

PROVOCATION AS A DEFENCE IN NIGERIAN LAW: A JURISPRUDENTIAL ANALYSIS*

Abstract

Provocation on its own it not a total defence as to make the accused discharged of his guilt. The defence of provocation can be best designated as a concession to human frailty, introduced by the common law to mitigate the strictness of the single penalty of death for a convict in a murder case. This paper aimed at examining the defence of provocation in Nigerian law, exploring its historical development, elements, and jurisprudential applications. The research adopted doctrinal methodology to examine the theoretical underpinnings of the defence of provocation. Through a critical analysis of case laws and statutes, this study revealed the challenges and controversies surrounding the defence, including gender and cultural biases, subjective interpretations, and the balance between justice and mercy. A comparative analysis with other jurisdictions highlights opportunities for reform and improvement. Therefore, the study recommended a swift resolution of the complexities surrounding the defence of provocation in order to contribute to the discourse on criminal law reform in Nigeria and improve our criminal law jurisprudence.

Key Words:

Provocation, Crime, Murder, Jurisprudence, Defence

1. Introduction

It is a grievous offence and a serious crime under the common law for a person to cause the death of another person and no defence will avail such person. However, it soon developed that there is a rebuttable presumption that practically speaking every common law crime requires adequate proof of guilty soul, making provision for a possible defence. The defence of provocation has enjoyed been an argumentative concern in Nigerian criminal law, generating considerations among researchers, practitioners, and legislators. Entrenched in the common law practice, provocation as a defence allows individuals who commit crimes in response to provocative conduct to mitigate their liability. Nonetheless, the application of this defence in Nigeria criminal justice system has raised concerns about its potential to propagate gender-based violence, reinforce harmful cultural norms, and undermine justice. Notwithstanding its significance, the jurisprudential foundations of the defence of provocation in Nigeria remain underexplored. This study seeks to address this gap by examining the historical development, elements, and applications of the defence in Nigerian criminal justice system. Through a critical investigation of case law, statutes, and comparative analysis, this study seeks to brighten the challenges and convolutions surrounding provocation as a defence, ultimately informing efforts to refine and improve its role in Nigerian jurisprudence.

2. Historical Development of Provocation as a Defence

The defence of provocation was first developed in English courts in the 16th and 17th centuries.¹ During that period, a conviction of murder carried a mandatory death sentence. This inspired the need for a lesser offence. At that time, not only was it acceptable, but was socially required that a man respond with controlled violence if his honour or dignity were threatened or

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¹ Provocation and Self-Defence in Intimate Partner and Sexual Advance Homicide” Briefing paper No.5/2012 NSW Parliamentary Research Service August 2012.

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insulted. It was therefore considered understandable that sometimes the violence might be excessive and end in killing.² During the 19th century, as social norms began changing, the idea that it was desirable for dignified men to respond with violence when they were insulted or ridiculed began losing grip and was replaced with the view that while these responses may not be ideal, that they were a normal human reaction resulting from a loss of self-control, and as such, they deserve to be considered as a mitigating circumstance. During the end of 20th century and the beginning of 21st century, the defence of provocation, and the situations in which it should apply, have led to significant controversies, with many condemning the concept as an anachronism, arguing that it contradicts contemporary social norms where people are expected to control their behavior even when angry. Today, the use of provocation as a legal defence is generally controversial, because it appears to enable defendants to receive more lenient treatment because they allowed themselves to be provoked. Judging whether an individual should be held responsible for their actions depends on an assessment of their culpability. This is usually tested by reference to a reasonable person; that is, a universal standard to determine whether an ordinary person would have been provoked, and if so, would have done as the defendant did, if the predominant view of social behavior would be that, when provoked, it would be acceptable to respond verbally and if the provocation persists, to walk away, that will set the threshold for the defence. *Furor, brevis* or “heat of passion” is the term used in common law to describe the emotional state of mind following a provocation, in which acts are considered to be at least partially caused by loss of self-control, so the acts are not entirely governed by reason or expressed. It is the heat of passion which renders a man deaf to the voice of reason.

3. The Defence of Provocation and Elements

Provocation may be by words or by deeds. The modification contrary to the old common law rule that words alone could not constitute sufficient provocation that will lead to the reduction of murder to manslaughter, was seen in *Holmes v DPP*³ where the exception “save in circumstances of a most extreme and exceptional character” was added making words of mouth in this circumstances to constitute sufficient provocation. There are variations to the meaning of provocation. Irrespective of these identified variations, provocation still includes any act or insult of such nature as likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and induce him to assault the person by whom the act or insult is done.⁴ Provocation is defined by the Black’s Law Dictionary⁵ as the act of inciting another to do something (such as word or action) that affects person’s reason and self-control, especially causing the person to commit a crime impulsively. Literally, provocation means an action or event that makes someone angry, that is, the intentional causing of annoyance or anger to another person that makes him to react violently. The foregoing is presumed when provocation is used generally, but when used in the technical sense, provocation is viewed from the legal perspective.⁶ The term provocation includes assault, or any wrongful of such nature to be likely done to an ordinary person or in the presence of ordinary person to another.

² Ibid.

