

SUPREME COURT OF NIGERIA
7TH MARCH, 2008. SC. 19/2005
CORAM:-N. TOBI, S. A. AKINTAN, M. MOHAMMED, F. F.
TABAI, P. O. ADEREMI, JJSC

1. ADAMU SULEMAN
2. MOHAMMED BELLO APPELLANTS
V.
COMMISSIONER OF POLICE, PLATEAU STATE ... RESPONDENT

CRIMINAL PROCEDURE - Bail - Grant or refusal of the application
- Discretion - Definition - Connotes acting according to the dictates
of one's conscience - Action taken having regard to what is right and
equitable (H1)

BAIL - Criteria - Court should follow in considering the application -
Include inter alia, the nature of the charge - Likelihood of interfering
with witnesses or evidence (H2)

COURTS - Discretion - Judicial officer - Is to arrive at a decision
based on facts before him - And apply the applicable law - Judicial
precedent rule need not be strictly applied - Where discretion is being
exercised (H3)

CRIMINAL PROCEDURE - Bail - Discretion - Granted the factual
situation at the time appellants were arraigned - Refusal of bail by
lower courts - Was a proper exercise of judicial discretion (H4)

APPEALS - Bail - Discretion - Affidavits - Shift in factual situation at
appeal stage - That gives credence to the averment - That respon-
dent is not willing to prosecute appellants - Will justify grant of bail
by Supreme Court (H5)

FACTS

Sometime in 2002, the appellants were arrested and detained
at a Plateau State Police Station for armed robbery, and they were
later arraigned before the Chief Magistrate's court Jos. At the Jos
High Court, appellants caused to be issued a summon to admit them

to bail pending trial, supported with a 5 paragraph affidavit deposed to by their counsel's litigation secretary. It was averred inter alia, that respondent is not willing to prosecute appellants but only wanted them detained in prison custody. The bail application was opposed vide a 15 paragraph counter affidavit deposed to by an Assistant Superintendent of Police (ASP). He deposed inter alia, in paragraph 4 that appellants made useful statements to the Police to the effect that they are members of a gang of armed robbers that have committed series of armed robberies in the recent past in Jos area. But the said useful statements were not attached to the affidavit.

The learned trial Judge after reviewing all the issues raised, came to the conclusion that there was no merit in the application for bail and dismissed it. He ordered that investigation be stepped up and the appellants be charged before the High Court forthwith. Appellants' appeal to the Court of Appeal was dismissed. Still aggrieved, they have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether or not the Court of Appeal exercised its discretion judicially and judiciously when it dismissed the appellants' appeal.

2. Whether or not the Court of Appeal was right when it upheld the decision of the trial court which refused to be bound by the decision of the Court of Appeal in *Anaekwe v. C. O. P.* (2004) 17 NWLR (Pt 901) 1; and *Musa v. C.O.P.* (2004) 9 NWLR (Pt 879), 483."

HELD (Unanimously allowing the appeal per AKINTAN JSC)

Bail - Grant or refusal of the application

1. It is not in doubt that the decision whether to grant or refuse an application for bail involves exercise of judicial discretion in every case. The word "discretion" when applied to public functionaries, a term which includes judicial officers, is defined in *Black Law Dictionary*, 6th edition, 1990, page 466 as meaning:

"A power or right conferred upon them by law of acting in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. It connotes action taken in light or reason as applied to all facts and with view to rights of all parties in the action while having

regard for what is right and equitable under all circumstances and law." (p. 1350 C)

BAIL - Criteria - Court should follow

2. The criteria to be followed in taking a decision in cases of this nature as laid down by this court include:

- (i) the nature of the charge;
- (ii) the strength of the evidence which supports the charge;
- (iii) the gravity of the punishment in the event of conviction;
- (iv) the previous criminal record of the accused, if any;
- (v) the probability that the accused may not surrender himself for trial;
- (vi) the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- (vii) the likelihood of further charge being brought against the accused; and
- (x) the necessity to procure medical or social report pending final disposal of the case. (p. 1350 E)

COURTS - Discretion - Judicial officer

3. It follows, therefore, that a judicial officer saddled with the responsibility of exercising a discretion is required to arrive at the decision in every case or situation based on the facts placed before him in the very case and apply the applicable law. His decision is therefore likely to vary from case to case since the circumstances in each case may vary. ¹The question of stereotype or strict application of the rule of judicial precedent would not be of importance. (p. 1351 B)

Bail - Discretion - Factual situation at time of arraignment

4. As at the time of their arrest, there was a wave of armed-robberies in the Jos area and the police told the court of the need to detain the appellants pending their efforts to arrest the remaining members of the gang of robbers terrorizing the area. This was the situation as at the time when the appellants were arraigned before the Chief Magistrate Court, Jos who ordered their detention in prison custody. ²It will therefore be totally out of place to say that the trial High Court who refused their application for bail failed to properly exercise its

judicial discretion judiciously and judicially having regard to the above facts presented to him.

Similarly, the court below could not be blamed for upholding the decision of the trial Court by dismissing the appellants' appeal. This is because there were no justifiable reasons placed before it to warrant querying or tampering with the trial Judge's exercised of his judicial discretion by refusing the application before him in the case. (p. 1351 E)

C Bail - Discretion - Shift in factual situation at appeal stage

5. The ruling of the High Court was delivered on 30th October, 2003, while the judgment of the Court of Appeal was delivered on 8th December, 2004. On 13th December, 2007, when this appeal came up for hearing in this court, the order of the learned trial Judge made on 30th October, 2003, that the police should step up their investigation into the case and charge the appellants before the High Court forthwith, had not been complied with. This is because we were told that the appellants were still being remanded in prison custody on the order of the Jos Chief Magistrate. The flagrant breach of that order on the part of the Police has given credence to the averment in paragraph 3 (g) of the affidavit in support of the appellants' application where it is averred:

"That the respondent is not willing to prosecute the applicants. That the respondent only wants the applicants to be detained in prison custody without prosecution."

The disclosure that the appellants are yet to be arraigned before the High Court since their arrest in October, 2002, is totally unacceptable and cannot be justified under the guise that the police are yet to complete their investigations.

In the result, there is absolute justification in not allowing the continued detention in prison custody of the appellants as ordered by the Jos Magistrate Court. The appeal is therefore allowed. (p. 1352 A)

NOTABLE POINTS OF INTEREST

H TOBI JSC

1. Bail - Purpose of - Nature - Criteria to examine

The right of bail, a constitutional right, is contractual in nature. The

effect of granting bail is not to set the accused free for all times in the criminal process but to release him from the custody of the law and to entrust him to appear at his trial at a specific time and place. The object of bail pending trial is to grant pre-trial freedom to an accused whose appearance in court can be compelled by a financial sanction in the form of money bail. The freedom is temporary in the sense that it lasts only for the period of the trial. It stops on conviction of the accused. It also stops on acquittal of the accused.

The contractual nature of bail is provided for in section 345 of the Criminal Procedure Code. The section provides that before any person is released on bail, he must execute a bond for such sum of money as determined by the police or the court on the condition that such a person must attend at the time and place mentioned therein until otherwise directed. And if the person is released on bail, the sureties must execute the same or another bond or other bonds containing conditions to the same effect. See generally Local Government Police v. Abiodun (1958) WRNLR 212.

The most important consideration in the bail decision is the determination of what criteria the court should use or invoke in granting or refusing bail. The bailability of the accused depends largely upon the weight the court attaches to one or several of the criteria open to it in any given case. The determination of the criteria is quite important because the liberty of the individual stands or falls by the decision of the court. In performing the judicial function, the court wields a very extensive discretionary power, which must be exercised judicially and judiciously.

In exercising its discretion, the court is bound to examine the evidence before it without considering any extraneous matter. The court cannot exercise its whims indiscriminately. Similarly, there is no room for the court to express its sentiments. It is a hard matter of law, facts and circumstances which the court considers without being emotional, sensitive or sentimental.

