AN APPRAISAL OF THE POST TRIAL BENEFITS ACCRUING TO AN OFFENDER ON THE COURTS RECOURSE TO CONVICTION OR DISCHARGE

By

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1.0. INTRODUCTION

During a criminal proceeding, three separate and distinct acts take place, in sequence as to time. First is the entry of a plea of guilty or not guilty made by the accused person. Second, is a judgment of conviction or acquittal based upon the plea, and third, a sentence.

A plea of guilty by the accused person is treated as confession of guilt in open court. A judgment is the declaration of the court entered on record. The court adjudges the accused guilty of the offence according to the plea of guilty or acquits him of the verdict is not guilty. Thus, while on the one hand, a judgment of conviction fixes the punishment as determined by the court, on the other hand a judgment of acquittal orders the accused discharged. A sentence is the order of the court made in the presence of the accused pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law.[1]

In view of the foregoing, it is contended that conviction is customarily followed by sanctions. The sanctions include criminal penalties and disabilities. It should be pointed out however, that the penalties and disabilities are not usually mentioned in the sentence of court but are incurred by the offender as a collateral consequence of his conviction. Accordingly, the penalties and disabilities, which the offender may suffer manifests in the loss of some rights by the fact of conviction. Conversely, by the very fact of conviction, it is arguable that certain rights accrue to the offender as well. Be that as it may, this paper seeks to highlight the Post-Trial benefits accruing to an offender upon conviction or discharge. This is with a view to determining the extent to which such benefits are actually accorded to an offender at the post trial state of criminal justice administration.

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[1] KERPER, H.B. AND KERPER, J. Legal Rights of the Convicted. West Publishing Co. Minnesota, U.S.A. (1979) at pages 1-2.

2.0 RIGHT OF APPEAL ON CONVICTION

The exercise of this right enables a direct review of the judgment. The protection of the offender here is to quash unjust conviction and reduce excessive lower court punishment by higher court. It can however only be exercised on certain stated constitutional grounds.[2] For example, appeal can be against the final judgment of the lower court, or on question of law, or infraction of fundamental rights arising out of the judgment etc. Appeal on other grounds apart from the ones stated in the constitution must be with leave of the trial court or appeal court.[3]

For the purposes of the exercise of this right, the court must keep a record of the proceedings and furnish the convicted person with copies of it within seven days of the conclusion of the case.[4] There is usually a time limit for appeal which must be complied with, together with other rules of court regulating appeals.[5] In some of the situations, where time has run out, appeal out of time is allowed in accordance with laid down procedures. This is in recognition of the fundamental nature of this right.

However, it should be stated that the right of appeal exists only where it is provided for under an enactment. Where there is no Act, Law, Decree or Edict providing for a right of appeal, an aggrieved party cannot appeal against the decision of the trial court.[6] Further, a criminal appeal, other than an appeal against sentence of a fine abates on the death of the appellant.[7]

In the English case of *R. v. Rowe*,[8] the applicant was the widow of the deceased who was sentenced to a term of imprisonment. The applicant filed an application for leave to appeal against the sentence of imprisonment imposed on her deceased husband. The court of criminal appeal in England, refusing the application held that any right of appeal which the

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[2] Refer to sections 233(2) and 241 of the Constitution of the Federal Republic of Nigeria, 1999.

[3] Refer to Section 233(3) and 242(1) Ibid.

[4] Refer to Section 36(7) Ibid.

[5] Refer to Section 27(2) (b) of the supreme court Act, Cap 424 Laws of the Federation of Nigeria, 1990 Vol.22; the Supreme Court Rules, 1960 and the Court of Appeal Rules 1977.

[6] See Nunku V. Police 15 W.A.C.A 23; Ugwuh V. Att. General East Central State (1975)6 S.C. 13; Boardman V. Sokoto Native Authority (1965) NMLR 329 and Adili V. State (1989) 2 NWLR (pt 103) 305.

[7] Refer to Section 291 of the Criminal Procedure Code.

[8] (1955)39 Cr APP. R. 57.

deceased had abated on his death. Therefore his widow had no right of appeal. However, it added that if the sentence of the court was a fine, the right of appeal inured in the legal representatives of the deceased, who could file an appeal in the interest of the estate of the deceased.

Although the above decision represents the legal position in England, there is every reason to believe that Nigerian courts would have equally arrived at the same conclusion based on the relevant provisions of our laws already cited.

In view of the foregoing, it is apparent that the right of appeal ascribed to a convict is not absolute. The right is limited in the following instances; (1) where the relevant law makes no provision for a right of appeal; and (2) where the convict dies before the determination of his appeal.

Apart from these limitations however it is submitted that the right of appeal can be exercised automatically upon conviction by a trial court.

3.0 BAIL PENDING APPEAL

Bail pending appeal envisages a situation where an accused person has been found guilty of a crime and sentence passed therefore. He thereupon determines to exercise his right of appeal for review of his conviction and sentence to a higher court.[9] The power of courts to grant bail pending appeal is statutory. Thus, Section 342(2) of the Criminal Procedure Code provides that:

When a person is convicted of an offence in a court and appeals from such court to the High Court, the High Court or single judge thereof may, subject to the provisions of Section 341 direct such person to be admitted to bail.