³ (1946) AC 588 75

⁴ AA Daiby & O.O. Mbanugo – A Critical Appraisal of the Extent of Provocation, as a Defence to Criminal Liability in Nigeria.

⁵ 11th ed.

⁶ Abdulrazaq A: A Critical Appraisal of the Extent and Limit of the Defence of Provocation in Murder Charge in Nigeria, (2010) *The Jurist*, A publication of the LSS Unilorin p.59.

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The Criminal Code⁷ defines provocation with reference to an offence of which assault is an element. For clarity sake, and for ease of understanding, the section will be reproduced. It provides as follows:

The term “provocation” used with reference to an offence of which assault is an element, includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master or servant to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the later stands in any such relation as aforesaid, the former is said to give the later provocation for an assault. A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of excitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation on that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

Section 284⁸ provides for the defence of provocation thus:

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation and is not intended, and is not such as is likely to cause death or grievous harm.

Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether in any particular case; the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

Also section 287⁹ provides that when a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous harm, to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous harm. However, the second limb of the section holds that this protection does not extend to a case in which the person using force, which causes death or grievous harm, first began the assault with intent to kill or to do grievous harm to some person; nor to a case in which the person using force which causes grievous harm endeavoured to kill or to do grievous harm to some person before the necessity arose, the person using such force declined further conflict and quitted it or retreated from it as far as was practicable.

⁷ Section 283 Criminal Code.

⁸ Criminal Code Cap C38 LFN 2004.

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Provocation as a defence to culpable homicide was provided for in the Penal Code. Culpable homicide (murder) ordinarily is punishable by death¹⁰ but section 222¹¹ provides that 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. Here the explanation is that whether the provocation was grave and sudden enough to prevent the offence from amounting to culpable homicide punishable with death is a question of fact. Culpable homicide is not punishable with death if the offender, in exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of that defence. Culpable homicide is not punishable with death if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. Here it is immaterial in such cases which party first provokes the other or commits the first assault. From the preceding submissions, it is clear that the Penal Code provided for the defence of provocation if properly pleaded to avail the defendant in matters of culpable homicide. It is worthy of note here that defence of provocation is not a complete defence, rather a partial defence that can if successfully pleaded, mitigate and reduce the severity of the offence.

Exploring different theories of provocation, including evaluative, volitional, and classical gloss theories, offers valuable insights and provides additional depth to the investigation. Evaluative theory evaluates the reasonableness of a defendant's actions in response to provocation, considering the circumstances and context of the situation. This theory goes beyond the classical gloss theory's focus on whether a reasonable person would have lost self-control, and instead assesses the defendant's actions based on a more nuanced evaluation of the provocation and defendant's response. Below are the key aspects of the theory:

- i. Contextual consideration: The theory considers the specific context and circumstances surrounding the provocation and defendant's response.
- ii. Reasonableness assessment: The theory evaluates whether the defendant's actions were reasonable in response to the provocation, taking into account the severity of the provocation and the defendant's response.
- iii. Proportionality: This theory considers whether the defendant's actions were proportionate to the provocation, and whether the response was excessive or unjustified.
- iv. Subjective and Objective elements: The theory considers both subjective factors (the defendant's personal characteristics, experiences and perception) and objective factors (the severity of the provocation and the reasonableness of the response)
- v. Flexibility: The theory allows for a more flexible approach to evaluating provocation, recognizing that each case is unique and may require a nuanced assessment.¹²

This theory aims to provide a more comprehensive and fair approach to evaluating criminal responsibility, considering the complexities of human behaviour and the context in which actions occur.

¹⁰ Section 220 Penal Code.

¹¹ Penal Code.

¹² Baier, K., *The Moral Point of View*. (New York: Cornell University Press, 1958)

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The volitional theory of provocation is a legal theory used to determine whether a defendant's actions were provoked, and therefore potentially subject to reduced criminal liability. According to the proponents of this theory, a defendant's actions are considered provoked if they were caused by a reasonable loss of self-control in response to another person's proactive conduct. The key element is that the defendant's actions were voluntary, but their self-control was disrupted by the provocation. In other words, the defendant is held responsible for their actions, but the provocation is considered a mitigating factor that may reduce their culpability. This theory is often applied in cases of murder, manslaughter, or other violent crimes where the defendant claims to have acted in the heat of passion or under adequate provocation. The volitional theory of provocation is used to determine whether the defendant's actions were the result of a rational, voluntary decision, or if they were driven by extreme emotional disturbance or passion reducing their criminal responsibility.¹³ This defence argues that the defendant's actions were a result of being provoked, and that they should not be held fully responsible for their behaviour under the circumstances. In order for the provocation defence to be successful, several key elements must be present. Firstly, there must have been a reasonable provocation. This means that the defendant must have been subjected to some form of serious, immediate threat or harm that would cause a reasonable person to lose control. Additionally, the defendant must have acted on this provocation without having time to cool off and regain their composure. It is important to note that the volitional theory of provocation is not a blanket defence that can be applied to all cases of provocation. The defence is not available if the provocation was not serious enough to warrant the defendant's actions. The success of this theory as a defence in murder trials can vary depending on the specific circumstances of the case and the jurisdiction in which the trial takes place. In some cases, the provocation defence has been successful in reducing charges from murder to manslaughter, resulting in a lesser sentence for the defendant. However, success rates can also depend on the arguments presented by the defence, the evidence available, and the opinions of judges. It is worth noting that the provocation defence is not universally accepted in all jurisdictions, and some places have stricter criteria for applying this defence. In some jurisdictions, the defence of provocation may not be available in cases where the defendant's actions were deemed to be premeditated or calculated. Overall, the success of the volitional theory of provocation in murder trials can vary from case to case, and its effectiveness will depend on the specific facts and circumstances of each individual case. Generally, the volitional theory recognizes that human emotions and reactions are complex and sometimes uncontrollable, and seeks to take this into account in the legal system when determining culpability for criminal actions.¹⁴

