



## **A JURISPRUDENTIAL EXAMINATION OF THE DEFENCE OF PROVOCATION UNDER THE NIGERIAN CRIMINAL JUSTICE SYSTEM**

By

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### **Abstract**

*By the nature of human beings, they are capable of losing power of self-control when they are enraged. Nigerian law recognizes the potential for diminished capacity due to provocation for a person who is alleged to have committed a crime. This is because justice appreciates the need to inquire into the degree of culpability of the accused in the events leading to the crime. The aim of this work is to examine the provisions of Sections 283, 284, 285 and 318 of the Criminal Code applicable in Southern Nigeria and Sections 265 and 266 of the Penal Code Law applicable in the Northern States of Nigeria and attitude of the courts when the defence is raised by the defence. The study adopted doctrinal methodology and placed reliance on statutes, decided cases, journals, textbooks and internet sources. This study found that the defence of provocation under the Nigerian law will only mitigate the punishment for the offence of murder (or culpable homicide punishable with death in the northern part of Nigeria), but will not attract an acquittal; and that the test of provocation is inadequate. The study recommends that when the defence is raised by the defendant, the court should give significant weight to the defendant's state of life prior to the commission of the alleged offence in awarding punishment.*

**Keywords:** Conviction, Crime, Mitigation, Provocation, Punishment

### **1.0 INTRODUCTION**

It is a general proposition of the law that a man intends the natural consequences of his act.<sup>1</sup> In criminal law jurisprudence, the applicable legal maxim is: *'actus non*

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<sup>1</sup> See the Criminal Justice Act of 1967 which included in the law that a court or jury, in determining whether a person has committed an offence, (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of it being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence. This is a shift from an

*facit reum nisi mens sit rea*’, which means an act does not make a person legally guilty unless the mind is legally blame worthy at the time of performing the *actus reus*.<sup>2</sup>

The Criminal Code<sup>3</sup> provides that any person who unlawfully kills another under any of the circumstances stated will be guilty of an offence called murder or manslaughter, which could be voluntary or involuntary. Involuntary manslaughter covers cases in which there is no intention to kill or cause grievous harm which resulted to death, while voluntary manslaughter on the other hand occurs when a person intentionally kills another, but the offence is reduced from murder to manslaughter because of provocation.

Thus, the provision of the Criminal Code<sup>4</sup> is to effect that a person is guilty of manslaughter only if he unlawfully kills another in circumstances which would otherwise have constituted murder so far it is done in the heat of passion caused by sudden provocation and before there is time for his passion to cool.

However, before the defence of provocation can avail a person, the test to be applied is to see what effect the act or series of acts of the deceased would have on a reasonable man, so that an unusually excitable or pugnacious person will not be able to rely on it as a defence. The law requires that the act of provocation must be such as to have led an ordinary person to act in the way the accused did. It must be observed that provocation, where it is a defence, does not negate *mens rea*; it is allowed as a defence because, even though the accused has committed the *actus reus* of an offense with the requisite *mens rea*, the law considers that at the moment of the commission of the physical act resulting in the *actus reus*, the accused by reason of passion arising from the act of provocation was not master of his mind.

## 2.0 DEFINITION OF CRIME

Like other legal terms, it is often a difficult task to give a concise and apt meaning of ‘crime’. Attempts have been made by jurists, legal scholars and lawyers to define the term, but none of the definitions has so far had a universal acceptance,<sup>5</sup> and there has remained an unending effort to give a universally accepted definition of crime.<sup>6</sup> However it is important to point out the two main approaches to define the term. The sociological approach, which seems wider in context, seeks to define a crime as an anti-social behaviour which encompasses several conducts which a conventional lawyer might construe to be merely deviant conducts.<sup>7</sup> The narrower and legalistic approach is to define a crime as what the law considers a crime. According to Chukkol, the second approach is considered preferable because it

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objective test for intent and foresight to a subjective test. See *DPP v Smith (1961) AC 290*; *Stephen Emoga v The State (1997) 7 SCNJ 518*; *Nyambus Kpanta v State (1977) 1 FCA 259*.

<sup>2</sup> See *R v Prince (1875) LR 2 CCR 154*; *R v Faulkner R v Adekanmi (1994) 17 NLR 99*; *Abeke v State (2007) 9 NWLR (Pt. 1040) 411 at 429-430*.

<sup>3</sup> Section 316, Criminal Code Act, Cap C 38 LFN 2004.

