

SUPREME COURT OF NIGERIA

30TH APRIL, 1999, SC. 178/1997.

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, S. U. ONU,
G. O. ACHIKE, U. A. KALGO, JJSC.**

| | | |
|---------------|-------|------------|
| DANIEL ADEOYE | | APPELLANT |
| V. | | |
| THE STATE | | RESPONDENT |

APPEALS - Nullity of a trial - Order of retrial - Power of the appellate court to order a retrial - Principles guiding it .

COURTS - Nullity of a trial - Order of retrial - Power of the appellate court to order a retrial - Principles guiding it .

CRIMINAL PROCEDURE - Defence - The Principle in *R v. Ukpong* - Only applies to the evidence of a witness - Other than an accused Person - Who is shown to have made a statement - Inconsistent with his evidence at the trial.

CRIMINAL PROCEDURE - Trial - In absentia - S. 210 of the Criminal Procedure Act - Requires a defendant to be Present through out his trial - Save where he falls under the exceptions.

CRIMINAL PROCEDURE - Trial - Nullity of - Circumstances under which a trial may be a nullity - The Present case falls under the circumstances.

CRIMINAL PROCEDURE - Nullity of a trial - Order of retrial - Power of the appellate court to order a retrial - Principles guiding it .

JUDGMENTS - Consequential Orders - To make - Where the trial was declared a nullity - In the circumstances of the present case - The interest of justice demands that no order of retrial should be made.

JUDGMENTS - Nullity of a trial - Order of retrial - Power of the appellate court to order a retrial - Principles guiding it .

JUDGMENTS - Trial - Nullity of - Circumstances under which a trial may be a nullity - The Present case falls under the circumstances.

FACTS

The appellant was charged with the murder of one Gabriel Nwosu. He was arraigned before the High Court of Lagos State on 17th February 1994 when his Plea was taken after the charge had been read over to him. He Pleaded not guilty to the charge. The prosecution on that date called two witnesses after whose evidence the trial was adjourned to 10/3/94. On 10/3/94, the appellant (who was all along in Prison Custody) was not produced in court but notwithstanding this fact which the learned trial judge noted in the record of Proceedings for the day, he proceeded with the trial. The prosecution called two further witnesses one of whom (PW 3) was a vital eye witness. At the end of the testimony of these two witnesses further trial was adjourned to 7/4/94.

At the conclusion of trial, the learned trial judge convicted the appellant of murder and sentenced him to death. He appealed unsuccessfully to the Court of Appeal. He has now further appealed to the Supreme Court raising four issues but the most important of these is issue (iv) which question the validity of the trial of the appellant.

ISSUES FOR DETERMINATION:

" Issue 1

Whether the courts below were right in law to have failed or refused to consider the defences raised by the Appellant on the ground that the said defences were inconsistent and contradictory.

Issue IV

Whether the proceedings and judgment of the trial Court and consequently the proceedings at the Court of Appeal was not unconstitutional, illegal and therefore a nullity and if the proceedings of the Court below are a nullity, what is the proper order to make in the circumstances."

HELD (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

Criminal Procedure - Trial - In absentia

1. It is not part of our criminal jurisprudence to try a defendant in absentia. Section 210 of the Criminal Procedure Act requires a defendant to be present throughout his trial except in two cases provided for in sections 100 and 223 of the Act. There are similar provisions in the State Laws. As this case was tried in the High Court of Lagos State it is the Criminal Procedure Law of that State that applies. Section 100(1) of the Law, and section 223 (1) and (2) do not apply in the case on hand. Section 210 being mandatory, a breach of it renders the trial a nullity. It is not suggested that the Appellant misconducted himself by interrupting the proceedings or otherwise on 10/3/94; he was just not produced in court. It must be borne in mind that he was, at all time relevant to the trial, in prison custody. (pp. 994 B/995 A)

Trial - Nullity of

2. In Eyorokoromo v. The State (1979) 6-9 SC 3, 9; (1979) NSCC 61, 65, this Court recognized the circumstances under which a trial may be a nullity. Bello, JSC, (as he then was) delivering the judgment of the Court, observed:

"It is pertinent, however, to point out that a trial, may be a nullity on one of the following grounds. Firstly, that the very foundation of the trial, that is the charge or information, may be null and void; secondly, the trial court may have no jurisdiction to try the offence; and thirdly, the trial may be rendered a nullity because of some serious error or blunder committed by the Judge in the course of the trial."

The case on hand falls under the third category above. (p. 995 C)

Nullity - Of a trial - Order of retrial

3. Having declared the trial of the Appellant a nullity, it remains to determine what consequential orders to make. This Court dealt exhaustively with this issue in Eyorokoromo v. The State (supra). There Bello, JSC after a discussion on the historical development of the power of the appel-

late Court to order a retrial where the original trial was a nullity, and a review of past cases where the Court had either declined to order a retrial or had ordered one, discerned the principles (1) that a retrial may not generally be granted where there is no valid charge or information and (2) that in the class of cases where, in the course of the trial, the trial Judge committed an error which rendered the trial null, retrial will be ordered unless there is merit in the case. Bello; JSC went on at pages 67-78 of the latter report:

