

SUPREME COURT OF NIGERIA
15TH FEBRUARY, 2008. SC. 212/2004
CORAM:- N. TOBI, S. A. AKINTAN, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH, JJSC

USMAN KAZA APPELLANT
V.	
THE STATE RESPONDENT

CRIMINAL LAW - Conspiracy - Penal Code ss. 96 & 97 - What prosecution must prove - Include agreement to commit illegal act - Which can be inferred from circumstantial evidence - Ignorance of the law is no excuse (H1)

CRIMINAL LAW - Abetment - Penal Code s. 85 - To secure conviction - Prosecution must establish that accused abetted the offence - Which was committed in consequence of the abetment (H2)

CRIMINAL LAW - Conspiracy and abetment - Distinction between the two offences - They have different ingredients - Prior agreement is not necessary in the case of abetment - A secondary party like appellant - Was rightly convicted in this case as a principal offender (H3)

CRIMINAL LAW - Culpable homicide punishable with death - Penal Code s. 221(a) - Elements prosecution is to establish beyond reasonable doubt - Include acting with intention of causing death (H4)

CRIMINAL PROCEDURE - Confessional statement - That is voluntary, direct and positive - Was rightly relied upon by trial court - In convicting appellant for murder (H5)

EVIDENCE - Prosecution's case - Contradictions - How determined - Minor discrepancy in evidence as in this case - Is not tantamount to contradictions (H6)

CRIMINAL LAW - Defences - Justification - Does not avail appellant

- Conditions for its application - Include good faith - Believing the act is justified by law - Ignorance of the law - Does not procure justification (H7)

CRIMINAL LAW - Defences - Provocation - To avail accused he must show inter alia - Loss of self control, actual and reasonable - And proportionate degree of retaliation (H8)

CRIMINAL LAW - Defences - Provocation - Where insulting words uttered are not known - And they were not uttered to accused - Defence of provocation cannot be considered (H9)

FACTS

Before the Kebbi State High Court, appellant as 2nd accused was jointly arraigned with 5 other accused persons. They were charged with conspiracy, abetment and culpable homicide punishable with death. The deceased, one Alhaji Umaru, was vide a rumour alleged to have insulted the Holy Prophet Muhammad (SAW). Appellant together with some of the accused persons arrested the deceased. They reported the matter to their village head who said nothing. One of the accused persons read a portion of the Risala to the effect that whoever insults the Prophet should be punished with death.

The accused persons who played various roles jointly slaughtered the deceased with a machete. They all made confessional statements admitting commission of the crime. The trial court found them guilty as charged and sentenced them to death by hanging. Appellant's appeal to the Court of Appeal was dismissed. Being dissatisfied, he has further appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per **CHUKWUMA-ENEH JSC**)

Conspiracy - Penal Code ss. 96 & 97

1. Having rehearsed over and over again the parties' cases on this issue as presented in their respective briefs of argument on the backdrop of the evidence of the prosecution witnesses thereof, I see no reason for not upholding the respondent's submission that the prosecution has proved its case of offence of conspiracy as encompassed

under Section 96 of the Penal Code, against the appellant beyond reasonable doubt.

The import of the provisions of Section 96 supra, has been considered in a long line of cases including *Chianagu v. The State* (2002) 2 NWLR (pt.750) 225 at 236 para.A. These cases in summary establish that to secure the conviction of an accused on a charge of conspiracy it must be proved beyond reasonable doubt that:-

(1) The agreement to commit an offence - an illegal act is between two or more persons.

(2) That the said act apart from the agreement itself must be express in furtherance of the agreement.

However, authorities abound to the effect that agreements under Section 96 of the Penal Code, can be inferred from circumstantial evidence.

It is my view that in such circumstances as here the prosecution does not have to prove that the accused persons were acting in pursuance of a common design of a prearranged plan. It is inferable from the surrounding circumstances. My reasoning here certainly begs the question - What did the accused persons agree to do? Pertinently, this is so in that if what the appellant and the other accused persons agreed to do is, on the facts known to them, an unlawful act they are guilty of conspiracy and cannot excuse themselves by unfoundedly contending that owing to their ignorance of the law they did not realise as per their Religious persuasion that such act is a crime. I hold that the appellant is rightly convicted of the offence of conspiracy. (p. 832 H/840 A)

Abetment - Penal Code s. 85

2. On the offence of abetment - this is covered under Section 85 of the Penal Code, and it provides as follows:

"85. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Penal Code or by any other law for the time being in force for the punishment of such abetment, be punished with punishment provided for the offence."

The clear purport of the above provisions of Section 85 of the Penal Code is clear to the extent that to secure the conviction of an

accused person as the appellant here the prosecution has the responsibility to establish as follows:

- (1) That the accused abetted the offence
- (2) That the abetted offence was committed in consequence of the abetment (These stipulations flow naturally from the definition of abetment as per the foregoing provisions). (p. 840 D)

Conspiracy and abetment

3. For my part I must turn to examining this question by scrutinising the distinction between the offences of conspiracy and abetment as properly accentuated by the trial court in its judgment.

The exposition recognises the distinction between the persons otherwise known as principals in the first degree who actually did the criminal act and those other parties or co-confederates who are secondary parties present at and assisting in the commission of the felony, for example by keeping watch. And so conspiracy is distinguishable from abetment; the two offences have different ingredients, in the case of conspiracy, prior agreement is necessary, it is not so in abetment.

I have followed meticulously the evidence of P.W.2, P.W.5 and P.W.6 as per the record indicating that the appellant and his co-accused persons were present at and assisting in the commission of the offence of killing the deceased by slaughtering him. Although the appellant is apparently a secondary party to this crime according to the law he has been rightly convicted and punished as a principal offender (i.e. as the 3rd and 5th accused persons) who did the criminal act, and I so hold. (p. 841 E/842 A)

Culpable homicide punishable with death

4. I now turn to the offence of culpable homicide punishable with death under section 221 (a) of the Penal Code, which section provides as follows:

- "221 (a) Except in the circumstances mentioned in section 222 culpable homicide shall be punished with death
- (b) If the act by which the death is caused is done with the intention of causing death."

By the foregoing provision the prosecution is to establish the following elements beyond reasonable doubt to secure conviction to

wit;-

- (a) That there was a death of human being
- (b) That the death was caused by the act of the accused Person

son

(c) That the act of the accused person was done with intention of causing death. B

At the trial of the appellant and his co-confederates the evidence of P.W.2, P.W.3, P.W.4, P.W.5 and Exhibit D as per the prosecution witnesses as found by the trial court has established beyond reasonable doubt all the above ingredients of the offence of culpable homicide punishable with death to secure the conviction and sentence of the appellant by hanging. (p. 842 E) C

Confessional statement - That is voluntary

5. Reverting to the confessional statement of the appellant Exhibits K and K1, I agree with the submissions of the respondent and also the finding of the trial court that the confessional statement of the appellant as per Exhibits K and K1, has remained as proved by the prosecution positive, direct, voluntary and consistent confession as to the offences charged and that from the prosecution's case which the trial court rightly accepted that the appellant had every opportunity as well as all of his co-confederates to commit the offence of murder. There are factors external to Exhibits K and K1, I have showed herein in clear support of the trial court's reliance on Exhibit K and K1, to convict the appellant. And as held by the trial court I see no reason therefore, declining to act on appellant's confessional statement again, particularly when it has been endorsed by a superior police officer attesting to its voluntariness and was tendered at the trial without any objection. In regard to the appellant, Exhibit K and K1, have not been retracted. The confessional statement is so conclusive as to sustain by itself alone the conviction of the appellant. (p. 845 A) D
E
F
G

Prosecution's case - Contradictions

6. Respectfully, I think the appellant's complaints here amount to no more than a storm in the tea cup. I entirely agree with the respondent's statement of the law at paragraph 7.4 of the respondent's brief of argument on this question to the effect that H

"there can only be contradictory evidence where a piece of evidence contradicts another when it affirms the opposite of what that other evidence has stated not when there is just a minor discrepancy between them. Thus, for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to the case, it must be fundamental to the main issues before the court." See *Agbo v. The State*

I have more or less rehearsed the areas of contradictions as raised as per the appellant's brief of argument vis-a-vis the evidence of the prosecution's witnesses at the trial court and I find no such conflicts or contradictions but minor discrepancies or inconsistencies in the testimonies of PW.2 and PW.5 at the trial in terms of chronology or sequence of events. This is only natural in a case of this kind and they are as can be expected in human affairs. There is no merit on this question and I reject the insinuation. (p. 848 D)

CRIMINAL LAW - Defences - Justification

7. It is settled, that for an accused as the appellant here to avail himself of this defence he has to satisfy certain conditions as stipulated under Section 45 of the Penal Code, which reads 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 in doing it."

The conditions for the defence of justification to apply arising from the foregoing provisions are:

- (1) That the criminal act is justified by law
- (2) That the criminal act was done as a result of mistake of fact not mistake of law.
- (3) That the act was done in good faith believing same to be justified by law in doing it."

I hold the view that the appellant's claim to the defence of justification is wrong footed on the premises that he cannot excuse himself of this heinous crime by contending that owing to his ignorance of the law he did not realise that the act of killing the deceased on the peculiar facts of this matter is a crime. After all, entitlement to this defence has to be rooted in good faith, which is not the case here. (p.

849 C/G)

CRIMINAL LAW - Defences - Provocation

8. The appellant also has taken issue with the failure of the courts below to give due consideration to the defence of provocation. Section 221(1) of the Penal Code, has provided for this defence and it reads: B

"221(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 any other person by mistake or accident." C

Therefore, for the appellant or an accused person to avail himself of this defence he has to establish by evidence the following conditions to wit:

"(a) That the act of provocation is grave and sudden" D

(b) That accused lost self control, actual and reasonable

(c) The degree of retaliation by the accused person must be proportionate to the provocation offered. (p. 850 E)

Provocation - Where insulting words uttered are not known E

9. And in the absence of the exact insulting words uttered by the deceased about Prophet Mohammed, there can be no basis for considering the defence of provocation; it is even not clear to whom the insulting words were uttered certainly not to the appellant. He has not contended that the words were directed to him. I wonder if the defence of provocation could avail him on these facts. It cannot in this instance be taken in vacuo as it would tantamount to working on mere speculation and so, it is a non-starter. F

On the foregoing basis it is not possible to determine whether the defence avails the appellant. Therefore, it does not arise for consideration in this case whether the insulting words were even uttered to the appellant or could be sustained on mere rumour. Even more so, the provocative act as reported by the co-accused, Musa Yaro, the 1st accused, cannot in law be a ground for the appellant to kill the deceased, it is too far fetched to say the least. (p. 851 C) H

NOTABLE POINTS OF INTEREST**TOBI JSC***1. Conspiracy - Definition - Ingredients*

B Black's Law Dictionary defines conspiracy as a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in
C itself unlawful. See Black's Law Dictionary (Sixth edition) page 309.

This most comprehensive definition says it all. The bottom line of the offence is the execution of an unlawful purpose by an unlawful means.

D From the above, I sift the following ingredients of the offence of conspiracy:

- (i) There must be an agreement of two or more persons. In other words, there must be a meeting of two or more minds,
- (ii) The persons must plan to carry out an unlawful or illegal act, which is an offence.
- E (iii) Bare agreement to commit an offence is sufficient.
- (iv) An agreement to commit a civil wrong does not give rise to the offence, as section 97(1) of the Penal Code provides only for criminal conspiracy.
- F (v) One person cannot commit the offence of conspiracy because he cannot be convicted as a conspirator.
- (vi) A conspiracy is complete if there are acts on the part of an accused person which lead the trial court to the conclusion that he and others were engaged in accomplishing a common object or ob-
G jective. (p. 855 C)

2. Abetment - What prosecution must prove

I go to the offence of abetment. Abetment is an act of encouraging, inciting or aiding another. The verb variant "abet" means to encourage, incite or set another on to commit a crime. An abettor is an instigator, or setter on; one who promotes or procures a crime to be committed See Black's Law Dictionary (Sixth edition) page 5. Abet-
H ment is easier to prove than conspiracy because it entails or involves

more overt actions.

For an accused person to be convicted of abetment, under section 85 of the Penal Code, the prosecution must prove the following ingredients (i) That there was an encouragement, incitement, setting on, instigation, promotion or procurement of offence. (ii) Any of the above acts must be positive and unequivocal specifically addressed to the commission of the offence. (iii) The act abetted must be committed in consequence of the abetment. (iv) An accused person could be convicted of the offence of abetment on proof by the prosecution of any of the acts mentioned in (i) above. In other words, the acts mentioned in (i) above are in the alternative and not cumulative.

