THE DEFENCE OF PROVOCATION IN NIGERIA AMD THE SUDAN
A COMPARATIVE STUDY

LL.M. THESIS

BY

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DEDICATION

This thesis is dedicated to my sincere uncle Sheikh Sheriff Ibrahim Saleh to whom I am greatly indebted.

DECLARATION

I hereby delcare that this dissertation has been written by me and it is a record of my own research work. It has not been presented in any previous application for a higher degree. All quotations are indicated and the sources are fully acknowledged.

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ABSTRACT

The aim of this then is is to make a comparative study of the defence of provocation in Nigeria and the Sudan.

Provocation as a defence attracted criticism by many writers directed to the concept of a reasonableman and the doctrine of proportionality. In this comparative study I examined the differences between the Criminal Code which is applicable in the South and the penal code applicable in the North. This thesis is divided into five chapters.

The introductory chapter is about the historical background and definition of the doctrine of provocation in Nigeria.

In Chapter III examined the defence of provocation under the Nigerian Law and showed the differences between the two codes and when there departure from the English Common Law,

In Chapter III I examined the defence of provocation under the Sudanese Law,

Tn Chapter IV I examined the provocation as a defence to offerees other than homicide - a comparative study.

Chapter V is about the test of provocate i.e. the test of a reasonableman.

The conclusion is about the future of provocation in Nigeria i.e. a critical appraisal of the Law of provocation in Nigeria.

C O N T E N T S

TABLE OF CASES

TABLE OF STATUTES

KEY TO CASE REFERENCE

(a) Law Reports

A.C.	.. Appeal Cases
All E.R.	.. All England Reports
A.I.R.	.. All India Reports
A.I.R. Lah	.. All India Reports (Lahore)
A.I.R. Cal.	.. All India Reports(Calcutta)
All. N.L.R.	.. All Nigeria Law Report
C.L.R.	.. Commonwealth Law Reports
COX Crim. Cas	.. Cox Criminal Cases
Cr. App. R.	.. Criminal Appeal Reports
E.A.C.A	.. East African Court of Appeal
E.C.S.N.L.R.	.. East Central State of Nigeria Law Reports.
E.N.L.R.	.. Eastern Nigeria Law Reports.
E.R.	.. English Reports
F.S.C.	.. Federal Supreme Court
K.B.	.. Kings Bench
N.L.R.	.. Nigeria Law Reports
N.M.L.R.	.. Nigeria Monthly Law Reports
N.N.C.N.	.. Northern Nigeria Case Notes
N.N.L.R.	.. Northern Nigeria Law Reports
N.R.N.L.R.	.. Northern Region of Nigeria Law Reports
Q.B.	.. Queen Bench
Q.B.D.	.. Queen Bench Division

V.R. .. Victoria Reports

W.A.C.A. .. West African Courts of Appeal

W.L.R. .. Weekly Law Reports

W.N.L.R. .. Western Nigeria Law Reports

W,R.N.L.R. .. Western Region of Nigeria Law Reports

(b) Journals

C.L.J. .. Cambridge Law Journal

Colum.Law Rev. .. Columbia Law Review

Crim. Law Rev. .. Criminal Law Review

(c) Others:

C.C. .. The Criminal Code

P.C. .. The Penal Code

S.P.C. .. Sudan Penal Code

S/O .. Son of.

INTRODUCTION

> "Acts proceeding from anger are rightly judged not to be done of malice aforethought; for it is not the man who acts in anger but he who enraged him that starts the mischief. Again, the matter in it is apparent injustice that occasions rage."
>
> Aristotle, Nicomachean Ethics, BK.V, 8.

Provocation as a defence is no ground for exonerating the accused person completely from the criminal liability for his acts, but may be a ground for mitigating the punishment. The human weakness is taken into account by the Law. If a man was provoked to such an extent that in the heat of passion, he lost his power of self-control and killed the source of provocation, although the act done with the intention to cause death or with the knowledge of the consequences, was not the result of malignity of heart, but was infact attributable to human frailty.

In this dissertation, an attempt will be made at a detailed consideration of provocation as a partial defence under both the Nigerian Codes (i.e. the Criminal Code and the Penal Code) with a comparative study to the position of the Sudanese Penal Code.

The scope of provocation as a partial defence is a narrow one, being a special defence that can be pleaded on very few charges like murder and assaults.

