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REFLECTIONS ON PROVOCATION AS SPECIE OF DEFENCE TO CRIMINAL LIABILITY IN NIGERIA

*Eworitsemogha Anthony-Okoboh **Prof. Izevbuwa Osaretin George

*Professor of Law and presently Dean of Law Igbinedion University College of Law, Okada
<izevbuwa.george@iuokada.edu.ng> <https://orcid.org/0000-0002-1690-0324>
**Graduate candidate-Igbinedion University School of Postgraduate Studies and Research Okada Edo State Nigeria
<eworitsemogha.anthony-okoboh@iuokada.edu.ng> <https://orcid.org/0009-0008-8432-7938>

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Abstract

This paper examines the defence of provocation in Nigerian criminal law, exploring its application, limitations, and implications for criminal liability. Provocation is a partial defence that can reduce liability from murder to manslaughter, based on the idea that a person who kills in response to provocation may not have the same level of culpability as one who kills without justification. By adopting the doctrinal method of legal research, the paper analyses the Nigerian Penal Code and Criminal Code, highlighting the requirements for a successful provocation defence, including the nature of the provocation, the loss of self-control, and the proportionality of the response. It also discusses relevant case law and judicial interpretations, illustrating the challenges in applying this defence in practice. It concludes by arguing for a nuanced approach to provocation, balancing the need to acknowledge human frailty with the imperative of protecting human life. Finally, the paper recommend among other things, reforms to clarify and standardize the application of provocation, ensuring fairness and consistency in the administration of justice.

Keywords: Provocation, Criminal liability, Defence, Human rights, Manslaughter, Murder.

1. **Introduction** Crime is as old as man, and it would not be out of place to say that crime emanated as a product of society. Most countries in the world have developed various legal systems that enacted legislations to contend with different varieties of crimes. The

> Nigerian legal system, *ab initio*, provided laws to contain crimes in the country. Similarly, the same legislations made provisional stipulations for defences available to accused persons. As a matter of fact, accused persons are entitled to raise any of these provisional defences to justify their conducts. Some of the defences include mistake, insanity, intoxication, self-defence, provocation, compulsion and a host of others.

It is a common instinct that humans when suddenly provoked, can become hostile and aggressive and react violently to such acts or conducts as the case may be. In the regime of criminal law, provocation has been specie of defence by excuse or exculpation, alleging a sudden and temporary loss of control (a permanent loss of control is in the realm of insanity) provocative action or conduct, sufficient to justify an acquittal, a mitigated sentence or a conviction for a lesser charge. This is because justice demands that where a person reacts violently to an issue or to a provoking act, notice should be given or taken of his rage in the process of imposing punishment. Provocation thus becomes a relevant factor in the court's assessment of the *mens rea* of an accused person or the intention or state of mind at the time of committing the act for which he is being accused.

The famous Greek Philosopher Aristotle once said:

> Acts proceeding from anger are rightly judged not to be done out of malice aforethought; for it is not the man who acts in anger but him that starts the mischief. Again, the matter in dispute is not whether the thing happened or not, but its justice, for it is apparent injustice that occasions rage.[1]

Generally, the defence of provocation is very controversial, apparently because of portraying the defendants as receiving a mild treatment on grounds of relying on provocation. For instance, judging an individual to hold him responsible for the action depends on the assessment of their culpability. Another factor which makes this defence controversial is that the provoked person must have carried out the act instantaneously after the provocation occurred, otherwise known as "sudden loss of control." According to Learned writers George O. Izevbuwa & Sheriff Okoh, there must be a state of passion without time to cool, placing the defendant beyond control of his reason.[2]

The defence of provocation is a complex and contentious issue in all jurisdictions particularly the Nigerian criminal justice system, with significant implications for criminal liability, notwithstanding the associated importance, the application of provocation as a defence in suffering criminal liability

[1] Nerder Uhzuru Owjang & A. K. Anya, Philosophical thoughts in passing, Berkings Publishers : Nigeria, 2008, Pp. 23, 25

[2] Criminal Law in Nigeria; A Comprehensive Approach, 2nd ed. Mase-Perfect Publishers Benin City-Nigeria, Pp. 514, 515

still remain inconsistent predicated on concerns of fairness, justice and protection of human rights, as if this is not enough, most of the decided cases on provocation is still controversial till date.

