IN THE SUPERIOR COURTS OF THE GAMBIA

IN THE GAMBIA COURT OF APPEAL

CRIM APPEAL NO: GCA 007/2020

BETWEEN

THE STATE APPELLANT

AND

BUBACAR KEITA RESPONDENT

CORAM: THE HON JUSTICE H. C. ROCHE JCA

THE HON JUSTICE B. V. P. MAHONEY JCA

THE HON JUSTICE K. SILLAH CAMARA JCA

DATED THE 31ST OF MARCH 2021

REPRESENTATION:

Respondent.....present

Mr K. Tah and Mr A. JOBE for the Appellant

Ms K Jallow for the Respondent

LEAD JUDGMENT BY HON JUSTICE K SILLAH CAMARA JCA

This appeal is against the Ruling of the High Court delivered on the 11th of August 2020 by Hon Justice M. S. M. Jallow.

The accused/applicant in the High Court hereinafter called the respondent was arraigned before the High Court on the charge of Rape contrary to section 3(1) the Sexual Offences Act 2013 and punishable under Section 4 (1) (a) (iii) (cc) of Sexual Offences Act 2013.

The respondent applied for bail pending trial and was granted bail by the High court on the 11th of August 2011. The appellant is the Complainant in the High Court and is dissatisfied with the Ruling of the High Court and thus filed an appeal before this court. The appellant filed a notice of appeal before this court. The said notice of appeal contains six grounds of appeal as follows;

GROUND ONE

The Learned Judge erred in law when he failed to avert his mind to the statutory provisions on non-bailable offences.

GROUND TWO

The Learned Judge erred in fact when he held that the Appellant did not prosecute the case with immediacy.

GROUND THREE

The Learned Judge erred in law by holding that section 19 of the Constitution requires the admission of an accused to bail when proceedings are pending.

GROUND FOUR

The Learned Trial Judge erred in law when he misapplied the principle in the ruling of the Supreme Court in the case of HENRY GABRIEL V THE STATE SC CA 001/2019.

GROUND FIVE

The Learned Trial Judge erred in law when he sought to adopt the applicant and respondent's arguments in the Lower Court as the Court's own.

GROUND SIX

The decision of the Learned Trial Judge is unreasonable and not supported by any evidence.

RELIEFS SOUGHT

1. **An order of this Court to set aside the Ruling of the Lower Court; and**
2. **An order for the respondent's bail to be revoked and be remanded in custody pending the trial and determination of the charges against him.**

A brief summary of the genesis of the appeal, the respondent in the Court Below filed a motion on notice seeking for the following reliefs;

1. That the applicant be released from custody upon entering into a recognisance with or without sureties as condition for his appearance before any Court where any charge(s) are preferred against him will be heard, or in the alternative;
2. Any further order this Honourable Court deems fit to make.

The respondent attached a 30 paragraph affidavit in support of the motion. The appellant in opposing the said application filed a 33 paragraph affidavit in opposition. Thereafter, the respondent filed a 20 paragraph affidavit in reply to the affidavit in opposition.

Both parties argued the motion orally and the High Court delivered its ruling in favour of the respondent. I shall reiterate part of the ruling as follows;

> "***...in passing, s19 of the 1997 Gambian Constitution requires when proceedings are pending the right of liberty of the accused person to be granted bail to be given due effect as well as harnessed in the case of Henry Gabriel which the Hon Court extends to the accused person in this case, Bubacarr Keita in favour of whom the Hon Court grants bail with reasonable conditions as permitted under Gambian***

law for the accused person's presumption of innocence to be given effect.

Thus the accused's bail is (1) D100, 000 or 2 Gambian sureties who must depose to separate affidavits of means to surrender copies of their Gambian National Identity Cards with the Court's registry.

It shall be a condition of the accused's bail to deposit his passport with the valid U. S. A. Visa with the Court's registry..."

Both parties filed their briefs of arguments in the appeal. The appellant filed their brief of argument on the 6th of January, 2021. Thereafter, the respondent filed his brief of argument on the 1st of February 2021 and the appellant filed their reply on points of law on the 8th of February, 2021.

On the one hand, the appellant raised two issues for determination as follows;

1. **Whether the learned judge has power to grant bail to the respondent considering the nature of the offence charged?**
2. **The learned trial judge exercised his powers properly in granting bail to the respondent?**

On the other hand, the respondent also raised two issues for determination which are more or less similar to the appellant's issues which are as follows;

1. **Whether the Trial Court has the powers to admit the respondent to bail?**
2. **Whether the appellant's appeal has merits?**

After carefully considering both briefs of counsel I adopt the appellant's brief as mine with a slight amendment to the second issue.

ISSUE NO 1

Whether the learned judge has power to grant bail to the respondent considering the nature of the offence charged?

The respondent is charged with rape contrary to section 3 (1) of the Sexual Offences Act, 2013 and punishable under section 4 (1) (a) (iii) (cc) of the Sexual Offences Act, 2013.

Section 3 (1) of the Sexual Offences Act states as follows;

> ***"A person who intentionally, under coercive circumstances-***
>
> ***(a) engages in a sexual act with another person; or***
> ***(b) causes another person to engage in a sexual act with the perpetrator or with a third person,***
> ***commits the offence of rape.***

In the same vain section 4 (1) (a) (iii) (cc) of the said Act stipulates as follows;

> ***Section 4 (1) states "A person who is convicted of rape under this Act, is subject to subsection (2), (3) and (4), is liable***
>
> ***4 (1) (a) In case of the first conviction-***
>
> ***4 (1) (a) (iii) where-***
>
> ***4 (1) (a) (iii) (cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant***
>
> ***To a mandatory imprisonment for life"***

The foregoing provision clearly provides the punishment of rape in section 3 (1) of the said Act to be a mandatory imprisonment for life.

