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THE SCOPE AND NATURE OF PROVOCATION IN THE NIGERIAN CRIMINAL JUSTICE SYSTEM: DETERMINATION OF APPLICABILITY

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10.5281/zenodo.21450367

Abstract

The defence of provocation is available to an accused as a mitigating defence rather than an absolute one. Though the law recognizes human weakness, it does not condone human ferocity. The doctrine of provocation and crime of homicide has always represented an anomaly in English Law. The defence of provocation is usually raised in criminal trials. By virtue of its prominence in the Nigerian Criminal Justice system account is therefore taken meticulously to give a vivid exposition of its nature. If provocation is successfully proved in homicide cases, it will reduce the offence to manslaughter with consequence of lesser penalty. The law of provocation in criminal trial has been the subject of controversies, both locally and in other commonwealth jurisdictions in recent years. Against this background, the author seeks to critically appraise the scope of provocation and its applicability in the Nigerian criminal justice system. The paper adopting a doctrinal method maintains that there are several technicalities in determining who is a reasonable man and also the proportional rule of retaliation. It is therefore concluded that the proportional rule of retaliation would definitely be detrimental to an accused person or defendant.

Keywords: Appraisal, Scope, Provocation, Applicability and Criminal Justice

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1. Introduction

In Nigeria, any act of killing which is unlawful is a criminal act. Such acts under certain offences are referred to as unlawful homicide, which includes suicide, infanticide, murder, and manslaughter. The burden of proving the guilt of an accused lies with the party making the allegation of the offence.¹ On the contrary, a defendant accused has the right to mount a defence against the charges brought against him, and indeed, provocation is one of such defence. The defence of provocation is commonly invoked by the accused, particularly in cases of homicide involving charges of murder or manslaughter. Not all killings however,

¹Section 36 (5) CFRN 1999 as amended, this provision also state that nothing in this section shall invalidate any by reason only that the law imposes upon any such person the burden of proving particular facts.

necessarily constitute murder. For instance, under Section 317 of the Criminal Code Act,² specific provisions address cases involving grievous harm. Additionally, voluntary manslaughter occurs when a person deliberately causes the death of another individual. The charge of murder however, may be downgraded to manslaughter when provocation is considered a contributing factor. Pleading provocation may also be applicable in cases where the individual unintentionally causes death or bodily harm, due to the presence of sudden passion that result in a loss of self-control, which is caused by provocation. The intricate nature of the defence has brought about so much controversy. This aspect remains contentious as the court is frequently inclined to ascertain whether the accused person has experienced peculiar circumstances that can be deemed as a provocation.

Under section 318 of the Criminal Code Act,³ the concept of provocation established that an individual shall be charged with manslaughter, exclusively when the individual unlawfully cause the death of another person under specific circumstances which would otherwise have constituted murder so far it is done under the heat of passion provoked by a sudden occurrence and before sufficient time has passed for their passion to subside. The Supreme Court in the case of *Obaji v State*⁴ held that section 318 of the Criminal Code Act,⁵ should be read alongside section 283 of the Criminal Code Act.⁶ In accordance with section 318 of the Criminal Code Act, for the defence of provocation therefore, to be applicable to an individual, it is necessary to assess the impact that the act or series of acts committed by the deceased would have on a reasonable person to be able to rely on it as a defence. Consequent on the significance of the above scenario, the paper seeks to appraise the scope of provocation and its applicability in the Nigerian criminal justice system.

2. Definition of Terms and Nature of Provocation

A. Provocation

The term "provocation" seems not to be clearly defined in the criminal code. The definition of provocation under the Common Law was modified in England under the statutory law. Consequently, Section 3 of the Homicides Act of 1957 stipulates that:

Where in a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said, or by both) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did, shall be left to be determined by the jury.⁷

According to Section 318 of the Criminal Code, provocation could be defined as:

When a person who unlawfully kills another in circumstances which, but for the provision of this section, would constitute murder, does the act which cause death in the heat of passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.⁸

² Cap C.38, Laws of the Federation of Nigeria, 2004.