In addition, Classical Gloss Theory of provocation is a legal theory that was developed in the 19th century to explain the concept of provocation in criminal law. The proponents of this theory defined provocation as words or actions which would cause a reasonable person to lose their self-control and act rashly. This theory is also known as the "reasonable person" test, and it is still used in many common law jurisdictions today. The theory holds that a person who commits a crime in the heat of passion or under adequate provocation should be held less culpable than one who commits a premeditated crime.¹⁵ The Classical Gloss Theory has been influential in shaping the development of provocation as a legal defence, and it remains an important part of criminal law in many countries of the world. There are certain elements that are notable with Classical Gloss Theory. These include:

¹³ Frankfurt, H.G., 'Freedom of the Will and the Concept of a Person' in *Journal of Philosophy*, 68(1), 5-20.

¹⁴ Kane, R.H., *The Significance of Free Will* (New York: Oxford University Press).

¹⁵ R. v Morhall (1996) 1 AC 90

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1. Reasonable person test: The theory uses objective test to determine whether the provocation was sufficient to cause a reasonable person to lose their self-control.
2. Loss of self-control: The theory requires that the defendant must have lost their self-control as a result of the provocation.
3. Heat of passion: The theory applies to crimes committed only in the heat of passion, which means that the defendant must have acted impulsively and without premeditation.
4. Adequate provocation: The theory requires that the provocation must be sufficient to cause a reasonable person to act rashly.

Provocation, be it in words or in action can never suffice as a justification to killing of a fellow human being. It can only reduce murder to manslaughter.¹⁶ For an accused who pleaded provocation as a defence to succeed, there are certain ingredients which must be proved. These ingredients which must constitute his defence is referred to as elements of provocation. They constitute condition precedent that must be satisfied for the plea of provocation to avail a defendant or accused person. They include:

- i. The provocation must be such as to cause a reasonable man to lose his self-control.¹⁷
- ii. The act which causes death must be done in the heat of passion¹⁸ caused by a sudden provocation.
- iii. The provocation by one person is no excuse for killing another person who does not in fact offer any provocation to the defendant.¹⁹
- iv. The mode of resentment must bear a reasonable proportion to the provocation offered.²⁰
- v. The killing must involve an assault.²¹

From the above, we can deduce that the provocation must be such as to cause a reasonable man to lose his self-control. Here it is said that for the plea or defence of provocation to avail the defendant or for it to be successful it must be such that has the capability of causing a “reasonable man” to lose his self-control. The test here is predicated on the effect which the provocation will have on a reasonable man, and not the actual effect on the accused.²² This is not absolute because if a “reasonable person” would be proved by the word or action, whereas the accused himself was not provoked, his plea of provocation of a surety will fail. It can only avail him, if he in fact loses his-self-control in the circumstance irrespective of it being a circumstance in which a reasonable man will lose his self-control.²³ For purpose of clarity, a reasonable man in this content has been held to mean a reasonable man in the accused person’s standing in life and standard of civilization. The issue of a reasonable man test has been an object of controversy, as various definitions by authors often confuse reasonable men the more.²⁴ The test asks whether a reasonable person with ordinary powers of observation, knowledge and

¹⁶ A. M. Adebayo, *Casebook on Criminal Law: Text, Comments and Cases* (Lagos: Princeton & Associates Publishing Co. Ltd., 2018) p. 525.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *R. v Nwanjoku* (1937) 3

²³ (n 21) 526.

²⁴ Adesola, MA, *Provocation; a Ruck in the Texture of Justice*, (1996) *The Jurist*, Publication of LSS Unilorin 56

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understanding, would have acted in the same way as the defendant in similar circumstances. This is geared towards the determination of whether defendant's action was those of an ordinary, prudent and reasonable person. This test has been applied in Nigeria in various cases including provocation among others. The Supreme Court in the case of *R. v Udofia*²⁵, held that the reasonable man test is a relevant consideration in determining whether a defendant's actions were justified by provocation. In Nigeria, courts take into consideration the cultural status of the defendant. The relevance of this cannot be overemphasized, because an act committed by the deceased against an illiterate and primitive peasant may amount to legal provocation, while it may not do so if committed against "an educated and civilized person". Peculiarities of the defendant are not taken into consideration in the determination of plea of provocation. In *Bedder v DPP*,²⁶ the defendant charged with murder of a prostitute who jeered at him and kicked him for inability to have sex with her owing to his impotency, pleaded provocation and argued that the proper test was what would be the reaction of an impotent reasonable man in the circumstance. The House of Lords upheld a direction that the proper test was the effect which the conduct of the prostitute will have on an ordinary person and not on a sexually impotent person.²⁷ The writers strongly contends that the position held by the House of Lords undermines the psychological content of the defendant which also contributes to his reasonableness.