This paper therefore aims to investigate the problems associated with provocation as a defence to criminal liability in the Nigerian criminal justice system. As a matter of fact, the paper extends to the consideration of the nature and scope of offence and criminal liability, elements and defence of provocation, and then conclusion.

1. Nature and scope of 'offence and criminal liability'

It is imperative to inquire why certain kinds of action forbidden by law, and consequently becomes 'crime' or 'offence'? The answer is: to announce to society that these actions are not to be performed and furthermore, to ensure that persons refrain from such acts. These are the common immediate aims of making any conduct a criminal offence and until we have laws made with these primary aims we shall lack the notion of a crime and of a criminal. Without recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.[3] This indeed is one grave objection to those theories of law, which in the interests of simplicity or uniformity obscures the distinction between primary laws setting standards of behaviour and secondary laws specifying what officials must or may do when they are broken. Such theories insist that all legal rules are 'really' directions to officials to exact 'sanctions' under certain conditions, for example, if people kill.[4] Yet only if we keep alive the distinction (which such theories thus obscure) between the primary objective of the law in encouraging or discouraging certain kinds of behaviour, and its merely ancillary sanction or remedial steps, can we give sense to the notion of a crime or offence.

It is important however to stress the fact that in thus identifying the immediate aims of the criminal law we have not reached the stage of justification. There are indeed many forms of undesirable behaviour which it would be foolish (become ineffective or too costly) to attempt to inhibit by use of

[3] This generally clear distinction may be blurred. Taxes may be imposed to discourage the activities taxed though the law does not announce this as it does when it makes them criminal. Conversely fines payable for some criminal offences because of a depreciation of currency become so small that they are cheerfully paid and offences are frequent. They are then felt to be mere taxes because the sense is lost that the rule is meant to be taken seriously as a standard of behaviour

[4] Cf. Kelsen, *General theory of Law and State* (1945), pp. 30-33, 33-34, 143-4. 'Law is the primary norm, which stipulates the sanction..: (ibid. 61).

the law and some of these may be better left to educators, trades unions, churches, marriage guidance councils or other non-legal agencies.

Conversely there are some forms of conduct, which we believe cannot be effectively inhibited without use of the law. But it is only too plain that in fact the law may make activities criminal, which it is morally important to promote and the suppressing of these may be quite unjustifiable. Yet confusion between the simple immediate aim of any criminal legislation and the justification of punishment seems to be the most charitable explanation of the claim that punishment is justified as an 'emphatic denunciation by the community of a crime. According to Lord Denning, this is the ultimate justification of punishment.[5]

Conversely the immediate aim of criminal legislation cannot be any of the things which are usually mentioned as justifying punishment: for until it is settled what conduct is to be legally denounced and discouraged, we have not settled from what we are to deter people, or who are to be considered criminals from whom we are to exact retribution, or on whom we are to wreak vengeance, or whom we are to reform. Even those who look upon human law as a mere instrument for enforcing 'morality as such' (itself conceived as the law of God or Nature) and who at the stage of justifying punishment wish to appeal not to socially beneficial consequences but simply to the intrinsic value of inflicting suffering on wrongdoers who have disturbed by their offence the moral order, would not deny that the aim of criminal legislation is to set up types of behaviour (in this case conformity with a pre-existing moral law) as legal standards of behaviour and to secure conformity with them: No doubt in all communities certain moral offences, for example, killing, will always be selected for suppression as crimes and it is conceivable that this may be done not to protect human beings from being killed but to save the potential murderer from sin; but it would be paradoxical to look upon the law as designed not to discourage murder at all (even conceived as sin rather than harm) but simply to extract the penalty from the murderer.

An offence is defined as an act or omission which is rendered punishable by some legislative enactments.[6] All legal systems around the world have incorporated crime, the moral ideal that no one should be convicted of a crime unless some measure of subjective fault can be attributed to him. The Nigerian criminal law is no exception. However, there are defences for those who cannot be

[5] In evidence to the Royal Commission on Capital Punishment, Cmd: 8932, para. 53 (1953)
[6] Criminal Code Act Section 2

said to be at fault, for instance, insane persons, young people, or those who are in a state of unconsciousness or under compulsion, and so on.[7]

