

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

MUSA YARO APPELLANT

V.

THE STATE RESPONDENT

CRIMINAL PROCEDURE - Defences - Culpable homicide - Provocation and justification - There was no material before trial court - To enable it consider these defences - As rightly held by Court of Appeal (H1)

APPEALS - Culpable homicide - Issues - Misconception - Issues of complaint about denial of hearing - Is misconceived and unfounded (H2)

CULPABLE HOMICIDE - Unchallenged evidence - Coupled with appellant's admission - That he incited other accused persons unto killing deceased - Justify failure of his two issues (H3)

FACTS

The appellant was the first of six accused persons arraigned before Kebbi State High Court Birnin Kebbi, on a three-count charge of criminal conspiracy, abatement and culpable homicide punishable with death contrary to ss. 97, 85 and 221(a) of the Penal Code. The prosecution called eight witness. Appellant elected not to testify or call a witness. Four of the accused persons in their statements to the Police implicated appellant. The accused persons alleged that the deceased made certain remarks which were insulting to Prophet Muhammad (SAW) and ought to be killed. In his statement to the police, appellant admitted reading a quotation from the Holy Quran before the other accused persons killed deceased.

The trial court found appellant and the other accused persons

guilty of culpable homicide punishable with death and accordingly sentenced them to death. 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 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 which they raised suo motu."

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

Defences - Culpable homicide

1. The above extract of the judgment of the court below clearly demonstrates that it was the view of the court below that the evidence before the trial court did not necessitate a consideration of the defences of provocation and justification. I am of the firm view that the court below was right in its views. There was plainly no material before the trial court to enable it proceed to consider the defences of provocation or justification. The appellant never called any evidence to show the exact words or acts which the deceased had uttered or done as to provoke the appellant and other accused persons into the killing him. Whether or not the appellant and the other accused persons were provoked into the act of taking the life of the deceased was a matter to be determined by a consideration of the nature of the annoyance given to the appellant and the others. This however could not be done without a knowledge of what the deceased had said or done. (p. 3992 E)

Culpable homicide - Issues - Misconception

2. It is obvious that the appellant's 2nd issue is misconceived as it was appellant's counsel himself who in his brief argued the defences of provocation and justification to which the court below reacted in its judgment. It is therefore, wrong to argue that the court below considered these defences without granting the appellant a hearing on the point.

(p. 3993 F)

Unchallenged evidence - Coupled with appellant's admission

3. I have given a very anxious consideration to the two issues raised by the appellant for determination in this appeal. Both must be decided against the appellant. The evidence against the appellant went unchallenged. More than that however is the admission by the appellant that he was the one who read to the other accused persons the portion of the Holy Quran that any one who insulted the Holy Prophet Mohammed (S.A.W.) ought to be killed without at the same time stating how and in what manner the deceased had insulted the Holy Prophet Mohammed (S.A.W.).

In any case, even if it is assumed that indeed the deceased had in some way committed the act ascribed to him, was it open to the appellant and the other accused persons to constitute themselves into a court of law pronouncing a sentence of death on another citizen? (p. 3993 H)

REPRESENTATION

Dr. A. Amuda-Kannike For the Appellant

Mr. I. K. Sanusi D.P.P. M.O.J. Kebbi State For the Respondent

CASES REFERRED TO

Oyediran v. The Republic (1967) NWLR 122

Erin v. The State (1994) 6 SCNJ 104, 106

Muminu v. The State (1975) 6 S.C. 79

Onochie v. The Republic (1966) 1 All N.L.R. 86

Nyam v. The State (1964) 1 ALL NLR 361

Buje v. The State (1991) 4 NWLR (Part 185) page 287 at 298-304

Akalezi v. The State [1993] 2 NWLR (Pt.273) page 1 at 14

Ekpenyong v. The State [1993] 5 NWLR (Pt.295) page 513 at 522

Ubani v. The State [2001] FWLR (Pt.44) page 483 at 490

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

Nwuzoke v. The State (1988) 1 NWLR (Pt. 72) 529

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

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

Ubierho v. The State (2005) 1 NCC 146

Namsoh v. State (1993) 5 NWLR (Pt.292) 129 at 143

STATUTES & RULES REFERRED TO

B Penal Code ss. 97, 85, 221 (a), 22 (a), 45, 222 (1)