It should be noted however, that the power of courts to grant bail pending appeal is in most part contained in the enabling statute establishing the court. The Supreme Court Act 1960, the Court of Appeal Act 1976, the various High Court Laws of the States and the magistrates Court. Laws contain provisions enabling the respective courts to grant bail to deserving applicants.[10]

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[9] See IBIDAPO-OBE, A. AND NWANKWO, C. The bail Process and Human Rights in Nigeria published by Constitutional Rights Project, Lagos (1992) at page 76.

[10] See ONYEIKE, D. Bail Pending Appeal – A Case for professional Suretyship Contained in Justice – a Journal of Contemporary Legal Problems. Published by Federal Ministry of Justice, Lagos (1990) Just. Vol.No.2 at page 9.

Like most discretionary powers, these statutes fail to provide the guiding principles upon which this discretion shall be exercised. However the position of Nigerian courts on grant of bail pending appeal seems to have been guided by the decision of the West African Court of Appeal in *R. v. Tunwashe Brothers*[11] that bail will not ordinarily be granted to a convict except his case falls within exceptional circumstances. The determining guidelines as to what in concrete cases constitutes special circumstances depends on the peculiar circumstances of each case.

The following situation have been pronounced upon by the court to constitute special circumstances:

(1) bail may be granted where a greater proportion of the sentence would have been served before the appeal is heard. Thus, where the convict may have served the sentence before his appeal can be heard, then bail may be granted.[12]

(2) bail may be granted where there is a high probability of success of the Appeal. Commenting on the issue in *Fawehinmi v. the State,*[13] Awogu J.C.A. stated thus:

"..... It is my view however that where a sentence is manifestly contestable as to whether or not it is a sentence known to law, it constitutes special circumstances for which bail should be granted to an applicant pending the determination of the issue on appeal. Refusal of bail in such circumstances would inflict a greater injury on the applicant who may well have served an illegal sentence."

Thus, where a sentence is manifestly contestable, it constitutes a special circumstance to warrant the grant of bail pending appeal.

(3) bail may be granted to a convict to give him access to counsel or advance facility for defence. Where the convict is himself a lawyer and wishes to conduct his appeal in person, the Court of Appeal has held him to be entitled on this ground. In *Fawehinmi v. The State,* Kalgo, J.C.A. delivering the lead ruling said:

> the only point worthy of note on this
> point is that the appellant like any

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[11] 2 W.A.C.A. 236.

[12] See Okoroji V. State(1990) 6 N.W.L.R. (pt 157) at page 509; Sule Sobayo Vs the State (1987)1 F.C.A. 136 at 137.

[13] (1990) 1 N.W.L.R. (pt 127) at 486.

> Nigerian is entitled to a lawyer of his own choice to represent him in the appeal and if he decided to choose himself as was deposed to in paragraph 17 of affidavit in support, he would normally not be denied this as this is his constitutional right.[14]

(4) The ground of ill health of a convict has always been accepted as good consideration for the grant of bail pending appeal. The principle was well articulated by Nnaemeka-Agu, J (as he then was) in *Chukwunyere v. Commissioner of Police*[15] where he observed as follows

> "It may well be that if such attacks come while in prison his health may be in serious jeopardy. If he is released on bail, he may be in a position to make arrangement for his medical care..... I held that this amounts to special circumstances."

The court of appeal in Fawehinmi's case adopted *in toto*, the reasoning of the lower court because "the issues involved in that case are similar to those in the instant application.... Accordingly, I hold that there are special circumstances disclosed by the state of health of the convict."[16]

Thus, in view of the fact that only exceptional circumstances would justify the grant of bail on appeal, it is very important to recognize that this stipulation is a large umbrella encompassing various other conditions which have evolved to regulate this type of bail. In this connection, bail pending appeal should be granted to an appellant in the following instances as well:

(a) The suggestion that bail pending appeal should be granted where convict alleges that his sentence is null and void was accepted by Awogu, J.C.A. in the case of *Gani Fawehinmi v. The State* (supra) when he held that when a ground of appeal alleges that the sentence is a nullity in that it is either unconstitutional or is

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[14] Ibid.

[15] (1975) 5 E.C.S.L.R. 44.

[16] Per Kalgo J.C.A., Fawehinmi V. The State (1990) 1 N.W.L.R. (pt. 127) 486 at 487.

unknown to law, the applicant should be granted bail pending appeal to forestall a possibility of applicant serving an illegal sentence if the ground eventually succeeds.

