

SUPREME COURT OF NIGERIA
14TH OCTOBER, 1994. SC. 303/1990
CORAM:- M. BELLO CJN, M. L. UWAIS,
S. M. A. BELGORE, A. B. WALI, M. E. OGUNDARE,
E. G. OGWUEGBU, Y. O. ADIO, JJSC

PETER NEMI & OTHERS APPELLANTS
V.
THE STATE RESPONDENT

CONSTITUTIONAL LAW - Inhuman and degrading treatment s. 31 (1) (a) of the 1979 constitution - Contention that having stayed in prison for a long period - It would be inhuman to execute sentence of death on appellant - Whether Supreme Court has jurisdiction to determine this issue.

CRIMINAL PROCEDURE - Ingenious reply - Where there is overwhelming evidence against each appellant - Whether an ingenious reply would vitiate conviction - Whether so called new matter warrants a reply by accused.

CRIMINAL PROCEDURE - Reply - Where accused and his counsel had no right of reply - Whether absence of defence counsel prejudiced accused person's right of reply.

CRIMINAL PROCEDURE - Reply - Introduction of new matter by prosecutor in his address - When failure to allow accused to reply will vitiate the trial.

CRIMINAL PROCEDURE - Reply - Forms an integral part of trial - Absence of accused person's counsel amounts to a breach of s. 352 of the CPL - When such breach is merely technical - Whether miscarriage of justice is occasioned.

CRIMINAL PROCEDURE - Taking a suspect to senior police officer - For a confirmation of voluntary confessional statement - Whether non compliance per se will affect evidential value of the confession.

EVIDENCE - Corroborative evidence - Armed robbery - Evidence of prosecution witnesses that implicated the appellants - As having committed robbery - Whether corroborative.

EVIDENCE - Confessions - Statements of accused persons to the police - Whether they qualify as confession.

FACTS

Armed with pistols, the appellants boarded the house-boat anchored in the Lagos lagoon and robbed the inhabitants. The appellants were shooting during the operation. The night watchman who disappeared that night was found floating in the lagoon three days after the incident with bullet wounds on his forehead. The police searched 1st appellant's house and found some of the stolen properties. He took the police to the house of the 3rd appellant where a stolen cassette player was discovered. All the appellants made voluntary confessional statements to the police. The appellants were convicted of conspiracy to commit armed robbery and of armed robbery, and sentenced to death. Their appeal to the Court of Appeal was dismissed by that court.

Being aggrieved the appellants have further appealed to the Supreme Court. The issue of inhuman and degrading treatment contrary to s.31(1)(a) of the 1979 Constitution was raised on behalf of the 3rd appellant. It was contended for the first time that having stayed in prison for an unreasonable length of time, it would be inhuman and degrading for the Supreme Court to uphold and execute the sentence of death on the 3rd appellant. The ultimate court had to determine whether it has the jurisdiction to determine this question. The Supreme Court also had to determine inter alia, whether Exhibit R can truly be regarded as a confessional statement and whether evidence of two of the prosecution witnesses were corroborative in material particulars.

HELD (Unanimously dismissing the appeal per lead judgment of ***BELLO CJN***)

Inhumanity of executing sentence of death

1. Section 30 of the Constitution authorizes imposition of death sentence by a court of competent jurisdiction and, unlike India, the appellate jurisdiction of this court under section 213 of the Constitution does not include appeal against sentence of death. Like the Privy Council in ***WALKER v. THE QUEEN*** (supra), this court is not vested with original jurisdiction to stop the Executive from carrying out the execution of a sentence of death. I hold that the question of whether or not execution of the Appellants would infringe their constitutional rights is a matter for determination by the High Courts upon which section 42 of the Constitution confers jurisdiction. Accordingly, the jurisdiction of this Court to determine the Constitutional question will only arise on appeal after a High Court has considered and adjudicated on the issue and the Court of Appeal confirmed or re-

versed the decision of the High Court. It will be unconstitutional for this court to assume jurisdiction and decide the question as contended (P217 L17)

Whether statements qualify as confessions

2. I do not think one needs any authority to treat both statements as confession by both Appellants as both admitted that they had committed the offences to wit conspiracy to commit armed robber and armed robbery. (P223 L26)

Confirmation of voluntary confession by senior police officer

3. With regard to the failure of the police to take the Appellants to a Senior Police Officer to confirm that the Appellants had made the statements freely and voluntarily in accordance with the Judge's Rule, this court long ago settled the issue. The practice is not a rule of law but is a commendable precaution for ensuring that enthusiastic junior police officers will not endeavour to be tempted to "*obtain*" confession to secure conviction. Mere failure to accommodate the practice does not affect the efficacy or evidential value of a confession which a trial court found to be freely and voluntarily made. (P223 L29)

Whether evidence is corroborative

4. Surely, the evidence of PW1 and PW2 in the present case was more that corroborative. PW1 directly and positively implicated all the Appellants if having committed the robbery while PW2 also implicated the 1st Appellant. There is no substance whatever in the challenge. (P224 L14)

Reply - Absence of defence counsel

5. It can be seen from these sections that neither the accused nor his counsel had a right of reply to the Reply of the State Counsel delivered under section 242. Accordingly, the absence of the defence counsel at ft material time did not prejudice or adversely affect the right of the accused concerning the Reply. (P. 228 L1 5)

When failure to allow accused to reply will vitiate the trial

6. However, although an accused person has, in strict law, no right of reply if the prosecutor has introduced a new matter in his Reply which was now covered by the address of the defence counsel, the rule of practice requires the trial court in the interest of justice and fairness to allow the accused, if he is not represented, or his counsel to respond on the new matter. In my

view, failure of a trial court under such circumstances to allow an accused or his counsel to respond will only vitiate the trial if the failure has caused a miscarriage of justice. (P228 L.19)

Whether ingenious reply will vitiate conviction

7. Having regard to the overwhelming evidence against each Appellant, which I have earlier indicated in this judgment, I would adopt the observation of Oputa, J.S.C., in NIGER CONSTRUCTION LTD. v. CHIEF OKUOBBI (supra) at page 114: *"No amount of brilliance in a final speech can make up for the lack of evidence to prove and establish or else disprove and demolish points in issue."* I do not think a reply however ingenious by any of the Appellants or their counsel to the Reply would cause a reasonable tribunal to reach a different decision from that of the trial court. Accordingly, I hold that the 3rd Appellant had no right of reply to the Reply and the so-called new matter introduced in the Reply did not warrant the trial court to invite him to reply. (P229 L.9)

When absence of accused person's counsel did not occasion injustice

8. Moreover, I also hold that the Reply formed an integral part of the trial and the absence of their counsel during its delivery amounted to a breach of section 352 of the Law. However, I consider the breach in the circumstances as a mere technical breach which had not occasioned actual miscarriage of justice. Since the provisions of sections 33(6) (c) of the Constitution and 352 of the Law were complied with throughout the trial except during the Reply, it will not be right to interfere with the convictions solely on the ground of mere technicality. (P229 L.21)

NOTABLE POINTS OF INTEREST

BELLO CJN

1. Constitutional question - Reference to other jurisdictions

It has long been the cardinal principle of our constitutional law that on account of the unique character and diversity of our Constitution, the courts should always endeavour to find solutions to constitutional questions within the Constitution through its interpretation but the courts may seek guidance as persuasive authorities from the decisions of their Constitutions which are in pari material with the relevant provisions of our Constitution. (P.214 L.13)

2. Classification of fundamental rights into two categories

It appears to me that upon careful examination of the fundamental rights in Chapter IV of the Constitution, they may be classified into two categories for the purpose of their observance and enforcement. Firstly, there are the rights which must be observed whenever the occasion for their observation has arisen. Endorsing the submissions of Mr. Agbakoba, they are intrinsic to the occasion and cannot be divorced from the occasion. They are generally procedural rights and are embodiment of a fair trial in courts and tribunals of a democratic society. Thus the right to fair trial and the right of the accused to defend himself under section 33 of the Constitution are intrinsic to the trial and failure to observe such right is a valid ground of appeal. The second category of the fundamental rights comprise of those rights that are enforceable by the High Courts under section 42 of the Constitution. Because the Constitution expressly confers original jurisdiction for their enforcement on the High Courts, this court has no jurisdiction as a court of first instance over them. (P214 L.29)

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3. Definition of corroborative evidence

Corroborative evidence was defined in OMISADE & ORS v. THE QUEEN (1964) NSCC 170 as evidence given by an independent witness which showed or tended to show that the accused committed the crime was true, not merely that the crime had been committed, but that it was committed by the accused. The corroboration needs not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. (P224 L.8)

25 4. Non representation of an accused in court - Whether unconstitutional

For the avoidance of any doubt, it may be emphasised that non-representation by a legal practitioner at the trial of a person charged with criminal offence, whether capital or not, is not by itself a contravention of section 33(6)(c) of the constitution unless the accused is not permitted to exercise his right to be defended by a legal practitioner of his choice. The Constitution simply guarantees his right to defend himself in person or by a legal practitioner. It is his business if he cannot afford to brief a legal practitioner of his choice or if the legal practitioner of his choice abandons him. Non-representation per se is not unconstitutional and does not render a trial unfair. (P.229 L.31)

WALI JSC

5. Violation of s. 31(1) (a) of the Constitution - Redress in High

Court

The issue of violation of S.31(1)(a) of the 1979 Constitution was not raised in the trial court which is vested with the jurisdiction to entertain such a complaint. The law has provided the procedure for raising such an issue under the Fundamental Human Rights (Enforcement Procedure) Rules, 1979. Where a person feels that any of his fundamental human rights has been violated, he can only seek redress in accordance with the provisions of the Fundamental Human Rights (Enforcement Procedure) Rules, 1979. On the face of these Rules the High Court will be the appropriate venue for the appellants to seek redress. (P.235 L.4)

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ADIO JSC

6. Fundamental rights breach - No original jurisdiction on Supreme Court

In short, the Supreme Court, in the circumstance, has no original jurisdiction to determine questions relating to an alleged breach of fundamental rights where the issue involved is not relevant to the determination of the merit or otherwise of an appeal properly brought before it. (P.240 L.8)

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7. Need to comply with statutory proceedings

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Further, if a law provides that certain proceedings in respect of a particular cause of action shall be commenced by one method, a litigant will be wrong to commence such proceedings by another method. The legal consequence is that however meritorious the cause of action may be, the court will have no jurisdiction to entertain it as it is not properly before it. (P.240 L.19)

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REPRESENTATION

Chief Olajide Oki with Olasup Ati-John for 1st, 2nd and 4th Appellants
Mr. O. Agbakoba with C. Obiogu for 3rd Appellant
Miss C. E. Uweja Asst. DPP for Respondent

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AMICI CURIAE

Chief F.R.A. Williams SAN, with J. I. Nweze
Chief Kehinde Sofola SAN, with H. S. Umar and W. N. Ekumankama
Tayo Falode A-G Ogun State with O. Mabekoje P.S.C.
Chief Mankanjuola Esq. A-G Ondo State
Y. A. Akande Esq. A-G Oyo State
Mrs. C. D. Goje A-G Adamawa State

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- Mrs. B. S. Lawenji A-G Bauchi State
 Mr. M. A. Sanni A-G Kwara State
 Tinu Akomolafe-Wilson (Miss) S-G Edo State
 A. O. Ukachukwu D.C.L. Imo State with Mrs. C.O. Okoro D.D.C.L.
 M. I. Atagher Esq. D.P.P. Benue State
 5 A. B. Mahmoud Esq.

