applicant had been in detention at Kirikiri maximum security prison, Apapa on the order of Kekere-Ekun, J., since October 1999, to await trial for offences contained in charge No. ID/43C/99; that because of his detention it had become impossible for him to have access to good “Medicare” and that this had greatly affected his health; that he developed some complications sometime in May 2000; that the prison clinic lacked equipment for proper diagnoses; that his poor state of health had continued to worsen and that he was suffering from serious kidney problem. It is stated that the applicant was on admission at National Hospital for Women and Children where he was undergoing ‘intense Medical Investigation’. There were attached to the affidavit, among others, (1) a letter addressed by the Assistant Control-

ler Prisons, Kuje Prison, F.C.T. to the Human Rights Violation Investigation Commission stating that the applicant was on admission for acute malaria, upper-respiratory track infection and hay fever and was consequently unable to appear before the Commission; (2) a letter dated 7<sup>th</sup> November, 2001 written by Dr. Priye Briggs to the  
 B Controller-General, Nigerian Prisons Service intimating him of “*the deteriorating medical condition’ of the applicant’ and indicating the need to investigate the left kidney vis-a-vis the stones.*”

A counter-affidavit sworn to by Mrs. Olabisi Ogungbesan, Assistant Director of Public Prosecutions in the Lagos Ministry of  
 C Justice, had attached to it a letter dated 17<sup>th</sup> January, 2002 written by the Chief Medical Director of Public Prosecutions, Lagos State Ministry of Justice concerning the medical condition of the applicant. The salient portion of the letter is as follows:

D “*Alhaji Mohammed Sani Abacha was first admitted at this hospital for investigation for a minor ailment on the 10<sup>th</sup> December, 2001 and was discharged on 21<sup>st</sup> December, 2001. He was re-admitted on 6<sup>th</sup> January, 2002 preparatory to minor operation on 8th January, 2002. His surgeon operates only once a week on Tuesday.*  
 E *Owing to the Christmas and New Year day, 1<sup>st</sup> January 2002 he was unable to carry out the minor surgery which was therefore done on the next available Tuesday 8<sup>th</sup> January 2002. The operation was very successful and Alhaji Abacha was duly discharged on Friday 11<sup>th</sup> January 2002. The condition and state of health on discharge was*  
 F *satisfactory. Alhaji Abacha has an appointment to be reviewed in six weeks from the date of his discharge*” [Emphasis mine].

A document dated 21<sup>st</sup> January 2002 headed “*To whom it may concern*” and written by Dr. Priye R. Briggs, Asst. Comptroller  
 G (Medical), of the Nigerian Prisons Service was introduced by a further affidavit sworn to by Mr. Amobeda, but it is evident that the writer of the document merely narrated therein the course of treatment that the applicant had received at the National Hospital, about which the letter of the Chief Medical Director of the hospital is a more  
 H authentic and more competent account. The use of medical terminologies in Dr. Briggs document does nothing to make its contents any impressive or weightier.

The counter-affidavit sworn to in opposition to the application by Mrs. Olabisi Ogungbesan shows, in paragraph 22-28 thereof,

in summary that the applicant had access to medical attention at the National Hospital where he was treated for a minor ailment and underwent minor surgery with his state of health satisfactory upon discharge. The document referred to as Exhibit DPP2 which is the letter of Chief Medical Officer of the National Hospital amply bore out these facts. The facts before us, summarized show that on 7<sup>th</sup> November 2001 the medical condition of the applicant was brought to the attention of the Controller-General of the Nigerian Prisons Services and the medical investigation was recommended [Exh. MSA 8]; on 10<sup>th</sup> December 2001 the applicant was admitted for investigation and was discharged on the 21st December 2001; on 6<sup>th</sup> January 2002 he was readmitted preparatory to a minor operation which was carried out on 8th January; the operation was successful and the applicant was discharged on 11<sup>th</sup> January 2002 with his state of health on discharge described as satisfactory [Exh. DPP2]. The applicant's application brought on 28<sup>th</sup> December 2001 was prior to the applicant's re-admission and treatment which produced such result as enabled his medical condition to be described as satisfactory. Nothing has been put before us to show that his medical condition has changed for the worse thereafter.

***There is thus nothing before this court, beyond the exaggerated and unsubstantiated claims of learned counsel for the applicant in his oral address, to show that the state of health of the applicant at the time the motion was filed on 28<sup>th</sup> December, 2001 up to the time of the hearing of the application on 7<sup>th</sup> December, 2002 was anything but satisfactory. No reasonable tribunal exercising its discretion responsibly and judiciously will on the facts as stated exercise a discretion to grant bail on the ground of special circumstance.***

In his oral address, counsel for the applicant argued that the appellant was entitled to be treated by a medical practitioner of his choice. He did not cite any authority for the right he claims for the applicant. ***Were it the law that an accused person remanded in custody to await trial is entitled to be granted bail pursuant to a right to have access to a medical practitioner or medical facility of his choice, hardly would any accused person remain in custody to await trial. There is no general principle of law affording that right to an accused person remanded in cus-***

**today. The duty of the state to ensure that the medical needs of persons in custody are met does not create such extravagant right as claimed that a person is entitled to be treated by a doctor of his own choice.** In this case, Professor Osinbajo, Attorney-General of Lagos State, has shown expected and befitting sense of responsibility when in the course of his argument before us he stated that the State is prepared to undertake to ensure that whenever the occasion arises medical treatment is available to the applicant. **The special medical need of an accused person whose proven state of health needs special medical attention which the authorities may not be able to provide is a factor that may be put before the court for consideration in the exercise of discretion to grant bail to the accused person. Such need is not brought before the court by the mere assertion of the accused or his counsel, but on satisfactory and convincing evidence. Such has been absent in this case.**