³ Ibid

⁴ (1965) 1 All NLR269

⁵ Ibid

⁶ [Hereafter, The CC LFN 2004], f/note 2

⁷ The Act is inapplicable in Nigeria as a post 1900 Statute

⁸ The CC (2004)

The above section has been treated by the court as an import of the Common Law into the Nigerian criminal law regime.⁹ Notably, provocation can also be defined as triggers such as words or actions, which evoke anger or animosity in another individual, leading them to react impulsively in the heat of passion.¹⁰ In a similar vein, provocation has been characterised as an 'act' that possesses the capacity to hinder the exercise of reason and temporarily rob a reasonable person of their self-control.¹¹ Provocation could also mean "an action or event that makes someone angry," that is, the intentional causing of anger or annoyance in someone that makes him react in a violent way. In cases where provocation is invoked in a general sense, the aforementioned conditions are typically presumed to exist. When provocation is however examined from a legal standpoint, it is assessed in a technical manner, taking into account the specific legal criteria and considerations.¹²

Several judicial decisions have been made with regard to the definition of provocation. The Nigerian Court of Appeal in *Kingsley Oghor v State* expressed the following in his statement:

When I said that appellant was provoked by the act done by the deceased I mean it to excite, to stimulate, to arouse, to initiate or to enrage the appellant. But legal provocation as has been defined all over the commonwealth demands of a higher requirement. Provocation which will reduce killing to manslaughter must be of such character as will in the mind of an average reasonable man sustain resentment likely to cause violence, obscure the reason and lead to action from passion rather than judgment. There must be a state of passion without time to cool pacing the defendant beyond control of his reason...¹³

No doubt provocation under our statute is in consonance with the Common Law definition of provocation. This is the reason why the court in *Biruwa v State* applied the common law definition attached to provocation.¹⁴ Thus, a court of law must at the end of the trial of an accused person who raises the defence of provocation, ask itself if the piece of evidence adduced is enough to reduce a case of murder to manslaughter not the definition of the term. Provocation can occur through verbal statements or actions. This rule however was amended in *Holmes v DPP* which explicitly states that words alone cannot be considered sufficient to constitute provocation, 'except in circumstances of a most extreme and exceptional character.'¹⁵ But what is meant by circumstances of a most extreme and exceptional character is a question of fact not law, and will vary with each given case. This principle was affirmed in the case of *R v Adekanmi*, where Francis J. held that in considering provocation, 'the effect it should be expected to have on a reasonable man must be taken to mean the effect it would be expected to have on a reasonable man of accused standing in life.'¹⁶

Since section 283¹⁷ of the Criminal Code, defines provocation for the purpose of section 318,¹⁸ there should be no question as to whether word alone can amount to a provocation that

⁹ *R v Nwankwo* (1959) 4 FSC 39

¹⁰ B A Garner, *The Black's Law Dictionary*, 9th Ed., Thomas Reuter Business (2009), 1346

¹¹ Osborn's *Concise Law Dictionary* (7th ed. Sweet and Maxwell: London, 1953), 259

¹² A. A. Abdulrazak, 'Critical appraisal of the extent and limit of the defence of provocation in murder charge in Nigeria,' (A publication of the University of Ilorin, 2010) 59

¹³ (1990) 3 NWLR [Pt. 139] at 484, Per Justice Justice Kolawale of the Court of Appeal

¹⁴ (1985) 3 NLCD 16 at 1713

¹⁵ (1964) AC 588

¹⁶ (1944) 17 NLR 99 at 101

¹⁷ The CC (2004)

is deemed adequate to downgrade a charge of murder to manslaughter. But there appears a conflict of authorities, in the case of *Basil Akalezi v State* the question was whether mere words of provocation suffice in reducing murder to manslaughter.¹⁹ The appellant was tried and convicted of murder in the High Court and was sentenced to death. The facts as established by the evidence were that the deceased was having an amorous discussion with his niece in his presence. The appellant slapped the deceased on the face twice and later ran away. The appellant gave him a chase, caught up with him and stabbed him with a pen knife. The appellant alleged that the deceased provoked him but the trial court and the Court of Appeal refused his argument. On further appeal to the Supreme Court, his argument of provocation was also dismissed. This reasonable man's test comes into play in this issue, as a reasonable man in that kind of situation will not be provoked to the extent of stabbing the deceased to death. In *Nungu v R* where a younger brother said to his elder brother during a quarrel that he provided money for his (elder brother's) marriage was held not to amount to such provocation as would reduce murder offence to manslaughter.²⁰ Also, the interference with the mother's property especially the destruction or attempted destruction thereof could not amount to provocation.

