

IN THE HIGH COURT OF THE GAMBIA

HC/226/10/CR/085/AO

BETWEEN

OUSMAN DARRY.....APPLICANT

AND

THE STATE.....RESPONDENT

N. M. Cham Esq. for Applicant

M. B. Abubakar Esq. for the State

R U L I N G

This is a Summons on Notice dated 29th April, 2010 and filed on 25th April, 2010 wherein the Applicant asked for an order admitting him to bail pending any charges that may be brought against him in Court. The Summons is supported by an Affidavit of 9 paragraphs deposed to by one Masaneh Darry who said he is the elder brother of the Applicant Ousman Darry.

When the matter came up in Court on 12th May, 2010, it was not clear the Respondent had been served with the process. This is because I did not see any affidavit of service in the file. However, the Process Server was sent for and he explained that he served the process at the office of the DPP and that he has been looking for the Affidavit of Service he handed to the Clerk of Court to put into the case file. I stood the case down and directed that the DPP's office be notified that the matter was in Court.

Soon, Mr. R.N. Chenge, DPP came in to announce his appearance for the State. The case was later adjourned on the request of the DPP to get in touch with the Police authorities on the position of the matter. Hearing of the Summons was then adjourned to 19/5/2010. On that date no Counsel appeared for the State. I allowed Applicant's Counsel to move her application. She said the application for bail was brought pursuant to Section 19(3)(b) of the Constitution; that she relied on all the paragraphs of the supporting affidavit.

Counsel drew attention to the main facts in the affidavit, namely: that the applicant, on 18/3/2010 went to the police station on his own to "set the records straight about one HAJANDING JAWLA who was making false accusations against him that he raped her"; that it was based on his complaint that the girl was invited to the station for questioning; that after that the applicant was detained in the station for 4 to 5 days and then taken to Janjanbureh Prisons in MaCarty and has remained there till now. He was not been charged to any Court of law; that the applicant is a married man with children and prepared to provide responsible people to stand as surety for him.

Counsel submitted that the applicant has been in custody for over 68 days without being brought to Court, the police or whoever detained him have seriously contravened Section 19(3)(b) of the Constitution which Section makes it unlawful to detain any body in custody beyond 72 hours without bringing the person to Court.

Counsel urged me to grant the Applicant bail pending any charges to be brought against him in any Court of law. I adjourned the case to 25/5/2010 for Ruling on the application. It turned out that 25/5/2010 was a Public Holiday and consequently the matter came up on 26/5/2010.

That morning, the Clerk of Court drew my attention to process served on her from the A G's Chambers, namely, a Counter Affidavit to the Applicants Motion and a Motion on Notice supported by an affidavit. I got from the Applicant's Counsel that she was similarly served, but there was no State Counsel in the Court. The said Motion prayed for an order to defer the ruling on the application for bail. The strange twist in the matter was that no State Counsel was present to move the Motion. For this reason, Applicant's Counsel urged me to ignore the process and give my Ruling. I stood down the ruling for a while to go through the processes in Chambers. Bail is at the discretion of the Court; I decided to suo motu defer the ruling and be sure that I based my decision on sufficient materials from both sides. The matter was subsequently adjourned to 31st May, 2010 on which day, Mr. M. B. Abubakar, Principal State Counsel appeared for the State. He served a Further Counter Affidavit to which has exhibited copy of an information against the Applicant. Although the procedure is some what irregular, I decided to hear him. He said that the Applicant has been charged in the High Court for Rape; that Ext A to

the affidavit_included Summary of Evidence List of Witnesses; List of Exhibits and proof of witness Statement. Counsel submitted that the grant or refusal of bail is at the discretion of the Court which discretion must be exercised judicially and judiciously having regard to a number of criteria which include:

- (i) The gravity of the offence charged;
- (ii) the probability of guilt
- (iii) the strength of the available evidence
- (iv) the likelihood of the accused interfering with the witnesses for the prosecution
- (v) the gravity of the punishment in the event of conviction.

Counsel submitted that the Applicant is charged with the offence of Rape and on convicted carries a sentence of death and that the gravity of the sentence on convicted was enough incentive for the Applicant to escape, if granted bail. He further submitted that the fact that the State had filed Ext. A is conclusive that they will proceed with the prosecution of the case without delay. Counsel urged me to refuse the application for bail.

Learned Counsel for the Applicant said she saw no reason to file a Counter Affidavit against the Motion on Notice and that relief (a) on the Motion paper had been overtaken by event in that the count suo

motu deferred the Ruling on the bail application. She submitted the affidavit in support of the Motion by the State is bare and does not support the reliefs sought.

