

**SUPREME COURT OF NIGERIA**

16TH MAY, 2008 SC. 243/2004

**CORAM:- S. U. ONU, D. MUSDAPHER, A. M.**

**MUKHTAR, W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC**

SULEIMAN DANTA ANNABI ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

---

CRIMINAL LAW - Defences - Murder - Penal Code, s. 45 - Justification - Applicability of - Defence of justification is inapplicable - For assuming what accused heard was true - It would not entitle him to kill the deceased (H1)

CRIMINAL LAW - Defences - Murder - Penal Code, s. 221 - Provocation - Applicability of - Defence of provocation - Is inapplicable - For even if appellant was provoked by what he heard - Much time did elapse - For him to have regained control (H2)

CRIMINAL PROCEDURE - Murder - Provocation - Ingredients of - To succeed in a plea of provocation - Accused must not only show actual loss of control - But also show that any reasonable man - Of his station in life - Would have lost control (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. Appellant and his co-accused had allegedly caused the death of one Abdullahi Alhaji Umaru by conspiring and concertedly dealing blows on him, with knife and other dangerous weapons. According to the Appellant, they had heard rumours that the deceased had used abusive words on Prophet Mohammed. Appellant and his co-accused had gone in search of the deceased to verify the rumour and if true, to deal with the deceased as purportedly enjoined by the Holy Quran. They found the deceased and did kill him as they had proposed. Upon his arrest, Appellant confessed to his participation in the crime in his statement to the police.

After trial, the Appellant was found guilty by the trial court and sentenced to death. He appealed to the Court of Appeal, contending that the trial court had failed to consider the defences open to him and that it had occasioned a miscarriage of justice. The Court of Appeal considered the defences of justification and provocation and held that they were unavailable to the Appellant. Consequently, it affirmed the judgment of the trial court. Appellant has brought this appeal against the judgment of the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*“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?”*

*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?*

*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?”*

### **HELD** (Unanimously dismissing the appeal per **MUKHTAR JSC**) ***Justification - Applicability of***

1. The conditions to be satisfied before the defence of justification can avail an accused 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. (p. 1966 C)

### ***Provocation - Applicability of***

2. Now, to the defence of provocation, which Section 221(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 or accident.”*

In the instant case, what was the sudden provocation that deprived the appellant of the power of self control? The appellant himself in his voluntary statement Exhibit ‘H1’, from which his counsel says the defence of provocation can be inferred said he was in fact sleeping when the courier of bad news came to wake him up with the story. He woke up and went in search of the deceased, and it must have taken so much time in between before locating the deceased. In the interval, should the power of self control have eluded him? That is even if what he heard was enough to provoke him. Then even before the barbaric act he was counseled on whatever act he was wont to take by a man who was supposedly more knowledgeable than him in the teachings of the quoran, but no he and his co-accused persons must deal with the deceased in their own way. In fact there is no evidence whatsoever in the record of proceedings to avail the appellant of the defence of provocation. (p. 1966 G)

***Murder - Provocation - Ingredients of***

3. 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 in 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."*

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. (p. 1968 A)

**NOTABLE POINT OF INTEREST**

***OGBUAGU JSC***

1. *Courts are only bound to consider defences raised in evidence on record*

I wish to state by way of emphasis, that on the decided authorities, the defences open to an accused person which a court -whether trial or appellate, has a duty to consider, in my respectful view, must be, the defences or such defence or defences that appear or are contained in the evidence before the court or that appear or are contained in the Record of Proceedings. In other words, the duty of the/

a court, is to consider all defences raised in evidence in the record of proceedings even if the accused person did not specifically raise them and this is regardless of whether such defence or defences is or are hopeless, weak or stupid.

Thus, it is not a matter of speculation by the court to consider every and all imaginable defences open to an accused person not raised in evidence before the court or contained in the Record of Proceedings. It cannot be by any stretch of imagination in my humble and respectful view. It is not, I repeat, it is not the duty of any court including this court, to look for all possible exculpatory evidence that is not borne out in the records, in favour of an accused person. It is not the law. (p. 1975 A)