With respect to criminal liability, things that are required before a person can be held to be criminally liable, Okonkwo and Naish, leading authors in criminal law defined 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.[8] Before then, Glanville Williams had defined crime to be a legal wrong that can be followed by criminal proceedings which may result in punishment, consider crime as a conduct which "will include a formal and solemn pronouncement of the moral condemnation of the community."[9] Similarly, Professor Ashworth stated that the chief concern of criminal law is seriously anti-social behaviour, and anti-social act which must not be abandoned as one considers the broader canvas of criminal liability.[10] In both criminal and penal codes, use is made of the word 'offence,' rather than of the word 'crime,' but since the adjective 'criminal' is also used in both codes and in the constitution,[11] the words 'crime' and, offence would appear to be interchangeable.[12]

Criminal procedure marks off a crime from a civil wrong, and it should be noted that a few of the distinguishing characteristics of that procedure.[13] There is no special intrinsic characteristic of criminal conduct distinguishing act from non-criminal conduct. Whatever views one holds about the penal law on crime, no one will question its importance to the society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions.[14]

Criminal liability is rarely used to describe the findings of fact. It is usually used at the second stage of the trial to describe the findings that not only did the accused commit the act or make the omission with which he is charged, but also that in law he is responsible for it.[15] The law may sometimes find a man guilty and therefore fully responsible for an act even though common sense

[7] Okonkwo and Naish, Criminal Law in Nigeria, p. 43
[8] Ibid
[9] Criminal Law (2nd ed., Stevens and Sons Ltd., London, 1961) p. 11
[10] Cambridge outlines of Criminal Law 15th, (ed.), 1936, p. 16
[11] Constitution of the Federal Republic of Nigeria, S. 33
[12] Okonkwo and Naish, supra, at p. 19
[13] N. Nwadialor, The Criminal Procedure of the Southern State of Nigeria.
[14] Ibid
[15] C. Richard., Criminal Law, (13th ed., Butterworth 1995) P. 19

might say that he is not responsible for such an act, the concept of responsibility rest on a reasonable amount of freedom of choice and capacity to regulate one's conduct.[16]

In law, crime consists of two elements; the *actus reus* and *mens rea*. The former represents the physical aspect of crime and the later represents the concerned mental aspect. *Actus reus* has been defined as such result of human conduct as the law seeks to prevent. An act may be positive or negative (omission). *Mens rea* is a loose term of elastic signification and covers a wide range of mental states and conditions, the existence of which would give a criminal hue to *actus reus*.

There might be *actus* without *mens rea*. Thus, for example, if an infant of 2 years while playing with a loaded pistol lets it go and kills another person, there is *actus reus* without *mens rea*. Conversely, there might be *mens rea* without *actus reus*. In ethics or religion an evil deed may be committed in mind and might constitute a wrong, even though it has not manifested itself in physical conduct.

It may further be noted that *mens rea* as such is not punishable. Thus, if A has intention to kill B, Å cannot be brought to the court on that ground; some act has to be done by A for example, if A is discovered with a loaded gun in the compound of B, then A has done some act and he may be guilty. There are some exceptions to the general rule that intention as such is no crime, for example, intention to commit some treason (crime against state) or conspiracy to commit a crime.

However, sometimes an act alone is sufficient to constitute a crime without the existence of *mens rea*. The guilty intent is not necessarily that of intending the very act or thing done or prohibited by law, but it must at least be the intention to do something wrong. Criminal intention is the purposive ness or design of committing an act forbidden by criminal law without just cause or excuse. An act is intentional when it is the outcome of the determination of the persons will and is foreseen and desired by the person. Thus, *mens rea* requires both a will direct to a certain act and knowledge as to the consequences that will follow from a particular act. In some cases it stands for a criminal intention of the deepest dye, such as is visible in a designed and premeditated murder committed with a full foresight of its fatal consequences. In other cases it connotes mental conditions of a weaker shade such as are indicated by words like knowledge, belief, criminal negligence or even rashness in disregard of consequences. Thus, the mental elements of different crimes differ widely. *Mens rea* means in the case of murder, malice aforethought; in theft an intention to steal; and in rape, an intention to have forcible connection with a woman without her consent

[16] Ibid

Significantly, it is difficult to give a portrait of the accusers mind or intention at the given moment as intention is an abstract idea, it is difficult to establish it and the help is taken of surrounding facts or factors, for instance;

i. Previous relation between the accused and the victim, any object of hostility between them.
ii. Existence of instigation i.e. whether accused was hired and what prompted him to commit crime.
iii. Whether the accused had something to gain out of the whole affair.