An encouragement here means an act of making someone to feel brave or confident enough to do something by giving active approval in support of the crime. Incitement also has the element of encouragement. By incitement, the person is provoked by a strong passion or feeling to commit an offence. The word "set" is a word of quite a number of synonyms. The two words "set on" connote the semblance of causing to attack or chase like one may say the fisherman prepared the bait to set on the fish. It also has the element of antagonism. An instigation, the act of instigating, means something happening by the action or conduct of a person, who is the starter. By the act of instigation, the co-accused is propelled or gingered to commit an offence. (p. 856 F)

3. Culpable homicide - Ingredients of the offence

The ingredients to the offence of culpable homicide punishable with death under the Penal Code are as follows: (a) the death of the victim, the deceased; (b) the death was a result of the act of the accused person; (c) that the accused knew that his act will result in death or did not care whether the death of the deceased will result from his act. As it is, the actus reus of the offence of culpable homicide punishable with death is the act of killing and the killing must be the deceased. If there is evidence that another person, not the particular deceased was killed, the accused will be discharged and acquitted. Of course, the death of the deceased must be directly traced or traceable to the act of the accused person. An accused person will not be convicted if the deceased died, not as a result of the act of the ac-

cused, but from any other way. Of the three ingredients, the third is the most difficult to determine. It is my view that trial Judges will use the objective test and not the subjective test in determining criminal responsibility or liability. And in considering the above ingredients the court will examine carefully the totality of the conduct of the accused and not acts of the deceased in isolation. (p. 857 E)

4. *Sharia law does not justify jungle justice*

Sharia is a stable jurisprudence built on the tenets of fair hearing. An accused person cannot, in principle, be convicted without being heard. And what is more, a hearing must be before a judicially recognised adjudicatory body, not a collective body of local persons out to do jungle justice; a kangaroo court. These are the points very correctly made by the Court of Appeal. Appellant and others paraded primitive and uncouth justice and meted same on the deceased clearly outside the rule of law. And so I entirely agree with the Court of Appeal that there was no justification for the killing of the deceased. (p. 861 B)

E 5. *Provocation defined and analyzed*

Provocation is an action or conduct which arises suddenly in the heat of anger. Such action or conduct is precipitated by resentment, rage or fury on the part of the accused person to the person that offered the provocation. Because of the anger, resentment, rage or fury, the accused person suddenly and temporarily loses his passion and self-control; a state of mind which results in the commission of the offence. There can hardly be provocation in respect of words or acts spoken or done in the absence of the accused. This is because words spoken or acts done in the absence of the accused will not precipitate any sudden anger, resentment, rage, or fury, as there is time for passions to cool. The very act of reportage of the words or acts of the accused should materially reduce or drown the anger, resentment, rage or fury of the accused. The test of provocation is objective, not subjective. It is the test of the reasonable man not the test of the particular accused. Therefore in the determination whether there was provocation, the court will consider whether a reasonable man in the street or situation of the accused would have been provoked to com-

mit the offence. There are no hard and fast rules for determining provocation. Each case will be determined in the light of the peculiar facts. The accused person must show that he killed the victim in the heat of passion caused by grave and sudden provocation on the part of the deceased and that there was no time for his passion to cool. A defence of provocation will not avail an accused person if there is evidence that there was a recess or a possible recess in the mind of the accused for passion to cool. Similarly, defence of provocation will not avail an accused if there is evidence of organised or premeditated vendetta. (p. 861 E)

MUHAMMAD JSC

6. Attitude of Supreme Court to fresh issues

It is to be noted that the appellate jurisdiction of the Supreme Court is inter alia, to review the decisions of the Court of Appeal. If therefore, an issue did not arise for the determination of the Court of Appeal, such an issue may not form the basis of an appeal to the Supreme Court. However, the Supreme Court will exercise its discretion to allow such fresh issue or question to be raised for the first time in that court if:-

- (i) It involves a substantial point of law substantive or procedural;
- (ii) All the facts in support of such new issue or question are before it and;
- (iii) A proper application for such issue or question to be raised is brought before that court.

It is my humble view that grounds 4 and 3 of the grounds of appeal from which issues 1 and 2 were formulated respectively, are incompetent. Consequent upon that I, thereby strike out grounds 4 and 3 and issues 1 and 2 and arguments in respect thereof of the appellant's issues being incompetent. (p. 869 E)

7. Defence of justification does not avail

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.

The above conditions will extend to situations where: (a) the accused acted in execution of the law; (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.

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. (p. 871 G)

8. Islamic law offers no defence of provocation

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. (p. 877 H)

9. Death penalty in Islamic law - How effected

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.

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. (p. 878 B)

10. Unauthorized killing in Sharia

The appellant in this appeal did not show to any of the courts that he had the requisite authority to take away the life of the deceased. He thus unlawfully deprived the deceased the opportunity to defend the allegations levelled 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 execute the deceased, flatly refused authority as he fully well knew that he was not the right authority to grant such a 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. B

I cannot see how these kind 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 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. (p. 879 E) D

REPRESENTATION

J. O. Adesina (Mrs.) with her Miss Ifayefum For the Appellant
I.K. Sanusi D.P. P. Ministry of Justice Kebbi State For the Respondent E

CASES REFERRED TO

Yakasi v. Nigeria Air Force (2002) 15 NWLR (pt. 790) 294 at 314 F
Shonde v. The State (2005) 12 NWLR (pt.939) 301 at 320
Obiakor v. The State NSCQR 972 at 930
Ahmed v. The State (1998) 1 AIR 71 at 72
Abacha v. The State (2002) 11 NSCQR 346 at 353 G
Upahor v. The State (2003) 6 NWLR (pt.816) 23 at 262
Idi v. Yau (2001)10 NWLR (pt. 722) 640 at 651 and 658
Onochie v. The Republic (1966) 1 ANLR 86
Mohan v. R (1967) 2 AELR 58
R v. Isa (1965) ANLR 68 H
Erik Uyo v. AIG Bendel State (1986) 1 NWLR 48
Lado v. The State (1999) 9 NWLR (pt.619) 369 at 381
Akalezi v. The State (1993) 2 NWLR (pt.273) 1 at 14

Ubani v. The State (2001) FWLR (pt.44) 483 at 490

Ekpenyong v. The State (1993) 5 NWLR (pt.295) 513 at 522

STATUTES REFERRED TO

Evidence Act s. 141

B Penal Code ss. 85, 96, 97(1) and 221(a)

BOOK REFERRED TO

Black's Law Dictionary (Sixth edition) page 5, 309.

C

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

This appeal is against the judgment of the Court of Appeal Kaduna Division, that is to say the Court below, delivered on 10/12/2003 which while dismissing the appellant's (Usman Kaza) appeal D affirmed his conviction and sentence by hanging passed on him (the appellant) by the trial court (Kebbi State High Court of Justice). In the trial court the appellant as the 2nd accused was jointly arraigned with 5 others for Criminal conspiracy, abetment and culpable homicide publishable with death under Sections 97, 85 and 221 (a) of the E Penal Code, respectively.

Being aggrieved by the decision of the court below the appellant finally has appealed to this court by a Notice of Appeal filed on 27/12/2007 wherein he has raised four grounds of appeal. In the F result the parties have filed and exchanged their briefs of argument in this matter. In the appellant's brief of argument three issues for determination have been distilled as follows:

- G *"(1) Whether the prosecution proved the case of conspiracy, abetment and murder against the appellant.*
(2) Whether mere presence at a scene of crime proof of actual participation in the commission of the crime.
(3) Whether the Defence of provocation and justification avail the appellant."

H The respondent in its brief of argument has adopted issues 1 and 3 of the appellant's issues for determination as the more proper and salient issues to resolve the appeal.

As the facts of this heinous crime are not in issue, I have culled the facts of the same as vividly and graphically set out in paras.2.1

and 2.2 of the respondent's brief of argument as follows:

"2.1. On the 14th day of July, 1999 a rumour was spread in Kardi and Randali villages of Birnin Kebbi Local Government Area of Kebbi State of Nigeria that one Abdullahi Alhaji Umaru of Randali village (the deceased) insulted the Holy Prophet Muhammad (S.A.W). In consequence thereof the appellant, together with co-accused, at the trial court who were both resident of Kardi, went to Randali in search of the deceased. The deceased was arrested on this account and taken to the outskirts of Kardi village near the village burial ground and kept in the custody of Suleiman Dan Ta Annabi (6th accused in the trial court) and Mohammed Sani (3rd accused in the trial court). In the interim, Musa Yaro (1st accused in the trial court) in conjunction with the appellant (2nd accused in the trial court) as well as Abdullahi Ada (the 4th accused at the trial court) went to Randali, the village of the deceased, in search of the deceased and clarification of whether the deceased uttered the insult or not after the arrest of the deceased they went to the house of the village head at Kardi to inform him that the deceased was caught and the prescribed death punishment of whoever insulted the Holy Prophet Muhammad (S.A.W.) would be carried out on him, Where upon the said village head did not say anything.

2.2 The appellant, Musa Yaro and Abdullahi Ada returned to the outskirts of the village where the deceased was held captive under the custody of Mohammed Sani and Suleiman Dan Ta Annabi. On getting to the place, Musa Yaro read a portion of the Risala to the effect that whoever insults the prophet should be punished with death. And following this recitation, Mohammed Sani (3rd accused at trial court) matcheted the deceased on the neck and also the appellant as a result of which the deceased fell down and was slaughtered by the neck with a knife by Abubakar Dan Shalla and the deceased died and thereafter the appellant and his co-accused at the trial dispersed from the scene."

At the trial, the prosecution called 8 witnesses including the brother of the deceased as P.W.3. In addition, the prosecution before the trial court tendered a total of 18 exhibits including particularly exhibits K and K 1 and being appellant's extra judicial statements to the police to show the appellant's involvement in the killing of the

deceased. The prosecution's case as can be gathered from the Record shows that the 1st accused gave the instruction to kill the deceased. The 3rd accused cut him down by the neck with a machet and the 5th accused slaughtered the deceased with a knife "like a goat" while being held to the ground by the 3rd and 6th accused. The 1st, 2nd, B 4th and 6th accused persons it is alleged abetted the commission of the crime in a manner that will become clearer soon. Be it noted that the appellant as the 2nd accused in line with the nature of the defence he opted for, before the trial court did not lead any evidence. C He rested his case on the prosecution's case.

On the issues for determination raised by the appellant herein vis-a-vis the background to the judgment of the court below, having gone over the same, I agree with the appellant's submissions that the four main pillars upon which the court below has predicated its reasoning for its decision are, firstly, that all the accused including the D appellant took part and participated in killing the deceased hence they are respectively convicted and sentence accordingly.

2. That the prosecution has led evidence to prove the essential ingredients of the offences for which the appellant and the co-accused were charged. E

3. That the prosecution's case has dispelled any availability of defences of provocation and justification to the appellant and other accused.

4. That the confessional and voluntary statements of the appellant and other accused to the police were neither denied nor retracted. F

The appellant has, as it were, joined issues with the respondent on these findings, as borne out by his four grounds of appeal and the G issues raised there from as per his brief of argument. I now proceed to deal, firstly with the appellant's case as per his brief of argument.

The appellant's case as per his brief of argument is that he went to the scene to witness what was going to happen to the deceased. He submits in this vein that it has not been showed that he used any H physical assault against the deceased as was the case with the 1st accused who as held by the trial court read the punishment from Risala; the 3rd accused who matcheted the deceased by the neck or the 5th accused who slaughtered the deceased with a knife. And that

on the totality of the evidence of the prosecution witnesses coupled with the extra judicial statement of the accused person and other Exhibits, the prosecution has not established a case of conspiracy, abetment and murder against the appellant beyond reasonable doubt. He submits that there is no basis therefore for his conviction by the trial court on the unproven charge for taking part in killing the deceased. He contends it is a grave error for the court below upholding the finding to the effect that "all the accused persons (including the appellant) herein took part and participated in the unfortunate incident that led to the gruesome murder or killing of the deceased" [Words in bracket supplied]. It is strongly contended that as regards the offence of conspiracy in particular the prosecution has failed to establish the existence of any previous agreement to kill the deceased in the face of irrefutable evidence that the accused persons came from different villages and so could not have formed the necessary common intention to ground a charge of conspiracy. Furthermore, that such agreement has to be express albeit to warrant relying on it to convict the appellant. As regards the offences of abetment and murder, it is argued that the prosecution has not proved conclusively either or both of them by evidence, that is to say, beyond reasonable doubt vis-a-vis the ingredients of these offences. The appellant has therefore relied on the cases of Yakasi v. Nigeria Air Force (2002) 15 NWLR (pt. 790) 294 at 314 paras. B-G, Shonde v. The State (2005) 12 NWLR (pt.939) 301 at 320 Paras. H-A for so submitting. The point is made that the appellant could not have conspired all by himself alone to kill the deceased and that the onus is on the prosecution to prove its case in any event against the appellant beyond reasonable doubt and not for the appellant to prove his innocence.

