

SUPREME COURT OF NIGERIA
13TH JANUARY, 1995. SC 166/1993
CORAM: A.B. WALI, M.E. OGUNDARE, E.O.
OGWUEGBU, U. MOHAMMED, S.U. ONU, Y.O ADIO,
A.I. IGUH, JJSC.

EDET EFFIOM APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Point of law - Raised for the 1st time on appeal - When to be allowed and determined by the Supreme Court,

APPEALS - Sentence - Murder - Overwhelming evidence against accused - Whether the mandatory sentence of the lower courts - Will be disturbed.

CONSTITUTIONAL LAW - Fair hearing - Criminal procedure - whether murder trial for a period of 2 years & 8 months - Amounted to unfair hearing - In view of the nature of the case.

CRIMINAL PROCEDURE - Plea - Of not guilty - Whether taken in compliance with 5.275 C.PL, and S.33(6) (a) of the Constitution.

CRIMINAL PROCEDURE - Plea - No miscarriage of justice flowing from the manner plea was taken - Whether the charge is imperfect - To warrant interference by appellate court.

CRIMINAL PROCEDURE - Delay in trial of the accused for murder - Each case to be considered on its own merit - Regarding available facility for prosecution and investigation - When delay is held to be neither inordinate nor unreasonable.

JUDICIAL PRECEDENT - Previous decision - Of the Supreme Court Circumstances under which it will be overruled.

JUDICIAL PRECEDENT - Established principle - On applicability of S. 33(4) of the Constitution - Whether to be overruled or departed from.

FACTS

Appellant had persistently sought to marry the deceased, Nwa Akpan Ikwo, but her father refused to give his consent saying that the deceased was already married. Appellant felt aggrieved apparently as he claimed to have spent so much money in assisting the deceased when she suffered from protracted illness. On 25th March, 1985, the appellant armed with a matchet, Exhibit 1, trailed the deceased to the farm. There, appellant dealt several matchet cuts on the deceased's hostess one Inyang Effiong Okon and thereafter pursued the deceased and inflicted severe matchet cuts on her and her daughter one Ekaete Moses and both of them died on the spot. Inyang Effiong Okon later died at the hospital after making statements to the villagers in which she gave detailed account of what happened in the farm.

The appellant who went into hiding after the attack was arrested two days after. On his arrest, appellant took the police to the scene of crime and showed them where he hid the matchet Exhibit I. He also made a confessional statement to the police. Appellant was arraigned before a Calabar High Court where he was tried, convicted and sentenced to death. His trial which had 30 adjournments lasted for a period of two years and eight months. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court to determine inter alia, whether his trial was within a reasonable time as provided by S.33(4) of the 1979 Constitution.

HELD(Unanimously dismissing the appeal per lead judgment of **ONU JSC**).

Plea - Compliance with S.215CPL&S. 33(6) (a) of the Constitution

1. In the case in hand, the plea I earlier set out above seems to have been fully stated, explained, and was adequately comprehended before the plea of "*Not guilty*" was recorded to set the stage for the trial to commence for any eyebrows now to be raised in an expression of doubt. In the light of the foregoing, I take the firm view that there had been a full compliance with section 215 C.PL. and section 33(6) (a) of the Constitution. (p. 22 A)

Plea - No miscarriage of Justice

2. There has been no miscarriage of justice in so far as the reading of the plea and explanation thereof was made to the appellant. Under no guise can it be said, in my opinion, that the charge in the instant case is an imperfect or defective charge. It is only when the mistake, or error is substantial in fact it has occasioned a miscarriage of justice, that this Court

sitting on appeal, is bound to interfere. (p.22 C)

Point of Law raised for the 1st time on appeal

3. Now, the law is settled that where the point of law taken for the first time on appeal involves a substantial and substantive or procedural point of law, and no further evidence could be adduced which would affect it, such point could be raised and determined on appeal. Indeed, the Supreme Court as a Court of last resort will entertain a new point not taken in the court below if no further evidence would be needed for the resolution of issues arising for determination and it will help in ensuring that the real question or questions in controversy between the parties to the trial, are ultimately determined, thus preventing a miscarriage of justice. (p. 32 F)

Previous decision of the Supreme Court

4. Although it would do so with the greatest hesitation, the Supreme Court has the power to depart from or overrule its previous decision. Similarly, the full court of the Supreme Court has the competence to overrule a previous decision of another full panel. The onus is on the party seeking to have an earlier Supreme Court decision overruled to satisfy the court that there is a need to do so. (p. 33 H)

Established Principle - Whether to be overruled

5. In the instant case, not enough reasons have been adduced, in my Opinion, to warrant a departure from or overruling by this court, of its established principle on the applicability of the provisions of section 33(4) of the 1979 Constitution as to whether there has been a fair hearing within a reasonable time being the date of arraignment to the date of verdict (delivery of judgment). The principle enunciated in *Asakitikpi v. The State* (supra) therefore, in my view, remains good law until departed from or overruled by this Court for good cause shown. (p. 34 G)

Fair hearing - Murder trial for 2 years and 8 months

6. With regard to the period from arraignment to the conclusion of trial said to be too long, my short answer is that the several adjournments between arraignment on 4/5/88 and the conclusion of trial on 7/1/91, spanning altogether 2 years and 8 months, does not, in my view, amount to unfair hearing or inordinate delay. In the first place, the nature of the case, to wit: murder of three persons carried out in gory and mindless circumstances although Appellant was indicted for killing only one person; he confessional statement made but the Appellant (Exhibit 2) for which here was an attempt at retraction but which failed, and more importantly, the absence of a miscarriage of justice and lack of merit in the complaint, which cumula-

tively go to render as tenuous the Appellant's grouse. (p. 40 A)

Delay in trial of the accused for murder

7. I concede in the light of all, I have said that there was delay but I take the firm view that it was neither inordinate nor unreasonable. Each case of delay, however, has to be considered on its own merit, regard being had to the facility with which an investigation and eventual prosecution of an accused person proceeded. (p. 41 C)

Whether the sentence will be disturbed

8. It has been variously suggested that should this appeal be allowed the Appellant should be given a reprieve and the sentence passed on him thereby commuted; that a retrial be ordered or that he be discharged and acquitted. As the end result I have arrived at admits of none of the above, in as much as the sentence of the trial court affirmed by the court below is mandatory and ought not to be disturbed, the issue herein is resolved against the Appellant by me. The evidence was overwhelming and to order a retrial, for instance, is to perpetuate injustice. (p. 51 B)

NOTABLE POINTS OF INTEREST

E ONU JSC

1. Commencement period for applicability of S.33 (4) of the Constitution

It was common ground between the parties, although there are discordant notes to the contrary to which I shall shortly come, that the commencement period for the applicability of the provisions of section 33(4) of the 1979 Constitution as to whether the Appellant was given a fair hearing within a reasonable time, is the date of arraignment. (p. 33 G)

2. Departure from previous Decisions

It ought to be pointed out however that there are no hard and fast rules laid down exhausting the area within which to warrant a departure from a previous decision and each case must be decided on its special facts and circumstances with a view to avoiding perpetuating injustice, (p. 34 C)

H 3. Primary aim of S.33 (4) of the Constitution

The primary aim of section 33(4), I therefore venture to opine, is -
"(a) a fair hearing or fair trial as understood under the rules of natural

*justice (especially) audi alteram partem) and
(b) sufficient time for the appellant to prepare his defence (which includes
reasonable notice of the offence alleged). (p. 40 E)*

4. Presumption of contravention of S.33(4) of the Constitution

While it is the correct principle of law to state that long interval between the reception of oral evidence of witnesses in a trial and the delivery of judgment raises a strong presumption of contravention of the provisions of section 33(4) in the instant case this has not been established. (p. 49 D)

5. When Court will not cling to technicalities

To accede to Appellant's prayer by setting him free to walk the streets of any corner in this country by the application of the *ibi jus ubi remedium* maxim is to cling to technicalities whose phenomena this court has been moving away from in these days and age in order to disrobe them of their garb of injustice. (p. 50 C)

6. Adjournment - Need for Judges to record reasons

Due to frequent complaints in respect of delays in trial courts in both criminal as well as civil cases, judges will do well to record reason why adjournments are necessitated at the end of each day. That way, appellate courts are better placed to know the causes of delay and how to go round them. (p. 51 A)

WALI JSC

7. Commencement of Trial - Fair hearing within a reasonable time

A trial of an accused person commences when his plea is taken. So the right to fair hearing will commence from the time an accused person is brought before a court and his plea is taken. The period does not include the pre-trial stage to wit: the period covering the time he was arrested to the time he was arraigned in court and his plea taken. Whether a trial is conducted within a reasonable time, is a question of fact, and will depend on the circumstances in each case. (p. 56 C)

8. Fair hearing defined

It is pertinent to note that section 33(4) of the Constitution does not provide a definition for the words "*fair hearing*" within a reasonable time. The phrase "*fair hearing*" was construed in *DEDUWA v. OKORODUDU* (1976) N.M.LR 236 at 246 to mean a "*hearing that does not contravene the*

principle of natural justice". (p. 57 B)

9. Reasonable time - How determined

As the question of what is a "*reasonable time*" within which to conduct and complete a hearing of a case (be it criminal or civil) is not provided in section 33(1) and (4) of 1979 Constitution, it is not practicable in construing section 33(1) and (4) *supra* to fix a time limit. None of the decisions in which the sub-sections came for review fixed a time limit either. The views expressed in all the decisions both local and foreign agreed that "*reasonable time*" would depend on the facts and circumstances of each case. (p. 58 A)

10. Dispensation of Justice - Fundamental Duty of Court

The fundamental duty of any court or any tribunal entrusted with dispensation of justice is to do justice or substantial justice to both parties to the litigation. Judicial activism in my view does not mean judicial recklessness such that may lead to chaos, nor does it mean bending the law in favour of one side to the detriment of the other.(p. 59 E)

OGUNDARE JSC

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11. Responsibility of State to bring accused for prompt trial

It is the responsibility of the State to bring an accused person to his trial promptly. If the accused person is in custody, the State, and not the accused, has the full responsibility to produce him in court. And, failure to do this for whatever reason, more so for lack of vehicle to convey him, must be weighted heavily against government.(p. 77 B)

12. Appellant's trial was not within a reasonable time

From all I have been saying above and after a careful consideration of all the factors to be taken into account in resolving the question whether Appellant had a fair hearing within a reasonable time in the court of trial, the conclusion I reach is that his trial was not within a reasonable time; there is a breach of his constitutional right to speedy trial as enshrined in section 33(4) of the Constitution.(p. 79 C)

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13. Deprivation of right to speedy trial is a violation s. 33(4)

This Court has always frowned at the delay in bringing accused persons to trial promptly and will continue to do so until the situation remedied. This

disapproval extends to the trial itself. The deprivation of the right to speedy trial is undoubtedly a violation of an accused person's constitutional right guaranteed under section 33(4) of the Constitution. (p. 76 E)

14. Breach of Constitution right - Miscarriage of Justice not occasioned

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I too have examined the evidence on record and the judgments of the two courts below; it is my considered view that the conviction of the Appellant was correct. The result is that although there has been a breach of the Appellant's constitutional right to speedy trial, the breach has not occasioned a miscarriage of justice. The appeal, therefore, will be dismissed. (p. 83 A) C

15. Speedy trial - Not a preclusion of public justice

But in safeguarding the fundamental rights of the Appellant in the present case the Court must not lose sight of the fact that while section 33(4) of the Constitution secures to the Appellant the right to speedy trial it does not preclude the rights of public justice. It behoves on the Court, therefore, to balance the two distinct rights, that is to the Appellant on the one hand and to the public on the other(p. 83 E) D

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16. Mandatory sentence - Effects

In the case on hand, the conviction being for the offence of murder the sentence provided for by the Criminal Code is mandatory, and that is death. Being mandatory the Court cannot interfere with it by reducing it to anything else. In the circumstance, this Court has no jurisdiction to commute the sentence of death to life imprisonment. (p. 85E) F

OGWUEGBU JSC

17. Meaning of Miscarriage of Justice

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A failure or miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word a judicial procedure at all. (p. 100 A)

ADIO JSC

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18. Attitude of Supreme Court to technicalities

The attitude of this court has been that cases should not be decided on the basis of technicalities. They should, wherever possible, be decided on merit.

Irregularity concerning the taking of the plea of an accused is fatal and to hold that a failure to record the language, understood by an accused, in which the charge was read and explained to him is such an irregularity, is to decide the case on the basis of technicality. (p.104 H)

B IGUH JSC

19.Compliance with S. 215 CPL and S. 33(6) (a) of 1979 Constitution

It seems to me quite plain that the said mandatory conditions laid down in section 215 of the Criminal Procedure Law together with the provisions of C section 33(6) (a) of the 1979 Constitution have been specifically provided to guarantee the fair trial of an accused person and to safeguard his interest at such a trial. I should stress that it is the duty of a trial court to ensure strict compliance with the said provisions by reflecting such compliance in the court's record. (p. 118 D)

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REPRESENTATION

Dr. I.A. Okafor with Mrs. Uche Nwene for the Appellant.

Mrs A.B. Ikpeme D.P.P. Cross River State for the Respondent.

E AMICI CURIAE

Mrs. E.N. Kpojime Director Civil Litigation with Mrs. T.A. Igoche A.D.P.P Benue State.

Mrs. M.F. Oladeinde Ag. D.P.P with A.I. Olatunbosun Esq. Senior Legal Officer, Oyo State.

F Livy Uzoukwu A.G Imo State with A.O.N. Ukachukwu, Ag. Solicitor-General

A.B. Mamoud Esq. with Mrs. Kaita of counsel.

A. Amiesimaka A-G Rivers State with K.O. Appah Esq. D.P.P. Rivers State

G CASES REFERRED TO

Erekanure v. The State (1993) 5 NWLR (Part 294) 385

Ibrahim v. The State (1979) 3 LRN 110

Onajobi v. Olanipekun (1985) 4 S.C. (Part 2) 156 at 163

H Chukwu v. The State (1994) 3 NWLR (Part 335) 649 at 657

Asakitipi v. The State (1993) 5 NWLR (Part 296) 641 at 652

Bendel State v. The Federation (1981) 5 S.C.1

Obayuwana v. Governor (1982) 12 S.C. 147 at 211

Ariori v. Elemo (1983) 1 S.C. 13. 24

- Garba v. The State (1972) 4 S.C. 118
 Nnaji for v. Ukonu (1985) NWLR (Part 9) 686
 Akpor v. Iguoriguo (1978) 1 LRN 36 (1978) 2 S.C. 115
 Ekeri & Sons v. Kimisede & Sons (1976) 1 NMLR 194
 Kakara & Sons v. Imonikhe (1974) 1 ALL NLR (Part 1) 383
 Ifezue v. Mbadugha (1984) 1 SCLR. 427 at 431 **B**
 Sambo v. The State (1989) 1 CLRN. 77
 Folade v. A-G of Lagos State (1981) 2 NCLR 77 at 779
 Baker v. Wingo 407 US 1514, 1530 (1972)
 Ozuluonye v. The State (1983) 4 N.C.L.R. 204 (1981) 2 N.C.R. 38
 Mohammed v. Kano N.A (1968) 1 All NLR 426 **C**
 Nwankwo v. The Queen (1959) 4 F.S.C. 274
 Ayambi v. The State (1985) 6 N.C.L.R. 141, 142
 Dr. Sofekun v. Chief Akinyemi (1980) 5-7 S.C.1
 Agu v. Ikewibe (1991) 3 NWLR (Part 180) 385 at page 403
 Oniah v. Onyiah (1989) 1 NWLR (Part 99) 514 **D**
 Bronik Motors v. Wema Bank (1983) 1 SCNLR 296
 Rossek v. A.C.B. Ltd (1993) 8 NWLR (Part 312) 382
 Wright v. New Zealand Shipping Co. Ltd. (1878) 4 Ex. D. 165n
 Davis v. Capper (1829) 4 C & P 134, 138
 Hick v. Raymond & Reid (1893) AC 22 per Lord Herschell LC at pp.28,29 **E**
 Read v. Bonham (1821), 3 Brod & Bing 147
 Bell v. D.P.P. (1985) AC P.C.
 Nemi v. The State SC. 303/1990

STATUTES REFERRED TO

F

- Criminal Code S. 319(1)
 Criminal Procedure Law (C.P.L.) Cap 32 Vol. 11 Laws of Cross River State
 SS. 215, 100.
 Constitution of the Fed. Rep. of Nig. 1979 SS. 33 (4), (6) (a), 33(1), 32(4), G
 31(1), 258(1)(4), 42(1), 212, 192, 254(1)
 Constitution of the Fed. Rep. of Nig. 1963 S. 21(3)
 Supreme Court Act. Cap. 424 S.26

LEAD JUDGMENT BY ONU JSC

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This is an appeal against the decision of the Court of Appeal, Enugu which on 16th February, 1993 affirmed the judgment of the Cross River State High Court (per Effanga, J.) wherein on the 7th day of January, 1991, the learned trial judge had found Edet Effiom

(hereinafter referred to as the appellant) guilty on a charge of murder contrary to Section 319(1) of the Criminal Code.

The facts of the case as made out by the prosecution briefly stated are, that on the 25th day of March, 1985, at Ekim Ebebit, Odukpani, in the Calabar Judicial Division the Appellant murdered three people to death, one of whom was Nwa Akpan Ikwo (hereinafter called the deceased) and for whose death alone the charge herein was laid. The deceased was married to one Udo Etim who because of an illness, returned her to her father, Akpan Ikwo (PW1). On being cured of her illness by a native doctor, the deceased who returned to PW1, was sent by the latter to live with one Inyang Effiong Okon at whose abode the appellant made overtures for marriage to her although she promptly turned him down. During her illness, the appellant who rendered considerable assistance to the deceased, was living and working with PW1. Apparently greatly desirous of marrying the deceased, the Appellant approached the late Inyang Effiong Okon, who referred the matter to PW1. Using Edem Iyamba (PW3) as intermediary, the appellant approached PW1 by requesting to marry the deceased but PW1 refused, saying that the deceased was already married. Undaunted with this initial rebuff, appellant continued to plead with PW1 through and with the help of PW3 because, according to appellant, he had spent a lot of money on the deceased.

Thus, on 25th March, 1985, after deceased's hostess, Inyang Effiong Okon, had left for her farm with her children and the deceased, the appellant went to the stream with a matchet (Exhibit 1 hereof). There, he was said to have dealt several matchet cuts on late Inyang Effiong Okon. He was thereafter stated to have pursued the deceased on whom he inflicted several matchet cuts as well as on her daughter, Ekaette Moses, both of whom died on the spot. He however, spared the breast-sucking one-year old daughter of the deceased. While it is shown that late Inyang Effiong Okon was rushed to the hospital where she was said to have later died, she had narrated to the villagers what transpired at the farm where the appellant carried out the attack, adding that the appellant who escaped into the bush, was caught after two days by a search party organised for the purpose. Upon appellant's arrest, it is stated that he took the investigating Police Officer (PW5) and some villagers, to the scene of crime and showed them where he had left the matchet he used (Exhibit 1). He then volunteered a statement to sergeant Thomas Atim (PW6) who later took him before the Divisional Crime Officer before whom he admitted and signed

his confessional(Exhibit 3). The statements recorded from appellant, the confirmation statement form in the Efik version of the statement are Exhibits 2, 3 and 4 respectively.

The appellant was first arraigned on 15th December, 1986 when plea taken before Udofia, J. There were five separate adjournments thereafter and it was not until on 25th January, 1988 that a fresh plea was taken from the appellant, this time before Effanga, J., who ultimately tried the case unto conclusion. Actual trial commenced on 4th May 1988 when the prosecution opened her case. Due to several reasons on several occasions, including inability of the prosecution to produce the appellant in court, and the absence of defence counsel, the trial progressed in fits and starts until judgment was finally delivered.

For the defence, the appellant alone testified. He denied committing the Offence attributed to him or making the statements accredited to him by the police. He however asserted that the PW1 bewitched him leading him to have mental disturbance. He later admitted under cross-examination that he made a statement to the police; that he used to go to the farm with matchet and hoes, though denying that Exhibit I belongs to him; More significantly, he admitted that he went to the farm with the deceased and that the deceased's daughter and late Inyang fiffiong Okon also were at the farm with the deceased. He did not however know if they returned home from the farm or their whereabouts.

When judgment was finally delivered on 7th January, 1991 by the learned trial judge following some delays for the addresses of counsel, the appellant was convicted and sentenced to death.

The appellant filled a notice of appeal against the judgment to the Court of Appeal. His counsel having indicated in the brief of argument that if Issue I relating to whether there had been a valid plea were answered in the positive, he had nothing to argue or urge in his favour, the Court of Appeal in its judgment delivered on 16th February, 1993 dismissed the appeal and affirmed the conviction and sentence of the trial court as hereinbefore alluded to.

Being dissatisfied with this decision the appellant has further appealed to this Court. He had previously filed a Brief dated 24/8/93 and filled on 15/9/93, accompanying which was his motion for extension of time to file his Notice of Appeal containing three grounds. That motion having been withdrawn on 7/4/94 was accordingly struck out. On the same day, his motion dated 28/2/94 for extension of time within which to seek

leave to appeal, leave to appeal and extension of time to file a Notice of Appeal containing three proposed grounds as well as for leave to argue issues 1 and 2 was accordingly granted. We in addition extended the respondent's time to file her brief with time to begin to run from that day (7/4/94). Three issues (the same which the respondent eventually adopted) were submitted on behalf of the appellant for determination, to wit:

- 1 Whether there had been a valid arrangement (sic) in accordance with the provisions of section 215 Criminal Procedure Law, (C.P.L.).
- C 2 Whether there was trial within a reasonable time within the provisions of section 33(4) of the 1979 Constitution.
- 3 Whether the prosecution had proved the case against the appellant beyond reasonable doubt.

On 7/7/94, when the appeal came up for hearing, we were compelled to adjourn it to 13/10/94 in order to empanel a full court to determine the constitutional issue relating to Issue 2 which we considered important. This was the genesis of our invitation to counsel including some Attorneys-General of States as *Amici Curiae* for them to assist the court aside from those involved in the contest.

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When therefore on 13th October, 1994 this court reconvened in a full panel with the several invited *amici curiae* in attendance, learned Director of Public Prosecutions, Cross River State, Mrs. Ikpeeme, first moved her motion dated 12th October, 1994 for extension of time within which to file the respondent's brief and to deem same as properly filed and served. It was ordered as prayed and learned counsel for the appellant, Dr. Ilochi Okafor, who had in the interval filed a supplementary had his prayer to argue same granted and it was regarded as if it was a Reply brief. After adopting both briefs, learned counsel made an oral submission in expatiation thereto. The argument proffered in both his briefs and orally, commencing with Issue one, took the following form.

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ISSUE NO.1 VALIDITY OF THE PLEA

It is the submission of learned counsel for the appellant in his brief on this issue that the original plea was taken on 15/12/86 before Udofia, J., later before Effanga, J on 25/1/88 and a further plea before Effanga, J. on 4/5/88. After setting out how the plea taken was recorded on the two latter occasions before Effanga, J., learned counsel contended that since both pleas were taken before the same judge, it followed that there was no need

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to examine the second plea made on 4/5/88 except the earlier of 25/1/88 was defective. In that case, the second plea would have a surplussage, he argued. But if the earlier plea was defective or otherwise invalid, he argued, then that plea becomes material. In which If the second plea was otherwise valid, he contends, then the plea ought to be ignored with the effect that its defectiveness, so had been overtaken by the validity of the second plea, However, should both pleas be held to be defective, he maintained, then it would be impermissible to merge or cumulate both of them to see if conditions prescribed under section 215 Criminal Procedure Law been met. After advertng our attention to the five conditions to satisfied and which must co-exist for a proper plea on arraignment to be in place, the recent case of this Court of Erekanure v. The State I) 5 NWLR (Part 294) 395 following Kaiubo v. The State (1988)1 O.R (Part 73)21; (1988)3 SCNJ.79,80-81; Evorokoromo v. The State 6-9 S.C.3; Ogoto Ebem v. The State (1990) 7 NWLR (Part 160)113 and Ovediran v. The Republic D (1967) NMLR.122, were cited to us that in the instant case, the plea of 25/1/88 suffers from the following defects; namely:-

- a) there is no record of what language was used in reading and/or interpreting the charge to the accused
- b) there is no record that the trial judge was satisfied with the explanation of the charge to the accused.

PLEA OF 4/5/88

Learned counsel similarly submitted that the plea made on 4/5/88 the following conditions:-

- (a) there is no record of what language was used in reading and/or interpreting the charge to the accused
- (b) there is no record that the charge was interpreted or explained to the accused
- (c) there is no record that the trial judge was satisfied that the accused fully understood the charge and its import.

The issue of the language used in interpreting the charge to the appellant, the contended, is especially crucial in this case as three rate languages were used in the proceedings, namely, English, Efik and Annang. PW6, he stated, had testified that on arrest, he cautioned the appellant in English language and he volunteered a statement in the Efik language which he (PW6) recorded in the English language through an Interpreter. Later, the appellant was alleged to have volunteered another statement in Efik i.e. Exhibit 4

and the evidence of PW7. We were further referred to the concluding part of Exhibit 2 wherein one PC, Ime. Etim who is shown as having interpreted from Annang to English to the appellant was himself not called as a witness; moreso that appellant's language is Efik and he (appellant) had testified in that language. It being therefore necessary to show the medium of interpretation i.e. that the language used was the type the appellant understood, this omission is fatal to the conviction of the appellant; In the result, it is submitted, both pleas are defective and invalid, adding that without a proper plea, no trial had commenced and no matter the strength of the evidence, the trial and the consequent judgment were null and void. The strength of the evidence is therefore a factor which compelled the court to order a retrial, not an acquittal of the appellant, vide the decisions in *Kajubo V. The State* (supra), *Qgodo Ebem V. The State* (supra) and *Ewe V. The State* (1992) 6 NWLR (Part 246)147.

In my consideration of Issue 1 with particular reference firstly, to VALIDITY OF PLEA, I wish to stress that the plea taken before Udofia, J. on 15/12/86 before disengaging from trying the appellant, is of no consequence and ought to be regarded as irrelevant in the arguments proffered herein. This is because the trial of the appellant strictly so called did not consist of the preliminaries that took place before Udofia, J. but rather those which were conducted from plea on 25/1/88 before Effanga, J. the first which went thus:

*“Accused in Court,
Mrs. O.N.O. Mkpubre - State Counsel for the State says –
Accused needs Legal Aid.*

N.B. *The Charge is read and interpreted to the Accused. He says he understands same. He pleads - “Not Guilty.”*

The second plea was recorded on 4/5/88 before the same learned trial Judge, Effanga, J. This was on the thresh-hold of his taking evidence from the first prosecution witness on that day when, quite rightly in my view, both the State and the appellant were fully represented by counsel and I presume, to make assurance doubly sure, the appellant was fully apprised of the charge. The record therefore once more stated inter alia:

“Accused in Court -Atim Ekpo (Mrs.) S.S.C. for the State - Orok Oyo, Esquire for the accused - (Bassey Eteta Esq. with him)

PROSECUTION OPENS

N.B. *Charge is read to the Accused. He says he understands the same.
He pleads - “Not Guilty.”*

In my view, this second and latter plea, which I presume was recorded. On

the side of caution or for the avoidance of doubt vis-a-vis that taken on 25/1/88 when appellant's counsel was absent from court (no law that I know imposes a duty on him to be present to render a plea valid), is the operative and applicable one and I will stick to it in my consideration of the arguments canvassed herein in relation to the sufficiency or otherwise of the requirements or conditions to be fulfilled by a trial court on the arraignment of an accused person before it in a criminal trial. Indeed, the learned counsel for the appellant bears me out on this when in his brief at page 7, paragraph 4.13 he asserted:

"4.13 Actual trial commenced on 4/5/88 when the second plea before the trial judge was taken"

The learned D.P.P. in her brief would appear to say the same thing.

Now, by virtue of section 215 of the Criminal Procedure Law, Cap. 32 Vol. II, Laws of Cross River State of Nigeria and section 33(6) (a) of the Constitution, upon arraignment of an accused person for his trial, the following requirements as decided by this Court in the case of Samuel Erekanure v. The State (1993) 5 NWLR (Part 294) 385, following Kaiubo v. The State (supra) and a host of other decisions where the same principles were established, must be satisfied, failing which any subsequent trial and conviction of him will be rendered a nullity. The requirements are that:

- (a) the accused must be present in court unfettered unless there is a compelling reason to the contrary;
- (b) the charge must be read over to the accused in the language he understands;
- (c) the charge should be explained to the accused to the satisfaction of the court;
- (d) in the course of the explanation technical language must be avoided;
- (e) after requirements (a) to (d) above have been satisfied the accused will then be called upon to plead instantly to the charge.

It is now trite that all the above requirements must co-exist and must be satisfied as they are mandatory.

After a careful reading of the authorities cited to us, I must say with due respect to the learned counsel for the appellant that the case in hand is distinguishable from that in Erekanure v. The State (supra). While in the latter, before the first prosecution witness gave evidence, the notes of the court read tersely thus:

"M. I. Edokpayi S.C. for the State J.E, Sharkarho for the Accused.

Charge read to the Accused. He pleads not guilty to the Law Court. Prosecution opens its case."

In the former, i.e. in the case in hand, the plea I earlier set out above seems to have been fully stated, explained, and was adequately
 B comprehended before the plea of "*Not guilty*" was recorded to set the stage for the trial to commence for any eyebrows now to be raised in an expression of doubt. In the light of the foregoing, I take the firm view that there had been a full compliance with section 215 C.P.L. and section 33(6) (a) of the Constitution. I therefore agree with the learned D.P.P.'s submission that
 C there has been no miscarriage of Justice in so far as the reading of the plea and explanation thereof was made to the appellant, (See Ibrahim v. The State (1979) 3 LRN110). Under no guise can it be said, in my opinion, that the charge in the instant case is an imperfect or defective charge. It is only when the mistake, or error is substantial in that it has occasioned a miscarriage of justice, that this Court sitting on appeal, is bound to interfere. See
 D Onajobi v. Olanipekun (1985) 4 S.C. (part 2) 156 at 163; Oje v. Babalola (1991) 4 NWLR (pt 185) 267 at 271 and Gwonto v. The State (1983) 1 SC NLR 152-3.

There is in the case in hand no suggestion that the plea was therefore fettered in any way. See Chukwu v. The State (1994) 3 NWLR (Part 335) 649 at 657. Indeed, the appellant is recorded as having given a direct and unfettered answer to the charge as read and explained (supervised by the trial court) before actual hearing commenced. Besides, he seemed perfectly to have understood the same. Moreover, being represented by counsel under whose nose the mandatory "*Not guilty*" plea which in murder
 F trials is a judicial ritual anyway was recorded, I cannot conceive of any irregularity attendant to what transpired at the trial worth complaining about. Appellant's grouse, is in my respectful view, at best misconceived and at worst, unnecessarily technical. My answer to the issue is therefore rendered
 G in the positive.

