

SUPREME COURT OF NIGERIA
5TH OCTOBER, 2007. SC.244/2004
CORAM:- S. U. ONU, G. A. OGUNTADE, A. M. MUKHTAR,
W. S. N. ONNOGHEN, I. T. MUHAMMAD, JJSC

ABUBAKAR DAN SHALLA APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Homicide - Defences open to accused - Though not raised - Should be considered by trial court - But court cannot consider imaginary defences - That are not available to accused (H1)

APPEALS - Issues - Misconception - Alleging that lower court did not hear parties - On suo motu issue raised by it - Is unfounded (H2)

CULPABLE HOMICIDE - Evidence - Of prosecution witnesses - Where not challenged or contradicted - Appellant's conviction based on his admission - Is proper (H3)

FACTS

Before the High Court of Kebbi State, Birnin Kebbi, appellant was the 5th of 6 accused persons arraigned on a three-count charge of criminal conspiracy, abatement and culpable homicide contrary to ss. 97, 85 and 221 (a) of the Penal Code. Each of the accused persons pleaded not guilty to each of the three counts. Prosecution called eight witnesses. Appellant elected not to testify or call any witness. Appellant and the other accused persons were among a group of persons that killed the deceased, one Alhaji Umaru. Accused persons stated that the deceased made certain remarks which were insulting to Prophet Muhammad (SAW) and ought to be killed as prescribed in the Holy Quran. They went in search of the deceased, laid their hands on him and slaughtered him with a knife. Appellant's confessional statement to the Police was tendered in

evidence wherein he admitted committing the crime.

Conduct of the accused persons during trial showed that they laboured under a notion that they had a duty under Islamic injunction to kill the deceased. The trial court found all the accused persons guilty and sentenced them to death. It observed that non of them raised any defence and that their voluntary statements to the police did not suggest any defence. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the learned justices of the Court of Appeal ought to confirm the conviction and sentence of the appellant by the trial court. This issue is distilled from grounds 1 and 2 of the grounds of appeal.)

2. Whether the learned justices of the Court of Appeal were right in raising the issue of defences of justification and provocation without affording the parties the right to be heard on the said issue raised suo motu. (This issue is distilled from ground 3 of the grounds of appeal)."

HELD (unanimously dismissing the appeal per **OGUNTADE JSC**)

Homicide - Defences open to accused

1. Now in *Takida v. State* [1969] 1 All N.L.R. 270 at 273-274, this Court per Coker C.J.F. said:

"No court is bound to speculate on what possible defences can be open to a person accused before it but where in a trial for homicide, the evidence suggests a line of defence, it is the duty of the court to consider and deal with that defence whether or not the accused or his counsel expressly raised that defence by the legal terminology ascribed to it by lawyers."

That approach however, does not enable the court to consider fanciful or imaginary defences which could not possibly be available to an accused person on the evidence before the court.

In the circumstances of this case, since the trial court was not told the words alleged to have been uttered by the deceased or the act he did which were contrary to the injunctions of Islam as contained in the Holy Quran, and which justifies his killing, the trial court could not be criticized for not

engaging in a futile speculation. The court below was therefore not in any error to have held that the defences of justification and provocation were not available to the appellant before the trial court. (pp. 3940 F)

APPEALS - Issues - Misconception

2. It is obvious that the appellant's second issue is misconceived and amount to a distortion of the true state of things. Appellant's counsel had himself argued the defences of justification and provocation. The court below did not therefore need to ask appellant's counsel to re-argue a point he had previously argued in his brief. (p. 3945 A)

Evidence - Of prosecution witnesses

3. I have given a very careful consideration to the two issues raised by the appellant in this appeal. Both must be decided against the appellant. The evidence against the appellant by prosecution witnesses was neither challenged nor contradicted. More than that is the admission in exhibits G and G1 by the appellant that he actually slit the throat of the deceased. (p. 3945 B)

NOTABLE POINTS OF INTEREST

OGUNTADE JSC

1. No citizen should impose death sentence unto killing another citizen
In any case, even on the assumption (although without any proof) that the deceased had in some way done any thing or uttered any word which was considered insulting to the Holy Prophet Mohammed (S.A.W.), was it open to the appellant and others with him to constitute themselves into a court of law and pronounce the death sentence on another citizen? Plainly, this was jungle justice at its most primitive and callous level. The facts of this case are rather chilling and leave one wondering why the appellant and the others with him committed this most barbaric act. (p. 3945 D)

ONU JSC

1. Words alone can constitute provocation but not in this case
Although it is settled law that words alone can constitute provocation

depending on the actual words used and their effect or what they mean to a reasonable person having a similar background with the Appellant and in the case in hand where the exact insulting words are neither known or disclosed and moreover not even heard from the mouth of the deceased,
B it will not be possible to determine whether the defence of provocation is open or available to the Appellant.

It is clear that for the defence of provocation to avail the Appellant, the act or utterance of the deceased must be directly offered or directed
C against the Appellant, which was not the case here where it was based on hearsay or rumour. (p. 3950 B/E)

MUHAMMADJSC

3. Islamic law makes no provision for defence of provocation

D The 1st issue to be put in its straight perspective is that Islamic Law, as opposed to Common Law, makes no provision for the defence of provocation. A sane and adult Muslim stands responsible and answerable to all his deeds or misdeed. Secondly, where he makes a free and voluntary
E confession, he is bound by his confession which is even regarded to be a better form of evidence than calling of witnesses. (p. 3974 D)

4. How death punishment is effected under sharia

F The trite position of the law under Sharia is that any sane and adult Muslim, who insults, defames or utters words or acts which are capable of bringing into disrepute, odium, contempt, the person of Holy Prophet Muhammad (SAW) such a person has committed a serious crime which is punishable
G by death

However as observed by the court below, Islamic law has not left the killing open in the hands of private individuals. The offence alleged has to be established through evidence before a court of law. The court itself will have to implore its professional dexterity in treating the case by
H allowing fair hearing and excluding all the inadmissible evidence or those persons who may fall within the general exemption clause such as an infant, imbecile or those who suffer mental delusion. Thus, the killing is controlled and sanctioned by the authorities. (p. 3974 F)

REPRESENTATION

Dr. A. Amuda-Kannike for the Appellant.

I. K. Sanusi Esq. D.P.P. Kebbi State for the Respondent.

CASES REFERRED TO

Phillip Ekpenyong v The State (1991) 6 NWLR (Pt.200)

Udofia v. D.P.P. (1955) 15 WACA 73

Nwuzoke v. The State (1988) 1 NWLR (Pt. 72) 52.9

R. V. Bio (1945) 11 WACA 46 at 48

Asanya v. State (1991) 3 NWLR (Pt. 180) 442 at 451

Williams v. State [1992] 8 NWLR (Pt.261) 515 at 522

Araba v. State [1981] 2 NCR 110 at 125

R vs. Fadina [1958] SCNLR 250

Udofia v. The State [1984] 12 SC 139

Ojo v. The State [1972] 12 SC 147

Ogunleye v. The State [1991] 3 NWLR (Part 177) 1 at 3

Opeyemi v. The State [1985] 2 NWLR (Pt.5) 101

Williams v. The State [1992] 8 NWLR (Pt.261) 515 at 522

STATUTES REFERRED TO

Penal Code ss. 97, 85, 221 (a), 45, 222 (1)

Constitution of Nigeria 1999 s. 36

Court of Appeal Act Cap C 36 LFN 2004 s. 15

Evidence Act s. 141

LEAD JUDGMENT BY OGUNTADE JSC

The appellant, Abubakar Dan Shalla, was the fifth of six accused persons who were brought before the High Court of Kebbi State, Birnin Kebbi on a three-count charge of criminal conspiracy, abatement and culpable homicide contrary to *Sections 97, 85 and 221 (a) of the Penal Code respectively*. On 18/1/2000, each of the appellants and the five other accused persons charged with him pleaded not guilty to each of the three counts. Hearing of the case opened on 19/1/2000. The prosecution called

eight witnesses. The appellant elected not to testify or call a witness.

The trial judge, Ambursa J, on 24-02-2000, in his judgment found the appellant and the five other accused persons charged with him guilty of the offence of culpable homicide and each was sentenced to death under *Section 221 (a) of the Penal Code*. The appellant brought an appeal against the judgment of the trial court before the Court of Appeal, Kaduna (hereinafter referred to as ‘the court below’). The court below, on 10-12-03 in its judgment dismissed the appeal and affirmed the judgment of the trial court. The appellant has come before this court on a final appeal. The appellant raised three grounds of appeal out of which two issues were formulated for determination.

The said issues are:

“1. Whether the learned justices of the Court of Appeal ought to confirm the conviction and sentence of the appellant by the trial court. This issue is distilled from grounds 1 and 2 of the grounds of appeal.)

2. Whether the learned justices of the Court of Appeal were right in raising the issue of defences of justification and provocation without affording the parties the right to be heard on the said issue raised suo motu. (This issue is distilled from ground 3 of the grounds of appeal).”

The respondent in its brief adopted the issues for determination as formulated by the appellant’s counsel in the appellant’s brief.

Let me start by examining the case of the prosecution against the appellant as put before the trial court. It was alleged that a group of persons of whom the appellant was one had stated that one Abdullar Alhaji Umaru (now deceased) made certain remarks which were insulting to Prophet Muhammed (S.A.W.) and that the deceased ought to be killed as prescribed in the Holy Quran for making the alleged remarks. They went in search of the deceased, laid their hands on him and slaughtered him with a knife. The incident was reported to the police on 14-7-99. The appellant and five other persons were arrested for killing the deceased. The evidence of P.W.5 as to the manner in which Abdullahi Alhaji Umaru was killed is particularly eye-opening. At page 51 of the record, he testified thus:

“What I know is that on 14/7/99 I was at my sleeping place at Kardi when one Mr. Bello Dan Nana woke me up and asked me whether I was

aware of what was happening and I told him that I didn't know. He told me that somebody was accused of insulting the Prophet Mohammed (SAW) and asked whether I will go to the place where he was being held. I took my catapult and started going to the scene along with Bello at Shiyar Riyoji where the person who was accused of insulting the Prophet (SAW) was arrested. On my arrival I found that it was Abdullahi Alh. Umaru of Randali village who was being held by the 6th accused Suleiman and the 3rd accused Muhammadu Sani. These accused persons pulled Abdullah Alh. Umaru towards the road leading to Randali on the Outskirt of Kardi near burial ground. As Abdullah was being held there in our presence, the 1st accused Mallam Musa just appeared and said whoever abused the Prophet shall be killed. He read a verse but I can't bring it as read. On hearing this, Muhammadu Sani (3rd accused) used a matchet which was with him on Abdullah Alh. Umaru on the head and Abdullah fell down. Then Abubakar Dan Shalla (5th accused) slaughtered Abdullah with a knife on the neck just like a goat. I saw the knife used by 5th accused in slaughtering Abdullah but I can't describe it as he went away with it. When they were sure that Abdullah died, they all dispersed and ran away. We too left the corpse and went home."