The general criteria for granting bail are:

(a) the availability of the accused to stand trial.

(b) The nature and gravity of the offence.

(c) The likelihood of the accused committing offence while on bail.

(d) The criminal antecedents of the accused.

(e) The likelihood of the accused interfering with the course of justice.

The above general criteria apart, the criteria for granting pre-trial bail or bail by trial court include:

- B (a) Likelihood of further charge being brought.
 (b) The probability of guilt.
 (c) Detention for the protection of the accused.
 (d) The necessity to procure medical or social report pending
 C a final disposal of the case. (p. 1355 C)

2. Affidavit opposing bail need not be frivolous

D Both counsel understandably took opposing views on the "useful statements" deposition in the counter-affidavit. While counsel for the appellants insisted on the document in which the "useful statements" were made, counsel for the respondent argued that a statement need not necessarily be in a document. Curiously, counsel did not tell this court what format or content the useful statements took. Were they made orally?

E Learned counsel for the respondent in his argument relied on the First Information Report as basis for the appellants committing the offence. This to me, is quite on the joking side. It is not a serious submission. The First Information Report as the name implies, is just a Report that an offence is committed. It is no more than a charge
 F in the Southern States. A charge is an allegation or accusation of crime. It is not tantamount to proof of evidence that the crime was committed or likely to have been committed.

G I go along with the submission of learned counsel for the appellants that the so-called useful statements if they exist, are official documents which ought to have been deposed to in the counter-affidavit. It is the general principle of law that where there is a document, oral evidence is inadmissible. The document must be produced. I am also with learned counsel for the appellants when he urged this court to invoke section 149(d) of the Evidence Act, which is to the effect that the respondent failed or refused to produce the so-called
 H useful statements because if they were produced, they would have been unfavourable to him. I very much doubt the existence of the

so-called useful statements. If they existed the police will be the first to depose to them, with all the alacrity. (pp. 1361 F/1362 B)

3. Need for proof of evidence before a murder charge

B Murder is a capital offence; a most heinous offence. Therefore before an accused is charged with murder, there must be sufficient materials by way of proof of evidence to justify and back up the offence. The court should be able to see at a mere glance of the proof of evidence that the accused is properly charged of the offence. I must say that at this stage the consideration is not whether the accused will be
 C convicted of the offence of murder but whether a prima facie case is made out on the proof of evidence that the accused is properly charged of the offence. If the offence of murder is camouflaged like a smoke-screen to deceive the court to punish an innocent person, the court has the competence to remove the veil and decide accord-
 D ingly. (p. 1362 G)

4. What the doctrine of judicial precedent implies

E Under the doctrine of precedent, decisions of superior courts are binding on inferior courts. In the hierarchy of the court system in Nigeria, decisions of the Supreme Court are binding on all other courts. Next in the hierarchy is the Court of Appeal. Decisions of that court are binding on all other courts. I can still go further. The next in the hierarchy is the High Court. Decisions of the High Courts are
 F binding on all other Courts, including Magistrate Courts, Area Courts and Customary Courts. I will not deal with hierarchy in the Sharia Court system because Sharia is not involved here.

G What is binding on a Judge's decision as an authority is the principle upon which the case was decided. That is the ratio decidendi; not the obiter dictum. ³There are however instances when an obiter dictum of the Supreme Court could be binding on inferior courts. We are not there and so I will not go there. (p. 1363 B)

5. Bail - High Court was wrong in not following Court of Appeal's decision

H With the greatest respect to Damulak, J., he got it completely wrong. Apart from the fact that by his refusal to follow Anaekwe, he has

thrown in the dust bin the well established principles of stare decisis, the reasoning which resulted in his failure to follow the decision is faulty and wrong. It is clear from his opening sentence that the case is not distinguishable from *Anaekwe*, when he said: "In the instant case, there is no proof of evidence exhibited or annexed to the application." That was the position in *Anaekwe* and he had no choice than to follow that decision, his personal decision that the decision was wrong, notwithstanding. *Anaekwe*, is a decision of the Court of Appeal and he, *Damulak, J.*, was bound to follow it. I do not want to say that it was judicial impertinence and arrogance on his part. He had no power to do what he did. It is a pity that he did what he did. I will say no more. (p. 1364 A)

6. Stare decisis - Meaning - Degree of blames on lower courts

It is the general position of the law that a court is bound by its own decision.

When I say the above, I should not forget to complete the picture by saying also that a court of law is competent to review its own decision. For instance, where a court of law is faced with two conflicting decisions of its own, it can resolve it by taking one of the decisions. That is not the position here.

While the Court of Appeal properly positioned the decision in *Anaekwe*, the court, like the trial Judge, with respect got it wrong on the counter affidavit. The counter affidavit does not contain prima facie evidence of the appellant committing the offence. Paragraph 4 deposed to an uncompleted story in the sense that the so-called "useful statements" were not annexed to the affidavit. While I agree with the learned trial Judge that there is no material or meaningful distinction between *Anaekwe* and this case, I part ways with the Court of Appeal which saw distinction. But I cannot blame or fault the Court of Appeal in the way I have blamed or faulted the learned trial Judge because the Court of Appeal genuinely believed that a distinction existed between *Anaekwe* and this appeal. And so, it is not a wilful judicial conduct on the part of the Court of Appeal for not following *Anaekwe*. (pp. 1365 B/1366 A)

REPRESENTATION

Mr. A.A. Sangei (with him D.G. Hassan Esq., M.M. Maridola Esq., G. Garba Esq.), for the Appellant
Mr. Bola Olotu, for the Respondent

CASES REFERRED TO

Ani v. The State (2002) 1 NWLR (Pt. 747) 217
Ekwenugo v. Federal Republic of Nigeria (2001) 6 NWLR (Pt. 708) 9
Eyu v. The State (1988) 2 NWLR (Pt. 78) 607
Anaekwe v. C. O. P. (2004) 17 NWLR (Pt 901) 1
Musa v. C.O.P. (2004) 9 NWLR (Pt 879); 483
Bamayi v. The State (2001) FWLR (Pt, 46) 956 at 984
Oshinaya v. COP (2004) 17 NWLR (Pt. 901) 1
Musa v. COP (2004) 9 NWLR (Pt. 879) 483
Enwere v. COP (1993) 6 NWLR (Pt. 299) 333
Dawodu v. Danmole (1962) 1 All NLR 702
Fatola v. Mustafa (1985) 2 NWLR (Pt. 7) 438
Local Government Police v. Abiodun (1958) WRNLR 212

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 s. 36 (5)
Criminal Procedure Code s. 345
Evidence Act s. 149 (d), 111 (1) & 132 (1)

BOOKS REFERRED TO

Blacks Law Dictionary, 6th Edition, 1990, page 466
St. John's Law Review, page 64

LEAD JUDGMENT BY AKINTAN JSC

The two appellants were arrested and detained at Garga Police Station in Plateau State for armed robbery sometime in October, 2002. They were later transferred to Jos Police Headquarters and then to Jos C.I.D where they were detained for quite sometime before they were arraigned before the Chief Magistrate Court, Jos on 11th December, 2002. They then caused to be issued a summon to admit them to bail pending trial at the Jos High Court. The application was supported with a 5 paragraph affidavit.

Paragraph 3 of the supporting affidavit deposed to by one

Serah Ibrahim, Litigation Secretary, in the law firm of the appellants' counsel, read as follows:

"3. That I have been informed by the Applicants in Jos Prison on 9/3/2003, at 12.00 noon while briefing A.A Sangei Esq. of Counsel and verily believe their information to be true:

B (a) That the Applicants were arrested and detained at Garga Police Station for alleged offence of Armed Robbery sometimes in October, 2002.

C (b) That they were later transferred to Jos Police Headquarters and finally transferred to Jos C.I.D. where there were detained for a long time.

(c) That the Applicants did not commit the alleged offence on the F.I.R. A copy of the F.I.R. is hereby annexed and marked as Exhibit "A".