Bail should be granted where the case is complex or technical in nature and the appellant desires to be in touch with his legal practitioner in order to assist him in the preparation of his defence. Thus in the case of *William Starkle v. R*,[17] the prisoner was sentenced to 24 months jail term. His counsel argued that the case had an intricate and technical character depending largely upon medical evidence and prayed the court to release the prisoner on bail so as to be free to consult with his legal practitioner. The English court of Appeal refused him bail. Also in the case of State V. Nwabunne,[18] the court rejected this ground in considering bail for the convict. The court reasoned that since the appellant had already filed his grounds of appeal, there was no need for further consultation with counsel. The court of Appeal expatiated on this issue thus:

In the instant application, the offence of contempt does not involve any document and there is no question of complication or complexity in the case or conviction such as would require the special attention of the applicant for him to be released on bail. The applicant can still argue his appeal personally without having to refer to any document used at the trial apart from the record of appeal. The release of an applicant on bail pending appeal may be justified only if the case has been one of some complexity and will take a long time before the appeal could be heard.

Bail should be granted where the appellant is of good character. It is trite law that in all cases in which any court is being invited to exercise a discretion in an applicant's favour the courts invariably take into consideration the behaviour of the applicant. So is it in applications for bail. An applicant who was enjoying bail in the court below before conviction will most likely be admitted to a bail after conviction provided that he did not abuse the indulgence by jumping bail.[19] In *William Starkie v. R* (supra)

APP. R. 1 at 2.

1n.c.l.r. 367.

illiam Harding V. R (1931) 23 CR. APP. R. 143.

the applicant was refused bail because he had previous record of convictions.

(d) Bail should not be refused on the ground that public policy dictates that the applicant remain in custody. Thus, the court of appeal has unequivocally refused to import the notion of public policy into matters of grant or refusal of bail. In the case of *Afibulu v. The State*,[20] Phil-Ebosie J.C.A. stated the view of the court thus:

We think that it will be defeating the whole purpose of section 29(1) of the Court of Appeal Act, if a convicted appellant, after having satisfied the court to grant him bail, is denied the right on the ground that it is of public interest to punish him or prevent others form committing another crime.

The above trend of authorities seems to indicate that there exist presumption against bail for a convict and the convict must show that his case qualifies as an exceptional one. It is submitted therefore, that where a convict establishes a justifiable circumstance to warrant the grant of bail pending appeal, then the appellate court shall exercise its discretion favourably on the convict.

4.0 RIGHT TO COMPENSATION FOR VEXACIOUS AND FRIVOLOUS PROSECUTION

On the right to compensation section 166 of the Criminal Procedure Code provides that:

> If, in any case instituted by complaint as defined in this criminal procedure code or upon information given to a member of a police force or a court and heard under this chapter, the court discharges or acquits the accused and is satisfied that the accusation against him was frivolous or veracious, the court may in its discretion by its order of discharge or acquittal direct the complainant or informant to pay to the accused where there are more than one, such compensation not exceeding twenty-five pounds (i.e. Fifty

[20] See Inneh V. Aruegbon (1952) 14 W.A.C.A 73

> Naira) to each such accused as the court thinks fit....

Similarly, Section 256 of the Criminal Procedure Act provides that:

> If in any case before a court one or more persons is or are accused of any offence and the court by whom the case is heard discharges or acquits any or all of the accused and the judge or magistrate may for reasons to be recorded, direct that compensation, to such an amount not exceeding ten pounds (twenty Naira) as he may determine to be paid to the accused or to each or any of them by the person upon whose complaint the accused was or were charged.

Thus, the conclusion to be drawn from these provisions is that the law seeks to safeguard persons from being harassed by unjusfiable litigation hence, the discretionary power vested in the judge or magistrate to award compensation against frivolous or vexatious prosecution. Although the law empowers a judge or magistrate to exercise this discretionary power for the award of compensation, yet no statutory guiding principles exist upon which the discretionary power shall be exercised. It is contended however, that in directing that compensation be paid to a person for a frivolous or vexatious prosecution, Nigerian courts would most likely take the following factors into account:

(i) That the complainant or informant instituted a prosecution against the person discharged or acquitted. It is not necessary that the complainant should have actually conducted the prosecution. It is sufficient for liability, if he laid an information before a magistrate on the basis of which the magistrate issued a summons against the accused or warrant for the accused person's arrest.[21]

Where the complainant merely informs the police of certain facts, which incriminate the accused, and the police as a result decide to prosecute, the complainant would not be regarded as having instituted proceedings. In Tiv

[21] See Inneh V. Aruegbon (1952) 14 W.A.C.A 73.

N.A. *Police v. Umango, RE: Abam*,[22] the appellant was a police corporal in charge of a police station. As a result of information given to him by a police constable, the appellant investigated the case and then transferred the case diary with a complaint against one Atim Umango to police sergeant Gbaah at another police station. Sergeant Gbaah signed a first information report and the magistrate took cognizance of an offence by Atim Umango. Sergeant Gbaah prosecuted the case before the magistrate and the appellant was a prosecution witness. At the close of the case for the prosecution the magistrate discharge Atim Umango and ordered the appellant to pay him E15.15.0 (N30.30k) compensation "for bringing this frivolous and vexatious allegation" against Atim Umango. At the time the magistrate made this order sergeant Gbaah and Atim Umango were present but the appellant was not. Two or three days later the appellant appeared before the magistrate who said he would listen to any objections the appellant might raise against the order of compensation already made. The magistrate heard the appellant and then found "no reason to change" his order.