### **REPRESENTATION**

J. E. Ochidi, for the Appellant.

I. K. Sanusi, ( D. P. P. M. O.J, Kebbi State), for the Respondent.

### **CASES REFERRED TO**

Green v. Queen (1955) 15 WACA 73

R v. Bio (1945) II WACA 46 at 48

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

Takida v. State (1969) BUNLL 53

State v. Ajie (2000) 7 S.C. (Pt.I) 24; (2000) 2 NSCQR

Ubani v. The State (2001) FWLR (Pt. 44) pg. 483

Okoere v. The State (1971) ANLR 1

Ofoke Nwambe v. The State (1995) 3 SCNJ. 77

### **STATUTE & RULES REFERRED TO**

Court of Appeal Act 1976 Cap. 75, Laws of the Federation of Nigeria, 1990, s. 16

Evidence Act, Cap. 62 of the Laws of the Federation of Nigeria, 1990, s. 138

Penal Code, ss. 45, 85, 95, 221, (a) and 222 (1)

Court of Appeal Rules, 2002 O. 1 r. 19

### **LEAD JUDGMENT BY MUKHTAR JSC**

In the High Court of Kebbi State, the appellant together with

five other accused persons pleaded not guilty to the charges of Criminal Conspiracy contrary to Section 97 of the Penal Code, Abatement contrary to Section 85 of the Penal Code, Culpable Homicide punishable with death contrary to Section 221 (a) of the Penal Code. The appellant as the 6th accused was alleged to have conspired with his co-accused persons to kill one Abdullahi Alhaji Umaru. The case for the prosecution is that the appellant on receiving the information that someone had abused the Holy Prophet Mohammed, together with some others went to confirm the truthfulness of the information, and on the confirmation of the story, they caused the death of the deceased by slaughtering him with a knife. The prosecution called eight witnesses, and there were addresses by both counsel. The learned trial Judge evaluated the evidence, considered the addresses and at the end of the day convicted and sentenced all the accused persons. Dissatisfied with the judgment, the appellant appealed to the Court of Appeal who dismissed the appeal and affirmed his conviction. Again, he was dissatisfied with the decision and has appealed to this court on three grounds of appeal, from which he distilled three issues for determination in the appellant's Brief of Argument, which was exchanged with learned counsel for the respondent. The issues in the appellant's Brief of Argument are:-

*"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?"*

*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?"*

*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?"*

In its Brief of Argument the following two issues were formu-

lated by the respondent:-

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

*2. Whether or not the Court of Appeal rightly held that the defences of justification and provocation as provided under Sections 45 and 222 (1) of the Penal Code respectively were not available to the appellant?”* <sup>B</sup>

The issues in the two Briefs are similar and interwoven, so for convenience I will deal with the issues in the appellant’s Brief of Argument and will do so together. In arguing issue (1), the learned counsel for the appellant submitted that the appellant was entitled to a consideration of the defences of justification by law as provided in Section 45 of the Penal Code as well as the defence of provocation as provided in Section 221 (1) of the Penal Code before the trial court. Learned counsel referred to the voluntary statement of the appellant Exhibits H and H1, and the evidence of P.W.2 and P.W.6. Learned counsel argued that the action of the deceased of insulting the Holy Prophet Mohammed as alleged by the appellant would definitely invite a consideration of the defences of justification by law and of provocation in favour of the appellant by the trial court. He added that the appellant’s background and station in life ought to be taken into account, and placed reliance on the cases of *Alkalezi v. The State* (1993) 2 NWLR (Pt.273) pg. 1. *Ekpenyong v. The State* (1993) 2 NWLR (Pt.295) pg. 513 and *Ubani v. The State* (2001) FWLR (Pt. 44) pg. 483. Learned counsel referred to an excerpt of the judgment of the learned trial court on page 75 of the Record of Proceedings which reads:- <sup>C</sup> <sup>D</sup> <sup>E</sup> <sup>F</sup> <sup>G</sup>

*“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 .....”*

Learned counsel submitted that it was erroneous of the trial court to have held that the voluntary statement of the appellant did not raise any defence, and that it was the duty of the trial court to consider the said defences no matter how stupid or unreasonable, for what it is worth. He referred to the cases of *Williams v. The State* <sup>H</sup>

(1992) 8 NWLR (Pt.261) pg.515, Arara v. The State (1981) 2 NCR 110, R. v. Fading (1958) SCNLR 250, and Udofia v. The State (1972) 12 S.C. 147. Failure to consider the defences, according to learned counsel was tantamount to the prosecution not proving its case beyond reasonable doubt.

