REFORMING THE DEFENCE OF PROVOCATION ON ISSUES RELATING TO VIOLENCE AGAINST WOMEN IN NIGERIA

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Abstract

The common law defense of provocation emanated from the 'appreciation and understanding of the frailty of human nature' which may make a man so taken up with resentment that his reasoning may be temporarily suspended. Unlike in common law where it provides a defense only to murder cases, the Nigerian criminal law makes it available to negate criminal liability in the offence of assault in addition to mitigating liability for murder. There have been calls for a reform of the criminal law on provocation in Nigeria from a gender viewpoint which the present author supports. These calls were made on the basis of the conditions for a successful plea of provocation which ignores the reality of women when they kill as a reaction to experiences of repeated and long-term violence or when they are killed. We argue that the state of the defenses of provocation at present in Nigeria still leaves a gap for violence against women to thrive. Drawing on graphic descriptions of the facts of reported cases, existing scholarly publications on the issue and media reports, this article contributes to this discourse on a gendered perspective of the defenses of provocation in Nigeria.

Key words: Provocation, Violence Against Women, Gender Critique, Law Reform

1.0 Introduction

According to a recent report, a woman is killed or sexually assaulted in Nigeria every 10 minutes.[1] The Nigeria Police Force reported that in 2024, at least 17,415 cases of gender and domestic-based violence were attended.[2] The Force also stressed that this number is a gross underrepresentation of the true number of domestic violence in the country as the majority of such cases go unreported. It was further revealed that 15,692 of these cases were charged to court ostensibly in relation to various offences provided for in the criminal codes. The invocation of this judicial process is the thrust of this essay. Various actions ranging from enactment of legislation, to creation of dedicated agencies, have been embarked upon by the federal government and component states to address the problem of gender-based violence, but the focus of this article is the machinery of the criminal law.

In conjunction with the Administration of Criminal Justice Act (ACJA), the two major criminal laws of the country, the Criminal Code (CC) and the Penal Code (PC), make up the legislative fulcrum of the criminal justice system of the country.[3] Although these two legislations do not set out the aims of the laws, it is trite that the aims of the criminal law include prohibiting and dealing with conducts that cause avoidable and unjustifiable harm to others.[4] The accompanying ACJA describes its role to cover inter alia 'protection of the society from crimes and protection of the rights and interest of the suspect, the defendant and victims in Nigeria.'[5] Presumably, these 'suspect, defendant and victims' can be women. Therefore, against the background of the operation of provocation, a partial defense in criminal law, which operates unjustly against women, this paper queries the commitment of the Nigerian state to the elimination of violence against women.

The common law defense of provocation emanated from the 'appreciation and understanding of the frailty of human nature'[6] which may make a man so taken up with resentment that may

[1] Emmanuel Agbo, 'How to Address Alarming Rate of Gender-Based Violence in Nigeria - Experts' Premium Times (Lagos, 4 February 2025) <How to address alarming rate of gender-based violence in Nigeria - Experts> accessed 20 February 2025.

[2] Johnson Idowu, '17,415 gender violence cases reported in 2024 – Police' b < 17,415 gender violence cases reported in 2024 – Police> accessed 20 February 2025.

[3] There are various offences scattered in different conduct specific laws. But the Codes are of general applicability.

[4] While considering the function of the criminal law, the Wolfenden Committee in 1957 noted that it included protecting the citizen from what is offensive and 'injurious'. 1957 (Cmnd 247).

[5] Section 1, Administration of Criminal Justice Act 2015

[6] Law Reform Commissioner Victoria, 'Provocation as a defenses to Murder' Working Paper No. 6 (Melbourne 1979) < https://www. austlii.edu.au/au/other/lawreform/VicLRCmrWP/1979/6.pdf> accessed 20 February 2025.

temporarily suspend his reasoning.[7] Unlike in common law where it provides a defense only to murder cases, the Nigerian criminal law makes it available to negate criminal liability in the offence of assault in addition to mitigating liability for murder. There have been calls for a reform of the criminal law on provocation in Nigeria from a gender viewpoint which the present author supports.[8] These calls were made on the basis of the conditions for a successful plea of provocation which include that the provocative act be sudden. Similarly, the reaction of the defendant which caused the deceased's death, must be sudden, borne out of loss of self-control, essentially lacking premeditation. As a result, previous wrongful actions of the deceased will not count as provocation because they do not possess the quality of suddenness. Similarly, a reaction which leads to the death of the provocateur that is not made within a short time after the provocative act will fail the 'heat of passion test'. Reforms have been made to this element in some parts of the world on the basis that this requirement is discriminatory to women as they do not often have an instant violent response to physical violence especially in intimate or familial settings.

The author further adds that another aspect which is relevant to Nigerian women in the provocation conundrum is the fact that women are often the victims in many reported cases on murder where the provocation plea is raised. In fact, critics of provocation in other jurisdictions argue that allowing the plea of provocation in such cases is akin to saying that these women contributed to/ provoked their own deaths.[9] Additionally, it means that the state is failing to sufficiently show disapproval for the infliction of violence against women. These form some of the reasons, for which critics have even argued that provocation should be abolished.[10] In short, the operation of the defenses ignores the reality of women when they kill as a reaction to experiences of repeated and long-term violence or when they are killed. Thus, despite efforts from various stakeholders to address the high spate of gender-based violence and domestic

[7] Sir Edward East wrote in 1803 East, "Pleas of the Crown" I, 238. Referred to in ibid.

[8] Akeem Bello wrote specifically with reference to gender. Akeem Bello, *Essentials of Criminal Law* (1st edn, Unilag Press 2022)196.
Vukor-Quarshie raised many issues which affected various categories of persons including women in domestic violence situations and the effect of the polygamous society on women's access to the plea of provocation. See G.N. Vukor Quarshie, 'Additional Posers in the Provocation Law of Nigeria' (1987) Semantic Scholar < https://doi.org/10.5771/0506-7286-1987-3-317 > accessed 20 February 2025.

[9] Susan S M Edwards, 'Provoking her own Demise: From Common Assault to Homicide' in Susan Edwards (ed) *Women, Violence and Social Control* (1987) http://dx.doi.org/10.1007/978-1-349-18592-4_11 > accessed 20 February 2025.

[10] In Australia, Tasmania, Western Australia and Victoria have abolished the defence. This was also the concluding sentiment of a Nigerian legal scholar, Muhammad. See Yahaya Abubakar Muhammad, The Future of the Defence of Provocation in Nigerian Criminal Law (2017) 60 JLPG 121 JLPG-Vol.60 2017 > accessed 20 February 2025.

violence in Nigeria, the present state of the defenses of provocation in Nigeria still leaves a gap for violence against women to thrive.

