

**SUPREME COURT OF NIGERIA**

8<sup>TH</sup> JUNE, 2007. SC.208/2006

**CORAM:- A. I. KATSINA-ALU, N. TOBI, F. F. TABAI,  
I. T. MUHAMMAD, P. O. ADEREMI, JJSC**

ALHAJI MUJAHID DOKUBO-ASARI ..... APPELLANT  
AND  
FEDERAL REPUBLIC OF NIGERIA ..... RESPONDENT

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CRIMINAL PROCEDURE - Bail - Grant or refusal of - Criteria trial court should consider - Include probability of accused - Not surrendering himself for trial (H1)

CRIMINAL PROCEDURE - Felony - Bail - Discretion of trial court - Is seldom disturbed by appellate court - And where the offence attracts as from three years imprisonment - Bail is not a matter of course (H2)

APPEALS - Interference - Concurrent finding - That is based on trial court hearing and seeing the witnesses - By principle is not easily disturbed (H3)

APPEALS - Concurrent finding - Documents - Evaluation of evidence based on documents - Can be done by appellate Court - In spite of an existing concurrent finding (H4)

CRIMINAL PROCEDURE - Bail - Factors to consider - National security - Evidence of threat thereto - Is in existence in the charge against appellant - As rightly held by Court of Appeal (H5)

CRIMINAL PROCEDURE - Bail - Grant of - Minimum demands for grant of bail - Are not met by appellant - As there is no assurance - That he will not execute his threat to national security (H6)

CONSTITUTIONAL LAW - Bail - National security - Personal liberty

s.35 1999 Constitution - Where national security is threatened - Accused person's right to personal liberty - Will be curtailed as in this case (H7)

### **FACTS**

The appellant was a one time member/leader of the Niger Delta Peoples Salvation Front (NDSF), and some other antigovernment societies that are seeking for one claim or another. He, together with other persons at large were said to have signed one communique which castigated Governors, Local Government Chairmen and NDDC directors in connivance with the Federal Government that they looted the oil revenue accruing to the people of Niger Delta. They felt this looting has left the people in a state of neglect and abject poverty. They cited recent hike in fuel pump price as one of their grievances. And threatened to take up arms against the government after lodging their protest with Pro-National Conference Organisation (PRONACO). The Association also revealed its plan to cause civil disorder that would lead to the overthrow of the present Government. Appellant was taken to court on a five count charge that included treasonable felony.

Upon the arraignment of appellant who pleaded not guilty before the Federal High Court Abuja on 6-10-2005, his counsel moved his summons on Notice praying the trial court to admit him to bail. In a considered ruling delivered on the 11-11-2005, the trial Judge refused to grant bail to appellant. His appeal to the Court of Appeal was dismissed. Still dissatisfied, appellant has further appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(i) Whether the Court of Appeal was right when it reached a conclusion of fact that there was acceptable evidence of threat to national security by the appellant in the case put forward by the respondent.*

*“(ii) Assuming (without conceding) that the case of the respondent revealed a strong prima facie case of threat to national security, whether that suspends the right to bail as enshrined in section 35 of the 1999 Constitution.”*

**HELD** (Unanimously dismissing the appeal per **MUHAMMAD JSC**)

***Bail - Grant or refusal of***

1. When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include, among others, the following:

- (i) the nature of the charge;
- (ii) the strength of the evidence which supports the charge;
- (iii) the gravity of the punishment in the event of conviction;
- (iv) the previous criminal record of the accused if any;
- (v) the probability that the accused may not surrender himself for trial;
- (vi) the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.
- (vii) the likelihood of further charge being brought against the accused;
- (viii) the probability of guilt;
- (ix) detention for the protection of the accused.
- (x) the necessity to procure medical or social report pending final disposal of the case.

These criteria are not exhaustive. Other factors not mentioned may be relevant to the determination of grant or refusal of bail to an accused. They provide the required guideline to a trial court in the exercise of its discretion on matters of bail pending trial. (p. 2806 F)

***Felony - Bail - Discretion of trial court***

2. Section 118 (2) of the CPA, in my view, makes the grant of bail to an accused person standing trial before a High Court, purely a discretionary matter in the hands of the trial Judge. Furthermore, where an offence carries a sentence of imprisonment for a period of three years or more, grant of bail is not a mere matter of course. It is a settled principle of law that except where a miscarriage of justice has been established or that

there is a violation of some principles of law or procedure; or that the discretion is known to have been wrongly exercised, or where the exercise was tainted with some illegality or substantial irregularity, an appeal court seldom interferes with the learned trial Judge's exercise of discretion. This is because discretion is of the trial court and not of the appellate court hence it cannot substitute its own discretion.

It is worthy of note as well, that on a question of exercise of discretion authorities are not of much value. No two cases are exactly similar and even if they are, the court cannot be bound by a previous decision to exercise it's way because that would be putting an end to discretion. No discretion in one case can be a precedent to another. (p. 2812 E)

#### **D APPEALS - Interference - Concurrent finding**

3. The practice of the appeal courts generally, and this has been on for quite sometime, is that where there is a concurrent finding of two lower courts, the appeal court hardly interferes with it except on exceptional circumstances. This principle of concurrent findings/decisions of two lower courts not to be ordinarily disturbed by a higher court is respected by the courts because it is founded on the understanding that the facts that have been deliberated on by two courts carefully before they arrived at certain conclusions can be, supported from the evidence laid before them particularly if much of the findings or conclusions depended on the trial court having heard and seen vital witnesses testify. In this regard it is an exclusive preserve of the trial court and an appellate court certainly lacks power to interfere. (p. 2813 G)

#### **Evaluation of evidence based on documents**

4. But, where the evaluation of evidence is only through documentary evidence, an appellate court has liberty to evaluate the affidavit evidence with a view to either affirming or reversing the trial court's decision depending on the substantiality of the dispositions made by the parties. In the appeal on hand the court below made some findings of fact on the affidavit evidence. Below is what the court said: -

*“Evidence available to the trial Judge and to us shows beyond doubt the threat to National Security. A close scrutiny of the charge and documentary evidence available reveals Offences that are a real threat to National Security.”*

The evidence available before the two lower courts was that of B  
affidavit evidence. (p. 2814 B)

***Bail - Factors to consider***

5. From the above, it is clear to me that the court below was right in its C  
conclusion that there was evidence which the trial court accepted to show the existence of threat to the National Security. For instance, in his statement to the Police, signed by him the appellant made strong statements.