The respondent was charged under the said section and paragraph 6 of the affidavit in opposition states that the complainant in this case is a minor. Even though the respondent in his affidavit in reply denied same but the denial was evasive and not substantive. See ***SINGHAM INVESTMENT V N. H. FARAGE & ANO (2002-2008) 1 GLR 68, it held that when a party denies an allegation of fact he must not do so evasively, but answer the point on substance.***

The respondent stated in paragraph 5 of the affidavit in reply and averred;

"That paragraph 6, 10, 11...of the affidavit in opposition to the motion is vehemently denied."

The respondent failed to deny the fact that the complainant was a minor. Therefore, the complainant was under the age of 18 years.

This court is mindful of the fact this appeal is an interlocutory appeal and that the substantive matter is *subjudice* in the Court Below. See **F. B. N. Plc V AKPARABONG BANK & ANOR, (2006) 1 NWLR PT. 962 438, the Court held:**

> ***"In an interlocutory application or appeal, the court must avoid making any observation in the ruling or judgment which might appear to prejudge the main issues in the proceedings relative to the interlocutory application and which may have the effect of affecting the merits of the substantive case or remove the substratum thereof."***

The thrusts of the appellant's submissions are stated as follows'

1. **The appellant relied on section 99 of the Criminal Procedure Code (CPC) VOL III CAP. 11.01, Laws of the Gambia 2009 which provides;**

   > ***"When a person, other than a person accused of an offence punishable with death or imprisonment for life, appears or is brought before a court on any process or after being arrested without a warrant, and is prepared at any time or at any stage of the proceedings to give bail, the person may in the discretion of the court be released upon his or her entering in the manner hereinafter provided into recognisance, with or without a surety or sureties, conditioned for his or her appearance before the court at the time and place mentioned in the recognisance."***

2. **That the first limb of section 99 of the CPC is mandatory and it is the law if there is a breach of a mandatory provision of a statute by the trial court, the appellate court will step in and ensure that there is compliance with the said provision.**

3. **That the trial court has no power to grant bail for offences that carry the capital punishment and life imprisonment.**
4. **That section 99 of the CPC ought to be given the literal interpretation since it is absolutely clear and unambiguous.**
5. **That section 19 (1) of the 1997 Constitution guarantees the right to personal liberty "except on such grounds and in accordance with such procedures as are established by law". Section 19 (1) of the Constitution provides that;**

   "Every person shall have the right to liberty and security of person. No one shall be subjected to arbitrary, arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law".
6. **That the said section 19 (1) has made recognition of other laws when it made an exception as to such grounds and in accordance with such procedures as are established by law.**

The main thrusts of the respondent's submission are as follows;

1. **That the trial court has the powers to admit the respondent to bail.**
2. **The issue of bail has always been at the discretion of the court.**
3. **That the presumption of innocence must be in vain for the reasons that the accused person must be kept in custody pending the hearing and determination of the suit.**
4. **That it is only section 3 (1) of the Sexual Offences Act that is stated on the charge and not section 4 (1) (a) (iii) (cc) of the said Act, and that the learned trial judge can only interpret what is before him and not the contrary.**

After going through the briefs of both parties I shall now determine the appeal proper.

Section 24 (3) (a) of the 1997 Constitution provides;

"Every person who is charged with a criminal offence-

(a) shall be presumed innocent until he or she is proved, or has pleaded guilty".

"If a person accused of felony talk less of a capital offence, can hide under the canopy of Section 35 of the Constitution to escape lawful detention, then, a flood gate of escape routes to freedom is easily made available to suspected felons and capital offenders which will not augur well for the peace, tranquillity and progress of society".
His Lordship IRIKEFE JSC in ECHEAZU V C.O.P. (1974) NMLR 308 PG.314

Section 19 (1) of the said Constitution provides for the right to liberty. However, a person's right to personal liberty will be deprived where for example he has been charged with an offence and lawfully detained in custody and is brought before a court upon reasonable suspicion of his having committed a criminal offence; or to such extent as may be reasonably necessary to prevent his committing a criminal offence. It is imperative to note that the limit on such an accused person's right to personal liberty must be within a reasonable time and he must not be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence he is being charged with. This is a constitutional guaranteed protection. This guarantee can however be curtailed if such accused person is arrested or detained upon reasonable suspicion of having committed a capital offence.

In the instant case the respondent was charged with rape and was arrested as a result of reasonably suspecting that he committed rape. The respondent was arrested on the 6th of November, 2019 by the police and he was granted police bail the following day which was on the 7th of November 2019. See page 7 of the records and paragraph 14 of the motion on notice. That averment was not denied in the affidavit in opposition and therefore it is deemed admitted. See ***THE STATE V CARNEGIE MINERAL LTD & ANOR (2002-2008) 2 GLR 220 AT 222, it held that it is trite law that where facts in an affidavit***

are not challenged or controverted by another affidavit, they must be regarded as admitted and acted upon as such.

The respondent was arraigned before the Bundung High Court on the 20th of July 2020. It should be noted that as at the time the respondent was arraigned before the High Court he was not in custody he was on police bail. He was only remanded in custody on the 20th of July, 2020. By the time the respondent was arraigned before the High Court he was already charged to court and the amended information is dated the 15th of June 2020. Thus from the date of the amended information to the date that the respondent was arraigned before the court it is barely over a month. Therefore, the respondent cannot invoke section 19 (1) of the Constitution for not being tried within a reasonable time.

Though bail is a constitutional right, it is trite law that the grant or refusal of bail is at the unfettered discretion of the court and such discretion must be exercised judicially and judiciously. A person charged with a capital offence will not ordinarily be entitled to bail, section 99 of the CPC clearly intended to make the provision of the Constitution on the right to liberty of a citizen not absolute.

