



The place of discharge and recognizance in criminal justice administration in Nigeria

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Abstract

The aim of this paper is to examine the place of discharge and recognizance in criminal justice administration in Nigeria. Discharge, as a non-custodial sentence, is rarely used by the courts notwithstanding its provisions in the Administration of Criminal Justice Act (ACJA), 2015 and other statutes. The paper examines a conditional discharge, absolute discharge, principles guiding the use of absolute and conditional discharge, combining absolute discharge with other sentences, effects of absolute discharge, breach of conditional discharge, right of an offender discharged conditionally or absolutely to appeal against his conviction and the effect of the exercise of the prerogative of mercy by the President or Governor. This paper further examines the use and practice of recognizance and circumstances in which recognizance can be forfeited. In conclusion, the paper advocated the encouragement of the use of discharge, whether conditionally or absolutely by the courts.

Keywords: discharge, recognizance, court, offences, forfeiture

Introduction

A discharge is a non-custodial sentence used by the court. When a person has been convicted of an offence other than one for which the sentence is fixed by law and the court is of the opinion, having regard to the circumstances, including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may make an order discharging the offender absolutely or conditionally. The word “discharge” means release from custody and exemption from punishment^[1]. Where the law creating an offence provides a mandatory sentence, a cautionary order cannot be made. The court, in *Sani v COP*^[2], relying on the earlier decision in *Agbegende v Ilorin Native Authority*^[3], held that “caution” or “discharge” is not a punishment and cannot therefore be ordered in a conviction for an offence for which punishment is mandatory. But where the power to punish is discretionary, the court may decline to punish and may caution the accused and discharge him.

Absolute and Conditional Discharge

It is impossible to differentiate between the circumstances in which absolute and conditional discharge will be used. Theoretically, the absolute discharge is called for when there is no likelihood of the repetition of the offence or the offence is so trivial or technical that repetition is not important^[4]. The conditional discharge should be used whenever there is some prospect of the repetition of the offence and the court is anxious to avoid it. The condition of the discharge then operated in the same deterrent way as binding over or a suspended sentence. The offender must not misbehave or commit another offence during the period specified or he will be liable to punishment^[5].

A discharge, whether absolute or conditional, used to be governed by Criminal Procedure Act in the South and the Northern Probation of Offender Law in the Northern Part of Nigeria

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

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 the opinion that having regard to the character, antecedents, age, health, or mental condition of 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 order than a nominal punishment... 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 which period not exceeding three years as may be specified in the order.*

It can be conveniently said that whilst section 435(1) (a) relates to absolute discharge, section 435 (1) (b) on the other hand may be linked to conditional discharge.

In the Northern part of Nigeria, the appropriate law on discharge may be found under section 8 of the Northern Probation of Offenders Law, which provides:

Where a person is convicted of an offence (not being an offence, the sentence for which is fixed by law) and the court by which he is convicted is of the opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment or to make a probation order, the court may make an order discharging the offender absolutely, or if the court thinks fit discharge him subject to the condition that he commits no offence during such period not exceeding twelve months from the date of the order as may be specified therein.

Whilst both provisions under the Criminal Procedure Act and the Northern Probation of Offenders Law are both disposed to absolute or conditional discharge, the provisions differ in the following respects:

1. by section 2(2) of the Law, the powers to apply the provision is limited to Area Courts only whilst there is no limit under the Act as to which court may apply the provisions on discharge.
2. under the Law, a conditional discharge is granted on the ground that the offender commits no offence for a period not exceeding twelve months whilst under the Act the period extends to three years.
3. whilst the Act requires the use of recognizance to enforce a conditional discharge, the Law does not require same.
4. section 8 only allows a discharge to be ordered after the accused has been convicted but section 435 of the Act does not require a conviction. If the case is proved, however trivial the offence may be, section 8 requires the court to convict and then take the triviality into account in ordering a discharge whereas section 435 of the Act simply lets the court dismiss the charge.
5. section 8 allows the use of a discharge for any offence “not being one the sentence for which is fixed by law”. Whereas, section 435 can be used for a wide range of offence.

It is pertinent to note that, notwithstanding the above differences, the general principles relating to the award of absolute or conditional discharge under the Law and the Act are the same. According to Adeyemi, these disposition methods do not appear to be used at all by the courts ^[6]. Commenting on the provisions of section 435 of the Criminal Procedure Act, Milner observed that this provision is, in form, the same as a binding over, at least, so far as it concerns a conditional discharge. The criteria which the section specifies for using discharges are the same as those in fact adopted for use in binding over and the use of the recognizance to enforce the conditional discharge heightens the similarity ^[7].