"Now the power of the Court of Appeal to order a retrial in criminal cases is conferred by section 20(2) of the Decree in identical words with section 26(2) of the Supreme Court Act. It follows therefore that the principles in Yesufu Abodundu & Others v. The Queen (supra) which are the guiding principles under which this Court will order a retrial, are applicable in the Court of Appeal in exercise of their discretion under section 20(2) of the Degree. To exercise that discretion judicially called for the examination by the Court of Appeal of the whole record of proceedings of the trial court to ascertain whether or not the evidence and the circumstances of the case came within those principles. "

What are the principles in Abodundu's case? Abbott, FJ delivering the judgment of the Federal Supreme Court in that said case opined at pages 73-74 of the report:

"We are of opinion that, before deciding to order a retrial, this Court must be satisfied (a) that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand this Court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to section 11 (1) of the Ordinance; (b) that, leaving aside the error of irregularity, the evidence taken as a whole discloses a substantial case against the appellant; (c) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time; (d) that the offence or offences of which the appellant was convicted, or the consequences to the appellant or any other person of the conviction or acquittal of the appellant, are not merely trivial; and (e) that to refuse an order for a

retrial would occasion a greater miscarriage of justice than to grant it."
(p. 995 E)

Criminal Procedure - Defence

4. No doubt, the charge against the Appellant is a serious one indeed and the evidence was rather strong. It is true that the learned trial Judge misapplied the principle in R. v. Ukpong (supra) when he rejected the defence of the Appellant for the reason only that his evidence at the trial was at variance with one of his statements to the police. This Court had, in Egboghonome v. The State (1993) 7 NWLR 383, held that this approach was wrong and that R v. Ukpong only applies to the evidence of a witness other than an accused person who is shown to have made a previous statement inconsistent with his evidence at the trial. (p. 1000 B)

Judgments - Consequential orders

5. If, however, the evidence of the two witnesses - one of whom was a star eye-witness - who testified in the absence of the Appellant was excluded, the case for the prosecution would be considerably weakened. I doubt if the learned trial Judge would have convicted without the evidence of these two witnesses, particularly PW3 whose evidence he relied upon considerably in convicting. I take into consideration that the offence was allegedly committed in 1991 and the Appellant has been in prison custody since then. I also take into consideration the fact given in evidence by the prosecution that since the occurrence of the event leading to the death of the deceased, all the tenants living in the Appellant's premises had moved away to unknown places and it may now be difficult to locate them to give evidence. Bearing all these factors in mind I think the interest of justice demands that I make no order of retrial in this case. Consequently, therefore, I allow this appeal, set aside the conviction and sentence of death passed on the Appellant and declare his trial null and void. I, however, do not order that he be retried for the same offence again. I, therefore, discharge and acquit him of the charge of murder preferred against him. (p. 1000 F)

NOTABLE POINT OF INTEREST

ACHIKE JSC

1. Order of retrial - Consideration of the guidelines

The ordeal of second trial, personally, might not easily appeal to me in the overall consideration of the interests of justice, particularly if the offence is a grave one like murder or rape. So also, if the guideline urging a refusal of a new trial is predicated on the fact that the appellant has long been incarcerated in prison. The fact of the appellant's long incarceration in prison should be taken into consideration in determining the period of prison term should the appellant be convicted after due trial. But, in contrast, the question of absence of witnesses to field in the event of a new trial might weight heavily on me. Thus in the instant case there is evidence by the prosecution that since the incident of the deceased's demise, all the tenants in the appellant's residence had taken their exit and their whereabouts may not be possible to be located. Such exodus of the witnesses will surely make an order for a new trial cosmetic and the court would be least prepared for a mere routine formality which should be much deprecated. In other words, in the interest of justice, I would not make an order for a new trial in the instant case. (1007 A)

REPRESENTATION

A. Akinrele, for the Appellant.
N. N. Mofunanya (Mrs.) DPP (Lagos), for the Respondent.

CASES REFERRED TO

Eyorokoromo v. The State (1979) 6-9 SC 9; (1979) NSCC 61, 65
Abodundu v. The Queen 4 FSC 70; (1959) SCNLR 162
Dennis Reid v. The Queen (1979) 2 WLR 221, 226
Ng Yuk Kin v. The Crown (1955) 39 H.K.L.R. 49, 60
Egboghonome v. The State (1993) 7 NWLR 383
Nnajibor v. Ukonu (1986) 4 NWLR 405 at 517
Devi v. Roy (1946) AC. 508
Hakido Kpema v. The State (1986) 1 NWLR (part 17) 396
Ababa v. Adeyemi (1976) 12 SC.51

Abodundu v. The Queen 4 FSC 70; (1959) SCNLR 162

Bakare v. Ibrahim (1973) 6 SC. 204 at 214-215

Abodundu v The State 4 FSC 70; 1959 SC. NLR 162

Eyorokoromo v. The State (1979) 6-9 SC 3

Bakare v Ibrahim (1973) 6 SC. 204 at 214-215

B

STATUTES REFERRED TO

Criminal Procedure Act, Cap 80 Laws of the Federation of Nigeria, 1990; ss. 100, 210 and 223.