On the whole, it is manifest that there is really no substance in this application and that, consequently, the application should be refused. However, before I part with this matter, it is expedient to point out that the fact that this application has been considered on its merits should not be seen as an indication that it has been held, albeit by implication, that this court is the proper and competent venue for applications such as this brought when the charge is still before the trial court which had made an order remanding the accused in custody. The order remanding the accused in custody still subsists and has not been appealed from nor discharged. There is nothing to show than an application has been made to the trial court for bail. The appeal before this court is an interlocutory appeal. In these circumstances at the appropriate time, should the matter be raised, the true ambit of section 31(1) of the Supreme Court Act which empowers this court, if it thinks fit, on the application of an applicant to admit the appellant to bail pending the determination of his appeal, will be determined in view of subsections (2)&(3) of that section which seemed to envisage the exercise of power to grant bail upon conviction.

Quite apart from the competence of the venue, it is still to be seen, should the matter be raised, whether this court will as a matter of discretion think fit to grant bail to an accused whose trial is still pending in the trial court and who has not challenged the order re-

manding him in custody which still subsists and who has not applied for bail in the court below or the trial court and when the appeal before this court is not after conviction of the accused or related to anything concerning bail. As I have said, these are not issues that have arisen in this application. They are merely adverted to so that entertaining this application and determining it on its merit may not be regarded as precedent in future as to the propriety of the venue for such applications. B

Be that as it may, I feel no hesitation in coming to the conclusion that this application is utterly without merit and should be dismissed. I accordingly dismiss it. C

### **BELGORE JSC**

I read in advance the judgment of my learned brother Ayoola JSC and agree with him that the application for bail in this matter has no substance and I also refuse it. D

### **OGWUEGBU JSC**

My learned brother Ayoola, JSC has given me the privilege of a preview of the Ruling which he has just read and I agree with him that the applicant has no merit. E

The applicant is standing trial with three others in the High Court of Lagos State on information charging them of various offences including murder contrary to section 319(1) of the Criminal Code Cap 32, Laws of Lagos State, 1994. F

Without pleading to the charge, the applicant moved the trial court for the information to be quashed on the ground that the proof of evidence does not disclose a prima facie case against him, requiring him to stand trial before that court or any other court of law and that the entire information is an abuse of process. The motion was dismissed by Kekere-Ekun, J. on 1<sup>st</sup> February, 2002 and his appeal to Court of Appeal was also dismissed. He has further appealed to this court and brought this application to be admitted to bail pending the determination of his appeal in this court. The grounds for the application are that:- G H

1. There is an order staying proceedings in Charge No. ID/

43C/99 before the Lagos State High Court of Justice.

2. This Honourable court is the only court currently seised of charge No. ID/43C/99 by virtue of appeal No. SC 290/2001.

3. The appellant/applicant is seriously ill and is on admission at the National Hospital, Abuja and cannot receive the desired medical attention while in detention.

4. By virtue of grounds 1, 2 and 3 above there exists an exceptional circumstance on the basis upon which this Honourable Court can entertain the application.

One would have expected the respondent to raise the issue of competence of this application in view of the fact that the application is not that of a convicted prisoner whose appeal is pending in this court and it is not a situation where an appeal is pending in this court against the refusal to admit the applicant to bail by a lower court. Since that issue was neither raised nor canvassed, I will not make further comments on it. It is not usual to grant bail in capital offences or where the applicant has been convicted and sentenced and his appeal is pending. This can only be done where exceptional circumstance is shown and of the four grounds upon which this application is based, ill-health appears to be the only ground worthy of consideration. It is in the interest of the defence as well as the prosecution for the applicant to be alive and stand his trial. There is an affidavit and a further and better affidavit in support of the application sworn to by one Simon Amobeda. There are exhibits annexed to them and for the purpose of this application I will confine myself to those exhibits touching on the state of health of the applicant. The respondent also filed a counter-affidavit and a further and better counter affidavit. A medical report Exhibit "DPP2" is annexed to the counter-affidavit.

Paragraphs 12 and 13 of the affidavit deposed to by Simon Amodeba on 28<sup>th</sup> December, 2001 read as follows:

*"12 That I am informed by the Applicant Alhaji Mohammed Sani Abacha on the 16<sup>th</sup> Dec. 2001 at the National Hospital, Abuja, whom I verily believe to be true and correct as follows:-*

(a) *That since October 1999 he has been in detention at Kirikiri maximum security prison Apapa, Lagos on the order of Hon. Justice Kudirat Kekere-Ekun for alleged offences contained in charge No. ID/43C/99.*

(b) *That because of his detention it has become impossible*

for him to have access to good Medicare and that this has greatly affected his health.

(c) That he developed some complications sometimes in May 2000 and that on his complain (sic) he was merely referred to and treated by the prison Doctor in the Prison Clinic.

(d) That the prison clinic lacks equipments for proper diagnosis and that his poor state of health has continued to worsen and that some times on September 21<sup>st</sup> 2001 he was unable to attend Human Right Violation Investigation Commission hearing because of his health. A copy of such report is annexed and marked Exhibit MSA7.

(e) That he is sufferings from serious health problems and that recent diagnosis indicates that he is suffering from KIDNEY problem. A copy of the medical report dated 7/11/01 is herein annexed and marked Exhibit MSA8.

(f) That he is currently on admission at the National Hospital for Women and Children Abuja where he is undergoing intense Medical Investigations as a result of the kidney problem. A copy of the Admission card is annexed and marked Exhibit MSA9.

(g) That he is presently going through a lot of pains and agony because of his failing health.