The appellant has claimed entitled on the available evidence before the court to the defences of provocation and justification which, it is urged should have been addressed even *more suo motu* by the courts below. In this respect it has been submitted that the blasphemy, that is, insulting words uttered by the deceased had provoked the appellant and other accused persons as the rumour made it rounds in the neighbourhood and the evident want of enough cooling time with regard to the appellant in the circumstances. It is broached on behalf the appellant the serious question of the contra-

dictory evidence of the prosecution witnesses which as contended by the appellant has thrown the prosecution's case asunder.

I must, however, observe that the appellant has not covered the offences of abetment and culpable homicide punishable with death as well as the defence of justification in his brief of argument. This
B summarises the appellant's case.

As can be seen the appellant's case put in a nutshell is one of total failure on the part of the prosecution to prove its case beyond reasonable doubt and that having, as it were, failed in that regard it
C tantamount to a miscarriage of justice for the trial court to convict and sentence the appellant for these offences and even moreso a grave error for the court below to uphold the said conviction and sentence. Because of the peculiar nature of this case I have taken great care in articulating the appellant's submissions thereof so ex-
D pansively on the three issues posed in this case.

The respondent on the other hand, on issues 1 has submitted that the inference to be drawn from the evidence of P.W.2, P.W.5 and P.W.6 shows that the appellant conspired with other co-accused to kill the deceased. The respondent also has reverted to extra judicial con-
E fessional statement of the appellant, that is, Exhibit K1 (English transaction) in which he has outlined his role in this heinous saga of an offence to support the contention that acting in concert with his co-confederates they killed the deceased.

On Issue 1 - that is, the offence of conspiracy under Section 97
F of the Penal Code, the respondent has submitted that the agreement to kill the deceased has to be inferred from circumstantial evidence of P.W.2, P.W.5, and P.W.6 as per the principle settled in *Obiakor v. The State* NSCQR 972 at 930 and *Ahmed v. The State* (1998) 1 AIR 71
G at 72. Furthermore, and rightly in my view, that the acts or omission of any of the conspirators done in furtherance of the common design are receivable in evidence against any other or others of the conspirators and that the appellant need not have inflicted physical assault on the deceased as propounded in the case of *Abacha v. The State* (2002) 11 NSCQR 346 at 353 to be a party to the offence of
H conspiracy. The appellant having spent a large chunk of its brief discussing this issue, I think, I should deal with it firstly.

Having rehearsed over and over again the parties' cases

on this issue as presented in their respective briefs of argument on the backdrop of the evidence of the prosecution witnesses thereof, I see no reason for not upholding the respondent's submission that the prosecution has proved its case of offence of conspiracy as encompassed under Section 96 of the Penal Code, against the appellant beyond reasonable doubt. Section 97, of the Penal Code, the punishment section of the offence of Criminal Conspiracy provides:

"97 (1) whoever is a party to a criminal conspiracy to commit an offence punishable with death or with imprisonment shall where no express provision is made in this Penal Code for the punishment of such conspiracy be punished in the same manner as if he had abetted such offence.

2. Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid D shall be punished with imprisonment for a term not exceeding six months or with a fine or with both."

Although Section 97 is the punishment section it is really section 96 that explicates the import of criminal conspiracy. It is Section 96 of the Penal Code that conceptualises the import of criminal conspiracy E and for case of reference it provides that:

"96 (1) when two or more persons agree to do or cause to be done

(a) an illegal act, or

(b) an act which is not illegal by illegal means, such an agreement is called a criminal conspiracy.

(2) Notwithstanding the provisions of subsection (1); no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done G by one or more parties to such agreement, or is merely incidental to that object."

The import of the provisions of Section 96 supra, has been considered in a long line of cases including Chianagu v. The State (2002) 2 NWLR (pt.750) 225 at 236 para A, Obiakor v. The State (2002) 10 NWLR (pt.776) 612 at 628 Upahor v. The State (2003) 6 NWLR (pt.816) 23 at 262 and Idi v. Yau (2001) 10 NWLR (pt. 722) 640 at 651 and 658. These cases in summary

establish that to secure the conviction of an accused on a charge of conspiracy it must be proved beyond reasonable doubt that:-

(1) The agreement to commit an offence - an illegal act is between two or more persons.

(2) That the said act apart from the agreement itself must he express in furtherance of the agreement.

However, authorities abound to the effect that agreements under Section 96 of the Penal Code, can be inferred from circumstantial evidence.

In this regard the evidence of P.W.2, P.W.5 and P.W.6 becomes very crucial bearing in mind that the appellant as the 2nd accused before the trial court rested his case on the prosecution's case. In this regard, I have to examine the evidence of P.W.2, P.W.5 and P.W.6 in relation to this question.

Firstly the P.W.2's testimony English Translation from Hausa as per the Record at page 42-44 runs thus: (male, Muslim, speaks Hausa, affirmed)

"My name is Aliyu Magga. I live at Randali village in Birnin Kebbi Local Government Area. I am a farmer. I know the 1st accused Musa Yaro, I know the 2nd accused, the 3rd accused, 5th accused and 6th accused very well. I also know one Abdullahi Umaru. He is now dead.

I returned to Randali around 3:00 am and was in my house when the 1st accused Musa Yaro, one Mamman Dambu Umaru Kaza (2nd accused), Abdullahi Ada (4th Accused), Suleiman Danta Aunabi (6th Accused) along with some other people whom I did not know woke me up and that I should come out as I am lucky because they would have killed me if they had not seen Abdullahi. When I came out, they asked me whether I knew exactly what Abdullahi said about the Prophet and I told them that I didn't know. I however asked them to go to the house of our village head and we went together. At the house of the village head, I called the attention of one Shehu Yalliya and Ustaz Mamman on what was happening. Then Ustaz Mamman read a verse from the Holy Quran and translated it in Hausa to the 1st accused and his group which included the other accused persons, that it is not their responsibility to punish a person who insults the Prophet but that it is only the authority that will punish him. The

accused persons led by the 1st accused were not satisfied with the explanation and they just went away towards Kardi village and I followed them. On getting to Danfili within Randali Market one Shehu Yanliyya asked me to go through the motor park so that I can find people who will go with me to Kardi in order to rescue Abdullahi even by force. I only got Baba Sambari and Abun Dambu and we proceeded together to Kardi. At then the accused persons and their remaining group members had proceeded to Kardi.

On reaching Kardi, near the burial ground we already met the late Abdullahi being held by Sule Dan ta Aunabi (6th accused) and Mohammed Sani (3rd accused) there were so many people around the scene. At then the 1st accused was not around. I went very close to where Abdullahi was being held and I saw one Abu Maigirgi and Adamu Aljani holding a spear and stick respectively. Ustaz Mamman, was also around and he repeated to the accused what he said at Randali that it is not their duty to punish Abdullahi. Then the 5th Accused, Dan Shalla, came and asked Ustaz Mamman, whether he too is not a Muslim. The 5th accused further asked whether Ustaz Mamman, was using a tape recorder to record what was happening. I used my torchlight and lit at the tape recorder and only then the 5th accused got satisfied that the recorder was not being used to record the happening.

As this was happening, Abu Dambu, came and told me that Abdullahi has been slaughtered. Then the accused persons and their group members started shouting (Allahu Akbar) God is great and moved away through a footpath into the town. I thought they were going away with Abdullahi and I asked Ustaz Mamman to follow them. But Abu Dambu repeated that we should go home because Abdullahi had been slaughtered. The incident happened between 3:00 am and 4:00 am. We proceeded to the exact place where Abdullahi was slaughtered and found his corpse close to the footpath near millet stalks dead slaughtered by the neck full of blood and we left him there and went back to Randali. There were more than 50 people at the scene of crime. I only identified those I mentioned because I know them very well and they cannot deny this fact."

As for P.W.5 his account of what happened as recorded by the police at p.51 of the record is as follows:

"My name is Atiku Dan Ayi. I live at Kardi village in Birnin Kebbi Local Government Area. I am a farmer. I know the 1st, 2nd, 3rd, 4th, 5th and 6th accused persons very well, I know one Abdullahi Alh. Umaru. He is now dead. 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 out skirt 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 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. We too left the corpse and went home."

PW.6 in his testimony at p.52 of the record (a translation of his Hausa testimony) runs thus:

"My name is Faruk Suleiman. I am a farmer. I live at Kardi village. I know the 1st, 2nd; 3rd, 4th, 5th and 6th accused persons. I know Abdullahi Alh. Umaru. He is now dead. I know about the death of Abdullahi because I was in my room when Muhammadu Auwal and Muhammadu Bello, came and told me that somebody from Randali insulted the Prophet (SAW). Myself and my friend went to the Eastern part of Kardi where we met a group of people from Randali standing while the person who was accused of insulting the Prophet was being held apart. I looked and found out that it was

Abdullahi Alh. Umaru who was being held by the 3rd and 6th accused persons. I remained there until Abdullahi was killed by the accused persons and people dispersed. That's all."

The appellant in his confessional statement at p.35 of the record being English translation of his Hausa statement to the police states:

"I could remember on 14/07/99 at about 0100hrs, we were sleeping where we normally gathered and lying in one place, every night. After eating my dinner, I later went to my house and drop the plate, then Musa Yaro, came and meet me and told me that somebody named Abdullahi, abuse Prophet Mohammed 'S.A.W.', there myself Musa Yaro, left and meet Abdullahi Danada, there we decided to proceed to Randali Village and meet Garba Soja, on reaching, Musa Yaro, asked Garba Soja that we heard one Abdullahi Alh. Umaru, abused Prophet Mohammed 'S.A.W.', then Garba Soja, confirmed to Musa Yaro, really late Abdullah Alh. Umar did abused Prophet Mohammed (SAW) there we proceeded to Wakilin Sarki of Randali named Shehu Dan Yau. on reaching to Shehu Dan Yau, Musa Yaro, asked him is it true that Abdullahi Alh. Umaru abused Prophet Mohammed 'S.A.W.' he said yes it is true, which I was not told the time of abuse the late did, but Shehu Dan Yau wanted to tell us the type of the abuse the late made, but Musa Yaro, ask him not to tell us. It was there Shehu Dan Yau, told us that he has already send 20 people to go and search for the boy and arrest him and brought to him, then we decided to come back to our village Kardi, on our way back home, we meet with some of our Village boys on the road who told us that the boy have been arrested that is Abdullahi Alh. Umaru, inside Kardi Township, we proceeded to the place, on reaching there the late Abdullahi Alh. Umaru alive, while the following persons surrounded him. (1) Kalli Musa (2) Adamu Aljani (3) Shehu Danbega (4) Dan Bala Matar Kura (5) Abubakar Dan Shallah and (6) Sani Aci B/Kebbi from there I and Musa Yaro and Abdullahi Danada, went to the Village Head of Kardi. Then Musa Yaro, asked the Village Head whether he is aware of what is happening? The Village Head replied him no, there Musa Yaro, told the village Head that there is a boy of Randali who abuse Prophet Mohammed 'SAW', then the Village Head asked Musa Yaro what is the next line of action? Musa Yaro, told the Village Head that whoever abused Prophet

Mohammed 'S.A.W.', God said he should be killed. Then the Village Head said should do mercy on us. We then returned back to where Abdullahi Alh. Umaru is arrested, before we could reach those people who arrested him took him to the bush on reaching the bush, then Musa Yaro, read a word from the Qu'ran saying 'Masabba Rasullilahi Kutoilla, that is to say whoever abuse Prophet Mohammed "SAW", Islamic Law says he should be killed. Immediately Musa Yaro said this one Sani Aci B/Kebbi, macheted the said Abdullahi Alh. Umaru with cutlass, he fell down, then when he fell down Abubukar Dan Shallah, slaughtered the boy with a knife as we were there he Musa Yaro, was in possession of an iron stick while I was with torchlight. That is all I have to state."