ISSUE 3:

A word or two needs be said in respect of this issue. It is evident that like in the court below, the appellant has abandoned it and has nothing to urge thereto, moreso that his whole arguments and conclusion are
 H focused only on the 1st and 2nd issues, As I shall seek to show shortly in my consideration of issue 2, the view as to whether the prosecution proved its case beyond reasonable doubt or not fades into insignificance having regard to the admission by learned counsel in his oral submission before us wherein he conceded that but for his contention of ft unreasonable delay

which rendered the appellant's conviction Impermissible, the totality of the facts and evidence in the case were overwhelming. Be that as it may, I shall now embark upon my consideration of issue 2 which with issue 1 Appellant expressly sought leave to argue as fresh points as follows:-

ISSUE 2:

The vital constitutional question as to whether the Appellant had a fair trial from the time of his arrest to the date of judgment in this case, as provided by Section 33(4) of the Constitution of the Federal Republic of Nigeria 1979 (hereinafter referred to as the 1979 Constitution) is what led to the invitation to the various amici curiae to address us. Thus, when on the 13th of October, 1994 the learned counsel for the Appellant, Dr. Ilochi Okafor and the learned D.P.P., Cross River State, Mrs. A.B. Ikpeme, for the Respondent, each made oral expatiations in addition to the briefs they had hitherto filed in this Court, each amicus curiae who also at the request of the Honourable Chief Justice, submitted a brief of argument each, elaborated thereon.

For better and clearer appreciation of the issue it is pertinent that I review-albeit, briefly the submissions of each of the learned counsel for the Appellant, the learned D.P.P. for the State/Respondent and the amici curiae respectively.

Learned defence counsel after submitting that the commencement period for the applicability of the provisions of section 33(4) of the 1979 Constitution as to whether the Appellant had been tried within a reasonable time is the date of arraignment vide *Asakitipi V. The State* (1993)5 NWLR (Part 296) 641 at 652 and that after a first arraignment and plea before Udofia, J on 15/12/86 who did not ultimately try the Appellant unto conclusion, actual commencement of trial began before Effanga, J, on 4/5/88 before whom two pleas were taken, with a total of six adjournments recorded before that event on 4/5/88 to when the trial ended in a judgment on 7/1/91, was a period of two years and 8 months, with a total of thirty sittings. An examination of the days when evidence was actually taken, it is pointed out, shows that seven witnesses in all testified for the prosecution with PW1 - the deceased's father - doing so on 4/5/88 while PW2, PW3 and PW4 gave evidence two months later on 1/7/88. After the crucial evidence of the above three witnesses, it was not until 11/4/89, namely about 9 months later, culminating in five aborted fittings before the evidence of PW5, PW6 and PW7 - all policemen - was recorded, it was added. The evidence next taken, it is stated, was that of the Appellant on 21/6/90 and 25/6/90, some 14 months from the last adjournment on 11/4/89. With the end of the evidence for the defence on 25/6/90, it is submitted, there were

nine total sittings spanning six months for addresses alone. The question then, it is contended is, did these facts show that Appellant had been tried within a reasonable time? While the answer to the question is rendered in the negative, it is in addition submitted on Appellant's behalf that the concept of "*reasonable time*" in the institution, hearing and determination of suits and matters, whether civil or criminal, is enshrined in several provisions of the 1979 Constitution. The legislature, it is pointed out, is deemed not to intend tautology or surplussage, and effect should be given to every provision vide *Bendel State v. The Federation* (1981) 5 S.C.I. Accordingly, it is argued, in order to arrive at the true and full meaning and effect of Section 33(4) of the 1979 Constitution, the latter must be considered, interpreted and construed in the light of and in conjunction with these other constitutional provisions. The cases of *Obavuwana v. Governor* (1982) 12 S.C. 147 at 211; *C.C.B. (Nigeria) Pic v. A.-G. Anambra State* (1992) 8 NWLR (Part. 261) 528 S.C.; *Oyeyemi v. Commissioner for Local Government Kwara State* (1992) NWLR (pt. 226) 661 S.C. were called in aid. These other provisions, it is maintained, are sections 32(4), 33(1), 33(4) and 258(1) and (4) respectively. It was reiterated that the crucial period is the period beginning with arraignment and ending with judgment, particularly the period of actual trial.

It is next contended that long intervals between the reception of oral evidence of witnesses in a trial and the delivery of judgment raises a strong presumption of contravention of the provisions of Section 33(4) *ibid*. It is then pointed out that a reasonable time within the context means "*the period of time which in the search for justice does not wear out the parties and their witnesses. A period of time which dims or loses the memory of impressions of the witnesses is certainly too long and is unreasonable*" (per Obaseki, J.S.C.) in *Ariori & Ors. v. Elemo & Sons* (1983) 1 S.C. 13, 24.

After setting out the stipulations of the sections set out above, an illustration of each with a whole gamut of decisions both civil and criminal in exemplification, was embarked upon. Thus, the case by this Court of *Ilug Garba v. The State* (1972) 4 S.C. 118 (per Sowemimo, Ag. JSC) illustrating apparently how a section in the 1960 Constitution in *pari materia* with section 32(4) of the 1979 Constitution deals with the period of time between the commission of the offence and the arraignment or commencement of trial, is aimed at ensuring that the accused person is tried speedily, the objective, being to secure his freedom unconditionally or conditionally.

It is in addition pointed out that in their approach to the application of the provisions of the above section, the courts have therefore inclined to provide the remedy of granting the accused person bail or calling upon the prosecution to show cause why the accused should not be released from custody.

B

Next to be considered was the case of *Nnajofofor v. Ukonu* (1985) (Part 9) 686 relating to the essential elements that go to make fundamental concept of fair hearing, including easy access to the the right to be heard (*audi alteram partem*), the impartiality of adjudicatory process especially C that of the *forum competens* the principle of *nemo iudex in causa sua*, inordinate delay in delivering judgment, etc. The latter concept, it is submitted, is the thrust of section 258 (1) and (4) of the 1979 Constitution (ibid), although what is of importance, in the present context is its relationship to Section 33(1) and I) of the 1979 Constitution (ibid). Other cases D relied on are *Akpor v. Iguoriguo* (1978) 1 LRN. 36; (1978) 2 S.C. 115 in which oral hearing of plaintiffs case commence on 11/7/72 with him calling eleven illnesses before closing it on 23/10/72. The defendant's case which opened on 21/11/72 did not close until 9/10/74 due to various reasons including the transfer of the trial Judge, its being adjourned sine die E until the trial Judge returned to complete it by delivering his judgment on 18/1/75.

Allowing the appeal, the Supreme Court took the view that the trial judge could not have recalled accurately the impressions made on him F by the witnesses due to lapse of time.

In *Ekeri & Sons, v. Kimisede & Sons* (1976) 1 NMLR. 194, an action for declaration of title, etc. in which there was a delay of 3 years and 5 months from the commencement of the hearing to the date when judgment was delivered, there were 16 months from the date the hearing completed to the date of judgment. The main reason for this Court allowing the appeal was that the period of delay from the date of conclusion of hearing to the date of judgment inevitably made the learned trial Judge to lose all impressions of the witnesses. In *Chief Yakubu Kakara & Sons v. Chief Okere Imonikhe & anor.* (1974) All , (Part 1) 383 hearing commenced on 20/1/71 and ended with addresses of counsel on 30/3/71 on which date the learned trial judge reserved judgment indefinitely. Judgment was eventually delivered on 13/4/72, about 13 months after the close of hearing. It would G H

have been a clear case coming within section 258(1) and (4) had the section been in existence at the time. Evaluating the evidence the Supreme Court came to the conclusion that the findings of fact of the trial judge were so wrong that they showed that he had lost all the impressions which the opportunities if a court of trial could afford him. Other civil and criminal cases like *Ifezue v. Mbadugha* (1984) 1 SCLR, 427 at 431; *Lawal v. Dawodu* (1972) 1 ANLR (Part 2) 270 and *Unongo v. Aku* (1983) 2 SCNLR. 332 as well as *Ozuluonve v. The State* (1983) 4 NCLR. 205 C.A., *John Folade v. Attorney General, Lagos State* (1981) 2 NCLR. 771 and *Avambi v. The State* (1985) 6 NCLR. 41 were called 'in aid. While therefore it is the Appellant's concession that on the authorities, the concept of "*reasonable time*" within the context of section 33(1) and (4) is dependent on the facts of each particular case, most of these cases have tended to equate delay as one which has resulted in miscarriage of justice in that it affected the memory and perception of trial court in its evaluation of evidence of witnesses. Thus, it is maintained, applying the dicta in some of the cases discussed above, it cannot however, be doubted that there is a delay which is intrinsically bad or inordinate and therefore constitutionally impermissible. Where the trial lasted for over seven years the question is asked if such a trial is not intrinsically bad because it is too protracted as to shock all civilized standards? Some delays, it is contended, may be so inordinate that they ought to invoke a conclusion that there was a miscarriage of justice irrespective of the contents of the judgment. Why, it is enquired, should a party wait until after judgment. Why, it enquired, should a party wait until after judgment if he ought to complain? The best test, appellant concludes, is that given by *Obaseki J.S.C.* in the *Ariori Case* (*supra*) to wit: that reasonable time must mean the period of time which in the search for justice does not wear out parties, their witnesses and the judge so as to ensure that justice is not only done but appears to reasonable persons to be done.

In his oral comments at the hearing of this appeal on the two briefs of argument, he pointed out for instance how the question as to whether a case has been tried within a reasonable time is one of high constitutional importance, although the decision in each case rested on the facts therein; adding that the test of reasonableness for purposes of section 33 of the 1979 Constitution had hitherto been narrowly examined. Learned counsel further expatiated that because a trial involves the memory of the parties, the witnesses and the judge the effect of delay should also be taken into consideration. For a proper appreciation of section 33 of the 1979 Constitution, he argued, the four separate conditions provided in sections 32(4), 33(1) as well as 25H(1) and (4) thereof should be considered along.

A question was put to learned counsel that if this Court found that there had been Unreasonable delay, what effect would it have on the appeal? Learned Counsel's reply was that a retrial should be ordered. When further asked that should his submission on issue 2, namely that of inordinate or reasonable delay be disregarded, would he say that on the totality of the evidence, the conviction of the Appellant is correct? Learned counsel conceded that on the totality of the facts proffered, the evidence was overwhelming but added that it was constitutionally impermissible to convict the appellant and that in the circumstances the appellant was entitled to a fair hearing.

Learned D.P.P., Mrs. Ikpeme, for the Respondent, in her brief and oral elaboration thereof, submitted that the commencement period of the trial for issues of applicability of the provisions of section 33(4) of the 1979 Constitution was on 4/5/88 when the second plea was taken before Effanga, J. who heard the case to conclusion. It is conceded that the trial indeed lasted for a period of 2 years 8 months involving 30 sittings. It is however pointed out that evidence and final addresses were concluded on 4/12/90, adding that the judgment was therefore delivered in total compliance with section 258(1) of the 1979 Constitution. Reliance was placed on the case of Ime Sambo v. The State (1989) 1 CLRN. 77, a murder case where the court considered the nature of the case, the evidence available and in particular, the appellant's confessional statement which was admitted and held that the delay in the trial of the appellant in no manner occasioned a miscarriage of Justice. It is further submitted that reference in section 33(4) of the 1979 Constitution to a fair hearing within reasonable time may not have contemplated the mere fact of a long delay in concluding the case as a vitiating factor, adding that the primary aim of that section is

- (a) a fair hearing or fair trial as understood under the rules of natural justice; and
- (b) sufficient time for the accused to prepare his defence (which includes reasonable notice of the offence alleged) vide Sambo v. The State (supra).

It is then contended that whether or not undue delay would lead to a denial of justice would depend on the nature and circumstances of the case, adding that in the instant case, the delay if any, did not lead to any miscarriage of justice. This, it is argued, is because the evidence in court revealed that the facts which were painful and vivid were still fresh in the memory of witnesses for the act of the cold-blooded murder of the de

ceased to be forgotten so readily even in a lifetime. Moreover, it is contended, the Appellant cannot be seen to complain over the delay to which he immensely contributed. The trial court, it is asserted, even had to issue a bench warrant against Appellant's counsel for absenting himself from court. It is further stated that since the delay did not occasion a miscarriage of justice, it should be discountenanced. In the case in hand, it is also argued, the period of time did not dim the memory of the witnesses. Thus, with regard to the cases cited, a reading of some of them would show that unlike in the present case, the witnesses could no longer give a coherent account of facts. Moreover, it is demonstrated, most cases cited are civil in nature and so should be distinguished from the instant case which is criminal in which three human beings were murdered in cold blood though Appellant was rightly charged for the murder of one of them. It is further contended that Appellant had postulated that the judgment was based on the perception and memory of the trial judge gained more than 21 months previously. This cannot be, it is argued, because a judge does not give judgment based on what is stored in his memory. It is based mostly on the recorded evidence before the court, it is added. What is important, it is maintained, is the memory of witnesses since the judge has his recorded accounts to refer to. What is reasonable time, it is pointed out, is subjective and depends on the circumstances of each case.

In reply to the Appellant's submission that a fresh trial be ordered in view of the fact that he had not been tried within a reasonable time, learned D.P.P. contended that this is really a contradiction of the views and arguments Appellant has been putting forward. For, if Appellant contends by saying that the whole trial lasted too long, basing his complaint on the witnesses who testified three to four years after the commission of the offence, how can he call back the same witnesses to testify nine years after that event? Asking for a retrial learned D.P.P. argued, defies all principles of fair hearing, moreso that the respondent has proved her case beyond reasonable doubt and section 33(4) of the 1979 Constitution which has not laid down any penalty for its breach or as to what period is to be regarded as a reasonable time.

The Honourable Attorney-General of Imo State, Mr. Livy Uzoukwu, who filed a brief of argument as *amicus curiae* after adopting same, also addressed us on its purport thereof. He submitted without hesitation that the trial of the case in hand was not conducted within reasonable time and that there is therefore a breach of Appellant's fundamental right of fair hearing as enshrined in Section 33(4) of the 1979 constitution. In the light

of the above, we are urged to uphold the four factors considered in John Folade v. A-G of Lagos State (1981) 2 NCLR. 779, relying on the American case of Baker v. Wineo. 407 US 1530 (1972) as necessary to determine whether a person has been of his right to speedy trial, namely the *“length of delay, the reason delay, the defendant’s assertion of his right and prejudice to the defendant”* After posing the question as to where we would go from learned counsel submitted that he could not conceive of a lion in which there is a breach of a Constitutional provision without a remedy. He then asserted that faced with two choices or remedies he opt for the first in acquitting and discharging the Appellant. He in aid the case of Otuka C Abase Ozuluonye & Ors. v. The State 4 N.C.L.R. 204; (1981) 2 N.C.R. 38. The second choice or remedy, argued the learned Attorney General should have been that of but in view of the breach of Appellant’s fundamental right, he should be set free, account being taken of the period of his detention from the date of his arrest till the date of his release founded on the principle of ubi jus ibi remedium and this Court’s decision in Aliu Bello v. A.G. of Oyo State (1986) 5 N.W.L.R. (Part 45) 828, 889-890. After the learned Attorney General had adverted our attention to such as Isiyaku Mohammed v. Kano N.A. (1968) 1 All NLR. 424, 426, v. The State (supra), Garba v. The State (supra) 25, Ezza & ors. v. The Queen (1959) 4 E F.S.C. 274 and Ayambi v. The (1985) 6 NCLR 141, 142 to exemplify his point, he urged us to lie our decision in Asakitikoi v. The State (Supra) - a case which not decided by a full court and in which the case of Dr. O.E. v. Chief N.O.A. Akinyemi (1980) 5-7 S.C.I, was not mentioned but where this court concerned itself with the date of arraignment up to conviction F rather than with the date of arrest up to conviction.

The Honourable Attorney-General of Rivers State, Mr, Adokiye Amiesimaka, who also submitted a brief of argument, in addition expatiated thereon as follows: -

He submitted that Section 33(4) of the 1979 Constitution does not what period or length of time should constitute *“a reasonable time”* within which any person charged with a criminal offence is entitled tried. The *“gestation”* period of capital cases of this nature in this country, the H learned Attorney-General contended, is usually long and for obvious reasons. For instance, he observed, there is the need to know when the case file in respect of the case reached the office of the D.P.P. and whether the case file was returned for further investigation. Since this, among other

relevant facts, is not available, one can safely contend that Appellant was brought to trial within a reasonable time. After all, at times it may be necessary to delay a bit to fair e.g. where an accused with counsel may procure an adjournment in order to await counsel's arrival, adding there
B was a time in this case that the absence of counsel displeased the trial judge who issued a bench warrant for his arrest. The much orchestrated delay, he maintained, was merely prejudicial to the State in that upon the State lay the burden and the difficulty to prove its case by calling seven witnesses where Appellant was not tasked, loss of memory was ever present
C with the prosecution, the learned Attorney-General added. He then conceded that there was some delay, adding that it does not lie in the mouth of the Appellant to allege unreasonable delay, moreso that any delay at all was more prejudicial to the prosecution than to the appellant. The trial, it is argued, took far less than three years, all in the face of no allegation of a
D miscarriage of justice. Justice, he asserted, it not a one-way but rather a three-way traffic in that it is not only the interest of the Appellant but also that of the State and society in the quest for ensuring that an accused gets a fair hearing. The cases of *Josiah v. The State* (1985) 1 NWLR (Part 165) 125 and *Agbapuonu V. Agbapuonu* (1991) NWLR (Part 165) 33 were cited
E in support of the proposition. The Learned Attorney-General submitted in conclusion that it may be necessary for this Court to put more pressure on Prison Authorities to be more alive to their responsibilities. He called in aid the case of *Ezeani V. Ekwealu & Anor.* (1961) 1 All NLR. (pt.2) 428 at 431. He urged us to dismiss the appeal as the interest of those who were killed
F ought to be taken into consideration.

Mrs. E.N. Kpojime, learned D.P.P. Benue State, who appeared on behalf of the Honourable Attorney-General of her State who had tilled a brief as *amicus curiae* but was unavoidably absent, after adopting the brief
G explanation thereon, submitted briefly that there was no unreasonable delay in the trial of the Appellant. That even if there was (though not conceded), there were cogent reasons for such delay. In this wise, she associated herself with the Honourable Attorney-General Rivers State. She urged that the issue herein ought not to have been canvassed as no leave was
H sought for doing so. That the appropriate procedure for seeking redress for the violation of the rights of the Appellant to fair hearing under Section 33(4) of the 1979 Constitution as provided in Section 42(1) of the said Constitution under the Fundamental Rights (Enforcement Procedure) Rules had not been followed. Thus, it is contended, the matter raised herein was

brought without jurisdiction. We were, in conclusion, urged not to order a retrial as to do so would cause more hardship to the Appellant.

Mrs. M.F. Oladeinde, Acting D.P.P., Oyo State adopted and elaborated on the amicus curiae brief filed by her Attorney-General who unavoidably could not put up appearance to personally argue it. The learned D.P.P. briefly in argument conceded that there had been some delay in the trial of the Appellant by the trial court but contended that appellant contributed in no small measure to it. Were Appellant to aggrieved that his right to fair hearing as enshrined in section 33(4) If the 1979 Constitution had been violated, the appropriate procedure to follow would have been to seek redress in the High Court under the fundamental Rights (Enforcement Procedure) Rules 1979 made pursuant to Section 42 of the 1979 Constitution. We were therefore urged to dismiss the appeal and to affirm the conviction and sentence pawed on the Appellant.

Mr. A.B. Mahmoud, of counsel submitted a brief as amicus curiae. He lilted on the brief and made an oral expatiation thereto. He submitted that he supported the appeal in that there was not a fair trial within a reasonable time as enjoined by Section 33(1) and (4) of the 1979 Constitution. It was his contention that

1. The period from arraignment to the conclusion of trial culminating in the delivery of the judgment was too long.
2. The long intervals between the reception of oral evidence and the delivery of judgment raise presumption of contravention of section 33(4).
3. A reasonable time should be construed as “*the period of time which in the search for justice does not wear out the parties and their witnesses.*” And in this case that time was long and unreasonable.

Earlier cases cited in support of these propositions were relied on. After submitting that the matter raised herein is of fundamental constitutional purport, learned counsel pointed out the role of Government in the protection of human right; the Government’s role in the proper administration of justice and how in the instant case there is an eloquent testimony in the decline of the administration of justice. We were urged to assume the activist role in molding and shaping the law with a view making it more dynamic as admonished by the former Indian Chief justice, Honourable Justice P.N. Bagwati by intervening to redeem or salvage the neglect of the institutions of criminal justice administration which clearly, is not reflected in other

institutions of Government. Learned Counsel, after asserting that to him the trial lasted over 5 years i.e. from its watershed of arrest to its termination, the judgment, added that all the agencies of Government - the Prison, the Police, the prosecuting counsel etc. are all involved in the criminal neglect and should bear responsibility for not providing such facilities as the “*Black Maria*.” For the several adjournments in the instant case, it is learned counsel’s contention that the delay is inexcusable. While learned counsel would not support a retrial as a remedy available to the Appellant since in his view the same is a mockery, he would, as to a recommendation for reprieve to the Governor, be cautious in admonishing same. It is, he maintained, for the Government to do things or arrest the declining standard in the administration of justice which presently sharply contrasts with what obtains elsewhere within the same Government. Learned counsel concluded his submission by urging us to balance the options at the court’s command while for his own part, he would have asked that the sentence imposed on the appellant be commuted to that of life imprisonment or for recommendations to be made in view of the provisions of section 33(4) of the 1979 Constitution on Appellant’s behalf, for the Governor’s reprieve in exercise of powers of his prerogative of mercy.

I think it is pertinent before embarking on the consideration of the points posed in this issue to first of all dispose of the query raised concerning failure on the part of the Appellant to seek relief tinder the Fundamental Rights (Enforcement Procedure) Rules made pursuant to Section 42 of the 1979 Constitution in the High Court instead of raising the matter here on appeal, knowing fully well that this Court has no original jurisdiction to so entertain it. Now, the law is settled that where the point of law taken for the first time on appeal involves a substantial and substantive or procedural point of law, and no further evidence could be adduced which would affect it, such point could be raised and determined on appeal. See *Stool of Abinabina v. Envimadu* 12 (VACA-171 and *Agu v. Ikewibe* (1991) 3 NWLR (Part 180) 385 at page 403, An allegation such as herein made in the instant case to the effect that in the trial of his case, Appellant’s fundamental right to fair hearing had been infringed and that there also had been unreasonable delay both in breach of section 33 of the 1979 Constitution, the very fact that these are substantial and substantive points of law (in fact of the Constitution) and since no further evidence could be adduced, which would affect it, this court gave him leave to raise the point as a fresh one. Indeed, the Supreme Court as a Court of last resort will entertain a

new point not ken in the court below if no further evidence would be needed for the resolution of issues arising for determination and it will help in ensuring the real question or questions in controversy between the parties to trial, are ultimately determined, thus preventing a miscarriage of justice. See Louis Onyiah & ors. v. Chief Obi J. I. G. Onyiah (1989) 1 1R (Part 99) 514 B and A-G. Oyo State v. Fairlakes Hotel Ltd. ipra). Thus, since in the instant case an application was indeed thought at the instance of the Appellant and was granted by this Court to argue the issue of want of “*fair hearing within a reasonable time.*” a challenge to the jurisdiction of this Court to entertain it will be dealt With first before any other issues, as for instance, C the argument herein as to whether by the purport of section 212 of the 1979 Constitution this Court in assuming original jurisdiction in a criminal case, lacks jurisdiction. This is because it is trite that any decision reached without jurisdiction or in excess of jurisdiction would be abortive, null and void. be Onyema & ors. v. Oputa & ors. (1987)2 NSCC 900; Attorney-General of Lagos State v. Dosunmu (1989) 3 NWLR (pt. III) 552 and Peter Nemi & Ors. v. The State unreported decision of this Court No. 303/199.0 of Nth October, 1994. What the Appellant was indeed doing in the instant case by his application to argue the issue under consideration, is no more than the ventilation of the defendant’s assertion of his right, which turns on E the constitutional issue of infringement of a fundamental right. It matters not that the issue was raised in the two lower courts. It is not the kind of right which, in the circumstances of this case, may be said to have been waived. See R. Ariori & ors. v. Muraino B.O. Elemo & ors. (supra) and John Folade Attorney-General of Lagos State (supra). It is, in my opinion, F therefore, still a live issue and it is substantial.

It was common ground between the parties, although there are discordant notes to the contrary to which I shall shortly come, that the commencement period for the applicability of the provisions of section (4) G of the 1979 Constitution as to whether the Appellant was given a fair hearing within a reasonable time, is the date of arraignment. That much this court had cause to restate in Godspower Asakitikpo v. The State (supra) following Titus Oyediran & 5 ors. v. The Republic (supra).

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We have been urged during the course of the hearing of this appeal to Depart from or overrule the principle as to the commencement period if the applicability of the provisions of section 33(4) of the 197V constitution being the date of arraignment. Although it would do so with the greatest

hesitation, the Supreme Court has the power to depart from or overrule its previous decision. Similarly, the full court of the Supreme Court has the competence to overrule a previous decision of another full panel. The onus is on the party seeking to have an earlier Supreme Court decision overruled to satisfy the court that there is a need to do so. The grounds upon which the Supreme Court will depart from and overrule its previous decision are where:-

- (a) it is shown that the previous decision is inconsistent with the Constitution or is erroneous in law; or
- (b) the previous decision was given per incuriam; or
- (c) it is shown that the previous decision is occasioning miscarriage of justice or perpetuating injustice.

It ought to be pointed out however that there are no hard and fast rules laid down exhausting the area within which to warrant a departure from a previous decision and each case must be decided on its special facts and circumstances with a view to avoiding perpetuating injustice. See *Odi v. Osafire* (1985) 1 NWLR (Part 1) 17 at 34-35; 37-39; 46 - 48; *Cardoso v. Daniel* (1986) 2 NWLR (Part 20) 1; *Ifediorah v. Ume* (1988) NWLR (Part 74) 5; *Bronik Motors v. Wema Bank* (1983) 1 SCNLR. 296 and *Rossek v. A.C.B. Ltd.* (1993) 8 NWLR (Part 312) 382, the latter in which at page 447, *Ogundare, J.S.C.* expatiated on the law inter alia thus:

"Having regard to the opinions expressed and the state of the authorities as they stand, I am of the firm view that this Court as the final court in this country has the power and jurisdiction to depart and overrule its previous decision whether or not by a Full Court where it is shown that the previous decision is inconsistent with the provisions of the Constitution or it is erroneously reached per incuriam or will perpetuate injustice. But as Eso, JSC warned in Odi v. Osafire, this Court should not overrule itself on the slightest pretence. It must be remembered that the doctrine of stare decisis or precedent is an indispensable foundation on which to decide what the law is and unless there is certainty in the law there will be no equilibrium in society,"

In the instant case, not enough reasons have been adduced, in my opinion, to warrant a departure from or overruling by this court, of its established principle on the applicability of the provisions of section 33(4) of the 1979 Constitution as to whether there has been a fair hearing within a Reasonable time being the date of arraignment to the date of verdict (delivery of judgment). The principle enunciated in *Asakitikpi v. The State* (supra) therefore, in my view, remains good law until departed from or overruled by this

Court for good cause shown.

Now, it is not disputed that Appellant was first arraigned on 15/12/86 plea was first taken before Udofia, J, and that when Effanga, J, ultimately heard the case unto conclusion took up the trial denovo, so to say, Appellant was arraigned before him on 25/1/88 and 4/5/88 respectively. As the record bears out, between 15/12/86 and 25/1/88 when Effanga, J. appeared on the scene, there had been a total of six adjournments. Both parties are agreed; indeed there is no dispute that actual trial, that is, before Effanga, J. commenced on 4/5/88. The learned D.P.P. states as much and glaringly too in that she has asked us to discard the earlier plea recorded from Appellant on 25/1/88. Since the trial of the Appellant ended in judgment delivered on 7/1/91 and it is agreed by both sides that it spanned 2 years and 8 months, there were therefore a total of 30 sittings, to wit: 4/5/88, 21/6/88, 12/7/88, 26/10/88, 9/11/88, 24/7/89, 16/3/89, 6/4/89, 11/4/89, 9/5/89, 11/7/89, 4/10/89, 21/6/90, U/6/90, 10/7/90, 17/7/90, 23/7/90, 8/10/90, 22/10/90, 22/11/90, 27/11/90, 1/12/90, 4/12/90 and 7/1/91. It is not contested that seven witnesses testified for the prosecution; that PW1, the father of the deceased, did so on 4/5/88 at commencement of trial and that 2 months after, namely on 12/7/88, PW3, and PW4 gave evidence; that out of these, PW2 was nearest to an eye-witness while PW5, PW6 and PW7 were police officers who took part in the investigation of the case. The latter set of witnesses testified on 11/4/89 following which the prosecution closed her case. It is not a contested fact that it took fourteen months from the prosecution closed its case to the opening of the Appellant's defence which took two settings of the trial court viz, 21/6/90 and 25/6/90 I accomplish. However, with the conclusion of the defence, the interval before counsel addressed the court witnessed nine adjournments while it addresses themselves alone consumed a period of six months. The question therefore posed in the face of all these is, did these facts show that Appellant had been given a fair hearing within a reasonable time? The Appellant's answer is categorically in the negative while that of the respondent is in the positive. In attempting to answer the question elf, I think it pertinent to consider the purports of Sections 32(4), I) and 33(4) as well as Section 258(1) and 258(4) of the 1979 constitution in so far as they have a bearing on the Pre-trial, Trial and post-Trial situations of the Appellant.

PRE-TRIAL -

The constitutional provisions that the Appellant has submitted are relevant to his pre-trial position is Section 32(4) of the Constitution. That section

provides:

“Any person who is arrested or detained in accordance with sub-section (1) (C) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of -

- (a) *2 months from the date of his arrest or detention in case of a person who is in custody or is entitled to bail, or*
- (b) *3 months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either conditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.”*

The meaning of the expression “reasonable time” within the context of this section is explained in sub-section 5 of this section thus:

- (5) *In sub-section (4) of this section the expression “a reasonable time” means -*
- (a) *in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres, a period of one day; and*
- (b) *in any other case, a period of 2 days or such longer period as in the circumstances may be considered by the court to be reasonable.”*

Apparently, section 32(4) deals with the period of time between the commission of the offence and the arraignment or commencement of trial, to ensure that the accused person is tried speedily. The objective, no doubt, is to secure the accused person’s freedom unconditionally or conditionally. This explains why Sowemimo, Ag. JSC in *Ilu Garba V. The State* (1972)4 S.C. 118 at 122 observed:

- “We observe with some concern the period the appellant spent in custody between his arrest which was one time in April, 1969 and his trial at the High Court, Maiduguri which commenced on 4th April, 1971, a period of about two years and two months. We had occasion in the past to draw attention to this unjustifiably long period of trial. In this appeal there is nothing in the record explaining or justifying the long delay. We wish that this situation should be brought to the notice of the authorities concerned in order to obviate any recurrence. We also wish to re-emphasize that it is of the essence of criminal justice, especially in a capital offence that there should be a speedy trial”*

The judgment of the trial court in the case though was not disturbed because the actual trial proceeded speedily and the evidence was

overwhelming. See also *Nasamu V. CO.P.* (1976)11 CC HCJ 2655, a where the applicant had argued that there was unreasonable delay bringing him to trial, the preliminary inquiry had taken up to six months. It was found as a fact that there were four adjournments of the proceedings of the inquiry two of which were at the request of the prosecution, one by the accused's counsel while the other was at the instance of the magistrate himself. The High Court held that since the reasons for the delay in the case were attributable to all the parties, albeit unintentionally, the court was unable to find any unjustified delay. Hence, it was not disposed to holding that section 21(3) of the 1963. Constitution was violated in the circumstances. While in their approach to the application of the provisions of Section 32(4) (ibid) the courts have therefore inclined or have been encouraged to provide the remedy of granting the accused person bail or calling upon the prosecution to show cause why the accused should not be released from custody, it is well to remember the following admonitions succinctly quoted by Oputa, J.S.C. in *Nnajofofor V Ukonu* (1985)2 NWLR (Part 9) 686 at pages 603, 704 if for no other purpose, as guides thus:

"The courts are full of honest witnesses whose memories, as the years go by, become more and more certain and less and less accurate." (per Justice MacNaughten)

Also: *"If an automobile accident should occur outside this hall this minute, it will probably not be tried by a jury until 1941 (five years hence). The most honest witness cannot remember accurately what happened during twenty to thirty seconds, five years ago, but a liar's memory is always fresh."* (per zechariah Chaffee, J.R),
"Delay thus plays a trick on human memory and lawyers and judges are no exceptions" per Oputa, JSC at p. 704 of the Report: *'Accordingly, while no doubt it is permissible to place emphasis on the securing of the freedom of the accused as the principal remedy to the provisions of section 32(4) 1979 Constitution, it must not be lost sight of that inordinate delay before the commencement of trial thus "plays a trick on human memory."*

While in the light of the foregoing I share Appellant's view that in that tense, a consideration of the provisions of Section 32(4) (ibid) bears some relation to the whole issue of the fairness of the subsequent trial of the Appellant within, the other provisions of sections 33(1) and (4) and 258(1) and (4), the instant case has its own peculiarities as follows:-

- (i) There was neither delay nor inordinate delay between 27th March, 1985 when the Appellant was arrested and when he was first

arraigned in court for trial on 15/12/86 - a period of about 21 months.