B. Homicide

According to the Black's Law Dictionary, homicide is the act of one person causing the death of another through an action, instigation, or failure to act.²¹ Criminal homicide occurs when an individual intentionally, knowingly, recklessly, or negligently causes the death of someone. Homicide is a neutral term as it solely describes the act of one person causing the death of another, without making any moral or legal judgments about its quality.²²

The World Encyclopedia, Volume 9, makes reference to homicide, as the act of an individual bringing about the demise of another. Hence homicide can be either lawful²³ or unlawful.²⁴ Homicide is therefore the act of killing one person by another, though the issue of the act being lawful or unlawful depends on the circumstances of the case.²⁵

C. Penal Code

The Penal Code provided for the defence of provocation in sections 222, 265 and 266 of the Penal Code.²⁶ Although the Penal Code also did not define what provocation is, section 222 (1) of the code merely contained what constitutes provocation.

Culpable homicide is not punishable with death if the offender whilst deprived of the power of self-control by grave and sudden provocation or causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

¹⁸ Ibid

¹⁹ (1993) 2 NWLR (Pt. 273), 10

²⁰ (1953) 6 FSC.50; *State v Ufomba* (1972) ECSLR, 775, where a village wife who was nursing a seven months old child was then five months pregnant called her husband a fool when he questioned her as to who was responsible for pregnancy. It was held to constitute provocation.

²¹ B A Garner, supra, f/note 10 at P. 902

²² Ibid

²³ Section 306 of Criminal Act, LFN, 2004

²⁴ Ibid Section 215

²⁵ M A Owoade, *Law of Homicide in Nigeria* (2nd ed, Obafemi Awolowo University Press, 1990) 2.

²⁶ Cap C 34 LFN, 2004

The provision of the above section provides that such provocation must be grave and sudden. It must have denied the person of self-control at the material time. The explanation of this section has been provided in the case of *Ahmed Hade v The State*.²⁷ In Ahmed Hade's case, the question was "whether the provocation was grave and sudden enough to prevent the offence from amounting to culpable homicide punishable with death."

Thus, the court held that for an accused person to avail himself of this defence, it must be established that:

- (a) There was a wrongful act or insult.
- (b) Such a wrongful act or insult is capable of causing a loss of self-control to an ordinary person.
- (c) The accused acted suddenly and in the heat of passion without cooling time.
- (d) The act of the accused was proportionate to the provocation arising from the wrongful act or insult.

In *Kwaku Mensah v King*, the court held that when a man is assaulted in the course of defending his property or while trying to apprehend a thief is a provocation of a most serious character.²⁸ In *R v Kankomba*,²⁹ the forcible grasping of a man's private parts may constitute sufficient provocation. Although there is no rule to this effect each case must be considered on its particular factors as was illustrated in some decided cases.³⁰ It should be noted that a lawful act, for example, a lawful arrest by a private person cannot constitute provocation as seen in the case of *State v Nweke*.³¹ On the other hand, an unlawful arrest may be evidence of provocation to a person who knows of the illegality. If there is no evidence however and the accused was not aware of the illegality, the presumption most favourable to him should be made. This is the decision of the court in *State v Aleke*,³² when the court held that the unlawful arrest of the accused by the deceased constitutes provocation. Provocation given by a group of persons however may be successfully pleaded where the person so provoked kills a member of such group. In *Queen v Dummeni*,³³ a group of Barkeji people caused and fought a group of Dumenni people with sticks. The appellant on hearing that a Dumenni was killed struck an axe in the abdomen of the deceased who was already injured and who belonged to the Barkeji group. The trial judge held that in such a circumstance it could not be said that the deceased provoked the appellant. On appeal, it was held that the shout that Barkeji had killed Dumenni did not constitute such provocation so as to reduce the crime to manslaughter irrespective of the fact that the deceased may not have personally offered provocation.

3. The Challenge of Burden of Proof

The burden is not only on the accused to establish a plea of provocation. Also the evidence must disclose a possible defence of provocation. The burden of proof remains throughout on the prosecution to negate it and prove beyond reasonable doubt that the prisoner did not kill the deceased in the heat of passion caused by sudden provocation.³⁴ Sometimes, the accused

²⁷ (1999) 9 NWLR (Pt. 619) 369

²⁸ (1946) AC 3; The Fact of intervening in a fight and wounding an already wounded unarmed man who is struggling to arm his original assailant was held in *R. v Ogoto*(1961) All NLR 700 to be an act of provocation.