<sup>4</sup> Section 318 CCA 2004.

<sup>5</sup> AG Karibi-Whyte, *Groundwork of Nigerian Criminal Law* (Nigerian Law Publications Ltd. 1986) 22.

<sup>6</sup> See OC Snyder, *Criminal Justice- Text and Cases* (Prentice-Hall 1958) 1

<sup>7</sup> See H Manheim, *Criminal Justice and Social Reconstruction* (Oxford University Press 1946) 5.

eliminated from serious consideration other vices that rightly belong to and should be the concern of other disciplines.<sup>8</sup>

The Black's Law Dictionary<sup>9</sup> defines crime as an act that the law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding. However, the Oxford Advanced Dictionary<sup>10</sup> defines crime as activities that involve breaking the law. Karibi-Whyte defines crime as any anti-social behaviour which falls within the general disapproval of the community<sup>11</sup>, while Okonkwo and Naish<sup>12</sup> defines crime as the breaches of the law resulting in special accusation procedure controlled by the state, and liable to sanction over and above compensation and cost.

Williams<sup>13</sup> defines crime as a legal wrong that can be followed by criminal proceedings which may result in punishment, he consider crime as a conduct which will include a formal and solemn pronouncement of the moral condemnation of the community. Clarke, Thomas and Allott define crime as the intentional commission of an act usually deemed socially harmful or dangerous and specifically defined, prohibited, and punishable under criminal law.<sup>14</sup>

The Criminal Code Act defines offence (or crime) as act or omission which renders the person doing the act or making the omission liable to punishment under the Code, or under any law.<sup>15</sup>

In the Nigerian case of *Aviomoh v C.O.P.*,<sup>16</sup> observed that is those types of conduct which are most detrimental to society and to the public welfare that are treated as criminal.

### **3.0 SOME DIFFERENCES BETWEEN CRIME AND CIVIL WRONGS**

A crime is often said to be a public wrong in the sense that when any crime is committed it is first and foremost against the State acting as custodian of people's liberty<sup>17</sup>. The person or victim who was injured or whose property was destroyed is merely a nominal party to the crime.

In a crime, the standard of proof is higher as the prosecution has a duty to prove the case beyond reasonable doubt against the accused person,<sup>18</sup> whereas in a civil case,

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<sup>8</sup> KS Chukkol, *The Law of Crimes in Nigeria*, (ABU Press Ltd. 1988) 1.

<sup>9</sup> BA Garner, *Black's Law Dictionary*, 10<sup>th</sup> edn (Thomson Reuters 2014) 451.

<sup>10</sup> AS Hornby, *Oxford Advanced Learner's Dictionary of Current English*, 8<sup>th</sup> edn (Oxford University Press 2010).

<sup>11</sup> AG Karibi-Whyte, *Groundwork of Nigerian Criminal Law* (fn 5) 23.

<sup>12</sup> CO Okonkwo and ME Naish, *Criminal Law in Nigeria* (Sweet and Maxwell 1980) 43.

<sup>13</sup> W William, *Criminal Law*, 2nd edn (Stevens and Son Limited 1961) 11.

<sup>14</sup> DC Clarke, DA Thomas and AN Allott, 'Crime I Definition, History, Examples, Types, Classification, & Facts' <https://www.britannica.com>topic> accessed 30 December 2023.

<sup>15</sup> See Section 2 CCA Cap C38 LFN 2004.

<sup>16</sup> (2002) 4 NWLR (Pt. 1819) 69.

<sup>17</sup> K Adegbite, *Learning The Law in Nigeria*, (Princeton and Associates Publishing Co. Ltd., 2015).

<sup>18</sup> See Section 36 (5) of the 1999 CFRN, as amended; Section 135 (1) EA Cap E.14, 2011 LFN; *Edamine v State* (1996) 3 NWLR (Pt. 438) 530 at 539; *Aje v State* (2006) 5 QCCR 191 at 204 lines 5-17; *Ubani v State* (2005) QCCR 131 at 139; *Brown v State* (2005) 3 QCCR 50 at 75.

the proof required of the plaintiff is satisfied on balancing of his evidence against that of the defence, a court can say that the evidence the plaintiff tendered was more probably the plausible explanation of what had transpired.<sup>19</sup> In civil cases, the burden of proof is usually on the party who asserts it.<sup>20</sup> The standard of proof is accordingly higher in criminal cases than in civil matters.