Constitution of Nigeria 1999 s. 36

Court of Appeal Rules 2002 O.1 r. 19 (4) & (3)

Evidence Act ss. 27, 7

C

LEAD JUDGMENT BY OGUNTADE JSC

The appellant, Musa Yaro, was the first 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 punishable with death contrary to *sections 97, 85 and 221 (a) of the Penal Code* respectively. On 18/1/2000, the appellant and the five other accused persons charged with him pleaded not guilty to each of the counts. Hearing of the case opened on 19/1/2000. The prosecution called eight witnesses.

D

E The appellant elected not to testify or call a witness.

The trial judge, Ambursa J, on 24-02-2000 in the judgment, found the appellant and the 5 other accused persons charged with him guilty of the offence of culpable homicide punishable with death under *section 221 (a) of the Penal Code*. The appellant was accordingly sentenced to death.

F

The appellant brought an appeal against his conviction before the Court of Appeal, Kaduna (herewith referred to as the court below). The court below, on 10 - 12 - 03 in its judgment dismissed the appellant's appeal and affirmed the judgment of the trial court. The appellant has come before this

G

court on a final appeal. The appellant raised three grounds of appeal. The two issues for determination raised in the three grounds of appeal read:

"1. *Whether the Learned Justices of the Court of Appeal ought to confirm the conviction and sentence of the Trial court. (This issue is distilled from grounds 1 and 2 of the grounds of appeal 1).*

H

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 which they*

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 his appellant's brief.

Let me start by examining the case of evidence as laid before the trial court by the prosecution. It was alleged that a group of persons including the appellant had stated that Abdullahi Alhaji Umaru (now deceased) had made certain remarks which were insulting to Prophet Muhammed (S.A.W) and that the deceased ought to be killed for making such remarks. The deceased was killed and 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 on the manner Alhaji Abdullar 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 Abdullahi Alh. Umaru towards the road leading to Randali on the Outskirt of Kardi near burial ground. As Abdullahi 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 Abdullahi Alh. Umaru on the head and Abdullahi 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 Abdullahi but I can't described it as he went away with it. When they were sure that Abdullahi 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 J and J 1. In the Exhibit J 1 (which is the translation of exhibit J from Hausa to English), the appellant had said:

“After official word of caution 1 of the above name and address voluntarily wish to state as follows on 14th July 1999 between the hours of 0300hr I was together with one Abdullahi Sallah and Usman Kaza from there Usman Kaza told me that did I know what is happening. Then I asked him what is going on? As (sic) result of that Usman Kaza told me that somebody by name Abdullahi Alh. Umaru (deceased) he insulted Prophet Mohammed ‘S.A.W.’ after Usman Kaza told me this. Myself and Abdullahi Sallah and Usman Kaza we left from Kardi that is our Village to Randali Village where the incident happened to confirm if it’s true. When reaching Randali Village we met Sarki Samari named Mamman Dambu; we asked if it’s true that somebody in this village insulted the Prophet Muhammed ‘S.A.W.’ from there he told us that really it’s true then from there Sarkin Samari namely Mamman Dambu told us that we should go to the house of Abdullahi Alh. Umaru ‘the deceased’. When we reached to the house of Abdullahi Alh. Umaru who insulted the Prophet Mohammed ‘S.A.W.’. From there Mamman Dambu used his torchlight in the house of Abdullahi Alh. Umaru. Then from there we do not see him present as result of that somebody by name Abdullahi Maga and one Garba Soja then gives more full insurance that really this (sic). Abdullahi Alh. Umaru insulted the Prophet Mohammed ‘S.A.W.’ from there Garba Soja give advice that we should go and (see) inform Dangaladima. When we meet Dangaladima, he told us that he instructed us to get him arrested for him. That is Abdullahi Alh. Umaru. When we started going we met with one Bello Aliyu mai Busa and one Shehu Lambega and the rest of them whom I don’t know even their names. After this Bello Aliyu told us that they have already arrested him. Abdullahi Alh. Umar. But they hide him somewhere else. But we assign one Adamu Aljani and one Musa Kalle and also Dan Bala Matar Kura to take care of him. When we came to the place where they hide him, they brought him out for us. As a result of that the people of that village