These statements were neither denied nor controverted. They were D  
made by the appellant. In fact in paragraph 10 of the counter-affidavit the deponent averred that it will be prejudicial to National Security to grant bail to the accused/applicant. No reply to this averment by the appellant when he filed a reply. It thus stands to be an uncountered aver- E  
ment which in law is deemed admitted. (p. 2818 C/2819 C)

***Minimum demands for grant of bail***

6. What assurances are put in place such that the appellant if released on F  
bail, will not eventually translate into action his threat of continued “armed struggle” which in his words “cannot be ascertain (sic)” as he was not God, if there was no “peace”? “Peace” may be taken in the context of what he meant, to be a relative term. Even the Devil cannot know or draw inference in what that unpredictable and oft oscillating organ in G  
human body called heart/mind, conceals. The applicant in my view has failed to meet the minimum demands for the grant of bail, looking at the totality of the circumstances surrounding his case. I resolve issue 1 in favour of the respondent. (p. 2820 F) H

***Bail - National security - Personal liberty***

7. The pronouncement by the court below is that where National Secu-

ity is threatened or there is the real likelihood of it being threatened human rights or the individual right of those responsible take second place. Human rights or individual rights must be suspended until the National Security can be protected or well taken care of. This is not anything new. The corporate existence of Nigeria as a united, harmonious, indivisible and indissoluble sovereign nation, is certainly greater than any citizen's liberty or right. Once the security of this nation is in jeopardy and it survives in pieces rather than in peace, the individual's liberty or right may not even exist.

The above provisions of section 35 of the Constitution leave no one in doubt that the section is not absolute. Personal liberty of an individual within the contemplation of section 35(1) of the Constitution is a qualified right in the context of this particular case and by virtue of subsection (1) (c) thereof which permits restriction on individual liberty in the course of judicial inquiry or where, rightly as in this case, the appellant was arrested and put under detention upon reasonable suspicion of having committed a felony. A person's liberty, as in this case, can also be curtailed in order to prevent him from committing further offence(s). It is my belief as well that if every person accused of a felony can hide under the canopy of section 35 of the Constitution to escape lawful detention then an escape route to freedom is easily and richly made available to persons suspected to have committed serious crimes and that will not augur well for the peace, progress, prosperity and tranquillity of the society. I entirely agree with the court below that a charge of treasonable felony is a very serious offence and is prejudicial to National Security. (pp. 2822 C/ 2823 E)

## **NOTABLE POINT OF INTEREST**

### **TOBIJSC**

#### **H 1. *Bail - Omnibus criterion is availability of accused to stand trial***

The main function of bail is to ensure the presence of the accused at the trial. Accordingly, this criterion is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother

of all the criteria enumerated above. Dealing with the criterion, the Working Party on Bail Procedure in Magistrates' Courts in the United Kingdom, said in paragraph 22 of the Report:

*"There are a number of other considerations to be taken into account in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicative of the likelihood or otherwise of the defendant's appearance."* B

As a matter of fact, all other criteria are parasitic on the omnibus criterion of availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the greater the incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital and non-capital offence in one way crystallised from the realisation that the atrocity of the offence is directly proportional to the probability of the accused person absconding. But the above is subject to the qualification that there may be less serious offences in which the court may refuse bail, because of its nature. This does not however apply in this case because the appellant is charged with treasonable felony, a heinous offence carrying a prison term of life. (p. 2826 A) C D E F

### **REPRESENTATION**

Festus Keyamo for the appellant with him; O. Amachree, Joshua Alobo, Isaac Enumudu, Arikun O. Donald, N. T. Oleweje (Miss), Inye Dokubo-Asari (Mrs.) and U. Pascal. G

S. Aliyu (Ag. Director, Public Prosecution) Federal Ministry of Justice for the respondent, with him; Abdullahi Mikailu (CLO) and A. G. Salihu (ACLO). H

### **CASES REFERRED TO**

Enebeli v. Chief of Naval Staff (2000) 9 N.W.L.R. (Pt. 671) 119 at 124-125

Ani v. State (2002) 1 N.W.L.R. (Pt. 747) 217 at 230

Abiola v. Federal Republic of Nigeria (1995) 1 N.W.L.R. (Ft. 370) 155

Anajemba v. Federal Government of Nigeria (2005) 1 N.C.C. 390 at page 3981

B Ani v. State (2002) 1 N.W.L.R. (Pt. 747) 217 at page 230 A-C

Nakutama Likita v. C. O. R (2002) 11 N.W.L.R. (Pt. 777) 145 at page 160 E-H

Bamaiyi v. State (2001) 8 N.W.L.R. (Pt. 715) 270 at 291

C Echeazu v. Commissioner of Police (1974) N.W.L.R. 308 at page 314  
R. v. Jamal 16 NLR 54

State v. Okafor (1964) ENLR 96

R. v. Rose (1898) 18 COX.C.C. 717

R. v. Robinson (1854) 23 LJ QB 286

D Ex parte Milburn 34 US 704 (1835)

US v. Ryder 110 US 729

Stack v. Boyle 342 U.S. 1 (1951)

E **STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999 ss. 35, 36 (1), 131, 137, 182, 239 & 285

Criminal Procedure Act Cap 80 LFN 1990 s. 118 (2)

F Criminal Code Act Cap 77 LFN 1990 ss. 516, 41, 62 (2) (1), 63, 59, 64

**LEAD JUDGMENT BY MUHAMMAD JSC**

From the facts contained in the Printed Record of appeal placed  
G before this court, the appellant Alhaji Mujahid Dokubo-Asari, was a one  
time leader of the Niger Delta Peoples Salvation Front (NDSF) but now  
leader, Niger Delta Peoples Volunteer Force (NDPVF). He is also a mem-  
ber, Pro-National Conference Organization. He, along with one Mr. Uche  
Okwukwu and others, now at large, were said to have signed one com-  
H munique, which castigated Governors, Local Government Chairmen and  
NDDC Directors in connivance with the Federal Government that they  
looted the oil revenue accruing to the people of Niger Delta while pursu-  
ing their personal projects and aggrandizement. This, they felt, had left

the people in a state of neglect and abject poverty. They also cited the recent hike in fuel pump price as one of their grievances. They therefore threatened to take-up arms against the government after lodging their protest with Pro-National Conference Organization (PRONACO). The Association also revealed its plan to cause civil disorder that would lead to the overthrow of the present Government. Dokubo Asari was arrested by the Police and taken to court on a five-count charge of conspiracy; treasonable felony; forming, managing and assisting in managing an unlawful society; publishing of false statement and being a member of an unlawful society. These are offences created by and punishable under the Criminal Code Act, Cap 77, Laws of the Federation of Nigeria, 1990.

On the 6<sup>th</sup> day of October, 2005 the appellant as accused, was arraigned before the Federal High Court holden in Abuja. The appellant pleaded not guilty to all the 5 counts.

On the same 6<sup>th</sup> day of October, appellant's Counsel moved his summons on Notice dated 10th day of October, 2005, praying the trial court to admit the accused/appellant to bail. After taking arguments from the learned counsel for the respective parties, the learned trial Judge examined their submissions along with the affidavit evidence laid before him. In a considered Riling delivered on the 11<sup>th</sup> day of November, 2005, the learned trial Judge refused to grant bail to the accused/appellant. Accused/Appellant was dissatisfied with the trial courts decision and he filed his Notice and Grounds of Appeal to the Court of Appeal, Abuja Division. (Court below). In its judgment of 6<sup>th</sup> June, 2006, the court below dismissed the appeal and affirmed the ruling of the trial court.

Further dissatisfied, the accused/appellant sought and was granted leave by the court below to appeal to this court. Two Grounds of Appeal were set out in the Notice of Appeal, which was filed within the time granted by the court below for filing same.