However, it is important to note certain laid down criteria to be met when considering bail:

- The prejudice of the proper investigation of the offence if granted bail; in the instant case it is clear that the complainant is the sister of his former wife and thus interference is likely.
- The serious risk of the accused escaping from justice; the charge against the respondent is a heinous crime and there is as serious risk of absconding when least expected.
- That no grounds exist for believing that the accused if released would commit an offence; there is no averment in the affidavit in support of the application to show that the respondent is not likely to commit an offence whilst on bail.
- The nature of the charge; the nature of the charge is rape and it is non bailable under section 99 of the CPC.
- The strength of the exhibit which supports the charge; the matter is subjudice in the High Court. This Court cannot at this stage make pronouncements on same.

- The gravity of the offense allegedly committed by the accused; it is heinous crime and attracts the punishment of a mandatory life imprisonment.
- The gravity of the punishment in the event of conviction; it is a mandatory life imprisonment.
- The previous criminal record of the accused, if any; he has no previous criminal record according to the affidavits filed.
- The probability that the accused may not surrender himself for trial; there is a high probability due to the nature of the offence and the punishment prescribed.
- The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him; bearing in mind that the witnesses are related or were related to him and the complainant is a minor the respondent might interfere with the witnesses.
- The likelihood of further charge being brought against the accused; this court cannot comment on same because the matter is subjudice.
- The probability of guilt; it is for the High Court to decide.
- Detention for the protection of the accused no proof has been provided;
- The necessity to procure medical or social report pending final disposal of the case; the matter is subjudice in the High Court
- The prevalence of the alleged offence, it is for the High court to decide;
- The presence of special circumstance such as prosecution's delay; failure to prepare the proof of service; failure to file information against the accused for the alleged offence. This is not applicable the information was filed within a reasonable time.
- The accused suffering from serious health disability which may occasion health hazard, calamity or even death if no proper medical attention is given etc. there is no evidence produced by the respondent to show that this was the case.
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These criteria would have been applicable in this case if the offense charged was a bailable offense. The offense charge is not a bailable offense and section 99 of the CPC is specific on it.

What happens to the presumption of innocence section 24 (3), section 19 (1) of the Constitution vis a vis section 99 of the CPC.

Section 19 (1) and section 24 (3) (a) should not be read in isolation but it should be read as a whole., the right to liberty and the presumption of innocence go hand in hand. See ***ATTORNEY GENERAL V PAP C. O. SECKA (2002-2008) 2 GLR 73 AT 75, it held that for a document or statute to be better understood it must be read as a whole to ensure consistency between the various parts of the same statute or document.***

Now when construing section 24 (3) (a) of the Constitution resort should be given to section 19(1) of the same Constitution when dealing with the issue of a person in custody charged with an offence. The presumption of innocence principle is a constitutional entrenchment of the principle of legality which presumes every person accused of a crime to be presumed innocent. The burden is always on the prosecution to prove the guilt of the accused and not his business to prove his innocence. See section 144 of the Evidence Act.

Section 19 (1) on the one hand states that every person shall have the right to liberty and the other hand it also states that no one shall be deprived of his or her liberty **except on such grounds and in accordance with such procedures as are established by law.**

It suffices to state that this is where section 99 of the CPC comes in and curtails the right to liberty in capital offense cases and life imprisonment cases. The right to liberty is not absolute and thus has exceptions.

Therefore, section 99 of the CPC is in tandem with section 19 (1) of the Constitution of which when dealing with persons charged with an offence it must be read with and as a whole with section 24 (3) (a) of the Constitution.

In respect of the case of **HENRY GABRIEL V THE STATE SC CRIM APPEAL NO 001/2019, this is a Supreme Court decision wherein the applicant was already a convict and he was granted bail pending Appeal. The distinction with the present case is that the respondent in this case is an accused and not a convict. The bail applied in this case is bail pending trial.**

The granting of bail pending an appeal is clearly at the discretion of the court, and it depends on the special facts and circumstances of the case, it is never a matter of course, every application for bail pending appeal is to be considered on its peculiar, special facts and circumstances. ***See OKOROJI V STATE (1990) 6 NWLR (PT. 157) 509; FAWEHINMI V STATE (1990) 1 NWLR (PT. 127) 486.***

Moreover, in bail pending appeal presumption of innocence is not an issue whereas bail pending trial presumption of innocence and the right to liberty is an issue and thereby the application of section 99 of the CPC is applicable as an exception to the right to liberty in capital offenses matters.

I hold that the facts and the principle in the case of HENRY GABRIEL do not apply mutatis mutandis in this case.

In the light of the foregoing, pursuant to the amended information the respondent was charged with rape contrary to section 3 (1) of the Sexual Offenses Act 2013 and punishable under section 4 (1) (a) (iii) (cc) for life imprisonment. Therefore, I hold that pursuant to section 99 of the CPC that the Learned Trial judge did not have the power to grant bail to the respondent.

ISSUE NO 2

Whether the learned trial judge exercised his powers properly in granting bail to the respondent?

It is settled law that an appellate court ought to refrain from interfering with or disturbing findings by the trial court, unless such findings are shown to be perverse or unsupportable by evidence". See ***BAKARY DAFFEH V THE STATE (2014-2015) SC GSCLR.***

I will not hesitate to state the areas in the Lower court's ruling which are perverse or unsupportable by evidence as follows;

1. **The Learned Trial judge adopted both sides' submissions against the grant of bail as his own.** Unless the parties agree on issues or terms the judge cannot adopt both sides' submissions.

A judge cannot adopt a method of adjudication, alien to procedural rules of justice. See *BAKARE V AKPENA (1986) NWLR (PT. 33) 1.*

It is unheard of or bizarre for a judge to adopt arguments of all parties at once with different perspectives and later determine their issues in favour of one.

I hold that the learned trial judge erred in law when he sought to adopt the applicant and respondent's arguments as the Court's own.