started saying let them kill him. Then from there I gave a suggestion that they should not kill him until we inform our village Head. When I brought this suggestion, myself, Abdullahi Adah and one Usman Kaza we went to the Village Head we explain (sic) after we might explain to the Village Head 'Inna Lillahi Wa Inna Illahi Raju'una. From there we asked our Village Head what did he see. He do not say anything. From there the Village Head asked us that what did we see? Then from there one of us by name Abdullahi Sallah he made mentioned that anybody who insulted Prophet Muhammed 'S.A.W.' they suppose to kill him. After Abdullahi Sallah made mentioned this in the present of the Village Head. The Village Head did not say anything, when we came back from Abdullahi Alh. Umaru who insulted the Prophet Muhammed 'S.A.W.' when we started going I brought a quotation in the Holy Quran ' Waman Sabbah Rasu Lillahi Kutilah' Wala Yako Bahu Taubatahu' after I might given (sic) quotation from the Holy Qur'an they started beating him. Somebody by name Sani Aci B/Kebbi matcheted him with his cutlass, and also one Abubakar Dan Sallah he slaughtered him, and the rest of the people whom I don't even know their names. But I myself I do not beat Abdullahi Alh. Umaru even at once. But definitely I am the person who brought the quotation from the Holy Qur'an or Risalah. This is all about it. Recorded by Det. Shehu Mohammed." Sign 15/07/99"

(This is as it was in the record)

It is apparent from Exhibit J1 above that the appellant only admitted that he read a quotation from the Holy Quran before the deceased was killed. He did not admit that he killed the deceased. P.W.5 however testified that, it was the appellant who pronounced the death sentence on the deceased. Further, the 3rd, 4th, 5th and 6th accused persons who were charged with the appellant in their written statements to the police under caution materially implicated the appellant. The statements of the 3rd, 4th, 5th and 6th accused persons were as given in evidence by P.W. 4 served on the appellant.

In Exhibit E 3, the 3rd accused said:

"I of the above given name and address wish to add here that, when Abdullahi Alh. Umaru was caught, immediately Musa Yaro finished

saying that whoever abused Prophet shall be killed, I suddenly used the cutlass which I collected from Musa Yaro when we were checking for Abdullahi. And immediately I finished matcheting the deceased, I returned back the cutlass to Musa's house and gave it to his son Nasiru Musa to keep it for his father. That's all."

In a part of his statement Exhibit F 1, the 4th accused said:

"And when we went to the Village Head, I was in possession of torchlight, Musa Yaro was holding an iron like stick and Usman Kaza was also holding a torchlight. When we informed the Village Head all that is happening that someone abused Prophet Mohammed, and also the judgment which supposed to pass to such person, according to Islamic teaching, the village Head did not made any comment, and we left him and went to where Abdullahi Alh. Umaru and the other people are. When we reached to their place, Musa told them all that we told the Village head, and he repeated that, it is written whoever abused Prophet Mohammed, that person shall be killed.

Then I heard a sound of hitting. But I cannot say precisely who E hit (sic) him, but I saw when Abdullahi fell down, and also I saw when Dan Shalla used the knife that was in his possession and slaughtered Abdullahi Alh. Umaru, and I was standing watching, but I did not touch Abdullahi, then we all dispersed. In conclusion, this case of Culpable F Homicide was done with him.

