

SUPREME COURT OF NIGERIA
30TH MARCH, 2007. SC. 247/2001
CORAM:- I. L. KUTIGI CJN, N. TOBI, S. A. AKINTAN,
A. M. MUKHTAR, W. S. N. ONNOGHEN, JJSC

1. MRS. E. A. LUFADAJU (CHIEF
MAGISTRATE GRADE 1) APPELLANTS
2. ATTORNEY-GENERAL OF
LAGOS STATE
AND
EVANGELIST BAYO JOHNSON RESPONDENT

CRIMINAL PROCEDURE - Charges - Remand in custody - Where accused was charged with treasonable felony - His production before a magistrate that has no jurisdiction - Falls under s. 78(b) and not s. 215 CPL - Hence no plea was taken (H1)

CRIMINAL PROCEDURE - Arraignment - Validity - Remand proceedings s. 236(3) CPL - Was what the magistrate/appellant handled - For all the requirements of a valid arraignment - Were not present in this case (H2)

CRIMINAL PROCEDURE - Constitution - Conflict - Right to personal liberty s. 32 1979 Constitution - S. 236(2) CPL that provides for remand in custody - Is not in conflict with the Constitution (H3)

CONSTITUTIONAL LAW - Trial - Fair trial within a reasonable time - S. 33(4) 1979 Constitution - Is not fettered by s. 236 (3) CPL - As what is reasonable time is subjective (H4)

CONSTITUTIONAL LAW - Presumption of innocence - S. 33(5) 1979 Constitution - Where accused was merely remanded in custody by magistrate - Without any plea - The presumption is not removed thereby (H5)

FACTS

The respondent together with other accused persons were detained at the Police Criminal Investigation Department, Alagbon, Lagos on 12-1-1997. He was presented before the Chief Magistrate (appellant) on 12-3-1997 on charge of treasonable felony which the appellant has no jurisdiction to determine. As such the charge was merely read to respondent without any plea and the appellant ordered that he be remanded in prison custody. Bail was refused as the magistrate has no jurisdiction to try the offence. As a result of this refusal of bail and motion on notice sought a judicial review in the High Court.

The High Court ruled that by virtue of s. 236 (3) of the Criminal Procedure Law (CPL), the 1st appellant was authorized to remand persons who may have been arrested for indictable offence. Dissatisfied with the decision, respondent appealed to the Court of Appeal which allowed his appeal. Aggrieved, appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right to hold that the proceedings before the 1st Appellant on the 12th of March, 1997 was an arraignment proceeding as opposed to a remand proceeding and that consequently once the 1st Appellant lacked jurisdiction to try the respondent for treasonable felony she could not remand him under Section 236 (3) of the Criminal Procedure Law.

2. Whether the Court of Appeal was right to hold that Section 236 (3) of the Criminal Procedure Law Cap 32 Volume 2 Laws of Lagos State, 1994 is in direct conflict with Section 32 of the 1979 Constitution of the Federal Republic of Nigeria (now Section 35 of the 1999 Constitution) and other relevant constitutional provisions and whether the above mentioned Section 236 (3) of the CPL is in effect unconstitutional.”

HELD (Unanimously allowing the appeal per **MUKHTAR JSC**)

Charges - Remand in custody

1. As far as the nature of the proceedings or the actual purport of what

transpired on that 12th of March, 1991 is concerned, I think it fell within the ambit of the procedure prescribed by Section 78 (b) of the Criminal Procedure Law supra, in that the accused/respondent was taken before the Magistrate Court with a charge in a charge sheet that contained all particulars and the offence allegedly committed by him. This was read over to him and I suppose it was for him to know the reason for his remand in custody. Even though Section 78 (b) of the Criminal Procedure Law supra is silent about reading the charge out to the accused/respondent, the very fact that it was read to him does not mean he was arraigned or charged to court under Section 215 of the Criminal Procedure Law supra. It is instructive to note that the provision of this later section necessitates the taking of plea, and in this proceedings plea was not taken, as is clearly and specifically stated in the reproduced proceedings of above. Perhaps I should state here that the offence the accused/respondent was alleged to have committed was that of a treasonable felony which the 1st appellant had no jurisdiction to try and in fact she said so in her ruling, so there was no way how it can be said there, was an arraignment, since she had no power to try the accused/respondent of the said treasonable offence, which only a High Court can try.

(p. 1341 H)

Arraignment - Validity

2. I am fortified by the above pronouncement, which especially makes the fulfillment of all the requirements stated above, absolutely necessary. My understanding of this is that once one of the four requirements is missing, (as it is in the instant case) then it is virtually tantamount to no arraignment at all. What transpired in the Magistrate Court and as is Contained in the proceedings reproduced above is definitely no arraignment, nor does it in fact derail from the provision of Section 236 (3) of the Criminal Procedure Law. The learned High Court judge was right to make the following observation in his ruling:-

“Firstly the proceeding is titled - “suit No. M1K7A/100/97 not charge No. A/100/97 which show that although the Applicant was brought to the court by a charge No. A/100/97, the proceeding was an administra-

tive or quasi-criminal proceedings. Paragraph 2 of the Ruling states:-

“As Mr. Femi Falana has rightly stated that before the court is a holding charge pending the filing of the information and the arraignment of the accused persons before the High Court.”

B Then he went on to deal with the said provision of Section 236 (3) and made a finding. That excerpt of the judgment reads thus:-

“I refer to the definition of indictable offence” in Section 236 (3) C. P. L. and hold that before a Magistrate can exercise power pursuant to Section 236 (3), he must first hold as did the Chief Magistrate in this, C case that he had no jurisdiction whatsoever under the law in which the accused was brought before him, The Magistrate will then proceed to remand the accused person as did the Chief Magistrate in this case. The fact that the Chief Magistrate did not refer to Section 236 (3) C.P.L. was D not fatal to her remand Order since in law she had the power under Section 236 (3) to remand the accused.”

In the light of the above discussions I resolve this issue in favour of the appellant. (p. 1343 B)

E

Constitution - Conflict - Right to personal liberty

3. I do not see that there is conflict between the provision of Section 236 (2) of the Criminal law supra and the provisions of Section 32 of the F Constitution supra. The fact is there was strong suspicion that the respondent and some others have committed an indictable offence to wit treason. After their arrest by the police, there was the need to properly and lawfully keep them in custody, and the only way to do this was to take them to a Magistrate court who would in turn remand them in custody. They couldn't possibly continue to remain in police custody without the order of a court. Police investigations sometimes take time, and sometimes there is the fear of a likelihood of continued committal, of the same or other offences. There is also a likelihood of interference with G investigations. Whilst this process continues or is concluded, the legal H advice of the Ministry of Justice is sought. (p. 1346 D)

Trial - Fair trial within a reasonable time

4. Learned counsel has argued that if Section 236 (3) of the Criminal Law is allowed to stand it would fetter the rights of accused persons to fail trial within reasonable time. Further, Article 7(1)(d) of the African Charter on Human and Peoples Rights makes the following provisions:-

“Every individual shall have the right to have his cause heard. This comprises;

(d). the right to be tried within a reasonable time by an impartial court or tribunal.”