As I observed earlier, the appellant elected not to testify at the trial. He called no witness but his statement under caution to the police was tendered in evidence as Exhibits G and Gl. The statement of the appellant exhibit Gl reads thus:

"On Wednesday 14/7/99 at about 2000hrs after Isha'i prayers, I sat down at the frontage of Mosque at Faransi Area of Kardi then one Musa Yaro of Kardi came and met me with an information that, someone abused Prophet Mohammed at Randali village which he is not sure, but he will try to find out at Randali. On hearing that, I stood up and went inside my house and carried knife along with me, and I moved to Randali. On reaching there, I went straight to one Shugaban Samari for confirmation about the abusing of Prophet Mohammed and he assured me that, the issue is true, and that there were witnesses to testify but he did not tell me the kind of abuse. And from there, I heard someone saying, that Abdullahi Alh. Umaru who abused the Prophet had been arrested at Kardi, then I

quickly went back to Kardi and met Abdullahi who was together with Adamu Aljani, Kalli Oditia and others whom I was not able to know then. Then we later sent the following: Musa Yaro, Usman Kaza and Abdullahi Ada to the village head of Kardi to know what is happening in his village.

B As they returned back from the village head's house. Musa Yaro made some quotation in Risalah which means that, whoever abused Prophet Mohammed shall be killed, then people started beating Abdullahi Alh. Urnaru, and Mohammadu Sani matcheted him and he fell down, then I removed the knife that was in my possession with my right hand and C slaughtered him "deceased" just along Randali-Kardi Road near a burial ground of Kardi. And we all dispersed. When I reached home, I fetched some water and washed the knife and part of my cloth that was stained, the cloth is light blue in colour. That's all my statement."

D It is apparent that the evidence of P.W.5 as to how the deceased was killed and in particular as to the fact that it was the appellant who actually slaughtered the deceased was unchallenged. More than that however, the appellant in exhibit G1 narrated how the deceased was apprehended, his E alleged offence and the manner the appellant himself killed the deceased.

The case against the appellant boils down to this: The appellant and the 5 accused persons charged along with him had heard from some sources that the deceased had somewhere in their village made some F remarks which were considered insulting to Prophet Mohammed (S.A.W.). The text of the remarks or the exact words employed by the deceased were not given in evidence. The 1st accused had read to the other accused persons including the appellant a passage in the Holy Quran where it was said to be prescribed that any one who insulted Prophet Mohammed G (S.A.W.) in the manner the deceased was said to have done deserved to be killed. As adherents to the teaching in the Holy Quran, the appellant and the other accused persons accepted that they had a duty to kill the deceased in effectuating the contents of the Holy Quran. They accordingly slaugh- H tered the deceased by slicing his throat.

In the manner the appellant and the other accused persons behaved during their trial by not calling evidence to deny the allegations against them; and by in fact admitting that they killed the deceased, there is no

doubt that they laboured under a notion that they had a duty under Islamic injunction to kill the deceased.

At pages 74 - 76 of the record of proceedings, the trial judge in his judgment said *inter alia*:

“It is worthy to note that the backbone of this case is the testimony of PWS 2, 3, 5 and 6. Exhibit D and the confessional and voluntary statements of the accused persons in Exhibits E, F, G, H, J and K. Each one of the accused persons admitted taking part and remaining at the scene where Abdullah Alh. Umaru was killed in a brutal manner. Each of them narrated fully the role he played. The 3rd accused admitted striking the deceased with a matchet on the neck, the 5th accused admitted slaughtering the deceased with a knife, the 6th accused admitted holding and pulling the deceased to the last destination, the 1st accused admitted giving the authority to kill the deceased while the 2nd and 4th accused admitted going up and down to ensure that the deceased was punished. I have carefully examined these statements and found that they are at all material times in corroboration of the evidence of the prosecution witnesses on the account of the death of Abdullah Alh. Umaru. I noted that the statements were duly endorsed by a superior police officer and were tendered without objection. I found the statement of each of the accused persons positive, direct voluntary and consistent. From the evidence adduced the accused persons had every opportunity to commit the offence. In Kanu v The State (1952) 14 WACA 30, 32 Combey J. said:

‘A voluntary confession of guilt, if it be fully consistent and probable, is justly regarded as evidence of the high test and most satisfactory whenever there is independent proof that a criminal act has been committed by someone.’

In the case at hand there is evidence that Abdullah Umaru was brutally killed and there is the confession of the accused persons to that effect.

In Phillip Ekpenyong v The State (1991) 6 NWLR (Pt.200) pages 683, 704 the Court of Appeal held:-

‘A person may be convicted on his own confession alone, there being no law against it. The law is that if a man makes a free and voluntary

confession which is direct and positive and is properly proved, the court may if it thinks fit, convict him of any crime upon it once a statement complies with the law and the rules governing the method for taking it and it is tendered and not objected to by the defence whereby it was admitted as an Exhibit, then it is a good evidence and no amount of retraction will vitiate its admission as a voluntary statement.'

I am satisfied that the confessional statements of the accused persons were voluntary, free, direct, positive, properly recorded, tendered and admitted in evidence. I see no reason to decline acting on them

Therefore in this particular case the onus is on the accused persons to prove that they have a right in the Quran or Risala to kill Abdullah Alh. Umaru. Further more the accused persons did not raise or suggest any defence, their voluntary statements did not suggest any defence and there is no doubt about this. The evidence adduced by the Prosecution remained uncontradicted and unchallenged, positive and direct. In Nasarmi v. The State (1969) F.S.C. I also observed that the witnesses who testified for the Prosecution gave direct evidence in support of the case for Prosecution and were found to be witnesses of truth. I accept their testimony."

In affirming the judgment of the trial court, the court below at pages 118-120 of the record reasoned thus:

"What is in dispute and on the crucial point stemming from the appellants submissions under the lone issue is the alleged failure of the learned trial judge to consider in his judgment all the possible or available defences open to the appellants. Amongst these possible or available defences, as suggested in the appellants brief, are the defences of justification and provocation. I have given due and careful consideration to the submissions in the two briefs on the issue. In its resolution, I will begin by stating or rather restating the settled principle of law on the topic raised under it to the effect that while the trial court is under an obligation or has duty to consider all the defences possible or available to the accused (appellants) on the facts even though they appear to be stupid improbable or unfounded, and whether or not they were specifically raised by the appellant, it (i.e. the trial court) cannot give him (the said appellant) the

benefit of defences which were not supported or reflected by the evidence on record - See Abara v. The State (supra) at p. 117 of the report; Ekpenyong v. The State (supra) at p. 525 of the report; Udofia v. D.P.P. (1955) 15 WACA 73; Sanusi v. State Digest of Supreme Court cases vol. 10 p.348; Nwuzoke v. The State (1988) 1 NWLR (Pt. 72) 52.9; R. V. Bio B (1945) 11 WACA 46 at 48; Asanya v. State (1991) 3 NWLR (Pt. 180) 442 at 451 and Ogunleye v. The State supra). As a corollary to the above rule or principle, the trial court is only under an obligation or duty to consider such defence(s) open to an accused person only as disclosed or supported C by the evidence on the printed record. Thus in Ekpenyong v. State (supra) it was held that a court of law will not presume or speculate on the existence of facts not placed before it and that accused person is usually required or recommended to give his evidence viva voce rather than adopting his D previous extra judicial statement for his defence or resting his case on the evidence of the prosecution as done by the appellants in the instance case. Moreover the defence of provocation as asserted by the appellants in the present case like all other defences cannot hang in the air without supporting evidence. Nor can it be built on scanty foundations. In order E to establish it, it is the duty of the accused person to adduce credible and positive evidence to support the alleged provocation. Where the accused person fails to adduce evidence in support of his defence as in the present case, the trial court has to rely on the evidence before it as adduced by the F prosecution. It must be noted that in the present case, before the trial court instead of the learned counsel for the appellants to call evidence in support of their two defences as canvassed in their brief of arguments, or at least to pinpoint the elements constituting such defences from the evidence G adduced by the prosecution upon which they relied, he failed to do so and such failure in my humble view shows that he did not perform his proper role or function in the defence of his clients (i.e. the appellants)."

Was the court below in error to have affirmed the judgment of the trial court in the circumstances narrated above? I now examine the issues H for determination formulated by the appellant.

Under the first issue, the argument of counsel is that, as the trial court failed to consider the defences of justification and provocation,

which were available to the appellant on the evidence before the trial court, it was the duty of the court below to have set aside the conviction of the appellant and the other accused persons. Counsel referred to *Williams v. State* [1992] 8 NWLR (Pt.261) 515 at 522; *Araba v. State* [1981] 2 NCR 110 at 125; *R vs. Fadina* [1958] SCNLR 250; *Udofia v. The State* [1984] 12 SC 139; *Ojo v. The State* [1972] 12 SC 147; *Ogunleye v. The State* [1991] 3 NWLR (Part 177) 1 at 3 and *Opeyemi v. The State* [1985] 2 NWLR (Pt.5) 101. It was finally argued under issue 1 that the court below should have ordered a retrial.

The appellant's counsel under the second issue for determination argued that the court below eventually went on to consider the defences of justification and provocation but that when it did, it had not allowed the appellant an opportunity to address it on the matter. It was argued that the court below *suo motu* raised the defences of justification and provocation and proceeded to decide the appeal on that basis without affording the appellant a hearing. Counsel relied on *Badmus v. Abegunde* [1999] 7ILRCN 2912; *Oshodi v. Eyifunmi* [2000] 80 LRCN 2877. Counsel finally urged the court to allow the appeal on the ground that the approach of the court below amounted to a denial to the appellant of his right to fair hearing as enshrined in section 36 of the 1999 Constitution of Nigeria.

In reacting to appellant's first issue; it is important to bear in mind that, at the proceedings before the trial court, there was not a shred of evidence as to what the deceased had done or what words he uttered which was considered by the appellant and other accused persons as constituting an insult to Prophet Mohammed (S.A.W.).