In other words a plea of provocation is not a general defence.

The doctrine of provocation however, raises a number of problems both for the students and the practicing lawyers. In the first place, there is the important question that whether the provocation in its application to homicide is defined by the codes themselves or by reference to Common Law. However, the Common Law has continued to be a guide in the interpretation of the codes' provisions. To this extent the law of provocation in Nigeria and the Sudan is supplemented by Common Law principles. For example the proportionality rule though not found in both the Nigerian Codes and the Sudanese Penal Code, the courts in both Nigeria and the Sudan are fond of incorporating the rule into their decisions.

The rationale underlying the doctrine of provocation is that it is unjust to convict of the most serious form of homicide if in the circumstance death is partly the fault of the deceased. Provocation is therefore a compromise between community interest and facts of life.

The defence of provocation is the sole concession to loss of self-control and operates to reduce murder to manslaughter. Provocation mitigates moral culpability to the extent that a person acted in a less than fully controlled manner under reasonable circumstances.

In homicide cases, provocation is insufficient to justify or excuse a killing. This is because of the seriousness of the offence in all societies. Provocation is therefore only a mitigating factor so that men will exercise some rational judgement in dealing with each other. To this extent, provocation has been legally defined and consists of a number of elements which must co-exist.

The plea of provocation is founded on loss of self-control, both actual and reasonable. There is therefore a combination of subjective and objective elements in the plea. Apart from the fact that the accused have received grave and sudden provocation, he must also have been provoked. The objective element in provocation emanates from the reasonable man test and includes the proportionality rule.

The second problem to be highlited in this disertation is the applicability of the objective test in Nigeria, Sudan and in English Law.
We will see what colour is the reasonable man?
Is he the reasonable man of the same locality or the hypothetical reasonable man?
In this work reference will be made to Islamic Law and we will see the justification in the non-recognition of the plea of provocation by the Maliki Law.

CHAPTER I

THE DEFINITION AND THE HISTORICAL BACKGROUND OF THE DOCTRINE OF PROVOCATION IN NIGERIA

(i) THE DEFINITION OF PROVOCATION

To give a precise definition of the word provocation is not an easy task. For provocation is intangible and it is related to the human physiology and human behaviour. One way of definiting anything is to use a word, the meaning for what that word stands. This approach is faulty in so much so that it may not be possible to define fictitious entities and non-existing things. But as far as the word provocation is concerned let us try to look it up in the shorter Oxford English Dictionary. In this dictionary provocation means the following:

(i) The action of calling, invitation, summons

(ii) The action of inciting, impulse, instigation, an incentive, astimulus

(iii) The action or an act of exciting anger, resentment or irritation.

(iv) Cause of anger, resentment, or irritation.

As far as the literal meaning of the word provocation in the dictionary we notice that the common words between all the four meanings is anger, stimulus irritation and exciting.

Let us look and see how the courts explain or define provocation. In the English case of

R.V. Duffy[1] Devlin J. said:

> "Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporarly 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..."

Lord Goddard said:

> "That is as good a definition of the doctrine of provocation as it has ever been my lot to read, and I think it might well stand as a classic direction given to a jury ..."

However others are not satisfied with the above definition. A comment was made that Devlin did not identify whether this is a definition of the word "Provocation" or an explanation of the doctrine of provocation . To me whether it is an explanation or definition it clearly shows us what provocation means by describing the special characteristics of the person who was provoked i.e. the act of provocation, the loss of self-control, both actual and reasonable and suddenness and gravity of the provocation.

The word provocation is also mentioned in section 222(1) of the penal code. The section provides as follows:

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

This section does not define provocation. A writer,[2] commenting on the penal code's provision said:

> "the penal code of the Northern States of Nigeria does not attempt to define what provocation is but merely tells us what provocation does."

Section 283 of the Criminal Code defines provocation generally. The section provides:

> "the term provocation includes any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered."

The above section of the Criminal Code also falls short of giving an exhaustive definition of provocation. The short-coming of the section is that it defines provocation as including any wrongful act or insult. The use of the word wrongful act is not a legal term in the sense that an act may be wrongful even though it does not give rise to any criminal or civil liability.

(ii) THE HISTORICAL BACKGROUND OF THE DOCTRINE OF PROVOCATION IN NIGERIA

The historical records showed that long before the nineteenth century in what is now Nigeria Justice was administered. We find in the North written Moslem Law of Maliki School of Jurisprudence administered in the native courts. In the South we find unwritten customary law also administered through the customary courts.