It was held on appeal that a police officer acting in the execution of his official duty is not a complainant or informant within the meaning of section 166 of the criminal procedure code.

However, the point must be stressed that if a complainant or informant makes a false accusation to the police or a judicial officer, with the result that an innocent man is sent for trial, he will be liable as prosecutor, even though technically the prosecution was not conducted by him.[23]

(ii) That the prosecution ended in favour of the accused person. Thus, no person who has been convicted on a criminal charge can benefit from the award of compensation. But where he was discharged or acquitted on the merits or in the absence of judicial determination of guilt, then the award of compensation may be made.

(iii) The third point of consideration relates to the absence of reasonable and probable cause on the part of the complainant or informant. As for what constitutes reasonable and probable cause, Hawkins, J. in the English case Of *Hicks v. Faulkner*[24] stated thus:

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[22] (1969) 1 NMLR 250
[23] See Payin V. Aliuh (1953) 14 W.A.C.A 267.
[24] (1878) 8Q.B.D. 167 at page 171.

I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstance, which, assuming them to be true would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime inputted.

Accordingly, if the complainant or informant believing in the accused persons guilt, lays the facts fully and fairly before the police, he will normally be held to have had reasonable and probable cause for the prosecution.[25]

(iv) The fourth and final likely point of consideration relates to the proof of the fact that the complainant or informant frivolously or vexatiously prosecuted the accused. The terms "frivolous" and "vexatious" have been defined ordinarily to mean unserious and annoying behaviour.[26] The next pertinent question therefore, - is, what constitutes frivolous and vexatious prosecution? It is submitted that the phrase "frivolous" or "vexatious prosecution" have a wider meaning than "unserious and annoying behaviour", for it includes any improper purpose other than that of simply instituting a prosecution for the purpose of bringing a person to justice.

Thus, anger or indignation aroused by an imaginary crime is clearly a sufficient ground upon which the courts may likely order the payment of compensation to the person discharged or acquitted. Similarly, if on the other hand, it is established that the complainant had no honest belief in the guilt of the accused but intends only to "trouble" him out of spite, ill-will or out of desire for vengeance, that would also amount to frivolous and vexatious prosecution.

5.0 RIGHT TO ALTERNATIVE ORDERS TO IMPRISONMENT ON CONVICTION

It would appear form the characteristics of the Nigerian prison population that there has been overuse of imprisonment as a means of punishment. There is no other way to account for the fact that about one-third of the convicted prisoners are incarcerated for stealing without violence, about 80 percent are serving not more than two years of imprisonment, and more

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[25] See Malz V. Rosen (1966) 1 W.L.R. 1008.

[26] See HORNBY, A.S. Oxford Advanced Learners Dictionary of Current English 3rd Ed. Published by Oxford University Press, London 1983 at pages 346 and 955 respectively.

than 55 percent are first offenders. The presence of debtors, mentally disordered persons, and pregnant and nursing mothers is further evidence.[27] Added to this, is the fact that more than 60% of the total prison admission are awaiting trial or being remanded in custody.[28] There are many better alternatives for dealing with these individuals. The problem is that some Nigerian judges make more use of imprisonment than any other type of disposition methods.[29] Thus, people are frequently sent to prisons without regard for the impact of imprisonment and its financial implications to the nation. According to one legal luminary,[30] the situation leads to the waste of public funds in catering for inmates, some ordinarily should be outside prison walls eking out a living for themselves and therefore contributing to the national economy.

While it is arguable that criminal activities may have been on the increase, however, the fact that the National Prison capacity has not kept pace with growth in the National Prison population contributed ultimately to the overcrowding of Nigerian prisons. According to one report,[31] most of the Nigerian prisons were built during the colonial period. Since then, very little effort has been made either rot build additional facilities or to modernize existing ones. In fact the population of our prisons at any point in time over the past ten years has oscillated between 42,000 and 45,000 inmates in the country's 144 prisons.[32] It is reasonable therefore, to expect that the prison population today outstrip available space for the prisoners.

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[27] See ADUBA, J.N. Overcrowding in Nigerian Prisons: A Critical Appraisal. Journal of Criminal Justice Published by Pergamon Press Inc. New York, U.S.A. (1993) Vol.21 No.2 at page 187.

[28] See TABIU, M. AND LADAN, M.T. (Eds) Human Rights and the Prison System in Nigeria – Manual for Prison Officers. A Publication of the National Human Rights Commission, Abuja (1998) at page 151.

[29] See ADEYEMI, A.A. "Some scientific Approach to Sentencing". The Nigerian Magistrate and the Offender. ELIAS, T.O. (ED) Ethiope Publishing Corporation Benin City (1972) at page 53.