- (ii) The period of time involved in (i) above in my view did not dim the memory of witnesses.
- (iii) There being nothing on the record to show that there was an application for bail by the Appellant before the trial court which was refused, the very fact that what amounts to reasonable time is subjective, depending on the circumstance of each case, the period before the arraignment can safely be regarded as time reasonably spent to bring him to trial by way of investigation in pre-trial formalities.
- B (iv) In the case of Ilu Garba (supra) the trial proceeded speedily after the delay of two years and two months between arrest and arraignment. In the instant case where the delay, if any, was of a shorter duration, the trial did not proceed so speedily after the arraignment, for reasons of circumstances beyond the control of the prosecution. But as I shall seek to show anon. where as in the instant case, there was a confession coupled with overwhelming evidence leading to a conviction in a considered judgment, an interference with the conviction will be unwarranted.
- D E The constitutional provisions which are relevant to the Appellant and which constitute the main thrust of the case in hand, are those enshrined in sections 33(1) and (4) of the 1979 Constitution wherein the question posed is: did the Appellant have a fair hearing within a reasonable time? Now, section 33 (4), argument in relation to which, in my view overlaps subsection F (1) therefore provides inter alia;

“Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a court or tribunal.....”

- G [Underlining is mine].
It has been observed that neither section 33 nor any other provision of the 1979 Constitution has attempted a definition of what amounts to fair hearing either in civil or criminal matters. Albeit, Morgan, CJ. In White V. C.O.P. (1966)NMLR 215 while acknowledging that it is impossible to give a comprehensive definition of the term said.
- H to give a comprehensive definition of the term said.

“It can hardly be said that an accused has not had a fair hearing as intended by the constitution when the court followed the procedure laid down for such hearing and has not violated the principles of natural justice.”

There have been several cases in which the Supreme Court has interpreted what ‘fair hearing’ mean but the one that readily comes to mind in that regard is the case of Isiyaku Mohammed V. Kano Native Authority (1968)1 All NLR 424 at p. 426, where it was held (per Ademola, CJ.N):

“We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two. The true test of fair hearing is the impression of a reasonable person who was present at the trial whether from his observation, justice has been done in the case.”

Black’s Law Dictionary, Special Deluxe, Fifth Edition, describes ‘reasonable time’ as

“Such length of time as may fairly, properly and reasonably be allowed or required, having regard to the nature of the act or duty or of the subject-matter, and to the attending circumstances.”

D

It goes on to say that it is “a maxim of English law that how long a “reasonable time” ought to be is not defined in law, but is left to the discretion of the judges. See also Davis v. Capper (1829) 4 C & P. 134 tt p. 138 wherein it was held that

“The question of reasonable time is a mixed question of law and fact.” E

The concept of ‘reasonable time’ in the institution, hearing and determination of suits and matters, whether civil or criminal, is enshrined in relevant provisions of the 1979 Constitution. The legislature deemed not to intend tautology or surplussage, and effect should be fowl to every provision. See Bendel State v. The Federation (1981) 10 I. Accordingly, in order to arrive at the true meaning and effect of on 33 (4) of the 1979 Constitution, the latter must be considered construed in the light of and in conjunction with the other visions *pan pasu*. See Obayuwana v. Governor of Bendel State (supra); C.C.B. (Nigeria) Pic v. A.G. Anambra State (1992) 8 NWLR (261) 528 S.C., and Oyeyemi v. Commissioner for Local Government area G State (supra).

Now, in the instant appeal, it has been argued on behalf of the Appellant that

1. The period from arraignment to conclusion of trial (delivery of judgment) was too long. H
2. The long intervals between the reception of oral evidence and the delivery of judgment raises a presumption of contravention of section 33(4).
3. A reasonable time should be construed as “the period of time

which in the search for justice does not wear out the parties and their witnesses” vide - Ariori v. Elemo (supra)

With regard to the period from arraignment to the conclusion of trial said to be too long, my short answer is that the several adjournments between arraignment on 4/8/88 and the conclusion of trial on 7/1/91, spanning altogether 2 years and 8 months, does not, in my view, amount to unfair hearing or inordinate delay. In the first place, the nature of the case, to wit: murder of three persons carried out in gory and mindless circumstances although Appellant was indicted for killing only one person; the confessional statement made by the Appellant (Exhibit 2) for which there was an attempt at retraction but which failed, and more importantly, the absence of a miscarriage of justice and lack of merit in the complaint, which cumulatively go to render as tenuous the Appellant’s grouse.

In similar circumstances as in the case in hand, the appeal against the offence of murder in *Egbo Oioio v. The State* (1970) A.N.L.R. 33 at 34 (Reprint) was dismissed by this Court, inter alia, because the appellant’s appeal was lacking in merit where he had murdered the deceased by night unprovoked by inflicting matchet cuts on her in the presence of an eye-witness. It is in the light of the above that it would seem to me clear that reference in section 33(4) of the 1979 Constitution to a fair hearing within a reasonable time may not have contempt the mere fact of a long delay in concluding the case as a vitiating factor. The primary aim of section 33(4), I therefore venture to opine, is –

“(a) a fair hearing or fair trial as understood under the rules of natural justice (especially) *audi alteram partem*) and
 (b) sufficient time for the appellant to prepare his defence | (which includes reasonable notice of the offence alleged. See *Sambo v. The State* (1989) 1 CLRN 75 in which there was a delay of seven years from the date of the offence to the date of judgment and the Court of Appeal held that Section 33(4) of the 1979 Constitution was not infringed because “in spite of this delay, it is difficult to appreciate how that fact alone can be a reason for declaring the trial or hearing unfair and setting free the appellant.”

However, in *Oluka Oba Ozuluonye & ors. v. The State* (supra), a case in which the purports of Section 32(4) and 33(1) and (4) were considered and dubbed “ a classic case of delay of trial/by the Court of Appeal, the appeal of the appellants there was allowed because there was what Belgore, J.C.A. (as he then was said inter alia was -

an unmitigated delay in the case, with several adjournments and

of the court to sit, taking trial from the first hearing almost four years....."

See also Ayambi v. The State (supra) at page 142, where the delay spanned about two years, the Court of Appeal allowed the appeal and lied the conviction. In John Folade v. Attorney-General of Lagos (supra) another case of enforcement of fundamental rights enshrined in sections 32(4), 33(1) and (4) of the 1979 Constitution, Balogun, J. relied on an American case, Baker v. Wingo (supra) four factors were identified as necessary to determine whether a person has been denied of his right to a speedy trial. They are: Length of delay, the reason for the delay, the defendant's assertion of his right and prejudice.

I concede in the light of all I have said that there was delay but I take a firm view that it was neither inordinate nor unreasonable. It is not Unknown and I herein draw from personal experience as a judge sitting at first instance, having once commenced and completed a murder case between three and five months of its commission. Each case of delay, however, has to be considered on its own merit, regard being had to the facility with which an investigation and eventual prosecution of a person proceeded. See Nnajofofor v. Ukonu (supra).

LENGTH OF DELAY

When one talks of delay, one should not be oblivious of the fact that there were indeed two trials. What took place between 15/12/86 - the Appellant was arraigned before Udofia, J. up to when it terminated prematurely on 15/1/88, constituted one trial. A new trial thereafter by force of law commenced before Effanga, J. on 4/5/88 and this is the factual situation. After the plea and the evidence of PW. 1 on that day, the case was adjourned to 21/6/88 but appellant was not produced for the trial to proceed.

However, on 12/7/88, the subsequent adjourned date, the prosecution continued by calling PW2, PW3 and PW4. The case was then adjourned 26/10/88 for continuation. For logistic problems, Appellant could not be produced from prison custody on four consecutive adjournments between 26/10/88 and 16/3/89. When the prosecutor made a personal effort to produce the Appellant on 6/4/89, Appellant's counsel was not in court. The court made frantic efforts to ensure his attendance but was informed that counsel's child was sick. The case was adjourned to 11/4/89 and on that day, the evidence of PW5, PW6 and PW7 was recorded. It was thereafter adjourned to 9/5/89. Due to the same logistic problems of lack of a vehicle to convey the Appellant from prison custody to court, Appellant could not be produced on 9/5/89, 11/7/89, 4/10/89 and 7/11/89. When he

was produced on 23/11/89 and he was found to be too weak to stand trial, he was ordered to be taken to the Hospital for medical attention, with the case being further adjourned to 16/1/90. The prosecution had to close her case on 14/6/90 when between 16/1/90 and the former date, the last witness; a medical doctor could not be produced.

The Appellant alone testified in his defence on 21/6/90 and 25/6/90. After the parties had addressed the trial court on 10/7/90 and 17/7/90 with five fruitless adjournments for the defence to conclude the Reply, the latter finally took place on 4/12/90. The case thus lasted for about 2 years and 8 months from arraignment to judgment. While further, it is conceded that in considering the 'reasonable time' within which the Appellant was tried, *"the crucial period is the period beginning with arraignment and ending with judgment, particularly the period of actual trial,"* in a matter devoid of complexity such as the one in hand, the search for justice cannot, with all seriousness, be said to have worn out the parties and their witnesses; neither did the delay dim the memory of impressions of the witnesses gained by the learned trial judge before the time he delivered his judgment. The case of *Ariori V. Ejemo* (supra) is accordingly distinguishable from the instant one. The Appellant therefore, in my view, had a fair trial. For instance, in order no longer to prolong Appellant's trial and his further remand in prison custody, the prosecution had to close its case without calling the medical officer who performed the autopsy on the deceased. The Appellant had justice and no deleterious evidence has, in my view, been admitted against him which ought not to be accepted and believed. It is in this regard that it can be said in this case that there is a tendency to over-dramatise some formal objections which seemed to inure to the Appellant. In such a situation, one can do no better than to pray in aid the dictum of *Oputa, J.S.C.*, which is apposite here, in *Kajubo V. The State* (1988) 1 N.W.L.R. (Part 73) 721 at pages 738-739:

"However, a court of law should not only temper justice with mercy but what is sometimes vitally important, it should also temper mercy with justice. And this is a case calling for mercy to be tempered with justice. The natural leaning of our minds may be in favour of and in sympathy with the appellant and we may in like manner be thus tempted to sympathise with any prisoner in the position of the present Appellant. But one has to sound a note of serious warning against giving away too easily to mere formal objections on behalf of accused persons. Such extreme facility may constitute a great blemish on the judicial process, owing to which more offenders

may escape than by the manifestation of their innocence. The danger here is that by such leniency we (the Courts) may imperceptibly loosen the bonds of society, which is kept together by the hope of reward, and fear of punishment."

In the same vein, the same learned Justice in *Josiah V. The State* (1985) 1 B NWLR (Part 1) 125 at 141, said:

"And justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic - justice for the appellant/accused of a heinous crime of murder - justice for the victim, the murdered man, the deceased - whose blood is crying to heaven for vengeance and finally justice for the society at large - the society whose social norms and values had been desecrated and broken by the criminal act complained of....."

Nnamani, J.S.C. in the same case at Page 133 of the Report opined laconically:

"I am reminded that it is not only the accused who demands or desires justice, the victim sent to his death prematurely in some cases, and always unjustly demands and deserves that justice."

In the instant case, the Appellant having lost in both courts below (concurrent findings) and particularly in the Court of Appeal where he had nothing to urge in the quest of the vindication of his innocence, he has now woken up to rake up his fundamental right to justice while 'forgetting that the deceased who lost her life, along with the lives of two others not included in the charge, was equally entitled to what he now demands from the society - his right to life.

REASON FOR DELAY

As earlier pointed out, the hearing of the case commenced on 4/5/88. Thereafter were 28 adjournments before judgment was finally delivered on 7/1/91, a period of 2 years 8 months. It is clear that out of 28 adjournments, 19 of them were because of one reason or the other but none of which was feigned nor framed-up e.g. the break down of the 'Black Maria' van to convey Appellant to the trial court, the less of the defence counsel's child or his absence induced by his appearance in the Court of Appeal etc. Twelve adjournments were granted because Appellant was not produced. This was not a deliberate attempt to deny Appellant his right to a speedy trial either due to the prosecutor's, the defense's or Court's default. Six adjournments were at instance of the defence while three were at the instance of the State. Where, as in this case, the 'Black Maria' broke down

irretrievably on occasions and it became impossible to convey the Appellant to court, that surely is a situation beyond the control of the prosecution whose duty it is notionally to produce the Appellant in court. I say notionally, most guardedly because, to insist that the prosecution which had no money to run the 'Black Maria' or secure a replacement to willy-nilly produce the Appellant in court, is to ask for milk out of stone. This is why Balogun, J. in John Folade V. A.G. Lagos State (supra) at p.779 observed inter alia -

"Reasons for delay of a trial must therefore vary, but a deliberate delay for advantage will weigh heavily; whereas the absence of witnesses could justify an appropriate delay. It must be emphasised that it is the duty of the prosecutor to bring the accused person to speedy trial, and that failure of an accused person to demand that right cannot be construed as a waiver of his fundamental right to speedy trial"

In the light of the above and many other reasons inclusive of the fact that Appellant killed three persons, the deceased alone for whose murder he was charged, coupled with the fact that it is on record that learned counsel for the Appellant at the court below submitted that he had nothing to urge in Appellant's favour, this court can do no more than to infer that there had been proof of the prosecution's case beyond reasonable doubt. Furthermore, in his confessional statement to the Police vide Exhibit 2, the Appellant said inter alia:

"It is because of my wife by name Nnwa Akpan Ikwo that brought this trouble. On Monday at about something after twelve noon I went to the farm belonging to one Inyang whose father's name I do not know and matcheted her, Nwa Akpan Ikwo and Ekaete who is the daughter to Nnwa Akpan Ikwo to death. I first met the woman by name Inyang in the stream bathing and matchet her and she fell down and

..... shouted before
I left her in the stream and went to the farm where I met my wife Nnwa Akpan Ikwo and her daughter - Ekaete and I also matchet them to death. But I did not harm my wife's last born who is about one year old and was also with them. After killing the three people leaving the youngest one who was also a female alive, I ran to one village called Ekpene. Both Ekaete and the last bom of my wife are not my children because she has never given me any issue. As I was in one Essien's house at Ekpene village, the villagers came and arrested me and handed me over to the police at Olatrikang. They arrest me yesterday 26th March, 1985 at about 4p.m. and they took me back to Ekim Ebebit village and this morning 27th March, 1985 they

handed me over to the Police at Okurikang – and from there, I was taken Police Station Odukpani. The reason why I kill them is that my wife was suffering from a certain sickness in which she did not know herself again.”

In the light of the foregoing, the delay in the instant case cannot be said to have amounted to a denial of fair hearing. In *Olayiwola Olaniyan V. State* (1987)1 NWLR (Part 48)156 at 161 C.A., the Court of Appeal stated quite rightly, in my view, inter alia:

“In addition having regard to the Nigerian situation in general and the circumstances and nature of the offences against the Appellant I would have thought that a period of 2 years 8 months cannot be said to constitute a denial of the Appellant’s right to a fair hearing within a reasonable time,”
[Underlining above is mine for emphasis and comment]

The Nigerian situation alluded to above which is nowhere to be found any written code but under which government functionaries work in conditions less than conducive and where they must at times make-do with obsolete or ill-maintained facilities, delay caused by taking an accused person to court promptly to face his trial, ought not to be placed at the door-steps of the prosecution. To hold otherwise, in a situation where longer periods of detention of accused persons awaiting trial for capital offences like the one under consideration is daily occurrence, is to expect the impossible. Indeed, to accede to Appellant’s supplication, in my view, is to ask that over 80% of those presently awaiting trial for similar offences should be set free to walk the streets of this country without appropriate punishment being meted out to them in established cases. There are, In this wise, reasons to hold that many things are daily going wrong by way of neglect by government of the administration of justice in as much as the Ministry of Justice, the Police and Prison authorities are deficient in much needed aids in the quest for an effective and efficient discharge of their duties to society. The frequent break down of available ‘Black Maria’ or none at all as a case in point, is most inexcusable; some more effort needs to be put in for a more durable and efficient judicial administration on the part of Government.

It needs to be stressed that authorities are divergent as to who between the prosecution or the prison authorities has the duty to bring an accused to a speedy trial. In so far as the prosecuting State Counsel or D.P.P. as an officer of court directly owes the duty to place an accused before the court to face his trial, I am of the view that it is he who bears the responsibility. However, the duty has by authority of decision, also been

assigned to the prison authorities. Thus: in *Ezeani V. Ekwealu & anor.* (1961)1 ALLNLR (Part 2)428 at 431 Palmer, J. held:

“*It is the duty of the keeper of prison to convey prisoners on remand to court The “commitment on remand Form printed as Form 22 in the First Schedule to the Criminal Procedure Ordinance (Act) and in both cases the Officer in Charge of the prison is commanded to receive the prisoner into his custody, keep him until a certain date and then on that day convey him before the court If the Officer in charge of the prison chooses to arrange for some other person to convey the prisoner to court, he does so at his own risk.”*”

C The extract above has reference to the interpretation of Customary Courts Law, 1956 of Eastern Region of Nigeria, which imposes a duty on the prison authorities specifically to produce prisoners in their care. Other than this specific provision, the duty of the prosecutor to produce a prisoner to face his trial in Court will appear to me to be undisputed. See Folade’s Case (supra).

THE DEFENDANT’S ASSERTION OF HIS RIGHT

As I have already pointed out elsewhere in this judgment, the Appellant having moved this court to be allowed to argue Issue 2 hereof on the vital constitutional point of infringement of his fundamental right to fair hearing and it was acceded to, the step thus taken by the Appellant constitutes such an assertion of his right. It is immaterial, in my view, that he did not come by virtue of section 42(1) of the 1979 Constitution by seeking redress at the High Court in independent proceedings taken out for the purpose. Section 42(1) (ibid) provides; “*Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.*”

PREJUDICE TO THE DEFENDANT

G As held in *Folade V. Lagos State* (supra) at page 779 in respect of the last factor - prejudice to the defendant

“*...A court will look to the possible prejudices and disadvantages suffered by an accused during a delay in his trial.*”

H In the instant case, the delay in the trial of the case from all I have already said, has to be balanced with the merit of the case. The Appellant killed three persons in cold blood and in circumstances invoking horror although the charge against him was for the death of only one person. The fact that there is nothing to fault the fairness of his trial and that all the defenses available to him viz. alibi, insanity witchcraft, and provocation

were carefully and fairly considered before life conviction, ruled out prejudice as a factor availing him. Besides, as no miscarriage of justice has been occasioned and the record shows that the learned counsel for the Appellant in the court below had said that he had nothing to urge in his favour, it is too late in the day to complain that prejudice in any form was established and this, notwithstanding that (a) Appellant was alleged to have in custody B for about 6 years from the date of arrest to the date of judgment and (b) that during the period, Appellant was wasted and had degenerated into a bag of bones.

Furthermore, the witnesses whose demeanor mattered i.e. PW1, PW2 and PW3 (the others- PW5, PW6 and PW7 being police witnesses) C had testified within two months of one another. No issue has been made either in the court below or in this Court of the propriety of the receipt of the evidence of those witnesses.

POST TRIAL

Under this head, the role the pertinent question of failure to deliver D Judgments within the prescribed period enshrined in the 1979 Constitution and the consequences thereof in relation to fair hearing Mid delay in trial pursuant to section 33 of the Constitution' is brought Hlto focus.

Many essential elements, it is acknowledged, go to make up the fundamental concept of fair hearing, including easy access to the court, the right to be heard (*audi alteram partem*), the impartiality of the adjudicatory process especially that of the *forum competens*, the principles of *nemo iudex in causa sua*, inordinate delay in delivering the judgment etc. The latter concept is the thrust of section 258(1) and (4) of the 1979 Constitution which has been the subject of vast judicial decisions as herein considered in relation to section 33(1) and (4) (*ibid*), section provides in both sub-sections as follows:

58(1) Every court established under this constitution shall deliver its "decision in writing not later than 3 months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter G determined with duly authenticated copies of the decision on the of the delivery thereof" *"258(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this Action unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of H such ton-compliance has suffered a miscarriage of justice by reasons thereof."*

As between section 33(1) and (4) vis-a-vis section 258(1), there is a clear difference and there is no better case in which that dichotomy is

forcefully brought out than in the judgment of Aniagolu, J.S.C. in Ifezue V. Mbadugha (1984)1 SCNLR.427 at 431. The learned Justice said:

“There is thus a clear difference between section 33 of the 1979 Constitution dealing with the right to fair hearing, with particular reference to sub-sections (1) and (4) and section 258(1) which limits the definite period for the delivery of judgment in concluded cases. Whereas section 33(1) and (4) enjoin the courts to hear cases expeditiously leaving the discretion to the courts, as indeed it must do, having regard to varying attendant circumstances that can befall a case in the course of hearing - availability of witnesses; illness of parties and witnesses; the pressure on the courts by reason of other cases to be heard; the strain on the judges who may thereby be compelled to be absent on one or other occasion; the indigency of parties resulting in their inability to finance promptly the monetary aspects of the litigation or criminal proceedings and a whole host of other circumstances which may delay the hearing of a case or impede its progress, section 258(1) deals with the situation where the hearing of a case has been concluded, including the final addresses, leaving only the judgment to be delivered, a final assignment remaining with the trial judge only, who has only to make up his mind and give expression to it in a considered judgment.”

E Kayode Eso, J.S.C.’s view thereon at p.412 of the Report was:

The provision of section 258(1) is way of imposing on the court what the legislator considers to be reasonable time, when it comes to determination of a case”

Uwais, J.S.C. at page 434 further explained:

“It follows therefore that for the correct interpretation of section 258(1) it is necessary to appreciate its purpose. In the past some High Court Judges were in the habit of reserving judgments for such long periods as to lose the advantage of having seen the witnesses and observing their demeanor for the purpose of assessing their credibility and because of such delay this court had to set aside such judgments and remit the cases for retrial The first limb of the subsection was intended to put a stop to that practice. See Awobiyi & 5 ors. v. fabalaive Brothers (1965)1 All NLR. 163; Chief Yakubu Kakara v. Chief Okere Imonikhe (1974)4 S.C. 151 and D.Ekeri & Anor. v. Edo Kimisede & ors, (1976) 9-10 S.C.6L 1| appears the main object of the subsection is to ensure speedy administration of justice.

Bello J.S.C., as he was then was, taking a similar approach said of the purport of subsection 4 of section 258 thus:

“Based on this interpretation, the Supreme Court has understand-

ably construed section 258(4) to mean that a judgment delivered outside the three month period will not be set aside if notwithstanding, the delay, the trial judge could still be said to have full understanding, full appreciation and full recollection of the evidence, including the demeanor of witnesses." See Rossek v. A.C.B. Ltd. (1993) 8 NWLR (Part 312)382.

B

Now, in the instant case the addresses by counsel although Characterised by six adjournments, one of which was due to Appellant's illness and two others for his absence with no explanation, two for which no reasons were assigned and one for which part address was made, did indeed move fast between 23/7/90 and 4/12/90 when they were concluded. C Between the latter day and 7/1/91 when judgment was finally delivered, was a period of one month and 2 days. As can be seen, neither the provisions of section 258(1) nor those of sub-section (4) thereof are applicable, the judgment sought to be impeached not having fallen outside the three months limitation of time as constitutionally provided. D

While it is the correct principle of law to state that long interval between the reception of oral evidence of witnesses in a trial and the delivery of judgment raises a strong presumption of contravention of the provisions of section 33(4) in the instant case this has not been established. This E is because the period 4/5/88 and 7/12/91 - a period of 2 years 8 months -the learned trial Judge clearly showed neither that his memory was lost nor dimmed. Thus, the principle enunciated in *Ariori V. Elemo* (supra) where this Court (per Obaseki JSC) held that a reasonable time within the context means "*the period of time which in search for justice does not wear out the F parties and their witnesses. A period of time which dims or loses the memory of impressions of the witnesses is certainly too long and is unreasonable*" has certainly no application here.

The civil cases of *Akpor v. Iguorieuo* (supra); *Ekeri & ors. v. (supra)*; *Kakarah v. Imonikhe* (supra); *Ifezue v.Mbadu* (supra) and the host of other cases earlier referred to in the it case not being on all fours with it, are distinguishable in my respectful view to have any binding force thereon. Suffice it to add that I consideration of what constitutes fair hearing and unreasonable delay at a mention of these cases albeit in passing, is like H proving food without salt as a seasoning element.

I wish to round up my consideration of this issue by touching briefly on the following matters:

EFFECT OF DELAY ON SOCIETY

Having already held that there was delay but not unreasonable or inordinate delay in the circumstances of this case, it is well firstly, to remember that in deciding the question, each case has to be decided by taking into consideration its peculiar circumstances. Secondly, that in setting the yardstick of what amounts to unreasonable delay a copy-cat adoption of what obtains elsewhere in the world would, in my view, be to set up pitfalls into which society may end up badly hurt. Thirdly, that taking into account the totality of this case, it cannot be said that there was unreasonable delay, Appellant, through his counsel having contributed to whatever delay there was. Fourthly, that to accede to Appellant's prayer by setting him free to walk the streets of any corner in this country by the application of the *ibi jus ubi remedium* maxim is to cling to technicalities whose phenomena this court has been moving away from in these days and age in order to disrobe them of their garb of injustice. See *Nneji v. Chukwu* (1988)3 NWLR (Part 81)184 at pages 207-312; *The State v. Gwonto* (1983)1 SCNLR.142 at 160; (1983)3S.C.62 at 76; *Bello & ors. v. A-G of Oyo State* (supra) and *Chinyere Stitch v. A-G of the Federation* (1986)5 NWLR (Part 46)1007. Indeed, such an act on the part of this court will open the floodgate for over 80% of persons accused of capital offences presently awaiting trial in prison custody (with only 20% constituting a few and far between who get speedy trials) by seizing the liberty to take unreasonably long time including their defence and thereby turning round to reap the benefits of a purported unreasonable delay. As the court of last resort, this court will refuse to lend its powers to perpetuate such a wrong.

NEGLECT IN JUDICIAL ADMINISTRATION

There has been neglect over the years in making adequate provisions towards an effective administration of justice. The Ministry of Justice, the Police and the Prison Authorities have over the years been less and less catered for in the provision of much needed vehicles and equipment to enable them perform. The frequent break down of the 'Black Maria' or unavailability of any to aid in the efficient discharge of the duties of these agencies or organs of Government leaves much to be desired. All this is against the background of some other agencies of Government having more than their fair shares. An accused person's fundamental right under section 33(4) of the 1979 Constitution will amount to a dead letter should the present neglect in the provision of transport, etc. continue.

ADMONITION TO JUDGES OVER RECORDING OF ADJOURNMENTS

Due to frequent complaints in respect of delays in trial courts in both criminal as well as civil cases, judges will do well to record reasons why adjournments are necessitated at the end of each day. That way, appellate courts are better placed to know the causes of delay and how to go round them. B

WHICH ORDER TO MAKE

It has been variously suggested that should this appeal be allowed the appellant should be given a reprieve and the sentence passed on him thereby commuted; that a retrial be ordered or that he be discharged and acquitted. As the end result I have arrived at admits of none of the above, in as much as the sentence of the trial court affirmed by the court below is mandatory and ought not to be disturbed, the issue herein is resolved against the Appellant by me. The evidence was overwhelming and to order a retrial, for instance, is to perpetuate injustice. D

Before concluding my consideration of this appeal, I wish to express my immense thanks and profound appreciation for the assistance rendered by counsel on both sides as well as the amici curiae. The briefs and oral arguments proffered, into which no doubt much industry went, were of very high standard as well as they were very effectively and commendably argued with clarity. E

The end result of all I have hereinbefore said is that this appeal lacks and it is accordingly dismissed. The decision of the court below affirming the judgment of the trial court is hereby confirmed by me.

F

WALI JSC

I have read before now the lead judgment of my learned brother, Onu JSC and I agree with the reasoning and conclusions on the issues raised and canvassed, that the appeal must be dismissed, learned brother has sufficiently given a resume of the facts in this in the lead judgment and I see no need to reappear them. G

Learned Counsel on both sides of the contest filed and exchanged of argument in compliance with the rules of this Court, and in view of the constitutional issue raised in this appeal at the invitation of Honourable Chief Justice of Nigeria, a number of Senior Counsel, counsel, both from the official and the private bar, filed briefs of argument as amici curiae. H

In the brief filed by learned counsel for the appellant, three issues

were raised for determination. They are -

- “(i) *whether there had been a valid arraignment in accordance with the provisions of S.215 of the Criminal Procedure Law.*
- (ii) *Whether there was a trial within a reasonable time in accordance with the provisions of S. 33(4) of the 1979 Constitution.*
- B (iii) *Whether the prosecution had proved the case against the appellant beyond reasonable doubt.”*

These three issues were adopted by learned counsel for the respondent in preparing his brief.

In examining these issues, I shall as briefly as possible, refer to the arguments presented by learned counsel in support of and against the appeal.

On the 1st issue, learned counsel for appellant referred to the pleas taken on 15th December 1986 before Udofia J, and those subsequently taken on 25th January 1988 and 4th May 1988 before Effanga J, and D contended that the pleas taken before Effanga J, had superseded the-one originally taken before Udofia J. He said the pleas to be considered in this appeal are the ones taken before Effanga J. who heard the case to its completion and determination. He then referred to Sec. 33(6)(a) of the 1979 Constitution and Sec. 215 of the Criminal Procedure Law and submitted that both pleas were defective and invalid and therefore the whole trial is a nullity. He cited and relied on KAJUBO V. THE STATE (1988)1 NWLR (PT.73) 721; EYOROKOROMO V. THE STATE (1979)6-7 SC.3: OGODO EBEM V. THE STATE (1990) 7 NWLR (PT 160)113: OYEDIRAN V. THE REPUBLIC (1967)NMLR 122: ERAKANURE V. THE STATE F H993)5 NWLR 122 and EWE V. THE STATE (1992)6 NWLR 246.