²⁹(1952) 14 WACA, 236

³⁰*R v Jinobu*(1961) All NLR 627 at 629; *Ifenodo v. State* (1967) NMLR 200

³¹(1965) All NLR,11

³² (1965) 9 ENLR 82

³³ (1955) 15 WACA 5

³⁴ Chan Kan v. R (1955) AC 206; *R v. Oshunbiyi* (1961) All NLR 453

may plead accident or self-defence. He may not wish to plead provocation as well because being an inconsistent plea. It is bound to weaken its defence, if not to destroy the alternative defences.³⁵ In such cases, the law does not place the accused in fatal dilemma, but requires the judge, if he is sitting with a jury to direct the jury upon it. Provided in either case that the evidence disclosed a possible plea of provocation fit to be considered by a judge or left to a Jury.³⁶ It was stated by Lord Goddard in *Kwaku Mensah v R* that:

But if on the whole of the evidence there arises a question whether or not the offence is manslaughter only, on the ground of provocation as well as on a way similar to the present, more especially in that; the lien of defence adopted was that the killing was accidental and no attempt have been made at the trial to rely on provocation. This ruling was expressly approved by the House of Lords in *Manicin v DPP*. The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought.

A defendant who pleads provocation in defence to a charge of murder bears an evidential burden to adduce evidence of the existence of the provocation sufficient to satisfy the trial judge that the defence is fit to be placed before the jury. It is one of the trial judge's important responsibilities to direct the jury on all defences which arise on the evidence even if the defendant himself does not adduce any evidence of the existence of that defence or perhaps even denies the existence of that particular defence. Thus, the House of Lords in *R v Achott*³⁷ deals with how the evidential burden relating to the defence of provocation might be discharged and the obligation placed upon the trial judge where the defendant advances a defence which is inconsistent with the existence of provocation. What sort of evidence must exist in order to invoke the judges duty to leave the defence to the jury.

4. Establishing the Defence of Provocation

It would be necessary to determine how far reaching the defence of provocation is. The questions therefore arising are:

- (a) To what offences can the defence be pleaded, either in mitigation or complete defence
- (b) How far is the law willing to accommodate provocation and still protect the sanctity of life?
- (c) Is there a reasonable relationship between provocation and self-defence?

These questions are pertinent in the light of the meaning of the word "scope" to include the range of activity. Thus the definition of provocation will be resorted to in order to adequately examine the issues raised.³⁸ From the tenor of that provision, one gets a distinct impression that the offence to which provocation is pleaded as a defence must contain assaults as an element. It follows therefore that in offences like stealing, sedition, libel, the defence would not be successful if pleaded. It is further suggested that the accused must have lost his self-control as a result of the provocation offered, inducing him to assault the deceased. Inclusively, section 252 of the Criminal Code defines assault as:

A person who strikes, touches, or moves or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent, or with his consent, if the consent is obtained by fraud or who by any bodily

³⁵ M A Owoade, Supr at p. 102

³⁶ *R v Aforya* (1955) 15 WACA 26, *Apistae v State* (1971) 1 All NLR 50

³⁷ (1997) 1 A11ER706

³⁸ S. 318 CC, Supra at f/n 2

act or gesture attempts or threatens to apply for of any kind to the person of another without his consent, in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purposes, is said to assault that other person, and the act is called an assault.

The questions which arise from the foregoing are:

- (i) Would a person be entitled to the defence of provocation where the retaliation is carried out by poison?
- (ii) Would the retaliation if done through an electrical contrivance or mechanical object capable of projecting hurt or steam, amount to provocation?

The only requirement in the defence of provocation is that irrespective of how the retaliation is carried out, it must bear a reasonable relationship to the degree of provocation offered and must also be done in the heat of passion as stated in the case of *R v Green*.³⁹

In the light of question (ii) which is as to how the law strikes the balance between the need to preserve the sanctity of life and the need to recognize human frailties. This can only be appreciated by reproducing the mechanics of provocation arising either through a violent assault or through adultery.