[30] Abdullahi, U.F. "Prison Congestion in the Context of Criminal Justice Reform in Nigeria" in Contemporary Issues in Nigerian Law – Legal Essays in honour of Hon. Justice Umaru Faruk Abdullahi, C.O.N. President Court of Appeal A Publication of Private Law Department, A.B.U., Zaria 2006, p.159.

[31] See EHONWA, O.L. Behind the Wall – A Report on Prison Conditions in Nigeria and the Nigerian Prison System published by Civil Liberties Organisation Lagos 2nd Ed. (1996) at page 15.

[32] Abdullahi, U.F. op. cit. p.154.

As has been stated earlier on, imprisonment affects the convict's rights more than any other punishment. Obviously, there are many drawbacks to imprisonment. Apart from the fact that it affects most of prisoner's rights, it also creates physical and mental health problems. The primary cause of health problems that prisoners develop in Nigerian prisons are malnutrition, unsanitary condition, exposure to heat or cold (depending on where In the country a person is incarcerated), and the disciplinary measures of putting prisoners on "half diet" and locking them up in punishment cells, which are often poorly ventilated and dark.

Similarly, imprisonment impairs mental health, although the extent to which this is true for the Nigerian penal system is difficult to say. In the absence of serious research, any conclusion on this issue is bound to be speculative. However, it is important to point out certain media reports stating that "700 Bendel prisoners go mental" and "prison turn the sane round."[33] It is not difficult to rationalize how imprisonment could be, especially among those who spend long continuous periods in detention. The monotony, idleness, lack of autonomy and loss of contract with the outside world all could be contributory factors to mental disorder.[34]

Another likely side effect of imprisonment is that, the pains of imprisonment can be particularly devastating for women. Wives and other dependants may suffer emotionally, psychologically, socially, and economically especially when the convict was the breadwinner. This can lead to the breakdown of marriages, stigma for members of the family, and abandonment of children.[35]

In view of the side effects of imprisonment as above highlighted, it is submitted that imprisonment should be avoided as much as possible on humanitarian grounds. An extract form the Home Office publication in England titled "The sentence of the court" aptly describes the prison situation thus:

[33] See Sunday Punch, Lagos of 10th July 1988; The Guardian Newspapers, Lagos of 29th September, 1988.
[34] See Journal of Criminal Justice op. cit. at page 189.
[35] Ibid.

The formative value of prison is limited and imprisonment often adds to an offender's problem of rehabilitation rather than reduces them.[36]

It is desirable therefore, that imprisonment be used sparingly. Where at all it is used it should be restricted to certain classes of cases and offenders e.g. the persistent offender from whom the court considers the public should be protected for substantial time because of his previous conduct and the likelihood of his committing further offences. Apart from such justifiable instances however, it is imperative that non-custodial sentences be resorted to as alternative to prison sentence especially where the offence is non-violent or petty in nature. The alternative to prison sentencing are:-

5.1 Option of Fine

The sentence prescribed for an offence may be a fine, or imprisonment or both.[37] The court may also impose a sentence of fine in lieu of imprisonment, where a sentence of imprisonment is prescribed for the offence.[38] For most offences under the penal code or criminal code the prescribed sentence is imprisonment or a fine or both. Where the sentence prescribed for an offence is imprisonment or a fine or both, it is imperative that the court exercises its discretion judiciously, by taking into account the nature of the offence committed and the antecedents of the offender. Thus, where the offence committed is non-violent and the person who committed it is a first offender, then in it such an instance, a sentence of fine would suffice.

However, where only a sentence of fine is prescribed for an offence, it is essential that such a sentence must be imposed by court. In imposing a sentence of fine the court should take into consideration t he financial means of the convicted person.[39] A heavy fine should not be imposed on a man of low o r modest income. If a heavy fine is imposed on a convicted person of low income, the imposition of the fine is illusory because his inability to pay the fine will lead to default and if he defaults in the payment of the fine, he would have to serve a term of imprisonment. In *Goke v.*

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[36] See OSINBAJO, Y. AND KALU, A.U. (Eds) Law Development and Administration in Nigeria published by the Federal Ministry of Justice, Lagos (1990) at page 203.

[37] Refer to Section 74 of the Penal Code; Section 389 of the Criminal Procedure Act.

[38] Refer to Section 382(1) of the Criminal Procedure Act; Section 23(1) of the Criminal Procedure Code.

[39] Refer to section 72 of the Penal Code; Section 391 of the Criminal Procedure Act.

Police,[40] the accused persons were charged inter-alia with the offence of rioting and unlawful damage to property resulting from the riot. They were convicted and sentenced to pay a fine of N210 each. The accused persons were all elderly men. The High Court held that the magistrate was not guided by the provisions of section 391 of the Criminal Procedure Act in imposing the fine f N200 on accused who were elderly men of modest income. It held that the option of a fine was illusory if a convicted person has not means of paying it. It allowed the appeal on sentence and reduced the fine of N100, in default of which the appellants would go to prison for four months.