D (d) That the Applicants were subsequently arraigned before the Chief Magistrate Court 11, Jos on the 11/12/2002, after staying at C.I.D. Jos for a long time.

(e) That the Chief Magistrate Court 11, Jos ordered for the remand of the Applicants at the Jos Prison. The proceedings are annexed hereto and marked as exhibit "B".

E (f) That the Applicants have been in prison since 11/12/2002.

(g) That the Respondent is not willing to prosecute the applicants. That the Respondent only want the applicants to be detained in prison custody without prosecution.

F (h) That the Applicants will not jump bail, they will also appear in court for their case.

(i) That the Applicants will not interfere with proper police investigation in case any is remaining.

(j) That the Applicants will provide credible and reliable surety/sureties as this Honourable Court may order."

G The application was opposed and to that end, a 15 paragraph counter affidavit deposed to by one Joseph Chinda, an Assistant Superintendent of Police (ASP) attached to the Special Anti-Robbery Section, C.I.D Plateau State Police Command, Jos. The facts relied on are contained in paragraphs 1 to 11 of the counter-affidavit which read as follows:

H "1. That I am the sectional head of the team of Police Officers

Investigating the case of criminal conspiracy, Armed Robbery and culpable Homicide Offences that the applicants and other culprits now at large are standing trial for, by virtue of the said position I am very conversant with the facts deposed to herein.

2. That I have read through the summons to admit the applicants to bail pending their trial as well as supporting affidavit and I know as a matter of fact that paragraph 3 (c, g, h, i and j) are not true. B

3. That Police investigating into the case is still in progress with the view of arresting the cohorts of the applicants that are still at large, and that should the applicants be released on bail, they (applicants) will not only elope justice but that they may tamper with Police investigation. C

4. That the applicants have made useful statements to the Police to be effect that they are members of a gang of armed-robbers that have committed series of armed robberies within Dengi-Kanam and its environs and Plateau State in particular in the recent past as well as neighbouring Bauchi State. D

5. That working on the above information given to the Police by the applicants, the detectives have since gone into action with the view of arresting the remaining culprits from their hide cuts. E

6. That based on further clues discovered by the Police against the applicants and others into the case, they (Police) shall substitute the initial First Information Report (F.I.R) with new one to include the other offences that were not included in the old First Information Report (F.I.R) against the applicants. F

7. That this will be done as soon as the investigating Police Officers (I.P.Os) who are in possession of the case file diary return from their special assignments in connection with this very case that the application for the application for bail is been sought by the applicants. G

8. That the delay in the arraignment of the applicants before the court all these while is not unconnected with the constant strike actions by both the Federal Civil Servants and Plateau State in particular, Ministry of Justice Plateau State, Jos inclusive since 2002/2003 and of late, the recent Nigerian Labour Congress (N.L.C) as a result of the fuel prices that were increased by the Federal Government of H

Nigeria.

9. That the Ministry of Justice Plateau State, Jos who is to file the necessary application before the High Court for leave to prefer a charge against the applicants was not left out of the strike stated in paragraph 8 above and the current Nigerian Bar Association (N.B.A) Plateau State, Jos Branch law week.

10. That now the strike action have been suspended by both Federal and State Civil Servants, I verily believe that the Ministry of Justice Plateau State, Jos, will make the necessary application to the High Court of Justice Plateau State, Jos for leave to prefer a charge against the applicants.

11. That since the arrest and detention of the applicants there had been a rapid decline of robbery incident in Shuwaka Garga village of Dengi-Kanam Local Government Area of Plateau State and Plateau State in general."

The application thereafter came up for hearing before Damulak, J. sitting at Jos High Court. After taking submissions from learned counsel for the parties, delivered his reserved ruling on 20th October, 2003. The learned Judge, after reviewing all the issues raised in the matter, came to the conclusion that there was no merit in the application. He therefore dismissed it. He said as follows in the concluding paragraph of his said ruling:

"In the circumstances, I find that the application does not succeed and is hereby dismissed. It is ordered that investigation into the matter be stepped up and the applicants be charged before the High Court forthwith."

The appellants were dissatisfied with the ruling and their appeal to the Court of Appeal Jos Division was dismissed. This is an appeal from the judgment of the Court of Appeal (hereinafter referred to as Court below). The parties filed their briefs of argument in this court. The following two issues are formulated in the appellants' brief which were also adopted by the respondent in the respondent's brief:

"1. Whether or not the Court of Appeal exercised its discretion judicially and judiciously when it dismissed the appellants' appeal.

2. Whether or not the Court of Appeal was right when it upheld the decision of the trial court which refused to be bound by the decision of the Court of Appeal in *Anaekwe v. C. O. P. (2004)*

17 NWLR (Pt 901) 1; and *Musa v. C.O.P. (2004) 9 NWLR (Pt 879); 483.*"

It is submitted in the appellants' Issue 1 that the learned Justices of the Court below were in error when they affirmed the decision of the trial High Court which is said not to have been exercised judicially and judiciously having regard to the circumstances of the case as depicted by the depositions of the parties. The court below is specifically accused of disregarding the appellants' right to presumption of innocence as envisaged by Section 36(5) of the 1999 Constitution. It is further submitted that the applicants having deposed to specific facts in paragraph 3 (c) to (k) which facts are not denied, the court below is said to be in error in dismissing the appeal.

It is submitted in the appellants' Issue 2 that the court below was in error when it affirmed the decision of the trial court which refused to be bound by the decisions of the Court of Appeal in some named cases where such applications were granted. Particular reference was made to the case of *Oshinayo v. Commissioner of Police (2004) 17 NWLR (Pt. 901) 1*, which was a case involving armed robbery where bail was granted to the accused person.

It is submitted in reply, in the respondent's brief that the criteria that should guide the courts in deciding whether to grant or refuse an application for bail are well laid down by this court in numerous decisions of this court, particularly in *Dokubo-Asari v. Federal Republic of Nigeria (2007) All FWLR (Pt. 375) 558; at 572; and Bamayi v. The State (2001) FWLR (Pt. 46) 956 at 984*. It is also argued that the bailability of an accused depend largely on the weight the judge attached to one or several of the criteria open to him in any given case. The court below in this case is said to have exercised its discretion judicially and judiciously when it dismissed the appellants' appeal having regard to the facts tendered in the case.

It is further submitted that the presumption of innocence does not make the grant of bail automatic since 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 said to be the existence of substantial ground for the belief that he would do so.

It is submitted in reply on Issue 2 that since the issue of grant

of refusal of bail is a discretionary matter, previous decisions are not of much value. They are therefore said not to be binding but can only offer broad guidelines as each exercise of discretion depends on the facts of each case.

The question to be resolved in this appeal is whether the Court of Appeal was right in its decision to dismiss the appeal before it and affirming the order of the trial High Court by which the appellants' application for bail was refused. It is not in doubt that the decision whether to grant or refuse an application for bail involves exercise of judicial discretion in every case. The word "discretion" when applied to public functionaries, a term which includes judicial officers, is defined in Black Law Dictionary, 6th edition, 1990, page 466 as meaning:

"A power or right conferred upon them by law of acting in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. It connotes action taken in light or reason as applied to all facts and with view to rights of all parties in the action while having regard for what is right and equitable under all circumstances and law."

The criteria to be followed in taking a decision in cases of this nature as laid down by this court include:

- (i) the nature of the charge;
- (ii) the strength of the evidence which supports the charge;
- (iii) the gravity of the punishment in the event of conviction;
- (iv) the previous criminal record of the accused, if any;
- (v) the probability that the accused may not surrender himself for trial;
- (vi) the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- (vii) the likelihood of further charge being brought against the accused; and
- (x) the necessity to procure medical or social report pending final disposal of the case.