Tracing the history of the doctrine of provocation in the Northern part of the country, it is pertinent to examine the position of provocation in Islamic Law. In Islamic Law[3] provocation is not at all a mitigating factor. According to the teachings of the Quran and the sunna of the prophet we find many verses and Hadiths telling a moslem to control himself if he gets angry. In the Quran God Almighty says:

> "The recompense of an injury is an injury equal thereto, but if a person forgives and makes reconcilation his reward is due from God."[4]

In a hadith narrated that, a person came to the prophet asking his advice, the prophet repeated three times "do not be angry".[5] According to Moslems' traditions, a moslem should not give way to his temper under whatever circumstances. That is why the prophet advised his Umma(nation) that whoever gets angry should perform ablution to cool his anger.[6]

From this Islamic premise no amount of provocative insult can justify a person to kill another and plead the defence of provocation. In Mallam Mamman Maizabo V. Sokoto N.A.[7] the accused was convicted of intentional homicide('amd) in the court of the Sultan of Sokoto and sentenced to death. At the trial there was evidence of provocation which, if accepted might have reduced the offence to manslaughter if the trial had taken place under the Criminal Code. In another case of Ayuba Fagoji V. Kano N.A.[8] it was held that the defence of provocation reducing murder to manslaughter does not exist in Moslem Law.

Whatever the gravity of provocation might be, it will not justify killing. As in Gishiwa Gana V. Bornu N.A.[9] the appellant was charged with murder in a native court applying Moslem law. He admitted killing the deceased and stated that he had found his wife and the deceased coming out of the deceased's room and taxed the deceased with adultery, whereupon the deceased kicked him, and he stabbed the deceased. His wife stated at the trial she had, just before, had sexual intercourse with the deceased. The court found the appellant guilty of murder.

Jibowu the then Acting Chief Justice of the Federation gave a further justification for the non-recognition of the defence of provocation in Maliki Law. He said:

> "the fact that the Maliki Law of wilful or intentional homicide differs from the English law or the provisions of the criminal code because it does not recognise provocation as a defence will not justify the conclusion that the Maliki Law of homicide is contrary to natural justice, equity or good conscience. It is the recognised law of the area to which it applies and it has been recognised by the people to whom it is applicable as their native law and custom. It is for the people to decide whether the law is good enough for them or not and whether they desire a change..."10

According to the unwritten customary law applied in the South, historical records show that nobody can ascertain authoritatively that provocation was pleaded as a defence in the customary courts.

It is noteworthy to say that the coming of Lugard administration in 1904, the Criminal Code Ordinance was introduced in the Northern part of Nigeria. One can say in the North the defence of provocation found its shape in 1904. Jibowu the then Acting Chief Justice of the Federation said:

> "it is sufficient to say that the law of provocation has been administered in this country for years back on the footing that the provocation which would reduce murder to manslaughter must be a grave one..."12

Besides the introduction of the criminal code in the North, we find that the powers of the native courts have not been affected. They continued to apply the same Maliki Law.

According to the words of then Acting Chief Justice of the Federation,[13]

> "with regard to the question whether the law of wilful or intentional homicide in Maliki Law is incompatible with a written law, there can be no doubt that it is incompatible with the provisions of the Criminal Code, which is a written law, but the incompatibility has been removed by direct legislation by the provisions of section 10A of the Native Courts Ordinance, which empowers native courts to administer native law and custom, "notwithstanding anything contained in the Criminal Code Ordinance."

The position in the North continued in duality. If the accused is lucky and hence falls within the jurisdiction of the courts administering the Criminal Code, his plea of provocation will be recognised. Otherwise in the native courts mercy is only from heaven.

In July 1960 the penal code was enacted. On 1st October, 1960, it came into force and the defence of provocation found its real scope as a mitigating factor.

The situation in the South continued to be the same with the continuity of the application of the *Criminal Code* up till now. *One can say* since 1916 the defence of provocation found its shape in the Southern part of the country.

(iii) THE HISTORY AND THE RELATIONSHIP BETWEEN THE RIGHT OF PRIVATE DEFENCE AND PROVOCATION

The right of private defence and the doctrine of provocation sprang from the same source. A distinction could be made that the right of private defence as a natural instinct of man comes from fear, love of self-preservation while provocation sprang out as reaction of anger. The difficulty which the early lawyers found is to distinguish between homicide committed in self-defence and homicide committed by mistake. This difficulty was accompanied by a confusion between cases of killing in self-defence and killing when under the influence of some physical provocation.