He urged the court to allow the appeal and make an order for a retrial.

In reply, counsel for the respondent, the learned Director of Public Prosecutions of Cross River State, after distinguishing the ratio in Kajubo’s case from the case in hand, submitted that since the record showed that the charge was read and explained to the appellant, S.215 of the Criminal Procedure Law had been complied with and that there was a valid plea.

The two pleas relevant to the determination of this issue were the ones taken on 25th January 1988 and 4th May 1988 respectively before H Effanga J. The one for 25th January 1988 reads:-

“Accused in Court-Mrs. O. N.O. Mkpubre - S.C. for the State. Says -Accused needs Legal Aid.

N.B. The charge is read and interpreted to the Accused. He says he understands same. He pleads - "Not guilty";

While that of 4th May 1988 reads thus -

"Accused in court - Atim E. Ekpo (Mrs) S.S.C. for the State. Oroko Oyo Esq for the Accused - (Bassey Eteta Esq. with him)

PROSECUTION OPENS;

N.B. Charge read to the Acd. He said he understands same. He pleads - "Not guilty.""

The provisions of Section 215 of the Criminal Procedure Law and S.33(6)(a) alleged to have been contravened vis-a-vis the pleas (supra) are respectively as follows -

"215: The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court and such person shall be called upon to plead instantly thereto, unless where the person is entitled to services of a copy of the information he objects to the want of such service and the court finds that he had not be duly served with;"

"Section 33(6)(a) Every person who is charged with a criminal offence shall be entitled:-

(a) to be informed promptly in the language he understands and the detail of the nature of the offence."

Looking at the contents of the arraignment of 25th January 1988 and the plea recorded on the same date, I am satisfied that the provisions of both Sec. 215 of the Criminal Procedure Law and Sec.33(6)(a) of the Constitution, 1979 (supra) were complied with by the learned trial judge. The record showed clearly that on that day, the appellant was brought before the court and the charge was read and explained to him to the satisfaction of the learned trial judge. The appellant said he understood the charge read and explained to him to which he pleaded not guilty. The procedure was in substantial compliance with the provisions of Section 215 of the Criminal Procedure Law and S.33(6)(a) of the 1979 Constitution.

The fads' in this case are not similar to the ones in Kajubo V. The State (supra). In Kajubo's case, the pleas to the original charge and its amended version showed that "Accused: Not guilty" and Accused: 1st H Count: Pleads not guilty. 2nd Count: Pleads not guilty"

respectively without any indication that same were read and explained to the accused and that he understood same before taking his pleas. The please were really in contravention of the mandatory provisions of section

215 of the Criminal Procedure Law and section 33(6) (a) of the 1979 Constitution. Also in *Erakanure V. The State* (supra) the plea recorded did not show that the accused understood the charge read to him, unlike the present case which showed that the charge read was understood by the B appellant before his plea was recorded.

The second plea recorded on 4th May 1988 by the learned trial judge was superfluous as it was not necessary. Issue (i) therefore fails.

I now come to issue II. Under this issue it was the contention of learned counsel for the appellant that the trial of the appellant commenced C on 15th December 1986 when he was arraigned before Udofia J. and his plea taken while the actual trial started on 4th May 1988 when the second plea taken before Effanga J, who ultimately concluded the hearing and delivered judgment on 7th January 1991. Learned counsel went on to nar- D stance the adjournments the case suffered during the trial; some at the in- stance of the prosecution, some at the instance of the defence and others at the instance of the Police who could not produce the appellant in court from prison due to non availability of transport. He said in his brief of argument-

"The commencement period for the applicability of the -provisions of sec- E tion 33(4) 1979 Constitution as to whether appellant had been tried within a reasonable time is the date of arraignment. Asaikitikpi vs. State (1993)5 NWLR PT.296. 641. 652. Appellant was first arraigned on 15/12/86, when plea was taken before Udofia J. however when Effanga, J. who ultimately concluded the hearing, took up the trial; appellant was arraigned on 25/ F 1188 and 4/5/88 respectively. Between 15/12/86 and 25/1/88, there were a total of six adjournments i.e. 25/2/87, 12/3/87, 1/6/87, 29/7/87 and 4/11/87.

"Actual trial commenced on 4/5/88 when the second plea before the trial judge was taken. The trial ended on 7/1/91, i.e. a period of 2 years, 8 G months. Between commencement of hearing and judgment, there were a total of 30 (thirty) sittings, ie. 4/5/88, 21/6/88, 12/7/88, 26/10/88, 9/11/88, 24/1/89, 16/3/89, 6/4/89, 11/4/89, 9/5/89, 11/7/89, 4/10/89, 7/11/89, 23/11/89, 16/1/90, 15/5/90, 5/6/90, 14/6/90, 21/6/90, 25/6/90, 10/7/90, 23/7/90, 8/10/90, 22/10/90, 22/11/90, 27/11/90, 3/12/90, 4/12/90 and 7/1/91.

H *"An examination of the days when evidence was actually taken show that seven witnesses testified for the prosecution. PW1, the father of the deceased, did so on 4/5/88. PW.2, PW.3 and PW.4 gave evidence two months after on 12/7/88. PW.2 was the nearest to an eye-witness. PW.3 took ap- pellant to the house of PW. 1 to solicit for appellant's marriage to deceased*

the back-ground event which allegedly supplied the PW.3 was like PW.2, an eye-witness to the immediate events after the matcheting of the deceased PW.5, PW.6 and PW.7 were police officers who took part in the investigation. They testified on 11/4/89, LA about 9 months after the crucial evidence of PW.2, PW.3 and PW.4 were taken on 12/7/88. In between, B there were five aborted sittings. As no further evidence was adduced by the prosecution, their case there/on actually ended on 11/4/89. "Evidence was next taken on 21/6/90 and 28/6/90 respectively. It was the evidence of appellant. From 11/4/89 when actual evidence of the prosecution ended to 21/6/90, when that of defence began and virtually ended, was a period of C 14 months. In this period, the court sat nine (9) times, only for the trial to be adjourned. When evidence for the defence ended on 25/6/90, there were further sittings totaling 9 (nine) merely to take addresses of counsel. Addresses alone consumed a further period of 6(six) months."

He submitted that the long intervals between the reception of oral D evidence of witnesses in a trial and the delivery of judgment raise a strong presumption of contravention of section 33(4) of the 1979 constitution. He also submitted that the intervals for the adjournments were unnecessarily and unacceptably long and protracted, thus not being fair to the appellant and contrary to section 33(4) of the 1979 constitution. He cited and relied E on several decisions of this Court and courts within the Federation, in support of his submissions. He urged this Court to allow the appeal and order a retrial.

In reply to the submissions above, learned counsel for the respondent emitted that the trial for the purposes of section 33(4) of the institution F commenced on 4th May 1988 when the second plea was ten before Effanga J. Learned counsel conceded that though there were 30 sittings during the trial, it only lasted for a period of 2 years and 8 months. She submitted that the delay in the present case did not lead any miscarriage of justice because the evidence given by the witnesses revealed that the delay did not affect G their memories vis-a-vis the facts the case. She urged us to dismiss the appeal.

I do not intend to review in detail in this concurring judgment the impressive and helpful arguments presented by the learned Counsel on 5th H sides and also the learned amici curiae in their respective briefs, since that has been sufficiently done in the lead judgment of my learned other, Onu JSC. We are most grateful to them.

Although the appellant was arrested on 27th March 1985, he was not I arraigned before the court until 14th April 1986 when his plea was

taken before Udofia, J. After this plea, for one reason or the other the case was adjourned for about 5 (five) times.

The appellant was, on 25th January 1988 produced before Effanga, J when a fresh plea to the charge was taken. On that date the appellant's counsel was not in court. On 4th May 1988 when the appellant and his counsel appeared, the learned trial judge took the appellant's plea again. This second plea was not necessary as I have earlier indicated in this judgment, as it is neither a requirement of section 215 of the Criminal Procedure Law nor section 33(6) (a) of the Constitution that a plea of an accused person must be taken in the presence of his counsel.

A trial of an accused person commences when his plea is taken. See unreported judgment of this Court in SC.68/1966 delivered on 17th October 1966, OYEYEMI v. COMMISSIONER FOR LOCAL GOVERNMENT KWARA STATE (1992)2 NWLR (PT.266)661 and ASAIKITIKPI v. THE STATE (1993)5 NWLR (PT.296)652. So the right to fair hearing will commence from the time an accused person is brought before a court and his plea is taken. The period does not include the pre-trial stage to wit: the period covering the time he was arrested to the time he was arraigned in court and his plea taken. See SOFEKUN v. AKINYEMI (198m NCLR 135. Whether a trial is conducted within a reasonable time, is a question of fact and will depend on the circumstances in each case: NASAMU v. COP (1976)11 CC HCJ 2655. In considering whether there was unreasonable delay, the following factors must be taken into consideration:-

1. Length of the delay;
2. Reasons for the delay;
3. The defendant's assertion of his right;
4. Prejudice to the defendant.

See BAKER v. WINGO (1972)VI07 US 1514.

For the purpose of considering whether there was unreasonable delay in the trial of the appellant, I will regard 27th May 1985 when the appellant was arrested to the 25th January 1988 (when his plea was taken before Effanga, J) as a pre-trial period. The actual period for the trial of the appellant will therefore be computed from 25th January 1988 to 7th January, 1991, covering almost three years. Within this period, there were 31 (thirty -one) adjournments, out of these adjournments, 8 were at the instance of the prosecution; 8 at the instance of the defence; 7 because the appellant could not be produced from prison due to lack of transport and the rest at the instance of the court.

In all the instances, the trial had to be adjourned for good and

valid reasons, beyond the control of the court. Some of the adjournments were granted by the court for the prosecution to produce its witnesses, some due to absence of counsel for the defence, some for the defence to present its case, some for purposes of cross examining witnesses and final addresses by the prosecution and the defence while others were due to the appellant's illness non-production of the appellant for lack of transport. B These are all cogent and compelling reasons explaining the adjournments.

It is pertinent to note that section 33(4) of the Constitution does not provide a definition for the words "fair hearing" within a reasonable time. The phrase "*fair hearing*" was construed in DEDUWA v. OKORODUDU (1976) N.M.LR 236 at 246 to mean "*a hearing that does not contravene C the principle of natural justice*". Also in

MUHAMMED v- KANO N. A. (1968)1 ALL NLR 41. Ademola, CJN, also construed the phrase thus

"A fair hearing must involve a fair trial, and a fair trial of a case consists of the whole trial.....The true test of fair hearing is the impres- D sion of a reasonable person who was present at the trial whether, from his , observation, justice had been done in this case.

ALSO in ARIORI v. ELEMOMO (1983) ALL NLR 1. Anagolu, JSC, in his concurring judgment described fair hearing on page 29 as follows:

"Fair hearing of which speedy trial is one of the factors that go to E make it fair is therefore, in my view, a right involving the public policy that judicial proceedings shall not fall below a certain standard that trials of cases must be fair. Immutable justice demands that justice must be even-handed...."

On the construction of "*fair hearing*" and "*reasonable time*", F Obaseki, JSC in his concurring judgment in the case (supra) interpreted the two phrases as follows -

"Fair hearing therefore, must mean a trial conducted according to all legal rules formulated to ensure that justice is done to the parties to the cause. "Reasonable time" must mean the period of time G which, in the search of justice does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done."

In EJIKE v. NWANKWOALA & ORS. (1984) 12 SC. 301. Oputa JSC, in H his concurring judgment interpreted the words "fair hearing" on page 341 thus -

"The question now is, what this (right fair hearing) imply? First and foremost it implies (at least in civil cases) that both sides be given an oppor-

tunity to present their respective cases. It implies that each side is entitled to know what case is being made against it and be given an opportunity to reply thereto."

As the question of what is a "reasonable time" within which to conduct and complete a hearing of a case (be it criminal or civil) is not provided in section 33(1) and (4) of 1979 Constitution, it is not practicable in construing section 33(1) and (4) *supra* to fix a time limit. None of the decisions in which the sub-sections came for review fixed a time limit either. The views expressed in all the decisions both local and foreign agreed that "reasonable time" would depend on the facts and circumstances of each case. See *NNAJIOFOR v. UKONU* (1985) 2 NWLR (PT.9) 686; *UNONGO v. AKU* (1983) 2 SCNLR 332; *EZE NWANKWO V. THE QUEEN* 4 FSC 274; *ILU GARBA v. THE STATE* (1979) 4 SC. 118 and *ASAIKITIKPI v. THE STATE* (1993) 5 NWLR (PT.296) 641 particularly at 652 wherein Uwais, JSC, delivering the lead judgment stated -

"It follows also that for the provisions of S.33 subsection (4) of the Constitution to apply it must be read in conjunction with the commencement of a trial and in the present case in conjunction with the provisions of S.275 of the Criminal Procedure Law, Cap 49. I am therefore, of the view that the delay from 6th day of July, 1981 to the 10th day of March, 1983, though most unfortunate and deprecated is not the delay in trial which s.33 subsection (4) of the Constitution envisages."

As I have said earlier, the trial in this case commenced on 25th January 1988 and completed on 7th January 1991, a period of about three years. The majority of the adjournments were inevitable for the just decision of the case. Only very few were unexplained.

In the cases cited and relied upon, the periods of delay varied, and in all the criminal cases that came before this Court, the delay was deprecated and where the appeal was allowed, an order for a retrial was substituted. There were of course several adjournments in this case some of which were at the instance of the prosecution to enable them present their case by adducing evidence and final address, others also at the instance of the defence for the same reason; some due to unexplained absence of defence counsel and others due to non-production of the appellant by the Prison Authority/Police for lack of transport. These were delays beyond the control of the trial court. In *NNAJIOFOR v. UKONU* (*supra*) Uwais JSC stated some factors that might result in a justifiable delay in completing a trial as follows-

“Some cases are by their nature short or lengthy by reason of the number of witnesses to be called or the length of the testimonies of the witnesses. Others involve witnesses who do not live, in the country or within the court’s jurisdiction. Documents to be put in evidence may be in the custody of a third party and may not as such be readily available for production at the trial. The health of a vital witness or even the trial judge may fail. All these and many more are factors which can reasonably delay the conclusion of a trial. Surety such delay cannot be taken to be unreasonable.” B

So even if it is to be conceded that there was a delay in the trial of the appellant, cogent reasons were advanced to explain them. Neither the prosecution nor the learned trial judge could be blamed for that. After all, the delay is not in my view, unreasonable having regard to the circumstances in the case. C

In deciding whether a trial was conducted and concluded within a reasonable time, the facts involved in each case, its peculiarities and the amenities within the disposal of the state to conduct such a trial must be taken into consideration. What is a “reasonable time” in England or United States of America and such other developed countries with modern equipments and better amenities at their disposal, may not and £ cannot be the same or equated with a “reasonable time” in a developing country like Nigeria. The fundamental duty of any court or any tribunal entrusted with dispensation of justice is to do justice or substantial justice to both parties to the litigation. See *ARIORI v. ELEMO* (supra). Judicial activism in my view does not mean judicial recklessness such that may lead to chaos, nor does it mean bending the law in favour of one side to the detriment of the other. The ratio decidendi in *ASAIKITIKPI* (supra) has not been shown to be wrong and so it [remains a valid law. D E F

The fact that I have reached the conclusion that there was no unreasonable delay in this case, did not mean that there was no delay. The reasons given by the Prison Authority/Police for non-production of The appellant on certain occasions though valid nevertheless contributed to the delay which is deprecated. It must not be allowed to continue. No effort should be spared by the state within the available meager resources to devise a procedure that would ensure the speedy trial of an accused person. The state should not be allowed to avoid its constitutional obligation of providing speedy trial and dispensation of all cases whether they are criminal or civil. G H

On the merit of the appeal, that is issue (111) the evidence against

the appellant is overwhelming. The findings of the trial court which were subsequently affirmed by the Court of Appeal are full and rightly supported by the evidence. The concurrent findings of the courts below are unimpeachable and give no room for any interference by me.

For these reasons and the fuller reasons contained in the lead judgment of my learned brother, Onu JSC, I also hereby dismiss the appeal and further confirm the conviction of the appellant and the sentence passed.

OGUNDARE JSC (Concurring differently)

C

I have had the advantage of a preview of the judgment of my learned brother Onu JSC. While I agree that this appeal be dismissed, I regret I do not share his views on the issue of section 33(4) of the Constitution of the Federation of Nigeria 1979 in relation to its applicability to the facts of the appeal on hand.

The facts have been fully set out in the judgment of my learned brother; I do not need to go over them again except in so far as they are relevant to this judgment. The Appellant is charged on an information with the murder of one Nnwa Akpan Ikwo on the 25th day of March 1985. He was arrested the following day and has remained in custody ever since. Information was filed on 21st January 1986 and the case first came before the court (Udofia J.) on 14/4/86; Appellant was absent in court as he was not produced from prison custody due to inability of the prison authority to procure a vehicle. This was also the position on subsequent dates of adjournment, that is, 28th day of May 1986, 18th day of June 1986 and 29th day of July 1986. On the 29th day of October 1986, he was present in court but the Prosecuting State Counsel was absent. The court then directed his Registrar to write to the Legal Aid Council with a view to legal representation being provided for the Appellant. On 1st day of December 1986, the Appellant was present in court; the Prosecution was also represented by counsel but counsel assigned by the Legal Aid Council, one Mr. Orok Oyo to defend the Appellant was absent. On 15th December 1986 the Appellant was again present in court and counsel both for the prosecution and the defence were equally present. The plea of the accused was taken on that day when he pleaded not guilty to the charge against him. The case was then adjourned to the 25th of February 1987 for hearing. Hearing could not proceed on that day because the Appellant was not produced in court from prison custody. This was also the position on the 12th of March 1987 to which date the case had been adjourned. On the

1st of June 1987, that is, 14 months after the case was first called in court and six months after the plea of the Appellant had been taken, hearing could not proceed again because defence counsel was absent. It was then adjourned to the 29th of July. The Appellant was not produced in court on that date and also on 4th November, 1987 to which date the matter had been adjourned. On the latter date, no counsel appeared for the prosecution either. On the 25th day of January 1988 the case came before Effanga J: Although the appellant was present in court, no Counsel appeared for him. None-the-less the learned trial judge caused the charge to be read and interpreted to the Appellant and after Indicating that he understood the charge his plea was taken. He pleaded not guilty and the case was adjourned to 22nd of March 1988 for bearing. On the latter date, although the Appellant and the prosecuting Counsel were in court, the defence counsel Mr. Orok Oyo was absent. It was ordered that hearing notice be issued on him. The case was adjourned to 4th of May 1988 for hearing. On the 4th of May 1988, the Appellant was present in court as well as both counsels for the prosecution and the defence. The following note appears:

“N.B. Charge is read to the Accused. He says he understands same. He pleads - ‘Not Guilty.’”

After this plea of the Appellant, the first prosecution witness gave evidence. At the conclusion of the evidence of the witness the prosecuting Senior State Counsel applied for adjournment to enable him other witnesses. The application was granted and the case was adjourned to the 21st of June 1988 for further hearing. Thus, hearing in this case commenced two years after it first came before the court, that is 14th April 1986 to 4th May 1988.

On the 21st of June, hearing could not proceed again because the Appellant was not produced in court and the case had to be adjourned to the 12th of July. On the latter date, the prosecution called three more witnesses and asked for adjournment to call the others. The application was granted and the case was adjourned to 26th October 1988 for further hearing. On the 26th of October 1988, 9th of November 1988, 24th of January 1989 and 16th of March 1989 the Appellant was not produced in court and so trial could not proceed. On 6th day of April the Appellant was in court as well as Prosecuting Senior State Counsel but defence counsel was absent. After the court had got information that the Counsel's son was ill, it adjourned further hearing of the case to the 11th of April 1989. On that day trial continued when two more witnesses testified for the prosecution.

At the request of the prosecuting counsel further hearing was adjourned to the 9th of May. Again the Appellant was not produced in court on the 9th of May 1989 and the case had to be adjourned to the 11th of July 1989. The case suffered further adjournments on 11th July 1989, 4th October 1989, and 7th November 1989, all because the Appellant was not produced in court and the doctor who was to testify for the prosecution was equally absent. On 23rd day of November 1989, the following notes appeared in the court's record:

"Accused in Court P.O. Fiawoyife Esquire P.S.C. for the State (J.E. Egot Esquire S.C. with him) Orok Oyo Esquire for the Defence -

PROSECUTION CONTINUES

PS.C. - *The doctor is not in Court at 11.40 a.m. The IPO told me that they could not serve the doctor to be in COURT. The Accused is very ill and the Court (Sic) may be ordered to be in the Hospital in view of his condition.*

COURT: Having seen the Accused in person and the state of his health, I am of the view that he is in no good health to continue with the trial He is in fact a bag of bones and needs urgent medical attention. ORDER: It is hereby ordered that the Accused be escorted to the University of Calabar Teaching Hospital and treated at Government expense immediately and in any case not later than Friday the 24th November, 1989. The case is adjourned to 16th January, 1990. The Accused may be remanded in prison custody or that of the Hospital subject to the heed (sic) of the Accused or Doctor's discretion."

(underlining is mine for emphasis).

On the 16th of January 1990 further trial could not proceed because the doctor who was to testify for the prosecution was not in court. On the 15th of May 1990, it was recorded again that the Appellant was not produced in court and the case had to be adjourned to the 5th of June 1990. On this latter date, although the accused was in court his counsel was absent. The court had to issue a bench warrant on defence counsel to show cause. The case itself was further adjourned to 14th June 1990. On the 14th of June 1990 the Appellant was in court as well as counsel for the prosecution and the defence. After counsel had apologised for his being absent in court on the previous date of hearing and was warned by the court against a repetition of absence from court and the bench warrant issued having being cancelled the learned trial judge called on the prosecution to continue with its case. The following note shows what happened:

P.S.C. - *We cannot wait for the doctor, I make an application to recall a witness - 4 police Sergeant to tender a medical report he obtained in respect of the deceased person. I may take a short adjournment to produce the witness a doctor.*

N.B. - *shall not adjourn the case anymore for the prosecution.* B

P.S.C. - *Prosecution now closes its case.* “

Prosecution having closed its case, defence counsel sought for an adjournment to present the defence. At the request of the defence counsel the case was adjourned to the 21st of June 1990 for the defence to present its case. C

Thus the case for the prosecution that commenced on the 4th day of May 1988 was concluded on the 14th day of June 1990. On the 21st of June 1990 the Appellant gave evidence in his own defence. At the request of the prosecuting counsel the case was further adjourned to 25th June 1990 for cross-examination to continue. The defence closed its case on the 25th of June 1990. Learned counsel addressed the court on 10th July 1990 and on 17th July 1990. On this latter date the case had to be adjourned to the 23rd of July 1990 for the address to continue but the case could not proceed on the 23rd of July because prosecuting counsel was absent in court. On the 8th of October 1990 when the case was next adjourned to hearing again could not proceed because defence counsel, this time, was absent due to ill health. Defence counsel concluded his address on 22nd of March but at the request of prosecuting counsel who sought leave to reply on points of law; further hearing was adjourned to the 22nd of October 1990. On that date, as well as on the 27th of November 1990 and 3rd day F of December 1990 further hearing could not proceed because the accused was not produced in court. On the 4th of December when the case came up again address of counsel was concluded and judgment was reserved.

Thus addresses of counsel took another six months. Judgment was delivered on the 7th of January 1991 barely a month after the conclusion of addresses but clearly almost five years after the case first came to court and almost three years after the 1st witness for the prosecution testified. G

I have set out the history of the case in view of the ground of appeal canvassed before this Court to the effect that there was a breach of H the Appellant's constitutional right to fair hearing within a reasonable time.

The Appellant was convicted of murder by the learned trial Judge and sentenced to death. His appeal to the Court of Appeal was unsuccessful. He has now further appealed to this Court. In the Appellant's Brief of

argument, three issues are formulated for determination to wit-

- (1) Whether there had been a valid arrangement (sic) in accordance with the provisions of section 215 Criminal Procedure Law, (CPL).
- (2) Whether there was trial within a reasonable time within the provisions of Section 33(4) of the 1979 Constitution.
- B (3) Whether the prosecution had proved the case against the appellant beyond reasonable doubt.

Issue 3 was raised before the Court of Appeal and it was resolved by that Court against the appellant. Two Appellant's Briefs were filed on behalf of the Appellant in the court below. The first Brief filed by Mr. O.M. Ugoh did not raise Issue 1 but the second filed by Dr. Ilochi A. Okafor however raised the issue. It would appear that it was the Brief filed by Mr. Ugoh that was adopted and relied on at the hearing of the appeal before the court below. D The Respondent's Brief made no mention of Issue 1 and the judgment of the court below said nothing on that Issue. Indeed it was Mr. Ugoh who appeared for the appellant in that court. It would appear that the Brief filed by Dr. Okafor was not made use of. The Appellant's Notice of Appeal to that Court contained no ground of appeal challenging the validity of the E Appellant's plea at the trial. Dr. Okafor who now appears for the Appellant in this Court has raised this issue both in the grounds of appeal and in the Appellant's Brief. Leave was granted to him to raise the point.

Issue 2 is also a new point being raised in this Court for the first time and being a constitutional issue and leave having been granted to F raise it, the Chief Justice of Nigeria invited some members of the Bar, both official and unofficial, to prepare and file Briefs on the issue and appear before the Court, The learned Attorneys-General for Benue State, Imo State, Oyo State and Rivers State responded by filing Briefs. Mr A.B. Mahmoud a private legal practitioner also responded to the invitation for G the learned Chief Justice of Nigeria by filing a Brief and appear before us. The learned Attorneys-General for Imo and Rivers States appeared and proffered oral arguments. The Attorneys-General of Benue and Oyo States were represented by the Director of Civil Litigation Benue State and the Acting D.P.P. (Oyo State) respectively who also proffered oral arguments. H A.B. Mahmoud also appeared before us and proffered oral argument. We are very grateful to these learned Amici Curiae for the very elucidating Briefs filed by them.

Before I come to the thorny questions raised in Issue 2, I better first dispose of Issue 1. Dr. Okafor learned counsel for the Appellant has

argued in the Appellant's Brief that there was no valid plea upon which the trial for the Appellant could be based. He observed that a plea of the Appellant was taken on 15/12/86 before Udofia J. and that when Effanga J took over the case, pleas were also taken before him on 25/1/88 and 4/5/88. He submitted that plea having been taken before Effanga J. on 25/1/88 the second plea taken before that Judge on 4/5/88 was unnecessary B unless if that of 25/1/88 was in any way defective. After examining the pleas of the 25/1/88 and 4/5/88, learned counsel relying on the decision of this Court in Erekanure v. The State (1993) 5 NWLR (Pt.294) page 385 submitted that both pleas were invalid in that as regards the plea of 25/1/88 there was no record of what language that was used in reading and/or C interpreting the charge to the Appellant and there was no record that the trial Judge was satisfied with the explanation of the charge to the Appellant. As regards the plea of 4/5/88 learned counsel pointed out that there was no record of what language that was used in reading and/or interpreting the charge to the Appellant, there was no record that the charge was D interpreted or explained to the Appellant and lastly, there was no record that the trial Judge was Satisfied that the Appellant fully understood the charge and its purport. Learned counsel asked for a retrial.

Mrs. Ikpeme for the Respondent, submitted that there was a proper plea before the Court. She observed in the Respondent's Brief that the E Appellant was not represented by counsel on 25/1/88 when the plea was taken but that learned counsel for the defence was present in court When the second plea before Effanga J. that is, that of 4/5/88 was taken. It is learned counsel's submission that the plea taken on 4/5/88 met the requirement of section 215 of the Criminal Procedure Law. Learned counsel distinguished the case on hand from the case of Kajubo v. The State (1988) 3 F SCNJ 79 80-81. She finally submitted that there was no image of justice in this case.

We can only concern ourselves with the pleas taken before Effanga, J. who conducted the trial to finality. The plea taken before Udoffia, J. is G no longer of any consequence. The 1st plea before Effanga, J. was taken on 25/1/88. Hereunder is the Court's note for that day.

"Accused in court. Mrs. O. N. O. Mkpubre - State Counsel for the State says - Accused needs Legal Aid.

N.B. The charge is read and interpreted to the Accused. He H says he understands same. He pleads - 'Not guilty' -"

At the hearing on 4/5/88 when the Appellant was represented by counsel, another plea was taken. I quote from the record of appeal the court's note

for the day.

*“Accused in Court -Etim E. Ekpo (Mrs.) S.S.C. for the State.
Orok Oyo Esquire for the Accused - (Bassey Eteta Esquire with him)*

PROSECUTION OPENS:

N.B. *Charge is read to the Accused. He says he understands same. He pleads - ‘Not Guilty.’*

B

The importance of plea to a valid trial has been emphasized in numerous cases. In *Kajubo v. The State* (1988) 3SCNJ 79; (1988) 1 NWLR 721 this Court held that for a valid and proper arraignment of an accused person, the following conditions, as contained in section 215 of the Criminal Procedure Law, must be satisfied:

C

(a) *The accused shall be placed before the court unfettered unless the court shall see cause to otherwise order;*

(b) *The charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court;*

D and

(c) *He shall then be called upon to plead instantly thereto (unless there are valid reasons to do otherwise as provided in section 100 of the Criminal Procedure Law);*

It is also held that

E (d) *failure to comply with any of the conditions stated in (b) and (c) will render the whole trial a nullity.*

Oputa JSC observed at page 737 of the latter Report thus:

“The mandatory provisions of Section 215 of the Criminal Procedure Act that the information or charge should be firstly read over to the accused, then secondly, explained to the accused and thirdly, explained to him to the satisfaction of the Court are not merely cosmetic; they are not mere semantics - No. They are provisions considered necessary to ensure that the accused person understands and appreciates what is being alleged against him, to which he is required to make plea. Section 215 C.P.A. sets out the mandatory rules required by law for a proper arraignment”

G

Section 215 provides:

“The person to be tried upon any charge or information shall be placed before the Court unfettered unless the Court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the Court by the registrar or other officer of the court, and such person shall be edited upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the Court finds that he has not been duly sewed therewith”

H

Bearing in mind the above I am satisfied that the plea taken before Effanga, J on 25/1/88 was in substantial compliance with section 215 and was, therefore, valid. That plea was sufficient to sustain the trial before the learned Judge. The cases relied on by Appellant are not on all fours with the facts here. In KAJUBO the Court note read:

“Court: *Registrar take the plea of the accused on the amended charge.*

Accused: 1st Court: Pleads Not Guilty

2nd Court: Pleads Not Guilty.”

There is nothing to indicate that the charge was ever read and explained, to the accused. In *Evorokoromo & Anor. v. The State* (1979) 6-9 SC.3, the issue there was not whether the plea was bad - that had been conceded by both parties in the Court of Appeal and the trial declared a nullity, the issue was whether the Court of Appeal was right to order a retrial in the circumstance. In *Oyediran & Ors. v. The Republic* (1967) NMLR 122, this Court, per Coker JSC, held that “*the arraignment consists of charging the accused or reading over the charge to him and taking his plea thereon.*” This statement, though correct, is non-the-less per curiam. I say this because the issues in that case were not on the validity of the plea - this was never questioned in the case - but on (i) the propriety of convicting an accused person for an offence on which he was not charged unless where the conviction is in respect of a Substituted offence as provided for by law and (ii) the return of verdicts where several persons are tried together or where there are several Counts on the same information. In *Ogbodo Ebem v. The State* (1990) 7 NWLR 113, the court note, read simply:

“*Accused in court. Plead not guilty. Mr. Ajagu for the State. Counsel for the accused to be informed of next adjournment. Case adjourned to 4/9/80 for hearing.*”

Court of Appeal held, and quite rightly in my view, that there was non-compliance with section 215 in that it was not shown that the charge was read to the accused person or that it was explained to him either, is not the case here.