General Principles Guiding the Use of Absolute and Conditional Discharge

Absolute Discharge

There are three conditions to be considered by a court before making an order discharging an offender absolutely. These are:

- a. that the offence is one for which the sentence is not fixed by law.
- b. that it is inexpedient to inflict punishment, and
- c. that probation is inappropriate.

An absolute discharge may reflect the triviality of the offence, the circumstances in which it came to be prosecuted or factors relating to the offender ^[8]. An absolute discharge will be used, for example, where the strict letters of the law has been breached but the offence is trivial and the public interest is not served by inflicting punishment on the offender ^[9]. It could equally be used where considerable time has elapsed between the commission of the offence and its prosecution ^[10] or where the accused is morally blameless. In *O'Toole* ^[11], an ambulance driver was convicted of dangerous driving on evidence that he was driving at a high but lawful speed along a straight road, with warning lights flashing and siren sounding, when he collided with a car which was driven into his path by an elderly lady whose driving on the occasion was described as “careless and disastrous”. The Court of Appeal, in quashing his conviction, held that it was difficult to say that there was any moral blame on the part of the driver. The fine of 50 pounds and a disqualification for twelve months were set aside and an absolute discharge substituted.

Combining Absolute Discharge with Other Sentences

Generally speaking, an absolute discharge cannot be combined with any other punitive measure for the same offence. Thus, a fine, being a punishment, may not be imposed in addition to a discharge for the same offence. Furthermore, a custodial sentence would be inappropriate in combination with an order for discharge. However, where a person is given a discharge for one of several offences of which he is convicted, a court is free to sentence him for the other offences in any manner in which it has power to do so ^[12].

It should be noted that orders for absolute discharge may be combined with ancillary orders such as orders for costs or compensation for any personal injury, loss or damage resulting from the offence which is taken into consideration in determining sentence. The court may at the same time exercise discretionary powers of disqualification from driving and endorsement of driving license in the absence of special reasons.

Effects of an Absolute Discharge

An absolute discharge terminated the proceedings in relation to the offence in respect of which it is granted ^[13]. The offender absolutely discharged actually has the charge against him dismissed. The implication here is that no further action on the part of the court in respect of the offence is possible.

Conditional Discharge

A conditional discharge differs from an absolute discharge to the extent that a condition is imposed that the offender commits no offence for a specified period in the future ^[14]. A conditional discharge is used whenever there is a possibility of the repetition of the offence and the court is ever ready to prevent it. Accordingly, the offender must not misbehave or commit another offence during the specified period which may be up to three years under the Act or twelve months under the law, otherwise he will be liable to punishment.

Before making an order for conditional discharge, the sentencer must explain to the offender in ordinary language that if he commits an offence during the period of the conditional discharge, he will be liable to be sentenced for the original offence. In *R v Welner* ^[15], the Court of Appeal held that the sentencer may delegate his duty of explaining to the offender the effect of the order provided always that the court is satisfied that the explanation has been made and understood before the order is drawn up.

Cases in which conditional discharge is used may be classified into two distinct classes. The first category may involve an offence of some degree of seriousness committed by an offender whose circumstances are such that a non-custodial individualised measure is appropriate but for whom the supervision of a probation officer is either unnecessary or unsuitable. Another category on the use of conditional discharge is a tariff sentence in cases of nominal gravity, where the facts of the sentence of imprisonment and a fine is inappropriate as the offender has no means.

Breach of Conditional Discharge

The breach of a condition in a conditional discharge will result in further proceedings being taken against the offender in respect of the original offence. Thus, the offender will be brought to the court before which his recognizance binds him to appear; the court then has the power, without further proof of his guilt, to convict and sentence him for the original offence. Where the offender is sentenced for the original offence, the conditional discharge ceases to have effect. If no such sentence is passed, the conviction in respect of which the discharge was granted shall be deemed not to be a conviction for any purpose other than the purpose of the proceedings in which the order is made and at any subsequent proceedings which may be taken against the offender in relation to breach of a probation or discharge ^[16].

Combining A Conditional Discharge with Other Sentence.

A conditional discharge takes the place of any sentence for the offence and may not be combined with a fine ^[17]. It may be combined with a disqualification from driving, a compensation order or an order to pay a sum towards the costs of the prosecution. Where the offender is convicted of more than one offence, there is no barrier to the imposition of a conditional discharge on one count and some other form of sentence on another.