Learned Counsel for the appellant, Mr. Keyamo, filed on behalf of the appellant a brief of argument in which he distilled two issues for the determination of the appeal by this court. These are the issues: -

*“(i) Whether the Court of Appeal was right when it reached a conclusion of fact that there was acceptable evidence of threat to na-*

*tional security by the appellant in the case put forward by the respondent.*

*(ii) Assuming (without conceding) that the case of the respondent revealed a strong prima facie case of threat to national security, whether that suspends the right to bail as enshrined in section 35 of the 1999 Constitution.”*

Learned Director of Public Prosecution of the Federation, who appeared for the respondent, filed the respondent’s brief of argument. The learned DPP, Mr. Aliyu, formulated one issue for determination of the appeal by the court. The issue reads: -

*“Whether in view of the totality of the facts and circumstances of this case and the evidence properly before the trial court, the court below was right when it confirmed the decision of the trial court.”*

In his submissions on issue 1, learned Counsel for the appellant argued that the concurrent findings of fact of both courts below as to threat to National Security cannot stand in the face of available evidence. He stated further that what is called “threat to National Security” can only be distilled from paragraphs 5 (d) of the respondent’s counter-affidavit at the trial court. These, he argued further, were just depositions without nothing more to support them when the burden is on the prosecution to prove why bail should not be granted. Bail pending trial, learned Counsel submitted, is a Constitutional right and there is a presumption of innocence of the individual. He cited and relied on the cases of *Enebeli v. Chief of Naval Staff* (2000) 9 N.W.L.R. (Pt. 671) 119 at 124-125; *Ani v. State* (2002) 1 N.W.L.R. (Pt. 747) 217 at 230. Learned Counsel stressed the point that it was not the duty of the Court of Appeal to believe or not to believe, anything at this stage of the proceedings when exhibits have not been tendered at the trial. It was a grave error for that court to prejudise the appellant by believing that he actually granted an interview contained in a newspaper cutting which was part of a bundle of papers given to the appellant’s Counsel (but not filed along with the charge, purportedly as proof of evidence. Learned Counsel urged this court to interfere with the finding of fact of the court as it violated the known principle of law that an accused is presumed innocent until proven guilty. He urged this court to resolve issue No. 1 in favour of the appellant.

In his submissions on issue No. 2, the learned Counsel for the appellant stated that a mere allegation of threat to National Security cannot automatically suspend the provisions of Chapter 4 of the 1999 Constitution which includes section 35 thereof, on right to bail. In disagreeing with the Court of Appeal in its reasoning process, learned Counsel B for the appellant argued that the only time human rights can take a second place is not when a mere charge relating to threat to National Security is brought against anyone, but when a formal declaration of a State of Emergency is proclaimed in line with the provision of the Constitution. C It was argued further for the appellant that if “threat to National Security” is to be taken as a factor to consider in the grant or refusal of bail, the court must still have recourse to the competing depositions in the affidavit as filed by both parties and see whether the prosecution has successfully discharged this burden to show that there is a threat to D National Security. Even if it is, it does not preclude altogether the consideration of that right to bail as enshrined in the Constitution. Learned Counsel referred to the case of *Abiola v. Federal Republic of Nigeria* (1995) 1 N.W.L.R. (Ft. 370) 155. He urged this court to resolve issue No. 2 in E favour of the appellant. Learned Counsel finally urged us to allow the appeal and admit the appellant to bail.

The learned Director of Public Prosecution for the respondent submitted that the trial court took into consideration all the relevant criteria F for the grant of bail as have been laid down in a plethora of cases and the court rightly held that all the requisite conditions for the grant of bail did not co-exist. He cited and relied on the cases of *Anajemba v. Federal Government of Nigeria* (2005) 1 N.C.C. 390 at page 3981; *Ani v. State* (2002) 1 N.W.L.R. (Pt. 747) 217 at page 230 A-C; *Nakutama Likita v. C. G O. R* (2002) 11 N.W.L.R. (Pt. 777) 145 at page 160 E-H; 161- B. It was his further submission that there is a strong probability of guilt of the accused and that there is a likelihood of the accused person interfering H with the cause of justice if released on bail. He relied on the affidavit evidence as well as the interim Police Investigation Report; the accused person’s confessional statement; Communiqué of meeting held at Samsy Hotel, Benin City, Edo State and the press interview. Learned Director of

Public Prosecution cited the case of *Bamaiyi v. State* (2001) 8 N.W.L.R. (Pt. 715) 270 at 291. It was the learned Director of Public Prosecution's submission that refusing bail to the appellant is not in anyway inconsistent with the provisions of Chapter 4 of the Constitution of the Federal Republic of Nigeria, 1999. The learned Director of Public Prosecution drew this court's attention to the fact that there are concurrent findings of the two lower courts against the appellant, which were adequately supported by credible affidavit evidence adduced before the trial court. The attitude of this court, he argued further, to such concurrent findings is that this court will not disturb such findings without any substantial error apparent on the record of proceedings or that such findings are perverse. He stated that the onus is on the appellant to demonstrate by showing the existence of special circumstances to justify why this court should interfere with the findings of fact made by the two lower courts. This; the appellant has woefully failed to do.

Further submission made on behalf of the respondent are that where an offence carries a sentence exceeding 3 years imprisonment, bail in such a case is not a mere matter of course, but rather, at the discretion of the court which must be exercised judicially and judiciously as has been done in this case. The learned Director of Public Prosecution cited section 118(2) of the Criminal Procedure Act (CPA). The charges against the appellant *carry* a maximum sentence of life imprisonment. It is in the interest of justice to refuse the appellant bail and uphold the concurrent findings of the two lower courts. The learned Director of Public Prosecution urged this court to dismiss the appeal.

**When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include, among others, the following:**

- (i) the nature of the charge;
- (ii) the strength of the evidence which supports the charge;
- (iii) the gravity of the punishment in the event of conviction;

- (iv) the previous criminal record of the accused if any;
- (v) the probability that the accused may not surrender himself for trial;
- (vi) the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him. B
- (vii) the likelihood of further charge being brought against the accused;
- (viii) the probability of guilt;
- (ix) detention for the protection of the accused.
- (x) the necessity to procure medical or social report pending final disposal of the case. C

See: Bamaïyi v. State (2001) 8 N.W.L.R. (Pt. 761) 670; Abacha v. State (2002) 5 N.W.L.R. (Pt. 761) 638; Ani v. State (2002) 1 N.W.L.R. (Pt. 747) 217; Ekwenugo v. Federal Republic of Nigeria (2001) 6 N.W.L.R. D (Pt. 708) 9; EYu v. State (1988) 2 N.W.L.R. (Pt. 78) 607.

**These criteria are not exhaustive. Other factors not mentioned may be relevant to the determination of grant or refusal of bail to an accused. They provide the required guideline to a trial court in the exercise of its discretion on matters of bail pending trial.** My learned brother, Uwaifo, JSC, had this to say on these factors:

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*“In that regard it is proper to consider the nature of the offence, F the nature of the evidence in support of it, and the severity of the punishment which conviction will entail. The learned trial Judge took this crucial factor as to availability to stand trial into consideration. These are not matters that should be glossed over. Some of them may not be admissible as evidence in the main trial but they are certainly worthy to be taken into account in an application for bail pending trial.” G*

See the case of Bamaïyi v. State (Supra).

