

IN THE SUPERIOR COURTS OF THE GAMBIA



IN THE SUPREME COURT OF THE GAMBIA

CRIM APPEAL NO: SC/002/2021

BETWEEN

BUBACARR KEITA

AND

THE STATE

..... APPELLANT/APPLICANT

..... RESPONDENT

APPLICATION FOR BAIL PENDING APPEAL PURSUANT  
TO RULE 42(1) OF THE SUPREME COURT RULES CAP 6:05  
OF THE LAWS OF THE GAMBIA

Tuesday 18<sup>th</sup> May, 2021

Coram: Before Hon: Justice R.C. Sock sitting as a Single Judge in  
Chambers

Counsel: Lamin S. Camara for the Appellant/Applicant

K. Tah for the Respondent State with A. Jobe

RULING

**R.C. Sock JSC-** By a motion on notice dated 7<sup>th</sup> April 2021 and filed on 9<sup>th</sup> April 2021, the Appellant/Applicant seeks the following orders from this Court –

1. An order granting bail to the Appellant/Applicant pending the hearing and determination of the appeal to this Court; and
2. Any further or other orders this court deems fit to make.

The motion is brought pursuant to rule 42(1) of the Rules of this Court, and is supported by an affidavit of 26 paragraphs, sworn to by the Appellant/Applicant on 7<sup>th</sup> April 2021, and an additional affidavit of 10 paragraphs sworn to by one Catherin Fatty, a resident of Banjul, on 16<sup>th</sup> April 2021 and filed on the same date.

The Respondent has filed a 12 – paragraph affidavit in opposition to the Appellant/Applicant’s motion, sworn to by one Abdoulie Saïdy, a legal clerk at the Attorney General’s Chambers, on 26<sup>th</sup> April 2021 and filed on the same date.

In reply to the Respondent’s affidavit in opposition, the Appellant/Applicant has filed a 19 – paragraph affidavit sworn to by one Haddija Jawara, a resident of Fajara M Section on 28<sup>th</sup> April 2021 and filed on the same date, and an additional 13 – paragraph affidavit in reply sworn to by one Catherin Fatty, a resident of New Jeshwang, on 3<sup>rd</sup> May 2021.

On 3<sup>rd</sup> May 2021, counsel for both parties addressed the Court and made oral submissions.

### **BRIEF FACTS**

The briefs facts of this case is that the Appellant/Applicant was initially arrested on an allegation of rape on 6<sup>th</sup> November 2019 and granted police bail on 7<sup>th</sup> November 2019 whilst the matter was being investigated.

On 20<sup>th</sup> July 2020, he was re – arrested and arraigned before the High Court, which granted him bail on the satisfaction of certain conditions including the deposit with the Court of his travel documents.

On 31<sup>st</sup> March 2021, the Gambia Court of Appeal, on an appeal filed by the Respondent, revoked the Appellant/Applicant's bail and remanded him in custody.

It is against the decision of the lower court revoking bail that this appeal is lodged.

### **PRELIMINARY MATTERS**

As stated above, the motion before this Court is said by the Appellant/Applicant to be brought pursuant to rule 42(1) of the Rules of this Court.

Under the rubric, Grant of Bail, rule 42 provides as follows (in extenso)

42.

(1) The Court may, at any time during the pendency of a criminal appeal, on its own motion or on an application made by any person, grant bail to the appellant or revoke or vary any order previously made.

(2) where the Court grants bail to an appellant pending the determination of his or her appeal, the Court shall specify the amount in which the appellant and his or her surety, if any, shall be bound by recognisance and unless otherwise directed by the Court the recognisance of the appellant or his or her surety shall be taken before the Registrar.

(3) The recognisances provided for in this rule shall be in Forms 20 and 21 set out in Part II of the Schedule to these Rules.

(4) An appellant who has been granted bail shall be personally present at each and every hearing of his or her appeal and at the final determination of the appeal unless the Court otherwise directs.