Thus, guilty intention is always preceded by a motive or real causal factors. One may speak in the plural of the mental elements or physical element of an offence, because the *actus reus* or *mens rea* of any particular offence may consist of a complex physical or mental circumstance. Therefore, it is all parts of the *actus reus* of an offence as in Section 456 of the Criminal Code that the accused causes a disease; that the disease is infectious; that it is caused to an animal; and that the animal is capable of being stolen. Most offences, on the mental side, require proof of at least some sort of knowledge and some sort of foresight against an accused.[17]

Due to space constraints, our discussion on constituents of criminal liability under the Nigerian law, that is, *actus reus* and *mens rea* will be limited in order to focus on available defences, more particularly, the defence to criminal liability and specifically provocation.

3. Elements and defence of provocation

As a matter of fact, defence is a concept that does not yield to easy definition under the law. This is because, in its true legal sense, defence (sic) signifies not a justification, protection, or guard which is now its popular signification; but merely an opposing or denial of the truth or validity of the complaint.[18]

The defence of provocation was first developed in English courts in the 16th and 17th centuries. During that period, a conviction of murder carried a mandatory death sentence. Consequent on the above, the need for a lesser offense was inspired. At that time, not only was it seen as acceptable, but it was socially required that a man respond with controlled violence if his honour or dignity were insulted or threatened. It was therefore considered understandable that sometimes the violence might be excessive and end with a killing.

During the 19th century, as social norms started to change, the idea that it was desirable for dignified men to respond with violence when they were insulted or ridiculed started to lose traction

[17] Criminal Law P. 43
[18] Prof Izevbuwa and Okoh, supra, at note 2, P. 426

and was replaced with the view that while those responses may not be ideal, that they were a normal human reaction resulting from a loss of self-control, and, as such, they deserved to be considered as a mitigating circumstance.

During the end of the 20th century and the beginning of the 21st century, the defence of provocation, and the situations in which it should apply led to significant controversies, with many condemning the concept as anachronistic, arguing that it contradicts contemporary social norms where people are expected to control their behaviour, even when angry.

Provocation is one of the numerous defences to criminal liability in murder cases recognized under the Nigerian law. The defence of provocation, as a matter of jurisprudence remains based on the law's compassion for human weakness. From earliest time, it has been recognized that human beings are prone to losing their control under extreme rage and should they react violently, the regime of justice demands that account be taken of their rage in inflicting punishment. Provocation offered by the victim or deceased render's the accused subject to temporary loss of self-control. Provocation may comprise either words or conduct or a combination of both. Unlike South African law, which is partly based on Roman law and Roman-Dutch law, which did not regard anger, jealousy or other emotions as an excuse for any criminal conduct, but only as a factor which might mitigate sentence if the emotion was justified by provocation, the Nigerian legal system has a different view.

CR Snyman Criminal Law argued that it is possible that extreme emotions such as anger or rage flowing from the provocation may be so strong that X, at the time he reacted to the provocation, lacked criminal capacity.[19] What this means is that should it be proved that X, at the time of the provocation, suffered such emotional instability to appreciate the wrongfulness of his act or conduct himself according to such appreciation, he cannot be found guilty of the crime.

Snyman also pointed out that provocation may also affect an accused person's intention to commit a crime. In certain cases, provocation may blur or exclude X's awareness of unlawfulness and therefore affects his intention to commit the crime. This would specifically play a role when 'intention' is an element of a crime (for example, murder, assault with the intent to do grievous bodily harm, and etcetera.). It should be noted at the same time, that pleading provocation can also prove intent. The pleading can establish motive to commit a crime. This is especially the case when there is a reasonable period between the provocation and the time the offence was committed, readily recognized under the English Law of crime as a defence to homicide charge.[20]

[19] 2014.
[20] R v Duffy (1949) 1 All ER 932

Provocation may be by words or deed. The old common law rule was that words alone could not be sufficient provocation to reduce murder to manslaughter. This rule was modified in Holmes v DPP[21] where it was held that words alone could not amount to provocation, 'save in circumstances of a most extreme and exceptional character...' and this was also approved in R v Adekanmi.[22] Thus, just as section 283 of the criminal Code defines provocation for the purpose of section 318 there should be no question as to whether words alone can amount to provocation and it is now well settled in Nigeria, words alone can amount to provocation sufficient to reduce murder to manslaughter. In R v Akpakpan, the Federal Supreme Court stated that, 'we do not, however, agree with the learned trial judge that words alone can never constitute such provocation as to reduce an offence from murder to manslaughter.'[23]