At the stage at which the respondent applied to enforce his fundamental right, it is not feasible to calculate or guess the time within which investigations will be completed, and hearing (whether fair or otherwise) will commence. What is reasonable time is subjective, and since this is dependent on the completion of investigations; all factors will be taken into consideration. Learned counsel for the respondent is talking about a detention of accused persons by Magistrates for periods not less than 7 years. It is instructive to note that the appellant was remanded in custody by the Magistrate on 12/3/97, and he filed his motion for enforcement of fundamental rights on 3/6/97, a period of less than 3 months. I am not unmindful that the respondent’s verifying affidavit in the High Court says he was arrested on 12th January, 1997 and detained in police custody. See paragraphs (4) and (5) of the said affidavit. I therefore disagree with the submission of learned counsel that there has been any infraction.

(p. 1347 D)

Presumption of innocence - S. 33(5)

5. On the presumption of innocence as laid down in Section 33 (5) of the supra Constitution, I fail to see anything in the record before us that there was a contrary presumption in respect of the appellant. The appellant and co-accused were taken before the Magistrate Court for the purpose of Lawful remand in custody; and that was exactly what the Chief Magistrate did. She did not ask him of whether he was guilty or not, so the issue of his innocence didn’t come to play at that stage of the proceedings. I need not go into the argument proffered in respect of Section 33 (6) of the 1979 Constitution supra by learned counsel for the respondent

as they have been adequately covered by my reasoning above.
(p. 1348 B)

NOTABLE POINTS OF INTEREST

B TOBI JSC

1. Arraignment and remand proceedings clarified

In *Asakitikpi v. The State* (1993) 5 NWLR (Pt. 296) 641, this court held that trials in criminal cases commence with the arraignment of the accused person and arraignment in turn consists of the charging of the accused or reading over the charge to the accused and taking his plea thereon in accordance with the provisions of section 215 of the Criminal Procedure Law Cap. 49 of the Laws of Bendel State of Nigeria 1976.

Arraignment therefore involves two things. One, the reading of the charge or information to the accused. Two, the response to the charge or information by a plea from the accused. The plea can either be guilty or not guilty. It is only when the above procedure is followed that a court of law will be said to have taken arraignment proceedings.

What is remand? It means to send to prison or send back to prison from a court of law to be tried later after further inquiries have been made, often in the phrase “remanded in custody”. It also means to re-commit on trial accused to custody after a preliminary examination.

Although remand proceedings is not set out in the Criminal Procedure Law, it is known that the charge is not read to the accused and therefore no plea taken. That makes the difference between remand and arraignment. Once an accused person is brought under section 236(3) for remand, the magistrate orders his remand without arraignment. By the subsection, the magistrate can do one of two things. He can remand the accused in prison. He can also grant bail pending arraignment.
(p. 1350 B)

H 2. *When personal action for damages against a magistrate is wrong*

Should the slip result in condemning the 1st appellant to damages; I ask? Should a slip of a magistrate not be corrected by the system of appeal, I ask again? When did it become the law that when a magistrate commits

an error in procedure, the remedy available to the aggrieved party is to sue for damages?

I must express my discomfort when a magistrate is sued for damages in the performance of judicial duties. I see in this appeal such a situation. The 1st appellant performed her duties as a magistrate in the administration of criminal justice and I feel bad that she was sued in her person. While I agree or concede that there are instances where a magistrate could be sued, I do not agree that this is one of such instances. I do not see any abuse of judicial power on the part of the 1st appellant. A magistrate could be wrong in the interpretation of the enabling laws but that should not give rise to an action in damages. The proper step to take is appeal against the decision of the magistrate and not to file an action on damages. (p. 1352 B)

D

AKINTAN JSC

3. Purpose of remand proceedings - Judicial process open to accused

It is necessary to state that Section 36(3) of the *Criminal Procedure Law* is aimed at ensuring judicial control of those arrested by the police on criminal negations. The power of the police to detain a suspect is restricted by law to specific number of days. They are therefore required within the period to bring the suspect before a court for the purpose of an order for further remand, if need be. The appropriate court for such request is the Magistrate Court. The purpose of bringing the accused to the court at that stage was not for a trial. It was for an order by the court for the suspect to be remanded in custody pending the time the police would be ready to arraign the suspect before the appropriate court or tribunal which has jurisdiction to trial the suspect for the indictable offence.

The judicial process open to the respondent was to apply to the High Court for bail and present a good case in support of his request before the High Court. The respondent, did not avail himself of the opportunity open to him by law to apply to a High Court for bail. Rather, he chose to challenge the legality of the entire system which he now termed as “holding charge” or any other name. What was done in this case was

that the man was taken before the Chief Magistrate for the purpose of being remanded in custody pending the time he would be arraigned for his trial. The remand is usually not for indefinite time. Where the period of remand is too long, the proper thing to do is to move the High Court for a review of the remand order made by the magistrate.
(p. 1353 H/ 1354 E)

ONNOGHEN.JSC

4. Counsel was wrong in suing 1st appellant magistrate personally
Before concluding this judgment I find it necessary, nay imperative to comment on the way the first appellant was sued personally in the instant case, in respect of actions taken by her in the course of the performance of her official judicial duties. I see no reason to justify what learned counsel for the respondent has done in the instant case. If it was not enough for him to sue the Hon. Attorney-General of Lagos State, learned counsel for the respondent could have joined the Chief Registrar in the action not to proceed against the 1st appellant personally. If what has been done by learned counsel for the respondent is intended to intimidate or embarrass the bench, I believe he has failed in the mission as the bench can neither be intimidated nor embarrassed in the discharge of its responsibilities under the constitution of this nation. It is the respondent that should be embarrassed by personalizing what is in reality not personal.
(p. 1360 G)

5. Need for punitive costs that will be paid counsel
I think this is an appropriate case where punitive costs ought to be awarded against the respondent but to be paid personally by learned counsel for the respondent but for the prevailing legal position of the Rules of this Court. (p. 1361 D)

H REPRESENTATION

O. Olayinka (Solicitor-General Lagos State) with her Mrs. O. Ogungbesan (Deputy Director, Public Prosecution, Lagos State) for the Appellants.
N. I. Quakers with him Chike Okafor for Respondent.

CASES REFERRED TO

Asakitikpi v. The State (1993) 5 NWLR (Pt.296) 641

Anaekwe v. C.O.P. 1996 3 NWLR part 436, page 320

Chief Pat Enwere v. C.O.P. 1993 6 NWLR part 299 page 333

Labiya v. Anretiola 1992 8 NWLR part 258 page 139

B

STATUTES & RULES REFERRED TO

Criminal Procedure Law Cap 32 Vol 2 Laws of Lagos State, 1994, ss. 236(2) & (3), 78, 215, 118(1) & (2)

Fundamental Rights (Enforcement Procedure) Rules 1979, O. 1 rr. 2 & 6

Constitution of Nigeria 1979, ss. 32, 33

African Charter on Human and Peoples' Rights, Art. 7(1)(b) & (d)

D

LEAD JUDGMENT BY MUKHTAR JSC

This appeal emanated and got its root from the proceedings in the Chief Magistrate Court of Lagos State, where the respondent and some others were taken on the allegation of committing the offence of conspiracy to commit treason and actually committing treasonable felony.