Drawing on graphic descriptions of the facts of reported cases, existing scholarly publications on the issue and media reports, this article contributes to this discourse on a gendered perspective of the defenses of provocation in Nigeria. Following this introduction, the paper delves into the discussion on provocation by providing a brief background of the defenses. It sets out the elements necessary to establish the defenses in Nigeria after which attention is drawn to some of the problems associated with the defenses in the common law world. The main focus of this paper which is the gender critiques of this defenses especially as it affects Nigerian women are presented. Against the background of advances that have been made in respect of this defenses in some other common law countries, this article suggests a reformation to enable women's experiences of violence to be taken into consideration within the operation of the plea in Nigeria.

2.0 Historical Perspective

The need to differentiate between a killing which should attract the death penalty and other penalties has always been important in the history of societies including the common law world. In the 16th century, the existence of malice aforethought had the effect of creating a distinction between killings, known as murder, and killings without malice aforethought, known as manslaughter.[11] By the 17th Century, killings done in hot anger or 'heated blood' were recognized as unpremeditated and lacking in malice. At this time, there was no consideration of the graveness of the provocative act. Subsequent documentation of the development of the defenses showed that concerns about the nature of provocation, suddenness of the killing and the proportionality of the reaction became important. On proportionality, Sir Matthew Hale had written at the time that 'He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder, the reason is, because it is an act of deliberation odious in law, and presumes malice'.[12]

[11] Law Commission of Ireland, Homicide: The Plea of Provocation (Consultation Paper) (LRC CP 27-2003) [2003] IELRC CP27 (October 2003) <Homicide: The Plea of Provocation (Consultation Paper) (LRC CP 27-2003) [2003] IELRC CP27 (October 2003)> accessed 20 February 2025.

[12] 1 Hale PC 455 referred to in ibid

By the 18th Century, clear categories of actions considered provocative had emerged and in cases such as *Mawgridge*,[13] the courts cited some actions that qualified as provocative for the purpose of the defenses, namely, grossly insulting assault, seeing a friend attacked, seeing an Englishman unlawfully deprived of liberty and catching someone in the act of adultery with one's wife. In the 19th Century, specifically, 1869, *R v Welsh*, introduced the concept of the "reasonable man" as the yardstick for measuring the accused's reaction to provocation. In directing the jury, Keating J said 'It is for the jury to decide whether the evidence was such that they can attribute the act to the violence of passion naturally arising … and likely to be aroused … in the breast of a reasonable man'.[14] This important shift to a subjective standard against which the accused's reaction can be compared, received recognition in 1879.

In 1877, based on a review of cases and earlier writings on the subject, Sir James Fitzs James Stephen, put together the definition and implication of provocation in the 1877 Digest of the Criminal law. Articles 224 and 225 of the Digest provide

> 224 EFFECT AND DEFINITION OF PROVOCATION.
>
> Homicide, which would otherwise be murder, is not murder, but man- slaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm. The following acts may, subject to the provisions contained in Article 225, amount to provocation: -
>
> (a) An assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted.
> (b) If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, and whichever strikes the first blow.
> (c) An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders.

[13] (1706) Kel 119
[14] *R v Welsh (1869) 11 Cox CC 338*

(d) The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part both of the adulterer and of the adulteress.

(e) The sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offence.

(f) Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation within this Article, except (perhaps) words expressing an intention to inflict actual bodily injury, accompanied by some act which shews that such injury is intended, but words used at the time of an assault -slight in itself - may be taken into account in estimating the degree of provocation given by a blow.

(g) The employment of lawful force against the person of another is not a provocation to the person against whom it is employed.

Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which lapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to shew the state of his mind

The above and another restatement in a Draft Criminal Code for England presented in 1879 by Criminal Code Commissioners, one of which was Stephen, are of immense importance to the Nigerian legislative and judicial interpretation of the plea.[15] Section 176 of the Draft Code, which was never adopted by England, stated

> Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool. Whether any particular wrongful act or insult, whatever may be its nature, amounts to

[15] Fitzjames Stephen was one of the Criminal lawyers, who authored the Draft Criminal Code, one of the documents consulted while drafting the Queensland Code. Nigeria's Criminal Code was modelled after the Queensland Code. The Queensland Code was also adopted by the State of Western Australia while the Eastern and Central African Codes were founded on the Nigerian Code. See C. O Okonkwo and Naish, Criminal Law in Nigeria (2nd edition, Spectrum Books 1980) 5

provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact:
Provided that no one shall be deemed to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person: Provided also, that an arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation.

Notably, although, the earlier Digest had not mentioned the reasonable man, this condition was incorporated in the Draft Code.

3.0 The Proof of Provocation in Nigeria

In Nigeria, provocation is available for both the offences of assault and murder and in cases of assault, a successful plea will lead to an acquittal. As is common across jurisdictions, through provocation, the criminal law's intention is to draw a moral distinction between an accused person whose overreaction to provocation led to deadly consequences and another who resorted to violence that was unprovoked.

The provisions of the Criminal Code and the Penal Code relating to provocation, basically restate the dated provisions above in varying degrees. Section 284 of the Criminal Code and section 266 of the Penal Code relate to provocation in assault while section 318 of the Criminal Code provides that a killing would be manslaughter if done in the heat of passion brought about by grave and sudden provocation. Section 222 (1) of the Penal Code affirms that culpable homicide will not be punishable with death if death occurs on the basis of sudden and grave provocation but makes some additions by extending the plea to cover instances where someone other than the provocateur was killed by mistake or accident.[16]

While providing the general definition of provocation, Section 283 of the Criminal Code also adds to the categories of persons through which the provocateur's actions may offer provocation to the offender. It states that the wrongful act or insult,[17] could amount to provocation if done 'in the presence of the ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial,

[16] Sections 24 and 25 of the Criminal Code on accident and mistake are also applicable to homicide offences.
[17] There is no counterpart provision in the Penal Code.

or fraternal relation, or in the relation of master or servant.' Why the term 'ordinary man' is used in the Nigerian Code instead of 'reasonable man' is uncertain, but it would appear that the courts also used them interchangeably. For instance, the House of Lords said in *Mancini v DPP* that 'an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an **ordinary person** to act as he did.[18] The Nigerian courts, almost without exception refer to 'the reasonable man.'