This interaction of self-defence and provocation can clearly be seen in the case of R.V. Brown[14] D, a soldier, wrongly, but apparently reasonably, supposed that P was a member of a gang who were attacking him and his comrade. He struck P with a sword and killed him. The offence was ruled to be manslaughter.

Commenting on this case East[15] says:

> "This was holden manslaughter; it is not murder as the jury had found, because there was a previous provocation, and the blood was heated in the contest, nor was it self-defence, because there was no inevitable necessity to excuse the killing in that manner."

Again, in several of the early cases in which death was caused by a person who was resisting an unlawful arrest it will be seen that the two ideas of self-defence and provocation are interwined. In such cases a good lawyer should always plead self-defence on behalf of his client rather than plead provocation. For the consequences of the two defences are different. If he successfully pleads self-defence the result is a complete exemption from the criminal liability and the accused will be acquitted. But in the case of provocation if he succeeds, it is only a mitigating factor from the conviction of murder to manslaughter. So provocation is commonly set up as an alternative to the complete defence of self-defence.

This relationship between self-defence and provocation is that, behind both there is a proportionality rule that governs their operation. If X attacks Y with stick, X should not shoot him with a gun. Thus J. Devlin said in Duffy[16]

> "Fists might be answered with fists, but not with a deadly weapon."

Though this relationship between the two defences is strong one, we find a marked distinction between them. The law has given a safeguard to self-defence and this is due to the sanctity or sacredness of the human soul and property. We find section 30(1) of the 1979 constitution provides:

> "Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."

With reference to the Holy Quran the right of private defence is also protected. The Quran provides:

> "And one who attacketh you, attack him in like manner as he attacked you. Observe your duty to Allah, and know that Allah is with those who ward off (evil)"17

The two Nigerian codes provide sections for self-defence i.e. sections 282, 286, 293 C.C. and 55-59-67 P.C. Section 59 of the penal code provides:

> "Nothing is an offence which is done in the lawful exercise of the right of private defence."

Also S-32(3) of the Criminal Code provide that:

> "Person is not criminally responsible for an act if the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence."

Due to the safeguards made by law for the self-defence, the law specifically laid down that provocation cannot be given in anything in the lawful exercise of self-defence.[18] The right of self-defence is paramount that is why the penal code has gone too far in giving the person exercising his right protection even if he causes injuries to an innocent third party.[19]

Though the relationship between self-defence and provocation dates from antiquity, the law has given much weight and special safeguards to self-defence more than to the defence of provocation.

FOOTNOTES

1. (1949) 1 All E.R. 932.
2. Kharisu Sufiyan Chukkol, Defemces tp Criminal Liability in Nigerian Law: A critical Appraisal at P.78.
3. Maliki School of Jurisprudence.
4. See Mukhtasr Al-Khalil & Tuhfat Commentary on the Mukhtasar 1882(Algiers) 305.
5. See Muwatta Malik at P. 212.
6. See Mukhtasr Ahadith al-Nabwi, 12th edition at P. 39.
7. (1956) N.R.L.R. 133.
8. (1957) N.R.N.L.R. 57.
9. (1955) 14 W.A.C.A. 587.
10. See Jalo Tsamiya V. Bauchi N.A.(1957)N.R.L.R. at P. 81.
11. Idi Wanaka V. Sokoto N.A. (1956) N.R.L.R.15
12. Jalo V. Bauchi N.A. (Supra)
13. Jibowu Ag. C.J. Supra
14. (1776) 1 Leach 148.
15. See Russel on Crime Vol. 1.518.
16. Supra
17. The Cow verse No.194.
18. Section 38 P.C.
19. See S.67 P.C.

CHAPTER II

THE DEFENCE OF PROVOCATION IN NIGERIA

One of the notable characteristics of the Nigerian Legal system is the tremendous influence of English Law upon it. The Nigerian Law is mainly derived from English Law. Nigeria being a vast country i.e. consists of nineteen states and a Federal capital territory. There is no doubt that the legal system is a complexity.