2. The learned trial judge's pronouncement that the case was not tried within a reasonable time.

The learned trial judge misapplied the facts, by failing to have recourse to all the affidavits in support of the bail application. The learned trial judge failed to appreciate the fact that the respondent was arrested on the 6th of November 2019 and granted bail on the 7th of November, 2019. The amended information was filed on the 15th of June 2019 as stated above. The respondent was arraigned on the 20th of July 2020 and he was remanded on the said date. The learned trial judge failed to read the averments in paragraphs 6 and 7 of the affidavit in support. The respondent was only charged with the offense of rape on the 15th of June 2019 and barely over a month and the respondent was arraigned before the High Court. Thus the learned was wrong to have said that the state failed to proceed with the case for more than a year.

I hold that the learned trial judge misdirected the facts by holding that the appellant did not prosecute within a reasonable time.

3. The misapplication of the principle in HENRY GABRIEL'S CASE SUPRA.

It is clear from the foregoing that the facts as well as the principle in the HENRY GABRIEL'S case are at variance with the present case and therefore not applicable.

I hold that the learned trial judge erred in law by misapplying the principle in the Henry Gabriel's case.

4. **Granting bail to the respondent without substantial reasoning.**

The learned trial judge in determining the bail application failed to give reasons for the fact that the matter was not tried within a reasonable time, he failed to apply the laws to the facts correctly, section 19 of the Constitution was mentioned in the ruling without putting it into proper context and there was no correlation between the facts and the law. The citing of the case of HENRY GABRIEL supra was done by the way side and no proper recourse of the case was made by the learned judge. The learned judge failed to apply the principle in the said case correctly. The learned trial judge failed to appreciate the fact that the respondent was charged with rape punishable with life in imprisonment. The learned trial judge failed to cite section 99 of the CPC which specifically deals with bail and the matter at hand. It is clear from the foregoing that the learned trial judge did not handle the matter properly, with due respect to the learned trial judge he misdirected material facts, misapplied principles and failed to apply the law correctly to the facts therefore, the ruling is completely flawed and devoid of reasoning and comprehension.

I hold that the learned trial judge's decision is not supported by evidence.

The appeal succeeds and the Ruling dated the 11th of August 2020 is hereby set aside. The respondent's bail is hereby revoked.

The respondent shall be arrested and remanded in custody pending the trial and determination of the charges against him.

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HON JUSTICE KUMBA SILLAH CAMARA

JUSTICE OF THE COURT OF APPEAL

31/03/2021

SUPPORTING JUDGMENT OF HON. JUSTICE H.C.ROCHE (JCA)

I concur with the lead judgment ably delivered by the Hon. Mrs. Justice K. Sillah-Camara (JCA).

The respondent is charged with rape under section 3(1) of the Sexual Offences Act 2013, and punishable under section 4(ii) (cc) of the same Act, which attracts a punishment of life imprisonment. Therefore, this Court and indeed all courts are restricted by the provisions of section 99(1) of the Criminal Procedure Code (CPC), which prohibits the grant of bail in serious cases which carry a punishment of life imprisonment or death. Therefore, even if all the conditions normally required to be satisfied for the grant of bail can be satisfied and are satisfied (for example even if the accused is confirmed not to be a flight risk, not likely to reoffend or interfere with witnesses), bail cannot be granted. Simply put, in such cases, bail cannot be granted for any reason.

Clearly, section 99(1) of the CPC imposes an absolute ban to bail in such cases, and by so doing prevents the courts from considering any relevant facts and circumstances which might support or oppose the granting of bail. It essentially prevents the courts from performing their judicial function guaranteed by section 120(2) of the 1997 Constitution. The courts cannot exercise discretion in such cases even in the face of some prima facie evidence strongly suggesting that the continued detention of the accused would be morally and legally wrong.

Thus, it has been held that an absolute ban to bail infringes upon the rights to presumption of innocence and liberty (see **O v Crown Court at Harrow [2016] UKHL 42** citing also the European Court of Human Rights decisions in **Caballero**

v United Kingdom (2000) 30 EHRR 643; SBC v United Kingdom (2001) 34 EHRR 619). Indeed, the rights to presumption of innocence and liberty were raised by the respondent at the lower court.

The preferable approach then is that, no matter how serious the charge, the judge should examine all the facts for and against the granting of bail, and there must be good and sufficient reasons justifying the relegation of the rights to presumption of innocence and liberty even in serious cases that attract punishment of life imprisonment or death.

Indeed, the practice across the world is to avoid an absolute ban to bail even in serious cases attracting punishment of life imprisonment or death. Therefore, as alluded to in the lead judgment, although bail is not granted as of right or as a matter of course in serious cases which attract a punishment of life imprisonment or death, it can nonetheless be granted in exceptional or unusual circumstances (see also the **UK Criminal Justice and Public Order Act (CJPOA 1994)** which allows for bail in serious cases such as murder, manslaughter and rape only where there are exceptional circumstances justifying the grant of bail. Such exceptional or unusual circumstances have been held to include:

1. Where there is breach of the right to trial within a reasonable time, such as where there is inordinate delay in prosecution because the accused has been detained for a long time and the prosecution has not taken the required diligent steps to charge, arraign and prosecute them, or to prepare the proof of the evidence in support of the charge against them (see **Anaekwe v C.O.P (1996) 3 NWLR (Pt. 436) 320; Adamu Suleiman & Anor** supra; **Ani v State (2002) 1 NWLR (Pt. 747) 217**).
2. Where the prosecution did not bring to the notice of the court the facts on the alleged charge/offence so that there are no facts or evidence before the court justifying the accused's detention (see **Enwere v Commissioner of Police (1993) 6 NWLR (Pt. 299) 333; Dogo v Commissioner of Police (1980) 1 NCR 14, 17; S v Viljoen 2002 (2) SACR 550 (SCA).**
3. Where from the charges and information filed proof of guilt is not evident or the presumption of guilt is not great (see for example **Sate v Hartzell 100 N.W. 747, 746 (N.D.1904); People v Superior Court 25 Cal. Rptr. 2d 38 (Ct. App.1993)**.