3.1 Elements of Provocation

The elements of provocation should necessarily derive from the country's criminal codes as the codes are meant to replace the common law.[19] However, under the guise of searching for the appropriate interpretations, the courts have resorted to looking at the state of the law before the Code which sometimes result in a different liability than the law intended. This is true of the law of provocation where Nigerian courts have incorporated proportionality as one of the elements needed to commute murder to manslaughter as a result of provocation. The conditions to be met before a plea of provocation will avail the defendant have been set out in various cases with varying degrees of clarity. [20] Summed up, there must be a provocative act, the offence must have been committed in the heat of passion after grave and sudden provocation, and instantaneously, before there was time for the passion to cool down, the provocation came from the deceased and the retaliatory act must be proportionate to the act resented.

First element is the occurrence of a provocative act or deed which could cause a reasonable man to lose his self-control.[21] It is settled that the both words and deeds can constitute provocation.[22] While the act must be shown to have actually made the accused lose self-control, the accused's reaction is not the measuring yardstick, the loss of self-control must also be reasonably founded. It must be shown that a reasonable man in the defendant's circumstances in life would have been provoked by the provocative act or word. Factors like religious beliefs,[23] cultural status,[24] age,[25] sex, peculiar physical characteristics, educational

[18] [1941] UKHL J101
[19] *Bank of England v Vagliano Brothers* (1891) AC107
[20] One of the most expansive enumerations of the elements can be found in *Shande*, where eight conditions were listed. *Shande v State* 2004 All FWLR (pt 223)
[21] *R v Nwajoku* (1937) 3 WACA 208
[22] *Shallah v. The State* (2007) 18 NWLR pt 1066 240 SC.
[23] *Kumo v State* (1967) FNLR 55
[24] *Unuga v State* (1977) NCAR 42
[25] *DPP v Camplin* (1978) 2 WLR 679

level and even mental infirmities[26] have become important in determining who a reasonable man is for the purpose of provocation. However, the fact that a defendant is of an excitable nature, that he belongs to a religion or ethnic group which have an unusually short temper[27] or that he was drunk have not been regarded by the courts.[28]

Secondly, the act which killed the deceased must have been done in the moment of extreme anger before there was time for the passion to cool. Essentially, the time between the provocative act and the deathly reaction must not be such that the defendant's anger could have cooled as an undue lapse of time renders the act to be vengeful. Therefore, where the accused person went a mile away to bring a matchet with which he killed the deceased, a plea of provocation was rejected.[29] Further added to this, is the requirement that the provocative act must be sudden. As a result, previous wrongful acts and insults would be insufficient because of the absence of suddenness. Nevertheless, as held in *Turku v Republic*,[30] a series of incidents may be so connected that they make the final provocative act proximate to the accused's action.

Thirdly, the retaliatory act must have been done to the person who gave the provocation.[31] Except, provocation was given by a group of people one of whom was the deceased, there is no excuse for killing anyone that did not give any provocation. Where an accused killed his wife and another woman who was merely on the scene, the court held that while provocation could avail him of the murder of his wife, it could not avail him for the other woman's killing.[32] As noted above, the Penal Code expressly makes an exception where the person who did not give the provocation was killed by accident or mistake.

Fourthly, the retaliatory act must be reasonably proportionate to the provocation received. It has been said that the mode of the killing or nature of weapon used is important for determining whether the retaliatory act is proportionate. In *Mancini*, Viscount Simon observed that 'To retort in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger'.[33] Therefore a defendant who responds with a deadly weapon to an act or insult which would reasonably attract an assault on

[26] *R v Smith* (2000) 3 W.L.R. 654
[27] *Unuga v State* (n 24), *State v. Abba Mohammed* (1969) NMLR 296
[28] *R v Chutuwa* (1954) 14 WACA 590
[29] *R v Igwe* FSC 83/1963
[30] *Thuku (alias Nyaga) v Republic* [1965] EA 496
[31] *Jideonwo v State* (1997)1 NWLR (pt 480) 209
[32] *R v Ekpo* (1938) 4 WACA 110
[33] [1941] UKHL J101

the deceased may be unable to rely on the defence. However, the power in the wielding of the weapon (where the use of a weapon is not out of place) or in the force used if the victim (deceased) was not physically disadvantaged,[34] will be immaterial.[35] In relation to the operation of the plea to murder in Nigeria, this element was imported from the common law because neither the definition section nor the provisions that specifically apply to killings due to provocation mentions it.

Fifthly, the offence committed must involve an assault. As defined in the Code, assault involves the actual or threatened use of force.[36] Accordingly, for provocation to apply to a killing, it must be brought about by force or the threatened use of force. Although Section 283 CC states clearly that the defenses relates to offences of which assault is an element and the Supreme Court has maintained that in homicide cases sections 283 and 318 must be read together, there are practical arguments for the dispensability of this element. One, the Penal Code does not have a counterpart provision to section 283 of the CC. Two, not all homicide cases involve an assault, thereby restricting the application of the defenses. The implication of this second observation is important to the gender dimension of the defenses being focused on of this article.[37]

4.0 Some Problems of the Defense of Provocation

Over the years, the defenses of provocation has been the subject of local and global critics in other common law heritage countries. Across jurisdictions, apart from the gender critique being addressed in this paper, other problems of the defenses have been summed up to be proportionality, the ordinary man's test, and the support of homophobia.[38]

In his classic textbook on Nigerian Criminal law, Okonkwo, observed that although the principle of proportionality has a sound basis, it has led to an undue emphasis being placed on the nature of the retaliatory act rather than the provocative act. He argued that someone who

[34] Here, as long as it was weapon for weapon, blow for blow, the fact that the accused used more power than a fully grown opponent would not be against him.
[35] *R v Mc Carthy* (1954) 2 QB 105
[36] Section 252 CC
[37] Killings by women in situations where the provocation stems from being abused by a much stronger person may not involve an assault.
[38] Helen Brown, 'Provocation as a Defense to Murder: To Abolish or to Reform?'(1999) The Australian Feminist Law Journal< https://doi.org/10.1080/13200968.1999.11077300 > accessed 20 February 2025.
K Ritz-Gibbon, 'The Partial Defense of Provocation in Homicide Law Reform', in K Ritz-Gibbon, (ed)*Gender and the Provocation Defense* (Springer 2014)1-21

has lost his cool is likely to overreact.[39] While, this view has support in judicial decisions[40] and the writings of some psychologists who observe that once anger is activated the results may be unpredictable,[41] others argue otherwise. They insist that studies have found that angry people have the capacity to make rational decisions.[42] Still in opposition to proportionality, Okonkwo additionally argued that where several blows were dealt in response to a provocative act, there is no proof that it was not the first blow that killed the deceased and that the other ones were in reality superfluous. His central argument was that the court's interest in the nature of the retaliatory act should only be to prove that the defendant lost control.[43]