Now in *Takida v. State* [1969] 1 All N.L.R. 270 at 273-274, this Court per Coker C.J.F. said:

"No court is bound to speculate on what possible defences can be open to a person accused before it but where in a trial for homicide, the evidence suggests a line of defence, it is the duty of the court to consider and deal with that defence whether or not the accused or his counsel expressly raised that defence by the legal terminology ascribed to it by lawyers."

See also *Williams v. The State* [1992] 8 NWLR (Pt.261) 515 at 522;

Udofia v. The State [1984] 12 SC 139 and *Oyo v. The State* [1972] 12 S.C. 147. That approach however, does not enable the court to consider fanciful or imaginary defences which could not possibly be available to an accused person on the evidence before the court. See *Abara v. The State* [1981] 2 NCR 110 at 125. *Ekpenyong v. The State* [1993] 5 NWLR (Pt-295) 513 at 522; *Asanya v. State* [1991] 3 NWLR (Pt. 180) 442 at 451. In the circumstances of this case, since the trial court was not told the words alleged to have been uttered by the deceased or the act he did which were contrary to the injunctions of Islam as contained in the Holy Quran, and which justifies his killing, the trial court could not be criticized for not engaging in a futile speculation. The court below was therefore not in any error to have held that the defences of justification and provocation were not available to the appellant before the trial court.

The second issue for determination is inexorably linked with the first issue. The court below having held that the defences of justification and provocation were not available to the appellant still went on to consider the applicability of those defences in the circumstances of this case. It was this occurrence that the appellant's counsel not relied upon under the second issue as denying the appellant a right to fair hearing on the ground that the appellant's counsel was not first heard on the point. Ordinarily, it would be unnecessary to consider the second issue since I have made the point that it was not even necessary to consider the defences since the evidence did not directly or indirectly raise them. I only consider the 2nd issue *ex abundati cautello*.

At pages 12 - 13 of the appellant's brief, counsel before us argued thus:

"4:17 With due respect to the Learned Justices of the Court of Appeal, we submit that from their pronouncement above, they have conceded that the learned trial judge ought to but refused to consider the defences of justification and provocation as raised by the Appellant.

4:18 We submit also that it is not in doubt with due respect to the learned Justices of the Court of Appeal, that the lone issue raised by the Appellant counsel before them was not considered at all, rather the new

issue raised *suo motu* as to whether the defences of justification and provocation enure in favour of the Appellant was the basis upon which the Appellant's appeal was eventually dismissed.

4:19 We submit that it is the law that where the court raises an issue
B *suo muto*, it ought to call on the parties to address it on such issue.

We refer to:

Badmus v. Abegunde (1999) 71 LRCN Page 2912; *Oshodi v. Eyifunmi*
(2000) 80 LRCN page 2877

4:20 We further submit that because the learned Justices of
C the Court of Appeal did not call on the parties to address on this new issue
raised by the court *suo motu*, as seen above and the failure to consider the
lone issue as raised by the Appellant's counsel in his brief of argument
before the Court of Appeal, it is tantamount to breaching the fundamental
D right of the Appellant to fair hearing as guaranteed under the Constitution
of the Federal Republic of Nigeria by virtue of *section 36 of the 1999*
Constitution."

Counsel has however overlooked the fact that in the appellant's
E brief before the court below at pages 85-86, it was argued thus:

*"In the court below, there is abundant evidence on the record
showing that the Appellant was involved in the death of the deceased and
that the deceased was so killed as retaliation for allegedly insulting Holy
F Prophet Mohammed. In this respect, reference must be made to the
voluntary statement of the Appellant as contained in pages 18-21 of the
record. The said voluntary statements of the Appellant both in Hausa
Language and its English translation were admitted in Evidence as
Exhibits G and G1 respectively - See page 49 of the record. In addition,
G the evidence of PW2 at pages 42-44, the evidence of PW5 at pages 51 and
52 and the evidence of PW6 at page 52 are all to the effect that the
Appellant was involved in the death of the deceased because of the
allegation that the deceased insulted Holy Prophet Mohammed (S.A.W.).*

H *It is submitted that as per the record before the trial court, the
Appellant is entitled to a consideration of the defence of justification by
law as provided for in section 45 of the penal code as well as the defence
of provocation as provided for in section 222(1) of the penal code.*

In Exhibits G and Gl, it is shown that the Appellant is a Moslem by religion. Therefore, for the deceased to have insulted the Prophet as alleged by the Appellant would inevitably invite a consideration of these defences in favour of the Appellant before a verdict as to the guilt or otherwise of the Appellant is reached. In considering whether an act or speech is capable of provoking a person to commit the offence of murder or homicide, the accused's background and station in life should be taken into account - See Akalezi v. The State [1993] 2 NWLR (Pt.273) page 1 at 14; Ekpen-yong v. The State [1993] 5 NWLR (Pt.295) page 513 at 522 and Ubani v. The State [2001] FWLR (Pt. 44) page 483 at. 490.

In the course of his address before the Court below, the learned counsel for the Appellant specifically invited the learned trial judge to consider the defences open to the Appellant in view of the evidence before the Court. At page 59 of the record, the said Counsel formulated the 2nd issue for determination before the Court below thus:-

'Has the prosecution proved that there is no defence to the 1st-6th accused persons in respect of the charges against them?'

In elaborating on this issue on page 60 lines 29 and 30 and on page 61, line 1, the said learned counsel for the Appellant submitted thus:-

'On the second issue for determination, it is our submission that it is not enough for the prosecution to establish elements of section 221 P.C. but the prosecution must exclude the existence of any defence to the accused persons.'

It was to the above arguments by appellant's counsel before it that the court below was reacting; when at pages 124-125 of the record it said:

"In all their voluntary and cautioned statements to the Police (which in my view amounts to a voluntary confession) in Exhibits E-K, the appellants confessed to the killing or causing the death of the deceased through their joint (or mob) act on the fateful day because they heard the rumour (which was not even confirmed) that he had insulted or blasphemed the Holy Prophet (S.A.W.). The actual words of insult allegedly uttered by the deceased were not known. The appellants along with others (now at large) however constituted themselves into a fanatical Islamic vanguard or a religious vigilante group and upon hearing the rumour took

it upon them to go in search of the deceased who was alleged to have insulted the Holy Prophet (S.A.W.). Even before seeing or hearing him, they had already passed a sentence or judgment against him that he must be killed for his offence under Sharia as recommended in both the Quran and Risala. They even made a threat to kill his master PW2 by name Aliyu Magga who they believed was hiding the alleged culprit in his place if he was not found. When they went to the Village Head of Randali to whom they reported the matter and who did not approve their plan to kill the deceased they still proceeded in their crusade to execute their planned or premeditated murder of the said deceased. Even when they were advised by one Ustaz Mamman that it was not their responsibility but that of the court or judge to punish the deceased as a person who insulted the Holy Prophet they shunned that advise and described the Ustaz as a non Muslim himself and went on with their plan to kill the deceased.

The crucial question to ask on the above facts confessed by the appellants themselves and supported or corroborated by the testimonies of the prosecution witnesses (PW2, 3, 4 and 5) is whether or not the appellants were justified in killing the deceased for his alleged insult of the Holy Prophet (SAW). This depends on or calls for a further and second question of whether they acted in good faith. Thus the essential element required for the defence of justification under S.45 of the Penal Code is that the accused must act in good faith and must exercise due inquiry on his belief before his action can or will be justified - See the comment in the annotated copy of the Penal Code at page 241 thereof. In this regard although an honest and reasonable mistake of fact may be excusable under the defence of justification, a mistake of law is not so excusable. In any case as in the case of witchcraft, the standard of living or the position in life of the accused person as well as the manner of life of the community have to be considered by the court - See Lado v. The State [1999] 9 NWLR (Pt.619) 369 at 381; R. v. Adamu [1944] 10 WACA 161; Akalezi v. The State (supra) and Ekpenyong V, the State (supra) at p. 522 of the report). Thus the standard or test for the justification of the act of the accused person under section 45 should be an objective one like that of the provocation. This is why I agree with the respondent's submission that the defence of

justification sought to be invoked or benefited from by the appellants in the present case should not be isolated from or stand on its own but must be tied to that of the provocation”

It is obvious that the appellant’s second issue is misconceived and amount to a distortion of the true state of things. Appellant’s B counsel had himself argued the defences of justification and provocation. The court below did not therefore need to ask appellant’s counsel to re-argue a point he had previously argued in his brief.

I have given a very careful consideration to the two issues C raised by the appellant in this appeal. Both must be decided against the appellant. The evidence against the appellant by prosecution witnesses was neither challenged nor contradicted. More than that is the admission in exhibits G and GI by the appellant that he actually D slit the throat of the deceased.

In any case, even on the assumption (although without any proof) that the deceased had in some way done any thing or uttered any word which was considered insulting to the Holy Prophet Mohammed (S.A.W.), was it open to the appellant and others with him to constitute themselves E into a court of law and pronounce the death sentence on another citizen? Plainly, this was jungle justice at its most primitive and callous level. The facts of this case are rather chilling and leave one wondering why the appellant and the others with him committed this most barbaric act. It F cannot escape notice that the victim of this reckless and irresponsible behaviour is another Moslem, an Alhaji. I am greatly pained by the occurrence.

In the final conclusion, this appeal fails. It is dismissed. I affirm the G judgment of the two courts below.

ONUJSC

This is an appeal against the judgment of the Court of Appeal of the H 10th day of December, 2003 that dismissed the appellant’s appeal by affirming the conviction and death sentence passed on him by the trial High Court (per Arnburusa, J-).

It is against the said judgment that the Appellant has filed this appeal based on three grounds of appeal out of which two issues were submitted as arising for our determination, to wit:

1. Whether the learned Justices of the Court of Appeal ought to confirm the conviction and sentences of the Appellant by the trial court. (This issue is distilled from grounds 1 and 2 of the grounds of Appeal.)

2. Whether the Learned Justices of the Court of Appeal were right in raising the issue of defences of justification and provocation without affording the parties the right to be heard on the said issue they raised *suo motu*. (This issue is distilled from ground 3 of the grounds of Appeal).

The Respondent formulated identical issues to those identified above by the Appellants for determination.

In my treatment of these issues of this appeal, I wish to adopt the Appellant's two issues, thus:

Issue 1

It is submitted on behalf of the Appellant on this issue that he is entitled to a consideration of the defence of justification by law, as provided under *section 45 of the Penal Code*, as well as defence of provocation under *section 222(1) of the Penal Code* considering the content of Exhibits G and GI of pages 18-20 of the record and also in the evidence of PW5 at pages 51-52 of the record raised in the defences of justification and provocation which ought to been considered by the trial court.