B The learned counsel for the respondent in his Reply submitted that having regard to Order 1 Rule 19 paragraphs 3 and 4 of the Court of Appeal Rules, 2002, the Court of Appeal has power to make such findings. He argued that where a trial court failed to consider the defence of an accused person, an appellate court can consider such defence with all available evidence on the record, and the court below did exactly that in the instant case. Reliance was placed on the cases of Namsoh v. State (1993) 5 NWLR (Pt.292) pg. 129. C Takida v. State (1969) 1 All NLR pg. 53, and State v. Ajie (2000) 7 D S.C. (Pt.I) 24; (2000) 2 NSCQR.

In further building up his argument learned counsel submitted that failure of a trial court to consider the defences available or open to an accused person is only fatal where there is evidence in support of such defences in the record of the trial court. The court of law will not presume or speculate on the existence of facts not placed before it and that an accused person is usually required or recommended to give his evidence viva voce rather than adopting his previous extra-judicial statement for his defence or resting his case on the evidence of the prosecution as decided in the case of Ekpenyong v. State (1993) E 5 NWLR (Pt. 295) page 513. F

Now, what is the content of Exhibit 'H1' and what form of defence can be inferred from it? I will reproduce the relevant and material excerpt of the voluntary statement here below. It reads:-

G *"I was sleeping at Majelisa Area of Kardi, then one Musa Yaro came and met me with a history that someone at Randali abused the Holy Prophet and people are looking for him. ' Then I myself, Musa Yaro and Mohammed Sani both went to Randali to find out whether the incident was true..... then the man was about to repeat the same kind of insult that was uttered but we told him not to repeat but to assure us, then he said actually the incident was true and that, the person told him to go and tell Prophet Mohammed. And he that abused the Prophet was Abdullahi Alh. Umaru Randali, and that (sic)*

H



*has ran to Kardi village, then we followed up and caught him. I held him on his trouser while Musa Yaro held him on his left hand and we drew him to the bush. Musa Yaro passed judgment, Mohammed Sani matcheted him and Usman Kaza also matcheted him with some cutlass. Then Abdullahi fell down, and Mohammed Danshal used his knife and slaughtered him.”* B

(Underlined is mine.)

As can be understood in the above reproduction the appellant did not even hear the nature of the alleged insult itself, for according to him they prevented the informant from repeating the insult. In C other words, the appellant couldn't have considered the gravity of the words uttered having not heard it directly. In the circumstance, how could his emotion have been stirred towards provoking him to the extent of wanting to kill a fellow human being, or what justification D could have arisen to make him want to carry out such barbaric act? It was not as though he was present when the deceased uttered the alleged insult, and as such heard it directly from the horses mouth, so to speak. It could very well have been mere rumours and it could have been false allegations, but he and his cohorts could not wait to E confirm the veracity of the allegation before taking the law into their hands and sending the deceased to his early grave. On the other hand, even if the allegation was confirmed to be true, was it in their place to pass judgment on the deceased and execute him there and F then the way they did? Definitely not. That is why we have law enforcement agents, and the courts and their functions cannot or will not be allowed to be usurped by individuals. That is also why we have laws and the persons who operate the law. A society that does not reckon with these authorities and abide by the laws of the land is G bereft of sanity, for the moment such acts are condoned then the consequence is chaos and jungle co-existence. .

Then the evidence of PW.2, which the learned appellant's counsel said raised defences of justification and provocation. In my opinion rather than do that, I would say that his evidence in fact further H corroborated the appellant's guilt, in that he said inter alia thus:-

*“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 Quaran 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."*

PW.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 PW.5, and PW.6. So how did their evidence raise these defences other than that they were eye witnesses to the slaughtering of the deceased by the accused persons.

***The conditions to be satisfied before the defence of justification can avail an accused 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 PW.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 221(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 or accident.”***

***In the instant case, what was the sudden provocation that deprived the appellant of the power of self control? The appellant himself in his voluntary statement Exhibit ‘H1’, from which his counsel says the defence of provocation can be inferred said he was in fact sleeping when the courier of bad news came to wake him up with the story. He woke up and went in search of the deceased, and it must have taken so much time in between before locating the deceased. In the interval, should the power of self control have eluded him? That is even if what he heard was enough to provoke him. Then even before the barbaric act he was counseled on whatever act he was wont to take by a man who was supposedly more knowledgeable than him in the teachings of the quoran, but no he and his co-accused persons must deal with the deceased in their own way. In fact there is no evidence whatsoever in the record of proceedings to avail the appellant of the defence of provocation.*** See the cases of Ihuebeka v. The State (2000) 4 S.C. (Pt.I) 203; (2000) 5 SCNQR (Vol.2) pg. 186 and Ahmed v. The State (1999) 5 S.C. (Pt.II) 39; (1999) 7 NWLR (Pt.612) pg. 641, cited by learned counsel for the respondent. In the famous case of Mancini v. D.P.P. (1942) AC.I. 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 in 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 determinating 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.***