The trial court in its review and findings on the prosecution's case against the appellant vis-a-vis the charge of conspiracy at p.67 LL6-14 stated thus:

"In the case of the 2nd accused person the evidence against him is that he was among the group that went to Randali on inquiry and subsequently returned to Kardi in search of the deceased. After the deceased was arrested he was also among the people who came to the house of the Village Head of Kardi to inform him what was going on. He was further among the group that come (sic) back to the place where the deceased was being held and remained there until the deceased was killed. This is supported by the testimony of P.W.s 2, 5 and 6 and the voluntary statement of the accused himself as in Exhibit K. This evidence too is uncontradicted and unchallenged. I am therefore satisfied that the 2nd accused took part in the conspiracy to kill the deceased."

Concluding this aspect of its review and findings of the prosecution's case of the 1st to 6th accused persons i.e. including the instant appellant the trial court from the third paragraph at p.68 of the record rightly in my view held that:

"From the above, it is evident that there is direct evidence of conspiracy against all the accused persons as in their voluntary statement and testimony of P.W.,2 who told the court how the accused persons confronted him and even threatened to kill him in place 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 ANLR 86, it was held that the proof of conspiracy can even be inferred from the circumstance of a case."

The court below on the other hand in agreeing with the foregoing abstract has observed at p.117 of LL5-16, thus:

".... it is not in dispute that all the appellants took part and participated in the unfortunate incident that led to the gruesome murder or killing of the deceased by name Abdullahi Alhaji Umaru, for the alleged (but unproven) use of abusive, defaming or insulting words against the Holy Prophet Mohammed (SAW). The prosecution has led evidence to prove the essential ingredients of the offences for which the appellants were charged including their confessional and voluntary statements to the Police which was neither denied nor retracted from by the said appellants. It is also to be noted as rightly pointed 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 chosed (sic) not give or call any evidence for their defence."

The foregoing findings cannot be faulted or flawed as the sole issue taken before the court below by the appellant ranged on whether the appellant suffered any miscarriage of justice when the trial court refused to consider possible several defences open to the appellant and his co-confederates. In this court the instant appellant has reopened all the questions dealt with at trial court in addition to the sole issue in the Court below. This act of chopping and changing a party's case at every stage of the hierarchy of the courts as here has been frowned upon and roundly condemned in the case of Jumbo v. Bryanko Internationals Ltd (1995) 6 NWLR (pt.403) 545 at 555-6. I have ignored this anomaly, as this is a murder case.

The findings of both courts below as stated above, I must again emphasize, are unimpeachable. It certainly cannot be contested on the facts of this case that the fatal act, that is to say, the heinous act of slaughtering the deceased like a goat by the 5th accused person and even before then hacking him (the deceased) down with a machet by the 3rd accused person with the common intention of causing him grievous bodily harm and kill him are outside the scope or tacit agreement of the accused persons to kill the deceased albeit in furtherance of their common intention to kill him for insulting the Prophet

Mohammed. Again, it is an unchallenged fact that the appellant was present at and aiding and abetting the others of them including the 3rd and 5th accused persons particularly in the execution of the gruesome slaughtering of the deceased. **It is my view that in such circumstances as here the prosecution does not have to prove that the accused persons were acting in pursuance of a common design of a prearranged plan. It is inferable from the surrounding circumstances. My reasoning here certainly begs the question - What did the accused persons agree to do? Pertinently, this is so in that if what the appellant and the other accused persons agreed to do is, on the facts known to them, an unlawful act they are guilty of conspiracy and cannot excuse themselves by unfoundedly contending that owing to their ignorance of the law they did not realise as per their Religious persuasion that such act is a crime.** I have here anticipated appellant's claim to the defence of justification. I shall return to it later. All the same, **I hold that the appellant is rightly convicted of the offence of conspiracy.**

On the offence of abetment - this is covered under Section 85 of the Penal Code and it provides as follows:

"85. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Penal Code or by any other law for the time being in force for the punishment of such abetment, be punished with punishment provided for the offence."

The clear purport of the above provisions of Section 85 of the Penal Code, is clear to the extent that to secure the conviction of an accused person as the appellant here the prosecution has the responsibility to establish as follows:

(1) That the accused abetted the offence

(2) That the abetted offence was committed in consequence of the abetment (These stipulations flow naturally from the definition of abetment as per the foregoing provisions)

I have set out in extenso the evidence of P.W.2, P.W.5 and P.W.6 herein in so far as they are relevant to establish this offence and I shall revert to them anon. The trial court at p.69 LL 16-25 of the record has found as regards this offence as follows:

"In respect of the 2nd and 4th accused persons, it is in evidence that after the arrest of the deceased, they ordered for his detention until their return. It is also in evidence that they told the Village Head of Kardi what was to happen to the deceased and acted as strong supporters of the 1st accused following him closely. It was when they came to (sic) scene of crime that the deceased was callously killed. The acts of the 2nd and 4th accused persons were supported by the voluntary statement of the accused persons in Exhibits K and F respectively and the testimony of PW.2. I am in agreement with the learned counsel for the prosecution that the ups and downs and final arrest of the deceased by the accused persons facilitated his killing. I am satisfied that the prosecution have proved beyond reasonable doubt the charge of abatement (sic) against the 2nd and 4th accused persons."

This finding cannot be faulted as it has brought to the fore the complicity and indeed the liability of the appellant for aiding and abetting the commission of the heinous crime. The court below as per the record has not adverted to nor made any specific findings on this question apart from its overview of the offences for which the appellant was charged as per my excerpt above i.e. as per p.117 LL5-16 of the record. As I observed herein this question has not been raised as an issue for determination before the court below hence it did not consider it.

For my part I must turn to examining this question by scrutinising the distinction between the offences of conspiracy and abetment as properly accentuated by the trial court in its judgment at p.66 LL13-22 of the record where it said thus:

"I am of the view that from the nature of the provisions of Section 85 and 97 of the Penal Code the two provisions are distinct. Conspiracy is distinguished from abatement (sic) in that the crime consists of simply in the agreement or confederacy to do some act, no matter whether it is done or not. In the other (i.e. abatement) (sic) the intention to do a criminal act is not a crime itself until something is done amounting to do or attempting to do some act to carry out the intention. More so the offence of abatement (sic) deals only with offenders who may be described as accessories before the fact and at the fact. Abattors (sic) must have committed acts or omissions

which must take place in pursuance of the conspiracy. I therefore find the two charges as framed by the prosecutions are distinct."

This is a correct statement of the law on the distinction between conspiracy vis-a-vis abetment and I uphold it. **The exposition recognises the distinction between the persons otherwise known as principals in the first degree who actually did the criminal act and those other parties or co-confederates who are secondary parties present at and assisting in the commission of the felony, for example by keeping watch. And so conspiracy is distinguishable from abetment; the two offences have different ingredients, in the case of conspiracy, prior agreement is necessary, it is not so in abetment.** See Mohan v. R (1967) 2 AELR 58.

I have followed meticulously the evidence of PW.2, PW.5 and PW.6 as per the record indicating that the appellant and his co-accused persons were present at and assisting in the commission of the offence of killing the deceased by slaughtering him. Although the appellant is apparently a secondary party to this crime according to the law he has been rightly convicted and punished as a principal offender (i.e. as the 3rd and 5th accused persons) who did the criminal act, and I so hold.

I now turn to the offence of culpable homicide punishable with death under section 221 (a) of the Penal Code, which section provides as follows:

"221 (a) Except in the circumstances mentioned in section 222 culpable homicide shall be punished with death

(b) If the act by which the death is caused is done with the intention of causing death."

By the foregoing provision the prosecution is to establish the following elements beyond reasonable doubt to secure conviction to wit:-

(a) That there was a death of human being
(b) That the death was caused by the act of the accused Person

(c) That the act of the accused person was done with intention of causing death.

At the trial of the appellant and his co-confederates the evidence of PW.2, PW.3, PW.4, PW.5 and Exhibit D as per the prosecution witnesses as found by the trial court has established beyond reasonable doubt all the above ingredients of the offence of culpable homicide punishable with death to secure the conviction and sentence of the appellant by hanging. B

On the first element the prosecution has proved the death of the deceased being i.e. Abdullahi Alhaji Umaru, PW.3, a brother to the deceased testified to the effect that he came to Kardi village and found the corpse of his brother who had been slaughtered. PW.2, PW.4, PW.5 and PW.6, all testified that the deceased was severely beaten and matcheted by the neck and eventually slaughtered to death by cutting his throat. This gruesome and chilling account of this callous murder was further corroborated by Exhibit D - the medical report and Exhibits E, El, E2, E3, F, Fl, G, G1, H, H1, J and J1 and exhibits K and K1 in particular that is, the extra judicial statements of the accused person confessing to the crime. C D

On the 2nd element - as rightly found by the trial court, it was the appellant and other accused persons who killed the deceased. I have expatiated on this aspect of the crime above and I need not even then flog that aspect of the case any further see: R v. Isa (1965) ANLR 68 and Erik Uyo v. AIG Bendel State (1986) 1 NWLR 48. E

The appellant as the 2nd accused person made a confessional statement, Exhibits K and K1 so also did other accused persons charged along with the appellant - this was corroborated in every material particular by the testimonies of PW.2, PW.5 and PW.6 and Exhibit D. Exhibit D, has described the injuries inflicted on the deceased thus: "... severe signs of violence around the neck cutting all the blood vessels around the neck and the air way thereby resulting in the death of the deceased on the spot." There can be no doubt that the conviction of the appellant and 5 other accused persons for causing the death of the deceased is well grounded. See Bwashi v. The State (1972) 6 SC 93, Kan Dan Adamu v. Kano N.A. (1956) 1 FSC25. F G H

On the 3rd ingredient i.e. whether the act was done with intention of causing death. All the accused persons it is agreed were present at the scene of the crime and each of them including the

appellant assisted in the commission of the offence of slaughtering the deceased. The evidence as per the record has acknowledged signs of violence around the neck region of the deceased, cutting of all the blood vessels and the air ways as per Exhibit D. The murder weapons, that is to say, the matchet and the knife, Exhibit A, used by the 3rd and 5th accused persons respectively are no toys. These are dangerous weapons that can cause grievous bodily harm and as they did here. P.W.3 has testified as to how the deceased was cut with a matchet by the 3rd accused who struck him down by the neck with a matchet and slaughtered by the 5th accused with a knife while the other accused persons including the appellants abetted the crime. The accused persons including the appellant intended not only to cause the deceased grievous bodily harm but to kill him. See *George v. The State* (1993) 6 SCNJ 249 at 257. From all accounts of this matter the appellant and his co-confederates must have intended the consequences of their act and must take the consequences. As for the appellant, the 1st and 4th accused persons the prosecution's case has showed them not to have used any physical assault against the deceased. The trial court nonetheless and rightly for that matter found conclusively that all accused persons i.e. 1st to the 6th were joint actors i.e. participates in criminis. In discussing their complicity and liability in this matter the law is settled that where persons have embarked on a joint enterprise, each is liable criminally for the act done in pursuance of the joint enterprise and even including unusual consequences arising from the execution of the joint enterprise see *R v. Anderson and Morris* (1966) 2 AER 644; *Nyam v. The State* (1964) 1 ANLR 361 and *Buje v. The State* (1991) 4 NWLR (pt.403) 287 at 298-304. It is clear that right from the outset of this despicable saga that the appellant and the other accused persons left Kardi village with the avowed intention apparently fired by the unproven rumour that Abdulahi Alhaji Umaru had insulted Prophet Mohammed to put the deceased to death.

The trial court therefore, rightly in my view held thus: "at p.74 LL1-3: *"I am therefore satisfied that 1st, 2nd and 4th accused persons (including the appellant) were equally guilty under section 221(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."* (Words in

bracket supplied) And I agree and also so hold."

Reverting to the confessional statement of the appellant Exhibits K and K1, I agree with the submissions of the respondent and also the finding of the trial court that the confessional statement of the appellant as per Exhibits K and K1, has remained as proved by the prosecution positive, direct, voluntary and consistent confession as to the offences charged and that from the prosecution's case which the trial court rightly accepted that the appellant had every opportunity as well as all of his co-confederates to commit the offence of murder, see: Kanu v. The State (1952) 14 WACA 30 at 32. There are factors external to Exhibits K and K1, I have showed herein in clear support of the trial court's reliance on Exhibit K and K1, to convict the appellant. And as held by the trial court, I see no reason therefore, declining to act on appellant's confessional statement again, particularly when it has been endorsed by a superior police officer attesting to its voluntariness and was tendered at the trial without any objection. In regard to the appellant, Exhibit K and K1, have not been retracted. The confessional statement is so conclusive as to sustain by itself alone the conviction of the appellant.