It is further submitted on behalf of the Appellant that failure of the trial court to consider the defences open or available to an accused person amounts to or is tantamount to a failure by the prosecution to prove the offence(s) alleged against the accused person beyond reasonable doubt and also a miscarriage of justice.

It is also submitted on behalf of the Appellant that the finding of the Court of Appeal quoted in paragraph 4.6 of Appellant's Brief of Argument as well the conduct of the court below in carrying out the examination of the said two defences by itself at pages 124-137 as not proper and the main issue formulated before the court was not considered.

It was also submitted that the learned counsel for the Appellant misconceived the whole issues when he considered the lone issue for

determination before the court below which he formulated and adopted by the Respondent at pages 86 and 94 of the record which queried:

“Did the Appellant suffer any miscarriage of justice when the court below refused to consider several defences available to the Appellant on the record before convicting the Appellant as charged?”

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This lone issue, it is contended, is wide and that the court below is bound to look into all the defences available in the record which was adduced before the trial court before it can make such findings.

It is further submitted that the question whether the Appellant was prejudiced by the finding of the lower court cannot be reached without evaluating the evidence available on the record and that what the court below did and its finding does not cause any miscarriage of justice to the Appellant and was right and that doing so is not raising any issue *suo motu*.

C

Learned counsel for the Appellant next submitted that the main issue before the lower court was against the failure of the trial court to consider the defences of justification and provocation which are said to be either available or raised by the defence, and whether the court below can examine such defences and make a finding thereof.

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Now, to the proper issues for determination. Issue No.1 asks whether or not the court below was right when it, went ahead and evaluated evidence with regard to defences open or available to the Appellant which ought to have been done by the trial court, having regard to *Order 1 Rule 19 paragraphs 3 and 4 of its Rules*.

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It is submitted that having regard to Order 1 Rule 19 paragraphs 3 and 4 of the Court of Appeal Rules, 2002 the Court of Appeal has power to make such findings, since it reads:

“19(3) The court shall have to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and make such further or other orders as the case may require.

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(4) The powers of the court under the foregoing provision of this rule may be exercise notwithstanding that no notice of appeal or respondents notice has been given in respect of any particular part of the decision of the lower court.....and the court may make any order on such terms as the court thinks just, to ensure the determination on merits of the

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real question in controversy between the parties.”

See the case of *Namsoh v. State* (1993) 5 NWLR (Pt.292) 129 at 143 where this Honourable court held that where a trial court failed to consider the defence of an accused person, an appellate court can consider such

B defence with all available evidence on the record.

In the case in hand the court below did exactly what is required of it by this Honourable court as per the decision in *Takida v. State* (1969) 1 All NWLR 53 and *State v. Ajie* (2000) 3 NSCQR 53.

C I am in entire agreement with the Appellant’s submission that failure of the trial court to consider the defences available or open to an accused person is only fatal where there is evidence in support of such defence(s) in the record of the trial court and a court of law will not presume or speculate on the exercise of facts not placed before it and that accused person is usually required or recommended to give his evidence *viva voce* rather than adopting his previous extra judicial statement for his defence or resting his case on the evidence of the prosecution as decided in the case of *Ekpeyong v. State* (1993) 5 NWLR (Pt.295) 513 at 522.

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E Issue No.2

This issue which relates to Ground 3 of the Grounds of Appeal asks whether or not the court below rightly held that the defences of justification and provocation as provided under *sections 45 and 222(1) of the Penal*

F *Code* respectively are not available to the Appellant.

I agree with the Respondent’s submission that the Appellant will be entitled to the defence of justification after satisfying the conditions set up by *section 45 of the Penal Code* which provides:

G “45. *Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake by law, in good faith believes himself to be justified by law in doing it.*”

The Appellant will be entitled for the defence of justification where: -

- H
- (i) His action is justified by law;
 - (ii) His action was done as a result of mistake of fact not mistake of law; and
 - (iii) He acted in good faith believing himself to be justified by law

in doing it.

As can be gleaned from the record of proceedings of the trial court the only evidence against the deceased is based on the rumour the Appellant overheard or hearsay allegation that he (deceased) had insulted the Holy Prophet in a neighbouring village Raudali of Birnin Kebbi Local Govern- B
ment Area of Kebbi State. I am in agreement with the submission of the Respondent that there is no evidence of any kind emanating from the Penal Code or Sharia disclosed in the record of proceedings to show that Appellant's action is justified by law having regard to his back ground and opinion or non-approval of his village Head and one Ustaz Mamman who C
were members of the same community, class, standard in life and live with Appellant. Moreover, the Appellant's act of killing the deceased cannot be said to amount to a mistake of fact in good faith as he has no authority to execute or slaughter the deceased as he did. Thus, I agree with the D
Respondent that from the evidence adduced before the trial court and available on record the Appellant cannot be entitled to a defence of justification, because the court cannot give the Appellant the benefit of defence which was not reflected or supported by the evidence on the E
record. See *Abara v. The State* (1981) 2 NRC 110 at 117.

I agree with the Respondent's submission that the Appellant will only be entitled to the defence of provocation under *section 222(1) of the Penal Code* where he established the ingredients therein. The section reads; F

"222(1) Culpable Homicide is not punishable with death if the offender whilst deprived of the power of self control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

The Appellant will be entitled to the defence of provocation when G
he shows by evidence in the trial court that:

- (i) The act of provocation must be grave and sudden;
- (ii) The Appellant must have lost self control actual and reasonable;
- (iii) The degree of relation by the Appellant must be proportionate H
to the provocation offered.

See the case of *Ihuebeka v. The State* (2000) 5 SCNQR 186 (Vol.2).

Moreover, in the case herein there is no evidence whatsoever in the record

of proceedings to establish that the Appellant was provoked by the deceased. What the record rather depicts is the overhearing of the rumour from co-accused, Musa Yaro, that the deceased insulted the Holy Prophet and how the Appellant and the co-accused went to one Shugaban Samari to confirm to them that that allegation was true by setting out the insulting words used or uttered. Although it is settled law that words alone can constitute provocation depending on the actual words used and their effect or what they mean to a reasonable person having a similar background with the Appellant and in the case in hand where the exact insulting words are neither known or disclosed and moreover not even heard from the mouth of the deceased, it will not be possible to determine whether the defence of provocation is open or available to the Appellant. See the case of *Ahmed v. The State* (1999) 7 NWLR (Pt.612) 641 at 684. Clearly, the provocation act done or reported by one person - the co-accused {Musa Yaro} cannot be a ground for the Appellant to kill the deceased. See *Idemudia v. State* (1992) 7 NWLR 356. And going by the definition of provocation as postulated in the case of *Lado v. State* (supra) at page 385.

It is clear that for the defence of provocation to avail the Appellant, the act or utterance of the deceased must be directly offered or directed against the Appellant, which was not the case here where it was based on hearsay or rumour.

There is no direct or indirect evidence to show that the Appellant was provoked by the deceased vide Exhibit G and G1 (the latter being the Hausa and the English translation of the Appellant's statement at pages 18-20 thereof as well as the evidence of PW5 at page 51 of the record) which is enough to convict the Appellant as charged. Consequently, it is manifest that the lone issue before the lower court is clear and related to all the defences available from the record and the Appellant in his Brief of Argument at pages 85-90 had canvassed all his argument on defences of justification and provocation and the Respondent in its Brief of Argument at pages 94-99 of the record. Thus, I am of the view that the court below did not raise any issue *suo motu* as submitted by the Appellant.

For the above reasons and those fully contained in the leading judgment of my learned brother Oguntade, JSC, I find no merit in this

appeal which I too unhesitatingly dismiss. I affirm the conviction and sentences of the two courts below.

MUKHTARJSC

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The appellant together with five others pleaded not guilty to the charges of criminal conspiracy contrary to *section 97 of the Penal Code*, and culpable homicide punishable with death contrary to *section 221 of the Penal Code*. The appellant was found guilty of the two offences and he was accordingly convicted and sentenced to death. In exercise of his constitutional right the appellant who was then the 5th accused person appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the conviction and sentence of the trial court. Aggrieved by the decision the appellant appealed to this court on three grounds of appeal. Briefs of argument were exchanged by learned counsel, and these were adopted at the hearing of the appeal. The two issues for determination raised in the appellant's brief of argument are:-

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“1. *Whether the learned Justices of the Court of Appeal ought to confirm the conviction and sentence of the Appellant by the trial court.*

2. *Whether the learned Justices of the Court of Appeal were right in raising the issue of defences of justification and provocation without affording the parties the right to be heard on the said issue raised suo motu.*”

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The issues raised by the respondent are:-

“*Issue No. 1*

Whether or not the Court of Appeal was right when it went ahead and evaluated evidence with regard to defences available to the Appellant which ought to have been done by the trial Court, having regard to Order 1 Rule 19 paragraphs 3 and 4 of its Rules.....

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Issue No. 2

Whether or not the Court of Appeal rightly held that the defences of Justification and Provocation as provided under Sections 45 and 222 (1) of the Penal Code respectively were not available to the Appellant.....”

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The argument of learned counsel for the appellant is that the trial

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 court did not consider the defences which the accused may be entitled to on the evidence before it, and in the circumstance the court below should not have confirmed the conviction of the trial court. Particularly learned counsel placed reliance on the case of *Williams v. State* 1992 8 NWLR part 261 page 515, which emphasise the need to consider any defence available to an accused person. It is instructive to note that in this case the appellant did not give evidence in his defence, whereas in the former case the accused person testified in his defence.

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 Indeed, in the instant case, the defence relied on by the appellant is contained in his voluntary caution statement to the police, Exhibit “G” the relevant portion of which, reads as follows:-

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 “..... I sat down at the frontage of Mosque at Faransi Area of Kardi then one Musa, Yaro of Kardi came and met me with an information that, someone abused Prophet Mohammed at Randali Village which he is not sure, but he will try to find out at Randali. On hearing that, I stood up and went inside my house and carried knife along with me, and I moved to Randali. On reaching there, I went straight to one Shugaban Samari for confirmation about the abusing of Prophet Mohammed, and he assured me that, the issue is true, and that there were witnesses to testify but he did not tell me the kind of abuse As they returns (sic) back from the village Head’s house Musa Yaro made some Quotation in Risalah which means that, whoever abused Prophet Mohammed shall be killed, then people started beating Abdullah Alhaji Umaru, and Mohammedu Sani matched him and he fell down, then I removed the knife that was in my possession with my right hand and slaughtered him “deceased” just along Randali-Kardi Road near a burial ground of Kardi.”