See Bamaiyi v. The State (2001) 8 NWLR (Pt. 715) 270; Dokubo-Asari v. Federal Republic of Nigeria (2007) All FWLR (Pt. 375) 558; Abacha v. The State (2002) 5 NWLR (Pt. 761) 638; Ani v. The

State (2002) 1 NWLR (Pt. 747) 217; Ekwenugo v. Federal Republic of Nigeria (2001) 6 NWLR (Pt. 708) 9; and Eyu v. The State (1988) 2 NWLR (Pt. 78) 607.

It follows, therefore, that a judicial officer saddled with the responsibility of exercising a discretion is required to arrive at the decision in every case or situation based on the facts placed before him in the very case and apply the applicable law. His decision is therefore likely to vary from case to case since the circumstances in each case may vary. ¹The question of stereotype or strict application of the rule of judicial precedent would not be of importance.

Thus from the facts of this case as set out in the affidavit evidence filed by the parties, the appellants were first arrested and detained for armed-robbery sometime in October, 2002. As at the time of their arrest, there was a wave of armed-robberies in the Jos area and the police told the court of the need to detain the appellants pending their efforts to arrest the remaining members of the gang of robbers terrorizing the area. This was the situation as at the time when the appellants were arraigned before the Chief Magistrate Court, Jos who ordered their detention in prison custody. ²It will therefore be totally out of place to say that the trial High Court who refused their application for bail failed to properly exercise its judicial discretion judiciously and judicially having regard to the above facts presented to him.

Similarly, the court below could not be blamed for upholding the decision of the trial Court by dismissing the appellants' appeal. This is because there were no justifiable reasons placed before it to warrant querying or tampering with the trial Judge's exercised of his judicial discretion by refusing the application before him in the case. The learned trial Judge went further when he ordered in the concluding paragraph of his ruling that: "investigation into the matter be stepped up and the applicants be charged before High Court forthwith."

The ruling of the High Court was delivered on 30th October, 2003, while the judgment of the Court of Appeal was delivered on 8th December, 2004. On 13th December, 2007, when this appeal came up for hearing in this court, the order of the learned trial Judge made on 30th October, 2003, that the police should step up their investigation into the case and charge the appellants before the High

Court forthwith, had not been complied with. This is because we were told that the appellants were still being remanded in prison custody on the order of the Jos Chief Magistrate. The flagrant breach of that order on the part of the Police has given credence to the averment in paragraph 3 (g) of the affidavit in support of the appellants' application where it is averred:

"That the respondent is not willing to prosecute the applicants. That the respondent only wants the applicants to be detained in prison custody without prosecution."

The disclosure that the appellants are yet to be arraigned before the High Court since their arrest in October, 2002, is totally unacceptable and cannot be justified under the guise that the police are yet to complete their investigations.

In the result, there is absolute justification in not allowing the continued detention in prison custody of the appellants as ordered by the Jos Magistrate Court. The appeal is therefore allowed. It is hereby ordered that the appellants be allowed on bail each in the sum of N200,000 with two sureties each in the same amount.

The sureties are to be resident in Jos area and supply proof of ownership of residence property in the Jos area.

TOBI JSC

The appellants were arrested in connection with the attack on Alhaji Hassan Madugu and his family with cutlasses and sticks by inflicting injuries on the head of Alhaji Hassan Madugu. There was also an allegation that the appellants made away with N1.5 million cash. They were arraigned before a Chief Magistrate, Jos on 11th December, 2002. The appellants applied for bail pending trial before the High Court. The learned trial Judge dismissed the application. He said in the last two paragraphs of his Ruling at page 24 of the Record:

"In the case, there is no proof of evidence exhibited or annexed to the application. Can that per se tantamount the grant of bail to an accused person facing the charge of armed robbery? I do not think so, more so that the appellants did not deny the contention in the counter-affidavit of the respondent. The averments in the counter-affidavit are rather serious considering the rampant occurrence

of incidents of armed robbery in this part of the country particularly in Kanam area. In view of the magnitude of the offence alleged the severity of the punishment and the rampant occurrence of the crime coupled with the fact that investigation is still in progress and the failure of the applicants to counter the averments of the respondent, my discretion is in favour of refusing rather than granting the application. In the circumstances I find the application does not succeed and is hereby dismissed. It is ordered that investigation into the matter be stepped up and the applicants be charged before the High Court, forthwith."

An appeal to the Court of Appeal failed. That court dismissed the appeal. Quoting part of the above statement of the learned trial Judge, the Court of Appeal said at page 63 of the Record:

"I agree with the learned trial Judge. I would in the circumstances also resolve Issue No. 2 against the Appellants and also dismiss grounds 2 and 5 of the grounds of appeal from which the issue was distilled. In the final analysis, this appeal fails and it is hereby dismissed, being without merit. The Ruling of Damulak, J. delivered on 30th October, 2002 is therefore affirmed."

Dissatisfied, the appellants have come to the Supreme Court. Briefs were filed and duly exchanged. The appellants formulated the following issues for determination:

"1. Whether or not the Court of Appeal exercised its discretion judicially and judiciously when it dismissed the appellants' appeal (distilled from Grounds 1, 3, 5 and 6).

2. Whether or not the Court of Appeal was right when it upheld the decision of the Trial Court which refused to be bound by the decisions of the Court of Appeal in *Anaekwe v. COP* (1996) 3 NWLR (Pt. 436) 320; *Oshinaya v. COP* (2004) 17 NWLR (Pt. 901) 1 and *Musa v. COP* (2004) 9 NWLR (Pt. 879) 483 (distilled from Grounds 2 and 4)."

Respondent adopted the above issues formulated by the appellants. Learned counsel for the appellants, Mr. A. A. Sangei, submitted on issue No 1, that the Court of Appeal was in error by affirming the decision of the trial Court, a decision which contravened the appellants' right to presumption of innocence in the Constitution. He vehemently attacked the allegation by the respondent that the

appellants made useful statements in the matter. He argued that the useful statements alleged by the respondent, being official documents and proceedings, the originals or certified true copies ought to have been produced. He cited *Ezemba v. Ibeneme* (2004) 14 (Pt. 894) 617; *Fashanu v. Adekoya* (1974) 6 SC 83; *Kimdey v. Military Governor of Gongola State* (1988) 2 NWLR (Pt. 77) 445; *Agagu v. Dawodu* (1990) 7 NWLR (Pt. 160) 56 and sections 111(1) and 132(1) of the Evidence Act. He also cited section 149(d) of the Evidence Act on the failure of the respondent to place before the court the alleged useful statements.

Taking Issue No. 2, learned counsel submitted that the Court of Appeal was in error when it affirmed the decision of the trial court which refused to be bound by the decisions of that court in *Anaekwe v. Commissioner of Police*, supra; *Musa v. Commissioner of Police* (2004) 9 NWLR (Pt. 879) 483; *Oshinaya v. Commissioner of Police* (2004) 17 NWLR (Pt. 901) 1 and *Ogueri v. The State* (2002) 2 CLRN 14. He argued that the Court of Appeal was bound by its previous decisions. He urged the court to allow the appeal.

Learned counsel for the respondent, Mr. Bola Olotu, enumerated ten criteria for granting bail and contended that the bail ability of an accused depends upon the weight a Judge attaches to one or several of the criteria open to him in any given case. He cited *Asari v. Federal Republic of Nigeria* (2007) FWLR (Pt. 375) 558 and *Bamaiyi v. The State* (2001) FWLR (Pt. 46) 956. He submitted that the Court of Appeal exercised its discretion judicially and judiciously and did not disregard the appellants' right to presumption of innocence.

Reacting to the submission of learned counsel for the appellants on the issue of useful statements made by the appellants, counsel argued that a statement need not necessarily be in a document and there is nothing from the respondent suggesting that the statements were in a document to necessitate their being exhibited.

On issue No. 2, learned counsel submitted that the issue of grant or refusal of bail is a discretionary matter and in matters of discretion, previous decisions are not of much value, thus not binding but can only offer broad guidelines, as each exercise of discretion depends on the facts of each case. He cited *Asari v. Federal Republic of Nigeria*, supra and *Abacha v. The State* (2002) FWLR (Pt. 98) 863.