The appellant has raised questions of contradictions in the testimonies of the prosecution's witnesses as regards 2nd, 5th and 6th witnesses so much so that I cannot gloss over it. He has dwelt passionately on p.w.2's evidence as per Exhibit C and his oral testimony before the trial court. Exhibit C, the critical exhibit in this regard, for case of reference reads as follows:

"I of the above given name and address wish to state that: on Wednesday 14/7/99, at about 2000 hours, when I was coming from Randali Garrage, heading to market field, I met with one Mamman Aboho who gist me that Abdullahi Alh. Umaru was said to have abused Prophet Mohammed and that me being his friend shall find a solution to how the friend Abullahi will escape that the issue had even reach the village head but he was not found at home. On hearing this information I later saw Abdullahi, then I invited him to his mother, Amarya Alh. Umaru, and then demanded transport money from the mother to enable Abdullahi leave the town to some where,

but the mother said that she have no money to give Abdullahi, then I later advice Abdullahi, to park his properties and go. Immediately we finish discussing, one Shugaban Samari arrive with Dan Ashibi and Danladi Umaru Giwa, and called me, as I went Abdullahi left then these '3' persons still went to the town telling people that I asked Abdullahi to go, and that if they did not see Abdullahi, I will be held responsible with that, I ran to Kardi to find out from one of his friend called Bello Aliyu and Bello told me that he did not see Abdullahi, then I told him about the incident that happened, and I also advised him that in case if he see Abdullahi, let him take him to the Police Station, or hide him somewhere and ran to inform Inspector Sule Dogon Yaro that my life is in danger that people says if they did not see Abdullahi, they will hold me responsible and that Abdullahi abused Prophet Mohammed and if he is seen he should be arrested and hidden, then the Inspector told me that he will take care, then I went back to Randali when I was in my room sleeping at about 0 300 hours, Mallam Musa Yaro, Shugaban Samari and others, came and woke me up and they told me that I was lucky that they have arrested Abdullahi, and that did I witness that kind of insult altered to the Prophet? I said no, then they all left.

And I later went and woke Shehu Yalliya and Mamman Dan Mallam and went to Kardi to rescue Abdullahi. As we reached Kardi, we met people surrounded with Abdullahi then Mamman Dan Malami who was in possession of tape recorder warned the crowed that, Islamically it is not right to touch whoever abused Prophet Mohammed, but that such person should be taken to the authority concerned. But they insisted, that Mamman Dan Mallam is a fake Moslem they attempted to damage his tape. We made our effort to rescue the deceased, but we were too limited. And after the struggling, one Abu Magaji drew my attention to one side arguing on why Abdullahi must be killed, then one Abu Danbu whom we went together to rescue the deceased later came and informed me that, we have to go home because they have killed Abdullahi, then we left back to Randali."

The pieces of contradictions with regard to PW 2 as per para.29at p.20 to para. 32, of the appellant's brief read thus:

"29. In Exhibit C, he told the police that he 'invited him

(Abdullah) to his mother Amarya Alh. Umaru and then demanded transport money from the mother in his evidence in chief he said 'On hearing this I returned to the motor park where I met Ahdullahi Alh. Umaru, and called him and went with him to his mother's place along with one of the brothers of the deceased called Kallamu, part of the spicing of his evidence is that. In his evidence-in-chief is that while he forgot immediately the incident took place to mention that deceased's brother Kallamu, was with him when he took the deceased's mother, he remembered it in his evidence in chief-in-Exhibit C, he said 'One Shugaban Samari, arrive with Dan Ashibi and Danladi Umaru Giwa and called me, as I went Abdullahi left then these '3' persons still went to the town telling people that I asked Abdullahi to go and that if they did not see Abdullahi, I will be held responsible. B C

30. In his evidence-in-chief he said: 'the mother did not give him the money. As we were coming out we met with 3 people namely Mamman Dambu, Dan Ashibi and Daladi Umaru Giwa and they asked me to follow them. We went to the motor park where, they looked for Abdullahi but he was not seen as he sneaked away when we were going to the Garage'. D

The 'we' that 'were coming out' including the deceased since he was the one that was taken to his mother's place. How come he PW2, was seen and deceased was not seen that they have to go looking for him. E

31. In Exhibit C, PW2 wrote: F

When I was in my room sleeping at about 0300hrs, Mallam Musa Yaro, Shagab and Samari, and others. But in spicing up his evidence and in an attempt to rope in the Appellant said 'I returned to Randali around 3.00am and was in my house when the 1st accused Musa Yaro, one Mamman Dambu, Umaru Kaza (2nd accused), Abdullahi Ada (4th Accused), Suleiman Danta Aunabi (6th Accused) along with some Other people whom I did not know woke me up and that I should come out one begins to wonder why the PW2 failed to mention the names of the 2nd accused person (Appellant) in his Exhibit C, which was a statement made two days after the incident but, suddenly remember this name in his oral evidence on 19th January, 2000 almost six months after the incident. G H

32. This witness alleged that he along with some other persons

attempted to rescue the deceased but that while were still trying to rescue the deceased, somebody came to inform him that the deceased had been killed. One then wonders where this witness was trying to rescue the deceased that somebody has to come from somewhere to inform him that the deceased whom this witness was trying to rescue had been killed."

It is submitted that these alleged contradictions go to the root of the entirety of the prosecution's case against the appellant and ought to have been countenanced by the trial court and even more so by the court below. And, that if it had been upheld it would have left the prosecution's case weak, insufficient and unreliable and devoid of any credible materials to sustain the conviction of the appellant. See Ani v. State (2003) 11 NWLR (pt.830) 142 at 162 paras. B-D, pt.166. A-B, at 171 para.D-G., Akpabio v. State (1994) 7 NWLR (Pt.359) 655 at 660-661 paras. G-A, at paras. D-E.

Respectfully, I think the appellant's complaints here amount to no more than a storm in the tea cup. I entirely agree with the respondent's statement of the law at paragraph 7.4 of the respondent's brief of argument on this question to the effect that

"there can only be contradictory evidence where a piece of evidence contradicts another when it affirms the opposite of what that other evidence has stated not when there is just a minor discrepancy between them. Thus, for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to the case, it must be fundamental to the main issues before the court." See Agbo v. The State

I have more or less rehearsed the areas of contradictions as raised as per the appellant's brief of argument vis-a-vis the evidence of the prosecution's witnesses at the trial court and I find no such conflicts or contradictions but minor discrepancies or inconsistencies in the testimonies of PW.2 and PW.5 at the trial in terms of chronology or sequence of events. This is only natural in a case of this kind and they are as can be expected in human affairs. There is no merit on this question and I reject the insinuation.

In the result issue 1 is resoundingly resolved against the appel-

lant.

On issue 3, i.e. on whether the defences of provocation and justification avail the appellant, if I may add, on the peculiar circumstances of this case. The appellant in his brief of argument has left no stone unturned in making his point in this regard. It is trite law, that a court trying a criminal case as here must consider all the defences raised by the accused and all other defences which surfaced in the evidence before the court however slight or minor. See: Ahmed v. The State (1999) 7 NWLR (pt.612) 641 at 679 para. D. Having taken the point in this regard, the appellant has, therefore submitted that the killing of the deceased was done in retaliation for insulting Prophet Mohammed, as clearly borne out by Exhibits K and K1, i.e. the voluntary statements of the appellant.

It is settled, that for an accused as the appellant here to avail himself of this defence he has to satisfy certain conditions as stipulated under Section 45 of the Penal Code, which reads 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 in doing it."

The conditions for the defence of justification to apply arising from the foregoing provisions are:

"(1) That the criminal act is justified by law

(2) That the criminal act was done as a result of mistake of fact not mistake of law.

(3) That the act was done in good faith believing same to be justified by law in doing it."

See: Lado v. The State (1999) 9 NWLR (pt.619) 369 at 381; R v. Adamu (1944) 10 WACA 161; Akalezi v. The State (1993) 2 NWLR (pt.273) 1 at 14; Ubani v. The State (2001) FWLR (pt.44) 483 at 490; Ekpenyong v. The State (1993) 5 NWLR (pt.295) 513 at 522.

I hold the view that the appellant's claim to the defence of justification is wrong footed on the premises that he cannot excuse himself of this heinous crime by contending that owing to his ignorance of the law he did not realise that the act of killing the deceased on the peculiar facts of this matter is a

crime. After all, entitlement to this defence has to be rooted in good faith, which is not the case here.

It is also significant here that the only evidence the appellant and his co-confederates have against the deceased is the unproven rumour that the appellant and his co-accused overheard, that is, hear-
 B say allegation that the deceased had insulted Prophet Mohammed, in a neighbouring village of Randali. And it is noteworthy that what constitutes the content of the insult so far has remained a mirage to the courts below and so also this has disabled the respondent to re-
 C fute it. Even then, on this ground alone, in my respective view, it is not open to the courts below to speculate on the words of the abusive insult. I therefore hold that there is no iota of evidence in the prosecution's case including Exhibit K and K1, on the appellant's con-
 D fessional statement to sustain a plea of justification for the dastardly act of killing the deceased by slaughtering him like a goat, I therefore, agree with the respondent's submission that the courts below cannot give the appellant the benefit of this defence as it is not supported by evidence on the record: see *Abara v. The State* (1981) 2 LNRC 110 at 117.

E ***The appellant also has taken issue with the failure of the courts below to give due consideration to the defence of provocation. Section 221(1) of the Penal Code, has provided for this defence and it reads:***

F ***"221(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 any other person by mistake or accident."***

G ***Therefore, for the appellant or an accused person to avail himself of this defence he has to establish by evidence the following conditions to wit:***

***"(a) That the act of provocation is grave and sudden
 (b) That accused lost self control, actual and reasonable
 (c) The degree of retaliation by the accused person must
 H be proportionate to the provocation offered. See Ihuebek v. The State (2006) 5 SCNCR 186 (vol.2), and Shande v. The State (2005) 22 NSCQR 756. "***

Again, if I must repeat, this defence as in the case of justifica-

tion cannot be taken or indeed discussed in vacuo. By its peculiar nature it must be predicated upon the evidence accepted by the court. Again, if I must repeat, and even more importantly the evidence upon which the appellant as well as his co-accused has rooted his plea of provocation is the overhearing of the rumour making rounds in Randali village that the deceased insulted Prophet Mohammed (SAW). As I stated earlier the exact insulting words have not been proved to the courts below as there is no evidence to that effect and so it is a fundamental flaw and must fail. The appellant, if I may recall, did not give evidence in his own defence at the trial having rested his case on the prosecution's case. Meaning in effect that the defence of provocation is as founded, if at all, as per the case of the prosecution. ***And in the absence of the exact insulting words uttered by the deceased about Prophet Mohammed, there can be no basis for considering the defence of provocation; it is even not clear to whom the insulting words were uttered certainly not to the appellant. He has not contended that the words were directed to him. I wonder if the defence of provocation could avail him on these facts. It cannot in this instance be taken in vacuo as it would tantamount to working on mere speculation and so, it is a non-starter.***

On the foregoing basis it is not possible to determine whether the defence avails the appellant. See Ahmed v. The State (1999) 7 NWLR (pt.612) 641 at 684. Idemudia v. The State (1992) 7 NWLR. 356. ***Therefore, it does not arise for consideration in this case whether the insulting words were even uttered to the appellant or could be sustained on mere rumour. Even more so, the provocative act as reported by the co-accused, Musa Yaro, the 1st accused, cannot in law be a ground for the appellant to kill the deceased, it is too far fetched to say the least.***

In conclusion, I find no merit in the appeal; the court below rightly in my view rejected the plea of provocation as it is on the whole highly speculative. I also resolve this issue against the appellant.

Finally, this appeal is unmeritorious. I dismiss it and uphold the conviction and sentence passed on the appellant by the trial court as

affirmed by the court below.

TOBI JSC

The appellant was the 2nd accused person in the High Court.

B He was the 6th appellant in the Court of Appeal. The case of the prosecution against him is that he and some other person (3rd accused) killed the deceased on the ground of an allegation that the deceased was blaspheming the Holy Prophet (SAW).