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 There was no defence raised by the appellant, and so there was nothing in that direction for the trial court to consider. As a matter of fact, the learned trial judge in his judgment considered the voluntary statements of the accused, and (which were most confessional) which included Exhibit ‘G’, as is illustrated by the following excerpt of the judgment, which reads thus;-

“Therefore in this particular case the onus is on the accused persons to prove that they have a right in the Quran or Risala to kill Abdullah Alh.

Umaru. Further more the accused persons did not raise or suggest any defence, their voluntary statements did not suggest any defence, and there is no doubt about this. The evidence adduced by the prosecution remained uncontradicted and unchallenged, positive and direct.”

So if I may ask, what defences is the learned counsel for the appellant making heavy weather of. Then, in spite of the absence of any defence, the appellant in his brief of argument in the Court of Appeal raised the following issue in his appellant’s brief of argument, which reads thus:-

“Did the Appellant suffer any miscarriage of justice when the court below refused to consider the several defences available to the Appellant on the record before convicting the appellant as charged.”

The Court of Appeal in its judgment considered these so called defences as follows:-

“In the case of the appellant (sic) who have no authority or warrant whatsoever to adjudicate under both the Common law and Sharia, they constituted themselves into a Kangaroo court in order to realize their purpose or plan to kill the deceased. The only evidence against the deceased was the rumour they overheard or hearsay allegation that he had insulted the Holy Prophet.”

On the issue of provocation discussed and found on by the court below, I am of the view that the sole issue raised by the appellant in the court below, which I have already reproduced supra sufficiently covered the question of provocation, which the court below was at liberty to consider. It should be noted that that single issue referred to ‘defences’ and not ‘defence’, so the Court of Appeal was perfectly in order to consider the defence of provocation as it did in the lead judgment. In the light of the foregoing I fail to see how this appeal can succeed. I have read in advance the lead judgment delivered by my learned brother Oguntade, J.S.C, and I am in complete agreement with the reasoning and conclusion reached therein, that the appeal lacks merit and deserves to be dismissed in its entirety. I abide by the consequential order made in the lead judgment.

ONNOGHENJSC

This is an appeal against the judgment of the Court of Appeal Holden at Kaduna in appeal No. CA/K/57/C/2003 delivered on the 10th day of December, 2003 in which the lower court affirmed the conviction and sentence of the appellant by the High Court of Kebbi State delivered in charge No. KB/HC/16C/99.

The facts of the case are simple and straight forward.

On the 14th day of July, 1999 a rumour went round the villages of Randali and Kardi, both in Birnin Kebbi Local Government Area of Kebbi State, that one Abdullahi Alhaji Umaru, now late of Randali Village insulted the Holy Prophet Mohammed. The appellant heard the rumour while sitting in front of a mosque at Faransi Area of Kardi village as a result of which the appellant went home and armed himself with a knife and proceeded to Randali village, allegedly to confirm the rumour. It is on record that one Shugaban Samari allegedly confirmed the alleged rumour to be true.

Following the capture of the deceased, Abdullahi Alhaji Umaru, by the mob, one Musa Yaro, a co-accused with the appellant, now appellant in S.C/244/2004 read some quotations in *Risalah* to the effect that whoever abused Prophet Mohammed shall be killed, as a result of which the mob started to beat up the deceased with the appellant eventually using his knife to slaughter the deceased. The facts are not disputed neither did the appellant testify in his defence at the trial. At the conclusion of the trial, the learned trial judge found the appellant and Musa Yaro, guilty of culpable homicide and sentenced them to death.

Being dissatisfied with that judgment, appellant appealed to the Court of Appeal in which the sole issue for determination was:

“Did the appellants suffer any miscarriage of justice when the Court below refused to consider the several defences available to the Appellants (sic) on the record before convicting the Appellants as charged.”

As stated earlier in this judgment, the lower court resolved the issue against the appellant and dismissed the appeal. It is against that decision that the instant appeal has been lodged in this Court, the issues for determination of which have been identified in the appellant’s brief of

argument filed on 13/9/05 and adopted in argument of the appeal on 5/7/07 as follows:-

“1. Whether the learned justices of the Court of Appeal ought to confirm the conviction and sentence of the Appellant by the trial court (This issue is distilled from grounds 1 and 2 of the grounds of appeal). B

2. Whether the learned justices of the Court of Appeal were right in raising the issue of defences of justification and provocation without affording the parties the right to be heard on the said issue raised suo motu (This issue is distilled from ground 3 of the grounds of appeal).” C

On the other hand, learned counsel for the respondent formulated the following two issues for determination:-

“1. Whether or not the Court of Appeal was right when it went ahead and evaluate evidence with regard to defences available to the appellant which ought to have been done by the trial court, having regard to Order 1 Rule 19 paragraphs 3 and 4 of its Rules. The issue relates to ground 1 of Grounds of Appeal. D

2. Whether or not the Court of Appeal rightly held that the defences of justification and provocation as provided under sections 45 and 222(1) E of the Penal Code respectively were not available to the appellant. This issue relates to grounds 3 of the Grounds of Appeal.”

It can be seen from the above that the issues as formulated by both counsel are substantially the same though those submitted by learned F counsel for the respondent are more lucid and to the point.

In arguing the appeal, learned counsel for the appellant submitted that appellant is entitled to the defence of justification by law as provided for under *section 45 of the Penal Code* in addition to the defence of provocation under *section 222(1) of the said Penal Code* having regard to the contents of exhibits G and G1 and the evidence of PW5 but that the trial court failed to consider the said defences before coming to its decision in the charge; that the failure to so consider the defences available to the appellant amounts to failure of the prosecution to prove the charge against the appellant and the decision of the trial court a miscarriage of justice. H

It is further submitted that the justices of the Court of Appeal were in error in raising the defences of justification and provocation *suo motu*

and without affording the parties the right to be heard thereon; that it was not proper for the tower court to have examined the record to see whether from the facts the defences were open to the appellant and that the lower court failed to consider the sole issue submitted to it for determination.

B On his part, learned counsel for the respondent submitted rightly in my view, that the main issue before the lower court was against the failure of the trial court to consider the defences of justification and provocation which defences were said to have been available to the appellant, and
C whether the Court of Appeal can examine such defences having regard to the evidence on record, and that the lower court did just that and was justified; that failure of the trial court to consider the defences available to an accused person is only fatal where there is evidence in support of such
D defences on record as the court is not allowed to speculate on the existence of facts not placed before it; that the evidence against the deceased was based on rumour and there is nothing on record to suggest that the action of the appellant is justified by law and urged the court to dismiss the appeal.

It should be noted that from the evidence on record, the parties
E involved in the drama that unfolded on the 14th day of July, 1999, are all Muslims. In any event, there is no evidence to the contrary, it is not a case of insult on the Holy Prophet Mohammed by a Christian or Traditional Religionist but a Muslim; which resulted in the deceased being slaughtered
F by his fellow Muslims.

Also of much significance is the fact that throughout the record, what the deceased is alleged to have said which was considered by his Muslim brothers as constituting insult on the Holy Prophet Mohammed and justifying his slaughter has not been stated therein. We are therefore
G deprived of the opportunity of weighing what was allegedly said against the standard of a reasonable Muslim so as to determine whether the alleged insult could amount to provocation in our law to justify the slaughter of the deceased.

H It is settled law that where the trial court failed or neglected to consider the defence of an accused person, an appellate court is at liberty or under duty to consider such defence having regard to the evidence on record. It is therefore not every failure of the trial court to consider the

defences open to an accused person that will be fatal to the case of the prosecution. For such a consequence to arise there must be on record, legally admissible evidence in support of the alleged defence(s) as such evidence is what grounds the defence(s).

In the instant case, the power of the Court of Appeal to examine the record to see whether the failure of the trial court to consider the alleged defence was fatal to the case of the prosecution is well grounded in *order 1 Rule 19(3) and (4) of the Court of Appeal Rules 2002* which provide thus:-

“19(3) The court shall have power to draw inferences of fact and give any judgment and make any order which ought to have been given or made, and make such further or other orders as the case may require.

(4) The powers of the court under the foregoing provision of this rule may be exercised notwithstanding that no notice of appeal or respondents notice has been given in respect of any particular part of the decision by the lower court..... and the court may make any order, on such terms as the court thinks just, to ensure the determination on merits of the real question in controversy between the parties.”

In the instant case, the main issue before the lower court was the consequence of the failure of the trial court to consider the defences of justification and provocation and whether the lower court can examine such defences and make findings thereon having regard to the evidence. As to whether an appellate court can so act in the circumstance see *Namson vs State (1993) 5NWLR (pt. 292) 129 at 143; Takida vs State (1969) 1 All NLR 53; State vs Ajie (2000) 3 NSCQR53.*

In the instant case, is there evidence on record to establish the existence of the defences of justification and provocation?

As stated earlier in this judgment, appellant did not testify at the trial. He rested his case on the case of the prosecution. However, in this his statement to the police, exhibit G1, he stated inter alia, thus:-

“Musa Yaro (the co-accused) of Kardi came and met me with an information that someone abused Prophet Mohammed on hearing that I stood and went inside my house and carried knife along with me and

I moved to Randali and met Abdullahi (the deceased) who was together with others Musa Yaro (co-accused) made some quotation in Risalah which means that whoever abused Prophet Mohamed shall be killed..... I removed the knife that was in my possession
 B and slaughtered him “deceased”.”

PW.5’s testimony confirms the statement of the appellant to the police when he stated, *inter alia*, under oath:

“On my arrival I found that it was Abdullahi Alh. Umaru of
 C Randali village who was being held.... the 1st accused Mallam Musa just appeared and said whoever abused the Prophet shall be killed. He read a verse..... On hearing this then Abubakar Dan Shalla (appellant) slaughtered Abdullahi with a knife.”

The question is whether the two passages can be said to be evidence
 D to ground the defences of justification and provocation so as to result in the acquittal of the appellant in a charge of Culpable Homicide punishable with death. The answer is obviously in the negative.

Section 45 of the Penal Code makes provision for the defence of
 E justification as follows:-

“45 Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law
 F in doing it.”

From the above provision, it is clear that for the appellant to be entitled to the defence of justification, he must prove or establish the fact that:-

- G (a) his action on that day in question is justified by law;
- (b) it was done as a result of a mistake of fact not law, and
- (c) that he acted in good faith believing himself to be justified by law in so doing.