She said she was served with a Counter Affidavit and Further Counter Affidavit against her own application only that morning and that it is the Further Counter Affidavit that has an Exhibit which, Counsel submitted, appeared to be a charge against the Applicant for Rape; and that as far as she is concerned as Counsel, the punishment for Rape is life imprisonment and that there is nothing in the both Counter Affidavits that can take away the Applicant's constitutional right of bail pending trial of the charge against him. Counsel submitted that she differed with the criteria for the grant of bail as presented by the State Counsel especially, the probability of guilt and the strength of evidence against the accused. This is because, Counsel submitted, the Court is not in a position to determine that there is a probability of guilt or that the evidence is strong against the accused person at the stage. Again, she submitted, there is no evidence that the accused, if granted bail, was likely to interfere with the prosecution's witnesses. Counsel submitted that the criteria to be considered is whether the offence is bailable, and submitted that by virtue of the Constitutional provision the offence is bailable. What is now left, Counsel concluded, is what conditions the Court will impose on the applicant to ensure that he appears in Court for his trial; that there is no evidence that he will jump bail if granted bail.

It will be noted that the above submission by learned Counsel for the Applicant was partly in response to the Motion by the State and partly in reply on point of law, in respect of her own application. She later filed a Further Reply on points of law on 17/6/2010. There she submitted first, that Ext A annexed to Further Counter Affidavit is not an indictment properly filed before this Court as the document bears the same suit number as the Applicant's application. Secondly, Counsel disagreed with the State Counsel that Rape carries a sentence of death on conviction pursuant to Section 99(1) of CPC as amended by Act No. 2 of 2002. Rather, Counsel submitted, the penalty for rape is life imprisonment as provided in Section 122 of the Criminal Code. But Counsel added that punishment is "not mandatory, it merely means that upon conviction of same, the Court has the discretion to impose any sentences up to life imprisonment unlike the offence of murder whose punishment is a mandatory death sentence"; and thirdly, even if "the applicant has been properly charged with rape before the Court, the offence is bailable". Counsel then submitted that the CPC Amendment "denies bail to any person charged with any offence which carries a mandatory punishment of "death" or "life imprisonment". She finally urged me to grant bail to applicant upon any conditions this Court will deem fit to make pending any charges that may be brought against him.

It was really wrong to have kept the Applicant in custody since March, 2010. That was in contravention of Section 19(3)(b) of the Constitution. Be that as it may, the State introduced a twist in this matter when the Counter Affidavit was brought to my attention. Paragraph 3 of the Counter Affidavit states:

- “(a) That the applicant is accused of having committed the offence of rape against one Hajanding Jawla”
- “(b) That the State has since concluded process for the arraignment of the applicant before the High Court.

With the above brought to the Court’s attention, it will amount to an act of indiscretion not to defer my Ruling.

I have read the affidavits filed in this matter and listened to the submissions of both Counsel. The question to answer, in my view, is whether, in the circumstances bail should be granted.

Ext. “A” to the Further Affidavit by the State is an annexure; it is not a charge before me. I say this because, Counsel for the Applicant, in her Further Reply on points of law submitted that “it is not an indictment property filed before this Court”.

All originating processes including an information are filed, not in a particular Court, but in the Registry of the High Court. The Principal

Registrar forwards them to the Chief Justice who assigns same to the Courts. Thus the paragraph 3(b) of the Counter affidavit deposed "that the State has since concluded process for the arraignment of the applicant before the High Court", not before this Court. The law allows me to take judicial notice of any process filed in the Registry of the High Court and exhibited in any matter before me.

Ext "A" shows that a case is filed in the High Court against the Applicant, the offence is Rape; there is proof of evidence, list of witnesses and list of exhibits. The case will or is to be assigned to a Judge, not necessarily myself. Whatever decision I take now will not be binding on the Judge before whom the Applicant will be arraigned. I think it is proper, in view of Ext "A" for the Court before which the Applicant will be arraigned to also consider whether or not to grant him bail.

The second issue is whether or not the offence of Rape is bailable. It is not in dispute that the offence of rape carries a sentence of life imprisonment on conviction. That much is provided by Section 99(1) of the CPC as amended by Act No.2 of 2002. That Section as amended should now read: (in part)

"99(1) When any person, other than a person accused of an offence punishable with death or life imprisonment appears or is brought before any Court on any process-----"

In other words, offences other than those carrying the punishment of death or life imprisonment, are bailable. The submission of Counsel for the Applicant that "the punishment of life imprisonment of the offence of rape is not mandatory, it merely means that upon conviction of same, the Court has the discretion to impose any sentence up to life imprisonment unlike the offence of murder where punishment is a mandatory death sentence", to my mind, is not consistent with the clear and unambiguous provision of Section 99(1) of the CPC as amended. My understanding of that Section as amended is that the legislature has curtailed the scope of the Courts discretion in bail matters. In other words by the amendment the scope the Court has no jurisdiction to grant bail has been widened to include life imprisonment". In the result, I hold that I have no jurisdiction to grant bail to the Applicant. The application is therefore, hereby, struck out.

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Hon. Justice E.A. Amadi
Judge
13/6/2010