

SUPREME COURT OF NIGERIA
25TH APRIL, 2008 SC. 242/2004
CORAM:- S. U. ONU, D. MUSDAPHER, A. M.
MUKHTAR, I. F. OGBUAGU, P. O. ADEREMI, JJSC

ABDULLAHI ADA	APPELLANT
V.		
THE STATE	RESPONDENT

CRIMINAL PROCEDURE - Evidence - Defence - Resting case on prosecution case - Effect of - Where accused rests his case on that of the prosecution - Evidence of the prosecution is deemed admitted - And court is duty bound to act on it if credible (H1)

EVIDENCE - Evaluation of - Duty of court - Court has a duty - To accept and act on unchallenged/uncontradicted evidence - Of prosecution witness - As done by the trial court (H2)

CRIMINAL LAW - Defences - Duty of court to consider - Court has a duty to consider all defences raised - By evidence on the record - Even those not specifically raised by the accused - But no defence was raised on the instant record (H3)

FACTS

The Appellant was one of six persons convicted by the High Court of Kebbi State for the offence of culpable homicide punishable with death contrary to section 221 of the Penal Code. The Appellant together with his co-accused had caused the death of one Abdullahi Alhaji Umaru by conspiring and concertedly dealing blows on him with a knife and sundry dangerous objects. According to the Appellant, the deceased had used abusive words and insults on Prophet Mohammed. It is not in dispute that the Appellant did not hear the alleged abusive words used by the deceased. Nevertheless, the Appellant and his co-accused tracked down the deceased and in purported enforcement of a decree of the Holy Quran of death to anybody that insults the Holy Prophet, killed the deceased. Even before seeing or hearing from the deceased, the Appellant and his

co-accused had even threatened to kill his master, by name Aliyu Magga who they believed was hiding the deceased. Moreover, Appellant had confessed to his participation in the crime in his statement to the police. Further, at trial, Appellant never testified in his defence and did not call any witness. He rather rested his case on that of the prosecution.

After trial, the learned trial judge found the Appellant guilty as charged. Appellant appealed to the Court of Appeal contending that the trial court failed to consider the defences of justification and provocation which he alleged were open to him. The Court of Appeal, *inter alia*, considered the defences of justification and provocation and held that they did not avail the Appellant. Accordingly, the court affirmed the judgment of the trial court. Appellant has brought this instant appeal against the judgment of the Court of Appeal.

HELD (Unanimously dismissing the appeal per **OGBUAGU JSC**)
Resting case on prosecution case

1. It was the decision of the learned defence counsel and the appellant, for the appellant not to go into the witness box to testify, but to rest his case on that of the prosecution. It was their/his right to so decide.

I will now deal even briefly with the effect of an accused person (just like a defendant resting his case on the case of the plaintiff). Such a stance, is regarded as a legal strategy. In my concurring judgment recently, in the case of *Major Bello M. Magaji & The Nigerian Army* (2008) 2-3 S.C. (Pt.II) 146. I dealt with this issue and referred to the cases of *Oforlete v. The State* (2000) 7 S.C. (Pt.1) 80; (2000) 7 SCNJ 162 at 179, 183, 184 and *Ubani & 2 Ors. v. The State* (2003) 12 S.C. (Pt.II) 1; (2003) 12 SCNJ 111 at 130, where it is firmly settled that where an accused person rests his case on that of the prosecution, the evidence of the prosecution which has not been controverted by the accused person, is deemed to have been accepted or admitted by such an accused person. Such evidence being unchallenged and uncontroverted, a trial court has a duty and in fact, is entitled to act on it where credible. In the case of *Ali & Anor. v. The State* (1988) 1 NWLR (Pt.68) 1 at 18; (1988) 1 SCNJ 17; *Oputa, JSC., (Rtd.)*, stated that it is always a gamble to rest the defence on

the case of the prosecution. The defence in effect, has shut itself out and will have itself to blame as the court, will not be expected to speculate on what the accused person might have said. (p. 1408 H)

EVIDENCE - Evaluation of

2. As noted above in this judgment, a trial court, will fail in its duty, if it fails, refuses and/or neglects to convict on the evidence of the prosecution which is unchallenged and uncontroverted. It is now also settled in a line of decided authorities by this court, that a court can convict based on the confessional statement of an accused person made voluntarily and which is direct, positive, true and unequivocal and made out of conscience of the necessity to uphold the truth even in the face of death.

The learned trial Judge, rightly and correctly again in my view, had a duty to act and did in fact act, upon the said unchallenged and uncontroverted evidence of the said prosecution witnesses and the said confessional statement of the appellant. Period! (p. 1411 B)

CRIMINAL LAW - Defences - Duty of court to consider

3. I am aware of and this is settled, of the duty of the court to consider all defences raised by evidence in the Records even if the defence does not specifically raise them regardless of whether the defences are weak or stupid. As is obvious from this proposition of the law, the defence or all the defences, must have been raised in the evidence before the trial court. Such evidence so raised, must be in the Records of proceedings. It is not a matter of speculation by the court. As noted by the court below in the excerpts I have reproduced:-

"..... It is 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 chosed (sic) not to give or call any 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....."