Another element of provocation to be considered is that the act which causes death must be done in the heat of passion caused by sudden provocation.²⁸ This element emphasizes on the fact that for defence of provocation to avail the defendant, the very act that caused the death of the deceased must be done in the heat of passion caused by sudden provocation. It must be done before there is time for passion to cool. Where enough time has elapsed for passion to cool between the provocative act and the killing, a plea of provocation will fail.²⁹ Premeditation therefore is the dividing line between provocation and murder. In *R. v Green*,³⁰ the defendant's plea of provocation was rejected by the West African Court of Appeal because between the provocation and the killing, enough time elapsed for his passion to cool. The facts of the case were that the prisoner's wife having left him went to stay with her mother where she began to accept the advances of A. The prisoner tried hard to win back his wife but failed. At about 9:00 pm, he visited his mother in-law and found his wife and A having sexual intercourse. He returned to his own house to brood over his misfortune. At about 1:00 am, he took a machete and returned to his mother-in-law's house to kill A if he was still there. He found his mother-in-law snoring and heard his wife and A talking in the dark room. He struck twice on the bed and killed his wife. The mother-in-law was also killed by him, when she ran into the room. The defence of provocation failed to avail him because the period of waiting (about four hours) destroyed the excuse of sudden provocation and heat of passion, because the defendant in the opinion of the court had enough time for reflection and for his passion to cool. As said earlier, premeditation is the dividing line between provocation and murder. The fact that he had enough time for his passion to cool destroyed and distressed the provocation plea. The same applied in the case of *Chinedu Osuji v State*³¹. Here it was held that the defence of provocation cannot be available to a defendant who was the aggressor. In this case evidence showed that the fight they had was separated, allowing a moment of calm and reflection, but he premeditatedly and

²⁵ (1963)1 SCNLR 416

²⁶ (1954) 1 WRLR 1119

²⁷ (n 21) 528.

²⁸ *Usman Kaza v State* (2008) LLJR-SC

²⁹ (n 21) 530

³⁰ (1955) 15 WACA 73. Also *Uwagboe v State* (2008) NWLR (pt. 1102) 621 SC

³¹ (2016) NGCA 113.

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callously picked up arms, pursued his armless victim, who had left the arena of fight and inflicted injuries on him that led to his death. The plea of provocation here failed.

In addition, the provocation by one person is no excuse for killing another person who does not in fact offer any provocation to the defendant.³² In *R v Ebok*³³, it was held that even if the defendant lost his self-control as a result of the provocation offered by his ex-wife, he was nevertheless guilty of murder because the second woman did not offer him any provocation whatsoever. The fact of this case is that the defendant went to farm and met four women, one of whom was his ex-wife who had since married another man. He demanded the cloth she was wearing and she was untying it at the insistence of the other women. He stabbed her several times and killed her. He overtook one of the other three women as they were running away and killed her. In spite of the foregoing however, provocation offered by a group of persons acting in concert may be successfully pleaded where the person so provoked kills a member of the group.³⁴ Mode of resentment must bear a reasonable proportion to the provocation offered,³⁵ is another element necessary to prove provocation as a defence.³⁶ This means that the retaliation to a perceived provocation should be reasonably commensurate with the provocation offered and not more. In considering the question of proportion, the courts take into accounts the nature of the instrument with which the homicide was effected.³⁷ In *R. v Akpakpan*³⁸, a woman brought her daughter's dead body home and when her husband remonstrated with her against such conduct, she used filthy and offensive language to him and he stabbed her five times with a heavy dagger. It was held that the degree and method of violence used by him precluded the court from bringing a verdict of manslaughter. In *Harrison Owhorukpe v. COP*³⁹ when the defence of provocation is raised, the question is whether the appellant was in fact provoked to lose his self-control. If yes, the next question is whether the provocation was enough to make a reasonable man do as the defendant did. In this case, stabbing the deceased to death. There is no doubt that the act of the deceased in snatching the appellant's bottle of drink and breaking it, then proceeding to threaten the appellant with the broken bottle is enough to provoke a reasonable man to lose his self-control. The threat to the appellant's life ended when the appellant overpowered the deceased and took the broken bottle from him. A reasonable man would have given the deceased a couple of slaps and thrown away the broken bottle. Stabbing the deceased with the broken bottle was clearly disproportionate to the provocation. The stabbing of the deceased was not as a result of temporary loss of control, rather for the sole purpose of causing grievous harm. In such a situation, it is immaterial that the appellant did not intend to hurt the deceased. The killing was intentional and the defence of provocation would not avail the appellant. Another very important element is that the killing must have involved an assault. This is an essential requirement going by the community reading and application of sections 318 and 283 of the Criminal Code. The emphasis is on section 283 which makes reference to an offence which an assault is an element. Recall that the definition of assault in the code includes a battery and this then goes to say that every killing predicated on provocation must involve an assault.