From the record, the allegation against the deceased was based on
 H rumour, hearsay *simpliciter* and there is no evidence whatsoever as to what the deceased allegedly said to deserve such a brutal fate.

On the other hand, the defence of provocation is provided for under section 222(1) of the Penal Code as follows:-

“222(1) Culpable Homicide is not punishable with death if the offender whilst deprived of the power of self control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any person by mistake or accident.”

For the defence of provocation as provided under section 222(1) of B the Penal Code to be sustained, the appellant must produce evidence to establish the fact that:-

- (a) the act of provocation was grave and sudden;
- (b) the appellant lost his self control, actual and reasonable C
- (c) the degree of retaliation by the appellant must be proportionate to the provocation.

As stated earlier, there is no evidence on record as to what the deceased was alleged to have said touching and concerning the Holy D Prophet Mohammed which would have afforded the court the opportunity of examining same at the background of the law and available relevant facts. It is not disputed that words alone can constitute provocation but it all depends on the actual words used and their effects or what they mean to a reasonable person having a similar background with the accused/ E appellant.

In the instant case, not only are the exact words used by the deceased unknown, no one testified to the fact that he heard the deceased utter those words, not even the appellant who now intends to take F advantage of the defence of provocation in the circumstance of this case. Even if the alleged words were said directly by the deceased to Musa Yaro, the co-accused, which is not true, it cannot, in law, be a ground for the killing of the deceased particularly as it was the appellant who was not G present when the words were uttered that slaughtered the deceased, not Musa Yaro - granted that the alleged words had been disclosed and found to be provocative, and that Yaro was present when the said words were uttered.

Learned Counsel for the appellant has argued in one breath that the H trial court's error in not considering the defences of justification and provocation is fatal to the case of the prosecution and at the same time that the lower court was in error when it reviewed the evidence to determine

the issue as to whether the said defences were actually available to the appellant before deciding that they are not. The argument appears to me to approbate and reprobate. We have to always bear in mind that the Court of Appeal, and every appellate court, exists to correct errors in the proceedings, be it procedural or substantive, of the lower court, in accordance with its rules of procedure. In the instant case, the lower court need not call on the parties to address it on the alleged defences allegedly not considered by the trial court when it can, on its own, go through the evidence on record to determine the issue so as to do substantial justice between the parties.

In conclusion, I agree with the reasoning of my learned brother Oguntade, J.S.C. that the appeal is totally without merit and should be dismissed. I accordingly dismiss same.

Appeal dismissed.

MUHAMMAD JSC

The appellant, along with five others were charged before the Kebbi State High Court of Justice (trial court) for the offences of Criminal Conspiracy (*section 67 of the Penal Code*). He was also charged along with the 2nd, 4th and 6th accused persons before the trial court with the offence of abatement (contrary to *section 85 of the Penal Code*). When the counts were read to each of the accused, each separately pleaded not guilty to each of the counts. The case then proceeded to trial. After taking evidence from the respective parties and final addresses by their counsel, the learned trial judge delivered his Judgment wherein he found the appellant guilty and sentenced him to death by hanging.

Aggrieved with the trial court's Judgment, the appellant appealed to the Court of Appeal Kaduna Division, (court below). The Court below, after reviewing the case, the Grounds of appeal and the briefs filed by the parties, found the appeal to be a worthless one. It dismissed the appeal and affirmed the trial court's decision.

Further aggrieved, the appellant now appealed to this Court. In his Notice of Appeal, the appellant set out three grounds of appeal as contained

on page 80 of the printed Record of Appeal placed before this court. The parties filed and exchanged briefs of argument.

In his brief, learned counsel for the appellant formulated the following two issues:

“It is our contention on behalf of the Appellant that the issues arising for determination in this appeal are as follows:

1. Whether the Learned Justices of the Court of Appeal ought to confirm the conviction, and sentence of the Appellant by the trial court. (This issue is distilled from grounds 1 and 2 of the grounds of Appeal). C

2. Whether the Learned Justices of the Court of Appeal were right in raising the issue of defences of justification and provocation without affording the parties the right to be heard on the said issue raised suo motu. (This issue is distilled from ground 3 of the grounds of Appeal).” D

The learned counsel for the respondent adopted the two issues formulated by the appellant. (I shall come back to these issues as formulated by the parties). But let me now relate the salient facts giving rise to this appeal as contained in the printed record of proceedings. Sometimes on or about the 14th day of July, 1999, a rumour was spread within or between two neighbouring villages of Randali and Kardi of Birnin Kebbi to the effect that one Abdulbhi Alhaji Umar of Randali village (now deceased) had insulted or defamed the Holy Prophet Muhammad (SAW). On hearing this rumour, the appellant with five others all of Kardi Village left for Randali village in search of the deceased. E F

Although they could not arrest the deceased at Randali, he was eventually caught at Kardi village where he hid himself. On being caught at Kardi village, he was taken to the outskirts of the village and was held or kept under the custody of Mohammed Sani (3rd accused) and Suleiman Dan Ta Annabi (6th accused) at a place near the grave yard. Other accused persons then went to the village head of Kardi and informed him that the person said to have insulted the holy Prophet had been caught in his village and the appropriate punishment to be meted out to him under Sharia was death and he was therefore to sanction his killing. When the village head failed to give them any answer, then appellant along with Abdullahi Ada (4th accused), Musa Yaro (1st accused) and Usman Kaza (2nd accused) left and G H

went back to the grave yard where the deceased was being held or kept by the 3rd and the 6th accused persons. On arriving at the grave yard, the 1st accused brought out an Islamic text book “Risala” and read out some portion from it that the punishment of any person who insults the holy prophet was death. Thereupon the 3rd accused struck the deceased by the neck with a machete. When the deceased fell on the ground as a result of the machete blow, the 5th accused brought out a sharp knife and slaughtered the deceased like a ram. After the incident and when the accused persons were certain that the deceased was dead, they all dispersed leaving his corpse lying at the scene. It was later that the corpse was removed by the police and the relations of the deceased and it was conveyed to Birnin Kebbi Specialist Hospital where an autopsy was conducted and a medical report (Exh. 1) was issued. It was after due investigation by the police that the appellant along with the five other accused persons were arrested and prosecuted at the Court below which convicted all of them for the offences under *sections 85, 97 and 221 (a) of the Penal Code (PC for short)*. They were each sentenced to death accordingly.

In his submissions on issue No.1 learned counsel for the appellant, Mr. Amuda-Kannike states that the learned Justices of the Court of Appeal ought not to have confirmed the conviction and sentence of the appellant by the trial Court as it failed to consider and examine defences of justification and provocation which ought to enure in favour of the appellant by virtue of *sections 45 and 232 (1) of the Penal Code*. Learned Council argued further that both the evidence of PW5 and the appellant’s statement to the Police Exhibits “G” and “G1” which formed part of the evidence before the trial court no doubt raised the issues of justification and provocation on behalf of the appellant, yet the learned trial judge failed to consider the said defences throughout the entire gamut of the judgment that was delivered. Learned Counsel submitted that the trial Court was bound to look at the defences to which the accused may be entitled to on the evidence before it no matter how improbable or stupid or unfounded such a defence may be whether or not same were raised by the accused or his counsel during the course of trial. He cited and relied on some

authorities such as *Williams v. State* (1992) and *NWLR* (P 261) 515 at 522; *Arara v. State* (1981) 2 *NCR* 110 at 125. The learned Counsel stated that the non consideration of the defences aforementioned had affected the burden of proof placed on the prosecution which would have made the learned Justices of the Court below to have upheld the appeal by reversing the conviction of the appellant. Further citations made by learned Counsel included the cases of *Ogunleye v. The State* (1991) 3*NWLR* (P 177) 1 at page 3; *Opeyemi v. The State* (1985) 2*NWLR* Pg 101. *Clement Oguonzee V. The State* (1999) 2 *LRCNCC*; 232 at 245 paragraph f: *Doherty v. Doherty* (1964) *All NLR* 299. He urged this Court to resolve issue No 1 in favour of the appellant. B C

In his brief of argument, learned Counsel for the respondent submitted on issue No.1 that what the Court of Appeal did and its findings were based on the evaluation of the evidence available on the record and did not cause any miscarriage of justice to the appellant and the Court was right and doing so could not amount to raising any issue *suo motu*. On the main point raised under issue No.1 by the appellant, that is, that the trial Court failed to consider and examine the defences of justification and that of provocation which was wrongly done by the Court of Appeal, Learned Counsel for the respondent submitted that having regard to *Order 1 Rule 19(3) and (4) of the Court of Appeal Rule, 2002*, the Court of Appeal has power to make such findings. He supported his submission by quoting the said provision of the Court of Appeal Rules and the cases of *Namsoh v. State* (1993) 5 *NWLR* (pt 292) 129 at 143. *Takida v.State* (19(39) 1 *All NLR* 53; *State V. Ajie* (2000)3 *NSCQR* 53. He argued further that failure of the trial Court to consider the defences available or open to an accused person aforementioned is only fatal where there is evidence in support of such defences in the record of the trial Court. D E F G

I think it is appropriate for me to start by asking a question at this juncture: What were the defences raised by the appellant before the trial Court? I cannot find a better answer anywhere else other than from the H printed record of this appeal.

The learned trial Judge stated in that respect:

“Therefore in this particular case the Onus is on the accused

persons to prove that they have a right in the Quran or Risala to kill Abdullahi Alh. Umaru. Furthermore the accused persons did not raise or suggest any defence, their voluntary statements did not suggest any defence and there is no doubt about this.” (See page 75 of the record)

B So, there was no defence raised by the appellant. In fact, the appellant did not testify in person and he did not contradict, deny or retract his confessional statement. Therefore there was nothing by way of defence for the learned trial Judge to consider. The learned trial judge was an umpire and he could not stand in defence of the defenceless appellant. So, what bluff is the learned Counsel for the appellant making? But granted for the sake of argument only that there were no defences raised by the appellant and the trial Court omitted or failed to consider such defences. Can't the Court of Appeal remedy such an omission or failure by resorting to the provision of section 15 of the Court of Appeal Act. Cap.C.36 Law's of the Federation of Nigeria. 2004 (section 16 of same Act of LFN' (1990)? 'The section is general in nature and very clear. It provides as follows:

“15 General Powers of Court of Appeal

E *The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question*
F *which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken, and, generally shall have full jurisdiction over the whole proceedings as if the proceedings had*
G *been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purposes of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance*
H *with the powers of that court, or, in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction.”*

Thus, where a trial Court failed to consider the defence of an accused

person such as the appellant, the Appeal Court can consider such defence(s) with all available evidence on the record. This, I think, is what the Court below did rightly in my view See *Namsoh .v. State* (1993) 5 NWLR (P292)129 at P.143; *Takida v. State* (1969) 1 All NLR 53, *State v. Ajie* (2000)3 NSCQR 53. Issue No.1 lacks any merit. I resolve same B against the appellant.