CASES REFERRED TO

- Onyema v. Oputa (1987) 2 NSCC 900
 A-G Lagos State v. Dosumu (1989) 3 NWLR (Pt.111) 552
 10 Catholic Commission for Justice and Peace in Zimbabwe v. A-G (Unreported) No. S.C. 73/1993
 Pratt v. A-G for Jamaica (1993) 3 WLR 995
 Trevor v. Walker (1993) 3 WLR 1017
 Abbott v. A-G of Trinidad (1979) 1 WLR 1342
 15 Sher Singh v. State of Punjab (1983) 2 SCR 583
 Bello v A-G Oyo State (1986) 5 NWLR 828
 A-G Anambra State v. A-G Federation (1993) 6 NWLR (Pt.302) 692
 Okoro v. The State (1988) 5 NWLR (Pt.94) 255
 Josiah v. The State (1985) 1 NWLR (PT.1) 125
 20 Sode v. A-G Federation (1990) 1 NWLR (Pt.128) 500
 Senator Adesanya v. President (1981) 5 SC 112
 Legal Practitioners Disciplinary Committee v. Fawehinmi (1985) 2 NSCC 998
 Tukur v. Government of Gongola State (1989) 2 NSCC 225
 25 Egboghonome v. State (1993) 7 NWLR (Pt.306) 383
 Omisade v. The Queen (1964) NSCC 170
 R. v. Golder (1960) 1 WLR 1169
 Saka v. State (1981) 11-12 SC 65
 Niger Construction Ltd. v. Chief Okugbemi (1987) 11-12 SCNJ
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STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria 1979 ss. 31(1)(a), 42, 6(6)(a), 213(2)(c), 212, 33(5), 30
 Supreme Court Act 1960 ss. 26, 30(2)
 35 Constitution of Zimbabwe s. 24
 Criminal Code s. 402 (2)(a)
 Evidence Act s. 27
 Criminal Procedure Law of Lagos State s. 352, 287, 288
 Robbery and Firearms Tribunal (Procedure) Rules r. 5

LEAD JUDGMENT BY BELLO CJN

A very far-reaching constitutional question has been raised in this appeal. It is: Having stayed in prison confinement under a sentence of death for such an unreasonable length of time, from 28th February 1986 to date, it would amount to inhuman and degrading treatment contrary to section 31(1)(a) of the Constitution of the federal Republic of Nigeria, 1979 to uphold and execute the sentence of death passed on the 3rd Appellant. 5

The facts relevant, to the question may be summarised. The 3rd Appellant with four other persons were convicted of conspiracy to commit armed robbery and of armed robbery and sentenced to death on 28th February 1986. His appeal and the appeals of the three others were dismissed by the Court of Appeal on 29th March 1990. Further appeals to this court were filed on 26th April 1990. They have been in custody since their arrest on 9th September 1982. The delay in their trial, determination of their appeals and their non-execution were entirely caused by the due process of law and the Appellants have not in any manner whatsoever contributed to the delay other than by the exercise of their rights to invoke judicial process. 15

Because of the importance of the question raised as it relates to constitutional right to life, the Court invited all the Attorneys-General in the Federation, other than the Attorney-General of Lagos State, who is for the Respondent, and three learned counsel as *amici curiae* to assist the court on the question. Eleven Attorneys-General and the three learned counsel responded to the invitation by filing briefs. However, due to the transport problem brought about by the strike of the Union of Petroleum and Natural Gas Workers, some of the Attorneys-General were unable to attend the Court at the hearing. We are indeed grateful to the learned *amici curiae* of both the official and private Bars for the useful assistance they rendered to the court in their briefs and oral submissions. 20 25

It is pertinent to state that the constitutional question had not been taken in the lower courts. It was raised for the first time here with the leave of the court. In view of the circumstances some of the *amici curiae* have invited the court to consider two preliminary issues. Firstly, whether the court has jurisdiction to determine the question and secondly, whether the question is premature. Since the issue of jurisdiction has been raised, it is essential to deal with it first before any other issues on the constitutional question may be considered as any decision reached on the question without jurisdiction or in excess of jurisdiction would be abortive, null and void: 30 35

ONYEMA & ORS. v. OPUTA & ORS. (1987)2 N.S.C.C 900; ATTORNEY-

GENERAL OF THE FEDERATION & ORS. v. SODE & ORS. (1990)1 N.S.C.C. 271; ATTORNEY-GENERAL OF LAGOS STATE v. DOSUMU (1989) 3 N.W.L.R. (Part 111) 552.

The submission of Chief Williams, SAN, covered both jurisdiction and prematurity. He posed the question: *"Whether, in proceedings on appeal*
5 *from a conviction for a criminal offence involving the death penalty or from a sentence to death, the Supreme Court has jurisdiction to entertain a complaint that it would be unlawful or unconstitutional to carry out the execution of the sentence on the ground of inordinate or inexcusable delay in doing so."* After having reminded the Court that it had in many cases
10 held that in dealing with matters affecting fundamental rights, the Court would bend over backwards to avoid technicalities and to decide questions which were raised on the merit, he contended that it was important in this appeal to consider if the Appellant relying on section 31(1)(a) of 1979
15 Constitution could properly raise the constitutional issue as a ground of appeal. The learned Senior Advocate answered this question in the negative. He contended that a complaint of inordinate or inexcusable delay in carrying out a sentence of death was not concerned with the exercise of
20 judicial powers or jurisdiction of the court in respect of the charge of criminal offence against the convicted prisoner but it was only concerned with the alleged contravention of the constitutional or common law right of the convicted prisoners to a fair and humane treatment from the State. Relying
on the judgment of Gubbay, C.J., in CATHOLIC COMMISSION FOR JUSTICE AND PEACE IN ZIMBABWE v. ATTORNEY-GENERAL (unreported) No. 25 SC. 73/1993 delivered on 24th June 1993, he submitted
25 that the breach of the said legal right could not be a proper basis for a ground of appeal against the conviction or sentence of the prisoner. It might, however, form the foundation of appropriate proceedings in a court of competent jurisdiction to stop or commute the execution of the sentence. He pointed out that jurisdiction to entertain complaints based upon a
30 contravention of section 31(1)(a) is vested in the High Court pursuant to the provisions of section 42 of the 1979 Constitution and this court has no original jurisdiction to do so. He relied on PRAIT v. ATTORNEY-GENERAL FOR JAMAICA (1993) 3 W.L.R. 995 and TREVOR WALKER v. THE QUEEN (1993) 3 W.L.R. 35 1017 to show that most of the cases on
35 matters of this nature in other common law jurisdictions arose in proceedings specially instituted for the purpose and not on appeals against conviction or sentence. He stated that the Appellant had jumped the gun and that the constitutional issue would arise after the appeal process had been completed.

Mr. Sofola, S. A. N., did not deal with the jurisdiction and prematurity. His submission was confined to the constitutional question, the provisions of the constitutions of some of the common law countries relevant to it and the several approaches of their courts in the determination of the question. He particularly referred to PRATT v. ATTORNEY-GENERAL FOR JAMAICA (supra); CATHOLIC COMMISSION v. ATTORNEY-GENERAL (supra); RILEY v. ATTORNEY-GENERAL OF JAMAICA (1993) 1 A.C. 719; ABBOTT v. ATTORNEY-GENERAL OF TRINIDAD (1979) 1 W.L.R. 1342; DHLAMINI v. CARTER (1968) (1) R.L.R. 136 (AD); SHER SINGH v. STATE OF PUNJAB (1983) 2 SCR 583 and RAJENDRA PRASAD v. STATE OF UTTAR PRADESH (1979) 3 SCR 78. He urged the Court, in the event of upholding the conviction and sentence, to stay the sentence and to recommend that the Executive should review all cases of the prisoners awaiting execution with a view to commuting the death sentence or to carry out the execution where there has not been any appreciable delay. He also suggested that Criminal Procedure Act and Codes should be reviewed to make provisions for expeditious trials and appeals in capital offences.

In her brief, Mrs. Goje, the Attorney-General of Adamawa State, submitted that the Court was not competent to entertain the complaint of the infringement of section 31(1)(a) of the 1979 Constitution and that a High Court was the proper forum for the determination of such complaint in accordance with the provision of section 42 of the 1979 Constitution and the Fundamental Rights (Enforcement Procedure) Rules 1979. She referred to PRATT v. ATTORNEY-GENERAL OF JAMAICA (supra) where the proceedings commenced in the Supreme Court, which is equivalent, to our High Court, under section 25 of the Jamaican Constitution which is similar to our section 42. In the case of CATHOLIC COMMISSION v. ATTORNEY-GENERAL (supra), the learned Attorney-General pointed out that section 24 of the Constitution of Zimbabwe conferred original jurisdiction on their Supreme Court, unlike our court, to entertain application relating to the infringement of fundamental right.

The Attorney-General of Anambra State was *ad idem* with his colleague of Adamawa State in distinguishing the Jamaican and Zimbabwean situations from our own and in his submission that the proper approach to the constitutional question was for the Appellant to institute an application for the enforcement of his fundamental right before a High Court under section 42 of the Constitution.

Mr. Uzoukwu, the Attorney-General of Imo State, took a different approach in his Brief. Referring to sections 6(6)(a) and 213(2)(c) of the 1979 Constitution; sections 26 and 30(2) of the Supreme Court Act and

BELLO v. ATTORNEY-GENERAL OF OYO STATE (1986) 5 N.W.L.R. (Part 45) 828, he contended that the court has the power to commute the sentence of death on appeal if it found the constitutional right of the Appellant under section 31(1)(a) had been infringed. He further contended that even if there was no express provision enabling the court to commute the death sentence, the court should invoke the doctrine of "*ubi jus ibi remedium*" to exercise its inherent power to assume jurisdiction for commutation.

In his Brief and oral submissions, Mr. Esan, the Attorney-General of Ondo State referred the Court to sections 212, 213 of the 1979 constitution and the decision in ATTORNEY-GENERAL OF ANAMBRA STATE v. ATTORNEY-GENERAL OF THE FEDERATION (1993) 6 NWLR (Part 302) 692; MADUKOLU v. NKEMDILIM (1962) 1 All NLR 587 and submitted that the court has no original jurisdiction to determine the constitutional question and it could not properly do so on appeal when the matter had not been canvassed in the lower courts. He pointed out that unlike our court, the Supreme Court of Zimbabwe has original jurisdiction to entertain contravention of fundamental human rights and on that ground it decided the CATHOLIC COMMISSION case and the same consideration applied to PRATT'S CASE.

The learned Attorneys-General of Bauchi, Kwara and Oyo States, Mrs. Lawenji, Sanni and Akande respectively rested their submissions on the immaturity of the constitutional question. They argued that where an Appellant by his choice resorted to appeal, he could not complain of delay in his execution before the appeal was disposed of. They drew the attention of the court to the fact that the issue relating to delay in both PRATT case and CATHOLIC COMMISSION case was taken in the court having original jurisdiction on the issue after the convicts had exhausted their rights of appeal. Concluding, the learned Attorney-General urged the court to hold that the constitutional question in this appeal was premature.