Signed: RTI of Abdullahi Ada 15/7/99"

Similarly, in a portion of his statement Exhibit G 1, the 5th accused said:

"And from there, I hear someone saying that Abdullahi Alh. Umaru G 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 them. Then we later sent the following: Musa Yaro, Usman Kaza and Abdullahi Ada to the H Village Head of Kardi to know what is happening in his Village. 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 Abdullahi Alh. Umaru,

and Mohammadu Sani matcheted 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 was stained, the cloth is light blue in colour. That's all my statement."

And finally in a portion of Exhibit H 1, the 6th accused said:

"I have decided to state that, on Wednesday 14/07/99 at about 2200hrs, I was sleeping at Majelisa area of Kardi, then one Musa Yaro came and met me with a history that someone at Randali abused the Holy Prophet and people are there looking for him. Then I myself, Musa Yaro and Mohammed Sani both went to Randali to find out whether the incident was true. Then we met one Garba Soja who later directed us to Shugaban Samari to confirm from him, and I don't know him, then Musa Yaro asked him whether it is true that someone abused Prophet Mohammed, then the man was about to repeat the same kind of insult that was uttered, but we told him not to repeat but to assure us, then he said actually the incident was true and that, the person told him to go and tell Prophet Mohammed. And he that abused the Prophet was Abdullahi Alh. Umaru Randali, and that has ran to Kardi Village, then we followed up and caught him. I held him on his trouser while Musa Yaro held him on his left hand we drew him to the bush."

When Musa Yaro passed judgment, Mohammed Sani matcheted him and Usman Kaza also matcheted him with the same cutlass. Then Abdullah fell down, and Mohammed Dan Shalla used his knife and slaughtered him. Then we all dispersed. That's all my statement."

It is manifest in the statements of the 3rd, 4th, 5th and 6th accused persons and the evidence of P.W.5 that it was the appellant who encouraged all the other accused persons to kill the deceased by rehearsing to them extracts from the Holy Quran to the effect that whoever insulted the Holy Prophet Mohammed [S.A.W.] deserved to be killed.

The case made against the apparent 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

statements or comments which were considered insulting to Prophet Mohammed (S.A.W.). The exact comments or remarks said to have been made by the deceased were not stated or given in evidence. The appellant read to the other accused persons a portion of the Holy Quran where the death penalty is prescribed for any one who insulted Prophet Mohammed (S.A.W) in the manner the deceased was said to have done. The appellant and the other accused person thus accepted that they had the duty to put the deceased to death in effectuating what is written in the Holy Quran. They accordingly slaughtered the deceased by slicing his throat.

The trial judge in his judgment at page 66 to 67 of the record in explaining the role played by the appellant said:

"The allegation against the 1st accused is that he was the one who went round at Kardi informing others that the Prophet was insulted at Randali. He also took part in going to Randali for investigation. He also took part in searching and arresting the deceased at Kardi. He took part in going to the house of the village Head to inform him what was going on and the decision to ill the deceased. He was the person who read from the Risala thereby authorizing the killing of the deceased. As a result the deceased was killed. This is supported by the evidence of PWS' 2, 5, 6 and the voluntary statement of the accused as in Exhibit J. This is a conclusive evidence, it is unchallenged and uncontradicted sufficient in prove of the charge of Criminal Conspiracy against the 1st accused person."

And at pages 68 - 69 of the record, the trial judge said:

"From the above, it is evident that there is direct, evidence of conspiracy against all the accused persons as in their voluntary statements and the testimony of PW2 who told the Court how the accused persons confronted him and even threatened to kill him place (sic) of the deceased at the earliest stage. Furthermore the circumstances of this case are inferable to the only conclusion that the accused persons conspired to kill the deceased. In the case of Onochie v. The Republic (1966) 1 All N.L.R. 86 it was held that the proof of conspiracy can even be inferred from the circumstances of a case.