³² *R. v Afonja* (1955) 15 WACA 26, *State v Enabosi* (1966) NMLR 241

³³ (1950)19 NLR, 84, Also *Amaka v State* (1995)6 LKR 1241 (SC)

³⁴ This is shown in *R. v Ekpo*(1938) 4 WACA 110

³⁵ *Eze v State* (2018) LPELR 43715 (SC)

³⁶ *Ihuebek v The State* (2006) 5 SCNR 186 (vol.2) and *Shande v The State* (2005) 22 NSCQR 756

³⁷ *R. v Nwanjoku* (supra)

³⁸ (1956) 1 FSC 1

³⁹ (2015) LLJR -SC

4. Jurisprudential Analysis of Provocation

A defendant who has been brought or summoned before the court with regards to murder or manslaughter can plead provocation as cause of his/her action, and the court will hear him/her. The case of *R. V Nwanjoku*⁴⁰, which is the *locus classicus* of provocation has been influential in shaping the law on provocation in Nigeria and other common law jurisdictions. It was the bedrock on which provocation cases over the years have been decided. Here the court held that “Provocation, to be sufficient to reduce murder to manslaughter, must be such as would naturally provoke a reasonable person to lose self-control.” What this decision heralds are that for provocation to avail a defendant, it must be severe enough to cause a reasonable person to lose control and act impulsively. Following this decision, the courts in Nigeria have over the years decided on many cases on provocation. In *Uluebeka v State*⁴¹, it was held that provocation must be grave and sudden and must be such as to take away the defendant’s self-control and that the act of killing must have been done in the heat of passion before there was time for passion to cool and that the retaliation must be proportionate to the provocation offered. That if the accused was actually provoked, he would have attacked the deceased and his own wife in the heat of the passion, that instead he attacked his wife at home and allowed the deceased to go to the farm before he went there to attack him. It was therefore held that the defence of provocation did not avail the accused. Again in *Ahmed v State*,⁴² the plea of provocation and self defence availed the appellant and the trial court’s verdict of murder was reduced to manslaughter. In *Akalezi v State*⁴³, the appellant was convicted of murder and sentenced to death. He appealed to the court of Appeal, and it was dismissed. Dissatisfied, he appealed to the Supreme Court, arguing that the trial court and Appeal Court erred in not considering provocation as a mitigating factor. The Supreme Court held; that provocation must be sufficient to make a reasonable person lose self-control. The appellant’s act of killing the deceased with a machete after the deceased had slapped him was not justified. The trial and Appeal Courts correctly evaluated the evidence and dismissed the defence of provocation and so upheld the conviction and sentence. In similar vein, the Supreme Court in *Yusuf v State*⁴⁴, held that the appellant failed to prove that the provocation was sufficient to reduce his culpability from murder to manslaughter. Here the court said that provocation must be sufficient to make a reasonable person lose self-control, and as such the appellant’s act of killing the deceased with a knife after a verbal altercation, was not justified by provocation. The court reaffirmed that provocation is a matter of facts (evidence) and not a matter of law.

The case of *Nwede v State*⁴⁵ sets a precedence in criminal law jurisprudence emphasizing that provocation must be supported by credible evidence. The Supreme Court held that the appellant’s confessional statements did not raise a sufficient defence of provocation, and that the appellant’s claim of provocation was not supported by evidence as he was not seen at the scene of the initial quarrel. It also held that the appellant’s use of a machete with a longer reach than the pen-knife allegedly used by the deceased, is not commensurate and therefore dismissed the appeal on total absence of evidence amounting to provocation for the murder of the deceased, and upheld his conviction and sentence. In *Shalla v State*⁴⁶ where the deceased was alleged to have made offensive remarks on Prophet Mohammed (SWT), the court held that the plea of

⁴⁰ (1937)3 WACA 208

⁴¹ (2000) 7 NWLR (pt.665)401

⁴² (1999)7 NWLR (pt.612) 641

⁴³ (1993) 2 SCNJ 19

⁴⁴ (1998) 4 NWLR (pt.86) 96

⁴⁵ (1985) 3 NWLR (pt. 13)444

⁴⁶ (2007) LLJR SC

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provocation was not available to the appellant as there were no evidence amounting to provocation. Same was also the decision of the court on *Usman Kaza v State*.⁴⁷ The court in *Chinedu Osuji v State*⁴⁸ in dismissing the case of the appellant, held that the defence of provocation cannot be available to an accused person who was the aggressor. Evidence adduced before the court showed that the fight they had was separated, allowing a moment of calm and reflection, but he premeditatedly and callously picked up arm, pursued his armless victim, who had left the arena of fight, and inflicted injuries on him that led to his death. The court's decision in *Eyo v State*⁴⁹ was not different. Eyo was convicted of murder and sentenced to death by the trial court. He appealed to the Court of Appeal arguing that the trial court erred in not considering provocation as a mitigating factor. Here the court held that the trial court correctly evaluated the evidence and dismissed the defence of provocation, and that the appellant's claim of provocation was not supported by evidence, as he was the aggressor in the fight. The court therefore upheld the conviction and sentence.