13. That I am further informed by the Applicant Alhaji Mohammed Sani Abacha whom I still verily believe to be true and correct as follows:

(a) That his present state of health is caused by his detention as he has no access to medical care of his choice.

(b) That he has previous medical history of Kidney problem which he had effectively managed before his arrest and detention.

(c) That if he is granted bail he will have the opportunity to seek medical treatment in a specialist hospital of his choice.

(d) That from discussions he is having with Doctors he is presently confronted with serious medical problems which requires specialist treatment and that he is of the belief that his present detention will not make it possible for him to get the kind of specialist treatment he personally requires."

Three medical reports call for close examination in the consideration of this application. Exhibit "MSA8" dated 7<sup>th</sup> November, 2001 is annexed to the affidavit in support of the application and

Exhibit “MSA10” dated 21st January, 2002 is annexed to the further and better affidavit. Both exhibits were written and signed by Dr. Priye R. Briggs, Assistant Comptroller, (Medical), Nigeria Prisons Service, FCT Command, Kuje. The third medical report is that of Prof. F. A. Durosinmi-Etti, Chief Medical Director/Chief Executive of National Hospital, Abuja. It is dated 17<sup>th</sup> January, 2002. It was issued at the request of the respondent. It is Exhibit “DPP2”.

Exhibit “MSA8” is addressed to the Comptroller-General, Nigeria Prisons Service. It complained of the deteriorating medical condition of the applicant, frequent complaint of allergic rhinitis, hay fever, upper respiratory track infections and renal infections. He suggested that there was need to investigate the left kidney vis-a-vis the stones and the applicant be referred to National Hospital for expertise management. Exhibit “DPP2” showed that the applicant was first admitted at the National Hospital on 10<sup>th</sup> December, 2001 and discharged on 21<sup>st</sup> December, 2001, a period of about eleven days. He was re-admitted on 6th January, 2002 preparatory to a minor operation which was carried out on 8<sup>th</sup> January, 2002. (Underlining is for emphasis)

Paragraphs 5 and 6 Exhibit “DPP2” reads:

*“The operation was very successful and Alhaji Abacha was duly discharged on Friday 11<sup>th</sup> January, 2002. The condition and state of health on discharge was satisfactory. Alhaji Abacha has an appointment to be reviewed in six weeks from the date of his discharge.”*

Six weeks from the date 11 January, 2002 will be on or about 22<sup>nd</sup> February, 2002. Exhibit “MSA10” dated 21st January, 2002 was written 10 days after the applicant was discharged from the hospital and 4 days after “DPP2” was written. It enumerated the various tests carried out on the applicant at National Hospital. The last three paragraphs read:

*“A working diagnosis of Bulbomembranous urethral stricture, pre-urethritis and moderate lumbar spondilosis with sciatica of L2 and L3 nerve roots. He is currently placed on antibiotics, pain relieving drugs and regular physiotherapy regime. He is booked for follow-up examination and treatment on mid February, 2002 at National Hospital, Garki.”*

This application was filed on 28<sup>th</sup> December, 2001 about

the period the applicant was on admission at National Hospital and up to 6<sup>th</sup> January, 2002 when the minor operation was performed. The condition and state of his health on 8<sup>th</sup> January, 2002 when he was discharged was said to be satisfactory. If the state of his health was as deposed by Simon Amodeba in his affidavit sworn to on 28-12-2001 and as narrated by the applicant's Senior Counsel during his oral argument, Exhibit "DPP2" would have stated so. Exhibits "MSA8" and MSA10" issued by Dr. Briggs, Assistant Comptroller of Prisons (Medical), FCT Command, did not in any way weaken the weight I have attached to Exhibit "DPP2", an expert and objective medical report issued by a reputable hospital. The facts deposed to in the supporting affidavit raise false alarm and their sentimental value has no place in a judicial proceedings. B C

The applicant has failed by his affidavit to show any exceptional reason why this court should take the unusual course of exercising its discretion to admit him to bail. Having regard to the nature of the charge, the evidence by which it is supported as disclosed in the further and better counter-affidavit of Olabisi Ogungbesan, Assistant Director of Public Prosecutions in the Lagos State Ministry of Justice, the fact that some of prosecution witnesses are in protective custody for the safety of their lives and the sentence which by law may be passed in the event of conviction, it will be unsafe to grant this application. See the cases of *Bamaiyi v. The State* (2001) NWLR (Pt. 715) 270; *R. v. Gott* 16 App. R. 86 and *In re Emmanuel Barthelemy and Philippe Eugene Morney* 118 E.R.K.B. 337. D E F

There is an assurance from Hon. Attorney-General of Lagos State, Professor Osibajo that the applicant will receive adequate medical attention if and whenever the occasion arises and he went the extra mile to file an application for accelerated hearing of the applicant's appeal which was granted and hearing fixed on 9<sup>th</sup> May this year. These deserve special mention and commendation. G

In the final result, I too, refuse the application for it lacks merit. H

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### **UWAIFO JSC**

I have had the opportunity to read in advance the ruling of my learned brother Ayoola, JSC. I agree with it for the reasons he

has given. I intend to say few words of my own in support of the dismissal of the application for bail, and also make a few remarks on the circumstances in which it was entertained at all in this court.

The applicant along with three others are charged upon an information of 4 counts filed on December 1, 1999 at the High Court, Lagos. The counts involve conspiracy to murder one Kudirat Abiola (between 1995 and June 1996); murder of Kudirat Abiola on 4<sup>th</sup> June, 1996, accessory after the fact of the murder of Kudirat Abiola by providing money to one Mohammed Abdul with intent to facilitate his escape knowing that he took part in the murder of Kudirat Abiola; and accessory after the fact of the murder of Kudirat Abiola by providing money to one Aminu Mohammed with intent to facilitate his escape knowing that he took part in the murder of Kudirat Abiola.