Appeals

The right of an offender discharged absolutely or conditionally to appeal against his conviction or rely on it in bar of subsequent proceedings for the same offence is not affected or his right to the restoration of any property in consequence of the conviction and a conviction in respect of which a person has been disqualified from driving or whose licence has been endorsed under Road Traffic Acts, is, still despite the above provisions, to be taken into account in determining liability to punishment or disqualification for any offence involving obligatory or discretionary disqualification committed subsequently. It follows that an appellant may appeal either against the principal order or the ancillary order or both.

Prerogative of Mercy of the President and Governor

This power is contained in sections 175 and 212 of the Constitution of the Federal Republic of Nigeria, 1999 as amended. The President may grant any person convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions. Also, the Governor has the power to grant any person convicted of any offence created by any law of a state a pardon, either free or subject to lawful conditions ^[18]. This power, when exercised by the President or Governor is equivalent to a discharge which may be absolute or conditional ^[19].

A Young Offender

Like an adult, a juvenile can be found guilty but discharged absolutely or conditionally ^[20]. As an alternative, one of his parents may be ordered to give security for his good behaviour by entering into recognizance ^[21].

Recognizance

A recognizance is a solemn obligation or bond entered into before a court or official under which a person binds himself to the performance of certain obligations ^[22]. According to Lermack, recognizance originated by ransoming people captured in battle in order to prevent their death ^[23]. The court which makes an order for a

conditional discharge may allow any person who consents to do so to enter into recognizance for the good behaviour of the offender if the court thinks it expedient for the purposes of his reformation ^[24]. The recognizance is in effect a bond to forfeit a specified sum of money if the offender fails to comply with the terms of the bind-over.

Other persons than the subject of the recognizance may join in the promises as sureties. In the event of failure to carry out those promises, the recognizance may be forfeited ^[25]. This means that the court orders that the sums of money mentioned in the bond becomes due and payable ^[26]. Recognizance is used for the purpose of bail and securing attendance at the trial as well as for disposal of offenders at the trial itself as a sentencing measure ^[27]. The power to require a person to enter into recognizance is a common law power as far as misdemeanors are concerned. It applies whether the person was tried on indictment or summarily and may be used in addition to or in lieu of any other punishment and with or without sureties ^[28]. Additional conditions may be inserted in the recognizance for preventing a repetition of the same offence or the commission of other offences, although seldomly used. These may involve such things as requiring the offender to live in a particular place, to stay out of a specified area or abstain from drinking ^[29].

Where the power requiring a person to enter into a recognizance is exercised, the court usually prescribes imprisonment until recognizance is entered into, and under certain statutes, such a person may, in default of sureties, be imprisoned for not over one year ^[30]. Importantly, when a person is brought back to court for breach of recognizance, the court must be careful to see that the breach is properly proved. It has been said that the breach should be proved with the same particularity as if the allegations were that the prisoner had committed a crime ^[31].

Where a complaint is made against a person, even though no offence has been committed, a Magistrate may require a person to enter into a recognizance, for instance, in cases of a family quarrel. According to Milner, the difficulties of enforcement of the conditions attached to a recognizance make such requirements little more than pious exhortations when they are used ^[32].

Conclusion

The time has come to draw the attention of our Judges and Magistrates to the proper use of this disposition method. In a situation where a Magistrate is to sentence an accused person to six months imprisonment or less, he could as well, depending on the situation, caution and discharge him. This could be conditional discharge that the accused person should not commit an offence within six months or else he will be brought back to the same court and be convicted of the former offence. This approach will help to decongest the prisons and it may also be accompanied with a fine as this may be more effective and also make economic sense more especially for first offenders where the punishment is not mandatory.

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24. Section 435, Criminal Procedure Act, Cap 41, LFN, 2004, applicable to the Southern States of Nigeria. See also, section 167 (1) and (2) Administration of Criminal Justice Act, 2015.
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26. Section 179 (2), *ibid*; section 182 (1) of the Administration of Criminal Justice Act is to the effect that where a recognizance to keep the peace and be of good behaviour or not to do or commit some act or thing has been entered into by a defendant as principal or as surety before a court, a court on proof that the person bound by the recognizance as principal has been convicted of an offence which is by law a breach of the condition of the recognizance, may order that the recognizance be forfeited and persons bound by it whether as principal or as sureties or any of these persons, shall pay the sums for which they are respectively bound. See also, Filani, A.O et.al "Bail During Trial and Pending Appeal Upon Conviction: A Comparative Analysis" *African Journal of Law and Criminology*, 2021:11(1):67.
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