(5) Where an appellant is not present at the hearing of his or her appeal after having been granted bail under this rule, the Court may –

(a) Consider the appeal in his or her absence and make such order as it thinks fit; or

(b) summarily dismiss the appeal and issue a warrant for the arrest of the appellant in Form 22 set out in Part II of the Schedule to these Rules

(6) Subrule (5) shall apply with such modification as the Court may direct in any case where an appellant indicates he or she desires to be present at the hearing of his or her appeal but does not in fact attend.

[emphasis supplied]

It is quite clear, even on a cursory reading, that rule 42 of the Rules of this Court concern the granting of bail “during the pendency of a criminal appeal”(subrule(1); the amount of the recognisance “pending the determination of [the appeal]” which “shall be taken before the Registrar” (subrule 2); the Forms in which the recognisance should be, that is, Forms 20 and 21 in the Schedule to the Rules (subrule 3), which Forms make reference to the “conviction” of the Appellant seeking bail pending the determination of his or her appeal against his or her conviction ( and sentence); the personal presence of an appellant who has been granted bail “ at each and every hearing of his or her appeal” (Subrule 4); and the consequences of an appellant, who has been granted bail, failing to be present at the hearing of his or her appeal (subrules 5 and 6).

Clearly, therefore, rule 42 of the Rules of this Court, pursuant to which this application is brought, envisages a situation where one has been convicted of a criminal offence, has appealed to

this Court against his or her conviction and applied for bail pending the determination of his or her appeal before the Court.

The Appellant/Applicant has referred to an Order of this Court, per Hon. Mrs. Justice M.M. Sey, sitting as a single judge in chambers, made on 31<sup>st</sup> May 2019 in the case of Henry Gabriel and The State, Civil Appeal No. SC/001/2019, and urges this Court to exercise its discretion under rule 42(1) of the Rules of the Court. In that case, the Applicant/Appellant had applied for bail “pending the hearing and determination of the appeal before this Court” as stated in paragraph 1(d) of the said Order. The application was unopposed by the Respondent State and this Court admitted the Applicant/Appellant to bail upon terms and conditions stated under rule 42, including the following condition under paragraph 2 of the said Order –

“2. The Applicant/Appellant shall be required to attend Court at each and every hearing of this appeal in accordance with Rule 42 (4) of the rules of the Supreme Court 1999.”

In the instant application, however, the Appellant/Applicant’s trial at the High Court is on – going; there has obviously been no conviction and meanwhile the Appellant/Applicant has had his bail revoked and been remanded into custody by the Court of Appeal.

Another preliminary issue of importance to the present application for bail pending appeal is whether there is before this Court a criminal appeal. In his affidavit in support of the motion, the Appellant/Applicant states at paragraph 3 that “[he is] standing trial in Bundung High Court for rape”; that “on the 31<sup>st</sup> March 2021, the Gambia Court of appeal revoked [his bail upon an appeal filed by the Respondent.” (paragraph 10); that the Gambia Court of Appeal by a majority decision declared that the charge preferred against [him] is notailable and thus

revoked [his] bail. A copy of the said judgment is hereto attached and marked as “BK1”; (paragraph 11); and that “[he is] aggrieved with the decision of The Gambia Court of Appeal and [has] filed an appeal against same to the Supreme Court of The Gambia. A copy of the said Notice of Criminal Appeal is hereto attached and marked “BK2” (paragraph 12). Although the exhibits attached to the Notice of Motion have not been marked as “BK1” and “BK2”, an omission counsel is urged to rectify in future filings, the only two documents attached to the Notice of Motion can be identified as the exhibits referred to.