Furthermore, it should be made clear that once the Prosecution succeed in proving the existence of conspiracy, as in this case at hand,

evidence admissible against one Conspirator is also admissible against the other. See the cases of Oyediran v. The Republic (1967) NWLR 122; Erin v. The State (1994) 6 SCNJ 104, 106 and Muminu v. The State (1975) 6 S.C. 79.

Thus in the present case the only inference one can draw from the testimony of PWS 2, 5 and 6 and the voluntary statements of the accused persons in Exhibits E, F, G, H, J and K is that the 1st, 2nd, 3rd, 4th, 5th and 6th accused persons conspired and killed Abdullah Alh. Umaru.

I shall then consider the charge of abatement preferred against the 1st, 2nd, 4th and 6th accused persons.

The evidence in this respect against the 1st accused person is that after the deceased was arrested and detained at the outskirts of Kardi near the burial ground, he went along with the 2nd and 4th accused persons to the house of the Village Head to inform him about happenings and on their return to the scene of crime, he was the person who read from the Risala thereby authorizing the killing of the deceased. This fact is contained in the testimony of PWS 2, 5 and the voluntary statement of the accused as in Exhibit J. I am therefore satisfied that the act of the accused facilitate the killing of the deceased.”

And finally at pages 73 - 75 of the record, the trial judge conclude “I observed that the 1st, 2nd and 4th accused persons were not shown to have used any physical assault against the deceased but there is unchallenged and uncontradicted evidence as I already found under the charge of Criminal Conspiracy that the accused persons were joint actors. In such a situation the law is that it is same as if each of them had done the act directly leading to the death of Abdullah Alh. Umaru individually. Each of them is not only liable for his own acts but also for the sum of the acts of his fellow conspirators in furtherance of their common intention; actual presence together with their conduct means participation in the offence. The accused persons were present at the scene not as mere on lookers but with the purpose of ensuring that Abdullah Alh. Umaru was killed. See the cases of Nyam v. The State (1964) 1 ALL NLR 361 and Buje v. The State (1991) 4 NWLR (Part 185) page 287 at 298-304.

I am therefore satisfied that the 1st, 2nd and 4th accused persons were

equally guilty under *Section 22(a) of the Penal Code*. I found that the act of accused persons was done with the intention of causing the death of the deceased.

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 accuseds (sic) 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 *Philip Ekpenyong v. The State (1991) 6 NWLR (Part 200) page 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.”

Now, in the appeal to the court below, the accused persons in the trial court, of whom the appellant was one, formulated only one issue for determination and that issue reads:

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

Could it now be said that the court below was in error to have considered whether or not on the evidence available before the trial court the defences of provocation or justification were available to the appellant as contended before us by appellant’s counsel?

In attending to this issue, it is apposite to relate the submission by appellant’s counsel before us to his submission before the court below. At page 12 of appellant’s brief before us, counsel argued thus:

“4:23 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 appeal was eventually dismissed.

4:24 We submit that it is the law that where the court raise an issue 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

4:25 We further submit that because the learned Justices of 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 counsel in his brief of argument before the Court of Appeal, it is tantamount to breaching the fundamental 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.

4:26 We accordingly urge my lords to resolve issue Number 2 (two) in our favour also, especially the Appellant who is now prosecuting his appeal with out consolidation of the same with any other Appellant.”

In the argument of counsel for the appellant before the court below, he submitted 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 a retaliation for allegedly insulting Holy Prophet Mohammed. In this respect, reference must be made to the voluntary statement of the Appellant as contained in pages 26-31 of the record. The said voluntary statements of the Appellant both in Hausa Language and its English translation were admitted in Evidence as Exhibits J and J1 respectively - See page 53 of the record. In addition, 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.

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 J and J1, 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; Ekpenyong 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.”