(The underlining mine)

So, as regards issue No. 1, there was no defence or defences raised, proved or open to the appellant on the Record which the trial

court failed to consider and examine. The said issue, in my respectful view, is a non-issue in the circumstances and with respect, it is grossly misconceived. (p. 1412 A)

NOTABLE POINTS OF INTEREST

B MUKHTAR JSC

1. Station in life of accused is relevant to issue of his provocation

I am not unmindful of the fact that the background and the station in life of the appellant has to be considered in determining the availability of the defence of provocation, for in such a situation the definition of a reasonable man according to the law comes to play. The authors of Halsbury’s Laws of England Fourth Edition Reissue Volume 11(1) Criminal Law, Evidence and Procedure III paragraph 439 on page 337, propounded the criterion of the reasonable man vis-a-vis provocation thus:-

“In order to set up provocation as a defence it is not enough to show that the accused was provoked into losing his self-control, it must be shown that the provocation was such as would in the circumstances have caused a reasonable man to lose his self-control. For the purposes, ‘the reasonable man’ means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society. In determining the question, the jury may consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of provocation; it is merely a matter to be considered by the jury in determining whether a reasonable man would have acted as a reasonable man would have acted as the accused did.” (p. 1420 E)

G ADEREMI JSC

2. A judge needs to consider defences raised on the record

It is of importance for, me to say that at the trial, the appellant never led any evidence in his own defence and neither did he raise any defence. But this being a murder trial, the law is sacrosanct that in a murder trial, the judge must consider in his judgment not only the defences specifically raised by the accused but other possible defences in the circumstance of the case. The law, in the circumstances of this

type of criminal case, places special duty or responsibility on the judex that before convicting an accused of murder and thereafter proceeding to sentencing him to death, he (the judex) must look for all possible exculpatory evidence in favour of the accused. See *Umani v. The State* (1988) 1 NWLR (Pt.70) 274.

I will however quickly enter a caveat and that is, the judex must not turn himself into a Knight Errant desperately looking for any defence that will exonerate the accused when even on the face of the totality of the evidence led by the prosecution, no such defence can be garnered and in the circumstances of this case, when the accused chose not to proffer any evidence. (p. 1422 D)

REPRESENTATION

J. E. Ochidi, for the Appellant.

I.K. Sanusi, (D.P.P. Ministry of Justice, Kebbi State)
for the Respondent.

CASES REFERRED TO

Oforlete v. The State (2000) 7 S.C. (Pt.1) 80; (2000) 7 SCNJ 162 at 179, 183, 184

Ubani & 2 Ors. v. The State (2003) 12 S.C. (Pt.II) 1; (2003) 12 SCNJ 111 at 130

Ali & Anor. v. The State (1988) 1 NWLR (Pt.68) 1 at 18; (1988) 1 SCNJ 17

Onyejekwe v. The State (1992) 4 SCNJ 1 at 8

Kim v. The State (1992) 4 SCNJ 81 at 110

Akpan v. The State (1992) 7 SCNJ (Pt.1) 22 at 46

Bature v. The State (1994) 1 NWLR (Pt.320) 267; (1994) 1 SCNJ 19 at 29

Takida v. The State (1968) 1 All NLR 270

Apishe & 2 Ors. v. The State (1971) 1 All NLR 50

Njoku v. The State (1993) 7 SCNJ (Pt. 1) 36 at 41

Sobakin v. The State (1981) 5 S.C. 75; (1981) 5 S.C.

Igwe v. The State (1982) 9 S.C. (1982) 1 SCNJ 256

Ihuebeka v. The State (2000) 4 S.C. (Pt.I) 203

Ahmed v. The State (1999) 5 S.C. (Pt.II) 39; (1999) 7 NWLR (Pt.612)

page 641

STATUTE REFERRED TO

Penal Code - Ss. 45, 97, 85 and 221 (a)

BOOKS REFERRED TO

- B Halsbury's Laws of England Fourth Edition Re-issue Volume II(1)
Criminal Law, Evidence and Procedure III, paragraph 439, page 337

LEAD JUDGMENT BY OGBUAGU JSC

- C This is an appeal against the decision of the Court of Appeal,
Kaduna Division delivered on 10th December, 2003, dismissing the
appeal of the appellant and affirming his conviction and sentence of
death by the High Court of Kebbi State in Birnin Kebbi Judicial Divi-
sion presided over by Ambursa, J., on 24th February, 2000.
- D Dissatisfied with the decision, the appellant who was the 4th
accused person, has appealed to this court on three (3) grounds of
appeal which without their particulars, read as follows:-

GROUND ONE

- E *"The learned Justices of the Court of Appeal erred in law in
confirming the conviction and sentence of the appellant in spite of
the fact that the trial court failed to consider and examine the de-
fences open to the appellant on the record before convicting the
appellant as charged.*

GROUND TWO

- F *The Court of Appeal erred in law when in dismissing the ap-
peal of the appellant it held that the appellant failed to call evidence
in support of the defences available to him nor pinpoint the elements
constituting such defences.*

GROUND THREE

- G *The learned Justices of the Court of Appeal erred in law and
occasioned a miscarriage of justice to the appellant when they failed
to confine themselves and resolve the only issue formulated by the
appellant for determination before them but instead, suo motu raised*
H *and considered an entirely different issue without affording the ap-
pellant any opportunity to be heard on the said issue before using
same as a basis to dismiss the appeal of the appellant."*