He urged the court to dismiss the appeal.

The right of bail, a constitutional right, is contractual in nature. The effect of granting bail is not to set the accused free for all times in the criminal process but to release him from the custody of the law and to entrust him to appear at his trial at a specific time and place. The object of bail pending trial is to grant pre-trial freedom to an accused whose appearance in court can be compelled by a financial sanction in the form of money bail. The freedom is temporary in the sense that it lasts only for the period of the trial. It stops on conviction of the accused. It also stops on acquittal of the accused.

The contractual nature of bail is provided for in section 345 of the Criminal Procedure Code. The section provides that before any person is released on bail, he must execute a bond for such sum of money as determined by the police or the court on the condition that such a person must attend at the time and place mentioned therein until otherwise directed. And if the person is released on bail, the sureties must execute the same or another bond or other bonds containing conditions to the same effect. See generally *Local Government Police v. Abiodun* (1958) WRNLR 212.

The most important consideration in the bail decision is the determination of what criteria the court should use or invoke in granting or refusing bail. The bailability of the accused depends largely upon the weight the court attaches to one or several of the criteria open to it in any given case. The determination of the criteria is quite important because the liberty of the individual stands or falls by the decision of the court. In performing the judicial function, the court wields a very extensive discretionary power, which must be exercised judicially and judiciously.

In exercising its discretion, the court is bound to examine the evidence before it without considering any extraneous matter. The court cannot exercise its whims indiscriminately. Similarly, there is no room for the court to express its sentiments. It is a hard matter of law, facts and circumstances which the court considers without being emotional, sensitive or sentimental.

The general criteria for granting bail are:

- (a) the availability of the accused to stand trial.
- (b) The nature and gravity of the offence.
- (c) The likelihood of the accused committing offence while

on bail.

(d) The criminal antecedents of the accused.

(e) The likelihood of the accused interfering with the course of justice.

B The above general criteria apart, the criteria for granting pre-trial bail or bail by trial court include

(a) Likelihood of further charge being brought.

(b) The probability of guilt.

(c) Detention for the protection of the accused.

C (d) The necessity to procure medical or social report pending a final disposal of the case.

I will not consider all the above criteria. I will only deal with the two which are relevant to this appeal. They are the availability of the accused to stand trial and the nature and gravity of the offence. First, the availability of the accused to take his trial. The main function of bail is to ensure the presence of the accused at the trial. That is the D cynosure of all the criteria. It is the centre-piece. And so this criterion is regarded as not only the omnibus ground for granting or refusing bail, but the most important.

E The second criterion, as I have mentioned, is the nature and gravity of the offence, it is the belief of the law that the more serious the offence, the greater the incentive to jump bail, although this is not invariably or for all times true. For instance, an accused person charged with murder, as in this case, is more likely to flee from the F jurisdiction of the court than one charged with affray. The distinction between capital offences and non-capital offences in one way "crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the defendant absconding." See "Notes: Judicial Discretion in Granting Bail", (1952) 27 St. John's Law Review, page 64. The above is subject to the qualification that G there may be less serious offence in which the court may refuse bail, because of its nature.

H I should now consider three cases where bail was granted in murder offences. In Enwere v. Commissioner of Police (1993) 6 NWLR (Pt. 299) 333, the Court of Appeal granted a murder accused bail on the ground that the prosecution did not bring to the notice of the court facts on the alleged murder. Onu, JCA (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 the 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."

C In Chinemelu v. Commissioner of Police (1995) 4 NWLR (Pt. 390) 467, the Court of Appeal also granted bail pending trial to a murder accused, in the light of the special circumstances of the case. And the special circumstances were the absence or lack of facts justifying the continued detention of the accused. Ejiwunmi, JCA (as he then was) in his concurring judgment said at page 489:

"The only evidence about the case before the lower court and this court remains the affidavit filed by the inspector involved with the investigation of this case. And he only made references to what he considered to be the eye witnesses of the offence for which the appellant stands charged. However, there is nothing that can be likened to a complete proof of evidence from the witnesses themselves. For the respondent to justify the continued detention of the appellant I think it is only right for the respondent to produce such evidence for the consideration of the court."

F Adamu, JCA, also provided a helping hand when he said at page 491:

"In the instant case, the appellant had presented sufficient averment in the affidavit evidence at the lower court to take care of the first condition by showing that he would neither prejudice the investigation (or) prosecution of the case nor would he escape justice by jumping bail. It is also clear both from the records and from the briefs of counsel in this appeal that no proof or evidence or information has up till now been filed against the appellant at the lower court It is true that bail pending trial is not normally granted ex-debito justitiae where the offence is a capital offence as in the present case. However special circumstances may exist to warrant the grant of bail pending trial in a capital offence as in Enwere v. COP (1993) 6

NWLR (Pt. 299) 333. The special circumstance in the present case is the prosecution's delay or failure to prepare the proof of evidence or to file an information against him for the alleged murder."

In *Anaekwe v. Commissioner of Police* (1996) 3 NWLR (Pt. 436) 320, the Court of Appeal also granted bail pending trial to a murder accused on the same ground as in *Enwere and Chinemelu*. In *Anaekwe*, I said at pages 331 to 333:

"It is common ground in this appeal that the learned trial Judge heard 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 How can a court process filed after the Notice of Appeal 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. 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 law system, there is nothing magical in the word *per se*. But there is so much to fear in the offence 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 a court not to grant bail is to proffer 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. In the light of the foregoing, I have no alternative than to set aside the 21st December, 1994 Ruling of the lower court. I admit the appellant to bail upon the following conditions..."

Akintan, JCA (as he then was) put the position better in the case at page 334:

"The main question raised in this appeal is whether from the facts of the case, the learned Judge could be said to have exercised his discretion in the matter judiciously. A court before such an application

is made is expected to examine the evidence placed before it and ensure that there is sufficient evidence, from the proof of evidence produced by the prosecution in opposing the application, to support the charge of murder preferred against the applicant. The mere fact of just reading from the charge sheet that the offence for which the applicant was charged was that of murder is just not enough to warrant refusal of the application. The duty is on the Judge entertaining such an application for bail to ensure that the applicant's continued detention is well supported and justified by the evidence disclosed in the proof of evidence placed before him. There is nothing magical in the word 'murder charge' to justify failure of the court from enquiring if the charge was not cooked up merely to ensure the detention of an innocent person. A court that fails to look into the facts relied on in support of such charge cannot be said to have exercised its discretion judiciously."

I have gone this length because of the failure, or better, refusal of the High Court and the Court of Appeal to follow the above decisions. In the affidavit in support of the application for bail pending trial, Sarah Ibrahim deposed *inter alia*:

"That I have been informed by the applicants in Jos prison on 9/3/2003 at 12.00 noon while briefing A. A. Sangei, Esq of counsel and verily believe their information to be true:

a. That the applicants were arrested and detained at Garga Police Station for alleged offence of armed robbery sometimes in October, 2002.

b. That they were later transferred to Jos Police Headquarters and finally transferred to Jos CID where they were detained for a long time.

c. That the applicants did not commit the alleged offence on the FIR. A copy of the FiR is hereby annexed and marked as Exhibit 'A'."

In his counter affidavit, Joseph Chinda, Assistant Superintendent of Police, deposed *inter alia*:

"2. That I have read through the summons to admit the applicants to bail pending their trial as well as the supporting affidavit and I know as a matter of fact that paragraphs 3 (c, g, h, i and j) are not true.

3. That Police investigation into the case is still in progress

with the view of arresting the co-accused of the applicants that are still at large, and that should the applicants be released on bail, they (applicants) will not only elope justice but that they may tamper with Police investigation.

B 4. That the applicants have made useful statements to the Police to the effect that they are members of a gang of armed robbers that have committed series of armed robberies within Dengi-Kanam and its environs and Plateau State in particular in the recent past as well as neighbouring Bauchi State.

C 5. That working on the above information given to the Police by the applicants, the detectives have since gone into action with the view of arresting the remaining culprits from their hideouts.