In imposing a fine, the court must not exceed the maximum fine prescribed for the offence. Further more, where the jurisdiction of is circumscribed by statute, it must not exceed its jurisdiction to punish in imposing a fine.[41]

When a convicted person sentenced to a fine is unable to pay the fine immediately, the court may allow him time for the payment of the fine or it may direct that the fine be paid in installments. The court may also direct that the convicted person be at liberty to give to the satisfaction of the court, security either with or without a surety or sureties for the payment of the fine or any installment of it.[42]

Finally, it must be pointed out that where a sentence of fine has been imposed on a convicted person in lieu of imprisonment, in default of payment of such fine, the convicted person may be sentenced to imprisonment by a High Court to a term not exceeding two years, and by a magistrate's court to a term of imprisonment equivalent to the fine on the scale specified in section 390(2) of the Criminal Procedure Act.

5.2 Probation

Section 435(1) of the Criminal Procedure Act provides that:

> Where any person is charged before a court with an offence punishable by such court, and the court thinks that the charge is proved but is of opinion that having regard to the character, antecedents, age, health or mental condition of

[40] (1957) W.R.N.L.R. 80.
[41] Refer to Section 72 of the Penal Code.
[42] Refer to Section 306(1) and (2) of the Criminal Procedure Code; Section 392 of the Criminal Procedure Act.

the person charged, or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation the court may without proceeding to conviction make an order either:-

(a) dismissing the charge; or
(b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding three years as may be specified in the order.

The above section makes provision for the probation of offenders in our law. Although probation orders are not entirely new in our penal enactments, they are rarely applied. It seems under the present law that the order may be made without proceeding to conviction, but whether the court may still provide for probation after conviction is not entirely clear. Nevertheless, the order is made when the offender is unsuitable for punishment because for instance, he is a first offender, or he shows an inclination not to repeat his criminal activities or the offence was not serious or dangerous. The order releases the offender form custody but requires him to be under the supervision of a probation officer for a certain period of time.

Probation orders contain conditions for supervision and conduct of the offender and it might be necessary for investigations to be made concerning offenders home and surroundings. The procedure for dealing with the breach of this order is also provided by the law creating it.[43] It is the most common form of supervisory treatment which is helpful for those whose ability to survive in society is fairly good.

5.3 Binding Over/Security for Keeping the Peace

A person to be bound over promises to do or refrains from doing something and undertakes to forfeit stated sums of money if he does not keep his

[43] Refer to Section 440 of the Criminal Procedure Act.

promise. The undertaking takes the form of a statement recognizing a debt (a bond or recognizance) payable if the stated condition is not fulfilled.

The power to bind over seems no more than a preventive measure resort not because there has been any breach of the law but because a possible breach is apprehended. It is designed to guard against future lawlessness. A binding over does not operate as a conviction or an acquittal.

Section 25 of the Criminal Procedure Code provides for this order by stating that:

> A court may, whether the accused is discharged or not, bind over the complainant or accused, or both, with or without sureties, to be of good behaviour and may order any person so bound in default of compliance with the order, to be imprisoned for a term not exceeding three months in addition to any other punishment to which that person is liable.

Similar provisions are contained in Sections 300 and 309 of the Criminal Procedure Act. Accordingly, under these sections, it might be applied for a conviction and may be used instead of, or in addition to any other punishment.

In *Atte v. Commissioner of Police*,[44] two housewives quarreled resulting in one spitting at the other. They had both engaged in reigning abuses on one another before culminating in the spitting by one. The trial court convicted the appellant who spat on the other lady and bound her over to be of good behaviour. On appeal, the supreme court held that the trial court should have apportioned the blame appropriately between them both, so that both and not only the appellant should have been bound over to keep the peace. The order of conviction made on the appellant was set aside as well as the order made by the Chief Magistrate that the appellant should enter into a recognizance to keep the peace and be of good conduct for 12 months.
In requiring an offender to be of good behaviour, it has been held in the case of *Nwankwo v. Commissioner of Police*[45] that the words used did not have to be exactly the same as those of section 300 of the Criminal

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[44] (1974) 10 S.C. 149.
[45] (1980) 2 NL.R. 26.

Procedure Act. In that case, the trial court gave the binding over order, to be of good behaviour and included also "and to keep the peace". There was no reason to have the order quashed even through the additional words were wider than those in the section.

Finally, it has been held that it is a prerequisite of an order for binding over that the court apprehends a future breach of the peace or the threat of such breach; evidence that the appellants were not likely to be of good behaviour in the future should have been given and in that respect the orders of binding over were held to be invalid.[46]

From the above, it is clear enough that the binding over order is one of the orders applied by the courts. These are orders, which are ideal for assaults, riots, affrays and fights etc. Such offences should normally not require prison terms except there are very exceptional circumstances requiring imposition of prison terms, and talking into consideration the overcrowding of prisons, non-violent and generally quite harmless people who have probably lost their tempers or acted along with members of a group are not persons deserving a stay in prisons.