The end result of a criminal trial is the certainty of meting out punishment to a convict as contained in the law creating the offence, whereas in civil cases the purpose of the trial is to compensate the party wronged and put him in the position he would have been in if he had not been wronged.<sup>21</sup> However, Smith and Hogan have observed,<sup>22</sup> that where a defendant is ordered to pay a huge compensation to the plaintiff, the defendant may well feel that he is being punished and the award of exemplary damages in a civil will look punitive.

Lastly, in a criminal trial the court after pronouncing the accused guilty goes ahead to enforce its judgment, whereas in civil cases the plaintiff in whose favour a judgment is given applies for its execution.

#### **4.0 CONSTITUENTS OF A CRIME**

The constituent parts of a crime are *Actus Reus* and *Mens Rea*.

##### **4.1 Actus Reus**

The first constituent of a crime is *actus reus* which in its wider meaning refers to the conduct of the accused person, its result and those relevant surrounding circumstances and consequences or state of affairs.<sup>23</sup> The *actus reus* of an offence is often explained as being the conduct element of the crime. In this context though, the word conduct frequently embraces much more than the positive performance of a single physical act.<sup>24</sup>

Another aspect of *actus reus* that can be found in certain crimes is where the law demands that a particular consequence or result must ensue from the conduct of the accused person. For example, in a case of murder, it is required that the defendant's conduct should cause the consequence of the victim's death.<sup>25</sup>

Sometimes, where one owes a legal duty to another, failure or omission to perform such a legal duty or responsibility may give rise to *actus reus* of the crime. This kind of a situation comes to being where the law imposes responsibilities on persons with whom one has relationships with (for example, parents must provide for their

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<sup>19</sup> See Section 133 EA Cap E 14 LFN 2004; *Framo Nig. Ltd v Daodu* (1993) 2 NWLR (Pt. 281) 372.

<sup>20</sup> See *Union Bank of Nig. Ltd. v Prof. Ozigi* (1994) 3 NWLR (Pt. 333) 385; *Okubuke v Oyagbola* (1990) 4 NWLR (Pt. 147) 723; *Ike v Ugboja* (1993) 6 NWLR (Pt. 301) 539; *Okiri v Ifeagha* (2001) FWLR (Pt. 73) 140.

<sup>21</sup> Expressed in Latin maxim as: *Restitutio in Integrum*.

<sup>22</sup> JC Smith and B Hogan, *Criminal Law* 3<sup>rd</sup> edn (Butterworths 1973) 30.

<sup>23</sup> LB Curzon, *Criminal Law* (Macdonald and Evans, 1973) 23-24.

<sup>24</sup> DW Elliot and C Wood, *A Casebook on Criminal Law* 9th edn (Sweet Maxwell 2006) 75

<sup>25</sup> *Ibid.*

children) and failure to act may be regarded as *actus reus*. Where there is no such relationship established by law, then no crime can be committed.<sup>26</sup>

*Actus reus* and causation are indivisible twins as causation cannot be described without *actus reus*; causation therefore helps to know the source or what really led to the crime. For example in the case of *Oludamilola v State*,<sup>27</sup> Ogbuagu, JSC said it was in evidence that the deceased was shot on the side of the stomach at a close range, it would therefore be no surprise to a reasonable man if death results, as the likely consequence of the appellant's conduct is death of the victim.

## 4.2 Men Rea

This is the blameworthy state of the mind of the accused person and by this requirement of the law, no person can be convicted of an offence without an enquiry as to the condition of his mind when doing the prohibited act. It is a requirement of the law that the mind of the accused person must be blameworthy before he can be convicted; this is expressed in Latin thus: *Actus Non Facit Reum Nisi Mensit Rea*.

There are many states of mind as there are offences.<sup>28</sup> Men Rea could therefore take either of four forms of Intention,<sup>29</sup> knowledge,<sup>30</sup> negligence and causation.

## 5.0 PROVOCATION AS A DEFENCE

In Nigeria, provocation is one of the numerous defences to criminal liability in murder cases. Jurisprudentially, this defence acknowledges the concept of diminished capacity when an individual is extremely enraged and loses self-control. Justice, therefore, demands that this be considered when determining an appropriate punishment.<sup>31</sup> The defence of provocation is also recognised under the English Law in criminal charges,<sup>32</sup> but it is however not a ground for absolutely exculpating an accused person from criminal responsibility.<sup>33</sup>

### 5.1 Definition of Provocation

The Black's Law Dictionary defines provocation as the act of inciting another to do something, especially to commit a crime; or something such as word or action that

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<sup>26</sup> See *R v Miller* (1983) 2 AC 161; *R v Akanni* (1959) WRNLR 15; compare with the decisions in *Gibbins v Proctor* (1891) 64 LT 594 and *R v Pittwood* (1893) 1 QB 450 where English courts held that failure to provide maintenance to one's family or failure to perform a contract leading to death would make the accused culpable.