D 6. That based on further clues discovered by the Police against the applicants and others into the case, they (Police) shall substitute the initial First Information Report (FIR) with new one to include the other offences that were not included in the old First Information Report (FIR) against the applicants.

E 7. That this will be done as soon as the investigating Police officers (IPOs) who are in possession of this case file diary return from their special assignments in connection with this very case that the application for bail is been sought by the applicants.

F 8. That the delay in the arraignment of the applicants before the court all these while is not unconnected with the constant strike actions by both the Federal Civil Servants and Plateau State in particular, Ministry of Justice Plateau State, Jos inclusive since 2002/2003 and of late, the recent Nigerian Labour Congress (NLC) as a result of the fuel prices that were increased by the Federal Government of Nigeria.

G 9. That the Ministry of Justice Plateau State, Jos, who is to file the necessary application before the High Court for leave to prefer a charge against the applicants was not left out of the strike stated in paragraph 8 above and the current Nigerian Bar Association (NBA) Plateau State, Jos Branch law week.

H 10. That now the strike action have been suspended by both Federal and State Civil Servants, I verily believe that the Ministry of Justice Plateau State, Jos, will make the necessary application to the High Court of Justice Plateau State, Jos for leave to prefer a charge

against the applicants."

It is clear to me from the counter-affidavit that the respondent rushed to court without any proof of evidence on the part of the prosecution. This is clear from paragraphs 3, 5, 6, 7 and 9 of the counter-affidavit. As both counsels have dealt with the deposition in paragraph 4 of the counter-affidavit, I will take it here. That paragraph appears to be the only paragraph in the affidavit that the respondent seemed to rely upon. B

The paragraph deposed that the applicants made "useful statements to the Police to the effect that they are members of gang of armed robbers that have committed series of armed robberies within Dengi-Danam and its environs and Plateau State in particular in the recent past as well as neighbouring Bauchi State." Both counsel understandably took opposing views on the "useful statements" deposition in the counter-affidavit. While counsel for the appellants insisted on the document in which the "useful statements" were made, counsel for the respondent argued that a statement need not necessarily be in a document. Curiously, counsel did not tell this court what format or content the useful statements took. Were they made orally? If I know the Police tradition and the Police workings in the interrogation room (and I know a bit of it) statements of accused persons are made and taken in writing. They are not made orally. The police will never accept an oral statement from a suspect or an accused. In my view, learned counsel decided to play with words and I am not ready for that. No, not at all. The "useful statements" expression is a regular police phraseology which by now is a cliché or an aphorism and does not in most cases of usage serve any useful practical purpose and utilitarian value, as it relates to the unfriendly activities of the Police in the interrogation room. In most cases, the expression is designed to capture the sympathy and co-operation of the Judges who are by now wiser and their wisdom grow everyday in their experience with the Police. C D E F G

Learned counsel for the respondent in his argument relied on the First Information Report as basis for the appellants committing the offence. This to me, is quite on the joking side. It is not a serious submission. The First Information Report as the name implies, is just a Report that an offence is committed. It is no more than a charge in the Southern States. A charge is an allegation or accusation of H

crime. It is not tantamount to proof of evidence that the crime was committed or likely to have been committed.

I go along with the submission of learned counsel for the appellants that the so-called useful statements if they exist, are official documents which ought to have been deposed to in the counter-affidavit. It is the general principle of law that where there is a document, oral evidence is inadmissible. The document must be produced. I am also with learned counsel for the appellants when he urged this court to invoke section 149(d) of the Evidence Act, which is to the effect that the respondent failed or refused to produce the so-called useful statements because if they were produced, they would have been unfavourable to him. I very much doubt the existence of the so-called useful statements. If they existed the police will be the first to depose to them, with all the alacrity.

Murder is a capital offence; a most heinous offence. Therefore before an accused is charged with murder, there must be sufficient materials by way of proof of evidence to justify and back up the offence. The court should be able to see at a mere glance of the proof of evidence that the accused is properly charged of the offence. I must say that at this stage the consideration is not whether the accused will be convicted of the offence of murder but whether a prima facie case is made out on the proof of evidence that the accused is properly charged of the offence. If the offence of murder is camouflaged like a smoke-screen to deceive the court to punish an innocent person, the court has the competence to remove the veil and decide accordingly. I am unable to determine that now as the proceedings are still at the level of granting or refusing bail. What is more, this court is not competent to decide that at this stage.

And that takes me to issue No. 2. Under the doctrine of precedent, decisions of superior courts are binding on inferior courts. In the hierarchy of the court system in Nigeria, decisions of the Supreme Court are binding on all other courts. Next in the hierarchy is the Court of Appeal. Decisions of that court are binding on all other courts. I can still go further. The next in the hierarchy is the High Court. Decisions of the High Courts are binding on all other Courts, including Magistrate Courts, Area Courts and Customary Courts. I will not deal with hierarchy in the Sharia Court system because Sharia

is not involved here.

What is binding on a Judge's decision as an authority is the principle upon which the case was decided. That is the ratio decidendi; not the obiter dictum. ³There are however instances when an obiter dictum of the Supreme Court could be binding on inferior courts. We are not there and so I will not go there.

It is the complaint of the appellants that the learned trial Judge refused to be bound by the decisions of the Court of Appeal examined above. The learned trial Judge, Damulak, J., after quoting what I said above in *Anaekwe*, reacted to the judgment as follows at page 24 of the Record:

"In the instant case, there is no proof of evidence exhibited or annexed to the application. Can that per se tantamount to the grant of bail to an Accused person facing the charge of Armed Robbery? I do not think so more so that the Appellant did not deny the contention in the Counter-Affidavit of the Respondent. The averments in the Counter-Affidavit are rather serious considering the rampant occurrence of incidents of Armed Robbery in this part of the country particularly in Kanam Area. In view of the magnitude of the offence alleged the severity of the Punishment and the rampant occurrence of the crime coupled with the fact that investigation is still in progress and the failure of the Applicants to counter the averments of the Respondent, my discretion is in favour of refusing rather than granting the application."

With the greatest respect to Damulak, J., he got it completely wrong. Apart from the fact that by his refusal to follow *Anaekwe*, he has thrown in the dust bin the well established principles of stare decisis, the reasoning which resulted in his failure to follow the decision is faulty and wrong. It is clear from his opening sentence that the case is not distinguishable from *Anaekwe*, when he said: "In the instant case, there is no proof of evidence exhibited or annexed to the application." That was the position in *Anaekwe* and he had no choice than to follow that decision, his personal decision that the decision was wrong, notwithstanding. *Anaekwe*, is a decision of the Court of Appeal and he, Damulak, J., was bound to follow it. I do not want to say that it was judicial impertinence and arrogance on his part. He had no power to do what he did. It is a pity that he did

what he did. I will say no more.

I now take his reasoning for not following Anaekwe. First, the counter-affidavit. In his view, the averments in the counter-affidavit "are rather serious considering the rampant occurrence of incidents of Armed Robbery in this part of the country ..." With respect, there is not much in the counter-affidavit when applied to the legal position in Anaekwe and the group of cases. The only averment which should have assisted the respondent is paragraph 4 thereof; a paragraph I have examined above, in the light of the submission of both counsel in this appeal. I do not want to repeat myself. The so-called useful statements deposed to in paragraph 4 of the counter-affidavit were not before Damulak, J.

Another reason the learned trial Judge gave for not following Anaekwe is the rampant occurrence of incidents of armed robbery in the part of the country. With respect, that is clear sentiment which is not available to Damulak, J., the Judge that he is. The law goes against sentiments in judgments because that can easily lead to bias, or land the Judge to bias; a position that is forbidden by a Judge; a no-go area. It is good law that Judges should not give judgments based on sentiments or on their whims and caprice but on the law and the law alone. And the law in this appeal was provided for in the cases I have examined above. I think they number three. Could the Court of Appeal have gone wrong in all the three cases that Damulak, J. ought not to have followed in his mind and brain? It beats me hollow and hands down, if trial Judges fail or refuse to follow decisions of appellate courts in the context and spirit of stare decisis, what right or moral courage do we have in the Judiciary to condemn parties, particularly the Government for not obeying court orders? Let somebody provide an answer for me.