Erekanure v. The State (1993) 5 NWLR 385, the record of the proceedings read thus:

“*M.I Edokpayi S.C. for the State J.E. Sharkarha for the accused, charge read to the accused. He pleads not guilty to the Law Court. Prosecution opens its case*”

Commenting on the validity or otherwise of this plea, Olatawura, JSC delivering the lead judgment of this Court observed at pages 392-393

of the Report thus:

“Mr Olisa Agbakoba, the learned counsel for the appellant has filed a very comprehensive brief of argument. He has submitted that the arraignment of the appellant was not in accordance with the Criminal Procedure Law of the Bendel State of Nigeria, 1976. These requirements although familiar were not followed by the trial court. These requirements which have been spelt out in Sunday Kajubo v. The State (1988) 1 NWLR (Pt. 73) 7211731 and 737 are:

- “1. The accused must be present in court unfettered, unless there is a compelling reason to the contrary.*
- C 2. The charge must be read over to the accused in the language he understands.*
- 3. The charge should be explained to the accused ‘to the satisfaction of the court.’*
- 4. In the course of the explanation technical language must be avoided.*
- D 5. After requirements 1 to 4 have been satisfied the accused will then be called upon to ‘plead instantly’ to the charge’.*

In this case on appeal, and according to the printed record, there is nothing to show that the court fully complied with these requirements. The five requirements must be satisfied. They are mandatory. The best that could be seen to have been done was that the charge was read to the accused, but in what language? If as it has been shown that it was read, was it explained to him? No. There is nothing on record to show also that it was even read by the registrar or an officer of the court. Where for instance no officer of the court is capable of interpreting the charge in the language the accused person understands, a sworn interpreter is produced to explain the charge to the accused. As shown on page 26 of the printed record, the appellant spoke Urhobo language. The failure to comply fully or wholly with these requirements renders the trial a nullity. Evorokoromo v. The State (1979) 6-9 S.C. 3.”

There is nothing to show that the charge was explained to the accused. In the case on hand, the charge was not only read to the Appellant, it was also explained to him and he expressed his understanding of same.

I do not understand the authorities to say that it must be recorded that the court is satisfied with the explanation as it is being submitted to us by learned counsel for the Appellant. In my respectful view, the plea taken before Effanga, J on 25/1/88 met substantially the requirements of section 215 and I, therefore, hold it to be valid.

I now turn attention to the more difficult issue in this appeal which is

Issue 2. I find the Briefs filed before us extremely useful and the authorities cited very helpful in my determination of this issue. The first question that arises is: In the trial of the Appellant in the High Court, was there a breach of his constitutional right to a *fair hearing* within a *reasonable time*? Section 33(4) of the Constitution of the Federal Republic of Nigeria 1979 (hereinafter is referred to simply as the Constitution) provides:

“Whatever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or tribunal.”

(underlinings are mine)

As submitted by Dr. Okafor, learned counsel for the Appellant, in his supplementary Brief, and quite rightly in my view, there are two limbs to be considered in this subsection. Dr. Okafor submits:

“It is to be noted that (1) in each case, ‘fair hearing’ stands alone as an independent requirement (2) similarly the concept of reasonable time. (3) In other words, there must be (a) fair hearing and (b) within a reasonable time. (4) Both concepts must not therefore be lumped together too readily. (5) The concept of holding the hearing within a reasonable time must be divorced as a content of the concept of ‘fair hearing.’ (6) A construction must therefore be placed which gives a meaning to the concept of ‘fair hearing’ that does not emasculate the concept of ‘reasonable time’ within it.

In effect one has to consider first whether the Appellant had fair trial; if so, whether the fair trial was within reasonable time. I intend to adopt this approach in the consideration of the issue before us. The third limb of the sub-section, that is, trial by a court or tribunal does not come in for consideration as it is crystal clear - and this is not in dispute, that the Appellant was tried by a court within the meaning of that word in the sub-section.

As Obaseki JSC rightly put it in *Ariori v. Elemo* (1983) 1SC 13.

24: *“Fair hearing, therefore, must mean a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the cause.”*

Sub-sections (5) to (13) of section 33 of the Constitution provide the Ingredients of a fair trial. It is not contended by the Appellant that there has been a breach of any of these ingredients. This being the case it cannot be said that the Appellant has not had a fair trial. What he contends, however, is that whatever fair hearing he had was not within a reasonable time and, therefore, there has been a breach of his constitutional right under

section 33(4) of the Constitution to speedy trial.

What then is reasonable time? The phrase is not defined in the Constitution. In Coke upon Littleton 18th edition by Hargrave & Butler at page 56b the following appears:

B *"It would be unreasonable to expect an exact definition of the word 'reasonable.' Reason varies in its conclusion according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the verdict of a jury (or the decision of a judge sitting as a jury) usually determines what is 'reasonable' in each particular case; but frequently reasonableness 'belongeth to the knowledge of the law, and therefore to be decided by the justices."*

D In *Ariori v. Elemo* (supra) at page 24, however, Obaseki JSC preferred a definition in these words:

E *"'Reasonable time' must mean the period of time which, in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done."*

See also *Wright v. New Zealand Shipping Co. Ltd.* (1878) 14 Ex. D. 165n. per Bramwell, LJ. at p. 168n:

F *"...., a reasonable time for doing an act is a time within which it can be done by a person working reasonably"*

F Similarly, in *Re a Solicitor* (1945) KB 368, 371 Court of Appeal (England), per Scott LJ, observed:

G *"The word 'reasonable' has in law the prima facie meaning of reasonable in regard, to those existing circumstances of which the actor called on to act reasonably, knows or ought to know."*

H It is agreed by all counsel (including the amici curiae) that the time required to comply with the definitions given above will depend on the nature and circumstances of each particular case. I agree entirely with this view which is in accord with the weight of judicial opinion on the point. See: *Davis v. Capper* (1829) 4C&P 134. 138; *Hick v. Raymond & Reid* (1893) AC 22 per Lord Herschell LC at pp. 28; *Read v. Bot* (1821). 3 Brod. & Bine. 147, per Dallas at p. 124.

In determining what is a reasonable time for the trial of a criminal case having regard to the nature and circumstances of the case, four factors have been identified as guide, to wit, the length of the delay, the rea-

sons given by the prosecution for the delay, the responsibility of the accused for asserting his rights and the prejudice to which the accused may be exposed - see: *Barker v. Wingo*. 407 US 514; *Folade v. Attorney-General LagosState* (1981) 2NCLR771 777; *Bell v. D.P.P.* (1985) A.C. 937 P.C. I shall now examine the facts in this case along the line of these four factors.

Length of delay:

In determining the length of delay the question must first be resolved: From when is time to be computed? Is it from the time of arrest, which in this case was 26th March 1985? Or from the date of the filing of information, that is 21st January 1986? Or from the date of first appearance in court which was April 1986? Or from the date of arraignment, that is 15th December 1986? Going by a dictum of Fatayi-Williams, CJN in *Sofekun v. Akinyemi and Ors.* (1980) 5-7SC1, 18 to the effect:

"Bearing in mind that the words 'by a court' is only used once and at the tail-end of subsection (2) of section 22 /which was verbis verbissima D with section 33(4) under consideration in this appeal, the word 'charged' in the first line thereof can only be synonymous with the word 'accused'. No other construction is, in my view, possible."

[Brackets are mine]

One would be inclined to hold that length of delay would have to be calculated from the date of arrest when an accused person is formally accused of the offence for which he is arrested. With respect, I cannot agree with this view. Section 33(4) deals with the trial of a criminal action and computation of time, in my respectful view, can only relate to the time the trial F begins. A trial begins with the arraignment of the accused person before the court - see *Asakitipi v. The State* (1993) 5NWLR 64L 652 wherein Uwais, JSC delivering the lead judgment of this Court observed:

"The question that arises from the argument canvassed by learned G counsel for the appellant is whether the appellant has a fair hearing within a reasonable time. A fair hearing means a fair trial - see Isiaku Mohammed v. KanoNA. (1968) 1All N.L.R. 424. Trial in a criminal case is said to commence with arraignment which in turn consists of the charging of the accused or reading over the charge to the accused and taking his plea thereon - see Oyediran and 5 Ors. v. The Republic (1967) NMLR122 at p. H 125 and section 215 of the Criminal Procedure Law, Cap. 49 of the Laws of Bendel State of Nigeria 1976, which is the law applicable. The section provides -

‘215. *The person to be tried upon any charge or information shall be placed before the court unfettered unless the courts shall see otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has been duly served therewith.*’

It follows from the foregoing that although the appellant in the present case was taken to the high Court 19 times, his trial did not commence until the 10th day of March, 1983, since the procedure under section 215 of the Criminal Procedure Law, Cap. 49, did not previously take place. It follows also that for the provisions of section 33 subsection (4) of the Constitution to apply, it must be read in conjunction with the commencement of a trial and in the present case in conjunction with the provisions of section 215 of the Criminal Procedure Law, Cap. 491 am, therefore, of the view that the delay from the 6th day of July, 1981 to the 10th day of March, 1983, though most unfortunate and deprecable, is not the delay in trial which section 33 subsection (4) of the constitution envisages.”

I am in complete agreement with the views expressed above and, consequently, I hold that the time to calculate the length of delay ran from 15th December, 1986 when the Appellant was first arraigned in court before Udofia, J.

Trial in this case ended on 7th January, 1991 when judgment was delivered by Effanga, J. that is a period of 4 years and 24 days. And this in a murder case! Even considering the past and current problems which affect the administration of justice in criminal matters in this country, a period of 4 years between arraignment and judgment in a murder case is, in my view, inordinately too long. This Court has not, at any time that occasion calls for it, shirked its duty to deprecate, in strong terms, long delay in prosecuting murder cases. I refer in this respect to (1) *Eze Nwankwo & Ors. v. The Queen* 4FSC 274, 275 where Ademola CJF (as he then was) observed:

“We also wish to comment on the lapse of time between arrests and trial in this case. The accused persons, or some of them, were arrested a year before the case was tried.

We trust that our observations on these cases will receive the attention they deserve in the proper quarter.”

(2) *Ilu Garba v. The State* (1972) 4SC 118.122 where this Court again observed:

"We observe with some concern the period which the appellant spent in custody between his arrest which was sometime in April 1969 and his trial at the High Court, Maiduguri which commenced on 14th April, 1971, a period of about two years and two months. We have had occasion in the past to draw attention to this unjustifiably long period of keeping accused persons in custody awaiting trial. In this appeal there is nothing in the record explaining or justifying the long delay. We wish that this situation should be brought to the notice of the authorities concerned in order to obviate any recurrence. We also wish to re-emphasize that it is of the essence of criminal justice, especially in a capital offence, that there should be a speedy trial."

In these two cases the delay there complained of was before trial. In *Ozulonye & Ors. v. The State* (1983) 4 NCLR 204, 209-210. the Court of appeal, per Belgore J.C.A. (as he then was) observed:

"But the peculiar point in this appeal is that the ground of appeal is based on the Constitution of 1979. The trial had taken an inordinately long time from the information by the Attorney-General of defunct East Central State in 1973, followed by adjournments or unexplained delays taking years. The Constitution has no retrospective operation except for Transitional Provisions and Savings in Part 111 thereof of which do not apply."

The case suffered serious delays due to adjournments or unexplained failure to hold Court. But can this case only be related back in the matter of delay to 1st day of October 1979 when the Constitution came into operation? Awoju J. started the case in 1978 June, he continued almost from day to day as the occasion permitted and kept as closely as possible in some instances to his time-table. It could be observed he took eight witnesses between 13th and 16th June 1978 before the usual Summer Recess. He resumed hearing on 24/10/78 and adjourned to next day 25th October when he did not sit nor did he sit again on the case that year. He came back on the case on 23/2/79 and adjourned again to 3/4/79 but there was no sitting on that day except a month later on 3/5/79 and ended by final submissions of counsel on 21/3/80. Between 1st October 1979 and 23rd March 1980 there was some orderly expedition of the case. But the delay had occurred and the delay naturally defeats justice or denies justice to all accused facing a criminal prosecution. The issue was raised on the Constitution of 1979 S.33(4), none-the-less this Court must not close its eyes on gross miscarriage of justice caused by the delay. The Supreme

Court has always frowned on delays (Awobiyi and Sons v. Igbalaye Bros, supra) and that Court has not relented on its stand as to delay. In Akpor v. Imonnua 1 LRN36, Idigbe JSC (on 8/2/78) was saying that the real reason why there should be no inordinate delay or protraction in hearing a case and delivering judgment thereon is the possibility of the judge losing partially or even completely the impression of the demeanor of the witnesses. His Lordship asked:

'Can it be seriously contended that even at this stage, he undoubtedly had a complete impression of the demeanor of the witnesses he saw some 22 months ago and during which he had to watch the demeanour of other witnesses who gave evidence in a variety of other cases?'

If Supreme Court could be frowning so strongly on delays in civil cases, a delay in criminal matter is more serious and it is a matter a Court of Appeal should not close its eyes on. Section 22(2) of the Constitution of the Federal Republic of Nigeria 1963 even provided against delay to 1976 when the information was laid. Both Chief Kehinde for the appellants and Mr. Oguadi, Legal Adviser for the respondent made submissions on 5.22(2) of the 1963 Constitution which states:

'whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a Court or Tribunal.'

This provision but for the omission of the words 'in public' after the word 'hearing' is the same as S.33(4) of 1979 Constitution. There has been an unmitigated delay in this case with several adjournments and unexplained failure of Court to sit taking trial from hearing to judgment almost four years that the trial judge could not with certainty be said to retain his impression of the demeanour of the majority of the witnesses he saw in the case. Further the provisions under Fundamental Rights, Chapter iv of 1979 Constitution and Chapter III of 1963 Constitution must not be infringed in any trial. In Mukta Yarima v. Borno NA. (1968) 1AIIINLR 410 it was held by Supreme Court that S.22(2) of 1963 Constitution applied to all trials at first instance and that the fundamental rights are rights which could not be waived. In Buraimoh Aiayi v. Zaria (1964) NRMLR67. a matter decided under 5.22(5) of 1963 Constitution, the Supreme Court said that the provisions are mandatory and the rights of the accused therein should not be denied. Denial of fundamental rights as provided in the Constitution is an irregularity causing a serious miscarriage of justice. This ground therefore succeeds."

See also *Avambi v. The State* (1985) 6 NCLR 141.142 where the Court of

Appeal had occasion to comment on delay in the trial of an accused person for murder. The Court, per Olatawura J.C.A. (as he then was) observed:

"However this is not the end of this matter. The conduct of both counsel for the prosecution and the defence is blameworthy. They have been over-indulged in their various applications for adjournment with the result this case which started on 19th November, 1979 was not completed until 22nd March, 1982. I hope counsel and trial courts will bear in mind the provisions of S.33(4) of the 1979 Constitution of the Federal Republic of Nigeria which provides:

'Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or tribunal.'

The trial which lasted over two years cannot be said to have been conducted within a reasonable time. Besides, the accused was said to be 70 years old when his trial started. His age and confinement ought to have been taken into consideration when the various applications for adjournment were granted. The case for the prosecution was concluded on 12/2/81. On that day Mr. Agabi Wonah who appeared for the defence asked for adjournment of about 7 weeks! On that day, i.e. 1/4/81 both counsel were absent. The case was adjourned to 26/5/81. There were various adjournments and the defence did not start until 26/8/81, i.e. over 6 months after the close of the prosecutions' case. The case was adjourned to 5/10/81 for address: an adjournment of over 5 weeks. On 5/10/81 Mr. Agabi-Wonah applied for another adjournment. He was granted 2 months adjournment and the case was again adjourned to 8/12/81. In the meantime the brief of the prosecution changed hands and one Mr. N. T. Vasimi who appeared for the State trod the same easy path of his predecessor by taking the line of least resistance and asked for adjournment. He was granted over 6 weeks adjournment for the address. The record of proceedings from plea to the addresses of counsel occupied 21 pages. One is disturbed at the turn of events in a matter of this nature."

I agree with the comments of the Court of Appeal in these two cases: Powell, J in the American leading case of *Barker v. Wingo* (supra) jointed out at pp. 530-531 of the Report:

"Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the impression of the right to speedy trial, the length of delay that will provoke such an inquiry is

necessarily dependant upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious complex conspiracy charge."

In the case on hand a period of over 4 years for the trial of a simple murder case where only 6 witnesses testified for the prosecution in 3 days and one witness (the Appellant) for the defence in two days, is presumptively prejudicial.

Reasons for the Delay:

Four principal reasons can be discerned from the record as responsible for the series of adjournments suffered by this case at the trial. (a) Non production of Appellant in Court:- Trial commenced before Udofia, J on 15/12/86 when the Appellant's plea was taken but it could not proceed on two subsequent dates of adjournment because the Appellant was not in court for the reason that there was no vehicle to convey him to court. Throughout the course of the trial from 15/12/86 to 7/1/91 when judgment was delivered the Appellant was not produced in court on at least 16 occasions for precisely the same reason. It is to be noted that this was the situation on 4 occasions between 14/4/86 when the case was first called in court before Udofia J and 15/12/86 when plea was taken.

(b) Absence of defence counsel in Court: Defence counsel was absent on a total of 5 occasions. On the 4th occasion a bench warrant had to be ordered against him. After that he was absent only once due to ill-health.

(c) Absence of Prosecuting Counsel: Prosecuting counsel was absent on only two occasions during the period of 15/2/86 to 7/1/91.

(d) Absence of Witnesses: The case suffered three adjournments at the instance of the prosecution because of absence of its witnesses in court.

It can be seen from the analysis above that the principal cause of adjournments suffered by the case at the trial was the non-production of the Appellant in court to stand his trial - Indeed, this was the major cause of the delay from the date the case came to court to the date of the arraignment of the Appellant. Commenting on the reasons for delay, Powell, J observed at p. 531:

"Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or over-crowded courts should be weighted less heavily but never

theless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

It is the responsibility of the State to bring an accused person to his trial promptly. If the accused person is in custody, the State, and not the accused, has the full responsibility to produce him in court. And, failure to do this for whatever reason, more so for lack of vehicle to convey him, must be weighted heavily against government. Responsibility of the accused for asserting his rights; Discussing this factor Powell, J has this to say at page 531:

"Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain."

It cannot be said that the Appellant in any way contributed to his plight at the trial or that he failed, given the opportunity, to assert his rights. Indeed, throughout the trial he demonstrated the effect the delay was having on him by complaining of hunger and begging for money for food thereby showing that he was not even well fed in prison. In any event, the nature of the main reason for delay would not permit of his complaining of delay as nothing could be done in court in his absence. It may be argued that he could have moved the Court to dismiss the charge. But of what use would this have been to him since he could be re-arrested and charged and subjected to the same ordeal?

Prejudice to the accused: In respect of this factor, Powell J. observed at page 532 of the Report:

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case, skew the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past, loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

Of the three interests identified in the passage above the only one that appears to concern the Appellant is (ii). It has not been suggested that the delay had impaired the defence in any way. As to (ii), the record shows that the Appellant was, at a time, reduced to “a bag of bones” and needed urgent medical attention. This fact, coupled with his incessant complaints of hunger in court, is demonstrative evidence of the anxiety and concern he had during his long prison custody.

The learned Attorney-General of Oyo State has drawn our attention to *Olanivan v. The State (1987) 1 NWLR 156, 162* where the Court of Appeal observed, per Kutigi J.C.A. (as he then was); that:

“In addition having regard to the Nigerian situation in general and the circumstances and nature of the offences against the appellant I would have thought that a period of 2 years 8 months cannot be said to constitute a denial of the appellant’s right to a fair hearing within a reasonable time”

In Olaniyan, there was an appeal from the trial court decision on a “no-case” submission. The appeal was dismissed and it was ordered that the trial should proceed in the High Court.

In the course of the appeal, however, the issue of delay in the trial was raised. Kutigi J.C.A., after setting out the submissions of learned counsel for the accused person and the prosecution, observed at p. 162:

“In my view the complaint that the appellant has been denied his right of fair hearing because of adjournments is at this stage misconceived as it is premature. The simple fact is that the trial of the appellant is yet to be concluded. It is only the prosecution that has closed its case. The appellant may and may not decide to give evidence and or call witnesses. But the Judge has still got to write the judgments. A careful perusal of the record clearly show that most of the adjournments far from being unreasonable were explained and mostly due to the absence of witnesses. This is naturally to be expected although it should not be encouraged. Quite a number of the adjournments were also at the instance of the appellant’s counsel. So that if there was any delay at all, the defence also contributed to it.”

It distinguished *Bell v. P.P.P. (supra)* and concluded:

“I think it is opportune to observe here that the ruling of the learned trial Judge subject of this appeal was delivered on 6th March 1984 calling upon the appellant to enter his defence. It is now another 2 years 8 months since that ruling. I do not know who the appellant will blame for this delay hut certainly not the prosecution this time. I think the earlier the appellant

goes back and have the case decided one way or the other the better. I see no reason for example why this appeal could not have awaited the outcome of the case as a whole especially when the Judge is yet to decide whether or not there is sufficient evidence to warrant a conviction on Count 5 and the other counts 1, 6 & 7 which were conceded,"

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In my view, the facts of the case in hand are quite different to the facts in Olaniyan. Here the contribution to the delay by the defence counsel is quite minimal compared with the main reason for the delay, the non-production in court of the Appellant to stand his trial, a fault not of the Appellant or his counsel but of an organ of the State.

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From all I have been saying above and after a careful consideration of all the factors to be taken into account in resolving the question whether Appellant had a fair hearing within a reasonable time in the court of trial, the conclusion I reach is that his trial was not within a reasonable time; there is a breach of his constitutional right to speedy trial as enshrined in section 33(4) of the Constitution. I am not unmindful of the fact that, for a variety of reasons, the number of cases where there are extensive periods of delay between arrest and trial and between commencement of trial and judgment is increasing by the day. But this is not to say that the present state of affairs is anything to be proud of. This Court has always frowned at the delay in bringing accused persons to trial promptly and will continue to do so until the situation is remedied. This disapproval extends to the trial itself. The deprivation of the right to speedy trial is undoubtedly a violation of an accused person's constitutional right guaranteed under section 33(4) of the Constitution. The major reason for the delay in this case is the failure of the prison authorities to bring the Appellant to court on a number of occasions. The prison authority is an organ of the State. The failure is therefore, that of the State which incidentally is a party to the criminal proceedings. As Mahmoud Esq, learned *amicus curiae* put it in his Brief:

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"A government that cannot provide a means of transport to convey suspects to trials for very grave and serious offences loses much of its legitimacy. The point is not that the appellant may have committed a grave crime, but that the State has failed in its responsibility to bring him speedily to trial!"

G

I agree entirely with him; I need not say more but to add that there is an obvious decline in the quality of the administration of justice in this country which needs to be arrested now before it degenerates into chaos.

H

I have dealt with this issue of fair hearing within a reasonable time

not unmindful of the submissions of the learned Attorneys-General of Benue and Oyo States to the effect that this Court would have no jurisdiction to entertain the issue. They relief on section 42(1) of the Constitution in support of their submission. This Court has made it clear in a recent decision, *Peter Nemi & Ors. v. The State*, SC 303/1990 delivered on 14th October B 1994 (as yet unreported), that it has no original jurisdiction to entertain a complain of breach of constitutional right that is not intrinsic to the proceedings on appeal before it. Bello, CJN delivering the lead judgment of the Court, with which the other Justices that sat on the appeal agreed, said:

- C *"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.*
- D *It appears to me that upon careful examination of the fundamental rights in Chapter W 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 submission of Mr. Agbakoba, they*
- E *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*
- F *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*
- G *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 Constitu-*
- H *tion."*

The issue of fair hearing within a reasonable time arising in the appeal on hand belongs to the first of the two categories above. The issue is *intrinsic* to the trial and constitutes a valid ground of appeal. With profound respect

to the learned Attorneys, therefore, their submission on jurisdiction does not find favour with me.

Coming back to the thorny issue of speedy trial, the next question I have to answer is this: Having found that there is a breach of the Appellant's constitutional right to speedy trial as enshrined in section 33(4) of the Constitution, what remedy is he entitled to? Dr. Okafor, for the Appellant, asks for an order of retrial. The learned Attorney-General of Imo State, Mr. Livy Uzoukwu urges us to allow the appeal and discharge and acquit the Appellant. In the alternative, he urges "that this Court should sentence the appellant to a term of imprisonment which should approximate to the period the appellant has spent in custody from the date of his arrest to the date of the order of discharge (sic). The learned Attorney-General of Oyo State, Mr. Y.A. Akande, submits, in his Brief, that the delay complained of did not result in a miscarriage of justice since it has not in any way affected the merit of the case. He, therefore, urges us to dismiss the appeal.

The learned Attorney-General of Benue State, Mr. B.I. Horn is of the view that an order of retrial will cause more hardship to the appellant. I may mention that the position of Mr. Horn as well as that of Mr. Akande, Mr. Amiesimaka, learned Attorney-General of Rivers State and of Respondent's counsel, is that there was no unreasonable delay in the case on hand and, therefore there was no breach of section 33(4) of the Constitution.

Mr. Mahmoud whose position, as well as that of Mr. Uzoukwu is that there was inordinate delay occasioning a breach of section 33(4), submits as follows:

"Perhaps the more disturbing question for the Supreme Court is what is the remedy for the appellant? A retrial as has been urged. I submit this is ridiculous. It makes mockery of the provisions of the constitutions upon which the right to speedy trial is asserted.

It is suggested that in capital offenses, the death penalty should be imposed only upon proof of the offence in strict compliance with the due process of law and observance of all guarantees. The Human Rights Committee, the body that supervises the implementation of the United Nations Covenant on Civil and Political Rights considered this point in Raphael Henry.

After quoting the observations of the Committee, he observes:

"Nigeria is yet to ratify the Covenant on Civil and Political Rights. However even if it did, the decisions of the committee would only be of persuasive authority. The decision does nevertheless indicate the direction

in international jurisprudence of the protection of Human Rights. Fundamental Human Rights are placed on high pedestal by our constitution. The Supreme Court has an obligation to give meaning and effect to them. I admit in so doing, the court must balance this against the equally compelling demand for public justice. One of this is that criminals must be punished. However, that punishment must be inflicted after a fair trial."

He considers two possible remedies. Here is what he says on them:

"Should the Supreme Court recommend the appellant for Governor's consideration for some reprieve under his powers of the prerogative of mercy? While this may appear an option, it falls short of vindicating a constitutional right which has been found to be infringed! The essence of Fundamental Human Right is that where a violation has been established, the victim is entitled to a remedy.

Should the Supreme Court commute the death penalty to life imprisonment? This was the line of argument I adopted in my brief of argument (as amicus curiae) in Peter Newi v. The State. I have not seen the decision of the court yet. However, the position has the support of a number of judicial authorities which were cited and considered in Peter Newi. These include Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney-General and 2 Ors. Judgment no. S.C./3/93 as well as Earl Pratt and Ivan Morgan v. The Attorney - General of Jamaica and Anor, (unreported Privy Council Appeal No. 10 of 1993). Unless the Supreme Court has decided in Peter Newi, not to follow these authorities, I will still commend them to Your Lordships.

He finally urges that the death penalty be commuted to life imprisonment. In the alternative, he urges that we make a commendation on the Appellant's behalf for a reprieve by the Administrator in the exercise of his powers of prerogative of mercy.

I have given careful consideration to the submissions of learned counsel. Although the Appellant set out three issues in this Brief arguments are preferred only in respect of Issues (1) and (2). The position is that Issue (3) is deemed to have been abandoned. This is not surprising. In the court below, learned counsel who appeared for the Appellant had nothing to urge in favour of the appeal. In the Appellant's Brief in that court, the conclusion read:

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"With every sense of honesty and concern it is submitted that, having regard to the totality of evidence before the trial Court and the dispassionate and correct evaluation of it by the Court there is nothing to argue or urge in favour of the appeal. Therefore, the judgment of the

Honourable Justice E.E.E. Effanga of the Cross River High Court sitting at Calabar and sentencing the Appellant to death for murder appears from all respects to be proper."

I too have examined the evidence on record and the judgments of the two courts below; it is my considered view that the conviction of the Appellant was correct. The result is that although there has been a breach of the Appellant's constitutional right to speedy trial, the breach has not occasioned a miscarriage of justice. The appeal, therefore, will be dismissed.

True enough, the maxim is: *ubi jus ibi remedium*. that is to say, where there is a right there is a remedy. In this connection I bear in mind the dictum of Eso JSC in *Ariori A Ors. v. Elemo & Ors. (1983) All NLR (Reprint) 1 at p. 17*:

"Having regard to the nascence of constitution, the comparative educational backwardness, the socio-economic and cultural background of the people of this country and the reliance that is being placed and necessarily have to be placed, as a result of this background on the courts, and finally, the general atmosphere in the country, I think the Supreme Court has a duty to safeguard the fundamental rights in this country....."

But in safeguarding the fundamental rights of the Appellant in the present case the Court must not lose sight of the fact that while section S. 33(4) of the Constitution secures to the Appellant the right to speedy trial it does not preclude the rights of public justice. It behoves on the Court, therefore, to balance the two distinct rights, that is to the Appellant on the one hand and to the public on the other.

It clearly cannot be within the intendment of sections 33(4) to order a retrial in this case, as requested by Dr. Okafor. Such an order will further prolong the agony of the Appellant and lead to a possible breach of another fundamental right, the kind complained of in *Peter Nemi A Ors. v. The State (supra)*, that is, the right not to be subjected to torture or to inhuman or degrading treatment - section 31(l)(a) of the Constitution.

Similarly, an order of discharge and acquittal, as urged on us by Mr. Uzoukwu will amount to precluding the right of public justice. I say this because, on the evidence, the Appellant was correctly convicted and there is no allegation, let alone proof, that his defence was in anyway impaired. If the delay had occasioned a miscarriage of justice I would have unhesitatingly allowed his appeal and discharge and acquit him. But there was no miscarriage of justice occasioned in this case. Reading section 33(4) along with subsections (1) and (4) of Section 258 of the Constitution which

provide:

“(1) *Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.*

(4) *The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provision of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.”*

The inference that can be gathered is that it is not the intendment of the Constitution that delay per se is to vitiate any proceedings unless such delay occasions a miscarriage of justice. Such was the case in *Ozulonye & Ors. v. The State* (supra) where the Court of Appeal ordered an acquittal.

In *Ayambi v. The State* (supra) where there was no such miscarriage of justice, the Court of Appeal dismissed the appeal, although it strongly deprecated the delay in the trial. In *Bell v. D.P.P.* (supra) the Privy Council declined to order that the applicant be discharged and not tried again on the original or any other indictment based on the same facts, notwithstanding that it held that there was a breach of the applicant’s constitutional right to speedy trial. I must mention, however, that the Council took this stand after assurance that the authorities in Jamaica would invariably adhere to the letter and spirit of the Council’s advice. The Court at common law has always had power to provide a remedy against unreasonable delay before trial, such as releasing an accused person in custody on bail or dismissing the charge for want of prosecution, or in a proper case where retrial is ordered, treat the retrial if not conducted within a reasonable time as an abuse of the process of the court.