The respondent with the others were arrested and detained at the Police Criminal Investigation Department, CID, Alagbon Lagos on 12th of January 1997. The respondent sought bail, but the appellant said she had no jurisdiction to entertain the application for bail, and remanded the respondent in custody. As a result of this refusal of bail and the remand in custody, the respondent sought a judicial review in the High Court. The learned judge ruled that by virtue of Section 236 (3) of the Criminal procedure Law, the 1st appellant was authorized to remand persons who may have been arrested for indictable offence. Dissatisfied with the decision, the respondent appealed to the Court of Appeal, who in turn allowed the appeal. The respondents in that appeal have now appealed to this court, having been aggrieved by the decision of the Court of Appeal.

In the High Court of Lagos State, Ikeja Division, the appellant filed and moved a motion on notice pursuant to Order 1, Rule 2 and 6, and Order of the Fundamental Rights (Enforcement Procedure) Rules 1979,

for the following reliefs:-

“1. A DECLARATION that the arraignment of the Applicant before a court without jurisdiction in charge No. MIK/A/100/97 and the order remanding him in custody made on the 12th March, 1997 by E. A. Lufadeju (Mrs.) Chief Magistrate Grade 1 are unconstitutional and violate Applicant’s right to liberty and fair hearing under Sections 32 and 33 respectively of 1979 Constitution.

2. AN ORDER removing into this Honourable Court the proceedings comprised in charge No. MIK/A/100/97 Specifically the remand Order of 12th March, 1997. “Accuseds are to be remanded at Force C.I.D. Alagbon meanwhile” to be quashed forthwith.

3. AN ORDER releasing the Applicant from illegal detention forthwith.

4. N5 million being compensation/damages for Applicant’s illegal detention.

GROUND UPON WHICH THE RELIEFS ARE SOUGHT

1. The Chief Magistrate has no jurisdiction to try a charge of treason.

2. The arraignment of the Applicant before a Chief Magistrate for a capital offence is wrongful and unconstitutional.

3. The remand of the Applicant in force or other custody by a court without jurisdiction to try the charge is unconstitutional and violates Applicant’s right to personal liberty.”

The verifying affidavit sworn to by one Sam Amadi contain inter alia the following salient depositions:-

“4. The Applicant was arrested on 12th January, 1979 at his residence, No. 2, Olufemi Adebajo Street, Sango-Ota by a team of Policemen. He was severely beaten and later taken to Force C.I.D. Alagbon in handcuff.

5. On 13th January, 1997, the Applicant while still in detention in Alagbon was asked to make statement about one Adewale as a supplier of Computers, when he (the Applicant) needed some Computers.

6. The Applicant has been in detention in the Force C.I.D. cell, Alagbon since his arrest.

7. *On the 12th March, 1979, the Applicant and 12 others were charged before an Ikeja Chief Magistrate for conspiracy and treason. Attached as Exhibit BJ1 is a copy of the charge sheet.*

8. *The Chief Magistrate after declaring she had no jurisdiction to try the charge Ordered that the Applicant be remanded in custody of the Force C.I.D Alagbon, where the Applicant is presently detained. Attached herewith is Exhibit BJ2 a copy of the order.*

9. *The Applicant has suffered grave hardship financial loss and his family life is deteriorating because of his detention.*

Learned counsel made their submissions which the learned trial judge considered, and at the end of the day dismissed the applicant's application. The applicant was not happy with the turn of events, so he appealed to the Lagos Division of the Court of Appeal, where he argued his appeal based on a bundle of documents, after an order of departure from the rules had been obtained. The appeal succeeded and the learned Justices of the Court of Appeal nullified the proceedings of the learned Chief Magistrate which remanded the applicant/respondent, (as is contained in the following excerpt of the lead judgment) which reads thus:-

"From the foregoing I must say that this is a proper case for certiorari. The learned judge was not right, to have upheld the remand of the Appellant by the Chief Magistrate. There is clearly jurisdictional error on the face of the record of proceedings. She had no jurisdiction as admitted by her. She unlawfully used the concept of holding charge to remand the appellant. Where an inferior court exceeds its jurisdiction, its proceedings are a nullity and a superior court has jurisdiction to annul it. Accordingly, I hereby set aside both the order of the learned Chief Magistrate remanding the Appellant at Force C.I.D. Alagbon Close, Lagos and the ruling of the Lagos State High Court on 3/6/97."

Dissatisfied with the decision of the Court of Appeal, the present appellants appealed to this court on four grounds of appeal. In accordance with the rule of the court, Learned counsel exchanged briefs of argument, which were adopted at the hearing of the appeal. The following issues for determination were raised in the appellants' brief of argument:-

B “1. Whether the Court of Appeal was right to hold that the proceedings before the 1st Appellant on the 12th of March, 1997 was an arraignment proceeding as opposed to a remand proceeding and that consequently once the 1st Appellant lacked jurisdiction to try the respondent for treasonable felony she could not remand him under Section 236 (3) of the Criminal Procedure Law.

C 2. Whether the Court of Appeal was right to hold that Section 236 (3) of the Criminal Procedure Law Cap 32 Volume 2 Laws of Lagos State, 1994 is in direct conflict with Section 32 of the 1979 Constitution of the Federal Republic of Nigeria (now Section 35 of the 1999 Constitution) and other relevant constitutional provisions and whether the above mentioned Section 236 (3) of the CPL is in effect unconstitutional.”

D In his own brief of argument, the respondent formulated the following issues:-

E “(1). Was the Court of Appeal right to hold that the proceedings leading to the order of remand made by the 1st Appellant against the Respondent is an arraignment proceeding not within the purview of Section 236 (3) CPL and that the consequent remand order by the 1st Appellant was a nullity having declined jurisdiction to try the offence of conspiracy to commit treason and treasonable felony.

F (2). Was the Court of Appeal right to declare the provisions of Section 236 (3) CPL unconstitutional for impacting on the Respondent’s constitutionally guaranteed right as contained in Section 32 (1) (c), Section 33 (4), (5) and (6) of the 1979 Constitution and Article 7(1) (b) and (d) of the African Charter on Human and Peoples’ Right.”

G The treatment of this, appeal will be based on the appellants issues supra, starting with issue (1). I will commence by reproducing the provision Section 236 (3) of the Criminal Procedure Law Cap. 32, Volume 2 Laws Lagos State 1994 hereunder. It reads:-

H “If any person arrested for any indictable offence brought before any Magistrate for remand such Magistrate shall remand such person in custody or where applicable grant bail to him pending the arraignment of such person before the appropriate court or tribunal for trial.”

In this section unless the context otherwise requires, “indictable offence” means any offence -

(a). Which on conviction may be punished by a term of Imprisonment exceeding two years.

(b). Which on conviction may be punished by imposition of a fine exceeding five hundred naira or

(c). Which on conviction may be punished by death by hanging or by firing squad.