The Criminal Code which is heavily influenced by English Law applies in the south. The Penal Code which is motivated by Islamic and English Law applies in the North. Nigeria consists of many ethnic groups with different beliefs, cultural backgrounds and traditions. Due to this different set up in one country we find what may provoke a Kumoman in Bauchi state might not provoke a Gwozaman in Borno State and vise versa.

Provocation under the Criminal Code:

Provocation is defined under S.283 of the Criminal Code to include :

> 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 or fraternal relation or in the relation of master or servant to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered."

According to the above definition a person can be provoked by a wrongful act or insult offered to him or to any person who is under his immediate care or to whom he stands in congugal, parental, filial or fraternal relation or even acts done to his servant. Section 283 of the Criminal Code is so wide that it covers even provocation offered to relatives. A person can say the section put into consideration the African

realities that in our context a family is not only a husband and a wife but extended families.

The section inserted a limitation that the person who is supposed to be provoked by wrongful act or insult done to his relations, must be present when the wrongful act or insult occurred.

Under the Panal Code S.222(1) does not expressly mention provocation offered to relatives. But the decision in the case of Muhammadu Bello V. State[1], seems to favour the idea of provocation given to relatives as a defence. In this case the court rejected a plea of provocation on the ground that the abusive words directed at the accused's father were uttered in the accused's absence.

If we look at the decision a person could easily say that if the provocation i.e. the abusive words were uttered in the accused's presence, accused could have benefitted from the plea of provocation.
It is submitted that judges in courts should bear in mind that African reality in deciding cases.
The legislatures in enacting law should consider the same realities that a person can be provoked by wrongful act or insult directed to any of his relatives in his presence. In this respect the stand of the criminal code is preferable to that of the Penal Code which does not even endeavour to define provocation.

The position at the common law is that provocation is not a defence to a charge of wounding or any charge other than murder.[2] It would appear that in English Law provocation directed to third parties limited only to a near relative. In the case of R. V. Fisher[3], Park J said obiter:

> "that if a father came upon a man in the act of committing an unnatural act with his young son and instantly killed him, this by analogy to adultery rule, would probably have been sufficient provocation."

Furthermore, it has been indirectly suggested by a full court in the state of Victoria[4] that, it is provocation for a father to see his daughter run down by a reckless motorist.

In another English case of R. V. Harrington,[5] Cockburn C.J. contemplated the possibility that a violent assault upon his daughter by her husband might be sufficient to reduce D's killing of the husband to manslaughter, but did not decide the point. Whatever the position at Common Law, however, it is now clear that if there is evidence that D was in fact provoked to lose his self-control, the defence must be left to the jury even though the provocative act was directed against another.[6]

Section 283 of the Criminal Code defines the term provocation. Though the definition is not an exhaustive one, it gives instances of what can amount to provocation.

The section widened its scope by the use of the word "includes". It is submitted that "includes"

in S.283 of the Criminal Code is meant to provide a clear definition of provocation, for it is hard to imagine what other meaning provocation could have except as defined in that section.

In determining whether the accused has lost his power of self-control or not, the test applied is of the ordinary person and not of a particular or special person as the accused. That is to say our Nigerian Courts employed the objective test in cases of provocation. But in 1942 the objective-cum-subjective test was evolved. In the case of R v. John,[7] Mr. Justice Francis held that:

> "Provocation must be judged from the point of what would amount to provocation in the case of an ordinary reasonable man of the same standing in life and degree of civilization as the accused man, and that what might not be regarded as sufficient provocation in the case of an educated and civilized person, might be reasonably considered as sufficient when it concerned an uneducated and primitive peasant whose passions would naturally not be so much under control as those of the more educated person."

This decision if it stands as law in the country, may suggest two tests of "reasonable man". One test will be for the educated and the other for the uneducated.

Both S. 283 and S. 284 are found in Chapter 25 of the Criminal Code. Chapter 25 of the Criminal Code is meant for cases of assaults and violence.

Not only this but it is submitted that the word 'act' is qualified by the word 'wrongful'. One can infer that both words i.e. "wrongful act" relate to an assault whereas the word 'insult' will not be so limited in its application but will cover words, acts or conduct of an insulting nature. The two sections (i.e. 283 & 284 of c.c.) apply to assault and violence cases but not to homicide. Because not all homicide cases involve elements of assault.