C

LEAD JUDGMENT BY OGUNDARE JSC

The appellant was charged with the murder of one Gabriel Nwosu. He was arraigned before the High Court of Lagos State before Oduneye, J. on 17th February 1994 when his plea was taken after the charge had been read over to him. He pleaded not guilty to the charge. The prosecution, on that date, called two witnesses after whose evidence the trial was adjourned to 10/3/94. On 10/3/94, although the appellant (who was all along in prison custody) was not produced in court. The learned trial Judge, notwithstanding this fact which he recorded in the record of proceedings for the day, nevertheless proceeded with the trial in the absence of the appellant. The prosecution called two further witnesses one of whom (PW3) was a vital eye witness. At the end of the testimony of these two witnesses further trial was adjourned to 7/4/94. At the conclusion of trial, and after addresses by counsel for the prosecution and the defence, the learned trial Judge convicted the appellant of murder and sentenced him to death.

D

E

F

G

He appealed unsuccessfully to the Court below. He has now further appealed to this Court upon 7 original grounds of appeal. With leave of this Court an additional ground of appeal was added. It reads:

"8 The learned Justices of the Court of Appeal erred in law in hearing and determining the appeal herein when the judgment being appealed against was a nullity."

H

The particulars to the ground are omitted.

The appellant, through his counsel, Ademola Akinrele Esqr, filed

his brief of argument on 12/12/97. The Respondent failed to file its own brief. The appeal was set down for hearing on 18/10/98. In view of the issue raised in the appeal and based on Ground 8 above, this Court ordered that the original record of proceedings in the trial Judge's handwriting be produced on or before 18/12/98 and the hearing of the appeal was adjourned to 4/2/99. Before the latter date, the Respondent had filed a motion for extension of time to file Respondent's brief and to deem the brief already filed and served duly filed and served. On the application coming before the Court on 4/2/99 and not being opposed by Mr. Akinrele, it was granted as prayed.

In the Appellant's brief the following issues are set down as calling for determination in this appeal, to wit:

" Issue 1

D *Whether the courts below were right in law to have failed or refused to consider the defences raised by the Appellant on the ground that the said defences were inconsistent and contradictory.*

Issue 11

E *Whether the inconsistency in the evidence of the PW2 and PW3 on the one hand and PW7 on the other hand was de minimis or whether it was material contradiction and if it is material, whether the conviction of the Appellant is sustainable.*

Issue 111

F *Whether in the circumstances of the case, Hajia Rabiul Mohammed was a material witness and as such, whether the refusal and or omission of the prosecution to call her or tender her written statement raises the presumption in S. 149 (d) of the Evidence Act and therefore fatal to the case of prosecution.*

Issue IV

H *Whether the proceedings and judgment of the trial Court and consequently the proceedings at the Court of Appeal was not unconstitutional, illegal and therefore a nullity and if the proceedings of the Court below are a nullity, what is the proper order to make in the circumstances."*

The Respondent adopted the above issues.

As Issue IV calls into question the validity of the trial of the Appellant I intend to consider it first .

The trial of the Appellant had commenced on 17th February 1994 when two witnesses gave evidence for the prosecution. The Appellant was in court throughout the proceedings that day. After the second witness had concluded her evidence further trial was adjourned to 10th March 1994. Because of the importance of what happened to the Issue IV under consideration, I will set out part of the proceedings for that day. The record reads:

"IKEJA: Thursday the 10th March, 1994

Before the Hon. Justice J. A. Oduneye - Judge

Suit No. ID/3C/93

BETWEEN:

THE STATE

VS

COMPLAINT (sic)

D. ADEOYE

ACCUSED

Accused not Produced

F. E. Awolalu for the State

P. O. Ige for the Accused person.

3rd Plaintiff Witness:- _Sworn on the Holy Bible and states in English language."

(underlining is mine for emphasis)

Two witnesses gave evidence that day .

As we were not certain of the correctness of the record before us, we called for the original record in the trial Judge's own handwriting. There was no difference. And both counsel confirmed this.

It is Mr. Akinrele's submission that as two witnesses testified that day in the absence of the Appellant, the trial offended section 210 of the Criminal Procedure Act, Cap 80 Laws of the Federation of Nigeria 1990 and was consequently a nullity. He urged us to declare the trial void.

The learned Director of Public Prosecutions of Lagos State, Mrs. H Mofunanya who appeared for the Respondent at first maintained that the Appellant was present in Court when the PW3 and PW4 gave evidence on 10/3/94. When shown the original record of proceedings for the day,

she conceded that there was a defect in the proceedings. No doubt, the learned DPP was in some difficulty over the development. The only way she could overcome the difficulty was to challenge satisfactorily the correctness of the trial court's record for the day. As she had no materials with which to embark on such an exercise she threw in the towel.

It is not part of our criminal jurisprudence to try a defendant in absentia. Section 210 of the Criminal Procedure Act requires a defendant to be present throughout his trial except in two cases provided for in sections 100 and 223 of the Act. There are similar provisions in the State Laws. As this case was tried in the High Court of Lagos State it is the Criminal Procedure Law of that State that applies. Now Section 210 of that Law provides:

"210. Every accused person shall, subject to the provisions of section 100 and of subsection (2) of section 223, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable."