I leave Damulak, J., and move to the decision of the Court of Appeal. It is the general position of the law that a court is bound by its own decision. In *Fatola v. Mustafa* (1985) 2 NWLR (Pt. 7) 438, the Court of Appeal held that it was bound to follow its own decision under the rules of stare decisis. Mohammed, JCA (as he then was) followed the earlier decision of the Court in *Olagbegi v. Attorney-General of Ondo State*, Suit No. FCA/B/82 delivered on 17/1/83 (Unreported). In *Dawodu v. Danmole* (1962) 1 All NLR 702,

the Federal Supreme Court held that it was "bound by its decision in *Douglas v. The Federal Public Trustees*. When I say the above, I should not forget to complete the picture by saying also that a court of law is competent to review its own decision. For instance, where a court of law is faced with two conflicting decisions of its own, it can resolve it by taking one of the decisions. That is not the position here. I only wanted to complete the picture and I drop it now that I have done so.

The Court of Appeal, unlike the learned trial Judge, made efforts to distinguish the decision of Anaekwe and the group of cases. Nzeako, JCA, in trying her hand on distinguishing the case, said at page 58 of the Record:

"The decision of the Court of Appeal to grant bail pending trial where the High Court had refused to do so, such as in Anaekwe's case, a murder case, is based on the absence of or insufficient evidence before the court below. In that case, Tobi, JCA (as he then was) identified insufficient probability of guilt on the part of the accused because there was no proof of evidence' before the court." The learned Justice of the Court of Appeal had earlier said on the same page:

"In this case there is in the affidavit evidence prima facie evidence of committing an offence and prospect of committing more offences."

While the Court of Appeal properly positioned the decision in Anaekwe, the court, like the trial Judge, with respect got it wrong on the counter affidavit. The counter affidavit does not contain prima facie evidence of the appellant committing the offence. Paragraph 4 deposed to an uncompleted story in the sense that the so-called "useful statements" were not annexed to the affidavit. While I agree with the learned trial Judge that there is no material or meaningful distinction between Anaekwe and this case, I part ways with the Court of Appeal which saw distinction. But I cannot blame or fault the Court of Appeal in the way I have blamed or faulted the learned trial Judge because the Court of Appeal genuinely believed that a distinction existed between Anaekwe and this appeal. And so, it is not a wilful judicial conduct on the part of the Court of Appeal for not following Anaekwe.

It is in the light of the foregoing and the more comprehensive reasons given by my learned brother, Akintan, JSC, that I too allow the appeal. The appellant who has been in pre-trial custody since 2002 is certainly entitled to bail in the peculiar circumstances of this case. I abide by the conditions for bail set out in the judgment of my learned brother.

MOHAMMED JSC

This criminal appeal is against the judgment of the Court of Appeal Jos Division which affirmed the decision of the High Court of Justice of Plateau State sitting in Jos refusing to release the Appellants on bail pending their trial. The Appellants were being accused or suspected of the offences of Armed Robbery and Murder and have been in custody since their arrest in October, 2002.

When the appeal was heard on 13th December, 2007, learned Counsel to the Respondent had no explanation whatsoever on whether or not the trial of the Appellants has commenced in the High Court where they ought to have been charged or any indication as to when the trial was likely to commence. In the light of this situation, I entirely agree with my learned brother Akintan, JSC in his lead judgment that this appeal is meritorious. Accordingly, I too allow the appeal, set aside the concurrent decisions of the Courts below and release the Appellants on bail pending their trial on the same conditions laid in the leading judgment.

TABAI JSC

I had a preview of the lead judgment of my learned brother Akintan JSC and I agree that there is merit in the appeal. The facts of the appeal are clearly set out in the leading judgment and I need not repeat them except such facts as are necessary to make my comments comprehensible.

The Appellants were alleged to have committed the offence of armed robbery. They were charged before a Chief Magistrate Court. This was on the 11th December 2002. They applied for bail pending trial at the High Court. The application was dated 27th May 2003. It was supported by an affidavit of 5 paragraphs. Paragraph 3 of the

said affidavit is material. In the said paragraph 3 it was deposed:

That I have been informed by the applicants in Jos prison on 9/3/2003 at 12.00 noon while briefing A.A. Sangei Esq., of counsel and I verily believe their information to be true.

(a) That the Applicants were arrested and detained at Garga Police Station for alleged offence of Armed Robbery sometimes in October 2002.

(b) That they were later transferred to Jos Police Headquarters and finally transferred to Jos C.I.D. where they were detained for a long time.

(c) That the Applicants did not commit the alleged offence on the F.I.R. A copy of the F.I.R. is hereby annexed and marked as Exhibit A.

(d) That the Applicants were subsequently arraigned before the Chief Magistrate Court II Jos on the 11/12/2003 after staying at C.I.D. Jos for a long time.

(e) That the Chief Magistrate Court II Jos ordered the remand of the Applicants at the Jos prison. The proceeding are annexed hereto and marked as Exhibit "B"

(f) The Applicants have been in prison since 11/12/2002.

(g) That the Respondent is not willing to prosecute the Applicants. That the Respondent only wants the Applicants to be detained in prison custody without prosecution.

(h) That the Applicants will not jump bail, they will also appear in court for their case.

(i) That the applicants will not interfere with proper police investigation in case any is remaining.

(j) That the Applicants will not commit any offence.

(k) That the Applicants will provide credible and reliable surety/sureties as this Honourable Court may order. The Respondent opposed the application and filed a 15 paragraph counter affidavit. Paragraphs 2-8 thereof are also material and I reproduce them.

(3) That Police Investigation into the case is still in progress with the view of arresting the co-cohorts of the Applicants that are still at large, and that should the applicants be released on bail they (Applicants) will not only elope justice but that they may temper with

Police investigation.

(4) That the Applicants have made useful statements to the Police to the effect that they are members of gang of armed robbers that have committed series of armed robbers within Dengi-Kanam and its environs and Plateau State in particular in the recent past as well as neighbouring Bauchi State.

(5) That working on the above information given to the Police by the Applicants, the detectives have since gone into action with the view of arresting the remaining culprits from their hide-outs.

(6) That based on the further clues discovered by the Police against the Applicants and others into the case they (police) shall substitute the initial First Information Report with the new ones to include the other offences that were not included in the old First Information Report against the Applicants.

(7) That this will be done as soon as the Investigating Police Officers (IPOS) who are in possession of this case file diary return from their special assignments in connection with this very case that the application for bail is being sought by the Applicants.

(8) That the delay in the arraignment of the Applicants before the court all these while is not unconnected with the constant strike actions by both the Federal Civil Servants and Plateau State in particular, Ministry of Justice Plateau State Jos inclusive since 2002/2003 and of late the recent Nigerian Labour Congress (NLC) as a result of the fuel prices that were increased by the Federal Government of Nigeria.

The most material and crucial disposition on behalf of the Applicants are in paragraphs 3 (c) (f) and (g) which I have reproduced above. They are to the effect that they did not commit the alleged robbery and that there is no proof of same in the First Information Report; that they have been in prison custody since 11/12/2002, that the Respondent were not willing to prosecute them and they only wanted to detain them without prosecuting them.

In order to defeat this application the Respondents have a duty for effectively counter these depositions of the Appellants. And the best evidence to demolish the Applicants assertion of innocence is the production of these useful statements by which they allegedly admitted being members of gang of robbers. The Respondents failed

to do this despite the fact that as at the time of the application in May 2003 they had spent about five months in prison custody.

The trial court however refused the application despite the absence of the so called useful statements. He reasoned that the Applicants had the burden of further proof that they did not make any useful statement admitting the offence. This reasoning was endorsed by the court below.