The concept of the ordinary man was founded as an objective yardstick against which the defendant's capacity for self-control is measured. The court considers whether an ordinary man sharing certain characteristics such as age, sex, race, ethnicity, cultural status, religious beliefs,[44] past history, personal relationships, physical features[45] with the defendant would be provoked by the provocative act or deed. These range of characteristics considerably introduce subjectiveness to the objective test, thereby rendering it more complex to apply.[46] It is submitted that both aspects of the tests are problematic. The objective test presumes to base its opinion of the reasonable man on the social characteristics of the majority of the society. In essence, if a society is sexist, racist, or misogynistic, a reasonable man with such views would be acceptable to the local court. This 'subjective objectivity' forms part of the reasoning of the Irish court in adopting a completely subjective ordinary man's test. [47]

This does not mean that the Irish decision is considered better. The subjective stance has been critiqued for even ensuring that inherent negative individual characteristics are excused when

[39] Okonkwo and Naish (n 15) 248

[40] *R. v. McCarthy* (1954) 2 QB 105, *Ng Yiu Nam v. R* (1963) Crim. LR 850

[41] Paul M. Litvak and others, 'Fuel in the Fire: How Anger Impacts Judgment and Decision-Making' in Paul M. Litvak and others (eds) in International Handbook of Anger (2009 Springer Nature) 287

[42] Wesley G. Moons and Diane M. Mackie, Thinking Straight While Seeing Red: The Influence of Anger on Information Processing (2007) 33 (5) Personality and Social Psychology Bulletin < https://doi.org/10.1177/0146167206298566 > accessed 20 February 2025.

[43] Okonkwo and Naish (n 15) 249

[44] May vary according to jurisdictions

[45] *R v Masciantonio* (1995) 183 CLR 58

[46] K Ritz-Gibbon, 'Introduction: The Partial Defense of Provocation' in K Ritz-Gibbon (ed)(n 37) 9

[47] In Ireland, the ordinary man's test is completely subjective. The definitive case is People (DPP) v McEoin (1978) IR 27 (CCA). See also *Moffa v The Queen* [1977] HCA 14. *In McNamara*, Charleton J unsuccessfully attempted to modify the subjective approach by reintroducing the objective elements. *DPP v McNamara* [2019] IECA 148

the court determines that the deceased had indeed provoked the accused.[48] Identifying the ordinary man in multicultural environments also introduce more complications as it may be difficult even within communities to determine exactly what may provoke the average man in the community. Furthermore, the operation of the cultural concession is uncertain as the concession would not extend to considering whether members of one community are more easily angered than other communities. In *R v Masciantonio*, the ordinary man was described as 'pure fiction' given the multicultural setting of Australia.[49] Some other scholars and legal authorities such as the New Zealand Commission have taken a more radical view by opposing the notion that ordinary men kill when they are angry. Throwing out the ordinary man's test, they claimed that only extraordinary men resort to lethal violence when faced with grave provocation.

Homophobia, successfully found its way into the nature of acts that are considered provocative with cases such as *R v Murley*,[50] and *R v McKinnon.*[51] Some of the most vocal proponents of the abolition of provocation are supporters of the gay community who consider provocation as a 'judicial institutionalization of homophobia'.[52] They argue that provocation provides a legal reason to kill gays. They ask why the law, by allowing the defenses of provocation, approves the killing of men who have merely made non-violent sexual advances to other men. Two incidental defenses, Homosexual Advance Defense (HAD) and Homosexual Panic Defense (HPD), have developed in New South Wales, and the United States respectively. Simply explained, the defenses are available where a sexual advance by a gay victim triggered a violent psychotic reaction in the latent or repressed homosexual defendant, causing him to temporarily lose the capacity to distinguish between right and wrong and therefore incapable of criminal responsibility. It could also take the form of a panic at the suggestion of a homosexual activity. In the US, they are treated by the courts as a kind of insanity therefore making it possible to avoid criminal liability while they have been used in NSW to secure mitigation of murder to manslaughter. Many of the states of Australia have responded to criticisms against provocation

[48] Clíodhna Ní Chéileachair, 'Violence Against Women and the Defense of Provocation in the Republic of Ireland (2016) 1 QUBSLJ <Violence Against Women and the Defense of Provocation in the Republic of Ireland – QUBSLJ> accessed 20 February 2025

[49] (1995) 183 CLR 58, 74 (Mc Hugh J). See also the same argument made in relation to New Zealand Law Reform Commissioner Victoria, (n 6) para 63

[50] *R v Murley* (unreported Supreme Court of Victoria, Teague J, 28 May 1992)

[51] *R v McKinnon* (unreported New South Wales Supreme Court, 24 November 1993).

[52] Howe, Adrian, 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses - Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)' (1997) 19(3) Sydney Law Review 336

by abolishing the defense or excluding non-violent homosexual advances as a potentially provocative act. Tasmania abolished the defense completely while Victoria replaced it with the new crime of defensive homicide. Western Australia followed in the steps of Tasmania.

5.0 Gender Critiques

5.1 The first gender criticism of the defense is related to the suddenness component of the defense which is argued as being at variance with women's experiences of violence. The Victoria Law Commission commented on the gendered nature of this requirement and the Tasmanian Attorney General also noted that it reflected masculine not feminine reactions to provocation.[53] Men by nature have a lower threshold for provocation and are more likely to react violently in the heat of passionate anger caused by a sudden provocation.[54] Thus, they are also more likely to be able to fulfil the time requirements between the provocation and the violent reaction. Women generally do not react with violence to sudden provocation.[55] Further, women are more likely to react slowly to provocation.[56] This is obvious in cases of women who after enduring long periods of domestic violence, kill their husbands or partners at a time when there is no immediate provocative action. As a concession, the likelihood that a mental disorder may arise from long term exposure to abuse, was given recognition in the English *Alhuwalia* case.[57]

The appellant, Alhuwalia was a spouse in an arranged marriage. For several years, she endured violence and abuse of such magnitude from her husband that she had made unsuccessful attempts to take her own life. The abuse had also been brought to the notice of authorities leading to restraining orders being granted against him. Her husband was also unfaithful and he taunted her with his extra-marital affair with a co-worker. Before midnight, one night, her husband threatened to burn her with a hot iron and beat her the next day if she didn't give him money for the phone bill. At about 2.30am, the appellant threw a bucket containing a mixture of petrol and caustic soda, which she had purchased days previously, into the room in which he was sleeping. She accompanied this with a lit candle and thereby set the room and her

[53] Nicola Cheyne and Susan Dennison, 'An Examination of a Potential Reform to the Provocation Defence: The Impact of Gender of the Defendant and the Suddenness Requirement' (2005) Psychiatry, Psychology and Law
[54] Martha K Fahlgren and others, 'Gender Differences in the Relationship between Anger and Aggressive Behavior' (2022) 37(13-14) J Interpers Violence <https://doi.org/10.1177/0886260521991870 > accessed 20 February 2025.
[55] ibid
[56] Victoria, 'Victorian Law Reform Commission Defenses to homicide options paper'. (2003)
[57] (1993) 96 Cr App R 133 Court of Appeal

husband ablaze. She stayed on in the burning house with her son until she was persuaded to come out. The husband reportedly ran out of the room screaming, 'I'll kill you'. He later died of his burns at the hospital. At the trial, she raised the plea of provocation which was rejected on the basis of the relevant case law, *Duffy*[58].