Mrs. Wilson, Solicitor-General of Edo State expatiated the Brief of her Attorney-General that the issue in PRATT case was first heard by the Supreme Court of Jamaica in exercise of its original jurisdiction under section 25 of the Jamaican Constitution before the case went on appeal to the Privy Council. On the contrary, our Supreme Court has no original jurisdiction on the question which section 42 of our Constitution vested in the High Court.

She further contended that the constitutional question was premature since the Appellant has not exhausted the avenue of appeal and the sentence could not be lawfully carried out: BELLO v. OYO STATE (1986) 2 NSCC 1257. Mr. Ataghar, the Director of Public Prosecutions of Benue State

supported the submission on the prematurity of the question and absence of the Court's jurisdiction.

Mr. Mahmoud tied a very impressive Brief on the constitutional question but did not touch the issue of jurisdiction. He urged the court to commute the sentence to life imprisonment thereby implying the court has jurisdiction.

In his Reply Brief to the submissions of *amici curiae* on the issue of jurisdiction, Mr. Agbakoba based his contention on the proposition that inordinate delay in carrying out the execution of a death sentence constitutes inhuman and degrading treatment within the purview of section 31(1)(a), of the Constitution and that this court can entertain a complaint concerning such proposition and give relief therefore in the course of an appeal against conviction and sentence though no such complaint was made in the lower courts. Learned counsel submitted that the court was conferred with such jurisdiction by the 1979 constitution and the African Charter on Human and Peoples Rights.

Mr. Agbakoba pointed out that in the exercise of its appellate jurisdiction under section 213(2)(c) of the Constitution, this court has always entertained and given relief for complaints of violations of fundamental rights enshrined in our Constitution raised for the first time in the court on appeal in criminal matters where the violation arose from or was constituted by the conduct of the proceedings in the lower courts or arose therein as a collateral issue. He cited *ALABI v. THE STATE* (1993) 7 NWLR (Part 307) 511; *ADEYEMI v. THE STATE* (1991) 6 NWLR (Pt. 195) 1 and *OKORO v. THE STATE* (1988) 5 NWLR (Pt. 94) 255 on the presumption of innocence guaranteed by section 33(5); also *JOSIAH v. THE STATE* (1985) 1 NWLR (Pt. 1) 125 and 25 *UDO v. THE STATE* (1988) 3 NWLR (Pt. 82) 316 relating to the right to counsel to buttress his argument. He indicated a common feature to all these cases, namely the fundamental rights violations were *intrinsic* to the proceedings of every case and could therefore properly form the basis of *appeals* from those proceedings. He distinguished these cases with common *intrinsic* feature from *TREVOR WALKER v. THE QUEEN* (supra) wherein, he contended, the human rights violation complained of was *extrinsic* to the adjudication before the Jamaican Court of Appeal as the complaint was based on a delay occurring after the decision of that court on the conviction. He submitted that the human rights violation complained of by the Appellant herein was *intrinsic* to the adjudication in the Court of Appeal and could therefore be raised for the first time in a criminal appeal against such adjudication to this court. Since the inhuman and degrading treatment in the instant case arose from and

was constituted by the inordinate delay in the conduct of the proceedings in the Court of Appeal, contended learned counsel, it could legitimately form the basis of an appeal to this court. He surmised that section 213(2)(c) of the Constitution has vested on this court appellate jurisdiction against violation of all fundamental rights including section 31(1)(a) guaranteed in
5 Chapter (IV) of the constitution.

In the alternative, Mr. Agbakoba also submitted that the court could assume jurisdiction to determine the complaint of “*cruel, inhuman or degrading punishment and treatment*” contrary to Articles 5 of the African Charter On Human And Peoples Rights which forms part of our domestic
10 law by the African Charter On Human And Peoples Rights (Ratification and Enforcement) Act, Cap 10 of the Laws of the Federation of Nigeria 1990. He argued that the human rights guaranteed by the Charter were independent of the fundamental rights enshrined in our Constitution to which the submissions of *amici curiae* relating to the enforcement proce-
15 dure provided by section 42 of the 1979 Constitution were restricted. He stated that although section 1 of the Act required “*all authorities and persons exercising legislative, executive or judicial powers*” to give the Charter recognition and effect, neither the Act nor the Charter made any-provision for the enforcement of the rights by our domestic courts. He argued that
20 like any other domestic law, the rights under the Charter might be enforced by other judicial process and that the procedure for the enforcement of fundamental rights prescribed by section 42 was only permissible and it did not exclude the prerogative remedies of *habeas corpus*, *mandamus*, *certiorari* and prohibition.

In conclusion, he submitted that the court should fill the gap created by the absence of enforcement process in the African Charter in favour of the 3rd Appellant by assuming jurisdiction; that ambiguities and lacunae in penal and fundamental rights provision were usually interpreted to save jurisdiction which the court guarded jealously and would only decline where
25 there was express denial of jurisdiction; *SODE v. ATTORNEY-GENERAL OF THE FEDERATION* (1990) 1 NWLR (Pt. 128) 500.

I am inclined to agree with Mr. Agbakoba that the provision of section 42 of the Constitution for the enforcement of the fundamental rights enshrined in Chapter IV of the constitution is only permissible and does not
35 constitute a monopoly for the enforcement of those rights. The object of the section is to provide a simple and effective judicial process for the enforcement of fundamental rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions. The object has been achieved by the

Fundamental Rights (Enforcement Procedure) Rules 1979. It must be emphasised that the section does not exclude the application of the other means of their enforcement under the common law or statutes or rules of courts. These are contained in the several Laws of our High Court, for example sections 18, 19 and 20 of the High Court of Lagos State relating to mandamus, prohibition, certiorari, injunction and action for damages. 5
A person whose fundamental right is being or likely to be contravened may resort to any of these remedies for redress.

However, I am unable to agree with Mr. Agbakoba that because neither the African Charter nor its Ratification and Enforcement Act has made a special provision like section 42 of the Constitution for the enforcement 10
of its human and peoples rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of these rights. Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto. The following 15
may particularly be mentioned

(1) “(6) *The judicial powers vested in accordance with the foregoing provisions of this section-*

*(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the 20
civil rights and obligations of that person”* section 6 of the constitution.

(2) Section 236 of the constitution also provides:

“236-(1) *Subject to the provisions of this constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High 25
court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an, offence committed 30
by any person.”*

(3) Section 230 of the Constitution as modified by the Constitution (Suspension and Modification) Decree 1993, the Federal High Court has exclusive jurisdiction in civil cases or matters arising from, inter-alia:-

“(r) *subject to the provisions of this Constitution, the operation and 35
interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies; and (s) and action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies;*

Provided that nothing in the provisions of paragraphs (q), (r) and (s) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity."

5 It is apparent from the foregoing that the human and peoples right of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court. However, the question whether this court has jurisdiction to entertain for the first time on appeal the complaint
 10 of the 3rd Appellant that the delay in his execution contravened his right not to be subjected to cruel and degrading punishment or treatment under Articles 5 of the African Charter remains to be answered. I shall do so in due course. It has long been the cardinal principle of our constitutional law that on account of the unique character and diversity of our Constitution,
 15 the courts should always endeavour to find solutions to constitutional questions within the Constitution through its interpretation but the courts may seek guidance as persuasive authorities from the decisions of the courts of other common law jurisdictions on the interpretation and construction of the provisions of their Constitutions which are in pari materia with the
 20 relevant provisions of our Constitution: SENATOR ADESANYA v. PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA (1981) 5 S.C. 112 and ATTORNEY-GENERAL BEND EL STATE v. ATTORNEY-GENERAL OF THE FEDERATION (1981) 10 S.C.1.

25 There is almost a general consensus by the amici curiae that the Court lacks jurisdiction to determine the constitutional question on the ground that it is not a matter within the appellate jurisdiction of the court when it was not canvassed and decided by the lower courts and the appellate process which the Appellants invoked has not been completed.

30 It appears to me that upon careful examination of the fundamental rights in Chapter IV of the Constitution, they may be classified into two categories for the purpose of their observance and enforcement. Firstly, there are the rights which must be observed whenever the occasion for their observation has risen. Endorsing the submissions of Mr. Agbakoba, they are intrinsic to the occasion and cannot be divorced from the occasion.
 35 They are generally procedural rights and are embodiment of a fair trial in courts and tribunals of a democratic society. Thus the right to fair trial and the right of the accused to defend himself under section 33 of the Constitution are intrinsic to the trial and failure to observe such right is a valid ground of appeal: JOSIAH v. THE STATE (supra), UDO v. THE STATE

(supra) and LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE v. FAWEHINMI (1985) 2 NSCC 998.

The second category of the fundamental rights comprise of those rights that are enforceable by the High Courts under section 42 of the Constitution. Because the Constitution expressly confers original jurisdiction for their enforcement on the, High Courts, this court has no jurisdiction as a court of first instance over them: see “TUKUR v. GOVERNMENT OF GONGOLA STATE (1989) 3 NSCC 225 for alleged contravention of the rights of fair hearing, freedom of movement and wrongful detention guaranteed by sections 33(1), 32(1) and 38(1) of the constitution.

Now, to which of the two categories the right not to be subjected to inhuman or degrading treatment under section 31(1)(a), the subject matter of the constitutional question, belongs? I think it is germane to the issue to examine the cases on subjection to inhumanity decided by the courts of the common law countries cited by ,learned counsel and to see the process for their adjudication. Section 24 of the constitution of Zimbabwe vests original jurisdiction on the Supreme Court of that country as a court of first instance to determine breaches of human rights. In CATHOLIC COMMISSION v. ATTORNEY-GENERAL (Supra), the complaint of inordinate delay in the execution of the death sentence contravening section 15(1), which is *in pari materia* with our section 31(1)(a), was made in that court as a court of first instance after it had dismissed the appeals of the appellants against conviction. The appellants thereat invoked the original jurisdiction of the court after they had exhausted their rights of appeal.

The proceedings in the cases of RILEY v. ATTORNEY-GENERAL OF JAMAICA (19)1 A.C. 719 and PRATT & ORS. v. ATTORNEY-GENERAL OF JAMAICA originated in the Supreme Court of that country, which is equivalent to our High Courts. The convicts had formerly appealed against their convictions by the Supreme Court to the court of Appeal and later to the Privy Council. After the Privy Council had dismissed their appeals, they instituted fresh proceedings in the Supreme Court under section 25 of their constitution complaining of the inordinate delay constituting the subjection to inhumanity contrary to section 17 (1) of their constitution which is similar to our section 31(1)(a). The decision of the Supreme Court on the fresh proceedings went on appeal to the Court of Appeal of Jamaica and 3 thereafter to the Privy Council. In the same vein, ABBOTT v. ATTORNEYGENERAL OF TRINIDAD (supra) followed the same process.

It is worthy to note that a short-cut was taken in WALKER v. THE QUEEN (1993) 3 WLR 1017 where in an appeal against conviction from

Jamaica the constitutional issue was raised for the first time. The Privy Council held it had no jurisdiction to entertain it.