For the avoidance of doubt, I will reproduce verbatim, the

facts of this barbaric, heartless and most wicked slaughtering of the deceased by the six (6) accused persons including the appellant as stated in the appellant's Brief which facts, have been adopted by the respondent in its Brief. They read as follows:-

"1:1. On or about the 14th day of July, 1999, it was rumored (sic) in Randali and Kardi villages within Birnin Kebbi Local Government Area of Kebbi State that one Abdullahi Alhaji Umaru of Randali village (now deceased) defamed Holy Prophet Mohammed (SAW). Accordingly, some Moslem fanatics arrested the deceased at Kardi village and kept him in the custody of Suleiman Dan Ta Annabi who was the 6th accused person in the trial court as well as in the custody of one Mohammed Sani (the 3rd accused before the trial court). Meanwhile, one Musa Yaro - the 1st accused in the court of trial in conjunction with Usman Kaza (the 2nd accused in the court of trial) as well as the appellant (the 4th accused in the court of trial) went to intimate the village head of their intention to mete out the prescribed punishment on the deceased for defaming the name of Holy Prophet Mohammed (SAW)."

The village head never gave any answer to them.

1:2. Subsequently, the said Musa Yaro, Usman Kaza and the appellant returned to the outskirts of Kadi (sic) village where the deceased was being held captive by Suleiman Dan Ta Annabi and one Mohammed Sani and on getting there, Musa Yaro read a portion of Risala to the effect that the punishment of anyone who defame Holy Prophet Mohammed (SAW) is death. Following this recitation. Mohammed Sani matched the deceased on the neck and he fell down. Abubakar Dan Shalla (the 5th accused in the court of trial) used a knife and slaughtered the deceased by the neck and the deceased died on the spot (sic). Thereafter, everybody dispersed from the scene."

1:3. Subsequently, all the persons who participated one way or the other in the alleged crime were arrested by the Police and taken to C. 1 .D. office at Birnin Kebbi. At the end of Police investigation into the alleged offence, the appellant and 5 others were arraigned before the High Court of Justice Birnin Kebbi - Kebbi State of Nigeria presided over by Hon. Justice Mohammed Suleiman Ambursa on counts of criminal conspiracy, abetment and culpable

homicide punishable with death contrary to Sections 97, 85 and 221 (a) respectively of the Penal Code. The appellant was the 4th accused person before the trial court.

1:4. In the course of trial, the prosecution called 8 witnesses in proof of the alleged offences while the appellant rested his case on that of the prosecution - see pages 41- 56 of the record. Thereafter, the counsel to the respective parties addressed the court (see pages 56 - 61 of the record) and on the 24th day of February, 2000, the learned trial Judge delivered his judgment and found the appellant guilty of criminal conspiracy, abetment and culpable homicide punishable with death contrary to Sections 97,85 and 221 (a) of the Penal Code respectively. The appellant was therefore sentenced to death by the trial court.

1:5. Being aggrieved by the said judgment of the trial court, the appellant applied to the Court of Appeal (Kaduna Division) for an order extending time for him to file an appeal to the said Court of Appeal. The said application of the appellant was granted by the Court of Appeal - see page 81 (a) of the record. As a result, the appellant filed his notice and grounds of appeal before the Court of Appeal on the 28th of January, 2003, - see pages 79 - 81 of the record and in accordance with the Rules of Procedure of the said court, the appellant filed his Brief of Argument wherein he raised only one issue for the determination of the Court of Appeal- see pages 82 -92 of the record. In response, the respondent also filed the respondent's Brief as can be seen at pages 93 - 99 of the record. Subsequently, the Court of Appeal heard the said appeal on the 14th day of October, 2003, - see pages 100 - 102 of the record and by a judgment delivered on the 10th day of December, 2003, per Hon. Dalhatu Adamu (JCA.), Hon. Baba Alkali Ba 'aba (JCA.) and Hon. Stanley Shenko Alagoa (JCA.), the said appeal of the appellant was dismissed - see pages 105 -140 of the record.

1:6. Subsequently, the appellant who was out of time in filing an appeal to this court in challenging the said decision of the Court of Appeal applied to this court for an appeal of the appellant filed on the 11th of November, 2004, as properly filed."

As appears in the above facts, at the said Court of Appeal (hereinafter called "*the court below*"), the appellant argued only one ground

of appeal - i.e. ground 3 in his Notice of Appeal after abandoning grounds one and two. In other words, the appellant formulated one issue for determination which reads as follows:-

"Did the appellant suffer any miscarriage of justice when the court below refused to consider the several defences available to the appellant on the record before convicting the appellant as charged?" B

In this court, the appellant, has formulated three (3) issues for determination, namely;

"Issue No. 1

"Whether or not the Court of Appeal was correct in law when it confirmed the conviction and sentence of the appellant despite the fact that the trial court failed to consider and examine the defences open to the appellant on the record before convicting the appellant as charged? This issue relates to ground one of the grounds of appeal." C D

Issue No. 2

"Whether or not an accused person is under a legal obligation to call evidence in support of the defences open to him on the record or pinpoint the element constituting the defences before he is entitled to a consideration of the defences by the trial court? This issue relates to ground two of the grounds of appeal." E