As laid out in the *Duffy* case,

> Provocation is some act, or series of acts, done (or words spoken) … which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind

Against her was the fact that the provocation was not sudden and there was enough time between the provocation and the reaction for her passion to have cooled down. The judge also directed the jury that in order to establish the presence of provocation, what they were looking for 'is a sudden and temporary loss of control not a thought-out plan on how to punish him for his wickedness'. She was convicted for murder. On appeal, the seminal case of *Camplin*[59] which clarified the 'reasonable man' was raised in her defenses. In *Camplin*, Diplock J said

> In my opinion a proper direction to a jury on the question left to their exclusive determination by section 3 of the Homicide Act 1957[60] would be on the following lines. The judge should state what the question is using the very terms of the section. He should then explain to them that **the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him** ; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did."

[58] *R v. Duffy* (1949) 1 All ER 932

[59] *DPP v. Camplin* [1978] 2 All ER 168.

[60] Section 3 of the Homicide Act 1957 states:

> Where on a charge of murder there is evidence on which the jury can find that the, person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man

It was argued for the appellant that, women who were subjected to sustained abuse were more likely to react to the last act. It was described as a 'slow burn effect'. Essentially, the appellant's personality was argued to have been transformed by the abuse and violent acts she had been subjected to thus producing a kind of diminished responsibility known as 'learned helplessness' in accordance with the expert terminology. A letter which she wrote her husband earlier when he left home for three days, was produced to show her mental state. This mental disorder described by her lawyers was coined as the 'Battered Women Syndrome'. This is a state where the accused person's perception of circumstances has undergone a severe change due to exposure to repeated abuse.[61] It was contended that this reaction of abused women and the appellant's personality change was not considered at the trial. Indeed, it was acknowledged that while New Zealand[62] courts also take into account the mental state or other personality characteristics of the defendants, English courts were fixated on the physical characteristics of the defendant. The Court of Appeal maintained that the plea of provocation was unavailable to her because of the suddenness that must accompany the loss of self-control. Thus, the conviction for murder was upheld.

However, the Court allowed and accepted medical evidence supporting the diminished responsibility state of the defendant at the time of the deed. One of these was available before the trial but for unknown reasons was not presented to the court. Her attitude to the burning house also presented evidence of an unbalanced mental state. Because the decision was arrived at without considering this mitigating factor, the decision was deemed 'unsafe and unsatisfactory' and the appeal was allowed. A retrial was ordered wherein the diminished mental capability of the defendant was taken into consideration. A conviction for manslaughter and an imprisonment of three years four months was the result of the retrial. In the US, the Battered Women Syndrome is also available with varying effects in the US criminal law with some states allowing it under self-defense or to mitigate murder to manslaughter. [63]

Following a wave of reform in England, the Coroners Justice Act (CJA) 2009 in section 56 abolished the defense of provocation and replaced it with the new defense of 'Loss of Self-

[61] Navjothi Raju, 'Gender Based Violence: Examining Battered Women's Syndrome as a Defense' (2019) Open UCT < content > 3 accessed 20 February 2025.

[62] The term 'characteristics', used in the English case of *Camplin* was noted to have been derived from section 169 of the New Zealand Criminal Act. Sub section 2(a) states:

Anything done or said may be provocation if—

(a)In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the **characteristics** of the offender, of the power of self-control; and…

[63] See Akeem Bello (n 8) 196

control'(LOSC). Section 54(2) of the CJA eliminates the requirement that the loss of self - control be sudden[64] and allows for cumulative impact of previous events.[65] Additionally, section 55(3) allows that an offender may have killed another due to loss of self-control brought on by fear of serious violence or an extremely grave provocative act or word which caused the offender to have a justifiable sense of being seriously wronged. Purportedly, s55(3) was designed to allow women who kill abusive partners to have use of the defense because the 'sudden and temporary requirement' was one of the significant barriers to women making use of provocation in such situations. Nonetheless, women are still disadvantaged as men are more likely to 'blow up' with violence outbursts of anger and lose self-control while women slowly build up to a lethal reaction. This is especially true when the woman acts due to a combination of previous abuse and anticipation of future death and harm.

5.2 The second gender critique is the endorsement of lethal violence against women. This is one of the most prominent and ubiquitous features of provocation. It is so fundamental that in Howe's scathing paper on the evils of HAD, she acknowledges that the horrific accounts of the HAD killings are reminiscent or *déjà vu* of the renowned woman victim and her killer who always finds an umbrella in provocation. In these cases, the man kills his wife or girlfriend[66] who he has caught in adultery or has confessed to adultery or has even announced her desire to leave him. In the eyes of the jury and judging public, the killer's act is excusable. The numerous cases across various jurisdictions speak for themselves.

In the former West African Court of Appeal (WACA) case of *R v Sunday Igbani Green*,[67] the defendant's wife had packed her things out of the matrimonial house and returned to her mother's house. Abetted by her mother, she decided to break up with the defendant and accept the advances of one Shedrach Olawushola. Hur husband tried to woo her back but was unsuccessful. One evening, Green was told that she was in her mother's house with the lover. He arrived to find them in the act of sexual intercourse. This was around 9pm. He returned home to brood about his misfortune. At about 1am, he decided to go back to his mother-in law's house. Upon getting there, he heard his mother-in- law sleeping, while his wife was talking with the man in another room. The room was dark and he struck out at the figure on the

[64] However, a delay may make it more difficult to prove that it was LOSC and not revenge or desire to inflict punishment that precipitated the act. See *Jewell* [2014] EWCA Crim 414.
[65] *Dawes* [2013] EWCA Crim 322
[66] *Zinniteg v Republic* (1993) JELR 63607 (C.A)
[67] *Sunday Igbani Green V. The Queen* (1955) LJR-WACA.

bed with the matchet in his hand. It was his wife. He cut her with the matchet about four times. Upon hearing the noise, his mother-in-law ran into the room and he killed her as well.