In his contribution in the above case, Ogwuegbu JSC, stated: -

*“That court has in most cases, discretion to admit an accused H person to bail pending trial, but in the exercise of the discretion, the nature of the charge, the evidence by which it is supported, the sentence which by law may be passed in the event of conviction, the probability*

that the appellant will appear to take his trial, are the most important ingredients for the guidance of the court and where these are weighty, an appellate court will not interfere. See: *In the matter of Etienne Barronnet and Edmond Allian*. I. E. and B. I. (1852) Dears 51; 118 E.R. K.B. 337 B and *Re Robinson* (1854) 23 L.J. Q.B. 286”.

Pertinent for me at this juncture for clarity sake, to set out in full the counts for which the appellant is standing trial. They read as follows:-

C “CHARGE  
COUNT 1

That you: (i) Alhaji Mujahid Dokubo Asari ‘m’ 41 years old of No. 13 Agudama Street, D-Line, Port Harcourt; and others (presently at large on or about 28<sup>th</sup> August, 2005 at SAMSY Hotel, Benin City, Edo State within the jurisdiction of the Federal High Court did conspire among yourselves to commit felony to wit: treasonable felony; by forming an intention to:

(a) remove during his term of office otherwise than by constitutional means, President Olusegun Obasanjo as Head of State of the Federation and Commander-in Chief of the Armed Forces thereof: and

(b) levy war in order by force, constraint, to compel the President to change his measures, counsel and manifested such intention by overt acts; and you thereby committed an offence contrary to section 41 and punishable under section 516 of the Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria 1990.

COUNT 2

That you: (1) Alhaji Mujahid Dokubo Asari (m), 41 years old of No. 13 Agudama Street, D-Line, Port Harcourt, and others (presently at large) on or about 28<sup>th</sup> August, 2005 at SAMSY Hotel, Benin City, Edo State within the jurisdiction of the Federal High Court did commit treasonable felony against the Federal Republic of Nigeria by respectively belonging to Militant Groups known as the Niger Delta People Volunteer Force (NDPVF); Congress For the Liberation of Ikwere People (COLIP) and Chikoko Movement which threatened to take up arms in order to intimidate and overawe the President and Government of the Federal

*Republic of Nigeria and manifested such intention by overt acts and you thereby committed a felony contrary to and punishable under S. 41 of the Criminal Code Act Chapter 77 Laws of the Federation of Nigeria 1990.*

COUNT 3

*That you: (1) Alhaji Mujahid Dokubo Asari (m) 41 years old of No. 13 Agudama Street, D-Line, Port Harcourt; and others (presently at large) on or about 28<sup>th</sup> August, 2005 at SAMSY Hotel, Benin City, Edo State within the jurisdiction of the Federation High Court formed, managed and assisted in the management of unlawful societies of more than ten persons respectively known and called “Niger Delta Peoples Volunteer Force” (NDPVF), Congress For the liberation of Ikwere People (COLIP) and Chikoko Movement with the objective of:*

*a. Levying war on the Government of the Federal Republic of Nigeria*

*b. encouraging the killing and injuring of persons;*

*c. destroying, injuring and encouraging the destruction and injuring of property;*

*(d) subverting or promoting the subversion of the Government of the Federal republic of Nigeria and its officials;*

*(e) committing, inciting acts of violence and intimidation;*

*(f) interfering with, resisting; encouraging interference with or resistance to the administration of Law; and*

*(g) disturbing and encouraging the disturbance of peace and order in the Niger Delta States of Rivers; Delta; Edo of the Federal Republic of Nigeria contrary to section 62(2)(1) and punishable under section 63 of the Criminal Code Act Capt. 77, LFN 1990.*

COUNT 4

*That you: (1) Alhaji Mujahid Dokubo Asari (m), 41 years old of No. 13 Agudama Street, D-Line, Port Harcourt and other (presently at large) on or about 28<sup>th</sup> August, 2005 at SAMSY Hotel, Benin City, Edo State within the jurisdiction of the Federal High Court published a statement, rumour, report which is likely to cause fear and false alarm to the public knowing or having reason to believe that such statement, rumour, report, is false and thereby committed an offence contrary to and punishable*

*able under section 59 of the Criminal Code Act Chapter 77 LFN 1990.*

*COUNT 5*

*That you: (1) Alhaji Mujahid Dokubo Asari (m), 41 years old of No. 13 Agudama Street, D-Line, Port Harcourt; and others (presently at large) between year 2004 and 2005 at Port Harcourt, Rivers State, Nigeria within the jurisdiction of the Federal High Court are members of unlawful societies respectively called;*

- (1) “Niger Delta Peoples Volunteer Force” (NDPVF)*  
*(2) Congress for the Liberation of Ikwere People (COLIP); and*  
*(3) Chikoko Movement and you thereby committed a felony contrary to and punishable under section 64 of the Criminal Code Act Chapter 77 LFN 1990.*

*OVER THE ACTS OF THE OFFENCES OF COUNTS I AND II*

*1. That you: (1) Alhaji Mujahid Dokubo Asari: and others presently at large respectively formed the following Organization: Niger Delta Peoples Volunteer Force (NDPVF); Congress for the Liberation of Ikwere People (COLIP); and Chikoko Movement; all of whom want Nigeria to disintegrate so that its ethnic nationalities, particular the Ijaw and Ikwere people, would create their own nations;*

*2. That you: (1) Alhaji Mujahid Dokunbo Asari; and others presently at large, attended a meeting of “The Pan Niger Delta Action Conference/Council (PANDAC)”;* the meeting was attended by leaders and members of representative nationality organizations, militant formations, youth and civil society organizations from Niger Delta region, including the Niger Delta Peoples Volunteers Force (NDPVF), Chikoko Movement, Great Commonwealth of The Niger Delta (GCND), Movement for the Survival of Ogoni People (MOSOP), Ijaw Youth Council (IYC), Itsekiri National Youth Council, National Youth Council of Ogoni People (NYCOP), Civil Liberties Organization (CLO), Niger Delta Women for Justice (NDWJ), Congress for the Liberation of Ikwere People (COLIP), Supreme Egbesu Assembly (SEA), Delta Stakeholder Today Peoples Council, Socialist Workers Party, Federated Niger Delta Ijaw Communities (FINDIC), National Association of Ijaw Female Students, People with Disability Action Network (PEDANET) among others on or about Au-

gust 28,2005 at SAMSY Hotel Benin City in Edo State of Nigeria and issued a communiqué:

“COMMUNIQUE OF THE STRATEGY AND MOBILIZATION MEETING OF THE PAN NIGER DELTA ACTION CONFERENCE/ COUNCIL (PAND AC) AT THE SAMSY HOTEL, BENIN CITY, EDO STATE ON SUNDAY, AUGUST, 28, 2005”;

3. That in the said communiqué referred to in paragraph 2 above and signed by Alhaji Mujahid Dokubo Asari, you alleged that the irresponsible Governors of the Niger Delta, Local Government Chairmen and NDDC Directors in connivance with the Federal Government of Nigeria looted the oil revenue accruing to the people of Niger Delta while pursuing their personal projects and aggrandizement, and therefore threatened to take up arms against the Government of the Federal Republic of Nigeria;

4. That at the said meeting of August 28, 2005 at SAMSY HOTEL, Benin City, Edo State of Nigeria you: (1) Alhaji Mujahid Dokunbo Asari: and others presently at large planned to cause civil disorder that would lead to the overthrow of what you called “*the dictatorial government of Chief Olusegun Obasanjo*” and replace same by a Provisional government of National Unity.