The manner in which criminal proceedings may be instituted in a Magistrate Court is stipulated in Section 78 of the Criminal Procedure Law as follows:-

“78. Where *proceedings are instituted in a Magistrate’s Court they may be instituted in either of the following ways:-*

(a). *Upon complaint to the court whether or not on oath that an offence has been committed by any person whose presence the magistrate has power to compel, and an application to such magistrate in the manner hereafter set forth for the issue of either a summons directed to, or a warrant of arrest to apprehend, such person; or*

(b). *By bringing a person without a warrant before the court upon a charge contained, in a charge sheet specifying the name and occupation of the person charged, the charge against him and time and place where the offence is alleged to have been committed. The charge sheet shall be signed by the police officer in charge of the case.”*

In arguing this issue learned counsel for the appellants considered the meaning of the word ‘proceedings’ as is defined in ‘Blacks Law Dictionary’, 5th Edition page 1083. The said word is defined therein as “*the form and manner of conducting judicial business before a court or judicial officer. Regular and orderly prayers in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals; bureaus or the like All the steps or measures adopted in the prosecution or defense of an action The proceedings of suit embrace all matters that occur in its progress judicially. Term “proceeding’ may refer not only to a complete remedy but also to a*

mere procedural step that is part of a large, action or special proceeding. A ‘proceeding’ includes action and special proceedings before judicial tribunals as well as proceedings pending before quasi-judicial officer’s and boards.....”

B Learned counsel for the appellants has submitted that even if in the instant case the police instituted proceedings before the first appellant under on 78 (6 of the Criminal Procedure Law by bringing respondent and others before the court upon a charge containing a charge sheet, this could not and did not automatically turn the relevant proceedings of that day into an arraignment proceedings, especially when it was clear that the offence alleged could not be tried by a Magistrate court, and he referred to Section of the Criminal procedure Law, which states as follows:-

D *“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 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 served there with.”*

F Learned counsel further submitted that instituting proceedings before the first appellant by virtue of Section 78 (b) of the Criminal Procedure Law supra was simply a means of bringing the respondent before the court. Counsel drew the court’s attention to the fact that although the charge resented to the court was read out to the respondent, and others they did not lead ‘guilty or not guilty’ and there was in effect no arraignment. He laced reliance on the case of Asakitipi v. State 1993 5 NWLR part 296 page 641.

H Learned counsel for the respondent has in reply submitted that the proceeding leading to the appellant’s remand in prison custody, after the Magistrate had declined jurisdiction was an arraignment proceeding which is not within a purview of Section 236 (3) of the Criminal Procedure Law and the Court of Appeal was right to have so held, because Section 236

(3) does not envisage the existence of a charge, whereas it can be seen from the records that the process of commencing criminal proceedings pursuant to section 78 (b) of the Criminal Procedure Law, had been initiated.

Now, I will look at the controversial proceedings in the Chief B Magistrate Court, over which the 1st appellant was presiding. In fact it is on page (6) of the record of proceedings. It reads:-

“Between: Commissioner of Police v. Adegbenga Adebusuyi and 12 Others Accused present.

Charge read and explained to each accused in English Language. C Each accused states that he understands the charge. No plea taken. Sup. Of Police Ribadu for the prosecution and with him are A.S.P. M. T. Mkpa and Mr. S. K. Atteh, Mr. Femi Falana for the 1st, 2nd, 3rd and 4th accused, and with him are Messers Tokunbo Ajomaja, Ebun Olu D Adegoruwa Giwa Jacobs, C. O. Onyewu and Funmi Falana (Mrs.).

Ruling

After a careful consideration of the submissions of both counsel for defence, together with the objection of S. P. Ribadu, I find as fol- E lows:-

1. Even though Section 118 (2) of the C. P. L. permits the court to grant bail to the accused in certain cases, this does not apply in a case involving a capital offence like treason for which the accused persons F stand charged.

2. As Mr. Femi Falana has rightly stated what is before the court is a holding charge pending the filing of the information and the ar- G raignment of the accused persons before the High Court. As such, the court lacks jurisdiction to make any order whatsoever in respect of this case. The application for bail is therefore hereby dismissed. The accused may apply to the High Court for their bail.”

It is instructive to note that the submissions of counsel were not recorded, as is apparent in the supra proceedings (which in my view is H missing), for we can only surmise that the submissions had something to do with bail, in view of the content of paragraphs (1) and (2) supra. **As far as the nature of the proceedings or the actual purport of what**

transpired on that 12th of March, 1991 is concerned, I think it fell within the ambit of the procedure prescribed by Section 78 (b) of the Criminal Procedure Law *supra*, in that the accused/respondent was taken before the Magistrate Court with a charge in a charge sheet that contained all particulars and the offence allegedly committed by him. This was read over to him and I suppose it was for him to know the reason for his remand in custody. Even though Section 78 (b) of the Criminal Procedure Law *supra* is silent about reading the charge out to the accused/respondent, the very fact that it was read to him does not mean he was arraigned or charged to court under Section 215 of the Criminal Procedure Law *supra*. It is instructive to note that the provision of this later section necessitates the taking of plea, and in this proceedings plea was not taken, as is clearly and specifically stated in the reproduced proceedings of above. Perhaps I should state here that the offence the accused/respondent was alleged to have committed was that of a treasonable felony which the 1st appellant had no jurisdiction to try and in fact she said so in her ruling, so there was no way how it can be said there, was an arraignment, since she had no power to try the accused/respondent of the said treasonable offence, which only a High Court can try.

The requirements of a valid arraignment are set out by Ogwuegbu JSC in the case of *Tobby v. State* 2001 10 NWLR part 720 page 23 at page 33 as follows:-

“(a). the accused must be placed before the court unfettered unless the court shall see cause otherwise to order;

(b). the charge or information must be read over and explained to the accused to the satisfaction of the court by the registrar or other officer of the court;

(c). It must be read and explained to him in the language he understands;

(d). the accused must be called upon to plead thereto unless there exists any valid reason to do otherwise 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.

The above-stated requirement of the law are mandatory and must therefore be strictly complied with in all criminal trials. As they have been specifically provided to guarantee the fair trial of an accused person and to safeguard his interest at such a trial, failure to satisfy any of them will render the whole trial defective and null and void.

Underlining is mine.

I am fortified by the above pronouncement, which especially makes the fulfillment of all the requirements stated above, absolutely necessary. My understanding of this is that once one of the four requirements is missing, (as it is in the instant case) then it is virtually tantamount to no arraignment at all. What transpired in the Magistrate Court and as is Contained in the proceedings reproduced above is definitely no arraignment, nor does it in fact derail from the provision of Section 236 (3) of the Criminal Procedure Law. The learned High Court judge was right to make the following observation in his ruling:-

“Firstly the proceeding is titled - “suit No. M1K7A/100/97 not charge No. A/100/97 which show that although the Applicant was brought to the court by a charge No. A/100/97, the proceeding was an administrative or quasi-criminal proceedings. Paragraph 2 of the Ruling states:-

“As Mr. Femi Falana has rightly stated that before the court is a holding charge pending the filing of the information and the arraignment of the accused persons before the High Court.”

Then he went on to deal with the said provision of Section 236 (3) and made a finding. That excerpt of the judgment reads thus:-

“I refer to the definition of indictable offence” in Section 236 (3) C. P. L. and hold that before a Magistrate can exercise power pursuant to Section 236 (3), he must first hold as did the Chief Magistrate in this, case that he had no jurisdiction whatsoever under the law in which the accused was brought before him, The Magistrate will then

proceed to remand the accused person as did the Chief Magistrate in this case. The fact that the Chief Magistrate did not refer to Section 236 (3) C.P.L. was not fatal to her remand Order since in law she had the power under Section 236 (3) to remand the accused.”