The constitution of India does not contain inhumanity provision at all but the Supreme Court has incorporated it into Article 21 which guaranteed right to life: MULLIN v. ADMINISTRATION UNION TERRITORY OF DELHI, AIR (1993) S.C. 746. In India, death penalty is not mandatory and the courts have discretion to pass it or a sentence of imprisonment and may take into account delay when deciding whether death sentence should be imposed. For this reason the constitution issue relating to delay may be raised for the first time in the Supreme Court on appeal against conviction and sentence: see VATHEESWARAN v. STATE TAMIL NADU (1983) 2 S.C.R. 348. However, while an appellant has exhausted his right of appeal and the apex court has confirmed the death sentence, he still has the right to apply to the Supreme Court by petition to stop the execution of the death sentence on the ground of delay occurring after its confirmation: SMT TREVENIBEN v. STATE OF GUJARAT (1989) 1 SC.J. 383 and SHER SINGH v. STATE OF PUNJAB (1983) 2 SC.R. 582. The Supreme Court of India has jurisdiction as a court of first instance to decide such petitions.

Perhaps the Supreme Court of the United States of America did not have the opportunity to decide the relevant inhuman constitutional issue because no decision of that court has been referred to us. The decisions of the courts of the two states referred to us are not strictly relevant to the issue. In PEOPLE v. CHESSMAN 341 P 2nd 679, the convict was sentenced to death for first degree robbery by the Los Angeles County Court and the Supreme Court of California affirmed the conviction and sentence. Thereafter the United States Supreme Court on certiorari remitted the case to the State Supreme Court for review upon properly settled records. The note in the report shows that before the hearing of the review, the convict applied by motion to the Federal District Court for his discharge from custody on the ground that his confinement for eleven years pending execution of his death sentence was “*cruel*” and “*unusual treatment*” prohibited by Article 1 Section 6 of the California Constitution. The motion was denied and the denial was confirmed by the California Supreme Court in its judgment for review. It may be observed that constitutionality of capital punishment was not challenged in that case but it was subsequently challenged in PEOPLE v. ANDERSON 439 P 2nd 880 wherein the California Supreme Court declared capital punishment and unusual punishment contravening the said Article 1 section 6. As is the case in India, the jury has discretion in Massachusetts State to impose death sentence or imprisonment for life depending on the circumstances of each case and their decision is appeal-

able to the Supreme Court of Massachusetts: DISTRICT ATTORNEY v. WATSON Mass., 411 NE 2nd 1274 on appeal and COMMONWEALTH v. O'NEAL Mass., 33S N.E. 2nd 676 in advisory opinion where that court held death penalty was cruel and unusual punishment contrary to Article 26 of the Massachusetts Constitution.

The afore-considered cases, except in a country where there is a right of appeal against death sentence, show that in those common law countries the issue similar to the constitutional question in our present appeal was taken in a court vested with original jurisdiction to adjudicate on the matter after the convict, where he had exercised his rights of appeal against conviction, had exhausted the rights. Where the court vested with the original jurisdiction is not the Apex Court, such adjudication would only come to it by way of appeal from the lower court. 10

Now, at present this court has no original jurisdiction at all. The sentence of death for the offence of armed robbery contrary to section 402(2)(a) of the Criminal Code (Amendment No. 1) Law 1980 of which the Appellants were convicted-is-mandatory. Section 30 of the Constitution authorizes imposition of death sentence by a court of competent jurisdiction and, unlike India, the appellate jurisdiction of this court under section 213 of the Constitution does not include appeal against sentence of death. Like the Privy Council in WALKER v. THE QUEEN (supra), this court is nm-vested with original jurisdiction to stop the Executive from carrying out the execution of a sentence of death. I hold that the question of whether or not execution of the Appellants would infringe their constitutional rights is a matter for determination by the High Courts upon which section 42 of the Constitution confers jurisdiction. 25

Accordingly, the jurisdiction of this Court to determine the Constitutional, question will only arise on appeal after a High Court has considered and adjudicated on the issue and the Court of Appeal confirmed or reversed the decision of the High Court. It will be unconstitutional for this court to assume jurisdiction and decide the question as contended by Mr. Agbakoba. 30

I should like to reiterate our gratitude to the learned *amici curiae* for the research, industry and learning in their submissions on the constitutional question. Although it has turned out that the court cannot in this appeal determine the question, nevertheless their effort has not been in vain. They have alerted the court to appreciate the gravity and constitutional importance of the question. It is anticipated that the occasion for its determination is likely to be presented soon. In spite of the importance of the constitutional question, it is surprising that Dr. Onagoruwa, the then 35

Attorney-General of the Federation and Minister of Justice did not respond to the court's invitation to him to file a brief on it and to appear as an amicus curiae.

The appeal against conviction of each appellant may now be considered. The facts of the case found by the trial judge are straightforward.

5 Shortly after mid-night on 9th September 1992, the Appellants armed with pistols together with other marauders jointly boarded the house-boat anchored in the Lagos lagoon and at gun point robbed the inhabitants of the house-boat of their money and some properties. The Appellants had gone to the house-boat in their out-engine boat and speeded away there from
 10 after the robbery. One Baba, the night watchman on duty at the house-boat disappeared that night and his body was found floating in the lagoon three days after the incident with bullet wounds on his forehead. The Appellants were shooting when they boarded the house-boat.

On 13th September 1992, the police searched the 1st Appellant's
 15 house and found some of the stolen properties. The 1st Appellant took the police to the house of the 3rd Appellant in whose absence a stolen cassette player was discovered. When the 3rd Appellant was arrested later, he stated that the player had been given to him by the 1st Appellant. All the Appellants voluntarily made confessional statements to the police. Upon those
 20 facts established by evidence, the trial court convicted the Appellants of the offences of conspiracy to commit armed robbery and of armed robbery. The Court of Appeal affirmed the convictions. In his original brief tiled on 1st September 1992, Chief Oki had nothing useful to urge in favour of the 1st Appellant. He formulated three issues for the determination of the appeal of the 2nd Appellant, which are:

“(1) *Whether Exhibit R can truly be regarded as a confessional statement in fact and in the circumstances of this case?*

(2) *Can it be said that the evidence of PW.1 and PW. corroborated the statements of the Appellant in material particulars?*

30 (3) *Whether a Court can rely solely on a retracted confessional statement which was not endorsed by a superior Police Officer in convicting an accused person?”*

In respect of the 4th Appellant, he advanced two issues from which issue No. (a) is covered by issue No. (3) for the 2nd Appellant. The two
 35 issues are:

“(a) *Whether a Court can rely solely on a retracted confessional statement which was not endorsed by a Superior Police Officer in convicting an accused person?*

(b) *Whether from the facts and circumstances of this case, the pros-*

ecution can be said to have proved count 3 of the charge beyond all reasonable doubt?"

On issue No. 1, Chief Oki submitted that the lower court had erred in law by treating Exhibits R and U. statements of 2nd and 4th Appellants respectively, as confessions. He referred to the definition of "confession" and contended that for a statement to be so, it must be clear, precise, 5 positive and unequivocal and that the statement must be read as a whole and not disjunctively. He buttressed his submission with GBADAMOSI v. STATE (1991) 6 NWLR (Pt 196) 182, SAIDU v. STATE (1992) 4 S.C.41, AKPAN v. STATE (1990) 1 NWLR (Pt 160) 101, ADEYEMI v. STATE (1991) 6 NWLR (Pt 195) 1, OKEGBU v. STATE (1984) 8 SC.65 and 10 YUSUFU v. STATE (1976) 6 SC 167. The complaint for issue No.2 is directed to the observation of Babalakin, J.C.A. In the lead judgment, with which Akpata and Awogu, JJ.C.A. agreed, wherein he stated:

"The cases of the 1st and 2nd Appellants are also similar. They both made confessional statements in respect of the charges against them. These 15 statements were corroborated in material particulars by the evidence of PW1 and PW2".

Referring to the definition of "corroboration" in Black' law Dictionary, learned counsel contended that neither PW1 nor PW2 corroborated the confessions of the 2nd and 4th Appellants, Exhibits R and U PW2 did 20 not identify 2nd and 4th Appellants. With respect to issues No.3 and (a), Chief Oki relied heavily on UMANI v. STATE(1988) 2 SC. (Pt.1) 88 and OPAYEMI v. STATE (1985) 2 NWLR (Pt 5) 207 in his contention that the Court of Appeal was wrong in upholding the convictions when this court 25 had decided in these two cases that a court should not base a conviction solely on retracted confession. He further urged the court not to support the conviction because the prosecution had failed to take the Appellants to a superior police officer to confirm the voluntariness of the confessions in accordance with the practice approved by this court in EJINIMA v. STATE (1991) 6 NWLR (Pt 200) 627 and OTUFALE v. STATE (1988) NWLR 261. 30

In the Supplementary Brief, Chief Oki raised the issue of the absence of counsel for the defence at the end of the trial, namely:

"Whether as a result of the absence of the Defence Counsel at the Address Stage, the Appellants could be said to have had a fair hearing as 35 guaranteed by the rules of natural law and justice and s.33 of the constitution of the Federation 1979."

Learned counsel submitted that the right to be defended by counsel at any stage of the trial in a capital offence was essential to a fair trial and fair trial of a case consisted of the whole hearing and a conviction was fatal

in any case where the defence counsel absented himself at any stage of the trial: R v. MARY KINGSTON (1948) 32 Cr. App. R. 183, SAKA v. STATE (1981) 11-12 SC. 65, JOSIAH v. STATE (1985) NWLR 125, UDOFIA v. STATE (1988) 3 NWLR (Pt 84) 533 and MOHAMMED V. KANO NATIVE AUTHORITY (1968) NSCC 325.

5 Mr. Agbakoba framed two issues for the determination of the 3rd Appellant’s appeal against convictions:

 “1. *Whether it was safe and proper to convict the Appellant on the strength of only Exhibit P.*

 2. *Whether the non-representation of the Appellant at address stage*
 10 *(sic) Prosecution Counsel was a denial of the Appellant’s constitutional right to fair hearing.”*

 The complaint with respect to the first issue is that the 3rd Appellant made two conflicting statements, Exhibits P and S. In Exhibit P, he confessed having committed robbery at the boat house together with others
 15 while in the other statement he stated they had gone to the house boat to purchase a boat. Mr. Agbakoba contended that where two extra-judicial statements ‘were in materia conflict, there must be explanation clarifying the conflict and the onus of proof of such explanation lay on the prosecution and that failure to explain reduced the credibility and probative value
 20 of both statements. He referred to REX v. GOLDER (1960) 1 WLR 1169 and NAMSOH v. STATE (1993) NWLR (Pt 293) 413 and ONUBOGU v. STATE (1974) 1 SC.13 and further contended that the trial judge had wrongly relied on some portion of Exhibits which tended to support Exhibit P while totally disregarding the other material portions which were in con-
 25 flict. He stated that in the absence of a satisfactory explanation, such conflicting statements could not form the basis of conviction. Furthermore, since Exhibit P had been retracted, the trial court was required to look beyond the retracted confession for independent corroborating evidence to support the confession.

30 He also contended, that the confession was totally unreliable because it had not been endorsed by a senior police officer as had been commended in R v. NWAGBOKE 4 FSC 101 (1959) and EGBOGHONOME v. THE STATE (supra).