Furthermore, discovering a wife in adultery is sufficient provocation to reduce an offence from murder to manslaughter. Where a wife jeered at her husband who was an illiterate and primitive peasant, taunted him with being impotent, and told him that she was having sexual affairs with other men, this was held to be sufficient provocation to reduce the offence from murder to manslaughters.[24]

Other instances include, a village wife who was nursing a seven-month-old child and was then five months pregnant to call her husband a fool when he questioned her as to who was responsible for the pregnancy, constitutes provocation.[25] Again, it is debatable where for instance, a woman taunts her husband with incompetence and then spit in his face, may in certain circumstances, reduce an offence from murder to manslaughter because in primitive communities, where the subjection of women is accepted as natural and proper, such an insult from a wife arouses more passion than in more sophisticated societies.[26] For a younger brother to say to his elder brother during a quarrel that he had provided money for the latter's marriage has been held not to amount to such provocation as would reduce the offence from murder to manslaughter.[27]

The statutory defence in section 232 only 'becomes engaged upon proof of murder.' The provocation must be a subjectively held belief that is reasonable. This requires:

i. A wrongful act or insult of such a nature that it is sufficient to deprive an ordinary person of the power of self-control (objective) and

[21] (1946) AC. 588
[22] R v Adekanmi (1937)3 (WACA)208
[23] R v Akpakpan (1956) FLC 1
[24] R v Adekanmi, supra
[25] State v Ufomba (1972) E.C.S.L.R
[26] It appears that each case should be considered from cultural perspectives.
[27] Nungu v R (1953)

ii. The accused act upon that insult all of the sudden and before there was time for his passion to cool (subjective)

The objective requirement is to limit the availability of the defence and 'ensure that provocation strikes a balance between human frailty and ensuring that people are discouraged from committing homicidal acts of violence.' The restrictions should be to 'only those acts and insults that are capable of causing an ordinary person to lose self-control are open for consideration as provocation.'

There are two separate inquiries. The objective test considers whether:

i. There was a wrongful act or insult and
ii. Whether the wrongful act or insult was sufficient to deprive an ordinary person of the power of self-control?

The subjective test considers whether the accused acted.

i. In response to the provocation and
ii. On the sudden before there was time for his or her passion to cool?

The "sudden" nature of the event must be one that "strikes on the mind of an accused who was unprepared for it." Similarly, the accused's reaction or response to the event must be equally "sudden."

There is no absolute prohibition against the use of provocation in circumstances where the accused anticipated or prepared for the insult or had initiated the confrontation and received a foreseeable response.

On the objective element, the "normal temperament and level of self-control" refers to a person who is not "exceptionally excitable, pugnacious or in a state of drunkenness".

The objective inquiry is not simply into whether an ordinary person would commit the offence, but "whether the ordinary person would lose self-control to the degree that he formed the intention for murder."

The ordinary person is one that can be ascribed the "particular characteristics that are not peculiar or idiosyncratic" such as "sex, age, or race" This intends to "contextualize the objective standard" but not so far as to "individualize it."

The policy behind the objective standard is the desire to "seek to encourage conduct hat complies with certain societal standards of reasonableness and responsibility." There is expected to be a "minimum standard of self-control on all members of the community."

The objective standard can be subject to a "flexible approach." This can mean that the consideration can take into account "qualities and characteristics" of an accused and the "context in which he or she lives," such as cultural norms.

Evidence of anger can be used to support or demean the availability of the defence. It depends on whether the anger is the fuel for "cold blooded revenge" or the fuel for sudden rage resulting in a loss of control.

There must be "some evidence" that the conduct sets the passions [of the accused] aflame."

Provocation is not relevant to the analysis of the accused's statement of mind regarding the victim's conduct in proving murder. Evidence that is potentially provocative can still be used to assess the accused state of mind in proving murder. In deciding whether an unlawful killing amounts to murder. The trier of fact 'must consider all the evidence that sheds light on the accused state of mind at the time of the killing.'