4. Where the prosecution case appears very weak. This refers to the prima facie case of the prosecution-the possible guilt-not the ultimate guilt of the accused and not proof beyond reasonable doubt. It merely requires an assessment of the strength or weakness of the prosecution's prima facie case, so that where same is weak, the accused will be entitled to bail (see also **Echeazu v C.O.P (1974) (SC); Abacha v the State (2002) 5 NWLR (Pt.761) 683; Adamu Suleiman & Anor v CO.P**. supra.
5. Where the accused has a "cast iron alibi", such as where there is strong evidence pointing to the fact that they could not have committed the offence because they have good alibi, especially where the prosecution does not rebut the alibi with contradictory evidence (see **S v Viljoen** supra).
6. Serious existing medical condition and poor health, and terminal illness of the accused will also constitute exceptional circumstances, but mere allegations of poor health will not constitute exceptional circumstance (see **S v Viljoen** supra; **Abacha v The State** supra; **Fawehinmi v The State (1990) 1 NWLR (Pt. 127) 486**).

In this jurisdiction, because of the restriction placed by section 99(1) of the CPC, no court can consider whether or not there are any of the above exceptional circumstances justifying bail. Hence despite that the prosecution admitted that an assessment of the strength or weakness of the prosecution's prima facie case is normally a requirement in bail applications (see also the lead judgment and the case of **Albert Sambou v The State (Unreported) (Misc. App. No. 37/2002)** in this regard), they nonetheless dared to present what appears to be a weak prima facie case during the bail application. Even though they allege rape which they say was not witnessed by anyone, but which they allege produced a child, there is no indication from any of their seven witness statements, of any aim or desire on their part to establish or confirm paternity of the said child at any stage of the trial.

The seven witnesses include the statement of medical doctor and a boyfriend of the alleged victim. However none of the statements mention or concern the issue of paternity, or about establishing or determining paternity at the trial. Of course this is still the early days of the trial. However, this lapse at this bail

stage (where an assessment of the strength or weakness of the prosecution's prima facie case is usually made), is significant, and will indicate that if section 99 of the CPC allowed bail in exceptional circumstances, then there would be (in fact there is) an exceptional circumstance in this case (the apparently weak prima facie case of the prosecution), to justify the respondent's bail pending proof of the respondent's guilt beyond reasonable doubt.

Thus, the unreasonableness of section 99(1) of the CPC is very pronounced in this case. Obviously, some urgent intervention is required. However, it is my humble and considered view that, seeking to invoke the original jurisdiction of the Supreme Court under section 127 (2) (b) of the Constitution, is different from and does not apply where the matter simply calls for an interpretation and enforcement of the fundamental rights set out under sections 18, 33 and 36(5) of the same Constitution as provided for under section 127(1) (a) of the same Constitution-such as in this case. In this case, the application for bail was made under section 24 of the Constitution, and it prayed for:

> That the applicant be released from custody upon entering into recognizance with or without sureties condition for his appearance before any Court where any charge(s) preferred against him will be heard…

Thus, it is clear that the applicant was merely seeking the enforcement of his rights under section 24, which includes the right to fair hearing, presumption of innocence, and adequate time and facilities to prepare his defence. In the case of **Ousainou Darboe & Ors v IGP SC 003/2016**, because of the particularity of the grievance and the prayers the applicants were seeking, the applicants chose to proceed under section 127(2)(b) to invoke the original jurisdiction of the Supreme Court. They were in fact seeking a declaration from the Supreme Court that section 5 of the Public Order Act is unconstitutional as it violates section 25(1) (d) and 25(2) of the Constitution. Because of their prayer, they had every right to choose to proceed under section 127(2) (b). But in this case, the prayer as reproduced is clearly different.

In any event, whenever there is an allegation of violation of fundamental rights, the question of their enforcement will naturally arise (see the Indian case of **Smt Ujjam Bai v State Of U.P (Writ Petition (civil) 79 0f 1959).** Therefore, my view is that the aggrieved in the **Ousainou Darboe & Ors** case were not obliged to proceed under section 127(2)(b), they also had the choice to simply apply to the High Court under section 127(1)(a) to enforce their right to assemble and move freely under section 25(1) (d) and 25(2) respectively. Thus, in the present case too, there is no particular obligation to proceed under section 127(2)(b), it is simply a matter of choice based on what relief is desired, and the applicant simply wanted an enforcement of his rights. Section 127(1) (a) accords the High Court (and indeed this Court as appellate Court), the privilege and duty to enforce fundamental rights whenever someone seeks their enforcement. It provides:

> The Supreme Court shall have an exclusive original jurisdiction for the interpretation and enforcement of any of the provision of this Constitution **other than** any provision of sections 18 to 33 or section 36(5) (which relate to fundamental rights and freedoms)

Thus, the High Court and indeed this Court can make any decision that aims to enforce the fundamental rights stipulated in sections 18 to 33 or section 36(5), and it does not necessarily have to declare that any law was made in excess of the powers conferred by this Constitution while interpreting or enforcing the rights stipulated in sections 18 to 33 or 36(5). That role is exclusively reserved for the Supreme Court by section 127(2) (b), which provides that:

> The Supreme Court shall have an exclusive original jurisdiction on any question whether any law was made in excess of the powers conferred by this Constitution or any other law upon the National Assembly or any other person or authority

This being the case, it is my respectful view that, there appears no reasonable justification for seeking to invoke the original jurisdiction of the Supreme Court under section 127(2) (b). My view stems obviously from a modest interpretation of the provisions of sections 127(1) (a) and 127(2)(b). But it also stems from the awareness gained from numerous workshops emphasizing effective judicial

case management-in particular judicial critical thinking, proactivity and creativity (of course within the confines of the law and with adequate respect for the principle of precedent). It is also stems from a cognisance that the Supreme Court (an indeed any other court) should not be unnecessarily burdened with the wrong cases or the premature filing of cases- certainly not when there is another capable and appropriate forum to determine the matter.