The applicant brought an application on 10 December, 1999 in the High Court to have the Information quashed on the grounds:

1. That the proof of evidence does not disclose a prima facie case against the applicant to require him to stand trial.
2. That when the charges are compared and contrasted with the proof of evidence, the ingredients of all offences alleged and the list of witnesses, the result is that the entire information is an abuse of process.
3. That all the 4 counts in the statement of offences are prejudicial to the applicant's right to fair hearing.

The application was dismissed in a considered ruling given by the learned trial judge (Kekere-Ekun, J.) on 20 January, 2000.

The applicant appealed against the decision and in a reserved judgment delivered on 11 December, 2000 the Court of Appeal found no merit in the appeal and dismissed it. Upon an application, that court ordered stay of proceedings in High Court on 20 March, 2001. The applicant has now appealed to this court against the judgment of 11 December, 2000 upon nine grounds of appeal. In the meantime he asks for bail pending the determination of the appeal by motion on notice filed on 28 December, 2001. The application for bail was argued before us by Mr. Y. U. Usman SAN at the request of leading counsel, Mr. J. B. Daudu SAN.

The sole ground upon which bail is sought is that the applicant is seriously ill and was at the time of filing the application at the

National Hospital, Abuja. It was argued that if not granted bail he could not receive the desired medical attention. Reliance was placed on two letters signed by one Dr. Priye R. Briggs, Asst. Comptroller (Medical) Nigeria Prisons Service, Federal Capital Territory Command, Kuje, Abuja. At the material time the applicant was in Kuje Prison. The first letter dated 7 November, 2001 addressed to the Controller-General, Nigerian Prisons Service, Garki, Abuja stated that the applicant frequently complained of “*allergic rhinitis, hay fevers and upper respiratory tract infections.*” It was said that blood and urine culture indicated renal infections; and that there was need to investigate the left kidney. For that reason, the doctor suggested that the applicant be referred to the National Hospital for expertise management. B  
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A letter dated 17 January, 2002 addressed to the Director of Public Prosecutions Lagos by Professor F. A. Durosinmi-Etti, the Chief Medical Director in the National Hospital in reply to an inquiry made by the latter in regard to the health condition of the applicant and the facilities available to treat him at National Hospital showed (1) that the applicant was first admitted on 10 December, 2001 for investigation for a minor ailment and was discharged on 21 December, 2001; (2) that he was re-admitted on 6 January, 2002 preparatory to a minor operation which was carried out on 8 January, 2002; (3) that the operation was very successful and applicant was discharged on 11 January, 2002 in a satisfactory health condition; and (4) that an appointment for a review in six weeks had been fixed for him from the date of his discharge. D  
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However, on 21 January, 2002 Dr. Briggs of the Nigeria Prisons Service again issued another document headed “*To Whom It May Concern*” alleging some diagnosis “*of Bulbomembranous urethral stricture, pre-urethritis and moderate Lumbar spondilosis with sciatica of L2 and L3 nerve roots.*” He ended by saying that the applicant had been booked for follow-up examinations and treatment in mid-February, 2002 at the National Hospital, Abuja. G

This court recently stated factors that may be taken into consideration in application for bail pending trial in *Bamaiyi v. The State* (2001) 8 NWLR (pt 715) 270. It is unnecessary to go over them in the present application which is limited to conditions of ill-health although the Attorney-General on behalf of the respondent did make submission in reference to some of the said factors that they were H

capable of dissuading this court from granting bail to the present applicant.

The respondent has opposed bail and has shown that the applicant has been afforded adequate opportunity to receive necessary treatment in the hospital to which the Prisons doctor referred him. That hospital has said it has coped very well with the ailment of the applicant it duly diagnosed. There is noting to support the alarmist ailment which the applicant would appear to complain of. I am satisfied that the applicant has not presented the court with evidence of any health condition that ought to cause concern to the extent that a more intensive care is warranted, let alone granting him bail on health grounds. I do wish to commend the Attorney-General, Lagos State, Professor Osinbajo, for his assurance that the State would not under any circumstances look the other way if the applicant or any one else in its custody deserves special medical attention but that in the applicant's case he would do all that was necessary to meet the occasion.

It must be made quite clear that everyone is entitled to be offered access to good medical care whether he is being tried for a crime or has been convicted or simply in detention. When in detention or custody, the responsibility of affording him access to proper medical facility rests with those in whose custody he is, invariably the Authorities. But it ought to be understood that the mere fact that a person in custody is ill does not entitle him to be released from custody or allowed on bail unless there are really compelling grounds for doing so: see *Chinemelu v. Commissioner of Police* (1995) 4 NWLR (pt. 390) 467. An obvious ground upon which bail would be granted for ill-health is when the continued stay of the detainee poses a possibility of a real health hazard to others, and there are no quarantine facilities of the Authorities for the type of illness.