Section 100(1) of the Law, which provides -

"100. (1) Whenever a magistrate issues a summons in respect of any offence to which there is annexed a penalty not exceeding one hundred Naira or imprisonment not exceeding six months or both such penalty and imprisonment the magistrate may, on the application of the accused and if he sees reason to do so and shall, on such application when the offence with which the accused is charged is punishable only by a penalty not exceeding one hundred Naira, dispense with the personal attendance of the accused provided that the accused pleads guilty in writing or appears and so pleads by a legal practitioner."

and section 223 (1) and (2) which read -

"223 (1) When a judge holding a trial or a magistrate holding a trial or an inquiry has reason to suspect that the accused is of unsound mind and consequently incapable of making his defence the judge, jury or magistrate, as the case may be, shall in the first instance investigate the fact of such unsoundness of mind.

(2) Such investigation may be held in the absence of the

accused person if the court is satisfied that owing to the state of the accused's mind it would be in the interests of the safety of the accused or of other persons or in the interests of public decency that he should be absent, "

do not apply in the case on hand. Section 210 being mandatory, a breach of it renders the trial a nullity. It is not suggested that the Appellant misconducted himself by interrupting the proceedings or otherwise on 10/3/94; he was just not produced in court. It must be borne in mind that he was, at all time relevant to the trial, in prison custody. In Eyorokoromo v. The State (1979) 6-9 SC 9; (1979) NSCC 61, 65, this Court recognized the circumstances under which a trial may be a nullity. Bello, JSC, (as he then was) delivering the judgment of the Court, observed:

" It is pertinent, however, to point out that a trial, may be a nullity on one of the following grounds. Firstly, that the very foundation of the trial, that is the charge or information, may be null and void; secondly, the trial court may have no jurisdiction to try the offence; and thirdly, the trial may be rendered a nullity because of some serious error or blunder committed by the Judge in the course of the trial."

The case on hand falls under the third category above.

Having declared the trial of the Appellant a nullity, it remains to determine what consequential orders to make. Mr. Akinrele, after discussing Abodundu v. The Queen 4 FSC 70; (1959) SCNLR 162, urged us to acquit the Appellant. It is his argument that the learned trial Judge did not effectively consider the merit of the case put forward by the appellant in that, according to learned counsel, the Judge peremptorily rejected the defence on the principle of R v. Ukpong (1961) All NLR 25 which, learned counsel argued, was wrongly applied. He urged us take into account the length of time the Appellant had been incarcerated, the difficulty/impossibility of procuring vital witnesses and the age of the appellant.

Mrs. Mofunanya, for the Respondent argued forcefully that notwithstanding the defect in the proceedings the appeal be dismissed and the

conviction and sentence affirmed.

This Court dealt exhaustively with this issue in Eyorokoromo v. The State (supra). There Bello, JSC after a discussion on the historical development of the power of the appellate Court to order a retrial where the original trial was a nullity, and a review of past cases where the Court had either declined to order a retrial or had ordered one, discerned the principles (1) that a retrial may not generally be granted where there is no valid charge or information and (2) that in the class of cases where, in the course of the trial, the trial Judge committed an error which rendered the trial null, retrial will be ordered unless there is merit in the case. Bello; JSC went on at pages 67-78 of the latter report:

"Now the power of the Court of Appeal to order a retrial in criminal cases is conferred by section 20(2) of the Decree in identical words with section 26(2) of the Supreme Court Act. It follows therefore that the principles in Yesufu Abodundu & Others v. The Queen (supra) which are the guiding principles under which this Court will order a retrial, are applicable in the Court of Appeal in exercise of their discretion under section 20(2) of the Degree. To exercise that discretion judicially called for the examination by the Court of Appeal of the whole record of proceedings of the trial court to ascertain whether or not the evidence and the circumstances of the case came within those principles."

What are the principles in Abodundu's case? Abbot, FJ delivering the judgment of the Federal Supreme Court in that said case opined at pages 73-74 of the report:

"We are of opinion that, before deciding to order a retrial, this Court must be satisfied (a) that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand this Court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to section 11 (1) of the Ordinance; (b) that, leaving aside the error of irregularity, the evidence taken as a whole discloses a substantial case

against the appellant; (c) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time; (d) that the offence or offences of which the appellant was convicted, or the consequences to the appellant or any other person of the conviction or acquittal of the appellant, are not merely trivial; and (e) B that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it."

It is pertinent to observe that in arriving at these principles the Federal Supreme Court per Abbot, FJ. had warned:

"We have considered the cases cited by Mr. Lloyd, but have been C unable to extract from them any guiding principles. We have therefore (and as this is one of the first cases in which the exercise of the power to order a retrial has been argued in this Court) endeavored to formulate the principles on which this Court should act in considering the exercise D of that power. In formulating these principles we do not regard ourselves as deciding any question of law, or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combination of circumstances in which the ques- E tion of ordering a retrial may arise, and it may be that further experience will lead us to formulate additional principles, or to modify those we have formulated in this judgment. We wish to make it clear that the Court will be free to do this without infringing the doctrine of judicial F precedent."

This warning was re-echoed by the privy Council 20 years later in Dennis Reid v. The Queen (1979) 2 WLR 221, 226 where, in answering question 4 posed before the council, that is:

"4. What are the principles which should apply in considering G whether or not a new trial should be ordered?"

The Council, per Lord Diplock, had warned:

"Question (4) is general in its terms and asks for a statement of the principles which should apply in considering whether or not a new H trial should be ordered. Their Lordships would be very loath to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether

upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances."