Thus, law's insistence on the retaliation being done in the heat of passion and before there is time for the passion to cool is justifiable. A person therefore, who sets out to procure poison and finds the opportunity to administer same to the person who offered him the provocation would not be said to be acting in the heat of passion. As this is a clear distinction between killing due to provocation and cold blooded murder or revenge. As to the question of adultery, if a man discovers another man in the actual act of adultery with his wife, this is taken as sufficient provocation to reduce the act of killing either his wife or adulterer to manslaughter⁴⁰ This rule however will not be extended to cover the case of a fiancée or woman who is not married to the man.⁴¹

Significantly, there are several defences to provocation such as the following cases reveal:

I. Mistake

In the defence of mistake, there exists the reasonable man's test which is to the effect that a reasonable man standing in life. The defence of mistake goes further to add that the accused will be judged as liable on the facts as he believed them. According to Glanville Williams, there is no objective test in respect of mistake as it need not be reasonable. It has been stated that an accused lacks legal fault if he can prove that he lacked awareness of the fact bringing him within the definition of an offence and that he thought otherwise because he had made a mistake.

II. Self-Defence

Whenever self-defence is pleaded on a charge of murder, it is necessary to show that the nature of the attack by the deceased was such as to cause a reasonable apprehension of death or grievous harm. For instance in *R v Onyeamaizu*,⁴² before the defence of self-defence can avail an accused or can lawfully be invoked three fundamental principles must be established,

³⁹ (1955) 15 WACA73

⁴⁰ *R v Greening* (1913) 3 KB 846

⁴¹ *R v Palmer* (1912) 2 KB 26

⁴² (1958) NRNL 93; *Ekpev State* (1993) 7 NWLR (Pt. 297) 82

to wit:

- (a) The defence can only be invoked against a person who is an assailant or an aggressor.
- (b) The person attacked or assaulted or threatened with violence by the assailant must be in actual fear or belief or reasonable apprehension of death or grievous harm.
- (c) The force used to repel the attack by the assailant must be proportionate to the force used in the attack.⁴³

Where a defence of self-defence succeeds, the proper verdict is that of not guilty and the accused person will consequently be discharged and acquitted. Self-defence therefore affords a complete defence. Where the defence of an accused person is one of self-defence, what it means is that the accused admitted that he did the act which resulted in the death of the deceased and was justified in doing so to protect his own life because he was in the risk of imminent death and would have been killed or was in such fear when he committed the act.⁴⁴

III. Intoxication

In Nigerian law, intoxication is provided for by section 29 of Criminal Code.⁴⁵ By this section, there is the existence of involuntary and voluntary intoxication.⁴⁶ Intoxication is simply a condition of being stupefied by alcohol or narcotics. When it is caused by alcohol it is another term for drunkenness.⁴⁷ By virtue of section 29 (2) (A) of the criminal code, intoxication is only a defence if it is induced by malicious or negligent act of another. A self-induced intoxication is not defence of intoxication. A defence of intoxication does not avail a person where there was no evidence that the person was drunk and became temporarily insane at the time he committed the offence as a result of the malicious or negligent act of another. Intoxication is a question of fact which has to be established by evidence and the burden of establishing the defence rest on the accused person.⁴⁸

IV. Accident

Under the Nigerian legal system, section 24 of the Criminal code provides:

Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident.

An accident is the result of an unwilled act, an event which occurs without fault of the person alleged to have caused it. The expression "an event which occurs by accident" connotes an event totally unexpected by any reasonable person.⁴⁹ Thus, for an event to qualify as accidental it must be a surprise both to the doer of the act that caused it and a surprise to all. An event is therefore an accident if it is not objectively foreseeable by the ordinary man of reasonable prudence.

Although it is recognized by the criminal code that accident is a general defence in criminal

⁴³ *Kanimu v State* (1996) 7 NWLR (Pt. 462) 581

⁴⁴ *Ekpenyong v State* (1991) 6 NWLR (Pt. 200) 689

⁴⁵ Section 44 of the Penal Code provides for only voluntary intoxication

⁴⁶ Okonkwo and Naish, *Criminal Law in Nigeria* (Spectrum Law Publishing Nig., 1980) p. 149

⁴⁷ *Imo v State* (1991) 9 NWLR (Pt. 213) at P. 115

⁴⁸ *Osakwe v AG Bendel State* (1991) NWLR (Pt. 167) 319

⁴⁹ *Asuquo Thomas v State* (1994) 4 NWLR (Pt. 337) 131

law, it is not one of the traditional defence to the change of murder. This is however not to say that, the defence should not be considered where appropriate in a murder change, indeed it can. The defence of accident, like all other defences, presupposed that the accused physically committed the offence but he should be acquitted because it was an accidental act.