Section 284 of the Criminal Code provides:

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

Section 284 of the criminal code provides a complete defence for a person who made an assault on basis of provocation offered to him or to his relatives. This section put some qualifications or requirements to be satisfied in order to avail the accused the benefit of the complete defence. These qualifications are:

(i) The accused must have lost his power of self-control,

(ii) The force used must not be out of proportion to the provocation given and must not be one intended,

(iii) Nor likely, to cause death or grievous harm.

In this respect the act considered as provocation can be a wrongful act or insult by word of mouth or gesture directed to the accused or anyone of his relations.[8]

If the assault is likely to cause death or grievous harm the accused will be convicted of murder. Because "grievous harm" under S.316 of the criminal code is the requisite mensrea of murder.

Under the criminal code provocation is a mitigating factor in cases of homicide and a complete exemption from criminal liability in cases of assaults and violence. Thus S.284 of the criminal code introduces an important element into the Law of provocation, a departure from the common law position that provocation is not a complete defence to a criminal charge.

Section 318 of the criminal code provides:

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

Section 318 of the criminal code is found in chapter 27 of the code. This section neither defined provocation nor incorporated the proportionality rule in its provisions.

A question arises as to whether courts should read S.318 subject to S.283 which defines provocation or to read each section independentaly. The other question is whether the courts read S.318 of the criminal code subject to S.284 in order to help S.318 in incorporating the proportionality rule or read each separately since S.318 stands in a separate chapter which deal with homicide and not cases of assault or violence.

Answers for all these questions will be treated later in this disertation.

Provocation under the Penal Code:

S.222(1) of the penal code provides:

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

Whether the provocation was grave and sudden enough to avail the accused the benefit of the lesser offence i.e. manslaughter is a question of fact.

In the case of Mancini v D.P.P.[9], Lord Simon said:

> "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control as the result of which he commits the unlawful act which causes death..."

Section 222(1) of the penal code lays down three requirements that must be satisfied before the plea of provocation can be uphold by the court.

These are:

(i) that there was grave provocation

(ii) that the provocation must be sudden.

(iii) that such provocation caused the accused to lose power of self-control.

The accused person will not benefit from S.222(1) of the penal code if he retaliated to the provocation offered after sometime. Whenever there is a sufficient interval for reflection during which a normal man can realise and understand the gravity of the act he intends doing, the excuse of provocation cannot be accepted in a case of murder. In the case of R v. IGBANIGREEN[10], the deceased was the accused's wife. She left him and lived with her mother. The accused tried unsuccessfully to win her back. One night he found her in the act of sexual intercourse with a stranger in his mother-in-Law's house. He went back to the house and brooded over his misfortune. He went back to the house four hours later with his matchet. He killed his wife and his mother-in-Law when she intervened. The accused pleaded provocation but this was rejected because between the provocation and the killing enough time had elapsed for his passion to cool. And the period of waiting (about 4 hours) destroyed the excuse of "sudden provocation" because the accused had time for reflection. In another case of the Queen v. Ngba Haaba[22], the accused's plea of provocation could have been rejected had deceased not attacked him.

In this case the accused after witnessing deceased having sexual intercourse with his wife shouted at his brother to come and witness the incident - thereby allowing some lapse of time.
In determing whether there has been enough cooling time, it is proper to take into account the degree of provocation offered.[12]

According to S.222(1) of the penal code, provocation must be grave and sudden and must by its gravity and suddenness deprive the accused of the power of self-control.
Grave means that the provocation is such as would arouse passion and loss of self-control, and suddenness implies that there must be no cooling time. The act of killing by the accused, must have been done whilst he was deprived of his power of self-control by the grave and sudden provocation.

In A.G. for Ceylon v. Perera,[13] their Lordships expressed the view that:

> "the words "grave" and "sudden" are both relative terms, and must, at least to a great extent, be decided by comparing the nature of the provocation with that of the retaliation act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, and it is wrong to say that, because the penal code does not expressly say that the retaliation must bear some relation to the provocation, the contrary in the case."

It must be noted that section 294 of the Ceylon Penal Code is identicel with S.222(1) of Northern Nigeria Penal Code.