 In issue No.2, Mr. Agbakoba challenged the conviction on the ground
 35 of the absence of the defence counsel on the last day of the trial when the prosecution counsel addresses the trial court. He argued that the absence of the counsel was a denial of the 3rd Appellant’s constitutional rights to fair hearing under sections 33(4) and 33(6)(c) of the constitution. He relied on JOSIAH v. STATE (supra), UDO v. STATE (1988) 3 NWLR (Pt. 84)

and MADUKOLU v. NKEMDILIM (1962) 1 All NLR 285. The only matter complained of in the address of the prosecution counsel which had not been raised in the previous address of the defence counsel was that the prosecution counsel had urged the trial judge to rely on Exhibit G, the radio found in the house of the 3rd Appellant. Mr. Agbakoba stated that the trial judge had in fact relied on the submission where he stated in his judgment: 5

“shortly after the robbery, some of the items stolen from the Julius Berger house boat were found with the 1st and 3rd Accused”.

Finally, he contended that there was apparent miscarriage of justice in that the trial judge did not give the 3rd Appellant, and his counsel was absent, the opportunity to reply to the address of the prosecution counsel 10 and the failure was a denial of justice and the court should set aside the conviction.

In his response in his Brief, Stanley, the Director of Public Prosecutions, referred to the statement of the 2nd Appellant and submitted that it was a confession within the decisions of this court in SAIDU v. STATE 15 (1982)4 SC. 41 and IKEMSON v. STATE (1989) 3 NWLR (Pt 110) 458 and that the confession was corroborated by the evidence of PW1. He argued that the mere retraction of the confessions, Exhibits R and U, did not render them unreliable but only affected their weight. However, it was desirable to have some evidence outside the confessions which would make 20 it probable the confessions were true, contended learned counsel, and the identification of the Appellants by PW1 and the discovery of some of the stolen properties provided such evidence. He relied on SALAWU v. STATE (1971) NMLR 249, IKPASA v. STATE (1981) 9 SC. 7 and AKINFE v. STATE (1989) 3 NWLR (Pt 85) 734. Citing EGBOGHONOME v. STATE 25 (1993) 7 NWLR (Pt 306) 383 decided recently by this Court, he stated that a court may even convict solely on retracted confession.

With respect to the failure of the police to take the Appellants to a Senior Police Officer to confirm the veracity and voluntariness of the confessions, the Director of Public Prosecutions contended that on the authorities of OGBODU v. STATE (1986) 5 NWLR (Pt 41) 294 and OJEJELE v. STATE (1988) 1 NSCC 276, the failure did not vitiate the conviction as the practice of obtaining the endorsement of a Senior Police Officer on a confession is not a rule of law. 30

On the issue relating to fair hearing, the Director of Public Prosecutions pointed out that the Appellants had been represented by their counsel throughout the trial except on the last day when the State Counsel addressed the court in reply to the defence counsel's address and before that day the court had adjourned the case several times for the defence counsel 35

to attend hut he failed to do so and did not communicate to the court any reason for his absence. He submitted that the absence of counsel in the circumstances did not occasion any miscarriage of justice: ASEMKAHA v. STATE (1965) NMLR 317, UDO v. STATE (1988) NWLR (Pt 82) 316, UDOFIA v. STATE (1988) 3 NWLR (Pt 84) 533. He contended that if there
 5 was any breach of section 33(6)(c) of the constitution, counsel for the defence committed it and prosecution should not suffer for it. He relied on ONYEKWE v. STATE (1988)1 NWLR 565 that a person should not be allowed to benefit from or take advantage of his wrong doing.

Furthermore, the Director argued that this court had held in NIGER
 10 CONSTRUCTION v. CHIEF OKUGBEMI (1987) 11-12 S.C.N.J. 133 that addresses were to assist the court and the failure to call one party to address the court was not a matter for the other party to complain about.

As may be observed from the submissions of learned counsel, this appeal has been tainted with some elements of academic and intellectual
 15 exercises. Counsel have enriched their briefs with several courts decisions which are not relevant to the determination of the issues in this appeal. For example, on the issue relating to retracted confession, reliance has been placed on cases such as R. v. GOLDER (supra) and JOSHUA v. THE QUEEN (1964) 1 All NLR 1, which dealt with non-evidential value of the
 20 evidence of a prosecution witness which was inconsistent with his extrajudicial statement: OLADEJO v. STATE (supra) in which this court decided *per in curiam* that retracted confession had no evidential value whatever; cases like YESUFU v. STATE (supra) where conviction was based on confession corroborated by independent testimony and OWIE v. STATE
 25 (1985) 1 NWLR (Part 3) 470 in which the conviction was upheld on the totality of the evidence including retracted confession; and conviction solely on retracted confession as was the case in EGBOGHONOME v. STATE.

The issue in the present appeal is concerned with convictions based not only on retracted confessions but also on the evidence of two eye-
 30 witnesses, namely PW1 who identified all the Appellants and PW2 who identified the 1st Appellant only, to the commissions of the offences by the Appellants. The court should not therefore be tempted to follow learned counsel and indulge itself in academic exercise. Care should be taken to separate the wheat from the chaff. The first question for consideration is
 35 whether Exhibits R and U are confessions within the definition of section 27 of the Evidence Act, which 35 provides: “27(1) A confession is an admission made at any time by a person charged with the crime, stating or suggesting the inference that he committed that crime”

In his statement, Exhibit R, the 2nd Appellant, stated: “On the 8th

September 1982 I went to Mike Place and he Mike told me that I should followed (sic) him go out, and (we) Mike, Peter Benson, Augustine, we enter the boat to Julius Berger ship, when we got to the (Shi) Julius Berger myself and Benson stay inside the boat while the rest people went to the (SV) Ship, after they went up for some minutes before they come back, when they come back they told us that there is no market to buy, then Mike (M) go back to the ship he then brought out one colour tv, one video (when) from there we started to leave and on that junction not quite distance we heard a gun shot, but before then the boat has already grant before we heard the gun shot, then we all fall inside water later Mike (m) pushed the boat later we all come enter the boat and go away and none of us (my) received any injury. When we got to Maroko water side the Mike said that he want to used the colour TV. while we are to sell the video, and share the money to us but none of us fired at all."

On his part, the 4th Appellant stated in Exhibit U:

"On 8-9-82 we boarded our flying boat to Lagos Lagoon, when we got there the watch night guard fired on us from there. Mike Ogugu reply him with fire, it is from there we got to the house boat, and Smith asked the white man that were (sic) is the company saving? The white man said there is nothing like saving in the house boat, unless his own personal money in his possession, and some goods as follows: one video, one colour TV set, two 2 radio cassettes and one battery charger after that I fired one rounds of ammunition in the house boat, from there we all left back home, on our way Mike take the colour TV set, Benson one video, Peter one radio cassette, Joe one radio cassette, myself I was given N 60.00 and Augustine was given N 60.00 that is all."

I do not think one needs any authority to treat both statements as confession by both Appellants as both admitted that they had committed the offences, to wit conspiracy to commit armed robber and armed robbery.

With regard to the failure of the police to take the Appellants to a Senior Police Officer to confirm that the Appellants had made the statements freely and voluntarily in accordance with the Judge's Rule, this court long ago settled the issue. The practice is riot a rule of law but is a commendable precaution for ensuring that enthusiastic junior police officers will not endeavour to be tempted to "obtain" confession to secure conviction. Mere failure to accommodate the practice does not affect the efficacy or evidential value of a confession which a trial court found to be freely and voluntarily made: R v. NWAGBOKE (supra), EJINIMA v. STATE (supra), OTUFALE v. STATE AND EGBOGHONOME v. STATE (supra).

The challenge to the observation of Babalakin, J.C.A., to wit:

“The cases of the 1st and 2nd Appellants are also similar. They both made confessional statements in respect of the charges against them. These statements were corroborated in material particulars by the evidence of PW1 and PW2” may be summarily disposed of. Chief Oki stated that PW1 and PW2 had not corroborated the confessions by both Appellants and he particularly referred to Exhibit M in which the 2nd Appellant had denied committing the offence.

Corroborative evidence was defined in OMISADE & ORS v. THE QUEEN (1964) NSCC 170 as evidence given by an independent witness which showed or tended to show that the accused committed the crime was true, not merely that the crime had been committed, but that it was committed by the accused. The corroboration needs not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. Surely, the evidence of PW1 and PW2 in the present case was more than corroborative. PW1 directly and positively implicated all the Appellants of having committed the robbery while PW2 also implicated the 1st Appellant. There is no substance whatever in the challenge.

With regard to the issue relating to the evidential value of a retracted confession, it appears Mr. Agbakoba did not fully appreciate the *ratio decidendi* of the recent full court judgment in EGBOGHONOME v. STATE (supra) wherein the majority held that the principle stated in R v. GOLDER (supra) and adopted in OLADEJO v. STATE (supra) - to wit where a witness makes a statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the court can act - does not apply to the evidence of an accused and his retracted confession. The court *per* majority held therein that a court may rely solely on retracted confession and convict. Accordingly, Mr. Agbakoba's submission on the application of the rule in R v. GOLDER to the case on appeal has been misconceived.

It now remains to examine the issue concerning the denial of the right to fair hearing. Representation by a legal practitioner at the trial of any person accused of a criminal offence is one of the fundamental rights guaranteed by section 33 of our Constitution and, if the charge is of a capital offence and the accused is not represented by a counsel of his choice, the court has a statutory duty to provide such representation. Section 33(6)(c) of the constitution provides:

“s. (6) Every person who is charged with a criminal offence shall be entitled –

(c) to defend himself in person or by legal practitioners of his own

choice;”For the trial of the accused charged with a capital offence, section 352 of the Criminal Procedure Law of Lagos State, which is the relevant Law in this Case, prescribes:

“352. Where a person is accused of a capital offence the State if practicable, be represented by a law officer, or legal practitioner and if practicable, assign a legal practitioner for his defence.” 5

Where the criminal trial is before a Tribunal, Rule 5 of the Robbery and Firearms Tribunal (Procedure) Rules 1975 directs as follows:

“5. Where an accused charged with an offence punishable with death is not defended by Legal Practitioner, the Tribunal shall assign a Legal Practitioner for his defence”. 10

For non-compliance with the provisions of section 352 Rule 5, two cases have been drawn to our attention. The conviction of the Appellant of armed robbery was set aside and order of acquittal made in SAKA v. STATE (supra) by this court because he could not be said to have a fair trial for two reasons. Firstly, the Tribunal had failed in its duty under Rule 5 to assign a legal practitioner to represent him and secondly because the Tribunal had failed to comply with the provisions of sections 287 and 288 of the Criminal Procedure Law of Lagos State and thereby deprived the appellant of his right of electing as to whether or not to give evidence at all and call witnesses; or to make or refuse to make an un-sworn statement in the dock. 15
20 Concluding his lead judgment (with which Udoma, Eso, Aniagolu and Uwais, J.S.C agreed) Irikefe, J.S.C. stated:

“In view of the undisputed non-compliance with the provisions of section 25 287(1)(a)(i)-(iii) of the Criminal Procedure Law, coupled with the fact that the appellant was neither defended by counsel nor had one assigned for his defence by the tribunal as stipulated under Rule 5 of the Robbery and Firearms Tribunal (Procedure) Rules. 1975. I was not in any doubt that the appellant in this case could not be said to have had a fair trial.” 25