Exhibit “BK2”, the Notice of Criminal Appeal, complains of “the entire judgment of the Gambia Court of Appeal, in particular the finding that “the Learned Trial Judge did not have the power to grant bail to the respondent.” (emphasis by the appellant). And one of the reliefs sought from this Court in the substantive appeal is for “a declaration that the Appellant is entitled to bail.” Meanwhile, in the interlocutory application before this Court, the Appellant/Applicant seeks an “order granting bail to the Appellant/Applicant pending the hearing and determination of the appeal to the Supreme Court”

In the Nigerian case, of T.A.L Akapo v. Hakeem (1992) 7 SCNJ p.119 at p.139, referred to by Learned Counsel for the State, the Supreme Court stated that the Court ought not consider issues in an interlocutory application which are to be determined in the substantive suit for to do so would be to prejudge the suit itself. What the Appellant/ Applicant seeks from this Court at this interlocutory stage, that is the granting of bail to the Appellant/Applicant, is one of the principal reliefs sought under the main appeal to this Court. Whatever is decided at this stage of the proceedings would, therefore, obviously affect the determination of the main appeal. Consequently, this Court cannot in this interlocutory application for bail consider the

issue of bail, which is the main thrust of the appeal filed before this Court.

In the Additional Affidavit in Reply, sworn to by Catherine Fatty on 3<sup>rd</sup> May 2012, the deponent states at paragraph 8 thereof the following –

“8. that I am informed by Counsel Lamin S. Camara and verily believe the same to be true that in addition to the Appeal, a “case stated” is also referred to the Supreme Court on the right to liberty of the Appellant/Applicant as stated in section 19 of the 1997 Constitution vis –a – vis section 99(1) of the Criminal Procedure Code.”

To shore up this averment, Learned Counsel for the Appellant/Applicant in his submission relied on the dissenting decision of Hon. Justice B.V.P Mahoney, particularly the last paragraph of the judgement at page 32, where he states –

“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 in to the merits of the application for bail on the facts in the particular circumstances.”

With all due respect, the mere reference of a question for determination to this Court in a dissenting decision by one of the Justices of Appeal does not constitute a reference by the Court of Appeal to this Court under section 127(2) of the Constitution.

Now, as regards section 99 of the Criminal Procedure Code, Cap.11:01, which is of seminal importance to the application for bail before this Court, the section clearly provides that –

- (1) 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 a recognisance, with or without a surety or sureties, conditioned for his or appearance before the court at the time and place mentioned in the recognisance.

It is an accepted fact, confirmed by the Appellant/Applicant himself at paragraph 3 of his affidavit in support of the motion, that the Appellant/Applicant is presently “standing trial at the Bundung High Court for rape,” contrary to section 121 of the Criminal Code and punishable under section 122 thereof, on conviction, with imprisonment for life. The Appellant/Applicant, therefore, falls among persons accused of an offence punishable with life imprisonment and for whom bail cannot be granted by a court, pursuant to section 99 of the Criminal Procedure Code quoted above. The unambiguous provisions of the section mean that bail cannot be granted to “a person accused of an offence [such as rape] punishable with ..... imprisonment for life.” This also applies to a person accused of murder or treason which are punishable with death; but does not apply to any other offences regarding which an accused person may” at any time or at stage of the proceedings ..... give bail[and] .....in the discretion of the court be released upon his or her entering to a recognisance ..... for his or her appearance before the court.....”(emphasis supplied). This provision in my opinion allows



for repeat bail applications to be made before the High Court in respect of bailable offences.

I believe the law provides for three types of bail, namely police bail during the investigation of an offence, court bail during the trial (pending the hearing and determination of the offence); and court bail pending the hearing and determination of an appeal against conviction. However, these three types of bail are only available in respect of offences not punishable with death or imprisonment for life, as provided by section 99 of the Criminal Procedure Code. Consequently, in the absence of a conviction and an appeal therefrom, the Court of Appeal cannot ordinarily grant bail even with respect to bailable offences (emphasis supplied). In the instant suit, section 99 prohibits a court from admitting into bail a person accused of rape or other offences punishable with death or imprisonment for life. The lower court was, therefore, right to revoke the bail granted by the trial Judge contrary to the provisions of section 99 of the Criminal Procedure Code.

The application before this Court is, therefore, dismissed for incompetence.

  
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**Hon. Justice R.C. Sock (JSC)**