5. That you: (1) Alhaji Mujahid Dokunbo Asari; granted interview to the Independent Newspaper that was published on September 10,2005 in which you said:

*“Nigeria is an evil entity. It has nothing to stand on and I will continue to fight and try to see that Nigeria dissolves and disintegrates and I am ready to hold on to the struggle see to this till the day I will die. I do not see any reason why I should continue to live with people that have no relationship with me whatsoever”.*

DATED THIS..... 4<sup>TH</sup> DAY.... OF OCTOBER 2005.....

CHIEF BAYO OJO (SAN)

Hon. Attorney-General of the Federation and  
Minister of Justice”

It is thus clear that all the counts are of criminal nature. The of-

fences were all created by the Criminal Code Act and punishable by same.

The various offences set out above, if proved will each, attract a punishment of not less than three years of imprisonment. See the various sections under which the offences are punishable i.e.: Section: 41, 59, 63, 64 and 516 of the Criminal Code Act Cap 77, Laws of the Federation of Nigeria, 1990.

Section 118 (2) of the Criminal Procedure Act (CPA) Cap 80, LFN, 1990 provides as follows:-

“Where a person is charged with any felony other than a felony punishable with death, the court MAY, if it thinks fit, admit him to bail.”

(emphasis supplied by me)

The interpretative section, section 2 of the CPA assigns the following interpretation to the word “felony” -

“‘felony’ means an offence on conviction for which a person can, without proof of his having been previously convicted of an offence, be sentenced to death or to imprisonment for three years or more, or which is declared by law to be a felony.”

(underlining supplied for emphasis)

**Section 118 (2) of the CPA, in my view, makes the grant of bail to an accused person standing trial before a High Court, purely a discretionary matter in the hands of the trial Judge. Furthermore, where an offence carries a sentence of imprisonment for a period of three years or more, grant of bail is not a mere matter of course. It is a settled principle of law that except where a miscarriage of justice has been established or that there is a violation of some principles of law or procedure; or that the discretion is known to have been wrongly exercised, or where the exercise was tainted with some illegality or substantial irregularity, an appeal court seldom interferes with the learned trial Judge’s exercise of discretion. This is because discretion is of the trial court and not of the appellate court hence it cannot substitute its own discretion.** See the case of *Efetiroroje v. Okalefe II* (1991) 5 N.W.L.R. (Pt. 193) 517; *Royal Exchange Assurance (Nig.) Ltd, v. Aswani Textiles Ltd* (1992) 3 N.W.L.R.

(Pt. 227) 1 at page 5; *The Resident Ibadan Province & Anor. v. Mamudu Lagunju* (1954) WACA 549 at page 552; *Anya v. A. N. N Ltd* (1992) 6 N.W.L.R. (Pt. 247) 319; *Nzeribe v. Dave Engineering Co. Ltd* (1994) 8 N.W.L.R. (Pt. 361) 124 and *University of Lagos v. Aigoro* (1985) 1 N.W.L.R. (Pt. 143) 145.

In *Sarami v. Kotoye* (1990) 4 N.W.L.R. (Pt. 143) 144 at page 151, Obaseki, JSC, put it this way: -

*“The proper role of the Court of Appeal where there is a proper exercise of discretion is not to interfere with the decision. To do so merely on the ground that the Appellate Court would have exercised the discretion differently is an assault on justice and not within the statutory powers of the Appeal Court.”*

**It is worthy of note as well, that on a question of exercise of discretion authorities are not of much value. No two cases are exactly similar and even if they are, the court cannot be bound by a previous decision to exercise its way because that would be putting an end to discretion. No discretion in one case can be a precedent to another.** See: the holding of Kay, L.J. in the case of *Jenkins v. Bushby* E (1891) 1 Ch. 484, at page 485; see also *Kudoro v. Alaka* (1956) 1 FSC 82 at page 383; *Solanke v. Ajibola* (1968) 1 All N.L.R. 46 at page 51.

It is clear in this appeal that at the close of oral arguments by the parties before it and after considering all the submissions made by the learned Counsel for the respective parties, the court below, per Rhodes-Vivour, J C A; made the following conclusion:

*“In the light of the above the learned trial Judge was right in refusing the application for bail by the appellant. This court will not interfere with the decision of the learned trial Judge.”*

**The practice of the appeal courts generally, and this has been on for quite sometime, is that where there is a concurrent finding of two lower courts, the appeal court hardly interferes with it except on exceptional circumstances.** See: *Igogo v. The State* (1999) 12 H SCNJ 140; *Dogo & Ors. v. The State* (2001) 1 SCNJ 315. **This principle of concurrent findings/decisions of two lower courts not to be ordinarily disturbed by a higher court is respected by the courts**

because it is founded on the understanding that the facts that have been deliberated on by two courts carefully before they arrived at certain conclusions can be, supported from the evidence laid before them particularly if much of the findings or conclusions depended on the trial court having heard and seen vital witnesses testify. In this regard it is an exclusive preserve of the trial court and an appellate court certainly lacks power to interfere. But, where the evaluation of evidence is only through documentary evidence, an appellate court has liberty to evaluate the affidavit evidence with a view to either affirming or reversing the trial court's decision depending on the substantiality of the dispositions made by the parties. In the appeal on hand the court below made some findings of fact on the affidavit evidence. Below is what the court said: -

*"Evidence available to the trial Judge and to us shows beyond doubt the threat to National Security. A close scrutiny of the charge and documentary evidence available reveals Offences that are a real threat to National Security."*

The evidence available before the two lower courts was that of affidavit evidence. The appellant as applicant before the trial court deposed to the following facts in support of his application for bail, through Daniel Nuesiri:

*"1. That I am a litigation officer in Festus Keyamo Chambers, solicitors to the Accused/Applicant.*

*2. That I have the consent of the Applicant and my employers to depose to this affidavit.*

*3. That I was informed by the Accused/Applicant and I verily believe that::*

*a. That on Monday, September 19, 2005 the Applicant received a phone call from the Commissioner of Police, Rivers State, to report at the Police State Command,*

*b. That on getting there he was asked whether he knew anything about the threat to blow up oil installations over the arrest of the Bayelsa State Governor which he answered in the negative.*

*c. That he was then told that his attention was needed in Abuja*

*after which he was whisked away through the back gate of the command without the knowledge of his associates and friends who accompanied him to the Police Headquarters,*

*d. That from the 19<sup>th</sup> of September, 2005, the Applicant was in detention until the 6<sup>th</sup> of October, 2005, when he was arraigned before this Honourable Court on a five-count charge.* B