It was in response to the argument of appellant’s counsel that the court below considered whether or not the defences of provocation and justification which the trial court had not considered were available to the appellant. The court below at pages 118 - 120 of the record observed:

“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) 529; R. V. Bio (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 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 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 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 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 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). Even if he was giving the appellants a free legal aid or service he is required to do better than merely mentioning tacitly and generally about the defences available to the said appellants in his summing up (or final address - See pages 60 and 61 of the record of proceedings. I therefore agree with and accept the submission in the respondents brief on the point that the defences available or open to the accused person in a criminal trial which the trial court is bound to consider must be based or founded on material pieces of evidence from the record rather than on their being formulated in the counsels address or in the brief of arguments and in a very shallow manner making them to appear as an after thought as done by the appellants in the instant case - See *Oladipupo v. The State* (supra); *Asanya v. The State* (1991)3 NWLR (pt. 180) 422 at 465. *Ekpenyong v. State* (supra) at p. 525 of the report."

The above extract of the judgment of the court below clearly demonstrates that it was the view of the court below that the evidence before the trial court did not necessitate a consideration of the defences of provocation and justification. I am of the firm view that the court below was right in its views. There was plainly no material before the trial court to enable it proceed to consider the defences of provocation or justification. The appellant never called any evidence to show the exact words or acts which the deceased had uttered or done as to provoke the appellant and other accused persons into the killing him. Whether or not the appellant and the other accused persons were provoked into the act of taking the life of the deceased was a matter to be determined by a consideration of the nature of the annoyance given to the appellant and the others. This however could not be done without a knowledge of what the

deceased had said or done. This was what the court below stressed in its judgment at page 124 - 125 of the record where 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 (SAW). 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 groups and upon hearing the rumour took it upon themselves to go in search of the deceased who was alleged to have insulted the Holy Prophet (SAW). 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.”

It is obvious that the appellant's 2nd issue is misconceived as it was appellant's counsel himself who in his brief argued the defences of provocation and justification to which the court below reacted in its judgment. It is therefore, wrong to argue that the court below considered these defences without granting the appellant a hearing on the point.

I have given a very anxious consideration to the two issues raised by the appellant for determination in this appeal. Both must be decided against the appellant. The evidence against the appellant

went unchallenged. More than that however is the admission by the appellant that he was the one who read to the other accused persons the portion of the Holy Quran that any one who insulted the Holy Prophet Mohammed (S.A.W.) ought to be killed without at the same time stating how and in what manner the deceased had insulted the Holy Prophet Mohammed (S.A.W.).

In any case, even if it is assumed that indeed the deceased had in some way committed the act ascribed to him, was it open to the appellant and the other accused persons to constitute themselves into a court of law pronouncing a sentence of death on another citizen?

The facts of this case are rather chilling and leave one wondering why the appellant and others with him committed this dastardly act. It cannot escape notice that the victim of their reckless and irresponsible behaviour is another Moslem, an Alhaji. I am greatly pained by this occurrence.

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

ONU JSC

This is an appeal against the judgment of the Court of Appeal, Kaduna Judicial Division, which on 10th day of December, 2003 dismissed the appellant's appeal by affirming the conviction and death sentence passed on him by the High Court of Justice, Birnin Kebbi (per Ambursa, J.) dated 24th day of February, 2000.

The facts of this case have been so admirably set out in the leading judgment of my learned brother just delivered, that I do not deem it necessary to review same herein.

The issues formulated as arising for our determination in the appeal herein which clearly overlap the Respondent's two issues, are:

1. Whether the learned justices of the Court of Appeal ought to confirm the conviction and sentences of the trial court. (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* (Ground 3 of the grounds of Appeal).

I will now consider issues 1 and 2 briefly hereunder by adopting the Respondent's issues as guideline thus:

Issue 1

Whether the learned justices of the Court of Appeal ought to confirm the conviction and sentences of the trial court.

It has been submitted on behalf of the Appellant that the learned justices of the court below ought not to have confirm the conviction and sentence of the trial court which they did.

It is also submitted on behalf of the Appellant that his (Appellant's) statement at pages 29 - 31 of the record cannot qualify as a confessional statement, adding that Appellant had contended that he did not kill the deceased and that the reading of the Holy Qur'an he did was not the cause of the death of the deceased.