***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.***

***For the foregoing discussion, I am in full agreement with the learned Justice of the court below in the leading judgment when he said:-***

***"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.....***

***Moreover a considerable time had lapsed between the time or***

*date of the alleged insult and the killing of the deceased whose killing was also unjustified. Consequently, it is my humble view that the appellants are not entitled to the defence of provocation which is not open or available to them on the established facts from the evidence on record. Their claim for the benefit of the defence is only an after thought and, a misconception of the law (i.e. Section 222(1) PC) by their learned counsel.”* <sup>B</sup>

Now, at the trial court the appellant did not raise the defences, as was pointed out by the learned trial Judge in his judgment, when he said:-

*“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.”* <sup>C</sup>

It is instructive to note that it was not until the appellant appealed that he raised the issue of the defences in the sole issue for determination which he formulated. Based on this issue, arguments were proffered and in that respect the learned court below was constrained to review the evidence before it to consider the principles governing the defences and determine whether they availed the appellant. This, the court below was obliged to do, both under the rules of the court and the law establishing the court. See Order 1 Rule 19 of the Court of Appeal Rules supra. By virtue of Section 16 of the Court of Appeal Act, 1976, Cap. 75, Laws of the Federation of Nigeria, 1990, the court is empowered to evaluate evidence. The section makes the following provision:- <sup>F</sup>

*“16. The Court of Appeal may, from time to time make any order necessary for determining the real question in controversy in the appeal..... and in general shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part.....”* <sup>G</sup>

Now, the appellant vide his sole issue for determination and his arguments invoked the above provision that gives the lower court the power to exercise the power vested on it by the above provision, so he cannot be heard to complain and make heavy weather of the findings of the court below. Perhaps, he expected the court to find <sup>H</sup>

what it did not see. As for the submission of the learned counsel for the appellant that the lower court should have found the contrary i.e. that the prosecution did not prove its case beyond reasonable doubt, I think this is absurd. The prosecution did prove its case beyond reasonable doubt, and even the trial court found so. At this juncture and for the purpose of this very point, I will reproduce the relevant section of the Evidence Act which deals with the concept of proof in criminal cases. By virtue of Section 138 of the Evidence Act, Cap. 62 of the Laws of the Federation of Nigeria, 1990, the following is stipulated:-

*“138. (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.*  
*(3) If the prosecution prove the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the accused.”*

There is no doubt whatever in my mind that the prosecution discharged the burden placed on it by the law, as it did prove its case beyond reasonable doubt with credible and unchallenged evidence. Having proved its case beyond reasonable doubt the burden shifted to the appellant, but the appellant neither testified nor adduced evidence in the form of defence. The voluntary statement which the appellant relied upon for defence was bereft of any such defences. It rather confirmed and corroborated the case of the prosecution that he conspired with others to cause the unlawful death of the deceased. The appellant did not prove any doubt by adducing evidence in his defence. In the light of the reasoning in the body of this judgment, I resolve the issues in favour of the respondent, and dismiss the three grounds of appeal.

The end result is that the appeal fails in its entirety and it is hereby dismissed. The judgment of the Court of Appeal, Kaduna Division is affirmed. The conviction and sentence of the appellant remains.

---

### ONU JSC

Having had the opportunity to read before now the judgment of my learned brother, Mukhtar, JSC., just read, I am in entire

agreement with it that the appeal fails and it is dismissed by me.

### **MUSDAPHER JSC**

I have had the honour to read in advance the judgment of my lady, Mukhtar, JSC., just delivered. In the said judgment, all the issues submitted for the determination of the appeal have been comprehensively and exhaustively dealt with. I respectfully adopt the reasonings as mine and I accordingly also dismiss the appeal and affirm the decisions of the courts below.

### **ONNOGHEN JSC**

This is an appeal against the decision of the Court of Appeal holden at Kaduna in appeal No: CA/ K/60/03, delivered on the 10th day of December, 2003, in which the court dismissed the appeal of the appellant against his conviction and sentence to death by the High Court of Kebbi State in charge No: KB/HC/16C/99.