Lord Diplock, however, attempted to lay down some guidelines when at pages 226-227 he said:

"Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant. At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso to section 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to call witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and

some in favour otherwise of the offence must always be a relevant factors; so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantages rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a new certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction,

'It is in the interest of the public, the complainant, and the [defendant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery.'

This was said by the Full Court of Hong Kong when ordering a new trial in Ng Yuk Kin v. The Crown (1955) 39 H.K.L.R. 49, 60. That was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone."

B The guidelines suggested by the Privy Council in Reid's case are not too dissimilar from the principles laid down by the Federal Supreme Court in Abodundu.

I now turn to the case on hand. **No doubt, the charge against the Appellant is a serious one indeed and the evidence was rather strong. It is true that the learned trial Judge misapplied the principle in R. v. Ukpong (supra) when he rejected the defence of the Appellant for the reason only that his evidence at the trial was at variance with one of his statements to the police. This Court had, in Egboghonome v. The State (1993) 7 NWLR 383, held that this approach was wrong and that R v. Ukpong only applies to the evidence of a witness other than an accused person who is shown to have made a previous statement inconsistent with his evidence at the trial.**

E Whether this misdirection would suffice to vitiate the verdict of guilt entered by the learned trial Judge is another matter. Mr. Akinrele submits it would. Thus, Mr. Akinrele seems to be saying that the case for the prosecution, in the light of this misdirection, lacks merit. I do not think the case is without some merit. **If, however, the evidence of the two witnesses - one of whom was a star eye-witness - who testified in the absence of the Appellant was excluded, the case for the prosecution would be considerably weakened. I doubt if the learned trial Judge would have convicted without the evidence of these two witnesses,**

F **particularly PW3 whose evidence he relied upon considerably in convicting.**

G

I take into consideration that the offence was allegedly committed in 1991 and the Appellant has been in prison custody since

H then. I also take into consideration the fact given in evidence by the prosecution that since the occurrence of the event leading to the death of the deceased, all the tenants living in the Appellant's premises had moved away to unknown places and it may now be difficult to locate

them to give evidence.

Bearing all these factors in mind I think the interest of justice demands that I make no order of retrial in this case. Consequently, therefore, I allow this appeal, set aside the conviction and sentence of death passed on the Appellant and declare his trial null and void. I, however, do not order that he be retried for the same offence again. I, therefore, discharge and acquit him of the charge of murder preferred against him.

C

BELGORE JSC

The trial of the appellant in the trial Court was a nullity. The accused must be present in court to hear all allegations of crime against him. In the absence of any lawful reason for his absence during his trial, it was a trial in absentia, a procedure strange to our Criminal Procedure Act and Criminal Procedure Code Laws of the States. Looking at the trial with all the fundamental procedural defects, it cannot be saved. I find merit in this appeal and to order a retrial will not only spell more hardship on the accused person, but will put mire burden on the prosecution; both ways it will be unjust. I allow this appeal and as my learned brother, Ogundare, JSC., has held in the lead judgment, I also enter a verdict of discharge and acquittal for the appellant.

F

ONU JSC

I have had a preview of the judgment of my learned brother Ogundare, JSC just delivered. I agree entirely with him that this appeal is meritorious and ought therefore to succeed.

G

In expatiating on the said judgment of my learned brother, I wish to add by stating in no uncertain terms that the learned Justices of the Court of Appeal erred in law in hearing and determining the case herein appealed against which was a nullity. It was a nullity by reason of the facts that:-

1. On 10th March, 1994 during the trial of the appellant and for

no ostensible reason, the appellant was not produced in court to witness his trial.

2. A big chunk of the vital portion or what I consider the substantial case for the prosecution against the appellant, was adduced and made out against him in his absence and without an opportunity for him to cross-examine his accusers thereon; that amounts to trial in absentia which is unknown to our laws in Nigeria.

3. The proceedings are manifestly inconsistent with the express and mandatory provisions of Section 210 of Criminal Procedure Act, Cap.80, Laws of the Federation of Nigeria, 1990 - in the instant case, Section 210 of the Criminal Procedure Law of Lagos State which provides:-

"210. Every accused person shall, subject to the provisions of Section 100 and of sub-section (2) of Section 223 of this Law, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings otherwise as to render their continuance in his presence impracticable."

4. The error occasioned a grave miscarriage of justice as the appellant was not able to confront his accusers and refute their allegations. See the case of Nnajifor v. Ukonu (1986) 4 NWLR 405 at 517, ratio 4 where Obaseki, JSC quoting from Devi v. Roy (1946) AC. 508 held that it must be the violation of some principle of law or procedure which must be such an erroneous proposition of law that if such proposition be corrected, the findings cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. See also Adigun v. Attorney-General of Oyo State (1988) 1 NWLR (Part 53) 623.