<sup>27</sup> (2010) 3 MJSC (Pt.11) 108 at 120.

<sup>28</sup> See JF Stephen, *A History of the Criminal Law of England* (Macmillan 1883) 95.

<sup>29</sup> See *DPP v Smith* (1968) 2 QB 367.

<sup>30</sup> See *Sudan Govt. v Abu Bakr* (1956) SLJR 42.

<sup>31</sup> See for example the work of J Finrus, *Natural Law and Natural Right*, (Oxford University Press 1980) and J Finrus, *Fundamental of Ethics*, (Oxford University Press 1983) that extol the teachings of the Natural Theorists to the effect that human conduct is controlled by the nature of man under the control of reason and is certainly independent of any form of intervention.

<sup>32</sup> *R v Duffy* (1949) 1 All ER 932.

<sup>33</sup> WL Clark, *Handbook of Criminal Law* 3<sup>rd</sup> edn (St. Paul, West Publication 1915); See also *Umar v Kano State* (2022) LPELR 56958 (CA); *State v Da'u* (2021) LCN/5156 (SC).

affects a person's reason and self-control, especially causing the person to commit a crime impulsively.<sup>34</sup>

In the southern states of Nigeria, the Criminal Code<sup>35</sup> defines provocation as including any 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 a 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 of insult is done or offered.

The Penal Code<sup>36</sup> which is applicable in the Northern States of Nigeria 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. By this provision of the Penal Code, provocation cannot be a ground to completely exculpate the accused person from criminal responsibility, even if the accused's act is in retaliation of the victim's provocation. Accordingly, the Penal Code punishes who assaults another without first being provoked by that other with imprisonment of one year.<sup>37</sup>

The Court of Appeal in the case of *Oniya v State*<sup>38</sup> gave a brief but lucid definition of the essential ingredients of what constitutes a provocation. The court said, provocation means an act done by the deceased which would cause in any reasonable person and actually does cause in the accused, a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him for a moment not master of his own mind.

If the defence of provocation is acceded to by the court, it will not completely exonerate the accused, but it will rather mitigate the punishment. According to Glanville William, in a murder case, provocation is a legal defence, but not one that allows the defendant to go free if the jury accepts the defence, they return a verdict of manslaughter.<sup>39</sup>

## **5.2 The Defence of Provocation under Common Law and Nigerian Law**

English law recognises the defence of provocation, if the defence is considered by court, it is capable of reducing the offence to manslaughter, mitigating the punishment of the accused person. However, in Nigeria, if a person is charged with an offence which assault is a constituent element under section 284<sup>40</sup>, the accused person can plead the defence of provocation which will be a complete defence to assault. Where the force used is commensurate to the provocative act, the accused

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<sup>34</sup> BA Garner, *Black's Law Dictionary* 10<sup>th</sup> edn (Thomson Reuters 2004) 1421.

<sup>35</sup> Section 283 CC.

<sup>36</sup> Section 222 (1) PC.

<sup>37</sup> See Section 265 PC

<sup>38</sup> (2006) 2 WNLR (Pt. 991) 271.

<sup>39</sup> G Williams, *Textbook of Criminal Law* 3<sup>rd</sup> edn (Sweet and Maxwell 1978).

<sup>40</sup> CC Law Cap C 38 LFN, 2004.

may escape liability under the provision of the law<sup>41</sup>. To this extent, provocation may accord a complete defence to a charge of manslaughter of which assault is an element.<sup>42</sup>

Another observation is that there is no rational basis for allowing provocation to be a defence to assault alone and not to some other offence like defamation<sup>43</sup> and malicious damage to property.<sup>44</sup>

For a defence of provocation to succeed, generally, the act of provocation must come from or be offered by the person who was in fact killed and not from someone other than the person killed.<sup>45</sup>

In England before the passing<sup>46</sup> of the Homicide Act 1957<sup>47</sup>, words alone could hardly amount to provocation but this was not the case in Nigeria, where the definition of provocation under the Criminal Code includes any wrongful 'act' or 'insult'. Although it was suggested in *R v Mayer Nungu*<sup>48</sup>, that mere use of words could scarcely amount to ..... manslaughter, but more recent decisions of the Supreme Court have put beyond questions that in appropriate cases and circumstances, provocative words alone can avail an accused person.<sup>49</sup>