*e. That the Accused has no criminal record and has never been tried for any offence before,*

*f. That the accused will not commit any similar offence or any at all if granted bail,* C

*g. That the Accused will not impede any further investigation if granted bail,*

*h. That the Accused will not jump bail and will make himself available for trial,* D

*i. That the accused is worthy enough to be granted bail in self-recognizance and alternatively can provide credible sureties for his bail.*

*4. That there is no prima facie evidence that the Accused has committed the offences for which he is charged.* E

*5. That it will be in the interest of justice to grant this application.*

*6. That I depose to this affidavit in good faith."*

The respondent filed a counter-affidavit. It was sworn to by one Y. S. Abubakar who averred to the following facts: -

*"1. That I am a Senior Police Officer of Nigeria Police, Force Headquarters, Abuja FCT.* F

*2. That I am also one of the officers that investigated this case.*

*. That by virtue of my said position, I am sufficiently conversant with the facts, which I herein depose.* G

*4. That I have the consent and authority of the Complainant/ Respondent to depose to this counter affidavit.*

*5. That I was informed by the Hon. Attorney-General of the Federation and Minister of Justice on Tuesday, October 11, 2005, at 1200 Hrs in his office at Federal Ministry of Justice, Federal Secretariat Complex Abuja, and I verily believe him as follows :-*

*(a) That if the Accused/Applicant is released on Bail, the prosecu-*

*tion of the charge against him will be at risk.*

*(b) That most other suspects in this case are still at large.*

*(c) That the available evidence against the Accused/Applicant so far is overwhelming.*

**B** *(d) That the Accused/Applicant is a militant Leader of a dangerous, armed and unlawful society called the Niger Delta People's Volunteer Force (NDPVF).*

*(e) That the Accused/Applicant have had access to and can on grant of bail, have access to dangerous weapons.*

**C** *(f) That Accused/Applicant is from the riverine area of the Niger Delta of Nigeria.*

*(g) That the Niger Delta is an area consisting of Mangrove Swamp, numerous creeks and is an extremely difficult terrain to access,*

**D** *(h) That if granted bail the Accused/Applicant will commit similar offences, interfere with the investigation of the case and not make himself available for trial.*

**E** *6. That after the arrest of the Accused/Applicant, his statement was obtained wherein he confessed to the commission of the crimes*

*7. That I was also informed by the Hon. Attorney-General of the Federation and Minister of Justice on Tuesday, October 11, 2005, at 1200 hrs in his office at Federal Ministry of Justice, Federal Secretariat Complex Abuja, and I verily believe him that the Accused/Applicant has not shown any special circumstances warranting the grant of this application.*

**G** *8. That the Accused/Applicant is healthy and he is being taken care of by the State as was seen from his entire appearance when he was arraigned before the court.*

*9. That the Complainant/Respondent will do all in its power to ensure a very speedy trial of the substantive case.*

**H** *10. That it will be prejudicial to National Security to grant bail to the Accused/Applicant.*

*11. That it will be in the interest of justice to refuse this application.*

*12. That I do solemnly and sincerely declare that I make this dec-*

*laration conscientiously believing same to be true and by virtue of the provisions of the Oath Act.”*

In a reply to the counter-affidavit, Festus Keyamo, learned Counsel for the appellant, deposed to the following facts:-

*“1. That I am the Counsel to the accused person.*

B

*2. That I have the consent and authority of the accused person to deposed to this affidavit.*

*3. That the applicant himself could not depose to this affidavit because he is remanded in custody but he informed me and I verily believe the under-mentioned facts.*

C

*4. That no other person has been declared wanted by the Federal Government in relation to this charge.*

*5. That there is no proof of evidence filed with this charge as such the court has nothing upon which to decide about the nature of the evidence in this case.*

D

*6. That the accused/applicant has no access to dangerous weapons.*

*7. That the Accused/Applicant is prepared to provide sureties from E Rivers State who know the creeks, mangrove swamps and who can locate him anytime, even though he is not prepared to escape from his trial.*

*8. That the Accused/Applicant has never confessed to the commission of any offence.*

F

*9. That the Accused/Applicant was never found committing any offence or arrested in the course of committing any offence as he voluntarily went to the State Command, Rivers State on invitation and he was arrested.*

G

*10. That I swear to this affidavit in good faith.”*

The court below commented on the affidavit evidence and other processes placed before the trial court. The trial court considered these processes in arriving at its decision. This is what the court below said:-

H

*“Indeed the depositions in the affidavit and interview granted the Independent Newspaper on 10/9/05 are ominous and very disturbing. For example the appellant granted interview to the Press wherein he says*

that he will continue to fight until Nigeria disintegrates. Evidence available to the trial Judge and to us shows beyond doubt the threat to National Security. A close scrutiny of the charges and documentary evidence available reveals offences that are a real threat to National Security. They involve creating a situation where the government of the Federal Republic of Nigeria could yield to force or expose the public to serious danger.

Indeed paragraph 10 of the counter-affidavit supports that fact. It states that it would be prejudicial to National Security to grant Bail. I agree. This deposition easily covers all the counts against the appellant."

**From the above, it is clear to me that the court below was right in its conclusion that there was evidence which the trial court accepted to show the existence of threat to the National Security. For instance, in his statement to the Police, signed by him the appellant made strong statements.** It suffices to quote the following statements :-

"The objective of Pronaco is to organize a Sovereign National Conference. The Conference will kick-off in October, 2005. The Niger Delta Sovereign National Conference is a mini Conference of the Pronaco People's National Conference. Because General Olusegun Obasanjo manipulated himself to power through massive rigging of the 2003 election. The people must seize power through the process of democratic, progressive mass action that will lead to the formation of a provisional government of National Unity.

We can achieve peace without fighting by going our separate ways like the Czechoslovakia experience. If there is no peace the process leading to armed struggle cannot be ascertain (sic) as I am not God. The Niger Delta People's Volunteer Force (NDPVF) which I led have (sic) totally disarmed. Hence, armed struggle will predicate on the actions and activities of the regime of the Nigerian State. I will pursue the course of the disintegration of Nigeria through the process of the Peoples National Conference.....

The Government of General Obasanjo is illegitimate. It retain

*(sic) power through the manipulation of the electoral process. This is a negation of elementary principle of democratic governance. No man with self respect will allow his right of choice taking away (sic) from him by a regime claiming to be democratic. This has made me and others like me to resent the government of the regime of general Obasanjo. When Nigeria eventually disintegrate (sic) the Ijaws will form a country of their own..... if the struggle outlive (sic) me. I will be grateful to God for other better than myself such as Isaac Adahaboro, Ken Saro-Wiwa had gone before me."*

**These statements were neither denied nor controverted. They were made by the appellant. In fact in paragraph 10 of the counter-affidavit the deponent averred that it will be prejudicial to National Security to grant bail to the accused/applicant. No reply to this averment by the appellant when he filed a reply. It thus stands to be an uncountered averment which in law is deemed admitted.** See: *Adesina v. Osogbo* (1996) 4 SCNJ 111. *Attorney-General of Anambra State v. Okeke* (2002) 5 SCNJ, 318; *Stephen Lawson-Jack v. The Shell Petroleum Development Company of Nigeria Ltd.* (2002) 7 SCNJ 121.