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 the 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. When a person who unlawfully kills another in circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death is the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.[28]

A. Provocation by Word

The definition of provocation in section 283[29] brings our law into conformity with the position of English Criminal Law. It is recognized that provocation can be caused by things done or said or by both together.[30]

In the case of Danshallah v State the Supreme Court stated that it is not disputed that word as alone can constitute provocation but it all depends on the actual words used and their effects or what they mean to a reasonable person having a similar background with the accused person.[31]

The Penal Code is silent on the question of whether abusive words not accompanied by act can constitute provocation. In the case of Adamu Kumo v State, were a wife referred to her husband as a pagan, the court observed that such a reference to an Alhaji in the accused locality could constitute provocation to warrant the questioning of the education and capability of the accused, his defence of provocation was upheld.[32]

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[28] S. 318 Criminal Code
[29] Criminal Code of Nigeria
[30] 2009
[31] 66 (2007) 12 MJSC1
[32] Ibid

In Akanni Ogundimu v State,[33] the court in this case established the following that:

i. The words of mere abuse may constitute annoyance but not provocation.

ii. That series of disappointing, event which may not constitute provocation in law, may constitute motive for killing.[34]

iii. In determining whether a reasonable man of the accused status in life could be provoked, the fact that he is a soldier or police man or a person in the discipline of force or question culture, belief, or society, including a sportsman who is expected to be discipline and of sober behaviour is relevant and should be considered.

B. Provocation by Conduct

Provocation could be caused by conducts. Assaults which are unlawful and conduct which are injurious to person's reputation are regarded as sufficient act of provocation to reduce the offence of murder to manslaughter.

In Nga'aba v Queen, the accused met the deceased having sexual intercourse with his wife, the deceased then attacked the accused. His defence was that, because of the provocative act of adultery and subsequent assault he was completely thrown off balance and there by stabbed the deceased to death and he pleaded provocation. It was held that the illegal union and subsequent attack made on the accused were such that would be sufficiently provocative to mitigate the liability of the accused from murder to manslaughter.[35] Thus, provocative act whether in conduct or in words must be capable of making a reasonable man lose his senses and self-control.

4. Defence of provocation under the Nigerian Criminal Code

The Criminal code is the applicable law that governs criminal matters in the Southern part of the country. The provision that imported this common law defence to this country is Section 318 of the code, which provides:

> When a person who unlawfully kills another in circumstances which but for the provision of this section would constitute murder does the act which causes death in the heat of passion caused by sudden provocation and before there is time for passion to cool, he is guilty of manslaughter only.[36]

[33] (1979) 13 C.A.12
[34] Shande v State (2005) 22 NWLR (Pt. 11) 756
[35] (1969) NNCN 97
[36] Section 318 of the Criminal code, LFN 2004

This section is to the effect that whenever anybody acts in any circumstance that provocation can be inferred; the accused will not be liable for murder but for manslaughter. For instance in the case of Ekepeyong v State, it was reasoned that for the accused liability to be reduced to manslaughter as a result of provocation, the killing must be done in the heat of passion before there is time for his passion to cool down.[37] Furthermore, in Musa v State, the appellant left his house on the 25th July 1988 to a school intending to play football. On getting there, he met the deceased along with some boys playing in one of the classrooms in the school and ordered all of them to vacate the classroom, on the authority he claimed was donated to him by the Headmaster of the school. The deceased and others refused to leave while others left immediately. There was physical confrontation between them and the appellant stabbed the deceased. The appellant alleged that he was provoked by the act of the deceased in first attacking him and hence in self-defence stabbed the deceased. After appraising the evidence led at the trial, the trial judge held that no provocation emanated from the deceased as to sustain the defence of provocation and self-defence put up by the appellant. On appeal and thereafter further appeal to the Supreme Court, the appellant's appeal was dismissed, on grounds that the person seeking to invoke the defence of provocation must satisfy the following:

a. That he killed the deceased in a heat of the passion caused by sudden provocation, and
b. That at the time of killing, the heat of passion has not cooled.

Manslaughter is voluntary and does not need to be pleaded separately. When provocation is successfully raised in a case of murder it mitigates it to manslaughter. It is important to know that no amount of provocation can justify murder; the best it can do is to reduce the culpability of the accused from death sentence to some years of imprisonment.[38] 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 time for cooling down varies from one person to another. 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 of a reasonable man to cool down, the plea of provocation will not be available.