The appellant and five (5) others were charged upon an information for criminal conspiracy, abatement and culpable homicide punishable with death contrary to Sections 97, 85 and 221 (a) of the Penal Code.

On or about the 14th day of July, 1999, it was rumoured at Randali and Kardi Villages of Kebbi State that one Abdullahi Alhaji Umaru of Randali Village had insulted the Holy Prophet Mohammed (SAW) resulting in many Muslim brothers going in search of him. He was eventually arrested at Kardi Village and kept in the custody of the appellant who was the 6th accused at the trial, and Mohammed Sani, the 3rd accused. Some of the accused persons then left to consult with the Village Head on the appropriate punishment to be meted out to the said Umaru but the village head refused to make any commitment in the matter. The men then returned to the outskirts of Kardi Village where the said Umaru was being held captive by the appellant and Sani and Musa Yaro, one of the men who was later charged along with the appellant, read a portion of Risala to the effect that the punishment for anyone who insults the Holy Prophet Mohammed (SAW) is death, as a result of which the said Sani hit Umaru with a matchet causing him to fall to the ground while Danshalla, who was the 5th accused at the trial, used a knife to slaugh-

ter Umaru after which they all dispersed. As stated earlier in this judgment, the appellant and the other five accused persons were subsequently arrested, charged, tried and convicted of the offence of criminal conspiracy and culpable homicide and sentenced to death.

B The appellant was not satisfied with the decision of the trial court and therefore appealed to the Court of Appeal holden at Kaduna where the issue for determination, as identified by the learned counsel for the appellant in the appellant's Brief filed on 14/2/03, is stated as follows:-

C *"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?"*

In resolving the issue, the lower court restated the principles of law governing the duty of a trial court to consider all the defences D available to an accused on the facts on record irrespective of whether they were raised by the defence or not and followed same by an examination of the evidence on record to see whether there were facts in support of the alleged defences of justification and provocation. The court noted that the appellant never testified at the trial and E that the essential facts constituting the offence charged were never denied by the appellant even in his statement to the Police which was admitted in evidence at the trial and therefore came to the conclusion that there were no facts on record upon which those defences F could be anchored.

It is note-worthy that out of the single issue put before the lower court for determination and which was done, the learned counsel for the appellant has now formulated three (3) issues in the appellant's Brief of Argument filed on 14/11/05, for the determination of the G instant appeal. It appears the issues for determination are obviously in the increase. What then are the current issues? They are stated at pages 4 & 5 of the Brief as follows:-

"ISSUE NO 1

H 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 ap-



peal.

## 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. B

## 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.” D

It is clear that while the single issue before the lower court accused the trial court of failure to consider all the defences available to the appellant before convicting and sentencing him as charged, issue three before this court is challenging the examination of the record of appeal by the lower court so as to determine the availability of facts on record to ground the alleged defences of justification and provocation in order to determine the said issue one way or the other. The complaint of the appellant now is that the lower court ought not to have examined the record in attempt at determining the issue raised without first and foremost hearing arguments on behalf of the appellant as to whether facts exist on the record to sustain the alleged defences!! The argument is strange. I think it is misconceived. The learned counsel who complained against the non-consideration of the defences in favour of the appellant by the trial court owed a duty to both the court and his client to have pointed out the facts or evidence on record which when considered would establish or avail the appellant of the defences. Availability of any defence to an accused person is a matter of fact and law, not speculation. In fact the practice of the law is never based on speculation. Therefore, when a person alleges on appeal that certain defences are available to him, it is his duty to prove same by reference to the evidence on record which if accepted by the court will establish the existence of such defences. E F G H

In the instant case, the appellant never denied participating in the events leading to the death of the deceased in the circumstances recorded in the proceedings. He took an active part in it. He confirmed same in his statement to the Police which was tendered, admitted without objection and marked as an exhibit.

B The statement was never denied at the trial. The appellant did not testify at the trial to give a different version of facts surrounding the events of that day nor of facts suggesting remotely, the existence of any defence available to the appellant. The question is, where  
C does the learned counsel expect the court to get the facts with which to establish any imaginary defence available to the appellant except by speculation; which is frowned upon by the law. It is settled law that, while the trial court or any court for that matter is under an obligation or has the duty to consider all the defences possible or  
D available to the accused or appellant on the facts; even though they may appear to be stupid, improbable or unfounded, the court cannot give the accused or appellant the benefit of defences which were not supported or reflected by the evidence on record - See *Green v. Queen* (1955) 15 WACA 73, *Nwuzoke v. The State* (1988) I NWLR  
E (Pt.72) 529, *R v. Bio* (1945) II WACA 46 at 48, *Asanya v. State* (1991) 4 S.C. 42; (1991) 3 NWLR (Pt.180) 442 at 451, *Namsoh v. State* (1993) 5 NWLR (Pt. 292); 129 at 143, *Takida v. State* (1969) BUNLL 53.