Mr. Mahmoud has invited us to commute the sentence. In the circumstances of this case I would readily have acceded to this request if there was power to do so. Section 26 of the Supreme Court Act Cap. 424, laws of the Federation of Nigeria (1990 edition) which provided:

“The Supreme Court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any neces-

sary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court."

Read along with section 20(3) of the Court of Appeal Act which reads:

"20(3). On an appeal against sentence or, subject to the provisions of this Act, on an Appeal against conviction the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and if not of that opinion shall, in the case of an appeal against sentence, dismiss the appeal."

Empowers this Court, in appropriate cases, to interfere with the sentence passed on an appellant before it. But this power, in my view, can only be exercised where there is discretion in the court as to the sentence to be imposed. In the case on hand, the conviction being for the offence of murder the sentence provided for by the Criminal Code is mandatory, and that is death. Being mandatory the Court cannot interfere with it by reducing it to anything else. In the circumstance, this Court has no jurisdiction to commute the sentence of death to life imprisonment. Mr. Mahmoud's request is, therefore, refused.

Learned counsel has, in the alternative, urged us to recommend the exercise by the Military Administrator of his prerogative power of mercy. Section 192 of the Constitution gives the Administrator the power to exercise mercy to anyone concerned with or convicted of any offence created by the Law of the State. The section reads:

- (1) *The Governor may -*
- (a) *grant any person concerned with or convicted of any offence created by any Law of a State a pardon, either free or subject to lawful conditions;*
- (b) *grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;*
- (c) *substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or*

- (
d) *remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.*
(2) *The powers of the Governor under subsection (1) of this section shall be exercised by him after consultation with such advisory council of the State on prerogative of mercy as may be established by the Law of the State."*

B The responsibility for the breach of the Appellant's constitutional right to speedy trial is essentially that of the State. It was the duty of the C State as the charging authority to provide the Appellant with a prompt trial. Indeed, the duty of the State is not only to bring a defendant to prompt trial, it is equally its duty to ensure that the trial is consistent with due process of law. It has been argued that defence counsel contributed to the delay. This argument overlooks the fact that counsel was produced for D the Appellant by the Legal Aid Council, another organ of the State and that he had no part to play in the choice of counsel. That was (and still is) the factual situation. In any event the right to speedy trial is not one that can be waived by a defendant in a criminal trial - see *Ariori v. Elemo* (supra), even though his failure to assert that right is a factor to be considered along with other factors in an inquiry into the deprivation of that right E - see *Barker v. Wingo* (supra).

Bearing all these in mind, I agree with Mr. Mahmoud that this is a proper case calling for the exercise by the Military Administrator of Cross River State (after due consultation) of his prerogative of mercy as provided F in section 192(c) or (d). I so recommend. In making this recommendation I bear in mind, the major cause and length of the delay in this case, the fact that, as found by the learned trial Judge, the Appellant was reduced to "*a bag of bones*" in the course of the trial. It is to be hoped that all efforts will be made by the various governments in the Federation to enhance the G quality of the administration of justice in this country by the adequate provision of the wherewithal for this purpose.

OGWUEGBU JSC

H I have read the judgment of my learned brother Onu, J.S.C. I agree with his conclusion. Our view are with respect different in respect of the second issue for determination which alleged a breach of section 33(4) of the Constitution of the Federal Republic of Nigeria, 1979.

It is not necessary to travel into all the circumstances of this case.

However, the appellant herein was charged before the Calabar High Court in the Cross River State with murder contrary to section 319(1) of the Criminal Code.

The particulars on the indictment were that on the 25th day of B March, 1985 at Ekim Ebebit, Odukpani in the Calabar Judicial Division he murdered one Nnwa Akpan Ikwp. Altogether, seven witnesses testified for the State and the appellant testified in his defence and called no witness.

At the conclusion of the whole case, the learned trial judge, (Effanga, J.) in a reserved judgment after considering the evidence before C him found the appellant guilty of murder and sentenced him to death by hanging. He was dissatisfied with that judgment and appealed to the Court of Appeal. The court below came to the conclusion that the appeal lacked merit and dismissed it. The Appellant has appealed further to this court.

From the grounds of appeal, the following issues for determination D arc-Identified in the appellant's brief of argument:

- (1) *Whether there had been a valid arrangement (sic) in accordance with the provisions of section 215 of the Criminal Procedure Law, (CPL.);*
- (2) *Whether there was a trial within a reasonable time within the provisions of section 33(4) of the 1979 Constitution;*
- (3) *Whether the prosecution had proved its case against the appellant beyond reasonable doubts."*

The first two issues for determination are fresh points not raised in the F court below. It is clear that this court will not allow a party on appeal to raise a question in an appeal court or grant leave to a party to argue new grounds not canvassed in the lower courts except where the new points or new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an Obvious miscarriage of justice. See G *Akpene v. Barclays Bank of Nigeria* (1977) 1 S.C. 47, *Ohride v. Oyebe* (1984) 5 S.C.I., *Adio v. The State* 2 N.W.L.R. (Pt. 24) 581 and *Attorney-General. Oyo State v. ss Hotel Ltd.* (1985) 5 N.W.L.R. (Pt. 92) 1 at 29.

Both issues involve alleged breaches of statutory and constitutional provisions to ensure the fair trial of the appellant. They are fundamental and substantive hence this court granted the appellant leave to H canvass them in this court.

Arguing the first issue, Dr. Okafor learned appellant's counsel submitted in his brief of argument that a criminal trial does not commence

unless a proper plea of the accused person is taken. He referred to section 215 of the Criminal Procedure Law and section 33(6) of the 1979 Constitution.

B Learned counsel referred to the two pleas made by the appellant on 25:1:88 and 4:5:88 before Effanga, J. In respect of the plea made on 25:1:88, he submitted that there is no record of what language that was used in reading and or interpreting the charge to the appellant and no record that the trial judge was satisfied with the explanation of the charge to the appellant.

C As to the plea of 4:5:88, counsel submitted that there is also no record of what language that was used in reading and or interpreting the charge to the appellant; no record that the charge was interpreted or explained to the appellant and no record that the trial judge was satisfied that the appellant fully understood the charge and its import. He submitted that D both pleas were defective and invalid. On this issue, he urged the court to make an order for a retrial because the trial is a nullity. He cited and relied on the following cases in support of his submissions: *Kajubo v. The State* (1988) 1 N.W.L.R. (Pt. 73) 721, *Evorokoromo v. The State* (1979) 6-9 SC. 3 *Ogodo Ebemy. The State* (1990) 7 N.W.L.R. (PL 160) 113, *Oyediran v. E The Republic* (1967) N.W.L.R. 122 and *Erekanure v. The State* (1993) 5 N.W.L.R. (Pt. 294) 385.

Mrs. Ikpeme, learned Director of Public Prosecutions, Cross River State submitted in the respondent's brief of argument that the important thing is whether the appellant understood the charge. She distinguished F *Kajubo's* case *supra* from the case before the court. She contended that there was a valid plea and urged the court to uphold the conviction and sentence passed by the trial court and confirmed by the court below.

On 15:12:86, the appellant was arraigned before Udofia, J. and he pleaded to the charge. When Effanga, J. took over the hearing of the G case, fresh plea was recorded on 25:1:88 as follows:

"The charge is read and interpreted to the accused. He says that he understands same. He pleads - "Not Guilty". On 4:5:88, a further plea of the appellant was recorded before Effanga, J. in the following terms:

"Charge is read to the accused. He says he understands same. He H pleads - "Not Guilty"."

I will at this juncture set out the provisions of section 215 of the Criminal Procedure Law and section 33(6) (a) of the 1979 Constitution: "215.. *The person to be tried upon any charge or information shall be placed before the court unfettered, and the charge*

or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto” (unless there are valid reasons to do otherwise as provided in section 100 of the Criminal Procedure Law).

33(6) (a) Every person who is charged with a criminal offence shall be entitled - B

(a) to be informed promptly in the language he understands and in detail of the nature of the offence;”

The statutory and constitutional provisions are designed to ensure that an-accused person understands and appreciates the nature of the alle- C gation made against him.

Where an accused person does not understand the language of the court, it is the interpreter who will inform him in detail, the nature of the offence. Even where the accused person understands the language of the court which in this country is English, the charge must still be read over *and D explained to him* - section 215 of the Criminal Procedure Law. The provisions of section 215 of the Criminal Procedure Law and section 33(6) (a) of the Constitution are fundamental as well as mandatory. A strict compliance with the requirements of section 215 of the Criminal Procedure Law is a pre-requisite to a valid trial. See *Kajubo v. The State* (1988) 1 N.W.L.R. E (Pt. 73) 721 and *Sanmabo v. The State* (1967) N.M.L.R. 315 at 317.

Were the mandatory statutory requirements complied with in this case? In *Kajubo v. The State* supra, the provisions of section 215 of the Criminal Procedure Law were not complied with. The record of the Court F in that case reads:

“Court: Registrar please take the plea of the accused.

Plea: Accused: Not Guilty.”

When the charge was amended, the plea recorded by the learned trial fudge runs thus: G

“Court: Registrar takes the plea of the accused on the amended charge.

Accused: 1st Count: Pleads Not Guilty

2nd Count!: Pleads Not Guilty.”

In the more recent case of *Erakanure v. The State* (1993) 5 N.W.L.R. (Pt. 294) 285 which was also cited and relief upon by the learned H appellant’s counsel, the plea as recorded by the learned trial judge reads:

“M.L Edokpayi S.C for the State J.E. Sharkarho for the Accused Charge read to the accused. He pleads not guilty to the Law Court. Prosecution opens its case.”

The pleas recorded by the learned trial judges in the cases of *Kajubo and Erekanure* (supra) do not pretend to be in compliance with the statutory requirements. In the former, there is nothing to show that the charge was read to the appellant let alone explained to him in the language he understood. In the latter, the charge was read but the other requirements of B section 215 of the Criminal Procedure Law were left out.

The same cannot be said of the plea made by the appellant on 25:1:88 and recorded by the learned trial judge in this case. The plea showed that the charge was read over and interpreted to the appellant. The purpose of the interpretation is to inform the accused in the language he understands of the nature of the offence charged. After that, the record showed that the appellant understood the charge before he pleaded not guilty to it.

I am therefore of the firm view that the plea of the appellant taken D and recorded by Effanga J. on 25:1:88 is unimpeachable. It was a valid and proper arraignment. The appellant is merely trying to catch at a straw when he raised this issue. The plea is binding on him and the second plea taken on 4:5:88 before the same judge can be treated as superfluous. It is still good practice for trial courts to specifically record that “the charge was E read and fully explained to the accused to the satisfaction of the court and the accused understood the same.” Thereafter, his plea is recorded.

The second issue for determination is the complaint by the appellant that his right entrenched in section 33(4) of the 1979 Constitution was F violated. Because of its constitutional importance, this court invited some Attorneys-General of the country and eminent members of the unofficial Bar as *amici curiae* for their assistance. They responded favourably.

The Attorneys-General of Benue, Imo, Oyo and Rivers States as G well as Mr. A.B. Mahmoud filed written briefs of argument. Messrs. Livy Uzoukwu and Adokiye Amiesimeka, Attorneys-General of Imo and Rivers State were present at the hearing of the appeal as well as Mr. Mahmoud. They adopted their respective briefs of argument and made oral submissions in elucidation of their written briefs. The Attorneys-General of Oyo H and Benue States were represented by the Directors of Public Prosecutions in the States’ Ministries of Justice namely, Mrs. M.F. Oladeinde and Mrs E.N. Kpojime respectively.

The submission of Dr. Okafor learned counsel for the appellant on issue two can be summarised as follows:

1. The period from arraignment to the conclusion of trial was too long.
2. The long intervals between the reception of oral evidence and the delivery of judgment raised the presumption of contravention of the section 33(4) of the constitution.
3. A reasonable time should be construed as *“the period of time which in the search for justice does not wear out the parties and their witnesses and in this particular case, it was too long and unreasonable.”* B

He referred to the following cases: *Ariori & ors. v. Elemo A ors.* (1983) 1 S.C. 13. *Akpor v. Igurieuo* (1978) 1 L.R.N. 36. *Ekeri & ors. v. Kimisede C & ors.* (1976) 1 N.L.R. 383.

Learned counsel submitted that the appellant was not tried within a reasonable time and that this court should make an order for a retrial.

As to whether the appellant was tried within a reasonable time in accordance with section 33(4) of the Constitution, Mrs. Ikpeme conceded D that the trial lasted two years and eight months, that there were thirty sittings, final addresses were concluded on 4:12:90 and that judgment was delivered in compliance with section 254(1) of the Constitution. She further stated that since judgment was delivered within the constitutional limitation, it cannot be faulted on grounds of not being delivered within a reasonable time. I must state here that the complaint of the appellant is not on E the breach of section 258(1) of the 1979 Constitution but on the violation of section 33(4) thereof. The learned D.P.P. by the above submission appeared to miss the point raised in issue number two. She however referred us to the case of *Sambo v. The State* (1989) 1 C.L.R.N. 77. F

She further submitted that the several adjournments were not deliberate but due to circumstances beyond the control of the prosecution and whether or not undue delay led to a denial of justice in a particular case would depend on the nature and the circumstances of the case. In her G view, the delay if any, did not lead to any miscarriage of justice.

The learned amici curiae adopted two distinct and opposing stands in their briefs of argument. Mr. Livy Uzoukwu, Hon. Attorney-General of Imo State and Mr. A.B. Mahmoud held the view that there was unreasonable delay resulting in the breach of section 33(4) of the Constitution. The H Hon. Attorneys-General of Benue, Oyo and Rivers States were of the opinion that there was no undue delay in the trial and even if there was, it did not occasion any, miscarriage of justice.

Mr. Uzoukwu the Honourable Attorney-General, Imo State in his brief and oral submission pointed out that the appeal turns on the correct interpretation of the words “*fair hearing*” and “*within a reasonable time*” vis-a-vis the facts of the case which he high-lighted. For the interpretation of “*fair hearing*,” he referred to the case of Isiyaku Mohammed v. Kano N.A. B (1968) 1 All N.L.R. 424 at 426 and Black’s Law Dictionary 5th edition for the words “*reasonable time*”.

He further referred us to the case of Wright v. New Zealand Shipping Co. Ltd. (1878) 4 Ex. D. 165n at 168n, Davis v. Capper (1829) 4 C & D 134 at 138 and African Charter on Human And Peoples Rights Cap. 10 C Laws of the Federation of Nigeria, 1990.

On the meaning of “*reasonable time*”, he submitted that it is a mixed question of law and fact. It was his further submission that it took almost six years to arrest, prosecute and convict the appellant and that regard must be had to the length of time and the reason(s) for the delay. He D stated that for the most part, the prosecution was responsible for the delay and from the records, the appellant was a helpless victim of the inability of the prosecution and to a lesser degree, the defence counsel, to accord the trial the priority attention it deserved and that at a point, the appellant was described as “*a bag of bones*” by the court.

E He cited the cases of Ariori &ors. v. Elemo A ors. (supra) Folade v, Attorney-General. Lagos State and Barker v. Wingo, 407 U.S. 1514, 1530 (1972) and urged us to adopt the four factors identified in Barker’s case in determining whether the appellant has been denied his right to a speedy trial.

F As to the factor of “*prejudice to the defendant*”, he stated that the appellant was in custody for six years from the date of his arrest to the date of judgment during which period he was totally wasted and degenerated to “*a bag of bones.*” He finally submitted that section 33(4) of the Constitution was breached.

G As to the appellant’s remedy, he referred the court to the cases of Nwankwo & ors. v. The Queen (1959) 4 F.S.C. 274, Garba v. The State (1972)4 S.C. 118 at 122, Ozuluonve & ors. v. The State (1983) 4 N.C.L.R. 204; (1981)2 N.C.R. 38, Avambi v. The State (1985)6 N.CL.R. 141, 142 (C.A.), Sambo v. The State (1989)1 C.L.R.N. 75 (C.A.X Asakitikm v. The H State (1993)5 N.W.L.R. (Pt. 296) 641, Sofekun v. Akimemi (1980)5-7 S.C.I and Bellow & ors. V. Attorney-General, Oyo State (1986)5 N.W.L.R. (Pt. 45) 828. We were urged to allow the appeal on the ground of the infringement of the appellant’s right to fair hearing within a reasonable time and set the appellant free or in the alternative to sentence the appel-

lant to a term of imprisonment which should approximate to the period he had spent in custody from the date of his arrest to the date of the order for his discharge.

The Honourable Attorney-General, Rivers State, Mr, Adokiye Anieshimaka, M.O.N. submitted that the Constitution did not specify what period or length of time should constitute “a reasonable time”, within which any person charged with a criminal offence should be tried. It was his contention that from the facts, the causes of the delay were two-fold: firstly the inability of the Prison Authorities to bring the appellant to court on the adjourned dates and secondly, the absence of the defence counsel and in either case, the trial could not go on having regard to sections 210 C and 352 of the Criminal Procedure Act, Laws of the Federation of Nigeria, 1990 which provide:

“210. Every person shall subject to the provisions of section WO and of subsection (2) of section 223 of this Act, be present in court during the whole of his trial unless he misconducts himself by so D interrupting the proceedings as to render their continuance in his presence impracticable.”

“352. Where a person is accused of a capital offence the State shall, if practicable, be represented by a law officer or a legal E practitioner and if the accused is not defended by a legal practitioner the court shall, if practicable, assign a legal practitioner for his defence.”

He adopted the four factors which the courts apply in determining Whether a particular defendant has been deprived of his right to a speedy trial as identified in *Barker v, Wingo* 407 U.S. 1514, 530(1972). It his F further submission that the failure of the Prison Authorities to the appellant to court is extraneous to the trial while that caused the defence counsel is likened to the maxim “*volention fit injuria*.”

He urged the court to hold that the appellant had a fair trial within reasonable time. He reminded the court that justice is not a one way 5. He G finally submitted that the appeal lacked merit and should be dismissed.

Mrs. Oladeinde, learned acting Director of Public Prosecutions, Oyo state who held the brief of the Honourable Attorney-General, Oyo State Emitted that the learned counsel for the appellant in the court of trial contributed in no small measure to the delay and that the delay should be H balanced with the merits of the case. It was her further submission that the delay did not result in a miscarriage of justice and did not amount to a denial of fair hearing. She referred the court to the case of *Olaniyan v. The State* (1987)1 N.W.L.R. (Pt. 48) 156 at 162 and stated that the issue

should be canvassed under section 42(1) of the 1979 Constitution.

Mrs. Kpojime, learned Director of Civil Litigation, Ministry of Justice, Benue State held the brief of the Honourable Attorney-General of Benue State, Mr. B.I. Horn. She argued that the issue was never raised in the court below but assumed that leave to canvass the issue was granted by this court. It was her submission that by the provision of section 212(1) of the Constitution, this court has neither the original jurisdiction nor appellate jurisdiction to entertain the issue and that the appellant should have commenced proceedings in the High Court under Section 42(1) of the Constitution.

In the alternative, she argued that on the facts and the circumstances of the case, there was no procedural irregularity leading to a denial of fair hearing and what amounts to fair hearing within a reasonable time will continue to be a disturbing question in view of long delays in criminal trials in Nigeria in the absence, of laid down rule limiting the period of trials. She referred to *Nwankwo v. The Queen* (1959) 4 F.S.C 274, *Garba v. The State* (1972) 4 S.C 118 and *Nasamu v. C.O.P.* (1976) CCHCH, 2655.

She concluded by stating that there was no unreasonable delay in the trial and that a retrial will cause more hardship. She urged us to dismiss the appeal.

Mr. Mahmoud, learned amicus curiae in his submissions, pointed out that there is indeed a gradual but steady decline in the standards of administration of criminal justice in Nigeria.

Construing the provision of section 33(4) of the Constitution, learned amicus curiae stated that the salient words are “fair hearing” and “*reasonable time*.” He submitted that “fair hearing” is a broad concept which encompasses the fair exercise of authority consistent with the fundamental principles of justice embraced within the conception of due process of law. He referred to the case of *Mohammed v. Kano N.A.* (1968) 1 All N.L.R. 424. He stated that the concept of “*reasonable time*” is more problematic since it is not defined in the Constitution.

On the concept of unreasonable delay, he had to fall back on cases decided by Nigerian and foreign Courts. Such cases referred to us include: *Garba v. The State* supra, *Osasie v. The State* Suit No. FSC. 21/159 of 10:3:59, *Ariori v. Elemo* supra and *Beavers v. Haubert* 25 SC. 573, 198 U.S. 77 decided by the United States Supreme Court.

To resolve the question, he submitted that the court ought to consider the length of the delay and examine the reasons for the delay. He referred to the cases of *Bell v. D.P.P.* (1985) 1985 A.C. 937 and *Barker v. Winpo* 407 U.S. 514 where the United States Supreme Court identified

four factors which it considered in deciding whether the right to speedy trial asserted by the appellant in that case was infringed, namely, the length of the delay, the reasons given by the prosecution for the delay, the responsibility of the accused for asserting his rights and the prejudice to which the accused may be exposed. After outlining the various dates the case progressed from plea to judgment and the reasons for the delay, he submitted that there was an inordinate delay in the trial of the accused. B

As to the remedy, he submitted that the court should hold that the Appellant was not given a fair hearing within a reasonable time and that his fundamental human right under section 33(4) of the Constitution was infringed. He urged us to commute the death sentence to life sentence and in the alternative, to make a recommendation on the appellant's behalf for the Governor's reprieve in the exercise of his powers of prerogative of mercy. C

It is necessary at this stage to set out the facts and circumstance of the case to be able to say whether there was a trial within a reasonable time provided in section 33(4) of the Constitution. D

The appellant was arrested on or about 27:3:85 and he has remained in custody since then. His case first came before Udofia, J. on 14:4:86. It was not produced on that day. There were five adjournments from THAT day until 15:12:86 when Udofia, J. took his plea. After the plea, the case suffered five more adjournments. The last before Udofia, J. was on 4:11:88. E

The matter came before Effanga, J. on 25:1:88 and fresh plea was taken on that date. There were a total of eleven adjournments spanning over eighteen months when the case was pending before Udofia, J. F

From the date of plea before Effanga, J. (25:1:88) and the date lent was delivered on 7:1:91, there were thirty three sittings and one adjournments. The period of delay if any, must be reckoned 25:1:88 when plea was taken before Effanga, J. who eventually tried the case. The trial took almost three years. The appellant was in for five years and ten months from the date of his arrest to the date of his conviction and sentence. G

During the trial, the appellant's counsel was absent on seven occasions. On two of those dates, the appellant was not produced in court and even if his counsel had been present, hearing could not have proceeded, live out of the thirty three sittings, he was not produced. The prosecution could not go on with its case on seven occasions because of the absence of H

its witnesses.

Given the above facts and circumstance, can it be said that the constitutional right of the appellant enshrined in section 33(4) of the Constitution was not breached? The appellant was charged with a capital offence which carried death penalty on conviction. As rightly pointed out by B all the learned counsel who made submissions in this appeal, the meaning of “fair hearing” and “reasonable time” are not given in the 1979 Constitution nor in any previous Constitution. They have no doubt received judicial interpretations. The courts cannot definitely say how long is too long in our administration of civil and criminal justice. No inflexible rule can be set but C a balancing test must be applied in which the conduct of the prosecution and the defence are considered.

In *Anon & ors. v. Elemo & ors.* (1983)1 S.C. 13 at 24, Obaseki J.S.C. said:

“In my view, *“fair hearing within a reasonable time” accords with D the demands of justice and a waiver of this right amount to a waiver of justice. Fair Hearing, therefore, must mean a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the case. “Reasonable time” must mean the period of time which, in the search for justice, does not wear out the E parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done.”*

In *Isiyaku Mohammed v. Kano Native Authority* (1968) All N.L.R. 411 (Reprint), Ademola, C.J.N. said:

“It has been suggested that a fair hearing does not mean a fair F trial. We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two. The true test of a fair hearing..... is the impression of a reasonable person who was present at the trial whether, from his observation, G justice has been done in the case.

As I stated earlier in this judgment, there were a total of thirty one adjournments after the plea of the appellant before Effanga, J. The prosecution could not go on with its case on seven occasions because of the absence of its witnesses. The State could not produce the appellant on H twelve of the thirty one adjournments. The counsel which the State as signed to defend the appellant was absent on seven occasions and in two out of the seven occasions, the appellant was not produced in court.

P.W. 1 testified on 4:5:88, the day the second plea of the appellant was taken and the prosecution applied for an adjournment after his

evidence. PW.2, PW.3 and PW. 4 testified on 12:7:88. PW.5, PW. 6 and PW. 7 testified on 11:4:89 ten months after PW.4 testified. The appellant gave evidence on 21:6:90 over one year from the date PW.7 testified. His cross examination started on the same day and closed on 25:6:90. The defence closed its case on this date as well. Addresses of both counsels were taken on 10:7:90, 17:7:90 and 4:12:90 even though both counsels could have addressed the court in the one day. B

In other words, the prosecution's case took three days, the defence, two days and the addresses of counsel took three days making a total of right sitting days out of thirty one sitting days. The twelve adjournment necessitated by the non-production of the appellant either because the Black Maria broke down or was not available and the seven adjournments caused by the failure of the prosecution witnesses to attend the court and testify could not be attributed to the fault of the appellant. The appellant was from the date of his arrest to the date of conviction at the mercy of the State. C D

The following cases also illustrate the attitude of this court on "fair hearing" and "reasonable time" in criminal and civil proceedings: In *Nwankwo & ors. v. The Queen* (1959) 4 F.S.C. 274, this court expressed grave concern over lack of efficiency in the preparation and institution of certain criminal prosecutions and over the delay in bringing accused persons to trial. It was a prosecution for murder committed seven years before the case was tried. E

In *Garba v. The State* (1972) 4 S.C. 118, the appellant was convicted culpable homicide and sentenced to death. On appeal, Sowemimo, J.S.C. (as he then was) said: F

We observe with some concern the period which the appellant spent in between his arrest which was sometime in April, 1969 and his trial at the High Court, Maiduguri which commenced on 14th April, 1971, a period of about two years and two months. We have had in the past to draw attention to this unjustifiably long period in awaiting trial. G

In this appeal, there is nothing on record explaining or justifying the long delay. We wish that this situation should be brought to the notice of the authorities concerned in order to obviate any recurrence. We also wish size that it is of the essence of criminal justice, especially in Tence, that there should be a speedy trial." H

(the underlining is for emphasis only).

I entirely agree with this statement. The appeal was however dismissed. The situation has not yet improved.

In the more recent case of *Asakitikpi v. The State* (1993) 5 N.W.L.R.

I) 641, one of the issues decided was whether the appellant was denied a fair trial as a result of the inordinate delay in commencing the trial of the case. This court while interpreting section 33(4) of the Constitution said:

B *What section 33(4) of the 1979 Constitution provides for is the trial up to judgment after the accused has been charged with an offence, hence the provision "whenever any person is charged with a criminal offence" While investigation may even take quite sometime, trial must be within a reasonable time after the accused has been charged."*

C There was a time lag of fourteen months between the date the appellant was charged to court and the date the trial commenced. There was a short period of less than three weeks from the date of hearing to the date of judgment. The court held that the trial was conducted within a reasonable time and that what is material is the period of trial.

D Before *Ariori & ors. v. Elemo & ors.* supra was decided, this court had occasions to express its views on the issue of delay. See *Akpor v. Iguorisuo* (1978) L.R.N. 36, *Ekeri & ors. v. Kimisede & ors.* (1976) 1 N.M.L.R. 194 ^ *Chief Kakara & or. v. Chief Imonikfie & or.* (1974) 1 All N.L.R. (Pt. 1) 383 and *Awobivi & Sons v. iKbalaive Brothers* (1965) All N.L.R. (Re-print) 169 at 171.

E In the first two cases, the appeals were allowed and the cases were remitted to the High Courts for hearing de novo while in the last two, the defendants' appeals were allowed and the plaintiffs' claims were dismissed. These cases dealt with the effect of unreasonable delay between the hearing of the cases and the time when judgments were delivered by the trial
F courts.

G In those cases this court recognised that decisions on issues of facts primarily rest with the tribunal of trial but intervened because of unreasonable delay between the hearing of the cases and the time judgments were delivered by the trial courts. In each of them because of the lapse of
time, the trial judge could not have recalled accurately the impressions made on him by the witnesses when he gave judgment based principally on the relative value of the evidence presented.

H The Court of Appeal had also considered section 33(4) of the Constitution in the case of *Ozuluonve & ors. v. The state* (1983) 4 N.C.L.R. 204 where it took four years for the trial court to hear evidence and deliver its judgment. That court allowed the appeal and quashed the conviction. A similar decision was reached in *Ayambiv. The State* (1985) 6 N.C.L.R. 141 where the delay was about two years. In *Sambo v. The State* (1989) 1 C.L.R.N. 77, the same court held that section 33(4) of the Constitution

was not infringed notwithstanding a delay of seven years from the date of the offence to the date of judgment. These cases terminated in the court below.

Coming back to the appeal before us, contrary to the submission of the learned counsel for the appellant, the perceptions and memory of the learned trial judge were not affected by the delay. The facts and the circumstances of the case are very clear and not open to any speculation. B

As I observed earlier in this judgment, the reasons for the delay in the trial can in no way be attributed to the fault of the appellant. The delay in the trial was almost exclusively caused by the prosecution which is an agent of the State be it the Prison Authority or the Director of Public Prosecutions. C

On 23:11:89 when the prosecution could not go on because of the absence of the doctor, the learned trial judge observed as follows: “*Having seen the accused in person and the state of his health, I am of the view that he is in no good health to continue with the trial. He is in fact a bag of bones and needs urgent medical attention.....*” D

In view of the above comment, can “reasonable time” in this case still mean the period of time which, in the search for justice, does not wear out the parties and their witnesses? I think not See *Ariori & ors. v. Elemo & ors.* supra at 24. The appellant was completely worn during the period of his trial. I have applied a balancing test in considering the conducts of the prosecution and the defence in this case and I have come to the conclusion that there was unjustified and unreasonable delay on the part of the prosecution having regard to the nature of the offence charged. F

Having come to the conclusion that there was unreasonable delay in the trial, the next question is the appellant’s remedy. Dr. Okafor urged the court to remit the case to the High Court for a retrial. As rightly pointed out by Mr. Mahmoud, it will make a mockery of the provisions of the Constitution upon which the right to speedy trial is asserted. G

In the words of Mrs. Ikpeme learned Director of Public Prosecutions, Cross River State:

“*If appellant contends that the whole trial lasted too long, how can he urge the court to order a retrial. If he complains about witnesses who testified three to four years after the commission of the offence, how can he want the court to call back the same witnesses to now testify nine good years after the commission of the offence.*” H

A retrial is out of the question and runs counter to the main issue canvassed in this appeal

Before considering any other remedy, it is important to determine whether a failure of justice was occasioned by such delay. A failure or miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word a judicial procedure at all. See *Srimati Bibhabati Devi v. Kttmar Ramcndra Narayan Roy* (1946) A.C, 50K at 521. It is not only the appellant who has the claim to justice, the victims of this triple and barbaric killings and the general public demand justice as well. While it is obligatory on the courts to give meaning to the provisions of the fundamental human rights entrenched in our Constitution, the courts must balance it against the equally compelling demand for public justice. See *Kainho v. The State* (WHS) N.W.L.R. (Pt. 73} 721 and *Josiah v. The State* (1985) 1 N.W.L.R. (Pt. 1) 125. In *Heavers v. Haubert* (1905) 198 U.S. 77, it was said that:

"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of the public to justice."