It should be noted that section 318 does not discharge or free the accused totally of his criminal liability, the best it does is to reduce his culpability and also the section does not define provocation. Many courts have considered the question of whether the meaning of provocation in section 318 of

[37] (1993) 2 NWLR pt. 229 at 513
[38] The Law of Homicide in Nigeria (1990) P.70

the criminal code is also found is section 283. In the case of Obaji v State it was held that the two sections should be read together.[39] Section 283 of the Criminal Code provides:

> The term provocation used with reference to an offence of which an assault is an element, includes, except as here in after 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 who is under his immediate care or to whom he stands in a conjugal, parental. filial, fraternal, relational or in the relation of master to servant to deprive of power of self-control and to induce union to assault the person by whom the act or result is done or offered when such an act or insult is done or another person who is under the immediate care of that other or to whom the latter stands in any such relations as aforesaid and the formal is said to give the latter provocation for an assault.

A lawful act is not provocation to any person, for assault is 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 unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality. Provocation must be directed to the accused or person who the accused stand in relation with. It can be safely said here that provocation need not be directed to the accused in particular, it may avail the accused if he acted for the person who is under his care.

The provocation enunciated in section 318 of the code must be the one which will cause a reasonable man or an ordinary person to lose his self-control and make him for the moment not master of his own mind. This was the court held in R v Duffy which has been followed by various Nigerian courts.[40] Provocation must flow from the deceased to the accused.[41]

Section 284 of the criminal code provides as follow:

> 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 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 it 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

[39] Ibid
[40] Ibid
[41] Sunday Omenimu v State (1965) NMLR 365

the power of self-control and whether any force used is not disproportionate to the provocation are questions of fact.

The Penal Code is the applicable law in the Northern part of the country. Like the criminal code which is applicable in the southern part of the country, the Penal Code does not attempt to define provocation. Under the Penal Code, a defendant can plead "provocation" as a defense in offenses punishable with qisas in Islamic law, for instance homicide. Section 222(1) provided thus:

> Culpable homicide is not punished 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.[42]

The provision of this section is clear and unambiguous and non-contradictory. It covers provocation caused by the deceased and the accidental death of another person instead of the assailant that is, the person who gave the provocation. However, it retains the requirement of instantaneous reaction and loss of the power of self-control. Section 265 of the Penal Code[43] punishes it with imprisonment of one year to a person who assaults another person without first been provoked by the other.

It is however pertinent to note that the same section reduces that sentence to three months only if the assailed had offered provocation. However, it can be seen that in the Penal Code of the country provocation is not a major defence that can it avail a man of his guilt but all it can do is to mitigate the punishment.

Thus, what constitutes provocation would be judged from the circumstance of each case. The provocation may be verbal or physical or both for example drawing out a dagger by the deceased in an attempt to stab the accused may amount to provocation within the context and meaning of section 249 (1) of the Sudan penal code.[44] Provocation has been recognized as part of human being, that is human beings are prone to losing their control under extreme rage and should they react violently, justice demands that account be taking of their rage in inflicting punishment.

5. Conclusion

It has been demonstrated that even if the defence of provocation is successfully pleaded, it does not exculpate the accused of criminal responsibility, it only mitigates his punishment. Although the Nigerian law of provocation was originally based on the English law, it is now clear that the Nigerian courts have succeeded in evolving slightly different approach. In determining whether or not a person has been provoked, the law applied by the English courts is the purely objective one.

[42] Penal Code of Nigeria
[43] Cap P.3 LFN 2004
[44] Per Wali, JSC in Lado v State (1999) NWLR (Pt. 619)369 at 379-380.

On the other hand, in Nigeria, the test now applicable is the partially objective test. It is 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.

The essence of the defence of provocation is for the purpose of mitigation of punishment both in murder and assault cases. However; the requirements placed on the defence are so enormous that one wonders if an accused person can actually have the defence avail him. These complex areas include the reasonable man's test and the requirement that the mode of resentment must bear a reasonable proportion to the provocation offered which is contradictory to the defence of provocation. It is recommended that the law should be reformed on this aspect.

It is recommended that the reasonable man should not be judged with the standard or an ordinary man. The entire factual situation which includes the characteristics of the accused must be considered. This is because the issue of provocation is a psychological one and must be so considered.