The other case is JOSIAH v. STATE (1985) 1 NWLR 125 which was a murder case tried in the High Court of Bendel State. The trial judge failed to assign a legal practitioner to defend the accused as required by section 352 of the Criminal Procedure Law of the State, which is identical to the Law of Lagos State, and he had also failed to comply sufficiently with the provisions 35 of section 287 of the said Law. This court held that the accused had not had a fair trial and ordered a retrial. 30
35

In UDO v. STATE (supra), the court held that partial non-representation by a legal practitioner of the accused during the murder trial which substantially affected the trial was not concomitant with a fair trial. The

accused was represented by counsel and during the trial, counsel applied for adjournment in order to appear before another court. The trial judge refused to grant adjournment and in the absence of the counsel, when the accused was not represented, two important prosecution witnesses testified. Before then the trial judge had granted adjournments on twelve different occasions to the prosecution. After the testimony of the two witnesses, the defence counsel re-appeared and represented the accused throughout the remaining course of the trial. The court held that in a murder trial, the defence counsel, whether briefed or assigned, must be present and defend the accused person and it was contrary to the spirit and letters of section 33(6)(c) and (d) of the constitution and section 352 of the Criminal Procedure Law, if the accused not being a legally qualified person, was made to slug out his defence in a charge of a capital offence and that the said constitutional and statutory provisions could only be satisfied when the legal practitioner was present and rendered all necessary professional services all throughout the trial and that depriving such accused person of his right to full access to counsel at any stage of the trial amounted to unfair hearing. At page 333 of the report, Nnaemeka-Agu, J.S.C. observed as follows:

"It appears clear to me, therefore, that the purport and intendment of section 352 of the Criminal Procedure Law and section 33(6) (c) (d) of the Constitution of the Federal Republic, 1979, is to introduce or perpetuate what Lord Denning described as "the fundamental principles of a fair trial" (see TAMESHWAR v. THE QUEEN (1957) A.C. 476, at p.486) into our administration of criminal justice. It was breached in this case when the learned trial Judge failed or neglected to consider the learned defence counsel's application for an adjournment under rather compelling circumstances. It was trampled upon with impunity when he proceeded to take the evidence of P.W.3, Bassey Asuquo Effiong, a most important witness for the prosecution in the absence of the legal practitioner for the accused person who was standing trial for his life. It was also not adverted to when P.W.5, Dr. John Akpan Inieke, gave his evidence in Chief in the absence of the learned counsel for the appellant. I shall not visit the sins, if any, of the defence counsel on the court, as the learned counsel for the appellant appears to urge".

The conviction of the appellant was quashed and trial de novo ordered. In the same vein, the court followed UDO'S case in UDOFIA v. STATE (supra) where after he had cross-examined the PW1, the defence counsel absented himself from the court and the remaining prosecution witnesses were heard by the trial court when the accused was not repre-

sented by a counsel. After the prosecution had closed its case, another counsel was assigned by the court to defend the accused. The new counsel did not call any of the prosecution witnesses for cross-examination and did not call any witness for the defence. He simply addressed the court. The conviction of the accused of murder was set aside and a retrial ordered.

In his Brief, the Director of Public Prosecutions contended that the absence of the defence counsel during the Reply of the State Counsel did not cause a miscarriage of justice because the defence counsel had no right to respond. He referred to NIGER CONSTRUCTION LTD v. CHIEF OKUGBEMI (supra) a very unusual appeal which did not deal with non-representation by a counsel of an accused but with denial to the plaintiff, who did not complain of the denial, of the opportunity to reply an address by the defendant. Oputa, J.S.C. answered the complaint at page 114 thus:

"I fail to see why a Defendant who was given the extra latitude to address the court should complain that his opponent was not offered the same opportunity. Addresses are designed to assist the court. When, as in this case, the facts are straightforward and in the main not in dispute, the trial judge would be free to dispense with final addresses. Cases are normally not decided on addresses but on credible evidence. No amount of brilliance in a final speech can make up for the lack of evidence to prove and establish or else disprove and demolish points in issue".

It may be noted that this decision in a civil case may not strictly be relevant to the case or appeal. The practice and procedure for the hearing of civil cases are governed by the rules of courts while the practice and procedure for criminal trials are regulated by the Criminal Procedure Act or Laws. I think the submission of Mr. Agbakoba on the Reply may be reiterated. It is that the absence of the defence counsel was a denial of accused's rights under section 33(6)(a) of the constitution and the failure of the trial judge to invite the 3rd Appellant, since his counsel was absent, to reply to the Reply of the State Counsel was a miscarriage of justice which vitiated the trial.

Now, the Criminal Procedure Law of Lagos State makes provision for Address and Reply in these sections:

"240 After accused person has pleaded not guilty to the charge or information the person appearing for the prosecution may open the case against the accused person and then adduce evidence in support of the charge.

241. After the case for the prosecution is concluded the accused or the legal practitioner representing him, if any, shall be entitled to address the court at the commencement or conclusion of his case, as he thinks fit,

and if no witnesses have been called for the defence, other than the accused himself or witnesses solely as to the character of the accused and no document is put in as evidence for the defence, the person appearing for the prosecution shall not be entitled to address the court a second time but if in opening the case for the defence the person appearing for the accused
5 *has in addressing the court introduced new matter without supporting it by evidence the court, in its discretion, may allow the person appearing for the prosecution to reply.*

242. If any witness, other than the accused himself or witnesses solely as to the character of the accused, is called or any document is put
10 *in as evidence for the defence, the person appearing for the accused shall be entitled after evidence on behalf of the accused has been adduced to address the court a second time on the whole case and the person appearing for the prosecution shall have a right of reply.*

It can be seen from these sections that neither the accused nor his
15 counsel had a right of reply to the Reply (if the State Counsel delivered under section 242. Accordingly, the absence of the defence counsel at the material time did not prejudice or adversely affect the right of the accused concerning the Reply. However, although an accused person has, in strict law, no right of reply, if the prosecutor has introduced a new matter in his
20 Reply which was not covered by the address of the defence counsel, the rule of practice requires the trial court in the interest of justice and fairness to allow the accused, if he is not represented, or his counsel to respond on the new matter. In my view, failure of a trial court under such circumstances to allow an accused or his counsel to respond will only vitiate the
25 trial if the failure has actually caused a miscarriage of justice.

The question now is whether or not the mere absence of the defence counsel or the mere failure of the trial court to invite the accused to respond to the Reply or both jointly had occasioned actual miscarriage of justice.

The only new matter, according to Mr. Agbakoba, which was introduced in
30 the Reply and which had not been raised in the address of defence counsel was that the State Counsel urged the trial judge to rely on Exhibit G, the radio found in the house of the 3rd Appellant. Mr. Agbakoba submitted that the judge had in fact relied on the radio in convicting the 3rd Appellant.

35 The circumstances surrounding the absence of Mr. Olatunbosun, counsel for the Appellants, may be stated. He had effectively represented the Appellants throughout the trial up to 13th July 1985 when he addressed the court after he had closed the defence case. The trial was then adjourned to 8th August 1985 on the application of the State Counsel to

reply. Thereafter there were seven adjournments, two due to illness of the defence counsel, two because the State Counsel was not ready to reply while three were caused by the absence of the defence counsel without cause except for one where it was alleged he attended another court. Ultimately, the State Counsel, Miss Okikiolu, delivered the reply on 18th December 1985 in the absence of the defence counsel.

The offending extract of the Reply is cursory and sloppy and I consider it pertinent to produce it. It reads: *“Exhibit ‘G’ found in the house of the 3rd accused. He could not explain how he came to own it.”*

Having regard to the overwhelming evidence against each Appellant, which I have earlier indicated in this judgment, I would adopt the observation of Oputa, J.S.C., in NIGER CONSTRUCTION LTD. v. CHIEF OKUGBEMI (supra) at page 114:-

“No amount of brilliance in a final speech can make up for the lack of evidence to prove and establish or else disprove and demolish points in issue.”

I do not think a reply however ingenious by any of the Appellants or their counsel to the Reply would cause a reasonable tribunal to reach a different decision from that of the trial court. Accordingly, I hold that the 3rd Appellant had no right of reply to the Reply and the so-called new matter introduced in the Reply did not warrant the trial court to invite him to reply. Moreover, I also hold that the Reply formed an integral part of the trial and the absence of their counsel during its delivery amounted to a breach of section 352 of the Law. However, I consider the breach in the circumstances as a mere technical breach which had not occasioned actual miscarriage of justice. Since the provisions of sections 25 33(6) (c) of the Constitution and 352 of the Law were complied with throughout the trial except during the Reply, it will not be right to interfere with the convictions solely on the ground of mere technicality: see OKEGBU v. STATE (1979) J.S.C. 1, EKWERE v. STATE (1981) 9 S.C.4 and IKPASA v. STATE (1981) 9 SC 7 at pages 31- 32.

For the avoidance of any doubt, it may be emphasised that non-representation by a legal practitioner at the trial of a person charged with criminal offence, whether capital or not, is not by itself a contravention of section 33(6)(c) of the constitution unless the accused is not permitted to exercise his right to be defended by a legal practitioner of his choice. The Constitution simply guarantees his right to defend himself in person or by a legal practitioner. It is his business if he cannot afford to brief a legal practitioner of his choice or if the legal practitioner of his choice abandons him. Non-representation per se is not unconstitutional and does not render a

trial unfair.

- It should be noted in none of the relevant cases I have considered in this judgment, namely SAKA v. STATE, JOSIAH v. STATE, UDO v. STATE and UDOFIA v. STATE, did this court decide that want of counsel was per se unconstitutional under section 33(6)(c) of the Constitution. It was the
- 5 non-compliance or partial compliance with some of the mandatory provisions of sections 287, 288 and 352 of the Criminal Procedure Law or Rule 5 of the Arms Robbery Tribunal (Procedure) Rules that rendered the trials in those cases unfair and for that reason unconstitutional by virtue of section 33(1) of the Constitution.
- 10 In conclusion, I would dismiss the appeals and they are hereby dismissed. The convictions are affirmed.

UWAIS JSC

- 15 I have had the opportunity of reading in draft the judgment read by my learned brother the Chief Justice of Nigeria. I entirely agree with his reasoning and conclusion.

The jurisdiction to entertain any suit which alleges that any fundamental right, including the right of any person not to be subjected to torture, inhuman or degrading treatment under section 31 subsection (1) (a) if

20 the 1979 constitution, Cap. 62 of the Laws of the Federation of Nigeria 1990, can only be exercised by a High Court in accordance with the provisions of section 42 subsections (1) and (2) of the constitution, which provides-

- 25 “42-(1) Any person who alleges that any of the provisions of this Chapter has been, is being or Likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it

30 in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter.”

- 35 The jurisdiction of the Supreme Court is merely appellate and not original except with regard to cases where there is a dispute between the Federation and a State or between States - see section 212 of the 1979 Constitution Cap. 62 and A.-G. of Anambra State & Ors. v. A.-G. of the Federation & Ors., (1993)6 N.W.L.R. (Part 302)692. Although in practice

constitutional issues are being or can be raised in an appeal to the Supreme Court, such issues pertain only to a breach of a fundamental right in the course of trial or hearing before the lower courts. Such issues relate mainly to breach of the right to fair hearing and the right to personal liberty under sections 33 and 32 of the constitution. Rights like those to private and family life, peaceful assembly and association and freedom of the press 5 can only be enforced through a substantive suit and cannot be raised in this court as being incidental to the proceedings in the lower courts.