A person being tried or who has been convicted for a serious offence will normally be kept or maintained in custody while he receives available medical treatment. There is always the discretion to refuse bail if the court is satisfied that there are substantial grounds for believing that the applicant for bail pending trial would abscond, or interfere with witnesses or otherwise obstruct the course of justice. The crucial factor is the existence of substantial ground for so believing, strict rules of evidence are inappropriate: see *Re Moles* (1982)

Crim. L.R. 170; R v. Mansfield Justices ex p. Sharkey (1985) 1 All ER 193 at 201-202. It is enough if the facts related to the court at secondhand are reasonably reliable from what is known to have taken place or is being planned or has been done by or on behalf of an applicant for bail. The learned Attorney-General submitted that facts available coupled with the seriousness of the offences charged and probable penalty in the present case were such that person in the applicant's position would seize any opportunity to escape from justice. B

In the present case there are the following eight facts and circumstances in the further and better affidavit sworn by Olabisi Ogunbesan, an Asst. Director of Public Prosecutions in the Lagos State Ministry of Justice in opposition to the motion for bail: C

*"(i) That the appellant/applicant actually admitted in his statement to the police which form part of the record of proceedings before the court particularly pages 82-83, that one Aminu Mohammed and Mohammed Katako (both now proposed witnesses for the prosecution in this case) were given \$10,000 (ten thousand dollars) each on his instructions. D*

*(ii) That it was further revealed in the appellant/applicant's statement to the police, that the \$10,000 was given to enable them resettle else where outside the country in order to avoid being investigated, questioned or arrested in respect of this case. E*

*(iii) That Aminu Mohammed and Mohammed Katako confirmed in their statements to the police which for (sic: form) part of the record of proceeding before this court, particularly at pages 98, 111 and 112. F*

*(iv) That some of the key witnesses have expressed great fears on account of threats received through different sources alleged connected with the accused persons in this trial. G*

*(v) That in fact, one of the witnesses who was a driver to the appellant/applicant had to be taken into protective custody for his safety, and he is still under protective custody.*

*(vi) That there are other witnesses also under protective custody and many others who are not in protective custody." H*

On the whole it will not be a proper exercise of discretion to grant bail to the applicant. I, too, have come to the conclusion that there is no merit in the application for bail and it is accordingly re-

fused. I wish to express my agreement with the remarks of my learned brother Ayoola JSC as to the proper venue for an application of this nature and the scope of this court in bail matters. I think this was an unusual application and it hoped that the fact it was entertained by this court in order to quickly examine the alarm raised as to the health of the applicant (which has turned out to be unjustified) will not be regarded as a precedent for the future.

### **EJIWUNMI JSC**

I have had the privilege of reading in advance the ruling just delivered by my learned brother, Ayoola JSC. Though, I agree entirely with him for the reasons given in the said ruling that this application lacks merit, I wish to give my own reasons for my view that this application for bail must be refused.

The applicant who is seeking for this relief has been on trial in the High Court of Lagos State have been charged with three other persons upon an information filed by the Attorney General of Lagos State for the following offences:

- Statement of Offence - 1<sup>st</sup> Count*  
*Conspiracy to commit murder contrary to section 324 of the Criminal Code, Cap 32, Laws of Lagos State 1994.*  
*Particulars of Offence*  
*Hamza Al-Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Lateef Shofolahan between 1995 and June 1996 at Ikeja in the Ikeja Judicial Division conspired to murder Kudirat Abiola.*  
 (f)
- Statement of Offence - 2<sup>nd</sup> Count*  
*Murder, contrary to section 319(1) of the Criminal Code, Cap 32, Laws of Lagos State 1994.*  
*Particulars of Offence*  
*Hamza Al-Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Alhaji Lateef Shofolahan between 1995 and June, 1996 along Lagos/Ibadan Expressway Opposite Cargo Vision, Ikeja in the Ikeja Judicial Division murdered one Kudirat Abiola (f)*
- Statement of Offence - 3<sup>rd</sup> Count*  
*Accessory after the fact to murder contrary to section 322 of the Criminal Code, Cap 32, Laws of Lagos state 1994.*

*Particulars of Offence*

*Mohammed Sani Abacha sometime in 1999 knowing Mohammed Abdul (a.k.a. Katako) to have murdered Kudirat Abiola in the Ikeja Judicial Division gave various sums of money with intent to facilitate their (sic) from arrest and prosecution.*

*Statement of Offence - 4<sup>th</sup> Count*

*Accessory after the fact to murder contrary to section 322 of the Criminal Code, Cap 332, Laws of Lagos state 1994.*

*Particulars of Offence*

*Mohammed Sani Abacha sometime in 1999 knowing Mohammed Abdul (a.k.a. Katako) to have murdered Kudirat Abiola in the Ikeja Judicial Division gave various sums of money with intent to facilitate their (sic) escape from arrest and prosecution.”*

Since this information was filed, it does not appear from the Records made available to this Court, that the trial of the Appellant and the other persons charged along with him has commenced. This is apparent because several applications of one kind or the other, culminating in that which was brought by the applicant of a Motion on Notice dated 10<sup>th</sup> December 1999, pursuant to sections 167, 340(3) and 221(4) of the Criminal Procedure Law, Cap. 33 Laws of Lagos State and under the inherent jurisdiction of the Court. By that application, the applicant was seeking for an order of the trial Court to quash all the four counts and statement of offences in the information filed against the applicant. The application, which was grounded upon the contention that the proof of evidence does not disclose a prima facie case against the applicant. (2) That the charge when compared and contrasted with the proof of evidence, the ingredients of all the alleged offences and the result that the entire information is an abuse of process and (3) That all four counts in the Statement of Offences are prejudicial to the accused right to fair hearing. As that application was refused by the trial Court, the applicant appealed further to the Court of Appeal where he also failed to persuade the Court to overturn the ruling of the trial Court. For that reason, he has further appealed to this Court. And as this Court felt satisfied that the appeal deserved to be given accelerated hearing, the hearing of the appeal was fixed for the 9<sup>th</sup> May 2002. The applicant has however brought this application for bail pending the determination of his appeal to this Court.