V. Insanity

The term insanity is used mostly in countries of common law tradition to indicate the general mental abnormality that affords an exemption from punitive responsibility. According to section 28 of the Criminal Code:

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.⁵⁰

Insanity could be established by the following ways amongst others:

- (a) Evidence as to the past history of the accused
- (b) Evidence as to his conduct immediately preceding the killing of the deceased.
- (c) Evidence from prison warders who had custody of the accused and looked after him during his trial.
- (d) Evidence of medical officers and/or psychiatrists who examined the accused.
- (e) Evidence of relatives about the general behaviour of the accused and the reputation he enjoyed for sanity or insanity in the neighbourhood.
- (f) Evidence showing that insanity appears in the history of the accused family, and
- (g) Such other facts which will help the trial judge come to the conclusion that the burden of proof of insanity place by the criminal code on the defence has been discharged.

The law is that the onus of proof of the defence of insanity is on the person who pleads it, and it is discharged on a balance of probabilities. The accused must prove that at the time he committed the offence, he was actually insane within the conditions stipulated by section 28 of the Criminal Code.⁵¹

VI. Automatism

Under the Nigerian legal system, section 24 of the criminal code provides a defence where an act or omission is independent of the exercise of the will. This must mean that no one is liable for an unconscious act.⁵² When a man acts in a state of unconsciousness, under the English law he has a defence of automatism and term which can be defined as "unconscious involuntary action."⁵³ This does not result from a disease of the mind because the mind does not go with what is being done.

It is pertinent to suggested that automatism, epileptic feet etc. must be assimilated to the defence of insanity rather than living such matters unregulated as they are presently. The border line that automatism and insanity being more imaginary than real. Spasm reflects actions, convulsion and sleep walking are generally classified as forms of automatism.⁵⁴

⁵⁰ Section 51 of the Penal Code provides for the defence of insanity

⁵¹ *Oladele v State* (1993) 1 NWLR (Pt. 269) 297; *Nnabo v State* (1994) 8 NWLR (Pt. 361) 178

⁵² Okonkwo and Naish, *Supra*, at f/note 55 p. 174

⁵³ *Batty v. AG of Northern Ireland* (1961) 3 All ER 523

⁵⁴ *R v Ayindo*(1963) 1 All NLR 393

6. Applicability of the Defence of Provocation in Nigeria

In Nigerian criminal law, provocation is contained in two codes, that is, in the Criminal Code and the Penal Code. Provocation is a ground for reducing murder to manslaughter and this is its most important function. Apart from the fact that the accused must have in fact been provoked, the act causing the provocation must have been such as to deprive a reasonable man of his self-control. An ordinary reasonable man therefore is the standard for the test.⁵⁵

Under the Penal code, provocation is not a ground for exempting one absolutely from criminal responsibility for his acts, but may be a ground for finding him guilty of crime of lesser degree or for mitigating the punishment. It must however be shown that there was absence of malice and force used as a mode of resentment bears reasonable relation to the provocation received.⁵⁶

Under the Criminal Code however, provocation may constitute a full defence to an assault.⁵⁷ Thus means that provocation under the criminal code can make up adequately for an assault, entitling the offender to be set free unconditionally. Under the Penal Code applicable in Northern Nigeria provocation is a mitigating factor only. Flowing from above, it has been observed that the Penal Code provides that:

... It can therefore be seen that under the penal code provocation is never a complete defence to a criminal charge and even in assault cases the most it can do is mitigate the punishment. The penal code's stand might have been prompted by the legislators attempt to be guided by principles of Islamic law which hardly admits the defence of provocation even in murder charge.⁵⁸

In *Sadiku v The State*, it was held that even if provocation is not raised by the defence, it is incumbent where there is evidence indicating such a defence.⁵⁹ Again where there is no evidence for consideration by the court that the defence of provocation is not the law, the court must of necessity invent one so to desire a defence for the accused person. It was however, held in the case of *Effiong v State*, that the burden of proof in the defence of provocation within the Nigerian legal System rest on the accused person.⁶⁰