It follows therefore that the right not to be subjected to torture or to inhuman or degrading treatment under section 31 (1) (a) of the Constitution cannot be raised in this court as being incidental to the proceedings in 10 a case. Any complaint against delay in execution as in the cases of the Catholic Commission for Justice and Peace in Zimbabwe v. The A.-G. of Zimbabwe & Ors., (Judgment No. S.C. 73/93; Civil No. 137/93) and Earl Pratt & Anor. v. The A.-G. for Jamaica & Anor. (Privy Council Appeal No. 10 of 1993) can only be instituted in the High Court of a State. as provided 15 by the 1979 constitution in section 42 thereof.

Mr Agbakoba, learned counsel for the 3rd Appellant made reference to the provisions of Article 5 of the African Charter on Human and People's Rights, Cap. 10 of the Laws of the Federation of Nigeria, 1990 which is similar to section 31 of the Constitution. He submitted that the provisions of the 20 Charter are enforceable in the same manner as the provisions of any domestic or municipal law. It is true that section 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10 states as follows-

"1. As from the commencement of this Act, the provisions of the 25 African Charter Human and People's Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria." 30

This Act is silent as to the manner in which the provisions of the Charter are to be enforced. Mr. Agbakoba argued that the provisions may be enforced by judicial process or procedure other than that provided under section 42 subsection (3) of the 1979 constitution, Cap.62. This may well be so, but that is not the issue now before us. The question is whether the 35 provisions of Article 5 of the Charter which read:-

"ARTICLE 5

Every individual shall have the right to the respect of the dignity inherent in human being and to the recognition of his legal status. All forms of exploi-

tation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” can be raised as a fundamental point in a case before this court. The answer is of course in the affirmative but subject to the proviso that the point being raised must be incidental or intrinsic to the case. The issue of
5 delay in execution of a sentence of death cannot be incidental to the proceedings leading to the passing of the sentence. It has to be raised in a fresh suit as a complaint. As I have already indicated the court with the original jurisdiction to entertain the complaint is the High Court and not this court.

It follows that the complaint about the delay in the execution of the
10 3rd appellant cannot be raised in this court since we lack the original jurisdiction to entertain it.

With regard to the appeal against conviction, I am satisfied that it lacks merit. The evidence against the Appellants was over-whelming.

In the result the appeal fails and I too will dismiss it and affirm the
15 decision of the Court of Appeal.

BELGORE JSC

I had the privilege of reading in advance the judgment of the Hon.
20 Chief Justice of Nigeria and I am in agreement with his reasoning and conclusions. Of tremendous help are the learned amici curiae and I join His Lordship the Chief Justice of Nigeria in commending their industry in the various Briefs of argument filed.

The constitutional issue was never taken in the courts below and the
25 question is whether it can be taken here. Unlike other points of law that can be taken at any stage of the journey of a case, a matter under Chapter IV of 1979 Constitution i.e. Fundamental Rights, is a different one from others. All the rights enumerated under the Fundamental Rights i.e. right to life, right to dignity of human person, right to personal liberty, right to
30 private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the press, right to peaceful assembly and association, right to freedom from discrimination and right to compensation adequately on compulsory acquisition of property, are adequately dealt with as to procedure in S.42 of the Constitution. It is therefore pertinent to
35 set out the section which reads:

“42. (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this constitution, a High Court shall

have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter. 5

(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purpose of this section.

(4) The National Assembly-

(a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and 10

(b) shall make provisions-

(i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to his claim, and 15

(ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real."

Thus it is clear the jurisdiction in the original instance is not in this court but in the High Court. It is therefore a good approach to decide the issue of jurisdiction first, otherwise in the absence of jurisdiction this court might find itself setting a dangerous precedent in assuming jurisdiction where it has none. 20

We shall in such instance find that we are unwittingly legislating, a function clearly not ours under the constitution. (*Attorney-General of the Federation v Sode & Ors.* (1990) 3 NWLR (Pt 111) 552). As the Hon. Chief Justice has concluded, there is no original jurisdiction by this court to hear this all important issue of right to dignity of human person as provided in S.31(1) of the Constitution and I believe the time is not yet ripe to take up the issue at the appropriate legal forum. 25 30

It is to be observed that the foreign cases cited i.e. *Catholic Commission for Justice and Peace In Zimbabwe v. Attorney-General* (unreported Zimbabwe Supreme Court No. SC 73/1993; *Pratt v Attorney-General for Jamaica* (1993) 3 WLR 995 and *Trevor Walker v The Queen* (1993) 3 WLR 1017 are cases of different constitutional nature of those countries whereby after all remedies on merit of the substantive cases have been exhausted, special writs were instituted to raise the matters of violation of human dignity in the nature of cruel and unusual punishment. What is more, the 35

Supreme Courts of those countries either have original jurisdiction to hear such issues (which our own has not got) or their Supreme Courts are equivalent to our own High Court.

At any rate, it is always of great help to know the line of thinking jurisprudentially in other countries' courts with constitutional provisions resembling our own; none the less our constitution must always remain a creature of its own circumstance and must always be interpreted in its own location and meaning. (See Udoma JSC in Nafiu Rabiu v The State (1990) 12 NSCC 291).

As for the substantive appeal, I can see no merit. As the Chief Justice of Nigeria has rightly found, the voluntary statements of the appellants and the overwhelming evidence led by the prosecution left no doubt that the appellants deliberately went out to commit robbery with violence armed with dangerous weapon i.e. at least a firearm. Not only that, they used the firearm and an elderly watchman at the scene of crime was shot dead.

Therefore I hold there is no original jurisdiction in this court to hear the issue of Fundamental Right under the constitution or in the African Charter of Human and Peoples Rights and I strike out that issue. As for the substantive appeal against conviction for armed robbery and sentence of 20 death, I find no merit whatsoever and also dismiss the appeal.

WALI JSC

I have had the privilege of a preview of the lead judgment of my learned brother, Mohammed Bello, C.J.N., which has just been delivered. I entirely agree with his reasoning and conclusions for dismissing the appeal.

As argued by the majority of learned counsel involved in this appeal, that the issue of breach of section 31(1)(a) of the 1979 constitution to wit: the appellants having, stayed in prison confinement under sentence of death for such an unreasonable length of time from 28th February 1986 to date, it would amount to inhuman and degrading treatment contrary to the provision quoted supra, to uphold and execute the sentence of death passed on them, does not arise in this appeal as it is premature.

Unless the issue is intrinsic to the proceedings in this appeal, this court lacks original jurisdiction to entertain it. See Sections 42 and 212 of the 1979 Constitution with particular reference to the proviso to S. 212.

The issue of violation of S.31(1)(a) of the 1979 Constitution was not raised in the trial court which is vested with the jurisdiction to entertain such a complaint. The law has provided the procedure for raising such an issue under the Fundamental Human Rights (Enforcement Procedure) Rules, 1979. Where a person feels that any of his fundamental human rights has been violated, he can only seek redress in accordance with the provisions of the Fundamental Human Rights (Enforcement Procedure) Rules, 1979. On the face of these Rules the High Court will be the appropriate venue for the appellants to seek redress. See THE ATTORNEY-GENERAL OF ANAMBRA STATE v. ATTORNEY-GENERAL OF THE FEDERATION OF NIGERIA (1993)6 NWLR (PT. 302) 692.

The foreign cases cited and relied upon by learned counsel for the appellants in arguing this issue cannot be applied, since this court has not been conferred with original jurisdiction to deal with it. It has therefore been incompetently raised and it is accordingly struck out.

As regards the substantive appeal, I entirely endorse the cogent reasons given by the learned Chief Justice of Nigeria for dismissing the appeal. The evidence adduced by the prosecution has proved beyond reasonable doubt the charges brought against the appellants. The findings on the evidence by the trial court and the Court of Appeal are unimpeachable. I entirely agree with the learned Chief Justice of Nigeria that the appeals have no merit, and for the reasonably advanced in the lead judgment, which I hereby adopt as mine, I too would dismiss the appeals for want of merit. The conviction and sentence of death passed on the appellants are hereby further affirmed.

OGUNDARE JSC

I have had the advantage of reading in draft the judgment of the learned Chief Justice of Nigeria just delivered. I agree entirely with his reasoning and the conclusions arrived at by him.

As the issue of the alleged breach of the constitutional provision as enshrined in section 31 (1)(a) of the constitution of the Federal Republic of Nigeria 1979 is not intrinsic to the proceedings leading to the appeals to this court by the Appellants, this court will have no jurisdiction at this stage to entertain the complaints. Were the complaint intrinsic, this court would have had the jurisdiction to consider it along with other complaints raised

in the appeals of the Appellants. As the position is now, it is for the Appellants to make their complaint to the High Court as provided for in section 42 of the Constitution and the Fundamental Rights (Enforcement Procedure) Rules 1979. When the matter comes back to this court in its appellate jurisdiction, it is only then that we can examine the complaint and pronounce on it.

As regards the merit of the appeals before us, I agree entirely with the learned Chief Justice that the appeals are completely devoid of any merit and for the reasons given by him I too would dismiss them. In the net result, I dismiss the appeals of the Appellants and affirm the judgment of the court below.

OGWUEGBU JSC

I had a preview in draft of the judgment just delivered by my learned brother Bello, Chief Justice of Nigeria. I agree with his reasoning and conclusion.

Mr. Agbakoba, learned counsel for the 3rd appellant contended that the following issues arose for determination in this appeal namely:

"1. Whether it was safe and proper to convict the appellant on the strength of only Exhibit "P"

2. Whether the representation of the appellant at address stage (sic) prosecution counsel was a denial of the appellant's constitutional right to fair hearing.

3. Whether it would not amount to inhuman and degrading treatment and therefore a breach of section 31 (1) (a) of 1979 constitution to uphold the sentence of death on the appellant when the appellant had stayed in prison confinement under a sentence of death since February, 1986."

Chief Olajide Oki, learned counsel appearing for the remaining appellants in his supplementary brief of argument invited the court to consider the following issues:

"1. Whether as a result of the absence of the Defence Counsel at address stage, the Appellants could be said to have had a fair hearing as guaranteed by the rules of natural law and justice and S. 33 of the Constitution of the Federation 1979.

2. Whether or not the inordinate delay in executing the Appellants amount to torture or to inhuman or degrading treatment."

Issue three in Mr. Agbakoba's brief and issue two identified in chief Oki's brief do not arise in this appeal. Section 42 of the 1979 constitution

confers a special jurisdiction on the High Court with respect to the enforcement of any complaint based on a contravention of section 31(1)(a) and other provisions of Chapter 4 of the said constitution. The High court has the power in its original jurisdiction to make an appropriate order or issue any prerogative writs of habeas corpus, mandamus, certiorari and prohibition to ensure compliance. The said section 42 of the Constitution provides: 5

“42(1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this constitution, a High Court shall have original jurisdiction to hear and determine any’ application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any rights to which the person who makes the application may be entitled under this Chapter.” 10 15

Rules with respect to the practice and procedure of the High Court for the enforcement of section 42 of the constitution have been made by the Chief Justice of Nigeria.