In support of his application a 14 paragraph affidavit deposed to by one Simon Amodeba, legal practitioner. And attached thereto are various documents, which included the following:-

(1) The Ruling delivered by Kekere-Ekun J., delivered on 1<sup>st</sup> February 2000; (2) The judgment of the Court below delivered on 11<sup>th</sup> day of December 2000 dismissing the applicant's appeal against the Ruling of Kekere-Ekun J., of the High Court of Lagos State; (3) Ruling of the Court below granting stay of the proceedings of the trial of the applicant pending the hearing of his appeal and grounds of appeal filed pursuant to his appeal to this Court.

The Respondent also filed a counter-affidavit upon being served with the application of the applicant. The applicant thereafter felt compelled to file a Further and Better Affidavit in support of his application, and to which was attached a letter from the Nigeria Prisons Service. The Respondent also filed what was described as a Further and Better Counter Affidavit in support of its position. The affidavit had attached to it a letter from Director of Public Prosecutions, Lagos State and a reply to the letter.

Now, it is manifest from a careful perusal of the two Affidavits filed in support of this application, and sworn to by Simon Abodeba, a legal practitioner, that the main ground upon which the applicant is asking for bail is that of his ill health. This is evident from paragraph 12(a)(b)(c)(d)(e)(f)(g) and 13(a)(b)(c)(d). They read thus:-

*"12(a) That since October 1999 he has been detention at Kirikiri maximum prison Apapa, Lagos on the order of Hon. Justice Kudirat Kekere-Ekun for alleged offences contained in charge No. ID/43C/99.*

*(b) That because of his detention it has become impossible for him to have access to good Medicare and that this has greatly affected his health.*

*(c) That he developed some complications sometimes in May 2000 and that on his complain he was merely referred to and treated by the prison Doctor in the Prison clinic.*

*(d) That the prison clinic lacks equipment for proper diagnosis and that his poor state of health continued to worsen and that sometimes in September 21<sup>st</sup> 2001 he was unable to attend Human Rights Violation Investigation Commission hearing because of his health. A copy of such report is annexed and marked Exhibit MSA7.*

(e) *That he is suffering from serious Health problems and that recent diagnosis indicates that he is suffering from KIDNEY problem. A copy of the medical report dated 7/11/01 is herein annexed and marked Exhibit MSA8.*

(f) *That he is currently on admission at the National Hospital for Women and Children Abuja where he is undergoing intense Medical Investigation as a result of the Kidney problem. A copy of the Admission card is annexed and marked Exhibit MSA9.*

(g) *That he is presently going through a lot of pains and agony because of his failing health.*

“13(a) *That his present state of health is caused by his detention as he has no access to medical care of his choice.*

(b) *That he has previous medical history of kidney problem which he had effectively managed before his arrest and detention.*

(c) *That if he is granted bail he will have the opportunity to seek medical treatment in a Specialist hospital of his choice.*

(d) *That from discussions he is having with doctors he is presently confronted with serious medical problems which requires specialist treatment and that he is of the belief that his present detention will not make it possible for him to get the kind of specialist treatment he personally requires.*

It is also in support of this position taken by the applicant that a letter from the Nigeria Prisons Service dated 21st January 2002, and written by one Dr. Priye R. Briggs, Asst. Comptroller (Medical), FCT Command, Kuje, was forwarded with the Further and Better Affidavit sworn by Simon Amobeda, one of the legal practitioners handling the defence of he applicant. The letter reads thus:-

“Above named arrived Kuje Prison on the 2<sup>nd</sup> September, 2000 after one year of incarceration at the Kirikiri Prisons, Lagos. He presented (sic) at the Prisons Clinic with recurrent left-sided loin pains, which started 1998. Due to lack of medical equipment, he was referred to National Hospital Garki for further management. He was admitted at the National Hospital for eleven days and series of biochemical, hematological and Radiological tests were conducted on him. Prominent among the examinations done were renal ultrasound scan, intravenous orography. Retrograde urethrogams, micturiting cystourethrogams, cystourethroscopy and magnetic Resonance im-

*aging (MRI). A working diagnosis of Bulbomembranous urethral stricture, pere-urethritis and moderate Lumbar spondilosis with sciatica of L2 and L3 nerve roots. He is currently placed on antibiotics, pain relieving drugs and regular physiotherapy regime. He is booked for follow-up examinations and treatment on mid February 2002 at the*  
 B *National Hospital, Garki."*

As already observed, the Respondent also filed a counter-affidavit sworn to by Mrs. Olabisi Ogungbesan, the learned Assistant Director of Public Prosecutions in Lagos State, deposed inter alia in  
 C paragraph 20, 21 thus:-

*"20 That upon receipt of the Appellant/Applicant's application for bail dated 28<sup>th</sup> December 2001 presently before this Honourable Court, the Respondent made enquiries on his state of health by a letter dated 25<sup>th</sup> January 2002. A copy of same is at-*  
 D *tached hereto and marked Exhibit DPP1.*

*21. That by a letter dated 17<sup>th</sup> January 2002, the Chief Medical Director/Chief Executive Officer of the National Hospital, Prof. Durosinmi-Etti responded to the enquiry. A copy of the said letter is hereto attached and marked Exhibit DPP2."*

E The letter referred to in paragraph 21, reads thus:-

*"Thank you for your letter ref: LJ/A.32/96/683 of 15<sup>th</sup> January 2002 requesting information on the above named. Alhaji Mohammed Sani Abacha was first admitted at this hospital for investigation for a minor ailment on 10<sup>th</sup> December 2001 and was discharged on the 21<sup>st</sup> December 2001 and re-admitted on 6<sup>th</sup> January 2002 preparatory to a minor operation on 8th January 2002. His surgeon operates only once a week on Tuesday. Owing to the Christmas holiday on Tuesday 25<sup>th</sup> December 2001 and the New*  
 F *Year day, 1<sup>st</sup> January 2002 he was unable to carry out the minor surgery which was therefore done on the next available Tuesday 8<sup>th</sup> January 2002. The operation was successful and Alhaji Abacha was duly discharged on Friday 11<sup>th</sup> January 2002. The condition and state of health on discharge was satisfactory. Alhaji Abacha has an*  
 G *appointment to be reviewed in six weeks from the date of his discharge."*  
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And in a Further and Better Counter-Affidavit, sworn on to by Mrs. Olabisi Ogungbesan, the learned Assistant Director of Public Prosecutions, Lagos State, she deposed in response to the affidavit

filed in support of this application for the application to the following facts set out in paragraph 4(i),(ii),(iii),(iv),(v). They read as follows:-