One of the restrictive rules of common law was the test of the reasonable man. Thus, under common law, the emphasis is usually on the test of a reasonable man, but in Nigeria, a socio-cultural background test has been implied in ascertaining a reasonable man. For instance, the passion of a primitive peasant could be more readily aroused than that of an educated civilised person, thus the test adopted is usually that of a reasonable man in the accused standing in life and civilisation, rather than blanket approach of the common law. It is implicit that in the test of the reasonable man, no matter the form it takes in any circumstance, the doctrine requires that the mode of resentment by the accused must bear a reasonable proportion to the kind of provocation offered to him.<sup>50</sup>

Thus, a retaliatory measure, which is far in excess of the provocation offered, stands to be condemned as primitive and unreasonable and the accused may lose the benefit of the defence of provocation.<sup>51</sup>

If the accused kills in the course of provocation, the killing must be done instantaneously, that is, it must be done in the heat of passion as there will be no time for the passion to cool down. The courts often held that where there is interval to cool down, or where a long period of time has elapsed long enough for temper

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<sup>41</sup> Ibid, Section 248.

<sup>42</sup> See *State v Christian Chuazor* (1974) 8 CCHJ 1179.

<sup>43</sup> Section 375 of CC, LFN, 2014.

<sup>44</sup> Section 451 of CC LFN, 2014.

<sup>45</sup> *James Biruwa v State* (1985) 3 NWLR (Pt. 11) 167, Ratio 5, Ratio 8.

<sup>46</sup> See *Holmes v D.P.P.* (1946) 2 All ER 124.

<sup>47</sup> The Act is to the effect that words alone can amount to provocation in England since it directs the judge to take account, of all things said or done during ruling whether there has been provocation.

<sup>48</sup> (1950) 5 FSC 93; *Alonge v AG Western Nigeria* where it was held that the statement in the English case of *R v Mason* (1756) Fost. 132 could not have the effect of reducing the crime from murder to manslaughter.

<sup>49</sup> See *Nwogu v State* (1985) 3 NWLR (Pt. 13) 467; *Oladiran v State* (1986) 1 NWLR (Pt. 14) 75.

<sup>50</sup> See *Nwede v State* (1986) 3 NWLR (Pt. 13) 444; *Oladiran v State* (supra); *Nwogu v State* (supra).

<sup>51</sup> See *James Biruwa v The State* (1985) 3 NDLR 167.

of a reasonable man to cool down, the plea of provocation will not avail the accused.<sup>52</sup>

A lawful act is not provocation to any person, for assault is an act which a person does in consequence of excitement given by another person in order to induce a form of act and thereby to furnish an excuse for committing an assault. For example an arrest which is lawful is not necessarily provocative for an assault, but it may be evidence of provocation to a person who knows of the illegality. It can be safely said that provocation need not be directed to the accused in particular, it may be directed to someone who the accused has relationship, if he acted for the person who is under his care.

### **5.3 Elements of Provocation**

There are some elements that must be proved for a defence of provocation to succeed, these include: that the act of provocation must be done in the heat of passion, the loss of self-control must take place before there was time to cool down, and the retaliation must be appropriate to the provocation.<sup>53</sup> According to Coker JSC in *Ewo Akang v State*<sup>54</sup> provocation which reduces what will otherwise amount to manslaughter is a concept made up of number of elements which must co-exist. By virtue of Sections 288 and 284 and 318 of the Criminal Code and Section 38 and 222 (1) of the Penal Code, several basic elements of the defence of provocation are provided for.

#### **5.3.1 Heat of Passion**

Heat of passion is described as *le crime passionnel*. Heat of passion was the first type of killing recorded in history,<sup>55</sup> and has remained an extremely common type of homicide over the centuries. In determining the heat of passion, it is usually proper to take into account the degree of provocation offered. But the defence will be available even though there is an interval of time between, the act of provocation and the act of the accused, provided the time interval is so short that cooling off or rational reflection is not possible for the accused person.<sup>56</sup> The passion must have been caused by sudden provocation and in deciding whether the provocation was sudden, previous wrongful acts or insults by the deceased are not sufficient because they do not supply the requirement of suddenness.<sup>57</sup> At times, provocation given by

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<sup>52</sup> See *R v Green* (1955) 15 WACA 73; *R v Duffy* (supra); *R v Ibrams and Gregory* (1981) 74 Cr App R 154; *R v Thornton* (1996) 1 WLR11174; *R v Ahluwalia* (1993) 96 Cr App R 123; *Famakinwa v State* (2012) LPELR-9748 (CA).