F It is also settled law that, where a lower court failed to consider the defences available to an accused appellant, the appellate court is in as good a position as the lower court to consider the said defences provided there are facts available on record to support same. The omission of a lower court to consider any defences open to an  
G accused/ appellant can only be fatal to the decision of that court if there are available on the record, evidence of facts in support of the alleged defences. Where there is no such evidence as in the instant case, the court is not allowed to speculate on same — See *Ekpenyong v. State* (1993) 5 NWLR (Pt. 295) 513 at 522.

H I have had the privilege of reading in draft, the leading judgment of my learned brother, Mukhtar, JSC., and I agree with her reasoning and conclusion that the appeal is without merit and is accordingly dismissed by me.

**OGBUAGU JSC**

I had the privilege of reading before now, the leading judgment of my learned brother, Mukhtar, JSC. I agree with him, that the appeal fails. However, I wish to state by way of emphasis, that on the decided authorities, the defences open to an accused person which a court -whether trial or appellate, has a duty to consider, in my respectful view, must be, the defences or such defence or defences that appear or are contained in the evidence before the court or that appear or are contained in the Record of Proceedings. In other words, the duty of the/a court, is to consider all defences raised in evidence in the record of proceedings even if the accused person did not specifically raise them and this is regardless of whether such defence or defences is or are hopeless, weak or stupid. See the cases of Njoku v. The State (1993) 7 SCNJ. (Pt. I) 36 at 41, where it was held that it would be a different thing, if a trial court, merely conjectures such defences and citing the cases of APISHE & 2 Ors. v. The State (1971) ANLR 53 and Okoere v. The State (1971) ANLR 1, Grace Akpabio & 2 Ors. v. The State (1994) 7-8 SCNJ. (Pt. III) 429, Ofoke Nwambe v. The State (1995) 3 SCNJ. 77, just to mention but a few. Thus, it is not a matter of speculation by the court to consider every and all imaginable defences open to an accused person not raised in evidence before the court or contained in the Record of Proceedings. It cannot be by any stretch of imagination in my humble and respectful view. It is not, I repeat, it is not the duty of any court including this court, to look for all possible exculpatory evidence that is not borne out in the records, in favour of an accused person. It is not the law.

In the instant case, as appears or reproduced in the lead judgment of my said learned brother, the trial court stated that, the accused persons (which included the appellant),

*“did not raise or suggest any defence, their voluntary statement did not suggest any defence and there is no doubt about this. ....”*

On its part, the court below, stated at page 117 of the records, inter alia, as follows:-

*“..... It is only 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..... Consequently, the only evidence available before or at the trial court, were the act of the prosecution witnesses (8 of them) and the confessional or voluntary statements made by the appellants to the Police .....

Aderemi, JSC., in his contribution/concurring judgment in the case of Abdullahi Ada v. The State (2008) 4-5 S.C. (Pt. II) 45; (a co-accused/appellant in the murder charge) after referring to the case of Umani v. The State (1988) 1 NWLR (Pt.70) 724 (also reported in (1988) 2 SCNJ .86), succinctly, stated inter alia, as follows :-

*"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 or one may ask, if there was/is no evidence before the trial court, the court below and in this court in the record of proceedings, suggesting even remotely of the said defences of justification and provocation only raised in my respectful view by the learned counsel for the appellant, as an after thought in the court below, how can or could the three issues of the appellant, ever be an issue arising from the records? As far as I am concerned, with respect, they are none issues and the learned counsel for the appellant, was definitely not justified when he used the words *"defences open to the appellant / him on the record....."* when in truth and in fact, there is no such defences in the record so raised or even suggested by the appellant.

Finally, there is also the concurrent judgments of the two lower courts and this court, cannot disturb or interfere with them as there is no basis whatsoever, for such an interference.

It is from the foregoing and the more detailed judgment of my learned brother, Mukhtar, JSC., that I too, dismiss the appeal and affirm the said judgment of the court below affirming the conviction and sentence to death of the appellant by the trial court.