Issue No. 3

"Were the learned Justices of the Court of Appeal correct in law when they considered the record of proceedings suo motu and held that the defences of justification and provocation did not avail the appellant even when the appellant was not afforded the opportunity to canvass argument on the said point before their Lordships arrived at such a conclusion? This issue relates to ground three of the grounds of appeal." F G

On its part, the respondent has formulated two (2) issues for determination, namely;

Issue No. 1

"Whether or not the Court of Appeal was right when it went ahead and evaluate (sic) (meaning to evaluate) evidence with regard to defences available to the appellant which ought to have been done by the trial court, having regard to Order 1 Rule 19 paragraphs 3 and 4 of its Rules? The issue relates to ground 3 of grounds of ap- H

peal.

Issue No. 2

Whether or not the Court of Appeal rightly held that the defences of justification and provocation as provided under Sections 45 and 222(1) of the Penal Code respectively, were not available to the
B appellant? This issue relates to ground 1 of the grounds of appeal. ”

For clarity and completeness, I will take the said issues of the parties together since they deal with the consideration of the said defences of justification and provocation by the court below.

C From his issue No.1, it could be seen that the appellant is complaining about the failure of the trial court to consider and examine the defences open to the appellant on the record before convicting him as charged. I had noted that this was his sole issue at the court below. Now, under his issue No 3, he queries whether the court be-
D low was correct when it considered the defences of justification and provocation and held that they did not avail the appellant, and according to him;

“when the appellant was not afforded the opportunity to canvass argument on the said point before their Lordships arrived at
E such a conclusion. ”

From the said facts stated above, it is admitted by the appellant that while the prosecution called eight (8) witnesses in proof of its case, the appellant, never testified in his defence and did not call any witness. He rather, rested his case on that of the prosecution. At page
F 56 of the records after the trial court granted the application for an adjournment to 16th February, 2000, for defence and address, the following appear inter alia:-

“16/2/2000 - *E.C. Oguelina* (i.e. appellant’s learned counsel).
G *We must express our gratitude for the time given us by this Honourable Court to review the case and make up our mind as to whether to rest our case on that of the prosecution or call evidence. We have made up our mind to rest our case on that of the prosecution. We are ready to address the court.* ”

H [The underlining mine]

Learned defence counsel proceeded to address the court there and then. In other words, **it was the decision of the learned defence counsel and the appellant, for the appellant not to go**

into the witness box to testify, but to rest his case on that of the prosecution. It was their/his right to so decide.

I will now deal even briefly with the effect of an accused person (just like a defendant resting his case on the case of the plaintiff). Such a stance, is regarded as a legal strategy. In my concurring judgment recently, in the case of Major Bello M. Magaji & The Nigerian Army (2008) 2-3 S.C. (Pt.II) 146. I dealt with this issue and referred to the cases of Oforlete v. The State (2000) 7 S.C. (Pt.1) 80; (2000) 7 SCNJ 162 at 179, 183, 184 and Ubani & 2 Ors. v. The State (2003) 12 S.C. (Pt.II) 1; (2003) 12 SCNJ 111 at 130, where it is firmly settled that where an accused person rests his case on that of the prosecution, the evidence of the prosecution which has not been controverted by the accused person, is deemed to have been accepted or admitted by such an accused person. Such evidence being unchallenged and uncontroverted, a trial court has a duty and in fact, is entitled to act on it where credible. In the case of Ali & Anor. v. The State (1988) 1 NWLR (Pt.68) 1 at 18; (1988) 1 SCNJ 17; Oputa, JSC., (Rtd.), stated that it is always a gamble to rest the defence on the case of the prosecution. See also the case of Nwede v. The State (1985) 3 NWLR (Pt. 13) 444. The defence in effect, has shut itself out and will have itself to blame as the court, will not be expected to speculate on what the accused person might have said.

The learned trial Judge at pages 75 and 76 of the Records, stated in this regard inter alia, as follows:-

“Therefore in this particular case the onus is on the accused persons to prove that they have a right in the Quran or Risala to kill Abdullahi Alhaji Umaru. (i.e. the deceased). Furthermore, the accused persons did not raise or suggest any defence, their voluntary statements did not suggest any defence and there is no doubt about this. The evidence adduced by the prosecution remained uncontradicted and unchallenged, positive and direct. In Nasamu v. The State (1969) FSC (sic) it was held by the learned Justices that a court will fail in its duty if it fails to convict on the evidence of prosecution which is unchallenged and uncontradicted. I also observed that the witnesses who testified for the prosecution gave direct evidence in sup-

port of the case of the prosecution and were found to be witnesses of truth. I accept their testimony.”

(The underlining mine)

At page 117 of the Records, the court below - per Adamu, JCA., stated inter alia, as follows :-

B “.....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 his 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 (sic) the said appellants. It is also to be noted
C 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 chosed (sic) not to give or call any 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. Consequently, the only evidence available before or at the trial court were that of the prosecution witnesses (8 of them) and the confessional or voluntary statements made by the appellants to the Police and tendered as Exhibits E, F, G, H, J and K and other exhibits (e.g. medical report and the weapons used by the appellants etc.) also tendered by the prosecution. All other facts are commonly accepted by the parties, herein as there is no dispute about them.....”