On issue No2 Appellant's Counsel submitted that from the pronouncements of the Court of Appeal the learned Justices on the panel that decided the appeal under consideration, had conceded that the learned trial Judge C ought to but refused to consider the defences of justification and provocation as raised by the appellant was not considered at all rather the new issue raised *suo motu* as to whether the defences of justification and provocation enure in favour of the appellant was the basis upon which the appellant's appeal was eventually dismissed, further, he contended, it is D the law that where a court raises an issue *suo motu*, it ought to call on the parties to address it on such issue. He cited the cases of *Badmus v. Abegunde* (1999) 71 LRCN 2912; *Oshodi v. Eyifunmi* (2000) 80 LRCN 2877. Learned counsel argued that because of the lower court's failure E to call on the parties to address it on an issue raised *suo motu* by it and because of its failure to consider the lone issue raised by the appellant's counsel in his brief of argument, such a failure tantamount to breaching the fundamental right of the appellant to fair hearing as guaranteed by F section 36 of the Constitution of the Federal Republic of Nigeria 1999. He urged this court to resolve issue No 2 in favour of the appellant.

In his argument contained in the brief of argument, learned counsel for the respondent submitted that the appellant will be entitled to the G defence of Justification after satisfying the conditions set out by section 45 of the Penal Code. He further submitted that there is no evidence of any kind (Penal Code or Sharia) in the record of proceedings to show that the appellant's action was justified by law. He finally on this point, submitted H that from the available evidence before the trial court and available in the record the appellant would not be entitled to defence of justification as the court could not give the appellant the benefit of defence which was not reflected or supported by evidence on the record. He cited the case of

Abara v. State (1981) 2 NRC 110 at page 117.

Making his submissions on the defence of provocation, learned counsel for the respondent argued that the appellant would only be entitled to defence of provocation under *section 222(1) of the Penal Code* where he established the ingredients therein. There is no evidence whatsoever on the record of proceedings to establish that the appellant was provoked by Abdullahi Alh. Umaru (deceased). It is impossible he stated, to determine whether the defence of provocation was open or available to the appellant. He referred to the case of *Ahmed v. The State (1999) 7 NWLR (Pt.612) 641 at 684*. The provocative act done or reported by one person the co-accused Musa Yaro, cannot be a ground for the appellant to kill the deceased. He cited and relied on the case of *Idemudia v. State (1992) 7 NWLR (Pt.356)*. He concluded that the Court of Appeal did not raise any issue *suo motu*. He urged this court to affirm the conviction and sentence of the trial court and finding of the Court of Appeal and dismiss this appeal.

This issue is on the defences of provocation and Justification Under issue No. 1 I already made a finding that no such defences were raised by the appellant now since this issue is purely on these defences, I shall now expand on it. I will start by quoting what the court below said on these defences:

“It is also to be noted as rightly pointed out by the learned trial judge and as reflected by the record that the appellants rested their case on the evidence adduced by the prosecution and chose not give (sic) evidence for their defence. They were also ably represented by a counsel during their trial who failed to raise or prove any defence for them during the trial.”

Ideally that would have put an end to the issue of defences as none existed from the evidence laid before the lower court. But while reviewing the proceedings of the lower court, the court below made the following observation:

“It is necessary to dispel the impression made or given in the appellants brief to the effect that the learned counsel for the accused persons (i.e. the appellants) had at the trial court alerted the trial court on the two defences said to be available to them. On perusing the relevant

pages or passages of the record containing the submissions of the two learned counsel in the case and the ruling of the trial court on the matter I found that the appellants learned counsel only raised or asserted the defence of Justification in his final address in the following words in addition to what is reproduced in the appellants brief):

‘A question can be asked whether the prosecution has disproved that there is a punishment of death as provided in the Quran for anybody that (sic) insults the prophet and the Risala cited by the 1st accused person. The prosecution must show by positive evidence that the accused persons are not entitled to kill the accused (sic - the deceased) for insulting the prophet.’”

The learned Justice Court of Appeal then concluded in the following words:

“It is clear from the above quoted submission of the appellants counsel at the trial court that only the defence of Justification (under Sharia rather than under the Penal Code) was raised by the said counsel. There is no mention or suggestion whatsoever about the defence of provocation from the above quoted passage as its particulars or legal elements were not mentioned as done in relation to the defence of Justification. Consequently it is wrong, in my view, for the appellants counsel to now give the impression in his brief of arguments that their counsel had alerted the learned trial judge on that defence that to me is a mere after thought and a misstatement.”

From the above excerpts, it is clear that the issue of defences of provocation and Justification were by and large, raised and argued by the learned counsel for the accused/appellant. It thus not a new issue entirely as would require further address by appellant’s counsel. The lower court was in my view right in its approach to the issue of the defences which were raised in counsel’s address. Although not an evidence in itself counsel’s address forms part of the case. See: *Obodo .v. Olomu (1937) 2 NSCC 824 at 829*. That was why the Court below took considerable time, place and efforts to meticulously answer the points raised on the defences’ highlighted in the appellant’s brief.

Justification as a defence in a criminal trial arises because the

defendant/accused is not blame worthy for having acted in a way that would otherwise be criminal. The act carried out by the accused or where he failed to carry out an act is considered just and lawful.

Section 45 of the Penal Code has provided as follows:

B *“Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake by law, in good faith believes himself to be justified by law in doing it.”*

This means that an accused standing trial before a criminal court such as the appellant will be entitled to the defence of Justification if the defence is premised on the following conditions:

i. His action is justified by law

ii. His action was carried out as a result of mistake of fact not mistake of law

D iii. He acted in good faith believing himself to be justified by law in doing it.

The above conditions will extend to situations where:

(a) the accused acted in execution of the law

E (b) acted in obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful.

(c) when the action is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence.

F Now, from the facts and the evidence placed before the trial court, can the appellant be covered by any of the above conditions to justify his participation in killing the deceased? My answer is certainly in the negative.

G On the defence of provocation, which is provided by *section 222 of the Penal Code*, the appellant will be entitled to it if it is shown that he established all the ingredients therein. Permit me, my Lords to quote the section:

H *“222(1) Culpable homicide is not punishable with death if the offender whilst deprived of the power of self control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.”* (Underlying

supplied for emphasis).

In order to enjoy the above facility, the accused must lead evidence to establish the following ingredients:

- i. The act of provocation is grave and sudden
- ii. The accused must have lost self control actual and reasonable B
- iii. The mode of resentment must bear a reasonable relationship to the provocation

I am afraid, none of the defences will avail the appellant in this case as he elected not to lead evidence to establish all the supporting ingredients of the defences. By the provision of *Section 141 of the Evidence Act*, the burden of proving his entitlement to the defences rests squarely on his shoulders and he has woefully failed to discharge the burden. C

On the question of provocation, the Lord Chancellor, Viscount Simon, in *Mancini v The Director of Public Prosecutions* 26 C. A. R. 74 D stated the correct principle of the law when he said:

“It is not all provocation that will reduce the offence of murder to manslaughter. Provocation, to have that result must be such as temporarily deprives the person provoked of the power of self control, as the result of which he commits the unlawful act which causes death...The test to be applied is that of the affect of or evocation on a reasonable man, as was laid down by the court of Criminal Appeal in Lesbini 11 CAR 7. In applying the test, it is of particular importance to take into account the instrument with which the homicide was effected; for to retort, in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.” E F G

See the cases of *Wonaka v. Sokoto N. A.* (1956) ‘NSCC 28; *Kumu v. the State* (1967) NSCC Vol. 5, 283.

On the main, the free and voluntary confessional statement of the appellant alone is enough to send him to the gallows. Listen to what he said: H

“On Wednesday 14th July, 1999 at about 2000hrs after Isha’i prayers, I sat down at the frontage of Mosque at Faransi Area of Kardi then one Musa Yaro of Kardi came and met me with an information that,

someone abused Prophet Mohammed at Randali Village which he is not sure, but he will try to find out at Randali. On hearing that, I stood up and went inside my house and carried knife along with me, and I moved to Randali. On reaching there, I went straight to one Shuqaban Saman for confirmation about the abusing of Prophet Mohammed and he assured me that, the issue is true, and that there were witnesses to testify but he did not tell me the kind of abuse. And from there I heard someone saying, that Abdullahi Alh. Umaru who abused the Prophet had been arrested at Kardi, then I quickly went back to Kardi and met Abdullahi who was together with Adamu Aljani, Kalli Odita and others whom I was not able to know then. Then we later sent the following: Musa Yaro, Usrnan Kaza and Abduilahi Ada to the village Head of Kardi to know what is happening in his village. As they returned back from the Village Head's house... Musa Yaro made some Quotation in Risslah which means that, whoever abused Prophet Mohammed shall be killed, and then people started besting Abdullahi Alh. Umaru, and Mohammadu Sani macheted him and he fell down, then I removed the knife that was in my possession with my right hand and slaughtered him "deceased" just along Randali-Kardi Road near a burial ground of Kardi. And we all dispersed. When I reached home, I fetched some water and washed the knife and part of my cloth that stained, the cloth is light blue in colour. That's all my statement."

This was further corroborated by the unchallenged evidence of PW5 who stated as follows:

"What I know is that on 14th July, 1999 I was at my sleeping place at Kardi when one Mr Bello Dan Nana woke me up and asked me whether I was aware of what was happening and I told him that I didn't know. He told me that somebody was accused of insulting the Prophet Mohammed (SAW) and asked whether I will go to the place where he was being held. I took my catapult and started going to the scene along with Bello at Shiyar Riyoji where the person who was accused of insulting the Prophet (SAW) was arrested. On my arrival I found that it was Abdullahi Alhi Umaru of Randaii village who was being held by the 6th accused Suleiman and the 3rd accused Muhamrriadu Sani. These accused persons pulled Abdullahi Alh. Umaru towards the road leading to Randali on the outskirts of Kardi

near burial ground.’ As Abdullah was being’ held there in our presence, the 1st accused Mallam Musa just appeared and said whoever abused the Prophet shall be killed. He read a verse but I can’t bring it as read. On hearing this, Muhammad Sani (3rd accused) used a matchet which was with him on Abdullahi Alh. Umaru on the hand and Abdullah Alh. Umaru fell B down. Then Abubakar Dan Shalla (5th accused) slaughtered Abdullahi with a knife on the neck just like a goat. I saw the knife used by 5th accused in slaughtering Abdullahi but I can’t describe it as he went away with it. When they were sure that Abdullahi died, they all dispersed and ran away. C We too left the corpse and went home.”