B In the light of the above discussions I resolve this issue in favour of the appellant and so dismiss ground of appeal No (1) to which the issue is married.

Now, to issue (2) supra. In arguing this issue, learned counsel for the appellants referred to the cases of Anaekwe v. C.O.P. 1996 3 NWLR
 C part 436, page 320, and Chief Pat Enwere v. C.O.P. 1993 6 NWLR part 299 page 333, in which it was held that holding charge is unknown in Nigeria Criminal Law. Learned counsel’s submission, however is that holding charge may be unknown but remand proceedings are well known
 D and recognized under our laws by virtue of Section 236 (3) of the Criminal Procedure Law supra. He further submitted that the issue this court, is called upon to determine in the instant case relates essentially to the impact and effect of Section 236 (3) of the Criminal Procedure Law as it
 E relates to the powers of remand of the 1st appellant as well as the constitutionality or otherwise of the said Section 236 (3). It is his view that the issue of holding charge dealt with in the Court of Appeal cases can be distinguished from the issues that have arisen in this case for the determination of this court. Learned counsel further submitted that Section 263
 F (3) of the Criminal Procedure Law rather than conflict with relevant provisions of the Nigerian Constitution fully compliments such provisions.

In his own submission the learned counsel for the respondent is of
 G the view that Section 236 (3) supra under which the 1st appellant purportedly acted in remanding the respondent in prison custody violates the respondent’s fundamental rights as contained and clearly defined in the 1979 Constitution of the Federal Republic of Nigeria. He submitted that
 H the said Section 236 (3) violates the respondent’s rights to:

- (1). Liberty as guaranteed under Section 32 of the 1979 Constitution.
- (2). Right to fair trial within a reasonable time Section 33 (4).

(3). Right to presumption of innocence - Section 33 (5).

(4). Right to be charged promptly - Section 33 (6) (a).

Learned counsel dealt with each of these subheads individually in his brief of argument, and I will also treat them individually, starting with (1) above. Learned Counsel has submitted that that Section 32 (1) of the 1979 Constitution which guarantees the right and discloses no exception, does not contemplate the power of Magistrates to make remand orders, as contained in Section 236 (3). I will reproduce the provision of Section 32 (1) of the supra constitution here below. It reads:-

“Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following case and in accordance with a procedure permitted by law:-

(a). in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;

(b). by reason of his failure to comply with the order of a court in order to secure the fulfillment of any obligation imposed upon him by law;

(c). for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence or to such extent as may be reasonably necessary to prevent his committing a criminal offence;

(d). in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(e). in the case of persons suffering from infectious or contagious disease, persons of insane mind persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or

(f). for the purpose of preventing the unlawful entry of any person in Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto;

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of

imprisonment prescribed for the offence.”

It is the argument of learned counsel for the respondent that the above proviso as highlighted above talks about awaiting trial charge as a lawful process of detention. According to him it denotes the existence of a charge pending trial and by implication, it means due compliance with the pre-trial procedure has been fulfilled. In other words the arraignment procedure has been complied with and the accused person is in custody awaiting his trial, and so the holding charge or Section 236 (2) does not fall into any of the exceptions to the highlighted section. He further submitted that a conflict exists and it is trite that where a statute conflicts with the provision of the constitution, the statute to the extent of its inconsistencies is void. He placed reliance on the case of Labiyi v. Anretiola 1992 8 NWLR part 258 page 139.

I do not see that there is conflict between the provision of Section 236 (2) of the Criminal law supra and the provisions of Section 32 of the Constitution supra. The fact is there was strong suspicion that the respondent and some others have committed an indictable offence to wit treason. After their arrest by the police, there was the need to properly and lawfully keep them in custody, and the only way to do this was to take them to a Magistrate court who would in turn remand them in custody. They couldn't possibly continue to remain in police custody without the order of a court. Police investigations sometimes take time, and sometimes there is the fear of a likelihood of continued committal, of the same or other offences. There is also a likelihood of interference with investigations. Whilst this process continues or is concluded, the legal advice of the Ministry of Justice is sought. Indeed, the lower court took cognizance of these processes in its lead judgment as illustrated in the excerpt of the judgment, which reads thus:-

“Before an accused is brought before the court it should be assumed that the case is ripe for hearing, not for further investigation. He must not be there on mere suspicion under Section 35 of the Constitution. If there can be no sensible and prima facie inferences that can be drawn that an offence has been committed then the accused cannot be deprived

of his liberty even for a second. There cannot be a holding charge “hanging over an accused in court pending the completion of investigations into the case against him.....

The police have not by Section 32 (1) © of the 1979 Constitution been given unbridled powers to deprive citizens of their liberty while the case against them is still investigated. One often times hears the police claim that investigations have been concluded that the advice of the office of the Director of Public Prosecutions (DPP) is required before an information can be prepared during which period the accused must have to remain in custody.”

Then Section 33(4) of the 1979 Constitution where the principle of fair hearing is entrenched. This provision stipulates thus:-

“Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn be entitled to fair hearing within a reasonable time.”

Learned counsel has argued that if Section 236 (3) of the Criminal Law is allowed to stand it would fetter the rights of accused persons to fair trial within reasonable time. Further, Article 7(1)(d) of the African Charter on Human and Peoples Rights makes the following provisions:-

“Every individual shall have the right to have his cause heard. This comprises;

(d). the right to be tried within a reasonable time by an impartial court or tribunal.”

At the stage at which the respondent applied to enforce his fundamental right, it is not feasible to calculate or guess the time within which investigations will be completed, and hearing (whether fair or otherwise) will commence. What is reasonable time is subjective, and since this is dependent on the completion of investigations; all factors will be taken into consideration. Learned counsel for the respondent is talking about a detention of accused persons by Magistrates for periods not less than 7 years. It is instructive to note that the appellant was remanded in custody by the Magistrate on 12/3/97, and he filed his motion for enforcement of fundamental

rights on 3/6/97, a period of less than 3 months. I am not unmindful that the respondent's verifying affidavit in the High Court says he was arrested on 12th January, 1997 and detained in police custody. See paragraphs (4) and (5) of the said affidavit. I therefore disagree with the submission of learned counsel that there has been any infraction.

On the presumption of innocence as laid down in Section 33 (5) of the supra Constitution, I fail to see anything in the record before us that there was a contrary presumption in respect of the appellant. The appellant and co-accused were taken before the Magistrate Court for the purpose of Lawful remand in custody; and that was exactly what the Chief Magistrate did. She did not ask him of whether he was guilty or not, so the issue of his innocence didn't come to play at that stage of the proceedings. I need not go into the argument proffered in respect of Section 33 (6) of the 1979 Constitution supra by learned counsel for the respondent as they have been adequately covered by my reasoning above. Indeed I don't think I need to belabour this issue any further, for it will be tantamount to over flogging it.

For the foregoing reasoning I resolve issue (2) supra in favour of the appellant, and so grounds of appeal Nos (2), (3) and (4) which cover the issue succeed, and they are hereby allowed. In the final analysis this appeal succeeds in its entirety. The judgment of the court of Appeal, Lagos vision is hereby set aside. The order of Chief Magistrate and Re Ruling of High Court are affirmed. I assess costs at N10,000.00 in favour of the appellants against the respondent.