It is well settled that where an act is void and a nullity as in the instant case, it is stricto sensu unnecessary for the person concerned by the act (in this case the appellant) to apply to have it set aside because no legal effect results from such an act. It is the duty of this Court suo motu or where as here the nullity of the appeal proceedings has been brought to its notices, to declare as a nullity the judgment on appeal made from either want of jurisdiction and in contravention of the constitutional or other statutory requirement as exemplified in (3) above. See Hakido Kpema v. The

State (1986) 1 NWLR (part 17) 396 and Maisamari Maiwa v. Tanko Abdu (1986) 1 NWLR 437. Cf. Adis Ababa v. Adeyemi (1976) 12 SC.51. In the instant case, by exercising my direction guided by the well known case of Yesufu Abodundu & Ors v. The Queen 4 FSC 70; (1959) SCNLR 162, I adopt the reasoning in the lead judgment to advice against the retrial B of this case which apart from being a nullity, other circumstances stated therein connive to militate against such an order for a rehearing. See Bakare v. Ibrahim (1973) 6 SC. 204 at 214-215. From the foregoing, I have no hesitation in declaring the proceedings embarked upon in the two courts C below a nullity. For the reasons set out above and the more detailed ones contained in the lead judgment of my learned brother Ogundare, JSC, I too allow the appeal and enter a verdict of discharge and acquittal for the appellant.

D

ACHIKE JSC

Mr. A. Akinrele, learned counsel for the appellant referred to p.41 of the record of appeal which showed that for the proceedings of the lower E court on 10th March, 1994, the trial Judge recorded that the accused was not brought from prison and on the same day two key witnesses testified. Referring to section 210 of the Criminal Procedure Law, Cap 33 of the Laws of the of Lagos State which provides that

" Every person shall subject to the provisions of section 100 and F of sub-section (2) of section 223 be present in Court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable." G

Learned counsel for the appellant submitted that the proceedings on 10/3/94 rendered the entire trial a nullity, giving rise to miscarriage of justice.

Learned counsel dealing with the proper order the Court should make in the circumstances, either acquittal and discharge or retrial, submitted that the learned trial Judge did not give sufficient consideration to the merit of the case canvassed by the appellant in his defence but abruptly H rejected the defence on the misconceived application of the decision R v

Ukpong (1961) All NLR 25. He further submitted that the length of time the appellant had been confined in prison at all material times from the date of the alleged offence, trial and imprisonment as well as the extreme difficulty or impracticability of reaching or knowing the whereabouts of key witnesses should be taken into account to order the acquittal and discharge of the appellant rather than an order for re-trial. To this end, counsel called in aid the authority of Abodundun v. The Queen 4 FSC 70.

Mrs. N.N. Mofunanya, learned Director of Public Prosecutions of Lagos State was initially wary about the recording in the record of appeal for the proceedings of 10/3/94 wherein it was recorded that the appellant was not produced from custody on that day, nevertheless she accepted the obvious when she was shown the original trial Judge's case-file which confirmed the absence of the appellant at the proceedings on 10/3/94, bearing in mind that in law both the prosecution and the defence, as well as the Court, are all bound by the record of appeal and the burden lies on any party who disputes the content of the record of appeal to prove the contrary.

On the question of the proper order this court should make in the circumstances, learned D. P. P. urged us to order a re-trial having regard to the strong case established against the appellant. The simple issue raised in this appeal is whether an accused person charged with a criminal offence can be trial in his absence. In the case on hand, the appellant charged with murder was duly arraigned and he pleaded not guilty to the charge and two witnesses testified. On the next adjourned day, the accused/appellant was not brought to court from prison. Even though the court recorded that the accused was absent it proceeded to take evidence from two eye-witnesses and after the conclusion of the trial, the accused was convicted of murder and sentenced to death. He appealed to the Court of Appeal but that court confirmed the judgement of the trial court hence his further appeal to this Court.

To try an accused person for an offence in his absence is novel appeal under our substantive criminal and adjectival laws. The record of appeal as well as the original case-file bears out that the appellant was not brought to court on 10/3/94 when evidence of vital witnesses were exam-

ined. This was a serious oversight and it was the more disturbing that neither the prosecution, including their learned counsel, nor the learned defence counsel observed the absence of the appellant. This inattentiveness by the two counsel, undoubtedly learned officers of the court assisting in the administration of criminal justice at the court of trial, is much to be deprecated. To say the least, it left a sour taste in the mouth. A trial, whether objected to or not, in the absence of the accused person is a sham. Such procedural blunder is a negation of fair trial and contravenes section 210 of the Criminal Procedure Law, Cap 33, Laws of the state 1990 and renders the purported trial a nullity.

The only known exceptions of trials of an accused in absentia are first where the appellant misconducts himself at the trial; second, under section 100 of the said Act where the penalty to be imposed on a person by the magistrate does not exceed N100 or six month imprisonment or both penalty and imprisonment and the accused is dispensed personal attendance at hearing by the court; and third, under section 223(1) and (2) where the accused is of unsound mind.

Of course, the fact that the procedural blunder rendered the trial a nullity is not the end of the matter because the crucial question is what consequential order does the court make in such circumstances? The invariable question is whether the court should order a re-trial in order to remedy the procedural error or should the accused be discharged and acquitted. Our case law is replete with legal authorities such as Abodundu v The State 4 FSC 70; 1959 SC. NLR 162 and Eyorokoromo v. The State (1979) 6-9 SC 3 and Bakare v Ibrahim (1973) 6 SC. 204 at 214-215 as well as the well-known Privy council Opinion of Lord Diplock in Dennis Reid v The Queen (1979) 2 WLR 221, a case on appeal to the Privy Council from Jamaica, which furnished some guide-lines in this difficult arm of the law. These have been given in-depth consideration in the leading judgement of my learned brother Ogundare, JSC and I have no intention to rehearse them in my judgement.