*“4(i) That the appellant/applicant actually admitted in his statement to the police which form part of the record of proceedings before the court particularly pages 82-83, that one Aminu Mohammed and Mohammed Katako (both now proposed witnesses for the prosecution in this case) were given \$10,000 (ten thousand dollars) each on his instructions.*

*(ii) That it was further revealed in the Appellant/Applicant’s statement to the police, that the \$10,000 was given to enable them resettle else where outside the country in order to avoid being investigated, questioned or arrested in respect of this case.*

*(iii) That Aminu Mohammed and Mohammed Katako confirmed in their statements to the police which form part of the record of proceeding before this court, particularly at pages 98, 111 and 112.*

*(iv) That some of the key witnesses have expressed great fears on account of threats received through different sources allegedly connected with the accused persons in this trial.*

*(v) That in fact, one of the witnesses who was a driver to the appellant/applicant had to be taken into protective custody for his safety, and he is still under protective custody.*

*(vi) That there are other witnesses also under protective custody and many others who are not in protective custody.”*

At the hearing of the application, M. T. Usman SAN who moved the application first referred to the provisions of section 36(5) of the Constitution and then went on to submit that the four grounds on which the application is based are as follows:

*“(1) That the applicant had obtained an order staying the proceedings of his trial.*

*(2) That this is the only Court seised of Charge No. ID/43C/99.*

*(3) That the applicant is seriously ill and on admission, and he cannot receive desired medical attention while in detention.*

*(4) That there exist exceptional circumstances to support the application.*

Before continuing his submission, he conceded in answer to a question from the Court that the applicant is no longer in the Na-

tional Hospital. Continuing with his submission, the learned Senior Advocate referred to the case of *Bamaiyi v. State* (2001) 2 NWLR (Pt. 698) 435 where this Court recently set out what a court ought to consider in deciding whether bail ought to be granted to an applicant. But, he went on to submit that their application is based mainly on the grounds of the ill health of the applicant. The learned Senior Advocate then invited the Court to note that the nature of the ill health, which the applicant is suffering from, is what is called “*Kidney Failure*.”

In support of this contention, he brought to our attention, Merach’s Manual of Diagnosis and Therapy 1987 Edn, at pages 147 and 157.

Learned Senior Advocate in support of his proposition that bail can properly be granted to a person accused of an offence such as that which the applicant is charged, upon the ground of ill health, then referred to the following cases; *Bello v. A-G (Oyo State)* (1986) 5 NWLR (Pt. 45) 288; *Ani v. State* (2001) 2 FNLR (Pt. 7) 2; *Gani Fawehinmi v. State* (1990) 1 NWLR 486 and *Chinemelu v. State* (1995) 4 N.W.L.R (Pt. 390) 467. Concluding, learned Senior Advocate, then advocated for the principle that the right to medical treatment of one’s choice is fundamental, unless the Respondent is able to give undertaking that the applicant would be given medical treatment of his choice. In his view, it is a higher right than the right of a lawyer of one’s choice. This, he argued, is because it is in the interest of the State for the applicant to be alive to face his trial.

In his response, Mr. Osinbajo, the learned Attorney General for Lagos State, invited our attention to the affidavit and counter-affidavit filled in support of, and against the application of the applicant for bail. He invited the Court to note that the applicant was admitted for a minor operation on the 10<sup>th</sup> December 2001, and was operated upon on the 8<sup>th</sup> January 2002. He was discharged on the 11<sup>th</sup> January 2002 and his condition was pronounced as satisfactory. It is also the submission of learned Attorney General that a reading of the letter of the prison doctor would clearly reveal that the doctor did not treat the applicant. All he apparently did was to refer the applicant to the National Hospital following some tests he claimed were carried out on the applicant. It is therefore his submission that the doctor cannot lay claim to such knowledge of the state of health

of the applicant as was apparently attributed to him. But learned Attorney-General went on to submit that the Respondent would be prepared to give an undertaking that medical treatment would be given to the applicant when required.

Now it is clear from the facts made available in respect of this application that the applicant stands charged for offences of conspiracy to murder, murder and two other ancillary offences (see the information above) wherein he was charged with providing funds to persons who also committed the offence of murder to enable them escape from arrest and prosecution for the said offences. It is also not in doubt that the applicant has not been prosecuted for any of these offences. What has happened since he was charged for the several offences have been stated as briefly as possible earlier in this judgment. Therefore in the exercise of the discretion to grant bail to the applicant in such circumstances, the court has to consider the nature of the charge, the severity of the punishment and the character of the evidence and the criminal record of the accused and the likelihood of the repetition of the offence. Bail may also be refused the applicant where there is evidence that should the applicant be granted bail, the witnesses for the prosecution may be interfered with or prevented from appearing to testify. The court may also have to consider whether the applicant if granted bail would fail to attend court to face his trial. See *Obaseki v. Police* (1959) N.R.L.R 149; *Mamudu Dantata v. Police* (1958) N.R.N.L.R. 3.