(The underlining mine)

G All the above show that the appellant had no defence for his brutal and callous slaughter of the deceased perpetrated by him and his co-conspirators and accomplices - i.e. the other five (5) accused persons. In the court below, his grouse or complaint was/is that he suffered “a miscarriage of justice” as the trial court “*refused to consider the several defences available to him on the record before convicting him.*” Not that he raised any of the said defences either in his said confessional statement or in his defence in the witness box. For
H him and his learned counsel, since it is settled that a trial court must

consider all defences open or available to an accused person especially in murder cases, there was a miscarriage of justice to him.

I note that at page 75 of the Records, the learned trial Judge stated inter alia, as follows:-

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

As noted above in this judgment, a trial court, will fail in its duty, if it fails, refuses and/or neglects to convict on the evidence of the prosecution which is unchallenged and uncontroverted. It is now also settled in a line of decided authorities by this court, that a court can convict based on the confessional statement of an accused person made voluntarily and which is direct, positive, true even in the face of death. C D

See the cases of Onyejekwe v. The State (1992) 4 SCNJ 1 at 8, Kim v. The State (1992) 4 SCNJ 81 at 110, Akpan v. The State (1992) 7 SCNJ (Pt.1) 22 at 46 and Bature v. The State (1994) 1 NWLR (Pt.320) 267; (1994) 1 SCNJ 19 at 29 - per Onu, JSC., just to mention but a few. E

The question I or one may ask, is, in the face of the evidence of the said prosecution witnesses which were unchallenged and uncontroverted and were accepted or believed by the trial court and also and more importantly, the said confessional statement of the appellant, which the learned trial Judge was satisfied rightly in my respectful view to be voluntary, direct and positive and admitted in evidence without objection, what other defences were the learned trial Judge to consider? I have reproduced above, the findings of fact by the court below at page 117 of the Records. For purposes of emphasis, I repeat part of the said findings, namely- F G

".....Consequently, the only evidence available before or at the trial court were that of the prosecution witnesses (8 of them) and the confessional or voluntary statements made by the appellants (which include the appellant) to the Police and tendered as Exhibits....." H

The learned trial Judge, rightly and correctly again in my view, had a duty to act and did in fact act, upon the said un-

challenged and uncontroverted evidence of the said prosecution witnesses and the said confessional statement of the appellant. Period! See the case of Ubani & 2 Ors. v. The State (supra).

I am aware of and this is settled, of the duty of the court to consider all defences raised by evidence in the Records even if the defence does not specifically raise them regardless of whether the defences are weak or stupid. See the cases of Williams v. Inspector General of Police (1965) NMLR 470, Takida v. The State (1968) 1 All NLR 270, Apishe & 2 Ors. v. The State (1971) 1 All NLR 50, Njoku v. The State (1993) 7 SCNJ (Pt. 1) 36 at 41, Grace Akpabio & 2 Ors. v. The State (1994) 7-8 SCNJ (Pt.III) 429, citing several other cases therein; and Sampson Nkeji Uwaekweghinya (2005) 3-4 S.C. 29 at 38; (2005) 3 SCNJ 32, and many others. **As is obvious from this proposition of the law, the defence or all the defences, must have been raised in the evidence before the trial court. Such evidence so raised, must be in the Records of proceedings. It is not a matter of speculation by the court. As noted by the court below in the excerpts I have reproduced:-**

“..... It is 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 chosed (sic) not to give or call any 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.....”

(The underlining mine)

So, as regards issue No. 1, there was no defence or defences raised, proved or open to the appellant on the Record which the trial court failed to consider and examine. The said issue, in my respectful view, is a non-issue in the circumstances and with respect, it is grossly misconceived.

Flowing from the above, as regards issue No. 2, if there is or are any defence or defences raised proved or open to an accused person which evidence appear in the Record of proceedings, a trial court has a duty to consider and/or examine such defence or de-

fences whether weak or stupid. But since the issue is a hypothetical one, a court and this court, is not permitted to go into such hypothetical questions or issues. But since again, there are/were no defence or defences available to the appellant or to pinpoint the elements constituting such defences raised, open or proved in the Records, the trial court, could not and was not expected to consider, such defence or defences. I hold with respect in the alternative, that this issue, is completely misconceived and being hypothetical, I dis-
countenance the same.

Incidentally and ironically, the court below, considered the defences of justification and provocation. Yet, the appellant, like a drowning man hanging on or clinging to a straw, is now under issue No. 3, blaming that court and say that the court below, raised them suo motu and did not afford him the opportunity, to canvass argument on the said point before arriving at the conclusion that the said defences, did not avail him. Wonders it is said, shall never end!

However, for purposes of emphasis, as regards the said issue No. 3 and issue No. 1 of the respondent, I note or observe that the court below with respect, abundante et cautela, considered the defences of justification and provocation which were never raised in his confessional statement or in any defence on oath at the trial. The court below, was being "*magnanimous*" in so doing. It dealt in effect with defences not raised in the Records under the mistaken view that such defences, will be considered and examined by the trial court whether or not it was raised in evidence in the Records. Having found as a fact and held that, no such defence or defences, was or were ever raised by the appellant who never testified but rested his case on that of the prosecution in Which none of its said witnesses, testified of any justification or provocation the court below, in my respectful view, had no business considering the said defences of justification and provocation which were/are not the case of the appellant and not even raised by him and his learned counsel.