Secondly, in a Communiqué of the Strategy and Mobilization Meeting of the Pan Niger - Delta Action Conference/Council (PANDAC) held at the Samsy Hotel Benin City, Edo State on Sunday August 28, 2005, which was released to the Media on August 31, 2005 and which formed part of interim Police Investigation Report, it was alleged that the irresponsible Governors, Local Government Chairmen and NDDC Directors in connivance with the Federal Government of Nigeria looted the oil revenue accruing to the people of Niger Delta while pursuing their personal projects and aggrandizement. This, they felt, had left the people in a state of abject poverty and neglect. The PANDAC called on the peoples of Nigeria to act towards overthrowing the current dictatorship and replacing it with a provisional government of National Unity and a National Conference that will structure Nigeria and restore sovereignty to its people. The Communiqué was jointly signed by the appellant and two others. Although these documents i.e. the appellant's statement to the Police and the Communiqué just referred to above were not tendered as evidence,

yet they formed part of the Police Diary. They also formed part of the proof of evidence. Although the defence/ applicant/appellant denied in paragraph 5 of its reply that proof of evidence was filed by the prosecution/respondent and that the trial court had nothing upon which to decide the nature of the evidence in the cases, there is evidence of receipt of proof of evidence which controverted appellant's averment in his paragraph 5 of the reply referred to above. One Mr. Aniku, a legal practitioner and one of the defence Counsel deposed as follows:-

*"2. That attached as exhibits A, B and C are the letter (sic) received to collect proof of evidence, the proof of evidence received and the acknowledgment of the proof respectively."*

The trite position of the law is that in exercising the discretion given to him by the law in the grant or refusal of bail the trial Judge is bound to consider the weight of facts deposed to in an affidavit evidence placed before him. Other considerations enumerated earlier such as the strength of the evidence which supports the charge, the gravity of the punishment in the event of conviction, the likelihood of the accused interfering with proposed witnesses or may suppress any evidence that may incriminate him; the likelihood of further charge being brought against him and the probability of guilt are weighty issues in this case that the trial court cannot gloss over. See: Mamuda Dantata v. Inspector-General of Police (1958) NRNL 3; Abacha v. The State (2001) 3 N.W.L.R (Pt. 699) 35; Abiola v. Federal Republic of Nigeria (1995) 1 N.W.L.R. (Pt. 370) 155. **What assurances are put in place such that the appellant if released on bail, will not eventually translate into action his threat of continued "armed struggle" which in his words "cannot be ascertain (sic)" as he was not God, if there was no "peace"? "Peace" may be taken in the context of what he meant, to be a relative term. Even the Devil cannot know or draw inference in what that unpredictable and oft oscillating organ in human body called heart/mind, conceals. The applicant in my view has failed to meet the minimum demands for the grant of bail, looking at the totality of the circumstances surrounding his case. I resolve issue 1 in favour of the respondent.**

Appellant's issue No. 2 touches on appellant's right to bail as enshrined in section 35 of the 1999 Constitution. It is the contention of learned Counsel for the appellant that a mere allegation of threat to National Security cannot automatically suspend the provisions of Chapter 4 of the 1999 Constitution, which includes the right to bail. This, learned B Counsel further argued, was the major plank upon which the Court of Appeal based its decision to uphold the ruling of the trial court. The effect of this holding is to erroneously suspend section 35 of the 1999 Constitution of the Federal Republic of Nigeria -section which guaran- C tees the right of bail whenever any charge is preferred against anyone, including a charge of treasonable felony. Learned Counsel equated the pronouncement of the Court of Appeal on section 35 of the Constitution to that of suspending .a part of the Constitution through a judicial pronouncement. Learned Counsel for the appellant went on to submit that D the only time human rights can take a second place is not when a mere charge relating to threat to National Security is brought against anyone but when a formal Declaration of a State of Emergency is proclaimed in line with the provisions of the Constitution. Learned Counsel went on to E cite the Constitutional provisions, relating to period of emergency which would justify derogation from the provision of section 35(4) of the Constitution.

Let me observe from the outset, that although the respondent did F not advert its mind to fully address the appellant's issue, I must draw the attention of learned counsel for the appellant that the main discourse of his submission on issue two is on state of emergency. I think this is an unnecessary voyage in a world of fantasy. What is the relationship be- G tween grant of bail or refusal thereof with the suspension of a part of the Constitution i.e. section 35 of that Constitution? What brought about the provisions of the constitution which relate to the Declaration of Emergency? If refusal of bail to any person accused to have committed a H crime will amount to jettisoning some part of the constitution, or will invoke the Declaration for a period of emergency, then this country, which I believe, is populated by majority of law abiding citizens, who always carry out their normal day to day life without instilling any fear or caus-

ing any havoc to anyone, at any time, will be doomed. The reference made by learned counsel to provisions on Emergency situations is nothing other than mere concoction of facts to whip -up sentimental sympathy. The learned counsel is aware that courts do not make laws. They interpret laws. Courts cannot amend the Constitution. . Courts cannot suspend the Constitution or any part thereof. See: the case of Attorney-General of Bendel State v. Attorney-General of Federation & Ors. (1981) 10 SC 1 at 134 (1981) NSCC 314 However, if, in it's role of interpretation, a court makes a pronouncement which may have the weight and effect of declaring a law or some part of the Constitution for that matter null and void, the court must find support from the same Constitution or any other statute of equal force. **The pronouncement by the court below is that where National Security is threatened or there is the real likelihood of it being threatened human rights or the individual right of those responsible take second place. Human rights or individual rights must be suspended until the National Security can be protected or well taken care of. This is not anything new.**

**The corporate existence of Nigeria as a united, harmonious, indivisible and indissoluble sovereign nation, is certainly greater than any citizen's liberty or right. Once the security of this nation is in jeopardy and it survives in pieces rather than in peace, the individual's liberty or right may not even exist.**

Now, let me turn to the provisions of section 35 of the Constitution. These provisions in the first place are not absolute. The relevant provisions of the section are as follows :

*"35(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases 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;*

*(4) Any person who is arrested or detained in accordance with subsection (1) (c) of this Section shall be brought before a court of law*

*within a reasonable time, and if he is not tried within a period of-*

*(a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or*

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

*(7) Nothing in this section shall be construed -*

*(a) in relation to subsection (4) of this section, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital offence; and*

*(b) as invalidating any law by reason only that it authorizes the detention for a period not exceeding three months of a member of the armed forces of the Federation, or a member of the Nigeria Police Force in execution of a sentence imposed by an officer of the armed forces of the Federation or of the Nigeria Police Force, in respect of an offence punishable by such detention of which he has been found guilty."*

*(underlining supplied for emphasis)*

**The above provisions of section 35 of the Constitution leave no one in doubt that the section is not absolute. Personal liberty of an individual within the contemplation of section 35(1) of the Constitution is a qualified right in the context of this particular case and by virtue of subsection (1) (c) thereof which permits restriction on individual liberty in the course of judicial inquiry or where, rightly as in this case, the appellant was arrested and put under detention upon reasonable suspicion of having committed a felony. A person's liberty, as in this case, can also be curtailed in order to prevent him from committing further offence(s). It is my belief as well that if every person accused of a felony can hide under the canopy of section 35 of the Constitution to escape lawful detention then an escape route to freedom is easily and richly made available to persons suspected to have committed serious crimes and that will not augur well for the peace, progress, prosperity and tranquillity of the soci-**

ety. I find support in so saying from Irikefe's JSC (as he then was) earlier pronouncement in the case of Echeazu v. Commissioner of Police [1974] N.W.L.R. 308 at page 314.