On appeal, the issue for the Court's determination was whether the trial court properly directed itself on the issue of provocation. The WACA found that the trial court had rightly rejected the plea of provocation due to the four hours' time lapse and noted that he had a premeditated intention to kill. However, the court accepted that finding his wife in the act of sexual intercourse with another man constituted a provocative act which could excuse her murder. According to the Court,

> Section 318 of the Criminal Code reduces murder to manslaughter when the act which normally would amount to murder was done in the heat of passion caused by sudden provocation and before there is time for passion to cool. **In the present instance there was grave provocation at about 9 p.m. when applicant saw his wife and Shedrach on the bed. Had he there and then killed his wife, the circumstances would almost certainly have called for a reduction from murder to manslaughter.**

Other acts that courts have deemed sufficient provocation from a wife to her spouse or to a man in an intimate relationship include refusal to return to an estranged marriage. The Australian case of *R v Ramage*[68] illustrates this. In *Ramage,* the appellant, James Ramage, strangled his wife, Juli, to death. Two years before her death, she had become increasingly unhappy in the marriage. This was due to the controlling, oppressive, and violent behaviour the appellant exhibited towards her. She left the family home while he was on a business trip and moved into a flat with one of their children. He found the breakdown of the marriage in this way, unacceptable and emotionally demoralizing and tried to reestablish the marriage.

In the interim, the separation had given the wife confidence and newfound happiness and she had met another man to whom she felt a strong initial attraction and with whom she rapidly formed a close relationship. In a bid to win her back, he renovated the family home and attended mediated therapy sessions. According to his account of the events leading to the killing, on that day, he requested her to come back to the family home and view renovations to the kitchen and family room areas which were almost completed. She had dismissed the renovations as unimportant. He pleaded with her to return, she refused. Discussions turned to the new male

[68] (2004) VSC 391.

friend and the seriousness of that relationship. She replied that she had had sleepovers and how much nicer than him the new man was, that they shared interests and he cared for her. She then said that sex with him repulsed her and screwed up her face and either said or implied how much better her new friend was.

At this point, he lost control and attacked her. From the record of the police interview and from the forensic medical evidence, he struck at least two heavy blows to her face. She then fell to the ground striking her head severely or he struck her a third severe blow to the side of the head). Then, having knocked her down and in circumstances where she was already affected by the initial blows, he proceeded to deliberately strangle her with his bare hands until she appeared lifeless. During the attack, his wife initially struggled but then ceased to do so.

After the fatal assault, he made no attempt to revive his wife or to obtain emergency assistance for her. Rather, he embarked immediately on a sequence of careful and calculated actions to try and cover up what he had done - cleaning the scene of the crime with detergent, removing the deceased's body and her belongings and placing them in his car, moving the deceased's car from his home to a nearby car park, taking with him a change of clothes and shoes, and a spade and driving to another area. While driving, he made phone calls designed to simulate a lack of knowledge of his wife's whereabouts. On arriving at a relatively remote location, he dragged his wife's body over the ground, buried it roughly in a crude shallow grave and concealed that grave with bush litter. He buried a number of other incriminating items in a separate hole nearby and likewise concealed this hole.

He washed his car on the return journey and in a collected and calm fashion, went to a place where he completed the process of ordering granite tops for benches for the kitchen. On returning home he washed both his clothes and himself and maintained an appearance of normality taking his son to dinner and answered a telephone inquiry from his daughter as to his wife's whereabouts to which he replied that he did not know where she was. Subsequently that evening he contacted a friend and then handed himself in to the police.

The jury had one of two decisions to make. First, that it was not satisfied beyond reasonable doubt that he killed his wife with murderous intent and second, that it was not satisfied beyond reasonable doubt that the Crown had negatived provocation.

Despite the incriminating nature of these facts, the Supreme Court was constrained to uphold the jury's finding of manslaughter on the basis of provocation. Osborn J said inter alia

> Despite this sequence of actions, the jury clearly entertained a reasonable doubt as to whether the killing itself occurred when you were in a state of loss of self-control consequent upon provocation. …and I fully accept and must give effect to the jury's verdict. Nevertheless, I am satisfied: (a) that the attack was carried out with murderous intent; (b) that it was brutal and required a continuing assault to achieve its end; … In other words despite the personal vulnerability with which I accept you were afflicted, the gravity of the provocation with which you were confronted was objectively far from extreme. It was rather of a character which many members of the community must confront during the course of the breakdown of a relationship.

Upon sustaining the conviction for manslaughter, the judge proceeded to impose an 11year custodial sentence although, the maximum was 20 years. Nevertheless, as noted by Ritz-Gibbon 'there is one term that James Ramage can never be called: a murderer. His successful use of the partial defence of provocation in the Victorian Supreme Court (VSC) in 2004 ensured this.'[69]

Women have also been killed by men in other provocation cases for acts such as calling him impotent and telling him of her sexual escapades,[70] informing him of the impending visit of a former lover, calling him a fool when he inquired as to the paternity of their child, [71] taunting the husband with incompetence and spitting in his face.[72]

Although unsuccessfully pleaded, cases like the Irish case of *DPP v Cahoon,* further illustrate how women become victims in cases where the defendant expects provocation to avail them. The appeal was the third trial for the case.

Ms. Quigley was a 30-year-old, separated mother of four young children and was ten weeks pregnant at the time of her death. She had been in a relationship with the appellant, Cahoon, between 17th March 2008 and 12th July 2008, when it was ended by the deceased. Attempts at reconciliation, later in July 2008, was unsuccessful. In the early hours of the morning of 26th

[69] K Ritz-Gibbon (n 38) 3
[70] *Holmes v DPP* (1946)31 Crim. App. R 123, *R v Adekanmi* (1944) 17 N.L.R 99
[71] *State v Ufomba* (1972) E.C.S.L.R 755
[72] *R v Igiri* (1948) 12 WACA 377

July 2008, the appellant visited the deceased whose children were staying overnight with their father at a different address. The evidence of a taxi driver was that he drove the appellant to a point close to the deceased's address in the early hours of 26th July 2008, and that he was carrying a holdall bag with him. The appellant denied that he was carrying a bag.

Although the appellant maintained that the deceased voluntarily admitted him into her home, there was evidence of damage to the locking mechanism to the door and it appeared to have been forced open. The deceased's naked body was found in an upstairs bedroom on 27th July 2008 by her mother who had become concerned about being unable to contact her. The cause of death was manual strangulation. Bruises were found on her head, lips, neck, chest, flank, legs, ankles and arms. Some were described as likely defensive wounds. Pieces of parcel tape were found in the bedroom on each side of the bed and in the bathroom. One piece contained blood with DNA from the deceased. Traces of the appellant's DNA were found in the toilet bowl and on cigarette butts in the sink of the bathroom. The deceased's DNA was also found on a blood-stained white t-shirt found in the appellant's apartment.