C The appellant and others were charged with criminal conspiracy and culpable homicide contrary to sections 97 and 221(a) of the Penal Code respectively. He pleaded not guilty to the charges. The learned trial Judge convicted and sentenced the appellant as charged. He was sent to the gallows. His appeal to the Court of Appeal was D dismissed. He has come to this court.

Briefs were filed and duly exchanged. The appellant formulated three issues. The respondent adopted them. The issues read:

"1. Whether the prosecution proved the case of conspiracy, abetment and murder against the appellant.

E *2. Whether mere presence at a scene of crime proof of actual participation in the commission of the crime.*

3. Whether the defences of provocation and justification avail the appellant."

F Arguing Issues Nos.1 and 2 together, learned counsel for the appellant, Mrs J O. Adesina, reproduced sections 85, 97(1) and 221(a) of the Penal Code and contended that it is vital that persons accused of criminal conspiracy must have agreed to do or caused to be done. Agreement, counsel contended, is therefore the live G wire of criminal conspiracy. He cited Chianagu v.State (2002) 2 NWLR (Pt 750) 225 at 236; Obiakor v. State (2002) 10 NWLR (Pt 776) 612 at 628, Upahar v.State (2003) 6 NWLR (Pt. 816) 230 and Idi v. Yau (2001) 10 NWLR (Pt 722) 640 at 651.

H Referring to the statements of the appellant, 1st accused, 3rd accused, 4th accused, 5th accused, Exhibits K, J1, E-E3, F1 and G1 respectively, learned counsel submitted that the essence of conspiracy is the fact of combination by agreement, which may be implied. The conspiracy arises and the offence is committed as soon as the agree-

ment is made and the offence continues to be committed so long as the combination persists, that is, until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct not the execution of it. He cited DPP v. Doot (1973) AC 807; (1997) 1 All ER 940 and *Ozulonye v. State* (1981) 1 NCR 38 at 49. B

For the appellant's conviction for the offence of conspiracy to be sustained, the prosecution has to prove the ingredients of the offence against him. The prosecution has to first establish that there was an agreement to kill the deceased or the essential ingredients of the offence. Citing *Yakasai v. Nigerian Air Force* (2002) 15 NWLR (Pt. 790) 294 at 314, learned counsel argued that the appellant could not have conspired with himself and teleguided his conspiracy to others for execution. On the burden of proof placed on the prosecution, D counsel cited *Shonde v. State* (2005) 12 NWLR (Pt 939) 301 at 320. He pointed out that PW2 contradicted himself in his statement to the police (Exhibit C) and his oral testimony in court and argued that the contradictions go to the root of the entire case and therefore cannot be waived as mere discrepancies. He cited *Ani v. State* (2003) 11 NWLR (Pt. 830) 142 and *Akpabio v. State* (1994) 7 NWLR (Pt. 359) 635. C

Taking the evidence of PW5, learned counsel contended that it is not a crime just to be present at the scene of crime. He cited *Nwakwo v. State* (1990) 2 NWLR (Pt. 134) 627 at 636. He pointed out that PW6 did not say anything relevant on the offence of conspiracy against the appellant and so the Court of Appeal was in serious error to have affirmed the appellant's conviction for criminal conspiracy. He cited *Emeka v. State* (1998) 7 NWLR (Pt 559) 556 at 583. E

Counsel submitted on Issue No. 3 that a court trying a criminal case must consider all the defences raised by the accused and all other defences surfaced in the evidence before the court however slight. Citing *Ahmed v. State* (1999) 7 NWLR (Pt. 612) 641, learned counsel argued that the defence of provocation availed the appellant. He urged the court to quash the conviction of the appellant and allow the appeal on the ground that the defence of provocation availed the appellant. G

Learned counsel for the respondent, Mr I. K Sanusi, submitted on Issue No. 1 that the prosecution will only secure conviction against the appellant on the offence of conspiracy under section 97 of the Penal Code where it is established the following elements beyond reasonable doubt:

B (a) The agreement between two or more persons to commit an illegal act

 (b) That some act besides the agreement between one or more persons in furtherance of the agreement.

C Counsel contended that because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved facts. He cited *Obiakor. V State* (2002) 10 NSCQR 972 and *Ahmed v. State* (1998) 1 ALR 71. He said that the only inference which can be drawn
D from the evidence of PW2, 5 and 6 is that the appellant conspired with others (five co-accused persons) at the trial to Kill the deceased. He also relied on the confessional statement of (he appellant. Relying on *Abacha v. State* (2002) 11 NSCQR 346 at 353, learned counsel contended that the prosecution had adduced enough evidence to
E convict the appellant for the offence of conspiracy under section 97 of the Penal Code and was therefore rightly convicted by the trial Judge.

 On the offence of abetment, counsel contended that the prosecution will be entitled to conviction if it established the following
F elements beyond reasonable doubt: (a) The accused abets the offence; (b) The abetted offence was committed in the consequence of the abetment. He referred to the evidence of PW2 and 5 as well as the confessional statement of the appellant and submitted that there
G is enough evidence in the record to convict the appellant for the offence of abetment under section 85 of the Penal Code.

 On the offence of culpable homicide punishable with death, learned counsel submitted that the prosecution is to establish the following elements beyond reasonable doubt before securing conviction,
H viz: (a) That there was a death of human being, (b) that the death was caused by the act of the accused (c) That the act of the accused was done with intention of causing death. Relying on the evidence of PW2, 3, 4, 5 and Exhibit 0, counsel submitted that the

appellant was rightly convicted of the offence He argued that there was no material contradiction in the evidence of the prosecution witnesses which may warrant the setting aside the conviction and sentence passed on the appellant He cited *Agbo v. State* (2006) 25 NSCQR 137 at 143.

On the defences of justification and provocation, learned counsel submitted that they were not made out by the appellant. He cited *Araba v. State* (1981) 2 NRC 110 at 117 *Ihuebeka v. State* (2000) 5 SCNQR 186; *Shade v. State* (2005) 22 NSCQR 756, *Ahmed v. State* (1999) 7 NWLR (Pt. 612) 641 and *Idemudia v. State* (1992) 7 NWLR 356. He urged the court to dismiss the appeal. B
C

Black's Law Dictionary defines conspiracy as a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful. See *Black's Law Dictionary* (Sixth edition) page 309. D

This most comprehensive definition says it all. The bottom line of the offence is the execution of an unlawful purpose by an unlawful means. And that unlawful purpose is the criminality involved. While the words "combination" and "confederacy" may in general parlance generally convey the same meaning with conspiracy, the latter parts ways with the former in one basic respect and it is the doing of an unlawful or an illegal act. While I concede that the unlawful or illegal nature of an act could also be found in combination and confederacy, that is better reserved to conspiracy in criminal law, as an agreement between two or more persons to behave in a manner that will invariably or automatically constitute the commission of an offence by two persons or by at least one of them The offence of conspiracy can only be committed if there is a meeting of two or more minds. The offence cannot be committed by one person because that person cannot be convicted as a conspirator, the meaning of which is one involved in a conspiracy. E
F
G
H

In my view, the offence of conspiracy is not necessarily said to be committed only when an accused person in his confessional statement said "I conspired with a co-accused to commit the offence." He

needs not use the exact word, conspire. On the contrary, the offence could be said to be committed by the action or conduct of the accused person. While two or more persons committing the same offence may not always give rise to the commission of the offence, it could be so in a number of cases. In the offence of conspiracy, the mens rea is not easy to locate as it is mostly, if not invariably, buried in secrecy. And so, the actus reus of the offence which is easier to locate can draw the mens rea to the open, and make it possible for the court to find inculpatory evidence.

From the above, I sift the following ingredients of the offence of conspiracy:

(i) There must be an agreement of two or more persons. In other words, there must be a meeting of two or more minds,

(ii) The persons must plan to carry out an unlawful or illegal act, which is an offence.

(iii) Bare agreement to commit an offence is sufficient.

(iv) An agreement to commit a civil wrong does not give rise to the offence, as section 97(1) of the Penal Code provides only for criminal conspiracy.

(v) One person cannot commit the offence of conspiracy because he cannot be convicted as a conspirator.

(vi) A conspiracy is complete if there are acts on the part of an accused person which lead the trial court to the conclusion that he and others were engaged in accomplishing a common object or objective.

I go to the offence of abetment. Abetment is an act of encouraging, inciting or aiding another. The verb variant "abet" means to encourage, incite or set another on to commit a crime. An abettor is an instigator, or setter on; one who promotes or procures a crime to be committed. See Black's Law Dictionary (Sixth edition) page 5. Abetment is easier to prove than conspiracy because it entails or involves more overt actions.

For an accused person to be convicted of abetment, under section 85 of the Penal Code, the prosecution must prove the following ingredients (i) That there was an encouragement, incitement, setting on, instigation, promotion or procurement of offence. (ii) Any of the above acts must be positive and unequivocal specifically addressed

to the commission of the offence. (iii) The act abetted must be committed in consequence of the abetment. (iv) An accused person could be convicted of the offence of abetment on proof by the prosecution of any of the acts mentioned in (i) above. In other words, the acts mentioned in (i) above are in the alternative and not cumulative.

An encouragement here means an act of making someone to feel brave or confident enough to do something by giving active approval in support of the crime. Incitement also has the element of encouragement. By incitement, the person is provoked by a strong passion or feeling to commit an offence. The word "set" is a word of quite a number of synonyms. The two words "set on" connote the semblance of causing to attack or chase like one may say the fisherman prepared the bait to set on the fish. It also has the element of antagonism. An instigation, the act of instigating, means something happening by the action or conduct of a person, who is the starter. By the act of instigation, the co-accused is propelled or gingered to commit an offence. I think I can stop here I need not go to the "promotion" or "procurement" as they are parasitic on the above words I have examined in the sense of bringing into being or fruition the main offence. I do not think will be going outside section 85 of the Penal Code if I say that the above exercise of etymology is within the section and should be so construed; the words put separately.

I go to the offence of culpable homicide. The ingredients to the offence of culpable homicide punishable with death under the Penal Code are as follows: (a) the death of the victim, the deceased; (b) the death was a result of the act of the accused person; (c) that the accused knew that his act will result in death or did not care whether the death of the deceased will result from his act. As it is, the actus reus of the offence of culpable homicide punishable with death is the act of killing and the killing must be the deceased If there is evidence that another person, not the particular deceased was killed, the accused will be discharged and acquitted. Of course, the death of the deceased must be directly traced or traceable to the act of the accused person. An accused person will not be convicted if the deceased died, not as a result of the act of the accused, but from any other way. Of the three ingredients, the third is the most difficult to determine It is my view that trial Judges will use the objective test and

not the subjective test in determining criminal responsibility or liability. And in considering the above ingredients the court will examine carefully the totality of the conduct of the accused and not acts of the deceased in isolation.

B Was there any evidence of conspiracy and abetment? Was there any evidence of culpable homicide punishable with death? Learned counsel for the appellant submitted that there was no evidence of conspiracy and abetment and that there was adequate defence to the offence of culpable homicide punishable with death. Learned C counsel for the respondent took the opposite position. Who is right? PW2, in his evidence in-chief said at pages 42 and 43 of the Record.

"I returned to Randeli around 3.00 am and was in my house when the 1st accused Musa Yaro, one Mamman Darnbu, Umaru Kaza (2nd accused), Abduliah Ada (4th accused), Suleiman Danta D Aunabi (6th accused) along with some other people whom I did not know woke me up and that I should come out as I am lucky because they would have killed me if they had not seen Abdullah. When I came out, they asked me whether I knew exactly what Abdullah said about the Prophet and I told them that I didn't know. I however E asked them to go to the house of our Village Head and we went together. At the house of the Village Head, I called the attention of one Shehu Yalliya and Ustaz Mamman on what was happening. Then Ustaz Mamman read a verse from the Holy Quran and trans- F lated it in Hausa to the 1st accused and his group which included the other accused persons, that it is their responsibility to punish a person who insults the Prophet but that it is only the authority that will punish him. The accused persons led by the 1st accused were not satisfied with the explanation and they just went away towards Kardi G Village and I followed them. On getting to Danfilu within Randali Market one Shehu Yanliyya asked me to go through the motor park so that I can find people who will go with me to Kardi in order to rescue Abdullah even by force. I only got Baba Sambari and Abun Dambu and we proceeded together to Kardi. At then the accused persons H and their remaining group members had proceeded to Kardi"

Under cross-examination, witness said at page 44 of the Record:

"It was the 1st, 2nd and 4th accused persons who went to the house of the Kardi Village Head to inform him that they were going to kill

Abdullahi"

The appellant in his statement to the police translated from Hausa to English language, Exhibit K1 said that upon an information by the 1st accused that the deceased abused Prophet Mohammed, he and the 1st and 4th accused went to the scene of crime in Kardi Village. They met the deceased alive. The deceased was thereafter surrounded by the 1st, 5th, 6th accused and some other persons. Although the village head asked for mercy, 1st accused read a word from the Qu'ran saying *Masabba Rasullihahi Kutoilla* which means whoever abused Prophet Mohammed "SAW" God said he should be killed. Immediately 1st accused said that 3rd accused macheted the deceased with cutlass and he fell down. 5th accused person slaughtered the deceased with a knife. While this was going on, 1st accused was in possession of an iron stick and appellant was with a torchlight.