The jurisdiction of the Supreme Court is appellate except as provided in section 212 of the constitution which conferred original jurisdiction on the Supreme Court in certain cases. 20

A matter arising from section 31 (1)(a) of the constitution is not one of them. See Trevor Walker v. The Queen (1993)3 W.L.R. 107. This court is therefore not the proper forum where the complaint under section 31 (1)(a) can be made as a court of first instance. 25

In the cases of the Catholic Commission For Justice and Peace In Zimbabwe v. The Attorney-General of Zimbabwe & Ors. (Judgment No. S.C.73/93 Civil No. 137/93, Riley v. Attorney-General of Jamaica (1983)1 A.C. 719 and Earl Pratt & or. v. Attorney-General of Jamaica & or. referred to us, there were distinct complaints of inordinate delay in carrying out the death sentences. Section 24 of the constitution of Zimbabwe conferred original jurisdiction on the Supreme Court to entertain complaints touching on violations of human rights, hence the complainants in the Catholic Commission For Justice and Peace Zimbabwe (supra) were able to go to the Supreme Court as a court of first instance. In the case of Earl Pratt & or. v. Attorney-General of Jamaica & or supra, a motion under section 25(2) of the constitution of the was filed for the redress of alleged infringements of their fundamental rights. 30 35

The said section 25(2) of the constitution of Jamaica provides:

“25 (2) *The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-section (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled.*”

The above provision is in pari materia with section 42 of our constitution. The width of the language of our S.42(2) like section 25(2) of the constitution of Jamaica will enable the High Court to substitute for the sentence of death such order as it consider appropriate.

There is no provision similar to section 24 of the constitution of Zimbabwe in our constitution or any other law conferring original jurisdiction on this court and this court cannot confer such power on itself.

Even if the appellants had exhausted the rights of appeal afforded them under the law, they still cannot invoke the original jurisdiction of this court to entertain their complaints of inordinate delay in the execution of the death sentences passed on them as being violation of their fundamental rights not to be subjected to inhuman and degrading treatment. After this court must have disposed of the appeals on their merits, the appellants will have to fall back on section 42 of the 1979 constitution.

By the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act Cap. 10 Vol. 1 Laws of the Federation of Nigeria, 1990, Nigeria adopted the African Charter on Human and Peoples’ Rights as part of her municipal law. The provisions of that Charter are enforceable in the same manner as those of Chapter 4 of the 1979 constitution by application made under section 42 of the constitution.

The issue whether execution after a long confinement under sentence of death constitutes torture, inhuman and degrading treatment does not arise till determination in this appeal and this court cannot legally entertain it. Since capital punishment is part of our law, persons charged with capital offences and indeed all criminal cases are entitled to trial and appeal without delay. The Executive and Judicial Authorities must accept responsibility of ensuring that execution follows as swiftly as practicable after sentence allowing reasonable time for appeal and consideration for reprieve.

On the merits, the appeals also fail. The evidence against the appellant was overwhelming.

I will therefore dismiss the appeal and affirm the conviction and

sentence passed on each appellant.

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just read by the Hon. Chief Justice of Nigeria. I fully agree with his reasoning 5 and conclusion.

With reference to the appeals in the criminal case before this court, I agree with the Hon. Chief Justice of Nigeria that the appeals have no merit. For the reasons given by him, I too dismiss the appeals.

In view of the fundamental nature of the constitutional issue raised, 10 I wish to make some comments. My Lord, the Hon. Chief Justice of Nigeria has, in the lead judgment, made a comprehensive summary of the facts of the case and of the submissions made by the learned counsel who participated at the hearing of the appeals before us, including the *amici curiae*. The constitutional issue was that having stayed in prison confinement 15 under sentence of death for such an unreasonable length of time, from 28th February, 1986, to date, it would amount to inhuman and degrading treatment contrary to section 31 (1)(a) of the Constitution of the Federal Republic of Nigeria, 1979, to uphold and execute the sentence of death passed on the 3rd appellant. 20

It is to be noted that at the time that the aforesaid constitutional issue was raised, the appeals of all the appellants to this court from the Court of Appeal had not been heard by this court. So, when the constitutional issue was raised and argued before us this court itself could not say 25 what was going to be its decision in the appeals of appellants against their conviction and the sentence of death passed on them. In the circumstance, all that one could say at the time that the appeals and the constitutional question were being argued was that the 3rd appellant and other appellants might or might not succeed in the appeals. If the appeals of the appellants 30 against their conviction and the sentence passed on them succeed, then this court may quash their conviction and set aside the sentence of death passed on them. Consequently, the constitutional issue will be irrelevant and become hypothetical or academic. This court, by virtue of section 213 of the Constitution of the Federal public of Nigeria has jurisdiction to deal 35 with appeals in certain matters mentioned in the section. The Supreme Court has no jurisdiction or mentioned to determine hypothetical question or to embark on advisory or abstract academic opinion. See *Olaniyi v. Aroyehun*, (1991) 5 NWLR (Pt. 194) 652.

The legal implication of making provisions in Chapter IV of the

Constitution for the fundamental rights guaranteed by the Constitution and providing in Section 42 thereof that any person' who alleges that any of the provisions aforesaid is being or likely to be contravened in any State in relation to him may apply to a High Court or a Federal High Court in that State for redress, is that only a High Court of a State or a Federal High Court has original jurisdiction to entertain and determine such matters especially where they are really not relevant for the determination of the merit of the case or the merit of an appeal thereon. In short, the Supreme Court, in the circumstance, has no original jurisdiction to determine questions relating to an alleged breach of fundamental rights where the issue involved is not relevant to the determination of the merit or otherwise of an appeal properly brought before it. The present constitutional question does not pertain to the determination of the merit or otherwise of an issue raised in connection with the determination of the appellants' appeals before the Court of Appeal on which there was an appeal to this court. The position then is that the constitutional question was not properly before this court. It is a well-known rule of practice that a court will not deal with any issue which is not properly before it. See *Idowu v. Hausa*, 13 N. L. R. 96 cited with approval by this court in *Adeleke v. Aserifa*, (1991) 3 NWLR (Pt. 136) 94. Further, if a law provides that certain proceedings in respect of a particular cause of action shall be commenced by one method, a litigant will be wrong to commence such proceedings by another method. The legal consequence is that however meritorious the cause of action may be, the court will have no jurisdiction to entertain it as it is not properly before it. See *Obajimi v. Attorney-General, Western Nigeria*, (1967)1 All N.L.R. 31.

Even if, as argued by Mr. Agbakoba, learned counsel for one of the appellants, all authorities (including Judges) are bound to enforce the provisions of African Charter on Human and Peoples Rights, the legal position is still that the matter has to be properly brought before the authority can properly determine it. In this particular case, we were not referred to any procedure prescribed in the African Charter Oil Human and Peoples Rights for bringing the matter before the appropriate authorities. However, the corresponding provision of the 1979 constitution to the provision of the Charter, on prohibition of inhuman treatment, is contained in section 31(1)(a) of the 1979 constitution. There is a procedure prescribed in section 42 of the constitution for seeking a redress for a breach of fundamental rights including the provision of section 31 (1)(a) thereof. Thai procedure should or ought to have been followed.

If, as in this case, a court has no jurisdiction to entertain a matter, the court should, as from the time that it is discovered by it that it has no

jurisdiction stop further proceedings as it will be a waste of time to allow the proceeding to go beyond that stage. This is because where there is any defect in jurisdiction, such defect is fatal to the proceedings and will render the proceedings, however well conducted and decided they may be a nullity. It will be immaterial, however sympathetic the cause or application may seem. See Sanusi v. Ayoola, (1992) 9 N.W.L.R (Pt 265) 275. 5

The Supreme Court is a court created by the 1979 constitution and its jurisdiction generally is set out in sections 212 and 213 of the Constitution. The other relevant legislation concerning its constitution, practice and procedure is the Supreme Court Act under which the Supreme Court Rules were made. The foregoing contain the enabling constitutional and statutory provisions in so far as this court is concerned. As no court assumes jurisdiction over any matter without an enabling constitutional and/or statutory provision and as there is no provision in any of them conferring original jurisdiction on this court in a matter like this, the proper thing to do is for this court to let the proceedings in this matter end at this stage. See Osadebay v. A.G. Bendel State (1991) 1 N.W.L.R. (Pt. 169) 525; Ishola v. Ajiboye, (1994) 6 N.W.L.R. (Pt. 352) 506; and Odojin v. Agu (1992) 3 NWLR (Pt. 229) 350. 10 15

Finally, the Supreme Court, except in exercise of its appellate jurisdiction, cannot legally entertain any matter which is ordinarily within the original or appellate jurisdiction of any of the lower courts. It has to wait until the matter properly comes before it on appeal through the proper channel. That is the time or the stage when it can be said that the matter is ripe for determination by the Supreme Court. Any determination of the matter by this court before that time or that stage will be unconstitutional, without jurisdiction, and premature. That is one of the effects of the appellate system which has been firmly established in this country. In Attorney-General, Anambra State v. Okafor, (1992) 2 N.W.L.R. (Pt. 224) 396 the Court of Appeal entertained and determined a motion on a matter in respect of which the substantive issue was still pending at the High Court in another suit. This court, in holding that what the Court of Appeal did was wrong, stated, per Nnaemeka-Agu, J.S.C., at pp.429 - 430, inter-alia, as follows: 20 25 30

"The last point I wish to comment upon is in relation to the order of the Court of Appeal setting aside the recognition of the 5th defendant by the 1st and 2nd defendants while a substantive claim for that relief was pending in the High Court as suit No. E/36/87. That fact was brought to the notice of the Court of Appeal before the order was made. This cuts at the very roots of our appellate system. Every appellate court is a creature of 35

statute. In the case of the Court of Appeal it is a creature of the constitution which prescribes and circumstances its jurisdiction and powers (see sections 219 to 225 9f the 1979 constitution). In sum, it can only adjudicate or make orders over causes and matters and issues in any particular case which have been decided by the courts and tribunals from which
5 appeals lie to the Court of Appeal. It has absolutely no powers to make any orders or pronouncements over other matters and issues outside the issues on the causes or matters which have been decided upon by those lower courts or tribunals in any particular case. In the instant case, there was no *lis* between the parties on the recognition of the 5th defendant by the 1st
10 and 2nd defendants. That issue was not raised in suit No. AA/70/86 but was still pending in another suit(E/36/87). With respect, the manner whereby the Court of Appeal in the order under appeal took away the jurisdiction of the High Court in suit No.E/36/87 while adjudating in an appeal in suit No.AAI70/86 and made a final order on the matter still pending before the
15 High Court is unconstitutional, absolutely void and of no effect. May the day never come when, the Court of Appeal is vested with such wide powers that it can validly act like a universal *Ombudsman* and fish out and pronounce upon and make orders on issues not properly raised before it, no matter how wrong the matter might appear to be. Fortunately in our present
20 appellate system that day may never arrive. The order revoking the recognition of the 5th defendant was without jurisdiction and invalid.

The situation is worse in this case. What the applicant wants this court to do is to determine an issue which should be determined by the High Court or Federal High Court in a subsequent action to be instituted by
25 the 3rd Appellant, if he so desires.

I dismiss the appeals. The convictions and sentence passed on the appellants are hereby further affirmed. I abide by the consequential order made in the lead judgment.

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