I hold that such exercise by the court below, (although understandable and with respect, displaying transparent Justice) was uncalled for. But since the appellant has not shown what prejudice he suffered or what was the miscarriage of justice meted out to him by such an exercise, his said issue No. 3 in my respectful view, is of no

moment or consequence. But in answer to issue No. 1 of the respondent. I hold that the court below, was right in evaluating the evidence on record, and finding that there was no evidence therein, to sustain such defences that did not exist in the said record. Afterwards, an appeal, is in the nature of or by way of a re-hearing. See the cases of
 B Namsoh v. The State (1993) 5 NWLR (Pt.292) 129 at 143; (1993) 6
 SCNJ 55, Sabrye Motors Nig. Ltd. v. Rajab Enterprises Nig. Ltd. (2000)
 4 S.C. (Pt. II) 67; (2002) 4 SCNJ 370 at 382 and Attorney-General,
 Anambra State & Ors. v. Okeke & 4 Ors. (2002) 5 S.C. (Pt.II) 58;
 C (2002) 5 SCNJ 318 at 333, just to mention a few. Of note also, is the
 clear and unambiguous provision of Section 16 of the Court of Ap-
 peal Act, which gives full jurisdiction over the whole proceedings as if
 the proceedings, had been initiated in that court as a court of first
 instance and may re-hear the case as a whole or in part.

D The trial court at page 76 of the records, stated inter alia, as follows:-

"I have carefully observed the accused persons throughout the trial. It is sad that such young persons could heartlessly kill a human being such a cruel manner without any remorse whatsoever. I wonder what was their concern with a rumour which was said to happen in a neighbouring village. They actually acted in a cruel and unusual manner sufficient to warrant conviction."

I agree.

F The court below, on its part, after painstakingly and thoroughly, considering or dealing with the said alleged defences, at pages 123 to 136 of the records, held that the said defences, are not available to the appellant and the other co-accused persons.

G His Lordship, at page 123 of the records stated inter alia, as follows:-

".....There is no mention or suggestion whatsoever about the defence of provocation from the above quoted passage as its particulars or legal elements were not mentioned as done in relation to the defence of justification. Consequentially, it is wrong in my view, H for the appellant's 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 mis-state-ment."

(The underlining mine)

At page 124 thereof, the following inter alia, appear:-

"In all their voluntary and cautioned statements to the Police..... the appellants confessed to the killing or causing the death of the deceased through their joint (or mob) act on the fateful day because they heard the rumour (which was not even confirmed) that he had insulted or blasphemed the Holy Prophet (SAW). The actual words of insult allegedly uttered by the deceased were not known. The appellants however along with others (now at large) however constituted themselves into a fanatical Islamic vanguard or a religious vigilante groups and upon hearing the rumour took it upon themselves to go in search of the deceased who was alleged to have insulted the Holy Prophet (SAW). Even before seeing or hearing him, they had already passed a sentence or judgment against him that he must be killed for his ,offence under Sharia as recommended in both the Quran and Risala. They even made a threat to kill his master P.W.2 by name Aliyu Magga who they believed was hiding the alleged culprit in his place if he was not found....."

At page 126 of the records, His Lordship continued inter alia, as follows:-

"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....."

At page 136 thereof, His Lordship stated inter alia, as follows:-

"From my consideration of the lone or single issue formulated by the appellant (sic) for determination of this appeal, the said issue and its related ground of appeal have failed and must be resolved against the said appellant (sic). With the failure of the said issue the

appeal itself has also consequently failed and must be dismissed.....”

I completely agree. This hopeless appeal, however I or one looks at it, is very unmeritorious and fails. I note that there are concurrent findings of fact by, the two lower courts and on the authority
 B of the cases of Sobakin v. The State (1981) 5 S.C. 75; (1981) 5 S.C. (Reprint) 46, Igwe v. The State (1982) 9 S.C. (Reprint) 87; (1982) 1 SCNJ 256, Princent & Anor. v. The State (2002) 12 S.C. (Pt.I) 137; (2002) 12 SCNJ 280, and too many other decided authorities by
 C this court in this regard, there is no way, this court can interfere. I too, dismiss the appeal and affirm the decision of the court below affirming the conviction and sentence of death imposed on the appellant by the trial court.

D _____

ONU JSC

Having had the opportunity to read before now the judgment of my learned brother, Ogbuagu, JSC., just delivered. I entirely agree
 E with him that the appeal lacks merit and must perforce fail.

A comment or two will do, in my opinion, to confirm why the concurrent findings of fact of the two courts below culminating in this affirmation ought to stand undisturbed. This is because the facts of
 F the case have been so admirably considered in the leading judgment of my learned brother, in the offence of criminal conspiracy and culpable homicide punishable with death contrary to Sections 97 and 221 (a) of the Penal Code, as to leave no stone unturned and, rightly in my view, sentenced the appellant to death.

G This is the moreso that no divine or spiritual justification as well as any defence of provocation invoked in support of the brutal acts of the appellant and his partners in crime when they collectively hacked down and butchered the deceased in cold blood without compunction.