I see a clear act of conspiracy and abetment of the offence of culpable homicide punishable by death on the part of the appellant. The conspiracy started right from the moment 1st accused person told the appellant in that fateful night that the deceased abused Prophet Mohammed. In the trip to Kardi Village were 1st, 4th accused persons and the appellant.

The following is the most significant and telling aspect of the statement of the appellant at page 36 of the Record:

"We then returned back to where Abdullahi Alh. Umaru is (sic) arrested before we could reach those people who arrested him took him to the bush. On reaching the bush, Musa Yaro read a word from the Qu'ran saying 'Musabba Rasullilahi Kutoilla' that is to say who ever abused Prophet Mohammed SAW, God said he should be killed. Immediately Musa Yaro said this one Sani Aci B/Kabbi macheted the said Abdullahi Alh Umaru with cutlass. He fell down. Then when he fell down Abubakar Dan Shallah slaughtered the boy with a Knife. As we were there he Musa Yaro was in possession of an iron stick while I was with torchlight."

The crime was committed at night and that was why the appellant was with torchlight to produce light. Can appellant really provide any exculpatory evidence in the light of his own inculpatory evidence? Although appellant did not say in his statement what he used the torchlight for it is clear that it was to provide light for 3rd and 5th

accused persons to kill the deceased. The actus reus of culpable homicide punishable with death is the causing of death of a person in rerum natura. The confessional statement of the appellant and the evidence of the prosecution witnesses particularly PW2 pinpoint the appellant in the commission of the offences he was charged with. And what is more, Exhibit D is not even helpful to the appellant.

And that takes me to the defences of justification and provocation. Both are defences in the Penal Code. Justification conveys the usual dictionary meaning in the Penal Code. It connotes just, and lawful excuse or reason for acting in a particular way or failing to act in a particular way. In the defence of justification, the accused person is saying that there was sufficient reason for the act of killing. Black Law Dictionary defines justifiable homicide at page 865 as "killing of another in self-defence when danger of death or serious bodily injury exists." Although there is no definition of justifiable homicide in the Penal Code, it is my view that it conveys similar meaning.

The Court of Appeal went into the defence in admirable detail. The court took time and pains to analyse the relevant principles of Sharia on the defence. I will quote the court in extenso at page 125 of the Record:

"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. 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 applying the above principles of law on the defence of justification to the facts and circumstances of the case at hand, it will be very clear that the appellants with their shallow knowledge 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, 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 inflicted 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 the Village

Head and Ustaz Mamman. 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 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 anybody 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"

Sharia is a stable jurisprudence built on the tenets of fair hearing. An accused person cannot, in principle, be convicted without being heard. And what is more, a hearing must be before a judicially recognised adjudicatory body, not a collective body of local persons out to do jungle justice; a kangaroo court. These are the points very correctly made by the Court of Appeal. Appellant and others paraded primitive and uncouth justice and meted same on the deceased clearly outside the rule of law. And so I entirely agree with the Court of Appeal that there was no justification for the killing of the deceased.

Provocation is the second defence. Provocation is an action or conduct which arises suddenly in the heat of anger. Such action or conduct is precipitated by resentment, rage or fury on the part of the accused person to the person that offered the provocation. Because of the anger, resentment, rage or fury, the accused person suddenly and temporarily loses his passion and self-control; a state of mind which results in the commission of the offence. There can hardly be provocation in respect of words or acts spoken or done in the absence of the accused. This is because words spoken or acts done in the absence of the accused will not precipitate any sudden anger, resentment, rage, or fury, as there is time for passions to cool. The very act of reportage of the words or acts of the accused should materially reduce or drown the anger, resentment, rage or fury of the accused. The test of provocation is objective, not subjective. It is the test of the reasonable man not the test of the particular accused. Therefore in the determination whether there was provocation, the court will consider whether a reasonable man in the street or situation of the accused would have been provoked to commit the of-

fence. There are no hard and fast rules for determining provocation. Each case will be determined in the light of the peculiar facts. The accused person must show that he killed the victim in the heat of passion caused by grave and sudden provocation on the part of the deceased and that there was no time for his passion to cool. A defence of provocation will not avail an accused person if there is evidence that there was a recess or a possible recess in the mind of the accused for passion to cool. Similarly, defence of provocation will not avail an accused if there is evidence of organised or premeditated vendetta.

In considering the defence, the Court of Appeal said at pages 133, 135 and 136 of the Record:

"I have already said that words alone can constitute provocation depending on the position in life and primitiveness of the accused and society. However in no way under our law can words said to be uttered to another person who merely reported to the accused be capable of causing provocation on the said accused against the alleged utterer (deceased) who was not even around at the time of the report of the said words to the accused by the third party. Applying the above principles or rules on provocation to the facts and circumstances of the present case, there is no doubt that all the above ingredients for the defence were not satisfied by the appellants or were missing from the established facts in the record. The alleged provocative or insulting words were not shown to have been directed against them by the deceased and not uttered in their presence or to their hearing."

I entirely agree with the Court of Appeal. It is clear from the evidence before the court, and particularly the confessional statement of the appellant, that the alleged abuse of the Prophet was reported to the appellant. In other words, the deceased did not abuse the Prophet to the face and hearing of the appellant.

I would like to think that from the moment the 1st accused told the appellant of the abuse to the time they got to the scene of crime, passion ought to have cooled. It is my feeling that the pleas of the Village Head ought to have cooled the passion of a reasonable man in the circumstances. Here was a traditional ruler who pleaded for the deceased but to no avail. The passion did not cool but it ought

to have cooled The passion did not cool because it was premeditated plan on the part of the appellant and the others to kill the deceased. To them, the deceased must pay the price of abusing the Prophet In the circumstances, the defence of provocation is not available to the appellant, and I so hold.

In conclusion, I agree with my learned brother, Chukwuma-Eneh, JSC, that the appeal should be dismissed. I therefore dismiss the appeal.

AKINTAN JSC

The appellant was tried along with 5 others at Kebbi Slate High Court for criminal conspiracy, abetment and culpable homicide punishable with death under sections 97, 85 and 221 (a) of the Penal Code respectively. He was found guilty, convicted and sentenced to death by hanging. His appeal to the Court of Appeal was dismissed. The present appeal is from the judgment of the Court of Appeal.

The brief facts of the case are that the appellant and 5 others killed Abdullahi Alhaji Umaru of Randali village in Birnin Kebbi Local Government Area of Kebbi State on 14th July, 1999. Their action was based on an allegation that the said victim was accused of insulting the Holy Prophet Mohammad (S.A.W). The appellant and his co-accused got the man arrested and took him to a place on the outskirts of the village. There, one of them first struck him with a cutlass on the head. The man fell down and with a knife, one the accused persons slaughtered the man by cutting his throat while the others held him down and it was when they were sure that the man had died that they abandoned the corpse and dispersed.

The appellant did not deny the act at their joint trial. He made a confessional statement which was admitted at the trial. The trial court found him and his co-accused guilty as charged. Each of them was accordingly sentenced to death by hanging. Their appeal to the Court of Appeal was dismissed. The present appeal for the judgment of the Court of Appeal, Kaduna Division.

The two main points seriously canvassed in this are whether the prosecution proved the case of conspiracy, abetment and murder against the appellant and whether the defence of provocation

was not available to the appellant.

On the question whether conspiracy was proved, I believe that the evidence led by the prosecution relating to the meeting of the appellant and his co-accused person as soon as they learnt of the allegation they made against deceased which also led them to the
B house of the District head where they complained to the district head, are sufficient evidence upon which conspiracy could rightly be inferred.

As to whether the defence of provocation was available to the
C appellant, I do not see how the allegation that their victim insulted the Holy Prophet Mohammad (S.A.W) could be regarded as causing sufficient provocation as required by law to justify their action of killing their victim. The evidence led was to the effect that the allegation of insulting the Holy Prophet came to them as a rumour. None of the
D man's accusers gave the exact insulting words spoken by the deceased and it was not shown that their action was an immediate and uncontrollable reaction to the act of the deceased. That was not the position because the man was led to a place on the outskirts of the village where they slaughtered him. In the result, the defence of provocation
E tion could not be available to the appellant.

I had the privilege of reading the draft of the leading judgment prepared by my learned brother, Chuwuma-Eneh, JSC. For the above reasons and the fuller reasons given in the lead judgment, I also hold
F that there is no merit in the appeal and I accordingly dismiss it.

ONNOGHEN JSC

The deceased, Abdullahi Alhaji Umaru was alleged to have insulted
G the Holy Prophet Mohammed, (SAW) as a result of which the appellant, in the company of other accused persons sought for and, arrested the deceased who was taken to a burial ground in the outskirts of Kardi village and slaughtered, like a goat.

The actual words uttered by the deceased which were consid-
H ered to be an insult on the said Holy Prophet have not been stated neither is it the case of the defence that the appellant heard the deceased utter the alleged insult. It was a simple case of religious fanaticism yet the Learned Counsel for the appellant has argued that the

defences of provocation and justification are open to the appellant by virtue of which he ought not to have been convicted and sentenced to death for the offence of murder.

It is settled law that the defence of provocation avails an accused person who is able to establish, by credible evidence at the trial, that:

(a) The act of provocation was grave and sudden;
(b) That the accused lost his self-control, actual and reasonable, and;

(c) That the degree of retaliation by the accused was proportionate to the provocation offered by the deceased.

As stated earlier in this judgment there is no evidence on record that the appellant was provoked by the deceased. I should not be understood as saying that words alone cannot constitute provocation. It does, depending on the actual words used and their effect(s) or what they mean to a reasonable person having similar background with the person provoked. Here, as stated earlier, the exact words are unknown neither did the appellant hear the deceased utter the alleged insult. One then wonders how the appellant could have been provoked by the alleged insult on the holy prophet.

Just as there is no evidence of provocation on record worth considering, there is none of justification either.

In short, I agree with the reasoning and conclusion of my learned brother CHUKUWMA-ENEH, JSC in his lead judgment of which I had the privilege of a preview that the appeal is without merit and should be dismissed. I accordingly dismiss same and affirm the judgment of the lower courts.

Appeal dismissed.

MUHAMMAD JSC

This is a sister appeal to SC. 245/2004 which originated from the Kebbi State High Court of Justice via the Court of Appeal, Kaduna. The appellant, along with five others were charged before the trial court for the offences of criminal conspiracy, abetment and culpable homicide punishable with death under Sections 97, 85 and 221 (a) of the Penal Code respectively. The trial court found the appellant

guilty, convicted him and sentenced him to death by hanging. In the court below the appellant lost the appeal. The judgment of the trial court was affirmed. He now appealed to this court.

After settlement of briefs, the appellant identified three issues from the four grounds of appeal he set out in his Notice of Appeal.

B The issues are:

1. Whether the prosecution proved the case of conspiracy, abetment and murder against the appellant.

C 2. Whether mere presence at a scene of crime proof of actual participation in the commission of the crime (sic).

3. Whether the defences of provocation and justification avail the appellant.

On the proof of Conspiracy, Abetment and Culpable Homicide Punishable with Death as preferred against the appellant, who D was the 2nd accused person at the trial court, the trial court made the following findings:

(a) On Conspiracy:

E *"In the case of the 2nd accused person the evidence against him is that he was among the group that went to Randali on inquiry and subsequently returned to Kardi in search of the deceased. After the deceased was arrested he was also among the people who came to the house of the Village Head of Kardi to inform him what was going on. He was further among the group that came back to the place "where the deceased was being held and remained there until the deceased was killed. This is supported by the testimony of PWS2, 5 and 6 and the voluntary statement of the accused himself as in Exhibit K. This evidence too is un-contradicted and unchanged. I am therefore satisfied that the 2nd accused took part in the conspiracy to kill the deceased"*.