In addition to judicial precedents, there are many academic works that have addressed expansively the issue of provocation in Nigeria and beyond from different points of view. Motunrayo Oloyide in "The Dimensions of the Plea of Provocation in Criminal Trials; The Nigerian Experience,"⁵⁰ believe that the Nigerian position on the defence of provocation requires immediate attention when compared to other jurisdictions. In her argument, she posited that the doctrine of provocation has actually caused many problems for law students, judges and legal practitioners. She alluded that the doctrine is complex and difficult to understand, making it challenging for law students to grasp and apply. Also the ambiguity of the terms "provocation" and "reasonable man" are subjective and open to interpretation, leading to confusion and inconsistent application. She is of the view that the application of the doctrine is inconsistent. Oloyide on his own part found that there exist sentencing disparities. The doctrine can lead to inconsistent sentencing and judgment, as judges may weigh provocation differently, resulting in varying punishments for similar crimes. He also posited that court decisions on provocation have been inconsistent, creating uncertainty and difficulties for legal practitioners. This surely according to Oloyide has made the application of the plea of provocation grossly ineffective. Joshua Dressler, a proponent of the partial excuse theory of provocation defence, argues in favour of the defence of provocation that it is most relevant in the cases of murder irrespective of the pockets of inconsistencies.⁵¹ In his 2002 paper "Why keep the Provocation Defence: Some Reflections on a Difficult Subject"⁵² argued strongly on the need to keep the provocation defence, despite acknowledging the difficulties surrounding the defence. He rather preferred its reformation to abolishment. Friedman, L M.,⁵³ argues that the doctrine of provocation was developed to mitigate the severity of punishment for crimes committed in the heat of passion. He took cognizance of the fact that heat of passion can impair the reasoning and self-control of a person and proposed that the doctrine should be sustained to different intentional unlawful killing from unintended unlawful killings. Furthermore, Mackay, R D.⁵⁴ in his work, argues that

⁴⁷ (2008) LLJR-SC

⁴⁸ (2016) NGCA 113

⁴⁹ (2010) All FWLR (pt.533) 1913 CA

⁵⁰ The Dimensions of the Plea of Provocation in Criminal Trials; The Nigerian Experience <<https://www.sabilaw.org>>; Accessed September 12, 2024.

⁵¹ *Ibid*.

⁵² <<https://Onlinelibrary.wiley.com>>; Accessed September 12, 2024.

⁵³ Provocation and mitigating circumstances: A study of the origins and development of the Doctrine of Provocation. *Journal of Criminal Law, Criminology and Police Science* (1968)59(2) 155-164.

⁵⁴ "The Defence of Provocation: A Critique" *Criminal Law Review*, 1995, 446-455

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the defence of provocation is flawed and should be abolished, as it perpetuates gender bias and reinforces harmful stereotypes, but Hoder, J.⁵⁵ contends that the defence of provocation is based on the idea that the defendant was provoked into committing the crime, and therefore, their responsibility is diminished. Adejumo, O.⁵⁶ in his work, argues that the defence of provocation in Nigerian Criminal Law is flawed and needs to be reformed to address gender bias and ensure justice for victims of domestic violence. Ogundele J.O.,⁵⁷ critically appraised the defence of provocation in Nigerian criminal law, arguing that it should be reformed to ensure justice and accountability. He however argued that the defence is often used as a justification for violent crimes, particularly against women and marginalized groups. He also contended that the current legal framework and judicial interpretation of provocation are flawed and perpetuate harmful gender stereotypes. Ikejiani-Clark, M.A.⁵⁸ similarly argues that the defence of provocation in Nigeria perpetuates gender stereotypes and should be reformed from a feminist perspective to protecting women's right.

5. Challenges and Controversies

It is a well settled law that the defence of provocation is not a complete defence but a tenable plea which if successfully pleaded, can only have the effect of reducing the punishment which is that of murder, punishable with death, to manslaughter punishable with life imprisonment. This implies that not all provocation that will reduce the charge of murder to manslaughter. The court of Appeal in *Umar v Kano State*⁵⁹, held that the defence of provocation when successfully proved in a homicide case, would act to mitigate or reduce a capital punishment being the maximum penalty for the offence of homicide, to life imprisonment. In *Essien v State*⁶⁰ where the facts of the case were that on the 10th of September, a quarrel ensued between the appellant and the deceased, which led to a fight. In the course of the fight, both parties picked up separate knives, the deceased picking up a knife first. In the process, the appellant stabbed the deceased, one Edidion Blessing with a knife thereby killing him. The appellant made a confessional statement which he later retracted. The appellant was arraigned before the trial court on a one-count charge of murder contrary to the provisions of Section 319 of the Criminal Code Laws of Ondo State.⁶¹ At the trial, the appellant pleaded not guilty to the charge. The prosecution called three witnesses and tendered five exhibits while the appellant testified on his own behalf. The trial court convicted the appellant for manslaughter and sentenced him to a term of ten (10) years imprisonment. Dissatisfied, he appealed to the court of Appeal. The Court of appeal dismissed the appeal unanimously. The judgment of the trial court was accordingly affirmed. The inability of the appellant to prove provocation resulted in the dismissal of the appeal and the subsequent affirmation of his conviction and sentence. For the plea of provocation to be successful and avail the defendant, he must adduce substantial evidence that will satisfactorily satisfy the requirements of the legal elements of provocation and as well convince the court that he was actually provoked by the deceased, and in the heat of passion making him to react out of loss of self-control, within a time frame that was too short for passion to cool, and that the retaliation

⁵⁵ Provocation and Responsibility, (1992) *Oxford Journal of Legal Studies*. 12(2), 215-237.