On the merits and quite apart from the delay, the conviction and sentence imposed on the appellant cannot be faulted. I am therefore not prepared to hold that there is a miscarriage of justice in the case.

It was submitted by the learned Attorney-General of Oyo State that the issue of fair hearing within a reasonable time should not have been canvassed in this court and that the appropriate procedure is that provided in section 42(1) of the Constitution.

This argument tows the line of opposing arguments in a recent and unreported judgment of the full court in SC. 303/1990:

Peter Nemi & ors. v. The State

The main issue decided in that case was whether inordinate delay in executing the appellants amounted to torture, or inhuman or degrading treatment under section 31(1) (a) of the Constitution. The rights being asserted in that case were extrinsic to the trial whereas the right to fair hearing within a reasonable time as provided in section 33(4) of the Constitution is intrinsic to the trial of the present appellant. The complaint under section 31(1)(a) of the Constitution is in respect of delay subsequent to the trial and not part of it. A complaint under section 33(4) of the Constitution must relate to delay during trial i.e. from the date of arraignment to the date of judgment whereas any complaint based on section 31(1) (a) must have occurred after the trial of the person complaining. This court has no origi-

nal jurisdiction to entertain any complaint under section 33(1)(a). The procedure is as provided in section 42(1) of the Constitution which provides:

“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.”

While the procedure in section 42(1) of the Constitution may be followed in complaints of contraventions of the provisions of Chapter IV of the Constitution, the right to fair hearing claimed by the appellant under section 33 of the Constitution are challengeable in appellate proceedings and without resort to section 42(1).

In the result, I will dismiss the appeal and it is hereby dismissed by me. The conviction and sentence imposed on the appellant by the trial court and confirmed by the court below are hereby reaffirmed.

It must however be pointed out that a situation where the appellant was in custody for five years between his arrest and conviction because the State could not provide transport to convey him to court to stand trial within a reasonable time for such a serious offence is a dangerous to the administration of criminal justice in this country. While they may have their own share of the blame, the other arms of government have not shown enough interest in the institutions of criminal justice administration and have regarded those institutions as no priority areas. Otherwise the inability of the State to provide vehicle to transport an accused to court to stand his trial in a capital offence cannot be justified.

This is a proper case where the Governor may exercise his powers of prerogative of mercy by commuting the death sentence to that of life imprisonment under section 192 of the Constitution.

MOHAMMED JSC

I have gone through the draft of the lead judgment written by my learned brother, Onu, JSC., and the respective drafts of the judgments of my learned colleagues, with whom I had the advantage of sitting to hear and consider this appeal. I must state, without the slightest hesitation, that I agree that this appeal lacks merit and should be dismissed.

My learned brothers have written far-reaching and scholarly judgments on the facts and law put up for consideration in this appeal. Unless I want to be repetitive of what has already been considered in those deci-

sions, it is plain that I have been left with little to add. Be that as it may, it is pertinent to emphasize that the facts of this case are very simple indeed. The evidence of the prosecution which the learned trial judge believed and upon which conviction and sentence were passed came from the evidence of only six witnesses. But most importantly in my view, is the fact that Mrs.

B Inyang Effiong Okon did not die instantly after the appellant had dealt several matchet cuts on her. She survived to tell the police who their assailant was. Thus there is no dispute over the accusation that it was the appellant who hacked the three women in a farm, near a stream with a matchet resulting in their deaths.

C The appellant, in a statement, confessed to have killed the woman and, after his arrest, led the police and villagers to the scene of the crime and helped in recovery of the matchet which he used in the brutal murder.

The main argument in this appeal is whether the appellant had a
D fair trial within a reasonable time from the time of his arrest to the date of judgment, as provided by section 33(4) of the Constitution. It should be pointed out that the actual trial which is relevant to this appeal was conducted by Effanga, J. and it took the learned judge two years and eight months to complete it. The proceedings before Udofia, J. were hampered:
E by some classes of procedural requirements, which must have included investigations after the appellant's arrest, legal advice from the office of the Director of Public Prosecutions and the process of assigning counsel to defend the appellant.

These procedural requirements are necessary and important particularly in a murder trial. If they are not observed and complied with the trial may end up being declared void. In some states of this Federation where preliminary investigation is conducted, before trial, an accused may wait for up to two years before a full trial commences.

Fair hearing within a reasonable time is the key phrase in the provision of section 33(4) of the Constitution. 'Fair hearing' means fair trial and in the case of *R. v. Sang* (1979) 3 W.L.R. 263, Lord Scarman defined it at page 288 -289 thus:

'What does "fair" mean in this context? It relates to the process of trial. No man is to be compelled to incriminate himself; nemo tenetur se ipsum prodere. No man is to be convicted save upon the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless voluntary. If legally admissible evidence be tendered which endangers these principles (as, for example, in Res, v. Payne (1963) 1 W.L.R. 637), the judge may exercise his discretion to exclude it, thus ensuring that

the accused has the benefit of principles which exist in the law to secure him a fair trial; but he has no power to exclude admissible evidence of the commission of a crime, unless in his judgment these principles are endangered."

'Reasonable time' would depend on the particulars of each case. Whilst some cases due to their complexities, would take a long time to be disposed of, some are simple and could be handled within a much shorter period! Generally, 'reasonable time' in this context would mean a moderately and practically possible time within which a court or tribunal could complete a trial and pronounce its decision.

The facts of this case reveal requests for adjournments during the trial from both the prosecution and the defence. Delays in the course of proceedings could be attributed to many factors. It is the duty of the Government to endeavour to equip both the police and prisons departments so that they could not be found wanting in the performance of their duties. However, taking shelter under those inadequacies in order to claim breach of a constitutional right is unfair and unjust.

If the whole proceedings, in the case in hand, are carefully considered and analysed it will be clear that the trial of the appellant, taking the Nigerian situation into consideration, could not be regarded unfair. The facts of the case are very clear and excitable and, unlike the situation in the case of *Ariori and others v. Elemo and others* (1988) 1 S.C. 13, the trial judge would never forget what the witnesses testified, even if the case had dragged on for up to ten years. How could a judge forget evidence where an accused savagely, without any provocation or quarrel, used a machet to hack three women to death simply because he was not allowed to marry one of them.

The delay, if any, which this case suffered could be excused if all other aspects of the case are taken into consideration. It will be fishing for technicalities to attribute unfairness in the trial of this case. Substantial justice should not be sacrificed on the altar of technicalities or procedural irregularities. *Edwin Ogba v. The State* (1992) 2 NWLR. (Part 222) 164. There has been no miscarriage in the appellant's trial, and with due respect to the learned counsel who thinks that there was inordinate delay in the trial, I must conclude that I entertain.

For the above reasons, and the fuller reasons in the lead judgment, I hereby agree that the Court of Appeal is right to affirm the conviction and sentence passed on the appellant. Accordingly, this appeal fails and it is dismissed.

ADIO JSC

I have had the opportunity of reading, in advance, the judgment just read by my learned brother, Onu, J.S.C., and I agree that this appeal lacks merit. I too dismiss it and I affirm the judgment of the court below
B affirming the judgment of the learned trial Judge.

There were two main issues involved and one of them was very fundamental as it involved an alleged breach of a fundamental right. The first one that related to the question of taking the plea of the appellant in relation to the charge preferred against him is straightforward. I have read
C the relevant parts of the record of proceedings and I am satisfied that the charge was read and explained to the appellant in a language which the appellant understood. If, from all the circumstances of a case, it can reasonably be said that the charge was read and explained to the accused in the language that he understood before he was asked to plead and that he
D understood the charge before making his plea, the mere fact that the learned trial Judge did not put on record the language understood by the accused in which the charge was read and explained to him should not be fatal to the proceedings. In this case, Effanga, J., on the 25th January, 1988, after noting on the record of proceedings that the charge was read and inter-
E preted to the appellant made the following note on the record: -

“he says he understands same.”

If the charge was not read and explained to the appellant in the language that he understood, the appellant could not have stated to the learned trial Judge or informed him that he (the appellant) understood the
F charge read and interpreted to him in the aforesaid language.

Another plea was taken on the 4th May, 1988, by or before the same learned trial Judge, who, after noting on the record of proceedings that the charge was read to the appellant, further noted as follows:-

“He says he understands the same.”

G In this instance too, if the charge was not read and explained to the appellant in the language that he understood he could not have stated or informed the learned trial Judge that he (the appellant) understood the charge read and explained to him in the aforesaid language. Moreover, in this case, the appellant was represented by a learned counsel, Orok Oyo
H Esq.,

One has to be careful about a matter like this otherwise unnecessary technicalities will be introduced into proceedings relating to taking of the plea of an accused. The attitude of this court has been that cases should not be decided on the basis of technicalities. They should, wherever

possible, be decided on merit. See Akpan v. The State. (1992) NWLR. (Pt.

24S) 439. Irregularity concerning the taking of the plea of an accused is fatal and to hold that a failure to record the language, understood by an accused, in which the charge was read and explained to him is such an irregularity, is to decide the case on the basis of technicality. The real purpose of the provisions relating to the taking of the plea of an accused is to enable the accused to understand the nature of the charge or allegation preferred or made against him. There is no provision in section 215 of the Criminal Procedure Law or section 33(4) of the Nigerian Constitution, 1979, that a note should be made in the record of proceedings of the particular language, understood by the accused, in which the charge is read and explained to an accused. In the circumstance, it is enough if there is sufficient evidence on the record showing or from which it can be inferred that the charge was read and explained to the accused in the language that he understood. A similar requirement is provided for in section 33(6)(e) of the Nigerian Constitution, 1979, relating to the right of an accused to an interpreter. If he does not understand the language being used at the trial. The main purpose of the provision of the section is to enable an accused to understand the proceedings of the court trying allegation or allegations crime against him. There is nothing in section 33 of the Constitution making it mandatory for a court to state in its record that the provision section 33(6)(e) of the Constitution has been complied with. This court, when the issue, whether a court was bound to record that an interpreter was provided for the accused so as to comply with the provision of the section arose in *Ogba v. The State*. (1992)2 NWLR (Pt. 1)164, stated, per Karibi-Whyte, J.S.C., at page 195, as follows:-

“Learned counsel to the Respondent has pointed out and I entirely agree him that (here is sufficient evidence on the record to show by implication that appellant understood both Igbo language and English There is nothing from the record to show that there was no interpretation from Igbo language no English language and vice-versa. The only defect was the absence of a certificate of the trial Judge note showing that the proceeding was interpreted. There is no doubt there is the useful usual practice to so indicate. There is neither a statutory or constitutional support for the practice. The non-compliance the practice can therefore not affect the validity of the proceedings. Appellant could not have raised any objection on that ground.”

The conclusion to which I have come is that the plea of the appel-

lant which was taken by the learned trial Judge on each of the two aforementioned occasions was perfectly in order.

It was the second main issue that, because of its fundamental nature, necessitated the participation of the *amici curiae* in the proceedings in this appeal. The submissions made by the *amici curiae* had been of real benefit to this court in the resolution of the fundamental issue and we are very grateful to them.

The fundamental issue was whether the trial of the appellant was within a reasonable time in accordance with the provision of section 33(4) of the Constitution of the Federal Republic of Nigeria, 1979, which provides as follows:-

“33(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a court or tribunal,....”

The word “*reasonable*” in the provision of the section was not defined in the Constitution. The word “*reasonable*” in its ordinary meaning means moderate, tolerable or not excessive. See Webster’s, *New 20th Century Dictionary* page 1502. What is reasonable in relation to the question whether an accused has a fair trial within a reasonable time depends on the circumstances of each particular case, including the place or country where the trial took place, the resources and infrastructures available to the appropriate organs in the country. It is, therefore, misleading to use the standard or the situation of things in one or a particular country to determine the question whether trials of criminal cases in another country involves an unreasonable delay. In this particular case, the cause of the delay, if any, was the inability to produce the appellant for continuation of the proceedings as there was no motor vehicle to convey the appellant from the prison to the court. This is a matter over which the trial court had no control as it is not part of the judicial functions of a trial court to arrange for or to pay for the transport, from prison to the court, of a person being tried by it. In any case, though there was delay in the trial of the appellant the delay, in the prevailing circumstances, was not unreasonable. A demand for a speedy trial, which has no regard to the conditions and circumstances in this country, will be unrealistic and be worse than unreasonable delay in trial itself. It was possible to stipulate the time within which the judgment of a court should be given because that was a matter over which the court had control.

There is also the question of what should be the consequences of

an unreasonable delay in the trial of an accused. The legal consequences also depend on the circumstances in each particular case. If, for example, one of the consequences of the unreasonable delay in the trial of an accused is that the learned trial Judge can no longer have a vivid impression of the demeanour of witnesses a miscarriage of justice will no doubt occur and in such circumstances it may not be possible to allow the judgment to stand. On the other hand, if the accused made a confessional statement which has been found to be voluntary and admissible or there was evidence against him showing beyond reasonable doubt that he committed the offence and that none of the usual defences is available to him then whether the trial of the accused lasted for few months or for five or six years, the result will be the same. What I am saying is that it does not appear to be enough for an accused person merely to show that there was an unreasonable delay in his trial. He must go further, if he wants the judgment of the trial court to be reversed, to show that the unreasonable delay has occasioned a miscarriage of justice. If an accused is able to show that there was an unreasonable delay in his trial but is unable to show that the unreasonable delay occasioned a miscarriage of justice, this court may still dismiss the appeal. This is because by virtue of the proviso to Section 26(1) of the Supreme Court Act, 1960, the Supreme Court may, notwithstanding that it decides in favour of the appellant, the point raised in the appeal, dismiss the appeal if it considers that no substantial miscarriage of justice actually occurred. See *Asakitikpi v. The State* (1995) 5 NWLR (Pt 296) 691. In this particular case, even if one takes view that there was an unreasonable, delay in the trial of the appellant, the evidence against him showed beyond reasonable doubt that he committed the offence and that none of the usual defences was available to him. My learned brother, Onu, JSC, in the lead judgment stated the full facts of the case and they need not be repeated here. Whether his trial lasted for one month or eight years the result would have been the same. It was also not shown that the delay occasioned a miscarriage of justice so as to warrant a reversal of the judgment of the trial court on that ground. If the trial had lasted for one month or one year and the appropriate authority had not, in exercise of prerogative of mercy, commuted the sentence to life imprisonment or granted full pardon to appellant, the position is that the appellant would have been executed a long time ago.

There are, in my view, no special circumstances warranting a recommendation, by this court, that the law should not be allowed to take its normal course. It is up to the appellant, if he so desire, to make an application to

the appropriate authority for the exercise of prerogative of mercy in his favour.

It is for the foregoing reasons and for the detailed reasons given by my learned brother, Onu, JSC, that I agree that this appeal lacks merit. It is accordingly dismissed by me. I affirm the decision of the court below affirming the judgment of the learned trial Judge.

IGUH JSC

I have had the advantage of a preview of the lead judgment just delivered by my learned brother, Onu, J.S.C. and I agree with the reasoning and conclusion therein. In view, however, of the constitutional nature of the issues raised in the appeal, I consider it necessary to say some words of my own.

This appeal is against the decision of the Court of Appeal, Enugu Division, delivered on the 16th February, 1993. By this judgment, the court below affirmed the decision of the Cross River State High Court sitting at Calabar, presided over by Effanga, J, wherein the appellant was found guilty of the murder of one Nwa Akpan Ikwo at Ekim Ebebit in the Calabar Judicial Division contrary to Section 319(1) of the Criminal Code and was accordingly sentenced to death. Being dissatisfied with this decision of the Court of Appeal, the appellant has appealed to this court.

The facts of the case as found by the trial court and affirmed by the court below have been adequately set out in the lead judgment of my learned brother and it is unnecessary to recount them in detail all over again. It suffices to state that the appellant had persistently sought to marry the deceased but her father refused to give his consent to this proposal on the ground that the deceased was already married. The appellant apparently felt aggrieved as he claimed to have rendered much financial and other assistance to the deceased when she suffered from a protracted illness.

On the fateful day, namely, the 25th March, 1985, the appellant armed with a machet, Exhibit 1, trailed the deceased to the farm. In the farm, the appellant dealt several machet cuts on the deceased's hostess, Inyang Effiong Okon. Thereafter, he went after the deceased and inflicted several severe machet cuts on her and her daughter, Ekaette Moses. Both the deceased and her daughter died on the spot. The late Inyang Effiong Okon later died at the hospital but not before she made statements to the police giving detailed account of what happened in the farm.

The appellant after the attack went into hiding in the bush where

he was subsequently caught after two days when the villagers organised a

The appellant after the attack went into hiding in the bush where he was subsequently caught after two days when the villagers organised a search party. On his arrest, the appellant took the police and some villagers to the scene of crime and showed them where he hid his matchet, Exhibit 1. He also volunteered a statement Exhibit 2 to p.w. 6, Sgt. NO. 32246 B Thomas Atim.

Exhibit 2 is a clear confessional statement. In it, the appellant unequivocally admitted that he was the person who murdered the deceased Nwa Akpan Ikwo, her daughter Ekaette and the deceased's hostess Inyang to death. Parts of Exhibit 2 which was made under caution read as follows:-

"1, Edet Effiom having been duly cautioned in English that I am not obliged to say anything unless I wish to do so, but whatever I say will be taken down in writing and may be given in evidence, voluntarily elect to state as follows:'

(Signed) of Edet Effiom 27/3/85

It is because of my wife by name Nnwa Akpan Ikwo that brought this trouble. On Monday at about something after twelve noon I went to the farm belonging to one Inyang whose father's name I do not know, and E matcheted her, Nnwa Akpan Ikwo and Ekaette who is the daughter to Nnwa Akpan Ikwo to death. I first met the woman by name Inyang in the stream bathing and matchet her and she fell down and

(RTI) of Edet Effiom 27/3/85

shouted before I left her in the stream and went to the farm where I met my F wife Nnwa Akpan Ikwo and her daughter - Ekaette and I also matchet them to death. But I did not harm my wife's last born who is about one year old and was also with them. After killing the three people leaving the youngest one who was also a female alive, I ran to one village called Ekpene. Both Ekaette and the last born of my wife are not my children because she G had never given me any issue. As I was in one Essien's house at Ekpene village, the villagers came and arrested me and handed over to the police at Okurikang. They arrested me yesterday 26th March, 1985 they handed me over to the police at Okurikang and from there I was taken to police station Odukpiani The reason why I kill them is that my wife was suffering from a H certain sickness

(RTI) of Edet Effiom 27/3/85

in which she did not know herself again. She goes to stool in the house and I carry the faeces to throw. She passes urine in the house and I carry it. I

suffered so much for her which I cannot mention. After suffering for her, when her sickness finish, her parents said, she should not marry me again. And Inyang is the person who told the parents of my wife - Nnwa Nkpan Ikwo not to allow her marry me again that was why I killed them. I kill Ekaette because she is a daughter to Nwa Akpan Ikwo. I did not want my B suffering to go for nothing that is why I killed them. It is about two years and six months now since I married Nnwa Akpan Ikwo but I did not pay dowry for her head. I spent the whole money I had for her sickness that is why I did not pay dowry and also she did not give any issue. Her last issue who is about one year old is born for one Udo Etim. I handed over the C matchet I used in killing the three to the police at Okurikang today 27th March, 1985

R.T.I.

(Signed) of EDET EFFIOM 27/3/85

Interpreted by me No. 115274 PC. Ime Etim (m) attached to Police Station, Odukpani, from Anang language to English language to English language and I personally read over his statement to him through same language and he said it is true and correct before he affixed his thumb impression and I equally counter sign here under

(Sgd.) Ime Etim PC 27/3/85

E Time statement started 17.10 hours

Time statement ended 18.30 hours

Recorded by me through the above medium

(Sgt. Thomas Atim) 27/3/85

It ought to be mentioned that Exhibit 2 was confirmed by the appellant to F be his true voluntary statement. This was before a superior police officer, Mr. Cyril Okon, who was then a Divisional Crime Officer. The confirmation was made in the Admission of Confessional Statement to Police Form, Exhibit 3, which was duly signed by both the appellant and the said Divisional Crime Officer.

G Both the appellant and the respondent filed and exchanged their respective written briefs of argument. In the appellant's brief, the undermentioned issues were formulated for the determination of this court, namely:-

- (i) *Whether there had been a valid arraignment in accordance with the provisions of Section 215 of the Criminal Procedure Law.*
- H (ii) *Whether there was a trial within a reasonable time in accordance with the provisions of Section 33(4) of the 1979 Constitution,*
- (iii) *Whether the prosecution had proved the case against the appellant beyond reasonable doubt.*

The respondent, for its own part, adopted the same issues in its brief for determination.

In view of the constitutional importance of the second issue raised by both parties in this appeal, a number of senior and eminent learned counsel were invited by this court as *amid curiae* to address the court on the question. The issue on which this court invited addresses from learned *B amid curiae* is framed as follows:-

“Did the appellant have a fair trial within a reasonable time from the time of his arrest to the date of judgment as provided by Section 33(4) of the Constitution? The appellant was arrested on 27/3/85 and information charging him with murder was filed on 21/1/86. The trial commenced on 4/5/88 with the taking of the evidence of the first witness. The prosecution closed its case on 14/6/90. The defence closed its case on 25/6/90. The addresses of counsel for the prosecution and defence were taken between 10/7/90 and 4/12/90 when the trial Judge adjourned for judgment. Judgment was finally delivered by the trial judge on 7/1/91 wherein he found the appellant guilty of murder and sentenced him to death.”

Following this invitation, Y.A. Akande Esq., learned Attorney-General, Oyo State, Livy Uzoukwu Esq., learned Attorney-General, Imo State, B.I. Horn Esq., learned Attorney-General, Benue State, A. Amiesimaka Esq., learned Attorney-General, Rivers State and A.B. Mahmoud Esq. of learned counsel filed very useful and thought provoking briefs of argument. Oral submissions in amplification of the [Arguments contained in the said briefs were also made before us at the hearing of the appeal.

I must at this stage express profound gratitude to the learned gentlemen of the bar for the scholarly presentation of both their briefs and oral submissions before us as *amid curiae*. Their respective briefs were clearly stimulating and impressive and I take this opportunity to express to them my appreciation for professional assignments very well executed.

At the hearing of the appeal on the 13th day of October, 1994, both learned counsel for the parties adopted their briefs and made oral submissions in amplification thereof.

The submission of the learned counsel for the appellant, Dr. Ilochi A. Okafor in respect of the first issue is that the appellant's two pleas before Effanga, J. who tried him are both erroneous on point of law and invalid. His attack on both pleas centred on the facts that there is no record of the language employed in reading and/or interpreting the charge to the appellant and that there is also no record that the learned trial Judge was satis-

fied with the explanation of the charge to him. With regard to the second plea, learned counsel additionally contended that there is no record that the charge was interpreted or explained to the appellant. In this regard, references were made to the decisions in *Kajubo v. The State* (1988) 1 N.W.L.R. (Part 73) 721. *Evorokoromo v. The State* (1979) 6 - 9 S.C. 3, *B Ogoedo Edem v. The State* (1990) 7 N.W.L.R. (Part 160) and *Erekanure v. The State* (1993) 5 N.W.L.R. (Part 294) 385. He submitted that the appellant's two pleas were therefore defective and invalid and he urged the court to allow the appeal and to order a retrial of the case.

C With regard to the second issue, it was argued by learned appellant's counsel that from the period of the appellant's first arraignment before Udofia, J. on the 15th December, 1986 to the date of judgment in the case on the 7th January, 1991 was unreasonably long and raises the presumption of a contravention of section 33(4) of the 1979 Constitution. He referred to the D decisions in *Ariori and others v. Elemo and others* (1983) 1 SC. 13. *Akpor v. Iguoriguo* (1978) 2 S.C. 115. *Ekeri and others v. Kimisede and others* (1976) 9 - 10 S.C. 61 and *Chief Yakubu Kakara & Another v. Chief Okere Imonikhe & Another* (1974) 4 S.C. 151 and contended that the appellant was not tried within a reasonable lime. He urged the court to order a fresh E trial of the appellant.

Learned counsel for the respondent, A.B. Ikpeme (Mrs.) in her reply, submitted that the appellant' pleas were valid as he was shown to have understood the charge to which he entered a plea of not guilty. She emphasized F that the vital issue is whether or not the appellant understood the charge. She submitted that from the record of proceedings, there is no doubt that he understood the contents thereof. She stressed that although the appellant's plea before Udofia, J. on the 15th December, 1986 was not the operational plea in the instant case, it should be noted from the recorded plea G that the charge was:

*“read in English and interpreted into Efik to the accused person who understood same after the charge had been explained to him and plead **NOT GUILTY.**”*

H She then submitted that the charge having earlier been explained before Udofia, J. and interpreted to the appellant in the Efik language which is the appellant's language and he fully understood the same, there could be no doubt that he fully understood the same charge before Effanga J. She

therefore argued that mere failure to record the specific language into which the charge was interpreted or explained to the appellant before Effanga, J. cannot be any matter of great moment. She further pointed out in the alternative that the printed record at all events clearly shows that the appellant fully understood the charge in respect of which he stood trial.

B

On the second issue, learned counsel submitted that whether there was a trial within a reasonable time would depend on the circumstances of each particular case. She argued that the commencement period of the trial for the issue of the applicability of the provisions of section 33(4) of the Constitution is the 4th May, 1988 when the second plea was taken before Effanga, J. who heard the case to completion. She submitted that the period before Effanga, J. took over the case is irrelevant as the case was started *de novo* before him. She conceded that the trial before Effanga, J. lasted for 2 years and eight months and submitted that the appellant in the circumstance was tried within a reasonable time in accordance with section 33(4) of the Constitution having regard to the straight forward nature of the facts of the case and the appellant's voluntary confessional statement. She argued that all the adjournments in the case were on account of circumstances beyond the control of the prosecution. She stressed that the defence equally contributed to *whatever* delay the trial suffered. She therefore submitted that the appellant in the circumstance cannot now be heard to complain over an issue he contributed to. She concluded by arguing that whatever delay that occurred did not occasion any miscarriage of justice and should be discountenanced. She urged the court to dismiss the appeal.

F

Learned Attorney-General of Oyo State, Y.A. Akande Esq. in his brief conceded that there had been some delay in the trial of the case submitted that this did not result in any miscarriage of justice since it did not in any way affect the justice of the case. He argued that the delay must be examined in the light of the prevailing circumstances which were beyond the control of the prosecution. He referred to the decision in *Olaniyan v. The State* 0987) 1 N.W.L.R. (Part 48) 156 at submitted that having regard to what he described as "the Nigerian situation", a delay of 2 years and 8 months could not be said constitute a denial of the appellant's right to fair hearing within a reasonable time. He argued that the delay in issue did not amount to a breach of fundamental right to fair hearing within a reasonable time as enshrined in section 33(4) of the 1979 Constitution.

H

Learned Attorney-General of Imo State, Livy Uzoukwu Esq. in his brief recounted the relevant facts against which the issue of whether or not

appellant had a fair trial within a reasonable time must be considered. He closely examined the meaning of the words “fair hearing” and “within a reasonable time” citing the decisions in *Isiyaku Mohammed v. Kanu N.A. (1968) 1 All N.L.R. 424* at 426, *Wright v. New Zealand Shipping Co. Ltd. (1878) 4 Ex. D. 165* at 168 n. R. *Ariori and others v. Muraino Elemo & others*, *supra* and *John Folade v. Attorney-General of Lagos State (198 H2 N.C.L.R. 771* at 779. He then submitted that it took almost six years to arrest, prosecute and convict the appellant. According to him, the prosecution opened its case on the 4th May, 1986 and closed on the 14th June, 1990 - a period of more than four years. The defence closed its case on the 25th June, 1990 whereupon addresses were taken from learned counsel. Judgment in the case was delivered On the 7th January, 1991. He went on

“It seems from the record that the appellant was a helpless victim of the inability of the prosecution, and to a lesser degree the defence counsel, to accord the trial the Priority attention it deserved, As a result, the appellant suffered unnecessarily The scenario does not, in our respectful submission, approximate to a fair hearing within a reasonable time.....”

Learned counsel then urged the court to hold that the appellant’s fundamental right to fair hearing within a reasonable time enshrined in Section 33(4) of the Constitution has been infringed in this case.

On the question of the appropriate order that this court may make, learned counsel submitted that it is unsafe to make any general propositions as the circumstances of each case should determine the attitude of the court. He made reference to a few authorities and submitted that having regard to the particular circumstances of this case, the appeal should be allowed and the appellant acquitted and discharged. He reluctantly urged in the alternative that the appellant be sentenced to a term of imprisonment equivalent to the period he has been in custody in aspect of the offence charged.

Learned Attorney-General of Rivers State, A. Amiesimaka Esq. in his submissions pointed out that in the face of the overwhelming evidence against the accused, the issue under consideration must be regarded as entirely academic. He argued that it is sometimes necessary to delay a matter in order to be just and fair. He contended that the delay in this case was occasioned by two main reasons. The first was the inability of the Prison Authorities to produce the appellant in court on the adjourned dates

of trial due to lack of vehicle. The second was the absence of counsel in court on the hearing dates. He conceded that there was some delay in this case but contended that this did not by any means amount to an unreasonable delay. He recounted that the facts of the case are pretty clear and straight forward and that the actual trial lasted only two years and eight months. Learned Attorney-General therefore submitted that the case of *B* *Ariori and others v. Elemo & others* and the other civil cases referred to by the appellant are on the facts distinguishable from those of the present appeal. He contended that whatever delay that the case suffered was not prejudicial to the appellant and did not occasion any miscarriage of justice. He therefore submitted that the appellant had a fair trial within a reasonable time as prescribed by Section 33(4) of the Constitution. He drew the attention of the court to the decisions in *Kaiubo v. The State* (1988) 1 N.W.R. (Part 73) 721 at 738-739 and *Josiah v. The State* (1985) 1 N.W.L.r. (Part 1) 125 at 141 and stressed that justice is not just for an accused person but for his victim as well. *D*

B.I. Horn Esq., learned Attorney-General of Benue State in his brief argued that this court has no original jurisdiction to entertain the issue raised herein which relates to the infringement of the appellant's fundamental right under section 33(4) of the Constitution. He pointed out that this court is not in this appeal exercising appellate jurisdiction in respect of any decision over the issue in question. He referred to the decision in *Alhaji Lawani Atovebi & Another v. The Government of Oyo State and 2 others* (1994) 5 S.C.N. 62 at 78 and contended that the appellant should have commenced proceedings for the enforcement of his fundamental rights in the High Court in its original jurisdiction under the Fundamental Rights *E* *Enforcement Procedure Rules* for the determination of the question posed in this appeal. Thereafter, an appeal could lie to the Court of Appeal and thence to this court. He therefore submitted that the issue now raised by the appellant in this court is incompetent as it does not arise from the decision of the lower court. *F*

Alternatively, learned Attorney-General recounted the history of the case and submitted that in all the circumstances of the case, there was no procedural irregularity that led to any denial of fair trial. He reviewed a number of authorities such as *Nwankwo v. the Queen* (1959) 4 F.S.C. 274. *Garba v. The State* (1972) 4 S.C 118, *Nasamu v. Commissioner of Police* *H* (1976) 11 CC.H.CJ. 265 and *John Folade v. Attorney-General, Lagos State & others* (1981) 2 N.C.L.R. 771 at 779 and submitted that one of the factors to be taken into consideration in determining whether an accused person had his trial within a reasonable time is the reason for the delay. He

went on –

“It is clear from the printed records that out of these 28 adjournments, 19 of them were because for one reason or the other the case could not go on.