What seems to me to be crucial in the consideration of ascertaining if after quashing a conviction on the ground that it is a nullity is whether the overall interests of justice dictate that an order of retrial be made or

not. Abodundu v The Queen (supra) see pp. 73-74) has set out some useful guidelines which may be called in aid in making what is a far-reaching decision in such situations. Let me say straightaway that these identified guidelines are not exhaustive. But a court faced with such difficult decision may regard one or combination of these guidelines as determinant in reaching a decision, one way or the other. For me, I like, as earlier stated herein to be guided by interest of justice in all the circumstances of a given case, including the five guidelines identified in Abodundu case. One may in this regard use the term 'interest of justice' interchangeably with the term 'interest of the public' and, perhaps, even the term 'public policy'. These terms are fluid and nebulous. Little wonder, Burrough, J. referring to the term public police observed humourously in Richardson v Mellish 2 Bing 252

"Is a very unruly horse, and when once you get astride of it you never know where it will carry you."

This approach appears to have met with the approval of the Full Court of Hong Kong when invited to decide on a case, Ng Yuk Kin v The Crown (1955) 39 H. K. L. R 49 at 60 (cited in Reid v The Queen (supra) in circumstances not too dissimilar from the appeal on hand, preferring to order a new trial, had this to say:

"It is in the interest of the public, the complainant, and the (defendant) himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery."

There is no doubt that one can make an impressive decision not to order a new trial relying on one of the guidelines set out in Abodundun case which, at the end of the day, will depend on the Court's evaluation of the peculiarities of each case. Thus in the case on hand, learned appellant's counsel strongly submitted against a retrial because of some misdirection on the part of the trial Judge, nevertheless while conceding misdirection, my learned brother Ogundare, JSC in the leading judgment was not prepared to hold that that misdirection alone was enough to conclude that the prosecution's case was entirely without merit. I also respectfully share that view.

The ordeal of second trial, personally, might not easily appeal to me in the overall consideration of the interests of justice, particularly if the offence is a grave one like murder or rape. So also, if the guideline urging a refusal of a new trial is predicated on the fact that the appellant has long been incarcerated in prison. The fact of the appellant's long incarceration B in prison should be taken into consideration in determining the period of prison term should the appellant be convicted after due trial. But, in contrast, the question of absence of witnesses to field in the event of a new trial might weight heavily on me. Thus in the instant case there is evi- C dence by the prosecution that since the incident of the deceased's demise, all the tenants in the appellant's residence had taken their exit and their whereabouts may not be possible to be located. Such exodus of the witnesses will surely make an order for a new trial cosmetic and the court would be least prepared for a mere routine formality which should be much D deprecated. In other words, in the interest of justice, I would not make an order for a new trial in the instant case.

The result is that I entirely agree with the leading judgment of my learned brother, Ogundare JSC, a preview of which I had the privilege to E peruse in draft. I, too, would allow this appeal, set aside the conviction and sentence of death passed on the appellant and declare his trial a nullity. I do not order a re-trial but I substitute an order of discharge and acquittal.

F

KALGO JSC

I have read in advance the judgment of my learned brother Ogundare JSC just delivered. I am in complete agreement with him that G there is merit in this appeal and ought therefore to be allowed.

In agreeing with the reasoning and conclusions reached by my learned brother in his leading judgment, I wish to add the following.

In his brief of argument filed in this Court, the learned counsel for the appellant raised four issues for determination by the Court. The most H important of these issues, having regard to the facts and circumstances of this case, is issue number four, which reads:-

"Whether the proceedings and judgment of the trial Court and

consequently the proceedings at the Court of Appeal was not unconstitutional, illegal and therefore a nullity and if the proceedings of the Courts below are a nullity, what os the proper order to make in the circumstances".

B The proceedings of the trial court which took place on the 10th of March, 1994 and which commenced on page 41 of the record of appeal reveal the following:-

"BETWEEN:-

C THE STATE COMPLAINT (SIC) VS
D. ADEOYE ACCUSED

ACCUSED NOT PRODUCED

F.E Awolalu for the State

P.O. Ige for the Accused person

D 3RD PLAINTIFF WITNESS- Sworn on Holy Bible and states in English language..

My names are Gregory Nnandi Oputa. I live at No. 54

Sunday Agigun Street, Alansa Ikeja.....

E The evidence of this witness including cross examination continued to the end and finished on page 45 of the record. On the same page, the learned trial judge still in the absence of the accused proceeded to hear the evidence of another prosecution witness. P.W. 4, Sgt. Godwin Ugbaje who investigated the case.

F It is very clear the record of appeal that the evidence-of P.W.4 was taken in complete absence of the accused/appellant on 10th March, 1994.

G *Section 210 of the Criminal Procedure Law (cap. 80) of the Laws of Lagos state of Nigeria 1991 which applies to these proceedings, provides that:-*

H *"Every accused person shall subject to the provisions of Section 100 and of subsection (2) of Section 223 of this Law, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their circumstance in his presence impracticable.*

There are similar provisions in the Federal and other State Laws. By these

provision, in all criminal trials before a Court in Nigeria, the person accused of the crime and being tried, must at all times, be present in court when any proceedings are being taken in connection with his or her case until the trial is completed. There are however certain exceptions as specified under Section 100 and Section 223 of the said Law. Under Section B 100, the presence of the accused can be dispensed with where the offence of which the accused is being tried carries a penalty of only N100,00 or Six months imprisonment. And under Section 223 (2), the presence of the accused can also be dispensed with when a court is conducting an investigation as to whether the accused is of unsound mind and consequently C incapable of making his defence.