However, in respect of this application, while it may not be necessary to consider all the above criteria for bail to be granted to the applicant, yet because of the submission made to the court by learned counsel upon the facts presented, two questions must be considered. These are (1) whether the applicant ought to be granted bail on the ground of ill health and (2) whether if granted bail, he would not interfere with the witnesses for the prosecution. With regard to the first question, it is the submission of learned Senior Advocate for the applicant that the nature of the applicant's ill health is such that he ought to be granted bail so that he would be able to go and seek appropriate medical treatment for his ailment. In support of this contention, reference was made to *Chinemelu v. Police* (supra). The question then is, whether the applicant has sufficiently adduced enough evidence to lead to the exercise of my discretion to grant bail

to the applicant on the ground of ill health. There is no doubt that in *Fawehinmi v. State* (supra) bail was granted to Chief Gani Fawehinmi as he was able to satisfy the court that he had to see a cardiologist every other day of his life, and that a particular type of equipment was needed to treat him. As facts were not contradicted by the respondent, the court evidently accepted them, and then went on to exercise its discretion in favour of Chief Gani Fawehinmi. In the case of *Chinemelu v. C.O.P.* (1995) 4 N.W.L.R 390 at p. 467, though the applicant claimed in that case that he was hypertensive, bail was not granted to him as he was not able to satisfy the court that he could not be treated satisfactorily while in prison custody. In the *Chinemelu* case (supra), I happened to have been a member of the panel that heard the application. In the course of my own judgment, I made certain observations, which is appropriate to the question raised by this application. I therefore seek leave to quote the relevant portion thereof at page 489 of the said judgment. It reads:-

*“The learned trial judge having considered all the arguments before the lower Court, appear to have held after reviewing the case of Fawehinmi v. The State (1990) 1 N.W.L.R (Pt. 2217), that for ill health to be a ground for granting bail it must be shown to have existed before the event. In the course of his argument before us and in his brief, the learned Senior Advocate for the appellant urged us to hold that the learned trial judge came to the wrong conclusion by so holding. While it is evident that the learned trial judge did not elaborate on the reasons for so holding, it seems to me clear that the governing principle in such matters is that each case must be considered on its own merits. While it is manifest that this Court in the Fawehinmi (case) granted bail on the premise of ill health of the applicant, it is obvious in that case that the court considered and determined the facts before it to arrive at that conclusion. That is the proper approach that the lower court ought to have adopted in this case.”*

Bearing the above principle in mind, I now would consider the facts put forward for the applicant to justify the exercise of my discretion in his favour. It is of course patent that the determination of this application calls upon the exercise of my discretion. The case for the applicant has been reviewed above and I do not need to repeat same. What remains to be considered is whether the applicant has brought for my consideration such evidence as would lead to the

view that he was indeed suffering from ill health. It is clear that though his learned counsel claimed that he was suffering from kidney failure, it is my humble view that the evidence led in support of that claim has been less than satisfactory. In this regard, I think it is the law that where it is sought to lay claim to ill health in circumstances such as this, credible evidence given by an expert in that branch of medicine ought to have been made available. The prison doctor who wrote a letter about the condition of the appellant did not state he was an expert in that field of medicine. Moreover, even in that letter, there is nothing to suggest that he treated the applicant for this condition. However, it seems clear from that letter that the applicant went through certain tests, but without any evidence in plain simple language of the nature of the test. I do not think that his view on the condition allegedly ascribed to the applicant is of any assistance to the case presented for him. Medical language of the kind used in that letter may be useful in a medical conference among doctors but it is hardly of any use in the court without any explanation of such language in plain and understandable language of the Court. On the other hand, there is the letter from Prof . F. A. Durosinmi-Etti, the Chief Medical Director of the National Hospital. Although in that letter, the nature of the illness for which the applicant was treated was not disclosed, yet it was made clear that the applicant was successfully operated upon in the hospital. I have already referred to the letter written by Dr. Briggs of the Prisons Service Medical Unit and do not think that it can be considered to be an answer to the clear opinion given by Dr. F. A. Durosinmi-Etti about the condition of the applicant.

After due consideration of the facts before me, it is my humble view that I cannot in all the circumstances justifiably exercise my discretion to grant bail to the applicant on the ground of ill health. In any event, I think the anxiety about whether the applicant would be given adequate medical care should the need arise has also been laid to rest. This is due to the clear statement of Professor Osinbajo, learned Attorney-General for Lagos State that the Respondent would be prepared to give an undertaking to that effect.

Before concluding, I think it is also necessary to refer to the question as to whether this in any event is a proper case to grant bail. In this context, I refer to the affidavit sworn to by Mrs. Olabisi Ogungbesan, the Assistant Director of Public Prosecutions, Lagos State.

It is manifest from the several paragraphs of the said affidavit that there exist a measure of anxiety that the applicant might interfere with some of the witnesses who are still to testify in the case to be presented against the applicant. There has been no reaction of any kind to the assertion made by the respondent. Be that as it may, I  
 B take the view that regard ought to be had to this anxiety of the respondent on this aspect of the matter. In view of the decision I have already reached in the matter, all that I need to say is that it would be unsafe to grant this application. See the cases of *Bamaiyi v. The State*  
 C (2001) 8 N.W.L.R (Pt. 715) 270; *R. v. Gott* 6 Cr. App. P 86 and *In re Emmanuel Barthelemy and Phillipe Eugene Mooney* 118 E.R. & B. 337.

Finally, it is necessary to point out that the application to this Court is novel. It is hoped that it would be recognized that it is in the  
 D circumstance that have arisen in this matter that led to the application being heard in this Court. I will, having regard to all I have said above, refuse this application and also for the fuller reasons given in the lead judgment of my brother Ayoola, J.S.C.

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