(a) 12 were granted because appellant was not produced in court.

This I submit cannot be attributable to the fault of either the

B *prosecutor; the defence, nor the court,*

(b) 6 were at the instance of the defence, and

(c) 3 were at the instance of the State. And in any case, can the delay here be termed unreasonable when there were cogent reasons for such delays.....”

C

Learned counsel submitted that taking into account the totality of the case, it cannot be said that there was unreasonable delay.

A.B. Mahmoud Esq. of counsel, in his own brief examined the facts relevant to the issue for determination together with decided cases

D such as *Ilu Garba v. The State* (19721 4 S.C. 118. *Osagie v. Queen. F.S.C.*

21/159 of 10/3/59 unreported and the American case of *Beavers v. Haubert*

25 S.C.573; 198 U.S. 77 and submitted that what a “reasonable time”

means must depend on the circumstances and facts of each case. The

question should be whether the appellant, in the eyes of a reasonable man,

E was given a fair trial or a fair hearing within a reasonable time. He went on

-

“In a nut shell, the actual trial lasted 4 years one month. However from the date of arrest to sentencing was 5 years and about 10

months. From the date the information was filed to the end of the

F *trial of January 7th 1991, the case was adjourned 40 times. It is*

submitted, the length of the delay given the nature of the offence is inexcusable.”

He observed that the proceedings after the actual commencement of trial

G were adjourned 13 times on account of lack of transport to convey the

appellant to the court. He was of the view that there was an unreasonable

delay in the trial of the appellant and that the responsibility for the delay

was entirely the fault of the prosecution. He therefore came to the conclu-

sion that the appellant’s right to “fair hearing” within a reasonable time

H enshrined in section 33(4) of the Constitution had been infringed upon.

Learned counsel then pointed out that he arrived at the conclu-

sion he reached for reasons totally counsel as he did not think it could be

argued that because of the delay, the trial Judge had lost his appreciation

of the evidence or the witnesses as was the case in *Ariori and others v.*

Elemo and others (1988) 1 S.C. 13 and Akpor v. Iyuriguo (1978) 1 L.R.N. 36. He did not support an order for a retrial as this would make a mockery of the constitutional provision under consideration. He urged that the death, penalty be commuted to life imprisonment. In the alternative, this court may make a recommendation on the appellant's behalf for the Governor's reprieve in the exercise of his powers of prerogative of mercy. B

The first issue for determination concerns the validity of the appellant's plea before the trial court. The question posed is whether there had been a valid arraignment of the appellant in accordance with the provisions of section 215 of the Criminal Procedure Law of the former Eastern Nigeria applicable to the Cross River State of Nigeria. C

Section 215 of the Criminal Procedure Law provides as follows:-

"The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court and such person shall be called upon to plead instantly thereto, unless where he person is entitled to services of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith," D

A close study of this section of the law disclosed, and this is borne out by a long line of decided cases, that for a valid and proper arraignment of an accused person, the following three conditions must be satisfied or complied with, namely – E

- (i) The accused must be placed before the court unfettered unless the court shall see cause otherwise to order; F
- (ii) The charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court; and
- (iii) The accused shall then be called upon to plead instantly thereto (unless, of course, there exists any valid reasons to do otherwise G such as objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has in fact not been duly served therewith).

It cannot be over-emphasized that these provisions of section 215 of the Criminal Procedure Law are clearly mandatory and not directory. They must therefore be strictly complied with as without a valid and proper plea, no trial would have commenced and, no matter the strength of the evidence, the trial and the subsequent judgment will become null and void. I

need only add that the said requirements must co-exist and must be complied with as they are mandatory and failure to comply with any of them as I have already observed will render the whole trial a nullity. See *Evorokorom v. The State* (1979) 6-9 S.C. 3. *Godwin Josiah v. The State* (1985) 1 S.C. 406 at 416, *Sunday Kajubo v. The State* (1988) 1 NWLR (Part 73) 731 at 732. *Ogbodo Ebem v. The State* (1990) 7 NWLR (Part 160) 11, *Sanmabo v. The State* (1967) NMLR 314, *Akpiri Ewev. The State* (1992) 6 NWLR (Part 246) 144 and *Okon v. The State* (1991) 8 N.W.L.R. (Part 310) 424.

I should perhaps add that the mandatory nature of section 215 of the Criminal Procedure Law is further confirmed and emphasised by the provisions of section 33(6) (a) of the 1979 Constitution which provide thus:-

“Every person who is charged with a criminal offence shall be entitled:-
(a) *to be informed promptly in the language he understands and the detail of the nature of the offence”*

D

It seems to me quite plain that the said mandatory conditions laid down in section 215 of the Criminal Procedure Law together with the provisions of section 33(6) (a) of the 1979 Constitution have -keen specifically provided to guarantee the fair trial of an accused person and to safeguard his interest at such a trial. I should stress that it is the duty of a trial court to ensure strict compliance with the said provisions by reflecting such compliance in the court's record. See *Josiah v. The State* (supra). I will now examine the appellant's arraignment which has been vigorously attacked by his learned counsel in this appeal.

F

From the record of proceedings, it is clear that the appellant was first charged to court on the 14th April, 1986 before Udofia, J. His plea was duly taken on the 15th December, 1986. This plea is not now in issue as the appellant on the 25th January, 1988 is not now in issue as tin appellant on the 25th January, 1988 subsequently appeared before Effanga, G J. who started the case de novo and heard it to completion. As required by law, a fresh plea was taken before him as follows -

“The charge is read and interpreted to the accused. He says he understands same. He pleads - “NOT GUILTY”

Also on the 4th May, 1988, the appellant's second plea before tin same H Effanga, J. was recorded as follows:-

“Charge is read to the Accused. He says he understands same. He pleads- “Not Guilty””

Learned counsel for the appellant has submitted that since two pleas were taken before Effanga, J. who determined the case, there will be

in need to examine the second plea of the 4th May, 1988 unless the earlier plea of the 25th January, 1988 is defective or otherwise invalid. Both pleas were taken before the actual hearing of evidence commenced in the case and in the absence of any amendment of the information before the court. He contended that if the earlier plea is valid, then the second plea before the same Judge which was taken for no apparent reason must be regarded as superfluous. He argued that it is only if the earlier plea is defective or otherwise invalid that the second plea may become material. I entirely agree with learned counsel on these submissions. I will now proceed to examine the appellant's first plea before Effanga, J. B

I have earlier on in this judgment set out the appellant's first plea in issue before Effanga, J. A close study of this plea clearly shows that the appellant was duly placed before the court. There is no suggestion whatsoever from the appellant that he appeared before the court filtered. Secondly, it is also indicated clearly that the information was read over and explained to the appellant. The learned trial Judge was obviously satisfied that the appellant understood the contents thereof hence he took the trouble to record that the appellant said he understood the same. Thirdly, it is also manifestly shown on record that the appellant was called upon to plead instantly to the charge and that he in fact did so by pleading not guilty thereto. In these circumstances, it seems to me crystal clear that the mandatory statutory requirements of section 215 of the Criminal Procedure Law were without doubt, satisfied and/or complied with by the trial court. D E

Learned counsel for the appellant, relying on the decision of this court in Samuel Erekanure v. The State (1993) 5 N.W.L.R. (Part 294) 385, submitted that the appellant's first plea of the 25th January, 1985 before Effanga, J. is defective in that – F

- (a) *There is no record of what language that was used in reading and/or interpreting the charge to the accused.*
- (b) *There is no record that the trial Judge was satisfied with the explanation of the charge to the accused"* G

It will now be necessary to examine the decision of the court in the said Samuel Erekanure case on the question of the statutory requirements prescribed by section 215 of the Criminal Procedure Law with regard to the plea of accused persons. H

It is necessary to stress at this stage that there exists a long line of authorities on the conditions that must be satisfied for a valid and proper arraignment of an accused person before a court. These decisions culmi-

nated in the judgment of this court in Sunday Kaiubo v. The State, supra, where the three requirements I have already indicated in this judgment were restated in the lead judgment of Wali, J.S.C. and concurred to by Nnamani, Uwais, Oputa and Craig, JJ.S.C. Indeed, in the said case of Samuel Erekanure v. The State, supra, Olatawura, J.S.C. who delivered the lead judgment of this court noted with approval the said statutory conditions (and they are three) laid down in the Sunday Kajubo case which must be complied with for a valid arraignment of an accused person under section 215 of the Criminal Procedure Law. Said the learned Olatawura, J.S.C. -

B *'These requirements (for a valid arraignment) although familiar, were not followed by the trial court.'*

These requirements which have been spelt out in Sunday Kajubo v. The State (1988) 2 N. W.L.R. (Pan 73) 721 at 731 and 737 are:

- 1. The accused must be present in court unfettered, unless there is a compelling reason to the contrary.*
- D** *2. The charge must be read over to the accused in the language that he understands.*
- 3. The charge should be explained to the accused to the satisfaction of the court.*
- 4. In the course of explanation technical language must be avoided.*
- E** *5. After requirements 1 to 4 have been satisfied, the accused will then be called upon to plead instantly to the charge"*

(Words in brackets and underlinings supplied for emphasis)

It will be observed from the above observation of Olatawura, J.S.C. that he expressly approved the requirements for a valid plea as spelt out in Sunday Kajubo v. The State, supra. For the avoidance of doubt and at the risk of tautology, these requirements as laid down in the case of Sunday Kajubo are as follows, namely:

F

- "(1) He shall be placed before the court unfettered unless the court shall see cause to otherwise order;*
- G** *(2) The charge or Information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court;*
- (3) He shall then be called upon to plead instantly thereto (unless there are valid reasons to do otherwise as provided in section 100 of the*
- H** *Criminal Procedure Law"*

Although the requirements set out in the Samuel Erekanure case are five in number, it can be clearly seen that the 2nd, 3rd and 4th requirements set out thereunder jointly constitute the second requirements in the Sunday

Kajubo case which prescribes that the charge or information shall be read over and explained to the accused to the satisfaction of the court by the registrar or other officer of the court.

I will now return to the alleged defects in the appellant's plea of the 25th January, 1988. It has to be stressed in this connection that although it is most desirable and highly recommended in the interest of justice and fair trial that trial courts ought to indicate in their record books in what language a charge or information was read over and explained to an accused person upon his arraignment, it is certainly not the provision of either section 215 of the Criminal Procedure Law or section 33(6)(a) of the 1979 Constitution that the particular language so employed shall be noted in the court's record as a condition sine qua non to a valid arraignment. What seems to me of vital importance is that the charge or information shall be read over and fully explained to an accused person in the language he understands to the satisfaction of the court and trial courts ought at all times to comply strictly with this requirement. As I have already observed, it is good practice and in the interest of justice that trial courts ought at all times to make a recording of the precise language used in reading over and explaining a charge or information to an accused person upon arraignment. Accordingly and for the reasons I have given above, I am unable to accept that the mere absence of record of the language that was employed in reading over and explaining a charge or information to an accused person upon arraignment is fatal to his plea.

The alleged second defect suffered by the appellant's plea of the 25th January, 1988 is that there is no record that the trial Judge was satisfied with the explanation of the information to the appellant. In my view, the vital issue pursuant to the provisions of the law under consideration is whether or not a charge or information has been read over and explained to an accused person and the court is satisfied that such an accused person has understood the same. From the record of proceedings, there is no doubt in the present case that the information was read over and interpreted to the appellant who thereupon informed the trial Judge that he understood the same. He was accordingly asked to enter his plea and he pleaded not guilty to the charge. I must with great respect to learned appellant's counsel observe that I am unable to agree that there is no record that the trial Judge was satisfied with the explanation of the information to the appellant. There is obviously such a record as the learned trial Judge took the trouble, as he was obliged by law to do, to record after the information was read over and explained to the appellant, that the said appellant agreed that he under-

stood the same, I therefore find the alleged second defect of the appellant's plea as totally misconceived. I am fully satisfied that the appellant's first plea of the 25th January, 1988 before Effanga, J. is entirely proper and valid, that it complies with the provisions of section 215 of the Criminal Procedure Law and that it is totally devoid of all legal defects. In my view, B the appellant's second plea of the 4th May, 1988 before Effanga, J. seems to me entirely superfluous and must be discountenanced. Accordingly the first issue must be answered in the affirmative.

The second issue questions whether there was a fair trial of the appellant C within a reasonable time as prescribed by section 33(4) of the 1979 Constitution. It was argued in the briefs of argument of the learned Attorneys-General, Benue State and Oyo State respectively that this court has no original jurisdiction to entertain this issue as it was not raised before both the trial court and the court below. Learned counsel pointed out that as the D issue was neither raised before nor decided upon by the two courts below, it is a fresh issue which ought not to be canvassed for the first time in this proceeding. It is their submissions that the issue in so far as it raises the alleged violation of the appellant's fundamental right to fair hearing under section 33(4) of the 1979 Constitution cannot be determined by this court E in this original jurisdiction by virtue of section 212(1) of the said Constitution. They contended that the appropriate procedure the appellant ought to have followed is to seek redress before the High Court in its original jurisdiction under the Fundamental Rights Enforcement Procedure Rules by virtue of section 42(1) of the Constitution for the determination F of the question posed in this appeal. Thereafter, appeals, if necessary, may lie to the court below and thence to this court. They therefore submitted that the Supreme Court has no appellate jurisdiction to entertain the issue raised as it does not relate to any question arising from the decision appealed against.

G My simple answer to these submissions is that a person alleging an infringement of any of these Fundamental Rights as entrenched in the Constitution may validly canvass the issue of such alleged infringement at any stage of the proceedings where the alleged infringement is intrinsic to the proceedings. See Dr. O.G. Sofekun v. Chief N.O.A. Akinyemi and others (1980) 5-7 S.C.I., at 21, and Peter Nemi & Ors. v. The State S.C. 303/1990 of 14/10/94 as yet unreported. I will now proceed to consider the issue in question.

Section 33(4) of the 1979 Constitution provides as follows:-

“Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a court or tribunal.....”

It seems to me quite clear that a decision on this issue must turn on the correct construction of the words “fair hearing” and within a reasonable time” contained in the said constitutional provision.

In considering this issue, it is pertinent to note that section 33(4) of the 1979 Constitution does not define the term “fair hearing” or specify any length of time that constitutes a “reasonable time” within which any person charged with a criminal offence is entitled to be tried. However on the issue of the interpretation of constitutional provisions, two important principles appear to have been identified. The first is that the fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers of the constitution and the people who adopted it. Secondly, although due regard is to be given to international jurisprudence, foreign constitutions, statutes and judicial interpretations, the court will accord weight to our peculiar circumstances, local conditions and aspirations. See *Nafiu Rabiu v. The State* (1980)8-11 S.C. 130 and *The Attorney-General of Bendel State v. Attorney-General of the Federation and others* (1981) 10 S.C. 1.

It must be conceded that the term “fair hearing” is a broad concept and that its end result, without doubt, is justice. Fair hearing has been stated to involve a fair trial and the true test of fair hearing is the impression of a reasonable man who having been present throughout the trial is satisfied from his observation that justice has been done in the case. See *Isiyaku Mohammed v. Kano Native Authority* (1968) 1 All N.L.R. 424 at 426. Upon a most careful study of the record of proceedings in this case, there can be no doubt, and there has been no suggestion to the contrary, that all the rules of natural justice were observed by the learned trial Judge and that the appellant had a fair trial. From all the circumstances of the trial, it is clear that there was no procedural irregularity leading to a denial of fair hearing or a breach of the *audi alteram partem* rule. It should be noted too that learned counsel for the appellant has not complained of that either. The sole issue that is left now for consideration is whether the trial of the appellant was “*within a reasonable time*”. I will now examine the issue.

It is generally accepted that what is a reasonable time within the context of sections 33(1) and 33(4) of the 1979 Constitution must depend

on the circumstances, peculiarities and facts of each case. It is not therefore possible to lay down any hard and fast or fixed rule as to what a “reasonable time” is in the trial of every case. See *Nnaji v. Ukonu* (1985) 2 N.W.L.R. (Part 9) 686. But it can safely be said that the term “reasonable time” must mean inter alia the period of time which, in all the
B circumstances of a case, is necessarily required to ensure that justice is not only done but appears to reasonable persons to have been done to all concerned in a case. It means such length of time as may fairly, properly and reasonably be allowed in the trial of a case having regard to the surrounding circumstances and the overall interest of justice. Indeed as Uwais,
C J.S.C. rightly observed, in the *Nnaji v. Ukonu* case, *supra* at page 695,

*“Some cases are by their nature short or lengthy by reason of the number of witnesses to be called or the length of the testimonies of the witnesses. Others involve witnesses who do not live in the country or within the court’s
D jurisdiction. Documents to be put in evidence may be in the custody of a third party and may not as such be readily available for production at the trial. The health of a vital witness or even the trial Judge may fail. All these and many more are factors which can reasonably delay the conclusion of a trial. Surely such delay cannot be taken to be unreasonable”*
E *(Underlining supplied for emphasis)*

In the same vein, *Aniagolu, J.S.C.* in the same case in dealing with other factors that may quite legitimately delay or impede the hearing of a case had this to say -

*“Whereas Sections 33(1) and 33(4) enjoin the courts to hear cases
F expeditiously, leaving the discretion to the courts, as indeed it must do, having reeard to varying attendant circumstances that can befall a case in the course of hearing - availability of witnesses; illness of parties and witnesses; the pressure on the court by reason of other cases to be heard, the strain on the Judges who may thereby be compelled to be absent on one or
G other occasion; the indigency of parties resulting in their inability to finance promptly the monetary aspects of the litigation or criminal proceedings; and a whole host of other circumstances which may delay the hearing of a case or impede its progress*
.....”
H *(Underlining supplied for emphasis)*

So too, in *Unogo v. Aku* (1983) 2 S.C.N.L.R. 332, *Obaseki, J.S.C.*, commenting on the term “fair hearing within a reasonable time” had the following to say –

“Justice is the end result of fair hearing and the length of time a fair hearing takes has to make allowance for the full and free exercise of the parties to present their cases through their witnesses and counsel, and the obligations of the Judges to give full and effective consideration to the evidence led and the addresses of counsel, if any, in their decisions”

(Underlining supplied for emphasis)

B

I think it ought to be observed that it does not appeal any length of time may per se be dismissed outright as too long to warrant a close scrutiny or examination for the purpose of determining whether there had been a fair hearing within a reasonable time as prescribed by sections 33(1) and 33(4) of the 1979 Constitution. All the circumstances of each and every case must be considered very closely before a fair, reasonable and just conclusion can be arrived at. Indeed, four factors have now been identified as necessary for consideration in the determination of whether a person has been denied his constitutional right to a speedy trial. These four factors, comprise of –

D

- (i) Length of delay,
- (ii) The reason(s) for the delay,
- (iii) The defendant's assertion of his right to a speedy trial, and
- (iv) Prejudice caused by the delay to the defendant, See the American case of *Baker v. Wingo*. 407 U.S. 154. 1530 (1992) and the Privy Council decision in *Bell v. Director of Public Prosecutions* (1985) A.C. 937.1 entertain no doubt that the above factors constitute fair and reasonable legal considerations in the determination of whether or not an infringement of a person's fundamental right to fair trial within a reasonable time has been infringed. I will now recount briefly the facts relevant to the second issue under consideration.

F

The appellant was arrested on 27/3/85 and information charging him with the offence of murder was filed at the High Court of Cross River State, Calabar on 21/1/86. The case came up for hearing before Udofia, J. on 14/4/86, 28/5/86, 16/6/86 and 29/7/86 but could not be heard as the appellant who then was unrepresented was not produced from prison custody due to lack of Police vehicle which would convey him to the court. The appellant was however produced in court on 29/10/86 on which date an order for his legal representation was made by the court. He was also in court on 1/12/86, but his learned counsel was absent. On 15/12/86, he appeared in court with his counsel for the first time. It was on that date that his plea before Udofia, J. was taken.

G

H

The appellant was again absent in court on 25/2/87 and 12/3/87 but was produced on the 1/6/87 on which last date his learned counsel, Mr.

Orok Oyo was again absent and had not written to the court to explain the reason for his absence. Two more adjournments were granted by the court on 29/7/87 and 4/11/87. On both dates, the appellant for lack of vehicle could not be produced in court by the Police.

Altogether the case suffered twelve adjournments before Udofia, B J. I should however stress that all the above adjournment were granted by the court for clear and cogent reasons as the murder trial could not have proceeded to be heard in the absence of either the appellant or his learned counsel.

For reasons not apparent on the record, the appellant appeared C before Effanga, J. on 25/1/88 and 22/3/88 but his counsel was again absent on both dates. A second plea was taken on 4/5/88 whereupon the actual hearing of the case commenced with P.W.1 testifying. On 21/6/88, the appellant was not produced in court for lack of transport. However on 12/7/88, he was produced and P.W.2, P.W.3 and P.W.4 duly testified. But D on 26/10/88, 9/11/88, 24/1/89 and 16/3/89, the appellant could not be produced in court. His learned counsel was additionally absent on the last adjourned date.

On 6/4/89, the appellant was in court but his counsel was again absent. On E 11/4/89, the appellant with his counsel were present and P.W.5, P.W.6 and P.W.7 testified. He was however not produced in court on 9/5/89, on which date his counsel was also absent. He was again not produced on 11/7/89, 4/10/89 and 7/11/89. On 23/11/89 and 16/1/90, the appellant was produced but the Doctor who performed post mortem examination on the F body of the deceased had been transferred out of Cross River State and could not be served with witness summons to testify in the case. But on 15/5/90 and 5/6/90 the appellant and his counsel were both absent in court. So disturbed was the court over the constant absence of the appellant's counsel without explanation that he was constrained on the latter date to G issue a bench warrant against learned defence counsel.

On 14/6/90 the appellant was in court but the Doctor was absent. Application by the prosecution for a further adjournment to produce the Doctor was refused by the court whereupon the prosecution was obliged to close its case without calling the Doctor. Learned defence counsel applied H at that stage for an adjournment to open his defence. This application was granted.

The appellant testified in his own defence on 21/6/90 and the case was adjourned for addresses.

On 10/7/90 the prosecution duly addressed the court. The defence

opened its reply on 17/7/90 and the case was adjourned to 23/7/90 for further addresses. However on 23/7/90 the prosecuting counsel was absent in court. On 8/10/90 which was the next adjourned date, the defence counsel was absent in court but was reported ill. The defence continued its reply on 22/10/90 but on 22/11/90, the learned prosecuting counsel was again absent in court and the case was adjourned to 27/11/90 for completion of addresses. B

On 27/11/90 and 3/12/90, the appellant was not produced and his counsel was absent on the said 27/11/90. Addresses were finally concluded on 4/12/90 whereupon the case was adjourned for judgment. Judgment was delivered in the case on 7/1/91. C

As I have already pointed out, whether the trial of the appellant took place within a reasonable time will depend on a number of factors. The trial took place before two Judges. In the aborted trial before Udofia, J., the case was called on 12 different dates. Learned counsel for the State was in court in all but two adjourned dates. The appellant was unrepresented by counsel on 5 adjourned dates until one Orok Oyo Esq. of counsel was assigned to him by the court on 29/10/86. His said counsel was himself absent in court on 4 out of the 7 dates the case was adjourned to by Udofia, J. after he was assigned to defend the appellant. The appellant himself could not be produced in court on 8 out of the 12 dates the case came up before the same Judge. D E

In the trial de novo before Effanga, J., the case was called up on 31 different dates. The appellant first appeared before him on the 25/1/88 on which date his plea was taken. It is clear from the printed record that out of the 31 adjournments, 25 of them were because for one reason or the other, unconnected with any fault on the part of the court, the case could not go on. A breakdown of these courts appearances before Effanga, J. reveals as follows - F

- (1) Appellant was present in court on 19 out of the 31 adjourned dates. G
- (2) Appellant was absent in court on 12 adjourned dates due to lack of Police vehicle to convey him to court.
- (3) Appellant's counsel was absent in court on 9 adjourned dates.
- (4) Prosecution counsel was absent on 3 adjourned dates.
- (5) The actual hearing of the case covered 6 adjourned dates. H

It does appear from a close study of the record of proceedings that the main causes of the delay in the completion of the case were threefold. The first was the inability of the Police and Prison Authorities to bring the appellant to court on ground of lack of or break down of their vehicle. The

second was the absence of counsel in court. There were finally the difficulties on the part of the prosecution to trace and present their witnesses to testify before the court.

There can be no doubt that there had been some delay in the trial of this case in that from the date the appellant was arrested to the date of his conviction spread through a period of 5 years and 10 months. His actual trial before Effanga, J. however only commenced on 25/1/88 when his plea was taken. From that date to the date of judgment covered a period of 2 years and 11 months. But in considering whether or not there had been an unreasonable delay in the trial, the circumstances of the case must be closely examined. I have given this matter a most careful consideration and have come to the conclusion that having regard to the Nigerian situation of the present time, the particular circumstances of the case and the nature of the offence charged, I am unable to hold that the delay suffered by this case constitutes a denial of the appellant's right to fair hearing within a reasonable time.

In arriving at this conclusion, one cannot ignore the fact that the appellant through his counsel contributed in no small measure to the delay in issue. Learned defence counsel was absent in court on nine occasions and so nauseating was this position that the learned trial Judge on 5/6/90 was constrained to issue a bench warrant against him. There was therefore no question of the appellant or his counsel having asserted the appellant's right to speedy trial before the trial court. There is also the question of the inability of the Police and Prison Authorities to produce the appellant as a result of want of vehicle with which to convey him to the court. This is a clear Nigerian factor which, although deplorable, unfortunate and entirely unacceptable, must be taken into consideration. There is further the appellant's confessional statement which cannot be ignored. In it, he admitted in very clear terms that he killed the deceased, her daughter and their hostess. He also advanced his reason for this brutal murder of three persons. This is a revenge for the refusal of P.W.I. to allow him marry the deceased who at all material times was still married. And, most importantly, I ask myself whether the alleged delay in the appellant's trial occasioned any prejudice to the appellant. My answer must emphatically be in the negative in view of his established voluntary confessional statement to the police. Indeed it seems to me that having regard to the facts of this case, the delay complained of worked clearly in favour of the appellant unless it is seriously contended that he would have preferred an early execu-

tion after his commission of the offence in respect of which he stood trial.

As was rightly pointed out by the learned Attorney-General of Rivers State in his brief, there is always a tendency to over-dramatise some formal objections which seem to enure to an appellant. In such a situation, one may not do better than call in aid the admonition of Oputa, J.S.C. in *Kajubo v. The State* (1988) 1 N.W.L.R. (Part 73) 721 at 738-739 where he said -

“However a court of law should not only temper justice with mercy but what is sometimes vitally important it should also temper mercy with justice. And this is a case calling for mercy to be tempered with justice. The natural leaning of our minds may be in favour of and in sympathy with the appellant and we may in like manner be thus tempted to sympathise with any prisoner in the position of the present appellant. But one has to sound a note of serious warning against giving away too easily to mere formal objections on behalf of accused persons. Such extreme facility may constitute a great blemish on the judicial process, owing to which more offenders may escape than by the manifestation of their innocence. The danger here is that by such ‘leniency’ we (the Courts) may imperceptibly loosen the bands of society, which is kept together by the hope of reward, and fear of punishment.”

In the same vein, the learned Oputa, J.S.C. in *Josiah v. The State* (1985) 1 N.W.L.R. (Part 1) 125 at 141 rubbed in the warning when he commented thus -

“And justice is not a one way traffic. It is not justice for the appellant only. Justice is not even a two way traffic. It is really a three way traffic - justice for the appellant, accused of a heinous crime of murder; justice for the victim, the murdered man, the deceased, whose blood is crying to heaven for vengeance and finally justice for society at large - the society whose social norms and values had been desecrated and broken by the criminal act complained of”

I must say that I am in complete agreement with the above observations of Oputa, J.S.C. and fully endorse them.

Learned counsel for the appellant has in submitting that the appellant was not tried within a reasonable time relied on the decisions of this court in *Akpor v. Iguorigho* (1978) 2 S.C. 115, *Ekeri and others v. Kimisede and others* (1976) 9-10 SC. 61 and *Chief Yakubu Kakara & Another v. Chief Okere Imonikhe & Another* (1974) 4 S.C. 151. I need only observe that these civil cases are distinguishable from the facts of the present case. In cases, the inordinate delay which vitiated the trials was mainly in respect of the period between the close of evidence and addresses of the part and

the dates of judgments of the other part. There can be no doubt that such delays necessarily involve loss on the part of the court of the advantage of having seen the witnesses and observing their demeanour for the purpose of assessing their credibility and would therefore fatally affect the judgments of the trial court See too *Lawal v. Dawodu* (1972) 1 All N.L.R. (Part 2) 270 and *Ifegue v. Mbadugha* (1984) 1 S.C.N.L.R. 427.

In the present case, however, judgment was delivered by the learned trial Judge 1 month and 2 days after the addresses. In the second place, I do not think that it can be seriously argued that because of the delay complained of, the learned trial Judge must have lost his appreciation of the evidence of the witnesses. The facts in this senseless and cold blooded case of murder seem to me too vivid and straight forward. In all 7 witnesses testified including three police officers that investigated the crime, there are no discrepancies whatever in the evidence of the witnesses. The appellant when he was arrested took the police and some villagers to the scene and showed them where he hid the matchet with which he savagely murdered the deceased and two others. He subsequently made a voluntary confessional statement which was duly established and confirmed before a superior police officer. In it, the appellant admitted in no uncertain terms how he attacked and killed the deceased with his matchet in the farm. It is my view that in these deplorable and obnoxious circumstances, no passage of time is likely to blur or disturb the perception or appreciation of the evidence against the appellant particularly in the face of his voluntary confession which entirely tallies with the testimony of the prosecution witnesses.

I desire finally to state that although it cannot be seriously argued that there was no delay in the trial of the case, I am unable to accept that the delay in question was unreasonable. It also seems to me that whatever delay that the trial suffered did no occasion any miscarriage of justice. There can be no doubt that the evidence against the appellant in this case is thoroughly overwhelming. In my view, it is to pronounce the appellant not guilty as charged in the face of the overwhelming evidence against him together with his own free and voluntary confession to the murder that will certainly occasion a gross miscarriage of justice.

With respect to issue three, it is well settled that where an appellant fails to advance argument on an issue he submitted for the determination of the court, such an issue must be deemed abandoned. See *Alhaji Are & Another v. Raji Ipaye & others* (1986) 3 N.W.L.R. (Part 29) 416 at 418, *Chief Elijah Ikpuku and others v. Chief* (1991) 5 N.W.L.R. (Part 193) 571 at 588, *Mrs. Ajibade & Another v. Madam Theodora Pedro & Another* (1992) 5 N.W.L.R. (Part 241) 257 at 269. *Lemboye v. Ogunsiji* (199) 6

N.W.L.R. (Part 155) 210 at 232 etc. etc. No arguments were advanced by learned counsel for the appellant with regard to the third issue for determination and the same must accordingly be deemed abandoned.

I find no merit in this appeal which I also hereby dismiss. The judgment of the trial court as affirmed by the Court of Appeal is hereby further affirmed.

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