Therefore, I believe that the High Court and this Court as an appellate Court, would have been well within their powers to simply interpret and enforce the fundamental right to presumption of innocence and any other right under section 24, to grant the respondent bail without making any declaration about section 99(1) or any other law being in excess of them or the Constitution. If the High Court and this Court could not have done that, then there would appear to be no logical reason for the creation of section 127(1) (a).

Indeed, there are some persuasive authorities that the original jurisdiction of the Supreme Court should be sparingly invoked, and not be unwarrantedly stretched and expanded by construction, or be liberally invoked (see for example **Utah v United States 394 U.S.89, 95 (1968)**). Also, the exercise of the Supreme Court's original jurisdiction is not obligatory on that Court but merely discretionary-to be determined on a case by case basis, and on grounds of practical necessity in appropriate cases (see **California v Southern Pacific Co., 157U.S. 229, 261 (1895); Texas v New Mexico, 462 U.S. 554,570 (1983)**. And where there is other available forum for appropriate hearing and full relief, it will not be appropriate for the Supreme Court to exercise original jurisdiction (see **Wyoming v Oklahoma, 502 U.S. 437 451 (1982)**). Consequently, the Supreme Court should not be requested or obliged to exercise original jurisdiction when (as in this case), the lower court could have properly proceeded under section 127(1) (a) to enforce rights.

Admittedly, my view is just a singular view, and subject to the superior wisdom of the Supreme Court. Hence I concur with the lead judgment because I deem it time saving and prudent to do so, hoping there will be expeditious action to

invite the Supreme Court to make a pronouncement and set the precedent regarding possible qualifications to sections 99(1) of the CPC and sections 127(1) (a) and 127(2)(b) of the Constitution.

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HON. JUSTICE H.C. ROCHE

JUSTICE OF THE COURT OF APPEAL

31/03/21

DISSENTING DECISION OF HON. JUSTICE B. V. P. MAHONEY JCA

This Appeal was brought by the State/ Appellant who are aggrieved by the decision of Hon. Justice M. S. M. Jallow J of the High Court in which the learned Judge granted bail to the Respondent who was charged with an offence punishable with life imprisonment.

The Accused/ Respondent, by Amended Information dated 15th June 2020, was charged with Rape contrary to Section 3 (1) of the Sexual Offences Act 2013 and punishable under Section 4 (ii) (cc) of the same Act.

The Respondent filed a motion on notice at the trial Court dated 20th July 2020 applying for bail. The motion was supported by a 30 paragraph affidavit sworn to by the brother of the Respondent in which he deposed to facts favouring the grant of bail including: that the Respondent will not interfere with witnesses if granted bail, that investigations into the matter have been concluded, that he was previously on police bail since November 2019 and will not jump

bail, that the complaint was made a few months after the alleged rape happened when he divorced his wife who happens to be the complainant's sister, that the complaint of rape was motivated by anger after the divorce, that he has two children from his ex-wife and that they all lived in the same compound, that he is a prominent businessman, that he has no criminal record, and that if bail is not granted he will languish in detention posing a serious health risk due to the pandemic.

The Appellant herein filed a 32 paragraph affidavit in opposition to the aforementioned motion in which it is countered that: the complainant is a minor and has been traumatised and has suffered serious pain and granting bail is not in her interest or that of society, that at the material time the complainant was under the care and responsibility of the Accused's ex-wife and that the Accused was a guardian to the complainant and they lived in the same house, that the Accused is interfering with witnesses who can be influenced due to the relationship of the Accused and the complainant, that the Accused divorced his wife because she reported the rape incident to the police, that the Accused has a valid US visa and is a flight risk, that there is no health risk to the Accused if he is detained as the prisons have taken stringent precautionary measures to safeguard the health of the prisoners during the pandemic, that there is compelling evidence against the accused and granting bail would send the wrong message to the public.

The Accused filed a 20 paragraph affidavit in reply in which his brother stated that the Accused and the complainant no longer live together, that he has not interfered with witnesses, that at the time the complaint against him was lodged, the complainant was 4 to 5 months pregnant, that the prisons are still congested, that he acquired a 5 year US visa on 15th November 2019, just a week after being released on police bail and still stayed in the country, that he has his aged mother

and younger siblings to look after and has no intention of leaving the country and his lucrative business and that the evidence in support of the indictment is weak.

In their oral arguments on the motion at the court below, counsel for the Accused started by submitting that, "this motion is premised on Section 19 of the 1997 Constitution as well as Section 99 of the Criminal Procedure Code" before proceeding to make submissions on the principles to be considered in determining whether bail should be granted including that the Applicant will not interfere with witnesses, will not jump bail, etc. before concluding that the offence charged is bailable and that the Supreme Court granted bail in similar circumstances in Henry Gabriel v The State and other High Court cases. Counsel also mentioned that there is a presumption for bail under Section 13 of the Sexual Offences Act.

Counsel for the Respondent to the motion for bail responded by submitting that by virtue of Section 99 of the Criminal Procedure Code, the offence the Applicant is charged with is punishable with a sentence of mandatory life imprisonment so that it is not bailable.

Counsel further submitted that the Applicant referred to Section 24 of the Constitution on the presumption of innocence but that the said provision is not absolute.

On the High Court decisions relied on by the Applicant, counsel for the Respondent submitted that subsequent decisions departed from those decisions and that bail has subsequently been refused for non-bailable offences. On the decision in Henry Gabriel v The State, counsel submitted that the Court of Appeal and the Supreme Court have power to grant bail under their Rules as opposed to the High Court.

Counsel for the Applicant also countered the Respondent's submissions on the guidelines or considerations in bail applications by referring to the seriousness of the offence charged, the strength of the evidence available, the risk of jumping bail, etc.