The appellant maintained his right to silence throughout a number of interviews conducted by gardaí. Subsequently, he admitted having killed the deceased but maintained that he had had a row with her in the aftermath of consensual sexual activity, and that **he had lost control and grabbed her, pushing her onto a bed and placing his hand on her throat after she had told him that her baby was not his and that she intended to have an abortion**. He maintained that he when he left the deceased's home, he believed that she was alive and merely unconscious. He did not call an ambulance or otherwise seek assistance for Ms. Quigley.

His account to an acquaintance, James Casey, was different. He stated to him that he had done something bad" to the deceased. He told Mr. Casey that the deceased was unconscious or dazed when he had left her. He said that he had taken her forcibly upstairs and had assaulted her around her head and body and had used tape, and that he had either taped or covered her mouth to stop her screaming. Mr. Casey also gave a description as to what the appellant was wearing and also said that he had noticed spots of blood on his t-shirt. The admission of these statements, which showed that he did not lose control before assaulting her, into evidence pursuant to s. 16 of the Criminal Justice Act 2006, was the reason for the appeal which did not succeed.

In some other unsuccessful cases, the accused had killed their wives and women and claimed that these women had provoked the man by confessing to adultery[73] refusing to cook for the husband,[74] being accused by wife of having sex with housemaid[75]and making noises in an adjoining room which sounded like she was having sex with another man.[76]

The media is also awash with thousands of intimate violence and gender-based violence cases, ostensibly due to 'provocation,' which may not find their way to the law reports.[77]

6.0 Discussion

Since the 17th and 18th century when the categories of provocation were delineated, the law of provocation has had a connection with issues of sexism and male proprietary power. At common law, adultery and sodomy were recognised categories of provocation as they were considered to be infringements of one's proprietary rights in the body of the wife or son.[78] Before the *Mawgridge* case[79] where the categories were mentioned, in *Maddy*, an earlier case,[80] which involved the killing of a man discovered by the defendant in the act of committing adultery with his wife, a verdict of manslaughter was returned: 'the **provocation being exceeding great** and ... there was no precedent malice'.

As mentioned above, this categorisation included the sight of the act of adultery committed with a wife on the part both of the adulterer and of the adulteress which means that the provocation could be vented on either the woman or her lover. Arguably, this promotes a sense of entitlement. The defence provides an excuse to exhibit intolerance and male possessiveness. Thus, it's no surprise that many of the provocation cases that make their way into the law reports involve men who kill their wives, ex-wives or other men because of society's permissiveness/indulgence. And because the reasonable man's test is only an objective view of subjectively held ideals, what shines through are not some esoteric standards but the

[73] *Edache v R* (1962) 1 All NLR 38
[74] *R v Asuquo Eseno* (1960) LLJR -SC
[75] *Oladiran v State* (1986) 1NWLR PT 11 76
[76] *Agyeman v Republic* (1993) JELR 63607 (CA) (Ghanian)
[77] Victor Ayeni 'How Nigeria's Justice System Fails Women As Femicide Suspects Walk Free' Punch Newspaper (Lagos 8 February 2025) How Nigeria's justice system fails women as femicide suspects walk free> accessed 20 February 2025.
Evelyn Usman, 'Bitter Side Of Love: Killings Among Couples Soar In Nigeria' Vanguard Newspaper (Lagos 7 February 2025) BITTER SIDE OF LOVE: Killings among couples soar in Nigeria > accessed 20 February 2025.
[78] Law Commission of Ireland, (n 11).
[79] (1706) Kel 119.
[80] 1671) 1 Vent 158; 86 ER 108

characteristics that the society approves of.[81] Thus, the society could approve of misogyny, patriarchy, lack of emotional control and unreasonable hot temperedness and this translates into what is expected from a reasonable man. In *Ramage*'s case, Osborn J had remarked that Ramage had reacted abnormally to a normal life situation. Yet, the jury had viewed this 'normal life situation' as provocation. A similar sentiment was expressed by the WACA in *Sunday Igbani Green*

> This tragedy was undoubtedly caused by the shameful treatment meted out to the applicant by his wife and his mother-in-law. Whether or not this is a case where a merciful view can possibly be taken is not a matter within our province, but we feel that a Jury would probably have made a recommendation for mercy[82]

On the strength of decided cases in respect of provocation, it is doubtful that the nature of acts that courts will accept as constituting provocation in Nigeria will include women killing their husbands because of adultery, perceived or actual.[83] Although in a country like Ghana, women are legislatively supported to claim provocation were they to find their husbands in the very act of adultery,[84] women by nature are not wired to react violently to adulterous husbands because of the low level of possessiveness exhibited over men in in comparison to that of men over women as well as the polygamous nature of many African societies. Additionally, most of the time women are deterred by the incongruity in physical features. Women are often smaller and less powerful. Due to this, they endure violence and abuse in intimate relationships as well as in domestic settings. As noted by Chéileachair, no matter how provoked they get, most abused women cannot afford to react immediately because of fear of more repercussions at the hands of their abusers.[85] And so they react at the wrong time, but safe time, when their abusers are asleep or otherwise incapacitated and effectively lose the protection of the law that requires them to explode violently on the spot.

Furthermore, the mode of killing of women who kill in this way would almost always lack proportionality. While most cases of killings perpetrated by men usually involve show of

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[81] The Irish Commission describes them as 'community standards'

[82] (1955) LJR-WACA.

[83] In the opinion of Quarshie, the courts are unlikely to unfairly decide otherwise. Quarshie (n 8) 327-328

[84] Section 53 of the Criminal Code of Ghana provides i*nteralia*

> The following matters may amount to extreme provocation to one person to cause the death of another person namely-… (c) an act of adultery committed in the view of the accused person with or by his wife or her husband, or the crime of unnatural carnal knowledge committed in his or her view upon his or her wife, husband, or child; and

[85] Clíodhna Ní Chéileachair, (n 48).

physical strength like strangulation, kicking and blows to the body and head, killings by women involve stabbing, use of fire, or poisonous substances.[86] Since they cannot match their abusers in physical strength, their retaliatory acts would usually involve a weapon. As noted above, in determining proportionality, the courts have usually paid attention to the means by which the killing was perpetrated.[87] In *Musa v State,* R.D Muhammad JCA stated that it is important to

> … take into account the instrument with which the homicide was effected, for to resort in the heat of passion induced to a simple blow is a very different thing from making use of a deadly instrument like a concealed knife and the mode of resentment must bear a reasonable relation to the provocation if the offence is to be reduced to manslaughter[88]

This leads one to question a justice system that understands human frailty only from the viewpoint of the bully, whom the law may still excuse as having been 'provoked' if he kills the weaker one who loses control enough to stand up to him in a moment of furious passion.[89] Although, learned authors have criticised the proportionality element on the basis that once control is lost, it may be difficult to rationally control the intensity of the attack, it is doubtful that the reactions of women who are provoked over a cumulative period of time, is within the contemplation of these critics.