In the instance case, it has not been shown on the record that the accused/appellant on the 10th of March, 1994 misconducted himself and interrupted the proceedings so as to make it impracticable for the proceedings to go on without him. Also the provisions of Section 100 and 223 (2) D of the said Law cannot apply to him because he was charged with an offence of murder punishable with death and he was not being investigated for being of unsound mind. E

The provisions of Section 210 are clearly mandatory subject of course to the exceptions specified in the Section. Since none of the exceptions apply to the present situation; the learned trial Judge has failed to comply with mandatory provisions affecting the trial of the accused/appellant. What then is the effect of this failure ? Learned counsel for the F appellant submitted that since the learned trial Judge relies heavily on the evidence of P.W. 3 and P.W.4 in convicting the appellant of the offence of murder, there saw grave miscarriage of justice in this case and that the whole proceedings were a nullity. He urged the Court to discharge and G acquit the appellant.

Mrs. Mofunanya, D.P.P. Lagos State, who appeared for the State had no answer to the point canvassed in issue 4. She made no effort to attack the record of the learned trial Judge in respect of the absence of the H appellant when the evidence of these vital witnesses P.W. 3 and P.W. 4 were recorded on the 10th of March, 1994. This Court is bound to accept the record of appeal as certified by the registrar of the trial Court.

The learned D.P.P. however submitted that the learned trial judge had considered carefully all the evidence produced at the trial by the prosecution and had properly convicted the appellant of the offence of murder contrary to Section 319 (1) of the Criminal Code of Lagos State. She urged the Court to confirm the decision of the Court of Appeal which affirmed the decision of the trial Court.

As I stated earlier in this judgment, there must be very special circumstances to justify proceeding with a criminal trial in such circumstances as here. In the case of R. v. Lee Kun (1916) 11 Cr. APP. R 298 at 300 Reading L C J. had this to say on why an accused should always be present during his trial:-

" The prosecution of criminals and the administration of criminal law are matters which concern the state. Every citizen has an interest in seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safeguards so carefully provided by the law. No trial for felony can be had except in the presence of the accused unless he creates a disturbance preventing a continuance of the trial. Even in charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him, and having opportunity, having heard it, of answering it. The presence of the accused means not only that he must be physically in attendance, but also that he must be capable of the proceedings".

The appellant was charged and trial of the offence of murder which was no doubt a felony under the Criminal Code of Lagos State. There were no circumstances, not to talk of special circumstances justifying the continuation of the trial of the accused in his absence. This means in effect that there was no trial and therefore the whole proceedings are a nullity. If the proceedings are a nullity, the conviction and sentence cannot stand and I hold accordingly.

In considering the consequential issue of whether to order a re-trial of the appellant or not, I fully associate myself with views fully expressed in the leading judgement of my learned brother Ogundare JSC.

This Court has in a line of decided cases over the years established circumstances under which retrial can be ordered in criminal cases and this case, in my respectful view, does not come within the ambit of any of them. See Abdodundu v. Queen, 4 FSC 70; Abibu v. Binutu (1988) 1 NWLR (part 68) 57; Sanusi v. Ameyegun (1992) 4 NWLR (part 237) 52; Erekanure v. The State (1993) 5 NWLR (part 294) 385. B

I do not find it necessary, in the circumstances of this case, to consider the other three issues set out by the learned counsel for the appellant in his brief.

Before completing this judgment, I think it is pertinent to observe C that the whole question which arose in issue 4, could have been avoided with reasonable diligence on the part of the learned trial Judge. The learned trial judge must have known as this is of elementary knowledge in all criminal trials that an accused must be present throughout his trial under D normal circumstances especially when evidence of witnesses is being taken. It has been held in many decided cases that even the absence of a counsel in criminal trials should as far as possible be avoided talk less of an accused person. See Benjamin Shemfe v. C.O.P (1962) NRNL R 87; Mary v. Kingston 32 CR.APP. R 183; G. Hired Zor v. The King 1944 AC E 149.

It is my respectful view that the learned trial Judge in this case should have used his judicial discretion to adjourn the proceedings of 10th F March, 1994 even without such application or request by the accused/appellant's counsel. There was also nothing on the record to show that either the prosecution or the defence was guilty of inordinate delay in bringing the accused to trial or delay in the actual trial itself which commenced G only on the 17th of February, 1994. It seems to me therefore that if the learned trial Judge had exercised his discretion to adjourn the proceedings for the accused to appear, the whole situation the evidence presented at the trial

From what I have said above, and adopting the reasoning of my H learned brother Ogundare JSC in the leading judgment, I hereby allow the appeal and declare the proceedings in this case as conducted by the learned trial judge, a nullity. Consequently, I set aside the conviction and sentence

passed on the appellant by the learned trial judge and affirmed by the Court of Appeal. I make no order for retrial of the appellant and he is hereby discharged and acquitted.

B

C

D

E

F

G

H