KUTIGI CJN

I have had a preview of the judgment just delivered by my learned brother Mukhtar, J.S.C. I agree with her conclusion. The appeal is meritorious. It is hereby allowed. The judgment of the Court of Appeal is set aside. The order of the teamed Chief Magistrate remanding the appellant and the Ruling of the High Court thereon are restored and affirmed.

TOBI JSC

I have read in draft the judgment of my learned brother, Mukhtar, JSC, and I agree that the appeal should be allowed. This is yet another case where a magistrate is sued for damages for performing her judicial B functions. I have never liked this type of suit but here we are with another one.

Evangelist Bayo Johnson was arrested on 12th January, 1997 for conspiracy to commit treason and the commission of treasonable felony. C He was brought along with eleven others before the 1st appellant, Mrs. E. A. Lufadeju, Chief Magistrate Grade 1 on 12th March, 1997. An oral application for bail was made on the same day. 1st appellant refused the application on the ground that she lacked the power to entertain and D consider a bail application in respect of a capital offence such as treason. The respondent and others were remanded in custody at the Force CID, Alagbon.

Respondent filed an action in the High Court. He asked for a declaration that his detention prompted by the Magistrate's order was un- E constitutional and urged the court to quash the order. He also claimed N5,000,000.00 as damages for illegal detention.

The learned trial Judge dismissed the application of the respondent. He declared that the 1st appellant's order of 12th March, 1997 was a F valid order and the proceedings of that day was a remand proceedings under section 236(3) of the Criminal Procedure Law Cap. 33 Volume 2, Laws of Lagos State, 1994. Respondent appealed to the Court of Appeal. The appeal was allowed. Both the order of the 1st appellant and the ruling G of the High Court were set aside. This appeal is against the judgment of the Court of Appeal.

Appellants formulated two issues for determination. So too the respondent. It is the submission of the appellants that the proceedings H before the 1st appellant on 12th March, 1997 were remand proceedings and not arraignment. It is the submission of the respondent that the proceedings were arraignment and not remand. Both parties rely on section 236(3) of the Criminal Procedure Law, 1994 of Lagos State. It provides

in part:

“If any person arrested for any indictable offence is brought before any magistrate for remand such magistrate shall remand such person in custody or where applicable grant bail to him pending the arraignment of such person before the appropriate court or tribunal for trial...”

In Asakitikpi v. The State (1993) 5 NWLR (Pt, 296) 641, this court held that trials in criminal cases commence with the arraignment of the accused person and arraignment in turn consists of the charging of the accused or reading over the charge to the accused and taking his plea thereon in accordance with the provisions of section 215 of the Criminal Procedure Law Cap. 49 of the Laws of Bendel State of Nigeria 1976.

Arraignment therefore involves two things. One, the reading of the charge or information to the accused. Two, the response to the charge or information by a plea from the accused. The plea can either be guilty or not guilty. It is only when the above procedure is followed that a court of law will be said to have taken arraignment proceedings.

What is remand? It means to send to prison or send back to prison from a court of law to be tried later after further inquiries have been made, often in the phrase “remanded in custody”. It also means to re-commit on trial accused to custody after a preliminary examination.

Although remand proceedings is not set out in the Criminal Procedure Law, it is known that the charge is not read to the accused and therefore no plea taken. That makes the difference between remand and arraignment. Once an accused person is brought under section 236(3) for remand, the magistrate orders his remand without arraignment. By the subsection, the magistrate can do one of two things. He can remand the accused in prison. He can also grant bail pending arraignment.

What procedure did the 1st appellant follow in this matter? Did she comply with section 236(3) of the Criminal Procedure Law? Let me go to the Record. The Ruling of the 1st appellant is at page 6 of the Record:

“After a careful consideration of the submissions of both counsel for defence, together with the objection of S. P. Ribadu, I find as follows:-

1. Even though section 118(2) of the C.P.L. permits the court to

grant bail to the accused in certain cases, this does not apply in a case involving a capital offence like treason for which the accused persons stand charged.

2. As Mr. Femi Falana has rightly stated what is before the court is holding charge pending the filing of the information and the arraignment of the accused persons before the High Court. As such, the court lacks jurisdiction to make any order whatsoever in respect of this case.

3. The application for bail is therefore hereby dismissed. The accused may apply to the High Court for their bail. Parties agree on an adjournment to 9/5/97.

COURT: Case is adjourned to 9/5/97 for reports. Accused are to be remanded at Force C.I.D. Alagbon, meanwhile.”

I realize that the charge was read to the respondent. Is this enough reason to condemn the 1st appellant to damages? A wrong procedure was initially followed but the 1st appellant ended the day’s proceedings correctly by remanding the respondent in accordance with section 236(3) of the law.

The Court of Appeal examined section 236(3) and said at page 73 of the Record:

“A literal reading of section 236(3) CPL (Supra) shows that it only provides authority for a Magistrate to remand a person who has been arrested. It does not, by any stretch of imagination, apply to those persons who have been charged. The appellant had been charged for treason for conspiracy to levy war against the Federal Military Government of Nigeria punishable under section 37(2) of the Criminal Code Cap. 31 volume II Laws of Lagos State of Nigeria 1994. See Exhibit BJI-the charge sheet.

The main argument of the Appellant in the lower court was that the learned Chief Magistrate was wrong to him in custody when she had agreed that her Court had no jurisdiction whatsoever. The learned judge accepted this view but relied on S 236(3) of CPL. It would appear to me too that this section covers what is commonly referred in the Magistrates Court as “holding charge.”

The purpose of Section 236(3) CPL is to provide for the remand of persons while preparation for their arraignment continues. It actually creates an intermediate stage between arrest and the institution of criminal proceedings.”

B With respect, this is unnecessary hair splitting. It sounds too technical and abstract. Should the slip result in condemning the 1st appellant to damages; I ask? Should a slip of a magistrate not be corrected by the system of appeal, I ask again? When did it become the law that when a
C magistrate commits an error in procedure, the remedy available to the aggrieved party is to sue for damages?

I must express my discomfort when a magistrate is sued for damages in the performance of judicial duties. I see in this appeal such a situation. The 1st appellant performed her duties as a magistrate in the
D administration of criminal justice and I feel bad that she was sued in her person. While I agree or concede that there are instances where a magistrate could be sued, I do not agree that this is one of such instances. I do not see any abuse of judicial power on the part of the 1st appellant. A
E magistrate could be wrong in the interpretation of the enabling laws but that should not give rise to an action in damages. The proper step to take is appeal against the decision of the magistrate and not to file an action on damages.

F I think the learned trial Judge correctly dismissed the application. The 1st appellant correctly exercised her discretionary power under Section 236(3) of the Criminal Procedure Law. It is good that the Court of Appeal did not award any damages against the 1st appellant. It should be
G so. The appeal succeeds and it is allowed.

AKINTAN JSC

H I had the privilege of reading the lead judgment written by my learned brother, Mukhtar, JSC. The facts of the case are well set out and all the issues raised in the appeal are fully discussed therein. I entirely agree with the reasoning and conclusions reached in the said lead judgment.