5.4 Compensation

This is an option, which places more emphasis on the victims and less on the offender. An award of compensation in the course of a criminal trial speeds the process of justice and saves the victim the expense of a civil action. These orders are not in the nature of penalties but like fines they must be arrived at having regard to the offender's means and will have the same effect upon the offender as a fine regardless of their ultimate destination. They however serve the interest of justice from the complainants' point of view. Compensation orders may be imposed in case where crimes could also pass for torts and most especially in case involving stolen goods, damage to properties, cloths and in cases where assaults are committed to property or property is destroyed in the course of a fight or willful destruction of property.

Thus, Section 78 of Penal Code provides that any person who is convicted of an offence under the Penal Code may be adjudged to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for any other punishment.

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[46] See Commissioner of Police V. Nwogwu & 6 ors (1980 1 N.L.R. 289.

Section 365(1) of the criminal procedure code makes provision for compensation orders as well. The section reads thus:

> Whenever under any law in force for the time being a criminal court imposes a fine, the court may, when passing judgment, order that in addition to a fine a convicted person shall pay a sum:-
>
> (a) In defraying expenses properly incurred in the prosecution;
>
> (b) In compensation in whole or in part for the injury caused by the offence committed, where substantial compensation is in the opinion of the court recoverable by civil suit;
>
> (c) In compensating an innocent purchaser of any property in respect of which the offence was committed who has been compelled to give it up;
>
> (d) In defraying expenses incurred in medical treatment of any person injured by the accused in connection with the offence.

Section 435 of the Criminal Procedure Act which deals with probation also provides an order for compensation for a loss not exceeding a certain amount to be paid by the offender as damages for injury or compensation for loss and the parent of a 17 year old or less are to be liable for such payment or loss or damage if it appears they condoned such action.

Compensation may be made in addition to or in substitution for any other punishment.[47] In *Tsojoli v. Commissioner of Police*,[48] it was held that an order for compensation is part of the sentence passed by the court so it follows that when a conviction is quashed the sentence passed must be set aside and this includes compensation. Also in *Ubur v. Commissioner of Police*,[49] where the magistrate imposed a term of imprisonment in default of the payment of a compensation order, the court held that there was no statutory power to do so, and also that proceedings to enforce compensation

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[47] Refer to Section 70 of the Penal Code.
[48] (1971) 1 ALL N.L.R. 338.
[49] (1980) 1 N.L.R. 1.

should have been done at the instance of the beneficiary to the order and not *suo moto* by the magistrate.

5.5 Canning

When a person is convicted of an offence for which the prescribed punishment is six months or more, the court may order caning in lieu of or in addition to any other punishment prescribed.[50] Females and men aged 45 and over are however excluded from such corporal punishment.[51] In the Northern States, canning may be imposed on any male under 40 found guilty of a non-capital offence in addition to or in lieu of any other prescribed punishment.[52]

The court can impose a maximum sentence of 12 strokes of the cane.[53] The number of strokes passed must be specified in the sentence.[54] Where a person is convicted of one or more offences at the trial, the total number of strokes awarded must not exceed twelve.[55] Caning is applied with a light rod or cane or birch.[56] When an accused person is sentenced to caning, the sentence must the executed at such place and time as the court may direct.[57]

A sentence of caning should be carried out as soon as practicable, unless the person convicted gives notice of appeal or of his intention to apply for leave to appeal, as the case may be, in which case such punishment must not be carried out until the determination of the appeal or of the application for leave to appeal.[58]

6.0 RIGHT OF PLEA OF AUTREFOIS ACQUIT OR CONVICT

One of the safeguards or requirements provided by the Constitution to ensure fair hearing is contained in Section 36(9) of the 1999 Constitution itself which incorporates what is commonly referred to as the rule against double jeopardy.

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[50] Refer to Section 385 Ibid; Section 308(4) of the Criminal Procedure Code.
[51] Refer to Section 385 Ibid; Section 308(4) of the Criminal Procedure Code.
[52] Refer to Section 77 of the Penal Code; Section 308 (4) of the Criminal Procedure Code.
[53] Refer to Section 77 f the Penal Code; Section 386(1) of the Criminal Procedure Act.
[54] Refer to Section 386(1) of the Criminal Procedure Act.
[55] Refer to section 386(1) Ibid.
[56] Refer to Section 386(1) Ibid; Section 308(5) of the Criminal Procedure Code.
[57] Refer to section 308(1) of the Criminal Procedure Code.
[58] Refer to section 388(1) of the Criminal Procedure Act;

> "No person who shows that he has been tried by any court of competent jurisdiction for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court."[59]

The form and intent of this sub-section is the common law pleas of *autrefois acquit* and *outrefois convict*. In the English case of *R. v. Miles*,[60] Hawkins J. stated the rule in the following terms:

Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication whether it takes the form of an acquittal or conviction is final as to the matter so adjudicated upon, and may be pleaded in bail to any subsequent prosecution for the same offence.