H *"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. 7. B

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, 5th and 6th accused persons conspired and killed Abduliah Alh. Umaru. C

"In the result, I find the 1st, 2nd, 3rd 5th and 6th accused persons guilty of the offence of Criminal Conspiracy contrary to Section 97 of the Penal. Code and convict each as charge. D

I find the 1st, 2nd, 3rd, and 4th accused persons guilty of the offence of culpable Homicide punishable with death contrary to Section 85 penal (sic) Code and punishable under Section 221 (a) of the same law (sic) I convict each as charged. E

I also find the 1st, 2nd 3rd, 4th, accused persons guilty of the offence Culpable Homicide punishable with death contrary to Section 221(a) of the penal Code and convicted each as charged."

(b) On Abatement:

"In respect of the 2nd and 4th accused persons, it is in evidence F that after the arrest of the deceased, they ordered for his detention until their return. It is also in evidence that they told the Village head of Kardi what was to happen to the deceased and acted as strong supporters of the 1st accused following him closely. It was when they came to scene (sic) of crime that the deceased was callously G killed. The acts of the 2nd and 4th accused persons were supported by the voluntary statement of the accused persons in Exhibits K and F respectively and the testimony of PW2. I am in agreement with learned counsel for the prosecution that the ups and downs and find H arrest of the deceased by the accused persons facilitated his killing. I am satisfied that the prosecution have proved beyond reasonable I doubt the charge of abatement against the 2nd and 4th accused, persons."

(c) On Culpable Homicide Punishable With Death:

"Learned Principal State counsel I. K Sanusi submitted that the prosecution have proved that the death of a human being has actually taken place, PW3 Abubakar Alh. Umaru a brother to deceased testified to the effect that he came to Kardi village and found the corpse of his brother who was slaughtered. PW2 Aliyu Megga, PW4 Cpl Elisha Dandare, PW5 Atiku Dannayi and PW6 Faruk Suleiman all testified to the effect that Abdullahi Alh. Umaru was beaten and slaughtered to death. The assertion was further corroborated by Exhibit D, medical report and Exhibits E, E1, E2, E3, F, F1, G, G1, H, H1, J, J1, K and K1.

Taking all these into consideration I am in no doubt that the death of human being, Abdullah Alhaji Umaru actually took place".

The learned P.S.C submitted that the death of the said Abdullah Alh. Umaru was caused by the accused persons. It is a necessary requirement of law that in a case of Culpable Homicide there must be proof beyond reasonable doubt that it was the accused persons who killed the deceased or that the deceased died in consequence of the act of the accused persons as held in R. Isa (1961) ALL NLR 68 and Erik Uyo v. A.G. Bendel States (1986)1 NWLR 418. The 1st accused in his confessional statement as in Exhibit J and J1 said-

"..... after I have recited this verse they started beating him. Then one person called Sani Ali B/kebbi cut him with a matchet. Then one Abubakar Dan Sallah slaughtered him. And other people who I don't even know. I didn't beat Abdullah Alh. Umaru even ones, But definitely I was the one who read the verse from the book of Risala...

"It is evident that statements which formed the version of the accused persons to what took place was rightly corroborated by the testimony of PW2, PW3, PW4, PW5, PW6 and Exhibit D. There is no doubt that the accused persons were among the people who inflicted the injuries observed on the neck of the deceased which were described in Exhibit D as "severe signs of violence around the neck - cutting all the blood vessels around the neck and the air way" thereby resulting into the death of Abdullah on the spot. In the circumstances it is conclusive proof that it was the accused persons who caused the death of Abdullah Alh. Umaru. I refer to the case of Bwoshe

v. The State (1972). 6 S.C.93, Kato Dan Adamu v. Kano N.A. (1956) 1. F.S.C 25. I there hold that the death of Abdullah Alh. Umaru was caused by the 1st, 2nd, 3rd, 4th, 5th and 6th accused persons".

'I also find the 1st, 2nd, 3rd, 4th, 5th and 6th accused persons guilty of the offence Culpable Homicide punishable with death contrary to Section 221 (a) of the penal Code and convicted each as charge'. B

In the court below, it is clear from the record of appeal that of the three grounds of appeal filed, two of which were later abandoned, and the sole issue formulated on the single ground remaining, there was no challenge by the appellant against the findings of fact as set out above. This means that those findings were conceded by the appellant as there was no appeal against them. I therefore, fail to see the rationale in making those findings to form issues before this court. I do not think there was any leave sought or granted the appellant to raise and argue new points not raised and argued before the court below. The same applied to issue No.2. The law is trite that this court shall not permit a party to raise and argue any new issue which the court below did not have the benefit of considering except where leave to do so was sought and obtained. C D E

It is to be noted that the appellate jurisdiction of the Supreme Court is inter alia, to review the decisions of the Court of Appeal. If therefore, an issue did not arise for the determination of the Court of Appeal, such an issue may not form the basis of an appeal to the Supreme Court. However, the Supreme Court will exercise its discretion to allow such fresh issue or question to be raised for the first time in that court if:- F

- (i) It involves a substantial point of law substantive or procedural; G
- (ii) all the facts in support of such new issue or question are before it and;
- (iii) a proper application for such issue or question to be raised is brought before that court.

See: Atoyebi v. Gov. of Oyo State (1994)5 NWLR (Pt344) 290 at 365 C-F; Uhunmwangko v. Okojie (1989) 5 NWLR (pt122) 471; Djukpan v. Orovuyevbe (1967) 1 All NLR, 134; Uor v. Loko (1983) 2 NWLR (pt 77) 430; A-G Oyo State v. Fairlakes Hotel Ltd. (1988) 5 H

NWLR (pt 92)1; Bankole v. Petu (1995) 8 NWLR (pt 211) 523; Management Enterprises Ltd. V. Otusanya (1987) 2 NWLR (pt55) 179.

See: Sken Consult v. Ukay (1981) 1 SC 6; Agbaje V. Adigun (1993) 1 NWLR (Pt) 269; Waniko v. Ada-John (1999) 9 NWLR (pt 619) B 401.

It is my humble view that grounds 4 and 3 of the grounds of appeal from which issues 1 and 2 were formulated respectively, are incompetent. Consequent upon that I, thereby strike out grounds 4 and 3 and issues 1 and 2 and arguments in respect thereof of the C appellant's issues being incompetent.

Issue 3 of the appellant's issues is on the defences of provocation and justification whether they avail the appellant. I find it pertinent to repeat what I earlier said in the case of Dan Shalla v. The state D Appeal No. SC.245/2004, delivered on the 5th day of October, 2007, and now reported in 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 E 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 F (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 re- G viewing 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 H 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 any body 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 of the 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 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 issues were by and large, raised and argued by the learned counsel for the accused/appellant. It is thus not a new issue entirely as would require further address by appellants 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 fee case. See: *Obodo v. Olomu* (1987) 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 appellants 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:

"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
- (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; (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.

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.

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:

"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
- (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. B

On the question of provocation, the Lord Chancellor, Viscount Simon, Mancini V. The Director of Public Prosecutions 26 C. A. R. 74 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 effect of provocation on a reasonable man, as was laid down by the court of Criminal Appeal Lesbini 11 CAR 7. In applying the test, it is of particular importance to take into account the instrument with which the homicide was affected; 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." C D E

See: the cases of Wonaka v. Sokoto N.A. (1956) NSCC 28; Kumu v. The State (1967) NSCC Vol. 5,286.

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: F

"I of the above name and address wish to state as follows: I could remember on 14/7/99 at about 0100hrs we were sleeping where we normally gathered (sic) and lying in one place, every night. After eating my dinner, I later went to my house and drop the plate, then Musa yaro came and meet (sic) me and told me that somebody named Abdulahi abuse (sic) Prophet Mohammed "S.W.A" there myself Musa Yaro left and meet (sic) Abdullahi Danada, there we decided to proceed to Randali Village and meet (sic) Garba Soja, on reaching, Musa Yaro asked Garba Soja that we heard one Abdullahi Aih. Umaru abused Prophet Mohammed "S.W.A ", then Garba Soja confirmed H

to Musa Yaro really late Abdullahi Alh. Umaru did abused (sic) Prophet Mohammed (S.A.W) there we proceeded to Waldlin Sana of Randali named Shehu Dan Yau, on reaching to Shehu Danyau, Musa Yaro asked him is it true that Abdullahi Alh. Umaru abused Prophet Mohammed "S.A.W" he said yes it is true, which I was not
 B told the time of abuse the late did, (sic) but Shehu Dan Yau wanted to tell us the type of the abuse the late made, but Musa yaro ask (sic) him not to tell us. It was there Shehu Danyau told us that he has already sent 20 people to go and search for the boy and arrest him
 C and brought him, then we decided to come back to our village Kardi, on way back home, we meet (sic) with some of our Village boys on the road who told us that the boy have (sic) been arrested that is Abdullahi Alh. Umaru inside Kardi Township, we proceeded to the place, on reaching there the late Abdullahi Alh. Umaru alive, (sic)
 D while the following persons surrounded him. (1) Kalli Musa (2) Adarnu Aljani (3) Shehu Danbega (4) Dan Bala Malar Kura (5) Abubakar Dan Shallah (6) and Sani Aci B/Kebbi from there I and Musa Yaro and Abdullahi Danada went to the village Head of Kardi. Then Musa Yaro asked the Village Head whether he is aware of what is happen-
 E ing? (sic) The Village Head replied him no, there Musa Yaro laid the Village Head that there is a boy of Randali who abuse (sic) Prophet Mohammed "SAW", Islamic Law says he should be killed. Then the Village Head said should do mercy on us (sic). We then returned
 F back to where Abdullahi A.J.h. Umaru is arrested, before we could reach those people who arrested him took him to the bush on reaching the bush, then Musa Yaro read a word from the Qu 'ran saying "Masabba Rasullilahi Kutoilla ", that is to say who ever abused Prophet Moh'd "SAW", God said he should be killed. Immediately Musa Yaro
 G said this one Sani Aci B/Kebbi macheted the said Abdullahi Alh. Umaru with cutlass, he fell down, then when he fell down Abubakar Dan Shallah slaughtered the boy with a knife as we were there he Musa Yaro was in possession of a iron (sic) stick while I was with torchlight. That is all I have to state."

H A litany of authorities lays the rule that voluntary confession can fetch conviction. See: Kanu v. the State (1952) 14 WACA, 30 at page 32; Philip Ekpenyong v. The State (1991) 6 NWLR (Pt.200) 583 at p. 704.

I think I should observe that although this case like *D Shalla v. The State* (supra) is Sharia in nature, it was decided under the Common Law Principles, I should not delve much into the Islamic principles relating to such a case. I will limit my observation to what the court below said on some Islamic Law principles. Let me quote in extenso what the court below observed: B

"It will be very clear that the appellants with their shallow knowledge 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, 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 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 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 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 offences. Islamic religion is not 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 anybody 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 of Maliki law)" translated and C
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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 -naby) put to death without accepting his repentance ... "

B 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
C instructive:

"37.01: No One may be put to death for homicide unless he is convicted by (1) adequate testimony (bavvinat), or(2) his own admission (iqrar), or (3) as sworn indictment (oasama) if that is necessary"

(Underlining 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."

E In this subsequent chapter ii 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 (Yam'm)
F - see Athamarud 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 Prophet or any angel. In the later
G 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 attract no punishment or sanction at all. So it is necessary for the Qadi to
H exercise caution and exert 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 Salmon 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 appellants 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 overhead 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 proposed 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 appellants, it will easily be seen that the said appellant were not acting under an honest misapprehension or 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 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 pass 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 de-

fence 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. 11 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 Adawi Vol. 2 pages 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 Oudah in his criminal law of Islam vol. 111; (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 of 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 hudood and penal punishments. Such punishments can 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 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 ii provides in chapter 6 (Surat - An' Am) verse 151 as follows:

"And do not kill the souls 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: Bulusgh - Al - Maram Min Adillatil Ahkam by Asqalani, page 244). In another Hadith the Prophet 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 Annawawi)

The appellant in this appeal did not show to any of the courts that he had the requisite authority to take away the life of the deceased. He thus unlawfully deprived the deceased the opportunity to defend the allegations levelled 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 execute the deceased, flatly refused authority as he fully well knew that he was not the right authority to grant such a 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.

I cannot see how these kind 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 human, life due to their high degree of misappre-

hension 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.

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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