The main question raised in the appeal is whether a magistrate's owner to remand a person accused of an indictable offence in custody pending his trial, as provided for in section 236(3) of the *Criminal Procedure Law*, is lawful and not in conflict with the provisions of section 32(1)(c) of the 1979 Constitution. B

It is necessary to reproduce the two legislation in question for a proper appraisal of the matter in issue. Section 236(3) of the *Criminal Procedure Law* provides thus:-

"236-(3). *If any person arrested for any indictable offence is brought before a magistrate for remand, such Magistrate shall remand such person in custody or where applicable grant him bail pending the arraignment of such person before the appropriate court or tribunal for trial.*" C

Section 32 (1) (c) of the 1979 Constitution, on the other hand, provides as follows: D

"Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following case and in accordance with a procedure permitted by law -----

(c) *for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence or to such extent as may be reasonably necessary to prevent his committing a criminal offence.*" E

The facts of the instant case are that the respondent was brought before the 1st appellant, a Chief Magistrate, by the police on an allegation of committing the offence of conspiracy to commit treason and actually committing treasonable felony. The charge was read to the accused and thereafter the learned Chief Magistrate order that the said respondent be remanded in custody pending the time that he would be arraigned before a High Court which would try him. His plea was not taken. The man was however informed of his right to apply to the High Court for his bail. F G

But instead of applying to the High Court for bail, the appellant embarked on challenging the legality of the remand order made by the Learned, Chief Magistrate. It is necessary to state that Section 36(3) of the *Criminal Procedure Law* is aimed at ensuring judicial control of those arrested by the police on criminal negotiations. The power of the police to H

detain a suspect is restricted by law to specific number of days. They are therefore required within the period to bring the suspect before a court for the purpose of an order for further remand, if need be. The appropriate court for such request is the Magistrate Court. The purpose of bringing the accused to the court at that stage was not for a trial. It was for an order by the court for the suspect to be remanded in custody pending the time the police would be ready to arraign the suspect before the appropriate court or tribunal which his jurisdiction to trial the suspect for the indictable offence.

The Magistrate would consider whether to grant or refuse the accused bail. Where bail is refused, as in the instant case, the right of the accused to approach a High Court for bail is usually available to him. The idea is that the judicial process of determining whether to allow the accused on bail or not has commenced. The procedure is totally covered by the provisions of section 32 (1) (c) of the 1979 Constitution because what was done at that stage was that the court ordered that the respondent be remanded in custody upon an allegation by the police that he (respondent) was on reasonable suspicion of having committed a criminal offence, to wit: conspiracy to commit treasonable offence and actually committing treasonable offence.

The judicial process open to the respondent was to apply to the High Court for bail and present a good case in support of his request before the High Court. The respondent, did not avail himself of the opportunity open to him by law to apply to a High Court for bail. Rather, he chose to challenge the legality of the entire system which he now termed as “holding charge” or any other name. What was done in this case was that the man was taken before the Chief Magistrate for the purpose of being remanded in custody pending the time he would be arraigned for his trial. The remand is usually not for indefinite time. Where the period of remand is too long, the proper thing to do is to move the High Court for a review of the remand order made by the magistrate.

For the reasons given above, and the fuller reasons given in the lead judgment, which I also adopt, I allow the appeal and make similar orders as are made in the lead judgment.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Lagos in appeal No.CA/L/334M/97 delivered on the 13th day of June, 2001 in which it allowed the appeal of the present respondents against the decision of the Lagos State High Court in suit No.ID/350M/97 delivered on the 9th day of July, 1997.

On the 12th day of January, 1997 the respondent Evangelist Bayo Johnson was arrested together with others on allegation of having committed treasonable felony and detained at the Force Criminal Investigation Apartment, Alagbon, Lagos. On the 12th day of March, 1997 the respondent and the others were taken before the 1st appellant, then a Chief Magistrate where an oral application for bail was made by the respondent's counsel which application was refused with the 1st appellant staling that she had no power to entertain and consider the application in view of the nature of the offence and the fact that the respondent was brought before her pending the filing of information and subsequent arraignment before the High Court. Following the refusal of the application, the 1st appellant ordered that the respondent be remanded in custody in Force C.I.D. Alagbon, Lagos. It is important to note that although charges were drawn up and presented to the Chief Magistrate Court by the Police for the offences of conspiracy to commit treason and treasonable felony no plea of the respondent and the others was taken throughout the proceeding.

It is the order of remand made by the learned Chief Magistrate, 1st appellant in the instant appeal, that forms the basis of the application by the 1st respondent's counsel to the High Court contending that the detention of the respondent in the circumstances, particularly after the 1st appellant had clearly stated that she had no jurisdiction to entertain Increase, was unconstitutional; that the proceedings be removed to the High Court for the purpose of quashing same and that the respondent be released from illegal detention with N5 Million damages for illegal detention. The application was duly considered and dismissed with the court holding that the proceedings of 12th March, 1997 was a valid remand proceed-

ings under section 236(3) of the Criminal Procedure Law, Cap.33 Vol. 2, Laws of Lagos State, 1994.

The respondent was not satisfied with that ruling and consequently appealed to the Court of Appeal whose decision on the matter constitutes the basis of the instant appeal in this court. The issues for determination as identified by learned counsel for the appellants Prof. YEMI OSINBAJO, The Hon. Attorney-General of Lagos State, in the appellants brief of argument filed on 4/4/03 are stated therein as follows:

C “1. *whether the Court of Appeal was right to hold that the proceedings before the 1st appellant on the 12th of March, 1997 was an arraignment proceeding as opposed to a remand proceeding and that consequently once the 1st appellant lacked jurisdiction to try the respondent for treasonable felony she could not remand him under section 236(3) of the Criminal Procedure Law.*

D 2. *whether the Court of Appeal was right to hold that section 236(3) of the Criminal Procedure Law Cap.32 Volume 2 Laws of Lagos State, 1994 is in direct conflict with section 32 of the 1979 Constitution of the Federal Republic of Nigeria (now Section 35 of the 1999 constitution) and other relevant Constitutional provisions and whether the above mentioned Section 236(3) of the CPL is in effect unconstitutional.”*

F In arguing the appeal learned counsel for the appellants’ submitted that proceedings of the 12th day of March 1997 was a remand proceedings and arraignment and that the 1st appellant exercised her powers of remand under section 236(3) of the Criminal Procedure Law when she remanded the respondent and others in custody pending their arraignment before the appropriate court; that the exercise of the powers under section 236(3) supra is an administrative act or function of the Magistrate which does not depend on possession of the jurisdiction to try me offence the suspect is arrested for; and that the Court of Appeal was in error when it held otherwise.