A litany of authorities lays the rule that a voluntary confession can fetch conviction. See: *Kanu v The State* (1952) 14 WACA, 30 at page 32 *Phillip Ekpenyong v. The State* (1991) 6 NWLR (Pt.200) 633 at p. 704

I think I should observe that although this case is Sharia in nature, D it was decided under the Common Law principles. I should not delve much into the Islamic Law principles relating to such a case. I will limit my observation to what the court below said in citing some Islamic Law principles. Let me quote *in extenso* what the court below observed: E

“It will be very clear that the appellants with their shallow knowl- edge of Sharia or Islamic law and calling themselves Muslim brothers, have in ignorance or deliberate disregard of the rules of judgment and procedure under the said Sharia as contained in the same text of Risala, F arrogated to themselves the function and role of a court of law or a Khadi and wrongly (without any proof or evidence) or based on rumour or hearsay, convicted, sentenced and inflected (sic) or carried out the execution of the supposed punishment. They cannot claim that to be the way of life of their community because they were not supported by both G the village head and Ustaz Mamman. Although the prosecution did not call the Ustaz as a witness it is however clear that he gave them the advise in the presence of some of the witnesses (e.g. PW2) but they refused to heed and even went to the extent of describing him as an infidel or a non Muslim H for giving them such an advice. There is also no legal justification in the action taken by the appellants in killing the deceased for his supposed offence. Islamic religion is not a primitive religion that allows its adherents

to take the law into their own hands and to commit jungle justice. Instead there is a judicial system in Islam which hears and determines cases including the trial of criminal offences and any body accused of committing an offence against the religion or against a fellow Muslim brother should be taken to the court (either a Sharia or a secular/common law court) for adjudication. It is only when a person is convicted and sentenced by a court of law that he will be liable to a punishment which will be carried out by an appropriate authority (i.e. the prison) Although it is true that there is the provision in Risala which prescribes the punishment of death on any Muslim who insults the Holy Prophet such punishment can only be imposed by the appropriate authority (i.e. the court) rather than by any member of the society whether a Muslim or otherwise. The relevant provision can be quoted from “Risala (treatise on Maliki law) translated and annotated by Joseph Kenny - Chapter 37 at paragraph 37.19 page 173 as follows:-

“If someone speaks disrespectfully of the messenger of God (sabb - an -nably) he should be put to death without accepting his repentance”

The above provision is contained in a chapter dealing with “crimes, conviction and punishments.” From the wording of the chapter it presupposes that there must be a due process leading to the conviction by an appropriate authority of someone accused of committing the crimes contained in the chapter before he will be liable for the punishment. The chapter begins with the following passage which is instructive:-

“37.01 No one may be put to death for homicide unless he is convicted by (1) adequate testimony (bayyinat), or (2) his own admission (igrar), or (3) as sworn indictment (Qasama) if that is necessary,” (underling and brackets supplied for emphasis and explanation)

It is also pertinent to note that the next immediate chapter following chapter 37 (i.e. chapter 38) in the Risala provides for “judgment”: Procedure and cases”. In this subsequent chapter it is made very clear that decisions on cases including criminal cases are the function of judges who observe the court procedure and whose actions or decisions are based on testimony or evidence (bayyina) admission (Iqrar) or oath (Yamin) See

Aththamarud Dani (Commentary on Risala) pages 604 - 707.

In another Islamic text: Ashalul Madarik which contains similar but wider provision than that of Risala on which the appellants relied in their nefarious action, there is a proviso or a stinker to the rule against insulting Allah, (SWT) His Prophets or any angel. In the later text it is stated that the words used in the chapter differ in the rules (i.e. their application) and have been given different meaning depending on their aims (or objects) and changes in circumstances. Sometime they may necessitate the killing and sometime only chastisement for correction and sometime they attract no punishment or sanction at all. So it is necessary for the Qadi to exercise caution and exert (sic) his effort in research (Ijtihad) for each case or judgment concerning the rules.

All my above explanation of the rule in Risala relied upon by the appellants in their action show that it is the judge (who is qualified to adjudicate) or the court of law whose responsibility is to apply (or order the execution) of the sanction given in the text against any person accused under a civilized system of justice even under an Islamic state. I will recall here the sentence of death passed on an Indian born but British author Salman Rushdie for blaspheming the Holy Prophet Mohammed (SAW) in his book titled "The Satanic verses." I will recall that he was dully prosecuted and convicted (though in absentia) by an Iranian Islamic Court under the Regime of Imam Ayatollah Khomeini of blessed memory which tried him for the offence, in the case of the appellant who have no authority or warrant whatsoever to adjudicate under both the common law and Sharia they constituted themselves into a Kangaroo court in order to realize their purpose or plan to kill the deceased. Their only evidence against the deceased was the rumour they overheard or hearsay allegation that he had insulted the Holy Prophet. If the objective test is applied on them, and considering the non approval of the propose (sic) action by the village Head and Ustaz Mamman who were members of the same community and therefore in the same class or position or standard in life with the said appellant, it will easily be seen that the said appellant were not acting under an honest misapprehension of fact or in good faith but they were merely a bunch of blood thirsty and militant or religious fundamentalists who were

all out to satisfy their vindictive zeal against the appellant.

Notwithstanding their motive based on their ideological concept as Muslim brothers which is a Shii sect with a morbid dogma, they should be held fully responsible for their action and are not therefore entitled to the defence of justification under both Sharia and *Section 45 of the Penal Code*. With their cruel or wicked disposition they constitute or pose as very serious danger to their society or community, in my view, it is the appellants rather than the deceased who committed an offence against Islam or Sharia by their unjustified action which represents to the public that Sharia is an uncivilized and primitive system which allows or permits the killing of people without complying with the due process of law. I am consequently of the humble view that the defence of justification under the penal code is not open or available to the appellants as asserted in their brief.”

I agree. The 1st issue to be put in its straight perspective is that Islamic Law, as opposed to Common Law, makes no provision for the defence of provocation. A sane and adult Muslim stands responsible and answerable to all his deeds or misdeed. Secondly, where he makes a free and voluntary confession, he is bound by his confession which is even regarded to be a better form of evidence than calling of witnesses. See *Jawahir Al-Iklil Sharh Mukhtasar Al-khalil Vol. II* by Sheikh Salih Abd Alsami Al- Azhari, page 132; *Wonaka v Sokoto N.A supra*

The trite position of the law under Sharia is that any sane and adult Muslim, who insults, defames or utters words or acts which are capable of bringing into disrepute, odium, contempt, the person of Holy Prophet Muhammad (SAW) such a person has committed a serious crime which is punishable by death. See. *Alkhurshi, commentary on Mukhtasar Al-Khalil Vol. 8 page 70; Hashiyatul vol. 2 page 290.*

However as observed by the court below, Islamic law has not left the killing open in the hands of private individuals. The offence alleged has to be established through evidence before a court of law. The court itself will have to implore its professional dexterity in treating the case by allowing fair hearing and excluding all the inadmissible evidence or those persons who may fall within the general exemption clause such as an

infant, imbecile or those who suffer mental delusion. Thus, the killing is controlled and sanctioned by the authorities.

Abdul Qadar Qudah in his *criminal law of Islam vol. III*; (improved edition, 1999), stated that if any of the crimes involving Hudud (fixed punishment), Qisas (Retaliation) and Ta'azir (penal/exemplary punishments) is imputed to a person he will be prosecuted against in a court law. If the charge against him is established, sentence will accordingly be passed keeping in view the prescribed punishment. If the charge cannot be established, the accused will be acquitted. If the sentence is passed the ruler or the competent authority will be responsible for its execution in respect of offences involving hudud and penal punishment. Such punishments can only be executed by the ruler or his deputy for *Had* is Allah's right which has been made obligatory. Hence the responsibility for its execution will be vested in the Imam or the ruler of the Community. Besides, awarding of *Had* punishment requires exertion of the mind (Ijtihad) and it is likely to exceed the limit or be less than it. Hence, it is to be established by the ruler himself or depute his representative to do it on his behalf, (see generally pages 157 - 170 of the book under reference for further details).

The law will, thus, have set a dangerous precedence if private individuals were authorized to take the law into their hands as the appellant and others did in this case. Sharia guarantees and values the sanctity and dignity of human life. That is why it outlaws unlawful killing of human life. The Quran has several verses in various chapters where it outlaws such nefarious acts. For instance it provides in *chapter 6 (Surat al - An'Am) verse 151* as follows:

"And do not kill the soul which Allah has forbidden (to be killed) except by (legal) right."

The Prophet (SAW) is reported to have said that the first action to be judged on the Day of Judgment is the spilling of blood. (see *Bulugh Al - Maram Min Adiilatil Ahkam* by Asqalani, page 244). In another Hadith, he is reported to have said that three things have been made illegal to a Muslim:

- (i) to spill the blood of another or deprive him of his life

(ii) to deprive him of his property and

(iii) to deprive him of his honour or integrity

(see Forty Traditions of Imam An-Nawawi).

The appellant in this appeal did not show any of the courts that he
B had the requisite authority to take away the life of the deceased. He thus
unlawfully deprived the deceased the opportunity to defend the allegations
leveled against him before any court of law or authority. The village head
of Kardi who was contacted by the appellant and others for authority to
C execute the deceased, flatly refused authority as he fully well knew that he
was not the right authority to grant such leave. A learned person known
as Ustaz Mamman drew attention of the appellant and his co-accused
persons that they had no authority to take away the life of the deceased,
yet they kept deaf ears and even described the Ustaz as an infidel.

D I cannot see how these kinds of people shall have any respite by the
law. What is good for the goose is good for the gander. Life is precious
to all and sundry. He who kills by the sword shall die by the sword. I have
no sympathy for the banishment of such busy bodies who respect no
E human life due to their high degree of misapprehension of the law or,
should I say, complete ignorance of the law. The appellant failed to
convince me through his explanations. But he is free to make further and
better explanations to the hang man, though belatedly it may be.

F I find no merit in this appeal. I dismiss same. I affirm the conviction
and sentence of the trial court which were affirmed by the court
below.

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