H It is for the above reasons given by me and the fuller ones set out in the judgment of my learned brother, Ogbuagu, JSC., that I too dismiss this appeal.

MUSDAPHER JSC

I have read before now the judgment of my Lord, Ogbuagu, JSC., just delivered with which I entirely agree. For the same reasons so eloquently discussed in the judgment which I adopt as mine, I too, B
dismiss the appeal and affirm the conviction and sentence of death imposed by the lower courts.

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MUKHTAR JSC

I have had the opportunity of reading in advance the leading judgment of my learned brother, Ogbuagu, JSC., and would merely want to highlight some points. All the grounds of appeal, and the D
issues raised for determination revolve around defences that are likely to be opened to the appellant, and not defences raised in the course of the hearing of the case before the learned trial Judge. The defences are that of provocation and justification. The pertinent question is, where are these defences likely to be in the Record of Proceedings? Before I proceed to reproduce and examine the material E
excerpts of the proceedings I will give a brief background of the case, the detailed one having been given in the leading judgment.

The appellant was one of the six accused persons that were F
convicted by the High Court of Kebbi State, for the offence of culpable homicide punishable with death contrary to Section 221 of the Penal Code, and which conviction was affirmed by the Court of Appeal sitting in Kaduna. The appellant together with his co-accused G
had caused the death of one Abdullahi Alhaji Umaru by conspiring and in the process killed him by hitting him with some objects, and slaughtering him with a knife. The incident that led to the brutal murder of the deceased is what the accused described as the use of abusive words and insults on the Reverend Prophet Mohammed (Peace be H
unto him) by the deceased. As a matter of fact the appellant did not even hear the nature of the alleged abuse or insult before he and the others went in search of the deceased. Even if they heard the insulting or abusive words; it became hearsay because he didn't hear it

directly from the deceased before they haunted him down and snuffed life out of him by slaughtering him. Now, going back to the question asked earlier on in the judgment. It is on record, that the appellant in his caution statement to the Police Exhibit 'F I', said inter alia the following:-

B *"I and Usman Kaza were eating food at my house, then one Mallam Dan Imamu 'M' of Kardi met us with an information that, someone abused Prophet Mohammed at Randali Harmlet, but that, unless we go to Randali and find out. Suddenly, Musa Yaro arrived*
 C *and heard the same information, then Musa said that no action should be taken yet unless it has been proved to be true....."*

Then the three of us went to the house of Kardi Village Head and we warned those mentioned above that they should not touch Abdullahi Alh. Umaru unless we inform the Village Head as far as it
 D is in his jurisdiction for him to know what is happening in his area. And when we went to the Village Head, I was in possession of torchlight, Musa Yaro was holding an iron like stick and Usman Kaza was also holding a torchlight. When we informed the Village Head all that is happening that someone abused Prophet Mohammed, and also
 E the judgment which supposed to pass to such person, according to Islamic teaching, the Village Head did not make any comment, and we left him and went to where Abdullahi Alh Umaru and the other people are. When we reached to their place, Musa told them all that
 F we told the Village Head, and he repeated that, it is written, whoever abused Prophet Mohammed, that person shall be killed. Then I heard a sound of hitting. But I cannot say precisely who hitted him, but I saw when Abdullahi fell down, and also I saw when Dan Shalla used the knife that was in his possession and slaughtered Abdullahi Alh.
 G Umaru, and I saw standing watching, but I did not touch Abdullahi, then we all dispersed. In conclusion, this case of culpable homicide was done with me.

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

H Then the relevant evidence of P.W.2 which reads as follows:-
"At the house of the Village Head, I called the attention of one Shehu Yalliya and Ustaz Mammam on what, was happening. Then Ustaz Mammam 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.”

P.W.2 did not give evidence on the nature of the insult for he also did not hear it directly as he was not present. The same applies to the evidence of P.W.5 and P.W.6. So how did their evidence raise these defences other than that they were eye witness to the slaughtering of the deceased by the accused persons?

The conditions to be satisfied before the defence of justification can avail an accused person is set out by Section 45 of the Penal Code, and it reads:-

“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.”

There is nothing in the entire Record of Proceedings that reveals that the appellant was justified by law in taking part in the killing of the deceased. No. (1) he and his co-accused persons acted on rumours, and even if the rumours were authenticated, the grave action they took was not justified. Indeed I would say it was the most serious action any reasonable man would take, for it involved depriving a man of his life. No. (2) the appellant was warned and counseled about his/their actions by P.W.2 who even recited a portion of the Holy Book to him and the others on the appropriate steps to take, but they ignored his counsel. In the circumstance, will the action be said to have been done by mistake or in good faith? Definitely not. In this wise, I endorse the submission of learned counsel for the respondent that the court cannot give the appellant the benefit of defence of justification.

Now, to the defence of provocation, which Section 222(1) of the Penal Code, makes provision for. The section stipulates thus:-

“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 to or accident”

It is my view that there is no evidence whatsoever in the Record

of Proceedings to avail the appellant of the defences of provocation, see the cases of *Ihuebeka v. The State* (2000) 4 S.C. (Pt.I) 203; (2000) 5 SCNQR (Vol. 2) page 186, and *Ahmed v. The State* (1999) 5 S.C. (Pt.II) 39; (1999) 7 NWLR (Pt.612) page 641, cited by learned counsel for the respondent. In the famous case of *Mancini v. D.P.P.* (1942)

B AC 1. Viscount Simon, LC., threw some light on the efficacy of the defence of provocation thus:-

"If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder; it is no defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the Judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either Judge or jury went outside it."