<sup>53</sup> See *James Biruwa v State* (Supra); *Rafiu v People of Lagos State* (2021) LPELR-58368 (SC).

<sup>54</sup> (1971) 1 All NLR 46.

<sup>55</sup> The first crime reported in the Bible was the killing of Abel by Cain. Genesis 4:1-8. Although the facts surrounding the event are less than clear, in light of the fact that it was a familial killing, in which jealousy appears to have been a factor this may constitute crime passionnel.

<sup>56</sup> *R v Ogodo* (1961) All NLR 700; Section 300 of Indian Penal Code

<sup>57</sup> But as was stated in *Mehemet Ali v R.* (1957) W. ALR 28 at 39 per Jackson J. ‘the final wrongful act or insult might, of itself be comparatively drifting, but when taken with what had gone before might be the last straw in a cumulative sense of incidents which finally broke down the accused’s self-control and caused him to act in the heat of passion’; See *Uwaekweghinya v State* (2005) LPELR-3442 (SC).

a group of persons acting in concert may be successfully pleaded where the person so provoked kills a member of the group.<sup>58</sup>

### **5.3.2 Loss of Self- Control**

It is not enough that a wrongful act was done to the accused by the victim nor is it sufficient merely to allege that an insult has been offered. The provocative act must be based on self-revenge, be sudden and such as to cause an ordinary person temporary loss of self- control.<sup>59</sup> Yet, if a reasonable person would be provoked but the accused himself was not provoked, a plea of provocation will fail.

### **5.3.3 Proportionality of Retaliation**

For an accused person to rely on the defence of provocation, he must first of all show that there was an act considered wrongful or an insult which was sufficient to cause an ordinary person to be provoked to act in the way he did. The retaliation from the side of the accused must be proportionate to the act of provocation of the victim.<sup>60</sup> This is a matter for the court to decide based on the facts of the case. As a result recourse to judicial authorities will be useful for our purpose. Thus, in *Isenki v. The Queen*<sup>61</sup> the Federal Supreme Court had the opportunity to consider whether the unjustified and brutal beating of the appellant could in law amount to a wrongful act of provocation.<sup>62</sup>

## **5.4 The Application of the Reasonable Man's Test**

It is accepted law in most jurisdictions including Nigeria that not every provocation will modify the nature of an offence. The court will be interested in knowing the impact of the act or statement of provocation in the mind a reasonable man. A reasonable man, in law, is a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something.<sup>63</sup>

The Criminal Code talks of an 'ordinary person' in section 283, while the Penal Code has not been explicit on the test to be applied when the accused pleads provocation to justify his killing the victim. Apart from the fact that the accused

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<sup>58</sup> *Dummeni v R.* (1995)15 WACA 75.

<sup>59</sup> *R v Nwanjoku* (1937) 3 WACA 208; *Q v Reuben Enyi Jonobil* (1961) A HLR 654 at 656; *Lado v State* (1999) 13 NWLR (Pt. 619) 369 at 436; *Bassey v State* (2005) LPELR-22734 (CA).

<sup>60</sup> *Eze v State* (2014) LPELR-23631 (CA); *Harrison Owhoruke v C.O.P.* (2015) LPELR-24820 (SC).

<sup>61</sup> *Shanawa v Sokoto Nature Authority* (1959) FSC 33/59 in our opinion, a proper consideration of the whole evidence before the court, it is apparent that the appellant was deprived of the power of self-control by grace and sudden provocation as to reduce the offence to one of culpable homicide not punishable with death contrary to section 222(1) of the Penal Code.

<sup>62</sup> See also *Jinobu v The Queen* (1961) All NLR 627 at 629; *Babalola John v Zaria N.A.* (1959) NRNLR 43; *Wanaka v Sokoto N.A.* (1956) NNLR 19.

<sup>63</sup> Reasonable Person-FindLaw Dictionary of Legal Terms <https://dictionaryfindlaw.com>> accessed 2 January 2024.

might have been provoked, the act of causing the provocation must be such as to deprive a reasonable man of his self-control.