⁵⁶ "The Defence of Provocation in Nigerian Criminal Law; a Critical Analysis". *Journal of Law and Policy*, 1(1), 53-64

⁵⁷ Ogundele J.O, "Provocation and Criminal Liability in Nigeria: A Critical Appraisal." in *Nigerian Journal of Criminal Law and Criminology*, 10(1), 53-64, 2020.

⁵⁸ Ikejiani-Clark, M.A., "Rethinking the Defence of Provocation in Nigeria: *Feminist Legal Studies* (2017) 25(2). 147-164

⁵⁹ (2022) JELR 109148 (CA)

⁶⁰ (2021) LPELR-55181 (CA)

⁶¹ Cap 37. Vol. 1

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was proportionate to the provocation offered. This was affirmed by the Supreme Court in *Rafiu v People of Lagos State*⁶² where it was held that for provocation to constitute a defence in a murder case, it must consist of three elements which must coexist, namely:

- 1) the act of provocation must be done in the heat of passion,
- 2) the loss of self-control, must be both actual and reasonable, and the act was done before there was time for passion to cool down,
- 3) the retaliation is appropriate to the provocation. Once these requirements are met, the court will avail the defendant and mitigate his sentence.

Again the Supreme Court in *State v Da'u*⁶³, held that a successful plea of provocation is not exculpatory; it is a mitigating factor that whittles down punishment for culpable homicide punishable with death to that of culpable homicide not punishable with death. The Court of Appeal followed suit in *Umar v Kano State*,⁶⁴ where it held that the defence of provocation does not exculpate an offender from criminal liability, rather it minimizes or reduces the sentence. Where a defendant charged with homicide successfully raises a defence of provocation, that defence does not exculpate him of punishment but it merely reduces culpability to manslaughter which carries a term of imprisonment unlike homicide which is punishable by death. Provocation as a recognized defence when successfully pleaded, has the effect of whittling down the punishment stipulated in the law for the offence committed.⁶⁵ This goes to show that defence of provocation, is not a complete or absolute defence even when successfully established, neither does it completely exculpate the defendant from criminal liability. It can only mitigate the punishment, as no amount of provocation can serve as a justification to unlawful killing.⁶⁶ This is the position for now, of a successful plea of provocation. It can only mitigate the sentence as a partial defence as against the successful plea of self-defence which absolves the defendant of criminal liability. The defence of provocation has faced various criticisms and challenges. The following challenges bedevil the successful establishment of the defence of provocation. The defence of provocation has been criticized for being gender-biased, as it is often used by men to justify violence against women. It may also be influenced by cultural, societal and religious norms and beliefs that perpetuate harmful stereotypes and justify violence and aggression, gender stereotype and victim blaming that may reinforce “jealous husband” or “possessive partner syndrome”.⁶⁷ The scope of application of this defence is limited thereby precluding its availability to other heinous crimes. As it is today, the defence only applies to specific crimes, like murder or manslaughter and not to other violent offences. In delivering judgments, courts have applied the defence inconsistently, leading to unequal justice and potentially perpetuating systematic biases. Sentencing disparities depending on the judge and jurisdiction as well as the circumstances of the case can also pose a challenge even if the defence of provocation has been successfully established. Judges have significant discretion when applying the defence of provocation and can lead to inconsistent decisions. The ‘reasonable man’ test used to determine provocation is subjective and can be influenced by personal biases, leading to inconsistent applications. The defence also focuses on the provocation rather than addressing underlying

⁶² (2021) LPELR-58368 (SC)

⁶³ (2021) LCN/5156 (SC)

⁶⁴ (2022) LPELR-56958 (CA)

⁶⁵ *Onyia v State* (2008) LLJR

⁶⁶ Section 318 Criminal Code Act Cap C38 LFN 2004, *Musa v State* (2009) ALL FWLR (pt.492) 1020 SC.

⁶⁷ American Psychiatric Association (2013). *Diagnostic and Statistical Manual on Mental Health* 5thedn. Arlington, VA American Psychiatric Publishing.

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issues like mental health, trauma, or systematic injustices, for there to be justice, equity and fairness. Again, the law on provocation is not clearly defined. Disparity in its definition and mode of application by different courts leaves the defence mostly at the judge's discretion. These and other challenges like lack of or insufficient evidence on the part of the defendant to prove his case, public opinion influence, potential for abuse, thereby turning the defence as a pretext for violence or aggression, balancing justice with mercy, forms the bedrock for a legal reform.

6. Comparative Analysis

The defence of provocation is allowed in many jurisdictions of the world. Most of the jurisdictions, share semblance, but for a few with slight differences. In Nigeria, the defence of provocation can be pleaded in homicide cases, hurt, or assault. This we know stands not as a total defence in the case of homicide but can only mitigate or reduce the punishment for the offence of homicide but can absolve a defendant in the case of assault or hurt.