7. Effect of a Successful Plea of Provocation

It is trite law that the defence of provocation if successfully pleaded can only have effect of reducing the punishment from murder to manslaughter. The Law recognized defence which has the effect of whittling down the punishment stipulated for the offence committed as in the case of murder, if satisfactorily established.⁶¹ Thus, when a person who unlawfully kills another in circumstances which, but for the provisions of section 318 of the Criminal Code, would constitute murder does the act which causes death in the heat of passion caused by grave and sudden provocation and before there is time for his passion to cool down, he is guilty of manslaughter.⁶² Provocation is therefore not regarded as a ground for complete

⁵⁵ The Locus classicus was offered in *Chukwu Obaji v State*, Supra

⁵⁶ Section 318, Criminal Code

⁵⁷ Ibid section 284

⁵⁸ K. S. Chukkol, Defence to Criminal Liability in Nigerian Law: A Critical Appraisal at p. 77

⁵⁹ (1971) All NLR 519

⁶⁰ (1998) 59 LRCN 394

⁶¹ A. A. Abdulrazaq, Supra, at f/n 12

⁶² A. A. Aguda, *The Law of Evidence* (4th ed., Ibadan, Spectrum Books, 1999), p. 271

exculpation or a complete defence to criminal charge. The most it can do is to mitigate the punishment but no amount of provocation can justify killing.⁶³

The significance of a successful provocation plea is that it usually reduces murder to manslaughter, despite the fact that the defendant intended to and did kill in anger. The unique feature of provocation cases makes it particularly hard to understand why provoked killings are even partially excused by reducing murder to manslaughter. One possible explanation might be that what really matters is the effect of anger on the defendant's mental state.

8. Recommendations

The defence of provocation no doubt provided for or considered under the Nigerian Codes, that is, the Criminal Code and Penal Code. The requirements however placed on the defence of provocation are so tedious and we wonder if an accused person can actually have the defence avail him. Especially the reasonable man's testing and mode of resentment which actually contradict each other, therefore necessary reform need to be done in this regard.

Again all forms of technicalities of determining who a reasonable man should be abrogated. The examination however of when self-control would be lost is recommended as well as the interpretation given to the phrase "the effect it would be expected to have on a reasonable man in the accused person's situation in life."

The proportion rule of retaliation is detrimental to the accused. The proportionality rule in Nigeria therefore should be modified but not to be excluded since it will be contrary to public policy. The court in determining whether there has been enough cooling time, should take into account the degree of provocation offered. Also the physical peculiarities of the accused such as his age, sex, physical and mental disabilities as well as emotional condition should be taken into consideration.

The defence of provocation should be extended to cover offences like defamation, damage to property.⁶⁴ Since the defence of provocation is the sole concession to loss of self-control by persons who are not classified as mentally disordered, one would suggest that not every human frailty should be taken into account. The purpose of law is to regulate human behaviour and therefore demand a high standard of self-control in considering the defence of provocation. The evolution of society must be considered, social habits and feelings have to be taken into consideration.

9. Conclusion

Provocation operates as a partial defence to criminal charges. Provocative conduct is capable of raising in an ordinary person such a degree of psychological pressure, in the form of angry passion, as to deprive such a person of the ability to exercise rational control over his or her actions. The effect of provocation on the ordinary or reasonable man has several aspects. In considering the reactions of an ordinary person, we should take into consideration the effect of provocation on a bad tempered man and that of the good tempered man. Where loss of self-control is proved then the provisions of the law apply based on the laid down standards. In

⁶³ A. A Abdulrazaq, *Supra*, at f/n 12 p. 4

⁶⁴ A. Aguda., *Principles of Criminal Liability in Nigeria Law*, 1st Ed., Ibadan, University of Ibadan Press Pp.318, 319

criminal law the test of the reasonable man indicates an ethical standard.

The true view of provocation is that it is a concession to "frailty of human nature" in those exceptional cases. Though it is established that even if the defence is successfully pleaded, it does not exculpate the accused of criminal responsibility, it only mitigate its punishment. Nigerian Courts however have succeeded in evolving a slightly different approach in determining whether or not a person has been provoked and the test now applicable is the partially objective test.



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