Leaning further in the favour of the macho bully, provocation may completely excuse an assault under the laws of Nigeria as long as the elements of provocation are duly established. Meanwhile, more to women's disadvantage is the Criminal Code's definition of provocation as applying to offences of which assault is an element. This will make it more difficult for physically weaker persons, in this case, women, who cannot return force for force, to plead provocation. If the killing is done with poison for instance, the plea may be a pipe dream for the offender.

Evidently, the present state of the defence of provocation in Nigeria leaves much to be desired with respect to gender sensitivity. The primal implication of excusing violence when done by persons capable of violently exploding and lashing out when provoked does not favour folks who are not capable of quick violent reactions. Neither is it favourable to folks who are in

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[86] *Ahluwalia,* (1993) 96 Cr App R 133 Court of Appeal, *Shande v State* (2005) ALL FWLR (pt. 279) 1342., *R v Thornton* [1996] 1 WLR 1174, *Tembo v The King (1944/46)* RLR 123

[87] *R v Akpakpan* (1956) 1 F.S.C 1

[88] *Musa v. The State* (2007) 11NWLR (pt 1045) 202

[89] In *People (DPP) v MacEoin*, the accused killed the deceased with a hammer which he claimed the deceased initially attacked him with. *People (DPP) v MacEoin*,(1978) WJSC-CCA 1154

abusive situations, mostly women, and have been so dominated that they cannot respond with violence. This may often be because they cannot afford the luxury of standing up to their oppressors and risk further harm or death. Additionally, the perspective of judges in respect of the mode of killing is hypocritical. The plea of provocation is intrinsically an excuse for the extremely provoked, yet it has been difficult for judges to comprehend the fact that the extremely provoked person is equally an irrational individual. It has been accepted that provocation does not preclude the intention to kill,[90] therefore. as long as the existence of a provocative act grave enough to provoke a killing can be established, the accomplishment of the killing by the extremely powerful who gives a deathly blow, or many dagger cuts or the weak who kill when their stronger opponent is unarmed, should be acceptable. This understanding of provocation will be beneficial to victims of gender-based violence whose reactions may defy rationality.

The recognition of the battered women's syndrome contributed to the reform of UK law on provocation and the emergence of the Loss of self-control defence. It is desirable that Nigeria's diminished responsibility defence be widened to make the defence available where relevant medical and other evidence is available. As noted above, the UK LOSC defence, takes into consideration provocation that has built over a considerable period of time accepting that the sudden loss of control was as a result of several previous provocative actions. However, it still requires a sudden violent reaction which we argue may be impossible to prove because of the fact that by nature, women react slowly to provocation or because of the risk they, as weaker victims, stand to be exposed to. Thus, a more beneficial change of the Nigerian law in a way that considers women as equal members of the society and equally deserving of the protection of the law should steer clear of the 'temporary and sudden loss of control' element. The American Model Penal Code, which is in use in certain states of the USA, has adopted an approach that does not require the proof of sudden loss of control and substitutes the reasonable man's test with the viewpoint of the accused person.[91]

Section 210.3 (1) (b) of the Model Penal Code 1981 provides

Criminal homicide constitutes manslaughter when…

> (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or

[90] *Attorney General for Ceylon v Perera (1953) AC 200*

[91] See Akeem Bello (n 8) for a fairly extensive discussion on this.

> excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he wishes them to be.

Predictably, this provision introduces a great deal of subjectivity to the reasonable man's test. The allowance of high levels of subjectivity has been the subject of much criticism, some of which have been highlighted in this paper. It is therefore necessary to avoid the certain attendant controversy by taking a middle ground. The paramount condition should therefore be the establishment of the provocative act on which the accused acted in a fit of passion. It is therefore submitted that the provocation provisions of Nigeria's criminal codes be amended to recognise abuse (of various forms) of a physically or socially disadvantaged person over a prolonged period as an act of provocation capable of evoking such passion. Arguably, this would further widen the interpretation of the suddenness element. This modification would enable the courts to take account of seemingly distant but 'cumulative series of incidents', including repeated abuse of all forms, which are so connected as to make the retaliatory act and the not so immediate provocatory act proximate.[92]

Still with reference to the nature of provocative acts, its sustenance as an excuse to kill the adulterer or adulteress is no longer tenable in a world where the recognition and protection of the rights of women are more pronounced. Additionally, adultery is not only a ground for divorce but the rules of obtaining divorce in many jurisdictions have become highly liberalized. The UK's new loss of control defense does not recognise adultery as a qualifying trigger for loss of control. It is suggested that legislative action be taken to derecognise adultery as a ground for the plea of provocation in Nigeria.[93] Just as the knowledge that, the proof of cumulative violent and abusive acts reacted to in a fit of passion will avail a defendant, will put present and would-be gender based and domestic abusers on notice, we believe that knowledge that adultery or infidelity is no longer an acceptable provocative act will further protect women from the hitherto state sanctioned violence.

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[92] See the cases of *Mehemet Ali v R* (1957) WALR 28 and *Thuku v Republic* (n 30)

[93] Although, the Supreme Court's decision in *Shande v State*, by deciding that what is good for the goose should be extended to the gander, is commendable, we nonetheless urge that the killing of anyone for the moral wrongdoing of adultery has no place in a civilised world. In that case, the appellant set her husband's girlfriend ablaze. The Supreme Court substituted her conviction of murder with manslaughter based on the plea of provocation. *Shande v State* (2005) ALL FWLR (pt. 279) 1342.

7.0 Conclusion

The aim of the paper was to reinforce the calls for reforms to the operation of the defense of provocation in Nigeria. The focus of this paper was the implication of the criticized aspects on the defense on the women folk, especially in relation to the prevention of gender-based violence against women. Specifically, the problem of the supposedly reasonable man's test was highlighted, likewise the problems of the suddenness and proportionality elements. We argue that the natural propensity of women to slowly respond violently to provocation be recognized. Furthermore, besides the incorporation of the 'battered women syndrome' as a defenses for killings perpetuated by victims of domestic abuse, it is also argued that prolonged and repeated abusive acts be recognized as capable of provoking a violent reaction when it appears the immediate provocative act is trifling. Under this head, it is contended that less attention should be paid to the retaliatory act once loss of control can be proved. Finally, the legislatures are urged to amend the law on provocation to expressly exclude adultery or infidelity as a provocative act.