The justification of the rule against double jeopardy as BLACK J of the United States Supreme Court puts it;

> Is that the state with all its resources should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeals and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.[61]

To invoke the pleas of *autre fois acquit* and *autrefois convict*, the following conditions must be present:

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[59] Refer also to sections 181 and 221 of the Criminal Procedure Act; Section 223 of the Criminal procedure Code.

[60] 29 Q.B.D. 423

[61] See Green V. United States (1957) 335 U.S. 184 at pages 187 - 188.

Firstly, there must have a prosecution or trial. Secondly, the trial must have been before a court of law of competent jurisdiction. In *R. v. Lasisi Jinadu*,[62] the appellant was charged with the offences of assault contrary to section 367 and assault occasioning harm contrary to section 355 of the Criminal Code. At the trial he raised the point that he had previously been acquitted of similar charges in what are described as "orderly room proceedings", he being a Lance Corporal of Police. The learned trial judge ruled that a plea of *autrefois acquit* had not been made out. He therefore proceeded with the hearing, convicted and sentenced the appellant who then appealed to the West African Court of Appeal (W.A.C.A).

The appeal was dismissed on the ground that proceedings against police officer in a police orderly room for an offence against discipline are not proceedings in a court having jurisdiction to hear and determine a criminal charge and that, therefore, the special plea of *autrefois acquit or autrefois convict* cannot be raised upon a criminal prosecution of the. police officer for an offence against the criminal code arising out of the same facts.

Thirdly, the accused must have been convicted or acquitted of the first offence. Thus, a dismissal of a complaint or the discharge of the accused is not an acquittal for this purpose.[63] Another condition is that the second trial must be in respect of the same offence as the first or both offences must have the same ingredients. Thus it has been held that the test whether an offence is the same is whether the same evidence is required to sustain a conviction.[64]

In *Aliu Kadiri Edu v. Commissioner of Police*,[65] The court held that a person acquitted of stealing a postal package might be subsequently charged with negligently losing it.

The provision of subsection (9) of the constitution may seem to allow a double jeopardy when the second trial is "upon the order of a superior court." However, this provision is to preserve the power of an appellate court to set-aside a verdict of a lower court and to order a re-trial.

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[62] (1948) 12 W.A.C.A. 368.

[63] Refer to Section 159(3) of the Criminal Procedure Code.

[64] See Okwuwa V. The Queen (1965) N.M.L.R. 96.

[65] (1953)14 W.A.C.A 163 See also The State V. Muna Madu & Anor (1976) N.N.L.R. 155.

There are situations where an accused has not only been tried convicted and sentenced to a term of imprisonment by a court of law of incompetent jurisdiction, but also has served his sentence. Section 36(9) of the Constitution and other similar provisions seem to allow a second trial of the accused by the state for the same offence on the ground that the first trial for which he has served a sentence was not carried out by a court of competent jurisdiction. The result is that the first trial and the sentence would be a nullity.[66] In other words, it will be assumed that there has never been any trial at all, so that a fresh charge in respect of same offence could be brought against the accused in a court with competent jurisdiction by the state, notwithstanding the fact that the accused has actually served a jail term.

This is the true position of law on the matter. Therefore, subjecting the accused to a second trial in respect of the same offence occasion greater hardship to him. The hardship and injustice to the accused become more evident when we realize that the essence of the rule against double jeopardy is to protect an accused from the hazards of a criminal trial i.e. the ordeal, anxiety, embarrassment and expense incurred in his defence together with the fear of possible conviction and punishment.

7.0 CONCLUSION

From the above outlines, it is obvious that the Nigerian Statute books are littered with laws regulating various aspects of the offender's rights on his conviction or discharge. However, from a careful study of the relevant statutory enactments, it is obvious that the realization of the offenders post-trial benefits depends largely on the favourable exercise of judicial discretion. This is attributed to the fact that the relevant statutory enactments fail to provide the guideline approach that would determine the legislatively mandated instances in which such benefits are not only to be recognized, but are also to be accorded to the offender. Thus, in the absence of any such guideline approach, there is every likelihood that the discretionary powers vested in the court may be exercised arbitrarily and which ultimately, can deny the offender of such benefits on conviction or discharge.

Furthermore, considering all the various non-custodial methods earlier highlighted, it is obvious that statutory provisions exists for applying them.

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[66] See Alao V. Commissioner of Police (1987)4 N.W.L.R. (pt.64) 199 at page 201; Unuakhoni V. The State 1985 3 N.W.L.R. 364.

Judges and magistrates are therefore, to be blamed for limiting their sentencing restricted to fines and imprisonment. In this regard, if these non-custodial sentences are more widely used and resort to imprisonment is only made as a very last option, over crowding in the Nigerian Prison might well become a thing of the past and the offender would thus, have been accorded his or her post-trial benefits.

Finally, greater use needs to be made of other alternatives (as well) such as parole, community services, suspended sentences and restitution to victims. However, since neither the Criminal Procedure Act applicable in the Southern States nor the Criminal Procedure Code applicable to the Northern States provide for any form of such non-custodial sentence, there is the need for reform to address the imposition of these non-custodial sentences especially for minor offences.