**I entirely agree with the court below that a charge of treasonable felony is a very serious offence and is prejudicial to National Security.** I believe neither the appellant nor his counsel would sit down to fold up his arms, if on the seat of power, to allow any citizen to put his reign into terror and utter hopelessness or despondency while dancing to the music of a citizen who plots a Coup d'etat against him. He will certainly fight it to the end. I resolve issue No. 2 in favour of the respondent.

Finally, I find no merit in this appeal. Same is hereby dismissed by me. I find nothing wrong in the judgment of the court below which affirmed the trial court's judgment.

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#### KATSINA-ALU JSC

I have read in draft, before now, the judgment delivered by my learned brother Muhammad JSC in this appeal. I agree with his reasoning and conclusion. I also dismiss the appeal.

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F

#### TOBI JSC

The applicant was arraigned at the Federal High Court, Abuja on 6<sup>th</sup> October, 2005. It was a five-count charge of conspiracy to commit treasonable felony, treasonable felony, forming, managing and assisting in the management of unlawful societies, publishing a statement, rumour or report likely to cause fear and false alarm to the public and membership of unlawful societies.

The appellant filed a Summons on Notice with an affidavit in support asking for bail. The prosecution opposed bail. The learned trial Judge refused bail. Olayiwola, J. said at page 50 of the Record:

*"In the matter on hand, a five-count treason charge has been preferred against the applicant; count 2 of the charge attracts life imprison-*

*ment. In my view, this is weighty enough for court to exercise due care in the exercise of its discretion especially in the light of exhibit (b) the interim Police investigation report which in the word of the Counsel to the Applicant, the prosecution intends to rely upon as proof of evidence when it is filed eventually... In my view, the security fear envisaged by the prosecution in this case has not been assuaged by the accused in the application and it also weighs in the mind of the Court in the light of the other circumstances highlighted above. The Court would therefore refuse the applicant to bail pending trial."*

On appeal to the Court of Appeal, that court dismissed the appeal, thus refusing the appellant bail pending trial. In his judgment, Rhodes-Vivour, JCA, said at page 138 of the Record:

*"A close scrutiny of the charge and documentary evidence available reveals offences that are a real threat to National Security. They involve creating a situation where the government of the Federal Republic of Nigeria could yield to force or expose the public to serious danger... My Lords, where National Security is threatened or there is the real likelihood of it being threatened Human rights or the individual rights of those responsible take second place. Human rights or individual rights must be suspended until the National security can be protected or well taken care of."*

Dissatisfied, the appellant has come to this court. He formulated two related issues in respect of the threat to national security as held by the Court of Appeal. The respondent formulated a single issue for determination on whether the trial Judge was right in refusing the appellant bail and whether the Court of Appeal was right in confirming the decision of the trial Judge.

The general criteria for granting bail at the trial court are as follows: (a) The availability of the accused to stand trial. (b) The nature and gravity of the offence. (c) The likelihood of the accused committing offence while on bail. (d) The criminal antecedents of the accused. (e) The likelihood of the accused interfering with the course of justice. (f) Interference with investigations. The above apart, the criteria for granting bail by the trial court include (a) Likelihood of further charge being

made. (b) The probability of guilt. (c) Detention for the protection of the accused. (d) The necessity to procure medical or social report pending a final disposal of the case.

The main function of bail is to ensure the presence of the accused  
 B at the trial. See *R. v. Jamal* 16 NLR 54; *State v. Okafor* (1964) ENLR 96; *R. v. Rose* (1898) 18 COX.C.C. 717; *R. v. Robinson* (1854) 23 LJ QB 286; *Ex parte Milburn* 34 US 704 (1835; *US v. Ryder* 110 US 729; *Stack v. Boyle* 342 U.S. 1 (1951). Accordingly, this criterion is regarded as not  
 C only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above. Dealing with the criterion, the Working Party on Bail Procedure in Magistrates' Courts in the United Kingdom, said in paragraph 22 of the Report:

*"There are a number of other considerations to be taken into ac-  
 D count in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicative of the likelihood or otherwise of the defendant's appearance."*

As a matter of fact, all other criteria are parasitic on the omnibus  
 E criterion of availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the greater the incentive to jump bail although this, is not invariably true. For instance,  
 F an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital and non-capital offence in one way crystallised from the realisation that the atrocity of the offence is  
 G directly proportional to the probability of the accused person absconding. But the above is subject to the qualification that there may be less serious offences in which the court may refuse bail, because of its nature. This does not however apply in this case because the appellant is charged with treasonable felony, a heinous offence carrying a prison  
 H term of life.

It does not appear that learned counsel for the appellant has examined the confessional statement of the appellant. I should quote some extracts from that statement:

*“The Niger Delta People Volunteer Force (NDPVF) which I led have totally disarmed. Hence armed struggle will predicate on the activities of the regime of the Nigerian State. I will pursue the course of the disintegration of Nigeria through the process of the Peoples National Conference... The government of General Obasanjo is illegitimate. It B retains power through the manipulation of the electoral process...”*

*This has made me and others like me to resent the government of the regime of General Obasanjo. When Nigeria eventually disintegrates the Ijaws will form a country of their own.”* C

I clearly see signs of “war” from the above. I therefore agree with the Court of Appeal that there is a threat-to national security. There is instability in the Niger Delta area and I do not think the appellant will assist in reducing the instability and turbulence there. On the contrary, it is clear from his statement that there is every likelihood for him to foment or instigate more trouble. This is certainly not in the interest of the region and Nigeria as a whole. The appellant should therefore be where he is to take his trial. He could be discharged and acquitted. He could be sentenced. That is for the trial court. For now, all the criteria for granting E trial bail are against him. D

I therefore agree with my learned brother, Muhammad, JSC, that the appeal should be dismissed. I accordingly dismiss the appeal.

F

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### **TABAI JSC**

I have had the privilege of reading in advance the leading judgment by Muhammad JSC and I agree that the appeal lacks merit and ought to be dismissed and is accordingly also dismissed by me. G

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### **ADEREMI JSC**

I agree with my learned brother, Muhammad JSC whose views for judgment I have been privileged with a preview. The facts and the law applicable have been exhaustively articulated by my learned brother in the leading judgment. As I have nothing useful to add, I join him in H

saying that the judgment of the Court of Appeal, Abuja Division, is unsailable and I equally affirm it. This appeal, in my judgment, is unmeritorious and it is accordingly dismissed.

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