In his Reply on points of law, counsel for the Accused/ Applicant submitted that although the decision in Henry Gabriel v The State was premised on the rules of the Supreme Court, Section 99 of the Criminal Procedure Code was still relevant and that it effectively amended Section 99 by making the non-bailable offence bailable.

The learned trial Judge in his Ruling began by adopting both the Accused counsel's and the State counsel's submissions as the Court's own. He went on to consider that the prosecution had only decided to proceed with the case more than one year after the alleged offence was committed so that the likelihood of the Accused interfering with witnesses is not possible. That investigations have concluded and if the Accused opted to jump bail, he would have already fled the jurisdiction.

The Judge went on in his Ruling to accept that Henry Gabriel v The State binds lower courts to grant bail in cases where life imprisonment is the punishment.

Finally, before granting bail, the Judge stated as follows: "In passing, Section 19 of the 1997 Gambian Constitution requires when proceedings are pending the right of liberty of Accused Person to be granted bail to be given due effect as well harnessed in the case of Henry Gabriel which the Hon. Court extends to the Accused Person in this case, Bubacarr Keita in favour of whom the Hon. Court grants bail with reasonable conditions as permitted under Gambian Law for Accused Person's presumption of innocence to be given effect."

This is the background leading to the decision appealed against. The grounds of appeal are basically that the learned trial Judge failed to consider that the offence charged is non-bailable, that the Judge erred when he held that the Appellant did not prosecute the case with immediacy, that the Judge erred when he held that Section 19 of the Constitution requires the admission of an accused to bail when proceedings are pending, that the Judge misapplied the principle in Henry Gabriel v The State, that the Judge erred when he sought to adopt the Applicant's and Respondent's arguments as the Court's own, and that the decision is unreasonable and unsupported by evidence.

Counsel for the State/ Appellant argued two issues in their brief as follows: Whether the learned Judge has power to grant bail to the Respondent considering the nature of the offence charged; and whether the learned Judge exercised his powers properly in granting bail to the Respondent having regard to the averments.

On the first issue, counsel for the Appellant argues that Section 99 of the Criminal Procedure Code is mandatory where its states: 'When a person, other than a person accused of an offence punishable with death or imprisonment for life, appears or is brought before a court … the person may in the discretion of the court be released…'. Counsel submits that the trial court has no power to grant bail for offences that carry capital punishment or life imprisonment. That the Accused in this matter is charged with rape contrary to Section 3 (1) of the Sexual Offences Act 2013 and punishable under Section 4 (1) (a) (iii) (cc) that is mandatory imprisonment for life so that the offence is not bailable.

Counsel further argues that Section 99 of the Criminal Procedure Code is consistent with Section 19 (1) of the Constitution because the latter guarantees the right to personal liberty and that no one shall be

deprived of same except on such grounds and in accordance with such procedures as are established by law. Counsel submits that Section 99 of the Criminal Procedure Code is a law that limits the liberty of a person charged with an offence punishable with death or life imprisonment.

Let me stop there for a moment and look at the Respondent's position. Counsel for the Respondent also argues two issues namely: Whether the trial Court has the powers to admit the Respondent to bail and whether the Appellant's Appeal has merits.

On the first issue, counsel for the Respondent submits that bail is at the discretion of the court because every accused person is innocent until proven guilty pursuant to Section 24 (3) of the Constitution.

Counsel submits that the fact that an accused person is accused of a crime should not ipso facto deprive him or her of his or her constitutional privileges.

Now, on this first issue, the Accused in the court below and Respondent herein is charged with an offence punishable with mandatory life imprisonment.

He applied for bail which is provided for in Section 99 of the Criminal Procedure Code. Section 99 (1) provides that:

> When a person, other than a person accused of an offence punishable with death or imprisonment for life, appears or is brought before a court … the person may in the discretion of the court be released … [on bail]

As counsel for the State/ Appellant submits, this provision gives the court the discretion to grant bail but only for offences not punishable with death or life imprisonment. Contrary to counsel for the

Respondent's submission that there is a presumption for bail in Section 13 of the Sexual Offences Act, I do not see any such presumption. All the section refers to is the right of the complainant to be present in an application for bail. Section 99 (1) of the Criminal Procedure Code still applies as a general provision for when an accused person can be released on bail.

It is however argued that the constitutional rights to liberty and the presumption of innocence should not be taken away on the sole ground that a person is charged with an offence punishable with death or life imprisonment.

Section 19 (1) of the Constitution provides as follows:

> Every person shall have the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

Section 24 (3) of the Constitution provides as follows:

> Every person who is charged with a criminal offence-
>
> (a) shall be presumed innocent until he or she is proved, or has pleaded guilty… [among other rights]

One has to be mindful of the supremacy of the Constitution as stated in Section 4 of the Constitution which provides as follows:

> This Constitution is the supreme law of The Gambia and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

Although Section 19 (1) of the Constitution gives the right to personal liberty of persons and forbids the deprivation of their liberty, except

on grounds and in accordance with such procedures as are established by law, Section 99 of the Criminal Procedure Code mandates the deprivation of liberty of persons charged with offences punishable with death or life imprisonment. Even whereas such persons are presumed innocent, any person charged with an offence punishable with death or life imprisonment shall have their liberty deprived, no matter the circumstances, without even the attempt at the exercise of judicial discretion over the matter in the peculiar circumstances of each case.

It would appear from the impugned Ruling of the Court below that the learned trial Judge considered Section 19 of the Constitution on the right to liberty and Section 24 (3) on the presumption of innocence although it was stated, as the Judge put it, 'in passing' and relying on the case of Henry Gabriel v The State, he granted bail 'as permitted under Gambian law'.