Under the common law, it was first assumed that the objective concept of reasonable man is a man on the Clapham omnibus<sup>64</sup> which could conveniently be applied to the area of law. The test is objective, which means that any unusually excitable or pugnacious individual cannot rely on the defence which would have made an ordinary person to act the way he did.<sup>65</sup>

Thus in *R v Asuquo Eseno*<sup>66</sup> the wife refusal to prepare food for her husband was held not to amount to sufficient provocation in a reasonable man, standing, to reduce the killing of her by him from murder to manslaughter.

In *R v John Okoro*<sup>67</sup>, Francis J. said that in considering the defence of provocation, the degree of provocation must be judged from the point of view of what would amount to provocation in the case of an ordinary reasonable man of the same standing in life and degree of civilization as the accused man, for what might not be regarded as sufficient provocation in the case considered as sufficient where it concerns an uneducated and primitive peasant whose passions would naturally not be so much under control as those of the more educated person. In applying the reasonable man test, Nigerian Courts appear to have limited themselves to a consideration of the standards of civilization.<sup>68</sup>

### **5.6 Mode of Resentment**

In considering this question, the courts take into account the nature of the instrument with which the homicide was effected.<sup>69</sup> As a basic principle, the retaliation must be proportional to the wrongful act. The act of violence done to the victim by the accused, which act is done in retaliation for the wrongful act or insult must be proportionate to the said insult. The reason is that the law recognises human frailty, but does not indulge ferocity.<sup>70</sup> The danger of the rule is that the court at times places too much emphasis on the mode of retaliation as if this were determinative of the issue, whereas the main factor for consideration should be the provocative act itself.

### **5.7 The Third Party and Provocation**

The retaliation done under the influences of provocation must be done on the person who offered the provocation. This aspect of the law of provocation enjoins the person who claims provocation to take his retaliation on the person who offered the

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<sup>64</sup> The man on the Clapham omnibus is a hypothetical ordinary and reasonable person, used by the courts in English law where it is necessary to decide whether a party has acted as a reasonable person would. See 'Man on the Clapham Omnibus' <https://g.co/kgs/XtPKE8u> accessed 2 January 2024.

<sup>65</sup> See 'Provocation's Reasonable Man: A Plea for Self-Control' <https://journals.sagepub.com> accessed 2 January 2024; See also *Bedder v DPP* (1954) 2 All ER 801; *R v Nwanjoku* (1963) PLR.

<sup>66</sup> (1960) 5 FSSC 50; See also *R v Reuben Enyi* (1961) LLJR-SC.

<sup>67</sup> (1942) 16 NLR 63 at 65.

<sup>68</sup> See *Olubu v State* (1944) 17 NLR 99 at 101.

<sup>69</sup> *State v Mohammed* (1969) 1 NMLR 269 the court took into account the fact that the dagger used by the accused, was worn by his tribe as an ornament.

<sup>70</sup> See *Nomad v Borno NA* (1954) 21 NLR 103.

wrongful act or the insult. The reason for this position is that provocation as a defence does not offer an excuse for indiscriminate vendetta. In the case of *R v. Ebok*,<sup>71</sup> the court stated that it would be stretching the law to a dangerous extent to say that provocation from one person would justify the killing of another.<sup>72</sup>

Under Criminal Code and under the English Law, it is clear that provocation given by a person other than the person killed cannot be sufficient. However, under the Penal Code Law,<sup>73</sup> culpable homicide can be reduced from one punishable with death to one not so punishable with death. Under the section, an accused can successfully plead provocation if he kills another person by mistake or accident, as such killing will be construed as culpable homicide not punishable by death.<sup>74</sup>

Where there is evidence of a premeditated intention of the accused to kill the victim, it will not be consistent with the defence of provocation and as such the accused person will not be exculpated.<sup>75</sup>

## 6.0 BURDEN OF ESTABLISHING PROVOCATION

Under the English law, it is the duty of the state to prove the culpability of the accused. This position of the law was reaffirmed by Atkins in the case of *R v Basil Ranger Lawrence*<sup>76</sup> where he reiterated that it has always been part of English law for the Crown to prove the guilt of the accused person beyond reasonable doubt. This position of the law was reaffirmed by the House of Lords in *Woolmington v Director of Public Prosecution*<sup>77</sup> where Sankey J., stated that it has consistently been part of English law for the prosecution to prove the guilt of the accused.