In United Kingdom Justice System, the defence of provocation is only available to defendants charged with murder, though has been faced with a lot of criticism for being discriminatory towards women and in favour of men.⁶⁸ In Australia, provocation acts as a partial defence to murder where a defendant successfully argues that they were provoked to use lethal violence. While several Australian States have taken steps towards reforming provocation to limit its applicability, or in the case of Victoria, Tasmania and Western Australia, to abolish provocation altogether. This is because of criticisms that the defence has been used by men who have killed their partners and has been a topic of controversy.⁶⁹ Advocates of abolition of this defence argue that intentional or reckless killing should always be considered murder, regardless of what provoked it. They believe no one should be able to excuse their actions by citing the actions or words of the victim. Supporters of the defence on the other hand believe it should be maintained to acknowledge that people have weakness and react differently to various forms of provocation.⁷⁰ However, in most jurisdictions, the application of the defence of provocation is quite limited and in some states it has been abolished altogether. In most jurisdictions in Australia, if a defendant charged with murder is found to have acted under provocation, they will not receive a full acquittal but will instead be found guilty of the less serious charge of manslaughter. The partial defence exists in recognition that a person who commits a fatal act when acting in response to provocation while their powers of self-control are compromised, does not have the same level of culpability as a person who forms the intent to kill under other circumstances. In Queensland and Western Australia, provocation can be relied on as full defence to an assault charge. This means that if a defendant charged with assault successfully relies on the defence of provocation, they will receive a full acquittal, whereas it is partial defence to murder charge.⁷¹ It is a partial defence in murder charge in New South Wales,⁷² and in Northern Territory. In South Australia, it was abolished in 2020 and in Victoria in 2005⁷³ citing that it is often misused by men who killed their female partners in circumstances of infidelity or where the victim was seeking to end the relationship. Traditionally in France, provocation operated as a complete defence in cases where a man killed his wife after finding

⁶⁸ The Law of Provocation <<https://lawteacher.net.>>; Accessed September 12, 2024.

⁶⁹ "Legal loophole protecting violent men; why the defence of provocation needs to change <<https://theconversation.com>>"; Accessed September 13, 2024.

⁷⁰ <<https://www.armstronglegal.com>>; Accessed September 13, 2024.

⁷¹ Sections 268 & 269 Queensland Criminal Code Act 1899.

⁷² Sec. 23(1) of Crimes Act 1900

⁷³ The Crimes (Homicide) Act 2005(Vic)

her in the act of adultery.⁷⁴In the United States, the partial defence of provocation provides that a person who kills in the heat of passion brought on by legally adequate provocation, is guilty of manslaughter rather than murder. It exists in almost every state and other common law jurisdictions. Comparatively, while Nigeria allows provocation as a defence for assault and murder, the United Kingdom and Ireland only allows it as a defence for murder. It is a partial defence for murder in the United States Legal System, whereas in France it operated as a complete defence but today has been abolished.

7. Recommendations and Conclusion

The various identified challenges of the defence of provocation in the Nigerian Criminal Justice System, shall form the basis for the recommendation as a way forward to the effectiveness of the defence of provocation. Firstly, there should be a reform on the legislative framework. Laws on the defence of provocation in Nigeria are obsolete and need to be reviewed thereby enacting laws to accommodate the contemporary issues that are directly affecting the effectiveness of the plea of provocation. This should take into consideration the limited scope of the defence presently, to broaden its horizon to reflecting gender neutrality for a more liberalized approach. Laws allowing expert testimonies and witnesses from psychologists and sociologists who are professionals in human behaviour, if enacted will enhance justice delivery in this area of our jurisprudence. Secondly, community engagement and cultural sensitization coupled with public awareness geared towards the reduction of violent crime should be encouraged. This will promote a more nuanced understanding of the defence of provocation that will not be in vacuum but considering the complexities of human behaviour and traits. Again, the reasonable man's test which is hitherto subjective should be replaced with objectivity that will not only do justice but make it to be seen to have been done. A more objective rather than subjective test that looks into the circumstances of the case and the defendant's individual characteristics, should be incorporated as factors to consider in determination of provocation cases. Also, judicial education and review or provision of sentencing guidelines on defence of provocation will not only guide the courts in justice delivery, but will update them with world best practices with a view to delivering more consistent and informed decisions that will reduce disparities in sentencing. Furthermore, forensic analysis of human behaviour should be a vital part of our legal system. The gamut of the issue of provocation centres on human psychology which is influenced by so many variables like trauma, psychosis, etc. In conclusion therefore, this jurisprudential analysis of provocation in the Nigeria Criminal Justice System has revealed the complexities and challenges surrounding this defence. Through a critical analysis of the legal frame work, case law, and sociological context, it is clear that the plea of provocation is often employed as a strategic defence tactic, particularly in cases involving violent crimes. While the plea of provocation can be a legitimate defence in certain circumstances, its application in Nigeria's criminal justice system raises concerns about gender bias, cultural stereotyping, and the perpetuation of harmful gender norms. To address these issues, it is essential to reform the legal framework and judicial practices surrounding the defence of provocation. This may involve adopting a more nuanced understanding of provocation that takes into account the complexities of human behaviour, gender dynamics, and cultural context.

⁷⁴ Domestic Violence and the Gendered Law of Self Defense, <<https://link.springer.com>>; Accessed September 13, 2024.