Now, this is where the problem lies. Gambian law does not permit bail to persons charged with an offence punishable with death or life imprisonment due to Section 99 (1) of the Criminal Procedure Code. It was argued that bail could be granted going by the constitutional provisions mentioned but the trial Judge did not determine same expressly with reasons. He relied on Henry Gabriel v The State, an unreported Order of the Supreme Court in Civil Appeal No. SC/001/2019 dated 31st May 2019 in which the Supreme Court granted bail to a convicted person pending appeal upon an application that was not opposed. The Court of Appeal and the Supreme Court both have express provisions allowing for bail pending appeal. See the Court of Appeal of The Gambia Act, Section 12 and the Supreme Court Rules, Rule 42 respectively. The High Court also had power to grant bail pending trial until the amendment in 2002 restricting bail in the aforementioned offences in striking contrast to convicted persons who may be granted bail pending appeal.

These issues were brought to the trial Court's attention during the submissions of counsel but surprisingly, the trial court decided to 'adopt the State counsel's and Accused counsel's submissions as the court's own' – an unknown procedure to say the least as alluded to in the lead Judgment. The duty of the Judge is to ensure that the law is followed and to determine the facts from opposing parties. How does one determine the law and facts from opposing parties if the submissions of the opposing parties that are in controversy and in conflict are both adopted as the Court's own? Furthermore, the learned Judge's pronouncement that Section 19 of the Constitution requires bail to be given to the Accused when proceedings are pending does not hold water in the face of Section 99 (1) of the Criminal Procedure Code. Even for bailable offences, there is no 'requirement' for bail, it must be determined by the exercise of the Judge's discretion judicially and judiciously according to established principles and guidelines, which, again, had been brought to the attention of the Court in the submissions of counsel.

Having said this, the issue of applying the constitutional provisions to the application to grant bail in favour of the Accused/ Respondent is not as simple as the trial Judge put it in my humble view.

Section 5 of the Constitution on enforcement provides as follows:

(1) A person who alleges that –

(a) any Act of the National Assembly or anything done under the authority of an Act of the National Assembly; or

(b) any act or omission of any person or authority,

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect.

Then the Courts with competent jurisdiction are the High Court as stated in Section 132 as follows:

(1) Except as provided in section 127, the High Court shall have original jurisdiction –

(a) to hear and determine all civil and criminal proceedings;

(b) to interpret and enforce the fundamental rights and freedoms as provided in sections 18 to 33 and 36(5),

and in the exercise of such jurisdiction, the Court shall have all such power and authority as may be conferred by this Constitution or any other law.

And the Supreme Court as provided in Section 127 as follows:

(1) The Supreme Court shall have an exclusive original jurisdiction –

(a) for the interpretation or enforcement of any provision of this Constitution other than any provision of sections 18 to 33 or section 36(5) (which relate to fundamental rights and freedoms);

(b) on any question whether any law was made in excess of the powers conferred by this Constitution or any other law upon the National Assembly or any other person or authority;

(c) …[election of President or National Assembly members]…

(d) …[objections to documents on grounds of prejudicial to security or injurious to public interest]…

(2) Where any question referred to in paragraph (a), (b) or (d) of subsection (1) arises in any proceedings in any other court, that court shall stay its proceedings and refer the matter to the Supreme Court for its determination, and such other court shall give effect to any decision of the Supreme Court in the matter.

The procedure for enforcement of fundamental rights is provided for in Section 37 of the Constitution as follows:

> (1) If any person alleges that any of the provisions of sections 18 to 33 or section 36 (5) of this Chapter has been, is being or is likely to be contravened in relation to himself or herself by any person he or she may apply to the High Court for redress. …

In my humble view, I am of the opinion that whereas the High Court has original jurisdiction to enforce and interpret the fundamental rights in the Constitution whenever an application is made in that regard, where there is another law, a statutory provision in this case, which contravenes the fundamental rights, it has to be removed as a stumbling block from enjoying the constitutional right that the High Court enforces. This has to be done by declaring it void. This relief for a declaration that a law is void for being unconstitutional falls within the exclusive jurisdiction of the Supreme Court. If there was no stumbling block in the form of a law preventing one from enjoying the constitutional right, then one may have access the High Court to enforce the rights, but once there is a law in place preventing the enjoyment of the constitutional right, that law must be struck down by accessing the Supreme Court for such a relief. This was why, I believe, the applicants in the case of Ousainou Darboe & Ors v IGP & AG had to go to the Supreme Court for a declaration that Section 5 of the Public Order Act was unconstitutional and void as contravening a fundamental right. The applicants were charged, tried and convicted on a law that they believed was unconstitutional. That law had to be removed for the applicants to enjoy the fundamental human right to freedom of assembly, association and movement. Without removing that law, the applicants were caught by it - a stumbling block to enjoying their right and enforcing same. It was only the Supreme Court that could strike down that law, which, in the event, was

declared constitutional by the Supreme Court. Similarly in this matter, the applicant wants to enjoy his right to liberty but there is a law saying no bail for the offence you are charged with. The applicant thus has to remove that law to allow him enjoy his right to liberty or at least to allow the court to exercise its discretion over whether he should be granted bail.

To declare such a law unconstitutional and void, one has to access the Supreme Court, that's my view.

In the instant matter, a question has arisen as to whether the part of Section 99 (1) of the Criminal Procedure Code that prevents a person charged with an offence punishable with death or life imprisonment from being granted bail by the court in exercise its judicial discretion, contravenes Section 19 of the Constitution on right to liberty and Section 24 (3) of the Constitution on presumption of innocence, and whether the offending part ought to be declared void and struck down.

This question falls within the jurisdiction of the Supreme Court. And as it is necessary to answer same in order to determine the issue of whether bail may or may not be granted, I would stay the determination of this appeal and refer the question to the Supreme Court for determination. It is only if the Supreme Court strikes down the allegedly offending part of Section 99 making certain cases not bailable, that this Court could delve into the merits of the application for bail on the facts in the peculiar circumstances.

That is my humble decision

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HON. JUSTICE B. V. P. MAHONEY

JUSTICE OF APPEAL

31/03/21