I am not unmindful of the fact that the background and the station in life of the appellant has to be considered in determining the availability of the defence of provocation, for in such a situation the definition of a reasonable man according to the law comes to play. The authors of *Halsbury's Laws of England Fourth Edition Reissue Volume 11(1) Criminal Law, Evidence and Procedure III* paragraph 439 on page 337, propounded the criterion of the reasonable man vis-a-vis provocation thus:-

"In order to set up provocation as a defence it is not enough to show that the accused was provoked into losing his self-control, it must be shown that the provocation was such as would in the circumstances have caused a reasonable man to loose his self-control. For the purposes, 'the reasonable man' means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society. In determining the question, the jury may consider, along with other factors, the nature of the

retaliation by the accused, having regard to the nature of provocation; it is merely a matter to be considered by the jury in determining whether a reasonable man would have acted as a reasonable man would have acted as the accused did."

See *Rex v. Lesbini* (1914) 3 KB 1116, and *Kwaku Mensah v. R.* (1946) AC 83. B

I am guided by the above and would say the action of the appellant was definitely in excess of that of a reasonable man in the circumstance. He was most irrational and is bound to pay the price.

In the light of the above discussions and the fuller detailed ones in the leading judgment of my learned brother, Ogbuagu, JSC., I also dismiss the appeal for it lacks merit and substance. I am in full agreement with the said judgment, and the orders made therein. C

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ADEREMI JSC

The facts of this case have been succinctly set out in the leading judgment of my learned brother, Ogbuagu, JSC. I will just hereunder reproduce some salient facts for a clear understanding of the comments I will thereafter make. The facts, in brief, are as follows: one Alhaji Umaru of Randali Village was alleged to have defamed Holy Prophet Mohammed (SAW). Some fanatics arrested him at Kardi Village and kept him in the custody of one Suleiman Dan Ta Annabi as well as that of Mohammed Sani. For purposes of identification, the aforementioned fanatics who were all later arrested were Musa Yaro - 1st accused, Usman Kaza - 2nd accused, Mohammed Sani - 3rd accused, Abdullahi Ada - 4th accused who is the present appellant. Abubakar Dan Shalla - the 5th accused and Suleiman Dan Ta Annabi the 6th accused. Sequel to the arrest and direction as to the custody of the deceased as said supra, the 1st accused, the 2nd accused and the 4th accused, now the appellant, went to the village head to intimate him of their intention to mete out the prescribed punishment i.e. death - on the deceased for what they described as his defamation of the name of the Holy Prophet Mohammed. Suffice it to say that the village head never made any comment to them. They (accused persons) thereafter returned to the 6th accused who was hold- E
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ing the deceased in custody. As the story went, the 6th accused matcheted the deceased in the neck while the 5th accused slaughtered him. The participants (the accused) in the crime were later arrested and arraigned before the High Court of Kebbi State. At the close of the case for the prosecution and the defence of the accused persons and sequel to their respective counsel's addresses, the trial Judge, in a considered judgment, found all the accused persons guilty of the offences of criminal conspiracy and culpable homicide punishable with death contrary to Sections 97 and 221 (a) of the Penal Code. The 1st, 2nd, 3rd and the 4th accused were found guilty of abatement to commit culpable homicide punishable with death. In effect, they were all sentenced to death. They all appealed to the court below and each lost his appeal. It is the appeal of the appellant which is here relevant.

Having jointly agreed to do an act which is an offence to agree to do and which act led to the death of Alhaji Umaru of Randali Village, the appellant would be seen, in law, to have been rightly sentenced and condemned to death by the two courts below. Theirs was a very heinous crime. It is of importance for me to say that at the trial, the appellant never led any evidence in his own defence and neither did he raise any defence. But this being a murder trial, the law is sacrosanct that in a murder trial, the judex must consider in his judgment not only the defences specifically raised by the accused but other possible defences in the circumstance of the case. The law, in the circumstances of this type of criminal case, places special duty or responsibility on the judex that before convicting an accused of murder and thereafter proceeding to sentencing him to death, he (the judex) must look for all possible exculpatory evidence in favour of the accused. See *Umani v. The State* (1988) 1 NWLR (Pt. 70) 274.

I will however quickly enter a caveat and that is, the judex must not turn himself into a Knight Errant desperately looking for any defence that will exonerate the accused when even on the face of the totality of the evidence led by the prosecution, no such defence can be garnered and in the circumstances of this case, when the accused chose not to proffer any evidence. I find it convenient to stop here on this point. Suffice it to say that my learned brother, Ogbuagu, JSC., has admirably treated this point in the leading judg-

ment.

In the final analysis, I agree with the conclusion reached by my learned brother, that this appeal is completely unmeritorious. It must be dismissed. Consequently, I also dismiss it and I endorse the judgment of the court below affirming the conviction and sentence of death passed on the appellant by the trial court.

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