In Nigeria, the burden is placed on the prosecution and the standard required is a proof of the allegation beyond reasonable doubt<sup>78</sup>. This is done by proving all the essential ingredients of the offence charged as defined by the law that created the offence to the satisfaction of the court<sup>79</sup>. This is a principle, which has long been recognised in line of cases.<sup>80</sup> The basic necessity before a verdict of guilt in a criminal charge can be pronounced is, if the juries are satisfied of the guilt of the accused beyond reasonable doubt as Lord Denning as he then was stated in *Miller*

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<sup>71</sup> (1950) 19 WLR 84.

<sup>72</sup> See also *Omeniwu v State* (1966) 4 NMLR 356; *Ukwunneyi v State* (1989) 4 NWLR (Pt. 114) 131; *Shaila v State* (2004) 8 NWLR (Pt. 875) 396; *Idemudia v State* (1999) 7 NWLR (Pt. 610) 2001.

<sup>73</sup> Section 222 (1) PCL.

<sup>75</sup> See *Shalla v State* (2007) LLJR SC; *Ekpeyong v State* (1993) 5 NWLR (Pt. 295) 513; *John v Zaria N.A.* (1959) NRNLR 43.

<sup>76</sup> (1952) II NLR 6.

<sup>77</sup> (1935) AC 463.

<sup>78</sup> See *YAA'u v State* (2022)18 NWLR (Pt. 1863) 601; *Ofongo v A.P.C.* (2022) 9 NWLR (Pt. 1821) 543; *Kwenev v State* (2022) 13 NWLR (Pt. 1847) 273.

<sup>79</sup> *Obiakor v State* (2002) 6 SCJN 193 at 202.

<sup>80</sup> See *Ilori v State* (1980) 8-11 SC 81; *Aigureghi v The State* (2004) 1 (Pt. 1) 65 at 86; *Nigerian AirForce v Obiosa* (2003) 1 SC (Pt. 2) 145 at 146.

*v Minister of Pension*<sup>81</sup> proof beyond reasonable doubt does not mean proof beyond the shadow of doubt.

It is pertinent to state that if the prosecution proved the case against the accused person beyond reasonable doubt the evidential burden<sup>82</sup> of establishing a reasonable doubt shift on the accused person timeously put a defence to his criminal liability. It is apposite to state that, the reason for an accused action is a fact within his knowledge and the law<sup>83</sup> is that, Whosoever desires any court, to give judgment as to any legal right or liability dependent on the existence of a fact which he assert must prove those facts. Whenever a person is bound to prove the existence of any fact, it is said that the burden of proof is on the person.

The Nigerian constitution guarantees every Nigeria a right to fair hearing, accordingly, an accused person is given a benefit of doubt in the criminal allegation against him until the contrary is proved.<sup>84</sup>

### **6.1 Exception to the Burden of Proof**

Once the prosecution discharges the burden placed on him, the burden of proving reasonable doubt shifts to the accused person.<sup>85</sup> Section 140 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving the fact is upon him who alleges the fact.<sup>86</sup> Section 141(1) is another provision dealing with exception to the proof of evidence. The section provides that the burden of proving the existence of the circumstances bringing the case of the accused person within any exception or exemption from all qualification to the operation of the law creating the offence with which he is charge.<sup>87</sup>

## **7.0 CONCLUSION AND RECOMMENDATIONS**

The defence has continued to remain an integral part of criminal law jurisprudence. However, the application of the reasonable man test by the judges, without putting to consideration the peculiar state of life of the accused, would cause unquantifiable damage to the justice of the case. It seems judges in Nigeria are most times swayed by the English standard of reasonable man and English decided cases, without giving consideration to our peculiarities in Nigeria in deciding cases. A man experiences and circumstances go a long way in determining how the individual behave and respond to provoking events. The attitude of a man is therefore informed by so many factors, which the court deserve to be interested in. This study recommends that the relevant laws on provocation should be amended and the factors of loss of control and other qualifying factors that could prompt anger should be removed from the circumstances that could mitigate provocation.

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<sup>81</sup> (1947) 2 All E.R.

<sup>82</sup> Section 138 (1) of the Evidence Act Cap E.14 LFN 2011.

<sup>83</sup> Section 134 and 141 E.A.

<sup>84</sup> Section 36 (5) CFRN 1999.

<sup>85</sup> See *State v Chukwu* (2022) 6 NWLR (Pt. 1825) 105.

<sup>86</sup> See *Mathew Onakoya v R* (1957) 4 FSC 150.

<sup>87</sup> See *Johnson v COP* (1960) WNLR 118.