In my respectful view the Respondents had a duty to make the said useful statements referred to in paragraph 4 of the counter affidavit available in the First Information Report. It is the only evidence to effectively counter the Appellants assertion in paragraphs 3 (c) (f) and (g) of the affidavit in support of the application that the Respondent were not willing to prosecute them and that they only wanted to detain them in prison custody. In my view the application ought to have been granted.

For these reasons and the fuller reasons contained in the lead judgment of my learned brother Akintan, JSC., I shall also allow the appeal. Each of the Appellants is granted bail in the terms as contained in the lead judgment.

ADEREMI JSC

Briefly, the facts of this case are that the two appellants were arrested and detained at the Garga Police Station in Plateau State for armed robbery in October 2002. They remained in custody since that date. The application for bail was dismissed in a considered ruling delivered on the 20th October, 2003. The appeal against that ruling was equally dismissed by the court below. It is against the judgment of the court below that an appeal has come to this court. The main issue in this appeal is the determination of the exercise of discretionary power by the court. Judicial authorities are ad idem that appellate courts are always very reluctant to disturb decisions based on the exercise of discretionary power.

However, where injustice is seen to manifest itself in any decision founded on the exercise of discretion, the appellate court must readily intervene. The facts of this case demonstrate a clear manifestation of injustice. For the appellants not to be arraigned is a terrible case of

justice delayed and justice denied. No court, including the appellate court must fold its arms and allow this to continue unabated. It is for this little contribution but most especially for the comprehensive and lucid reasons in the leading judgment of my brother Akintan, JSC that I also agree that this appeal is meritorious. I allow it and I do subscribe to all the consequential orders contained in the leading judgment.

1 (pp. 1339 & 1351 D)

It is hoped that advocates would not misunderstand this relevant statement of the law as to wrongfully apply it to thwart the administration of justice. Let nobody be intimidated by citation of this statement by a counsel who may hide under it to urge that properly applicable judicial precedents be thrown to the dogs, merely because he wants his client's case to succeed by all means. Since justice means proper discretion judiciously and judicially applied, exercise of discretion is usual in most cases. This statement of law under consideration has not abolished application of judicial precedents during the exercise of judicial discretion. It simply said that stereotype or strict application of it would not be of importance, seeing that facts of cases do vary.

Thus, exercise of discretion that is on all fours with a judicial precedent demands that the rule of stare decisis be applied in following that precedent. Otherwise, justice may become a confused game that has no direction.

2 (pp. 1339 & 1351 F)

ABOUT HELD 4

We are at cross roads in knowing whether to take HELD 4 as a ratio decidendi or an obiter dictum. If it is an obiter, we would have highlighted it under NOTABLE POINTS OF INTEREST and not under HELD. The reason for Akintan JSC's lead decision is founded on his opinion that the two lower courts properly exercised their discretion in refusing bail at the time they did; seeing that there was a wave of armed robberies in Jos area at the time of their arrest and the police prayed the court to detain appellants pending their move to arrest other members of the gang of armed robbers. But that some other facts that arose over time such as non compliance with trial court's order to step up investigation and charge appellants before the high court forthwith, demand that the Supreme Court should exercise a different discretion in granting bail to the appellants. Statements of three justices in the panel, Tobi, Tabai and Aderemi, JJSC, tend to suggest different views with ratio 4. Though they felt the two lower courts wrongfully exercised their discretion in refusing the bail, they ended up expressing whole agreement with the reasons for the decision as contained in the lead judgment. This is our point of dilemma as to whether ratio 4 is a proper ratio or should be an obiter.

Could it be reasoned that because those Justices said in their concluding statements that they agreed with the more comprehensive reasons in the lead judgment, it is their own different opinions that remain obiter? Or can we take

all the opinions as ratio? Yet a deep scrutiny reveals that though the apex court unanimously granted bail to appellants, the majority opinion is that the lower courts exercised their discretions wrongfully in refusing bail. Tobi's own opinions that were clearly outlined have been highlighted under our NOTABLE POINTS column. Our humble view is that a Judge faced with facts similar to those of this case may be at liberty to rely on held 4, or the majority view that lower courts erred in refusing bail provided he justifies the basis for his preferred discretion, since "the question of stereotype or strict application of the rule of judicial precedent would not be of importance" (held 3). Again, if the opinions of Tobi JSC, are taken from the angle of the Court of Appeal authorities cited by him, those cases become ratio that should bind the lower courts. It is hoped that the Supreme Court would in a future judgment with similar facts clarify this issue by being more explicit. We need written reactions to this view expressed by us which we would publish subsequently.

ASPECT OF OUR LAW REPORTING STYLE

The reason we are into this held 4 conflict as reporters is because of an aspect of our style of law reporting which we desire to briefly point out for readers' judgment, so that if it be wrong, a better style may be suggested to us. Many years back, our oral discussion with Mohammed Bello CJN (rtd.), secured his lordship's approval of the style. We had seen past instances where cases cited by counsel based on some law reporters' HELD, received comments by their lordships that the ratio relied upon was not the decision of the Supreme Court in such cases. That is the reason for our adopting a style that may not mislead any as to the proper ratio decidendi in any judgment.

It is our view that what is to be taken as the decision of the Court is the lead judgment with which the majority of the Justices agree. That for the Court to have one voice and for certainty in following the principle of stare decisis, the ratio decidendi should be picked from the lead judgment alone. The basis of our picking ratio which we highlight under HELD (in the exact words of the Justice) is whether the statement comes within the issues for determination being considered by the Court. Then all other good reasons for the decision by other Justices in the Panel that are not a repetition of a holding are highlighted under NOTABLE POINTS OF INTERESTS, which are persuasive. Any notable statement even in the lead judgment that is not based on the issues for determination, and dissenting opinions are also highlighted under this column avoiding repetitions as well. If such statements are cited directly from the cases sometimes referred to by the Justice after making them, they may qualify as ratio and become binding. But if cited from the judgment where we highlighted them under NOTABLE POINTS, they remain obiter and merely persuasive, save where the reporter is mistaken in his assessment of what should come under HELD or NOTABLE POINTS. That is why the user of law reports should cite ratio based on his own proper assessment as to whether it flows from the issues and not just rely on the publisher's highlights that are meant to be a guide.

Thus, a reporting style that treats every notable statement/ratio as held would simply have highlighted the various reasons in the concurring judgments under HELD, in this Suleman case. To have done so would not raise the dilemma we had concerning ratio 4. But it would belittle the strong need for the Court to have one voice, so that application of the principles of judicial precedents be not obscured by any dent of uncertainty.

3 (pp. 1343 & 1363 D)

Black's Law Dictionary defines obiter dictum as "Words of an opinion entirely unnecessary for the decision of the case," etc., and ended with the phrase - "Such are not binding as precedent." His lordship's statement did not contradict this state of the law. He merely introduced an addition by stating that; "there are however, INSTANCES when an obiter dictum of the Supreme Court could be binding on inferior courts." Could it be that he wanted to say persuasively binding? In *Rosse v. A. C. B. Ltd.*, (1993) 8 NWLR (pt. 312) 382, Uwais JSC (as he then was) in his concurring Judgment said at p. 458 "My learned brother the Chief Justice of Nigeria has gone further in his judgment ... to hold that the decisions in *Kpema* and *Taylor* were obiter dicta and that they have, as such, no binding effect. I entirely agree that an obiter dictum of this Court is not binding on the court or indeed on the lower courts - See *American International Insurance Co. v. Ceekay Traders Ltd.*, (1981) 5 SC 81 at p. 110."

We think that the law should be one, so that a principle that binds an inferior court should bind even the superior court that stated it, for uniformity. We call for write-ups from members of the bar and the bench that will highlight such INSTANCES. But, shouldn't any such INSTANCE be seen as mistaken, in view of the meaning of that word, obiter dictum? We shall publish such articles received by us under our EDITORIAL COLUMN in subsequent KLR parts towards advancement of the law.

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