H Learned counsel further submitted that section 236(3) of the Criminal Procedure Law does not, in any way, conflict with constitutional provisions that protect the liberty of citizens of this country but complements sections 32 of the 1975 constitution (now section 35 of the 1999

constitution) and all other relevant sections and that it further ensures control and order as regards movement of suspects who may possibly face trial shortly. Learned counsel further submitted that to remove the section from the statute book or render same ineffective will create a totally chaotic state of affairs; that as section 118(1) of the Criminal Procedure Law enables the High Court, when necessary, to grant bail to suspects who are alleged to have committed capital offence(s), the right of suspects on remand to regain their freedom pending trial in appropriate court(s) is there by preserved. Learned counsel then urged the court to resolve the issue in favour of the appellants and allow the appeal. C

On his part, learned counsel for the respondent, NORISON I. QUAKERS Esq., in the respondent's brief filed on 27/5/03 raised identical issues for determination and submitted that the purpose of section 236(3) of the CPL is to remand any one arrested for indictable offences, while preparation for their arraignment before the appropriate court goes on, while section 215 thereof is the foundation to the commencement of Criminal proceedings or trial, and that an important feature of section 215 is the existence of a charge as opposed to simply being arrested; that section 236(3) creates an intermediate position or could be said to be an interim measure between arrest and institution of criminal proceedings and does not envisage the institution or drafting or existence of charge, but that the respondent was brought before the 1st appellant on a two count charge and that the incidence of arraignment occurred in the proceedings before the 1st appellant except the requirement of the taking of a plea. Learned counsel therefore submitted that the 1st appellant having declined jurisdiction to try the charge of treason and treasonable felony, erred in law in proceeding to remand the respondent and that the provisions of section 236(3) of the CPL impacts on the respondent's institutional right and the provisions of the African Charter on Human and peoples' Rights to Liberty, right to fair trial within a reasonable time, right to presumption of innocence and right to be charged promptly. D E F G H

Counsel cited and relied on the provisions of sections 32(1)(c), 33(4),(5) and (6) of the 1979 Constitution and Article 7(1)(b) and (d) of the African Charter on Human and Peoples' Rights and submitted that to

the extent of the inconsistencies the provision of section 236(3) of the CPL is null and void and urged the court to resolve the issues against the appellants and dismiss the appeal.

Now, section 236(3) of the Criminal Procedure Law provides as follows:-

“3. If any person arrested for any indictable offence is brought before any magistrate for remand such magistrate shall remand such person in custody or where applicable grant bail to him pending the arraignment of such person before the appropriate court or tribunal for trial.

In this section unless the context otherwise requires, “indictable offence” means any offence -

(a) which on conviction may be punished by a term of imprisonment exceeding two years.

(b) which on conviction may be punished by imprisonment or a fine exceeding Five Hundred Naira, or

(c) which on conviction may be punished by death, by hanging or by firing squad.”

From the above provisions it is very clear that for a magistrate to have jurisdiction to act thereunder, the person to be remanded or possibly granted bail where the court has the jurisdiction to so grant, must have been arrested for an indictable offence such as treasonable felony which is outside the competence or jurisdiction of the magistrate to try. In such a situation the magistrate is empowered, upon the suspect being brought before him, to remand the suspect in custody pending the arraignment of such person before a competent court with the requisite jurisdiction to try the said indictable offence. From the wordings of section 236(3) supra, it is obvious that the section does not contemplate the proceedings for remand before the magistrate to be an arraignment since it provides specifically that the remand of the suspect by the magistrate in the circumstance is pending an arraignment of such a suspect before the appropriate court or tribunal for trial.

The question that necessarily follows the above exposition is how is a suspect brought before the magistrate generally and specifically for the purpose of remand? That leads us to the provisions of section 78 of

the Criminal Procedure Law, Cap.32 Vol. 2, Law of Lagos State, 1994, which provides thus:

“Where proceedings are instituted in a Magistrate’s Court they may be instituted in either of the followings ways:-

(a) upon complaint to the court whether or not on oath that an offence has been committed by any person whose presence the magistrate has power to compel and an application to such magistrate in a manner hereinafter set forth for the issue of either a summons directed to or a warrant of arrest to apprehend such person, or

(b) by bringing a person without warrant before the court upon a charge contained in a charge sheet specifying the name and occupation of the person charged, the charge against him and the time and place where the offence is alleged to have been committed The charge sheet shall be signed by the Police Officer in charge of the case.”

The relevant mode of bringing the respondent in this case before the magistrate is as provided for in subsection (b) of section 78 supra; that is, by way of a charge signed by the Police Officer in charge of the case which was duly done in the instant case, it is very clear from the above provision and the jurisdiction conferred on the magistrate to remand a suspect in custody under section 236(3) supra, that the proceeding envisaged in section 78 of the CPL supra includes both remand and an arraignment proceedings.

It follows therefore that to determine whether what took place before the learned Chief Magistrate on 12th March 1997 was a remand proceeding or in arraignment, one has to take a look at the provisions of section 215 of the CPL which 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 the person is entitled to service of a copy of the information he objects to the want of service and the court finds that he has not been duly served therewith”.

It is very clear from the above that an arraignment of a suspect before the magistrate court or any other court involves the presentation of the person or suspect before that court unfettered where the charge or information against him is read over and interpreted or explained to him by the registrar of the court to the satisfaction of the court and the accused person is called upon to plead to the charge. It follows therefore that whereas in a remand proceeding the suspect may be brought to the magistrate court upon a charge signed by the Police Officer in charge of the case, he is not required to plead to that charge particularly as the offence with which the person stands charged, being in indictable offence, is clearly outside the jurisdiction of the magistrate court to try, an arraignment or trial under section 215 supra can not be properly so called unless the accused pleads to the charge containing the offence with which he is charged. In the instant case both parties agree that though the respondent was charged before the magistrate court, he never pleaded to the charge before the order of remand was made by the Learned Chief Magistrate, 1st appellant.

In *Asakitiki Vs The State* (1993) 5 NWLR (pt.296) 641 at 652 this court held that:

“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”.

I therefore hold the view that the lower court was in error in holding at the proceeding before the magistrate court in which the respondent never pleaded to the charge before that court constitutes an arraignment of the respondent.

Before concluding this judgment I find it necessary, nay imperative to comment on the way the first appellant was sued personally in the instant case, in respect of actions taken by her in the course of the performance of her official judicial duties. I see no reason to justify what learned counsel for the respondent has done in the instant case. If it was not enough for him to sue the Hon. Attorney-General of Lagos State, learned counsel for the respondent could have joined the Chief Registrar in the action not to proceed against the 1st appellant personally. If what

has been done by learned counsel for the respondent is intended to intimidate or embarrass the bench, I believe he has failed in the mission as the bench can neither be intimidated nor embarrassed in the discharge of its responsibilities under the constitution of this nation. It is the respondent that should be embarrassed by personalizing what is in reality not personal. B

As regards the second issue, I hold the view that section 236(3) of the CPL is not unconstitutional and that the lower court was in error when it held that it is. If anything the said section clearly complements C the provisions of section 32 of the 1979 constitution and is designed to aid the administration of criminal justice in this country.

We owe it a duty not to toy with an allegation as grave as treasonable felony neither should we play down the importance of individual D liberty and freedom. What section 236(3) of the CPL does is to maintain a balance between the two by doing away with the tendency of arbitrary and near indefinite Police detention of suspects without order of court.

I think this is an appropriate case where punitive costs ought to be E awarded against the respondent but to be paid personally by learned counsel for the respondent but for the prevailing legal position of the Rules of this Court.

In conclusion I agree with the reasoning and conclusion of my learned brother MUKHTAR JSC that the appeal is meritorious and ought F to be allowed. I accordingly allow the appeal and abide by the consequential order as to cost contained in the lead judgment of my learned brother MUKHTAR JSC.

Appeal allowed.

G

H