It is the contention on behalf of the Respondent that the statement of the Appellant at pages 29-31 of the record is a confessional statement vide Section 27 of the Evidence Act which provides:

"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime" (Underlining is for emphasis).

The Appellant after hearing the rumour that the deceased uttered insulting words against the Holy Prophet from Usman Kaza, he went for confirmation where he stated thus: -

"....After Usman Kaza told me this, myself and Abdullahi Sallah and Usman Kaza we left from Kandi that is our village to Randali village where the incident happened to confirm if it is true....."

Continuing, Appellant said:

".....When we reached the house of Abdullahi Alh. Umaru (the deceased) who insulted the Prophet Mohammed, from there Mamman Dambu used his touch-light (sic) in the house of Abdullahi Alh. Umaru. Then from there we do not see him....." See pages 29 - 30 of the record.

The Appellant, it was contended, declined to accept the advice of the village head when he reported the matter to him and suggested bringing the deceased to him when arrested; adding that after the arrest of the deceased, he assigned some one to get hold of him for him. However, the Appellant advised that before they killed the deceased they should inform the village Head, a suggestion to which they all agreed. He added that when he brought the suggestion, he along with Abdullahi Adah and one Usman Kaza, went to the village head to explain to him but who in turn did not say anything in reply.

Where upon, the Appellant passed the death penalty on the deceased and it was thereafter that the deceased was killed. It was then submitted that the only inference to be drawn from Exhibit J and J1 is that Appellant committed the offence on the authorities of *Section 7 of the Evidence Act* and the case of *Ubierho v. The State (2005) 1 NCC 146*.

It was further submitted that assuming that Exhibits J and J1 as well as their contents do not amount to a confession, there is enough evidence in the record to convict the Appellant. Besides, neither the Appellant nor his counsel has complained of failure to adduce evidence. Thus, the provision of *Section 45 of the Penal Code* cannot avail the Appellant as he cannot establish any of the circumstances under which he will enjoy the protection thereof.

That section provides:

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

Issue No.2

This issue asks whether the learned Justices of the Court of Appeal were right in raising the issue of justification and provocation without affording the parties the right to be heard on the said issue raised *suo motu*.

I am in agreement with Respondent’s submission that the lone issue before the lower court which reads:

“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?”

Is very clear that it related to all the defences available from the record and the Appellant in his Brief of Argument at pages 85 - 90 of the record, canvassed all its argument on the defences of justification and provocation and also on the same in Respondent's Brief of Argument at pages 94 -99 of the record. B

I entirely agree with the Respondent's submission that the court below did not raise any issue *suo motu* as argued by the Appellant.

Should this court overrule the above submission by the Respondent, it is submitted on its behalf that the court below has power to evaluate the evidence in the record and do what it considers just in the circumstances vide *Order 1 Rule 19 (4) of the Court of Appeal Rules, 2002* which reads: C

"The powers of the court under the foregoing provisions 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 of the court below or by any particular party to the proceedings in the court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice and the court may make any order, on such terms as the court thinks just to ensure the determination on the merits of the real question in controversy between the parties." D E

I agree with the Respondent that beside the above powers, the court below has power to make any finding which ought to be arrived at by the trial court based upon the evidence available in the record. See *Order 1 Rule 19(3) of the Court of Appeal Rules* (ibid). F

For these reasons and the more comprehensive ones contained in the leading judgment of my learned brother Oguntade, J.S.C. I too, dismiss this appeal as lacking in merit. G

MUKHTARJSC

H

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.

B **ONNOGHENJSC**

I have had the opportunity of reading in draft the lead judgment of my learned brother Oguntade, J.S.C. just delivered. I agree with his reasoning and conclusion that the appeal has no merit and should be dismissed.

C I therefore dismiss the appeal.

MUHAMMADJSC

D My learned brother Oguntade, J.S.C. graciously permitted me to read in draft the judgment just delivered. I am in agreement with his reasoning and conclusions that the appeal fails. I too dismiss it and affirm the judgment of the two Courts below.

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