The word "grave" can be said to imply into section 222(1) of the penal code that, the retaliation must be reasonably commensurate with the provocation received in order to extenuate culpable homicide to one not punishable with death. It is also of relevance to mention that section 222(1) of the penal code is largely based on section 300 of the Indian Penal Code. In Aziz Ahmad Mohammad v. Emp.,[14] the accused and the deceased belonged to two different religious sects. The deceased exhibited a poster containing some matter derogatory of the leader of the accused's sect. The accused attacked and stabbed the deceased two days after he saw the poster, thus causing the death of the deceased, It was held that assuming there was provocation which was not found in this case, it was not sudden. In the case of Holmes v. D.P.P.,[15] Lord Simon said:

> "the whole doctrine relating to provocation depends on the fact that it couses, or may cause, a sudden and temporary loss of self-control whereby malice, which is the f foundation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires the actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies; only one very special exception has been recognised, that is, the actual finding of a spouse in the act of adultery."

In Attorney General for Ceylon v. Perera,[16] the privy council refused to accept the view expressed by Lord Simon in Holmes, that provocation must negative an intention to kill to provode mitigation. Also in Lee Chun-Chuen v. The Queen,[17] their Lordships said:

> "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. Accordingly, as was held by the appeal court below and not challenged before the board, there had been misdirection by the trial Judge at the trial of the appellant on a charge of murder when he directed the Jury that if the provocation relied on by the defence caused in the mind of the accused an actual intention to kill or cause grievous bodily harm, then the killing would be murder."

The Penal Code of Northern Nigeria has gone further by recognising provocation as a mitigating factor not only in cases of murder but in cases of assault, voluntarily causing hurt[18] on provocation and voluntarily causing grievous hurt[19] on provocation. Both the English Law and the Criminal Code of the Southern Nigeria regard grievous harm as a requisite mental element of murder. Therefore the Criminal Code does not recognise cases of assault which are likely to cause death or grievous harm.

In cases of assault or use of criminal force otherwise than on grave and sudden provocation the penal code provides under S.265 a punishment

for one year. But in case the assault is on grave and sudden provocation the penal code reduces the punishment to three months.[20]

The penal code does not regard provocation as a complete exemption from criminal liability either in cases of assaults or in homicide. A writer[21] commented that:

> "the penal code's stand might have been prompted by the legislators' attempt to be guided by principles of Islamic law which hardly admit the defence of provocation even in a murder charge..."

The limitation on the defence of Provocation:

Both sections 283 of the criminal code and S.222(1) of the penal code mentioned some of the limitations on the defence of provocation generally. But S.38 of the penal code specifically stated that before the defence of provocation can succeed in reducing murder to manslaughter the following tests must be satisfied.

(i) the provocation must be grave and sudden. If the provocation offered is grave but not sudden the plea of provocation will not be recognised. In orher words there must be concurrence between sudden and grave. The missing of one of them, is the total failure of the plea of provocation.

(ii) provocation must not be sought or voluntarily contracted. In the Indian case of Q.E. v. Loshan,[22] where A, the widow of B8s cousin, lived in B's house. One night A left the house and B, believing she was going on an assignment, followed. Eventually B, found A in the act of sexual intercourse and killed her. The court held that B had deliberately gone in search of provocation and therefore, the defence of provocation was rejected.

(iii) provocation cannot be given by anything done in obedience to Law or by a public servant in the lawful exercise of the powers of such public servant.

The words "public servant" as defined under S.10 of the penal code denote:

> "every person appointed by the government or the Government of the Federation or of a region while serving in Northern Nigeria or by any native, provincial, municipal or other local authority. It denotes every person serving in Northern Nigeria appointed by a servant or agent of any such Government or authority for the performance of public duties whether with or without remuneration or for the performance of a specific public duty while performing that duty."

A policeman in exercising the power of arrest under S.26 of the criminal procedure code and using force necessary to effect the arrest, a plea of provocation cannot be raised against him. If the accused repelled the act of the police or the public servant, he can only succeed on the basis of the right of private defence if the act of the police or the public servant will cause apprehension of death or grievous hurt to him. In this connection we can see the clear interrelationship between the right of private defence and provocation.

In the case of R v. Hamman Dangar,[23] the defendant had been arrested by the deceased, a native authority policeman. The arrest was unlawful but this was unknown to the defendant who killed the policeman when trying to escape. The court held that the law on the point in Nigeria is that by virtue of section 317 of the criminal code, which is the same as the law in England, if any person unlawfully arrests another and the person so provoked immediately and unjustifiably kills the other, the offence is manslaughter, and not murder.

This decision warrants that if a police officer wants to arrest X illegally, and X assaulted him, X can plead provocation whether or not he knows of the illegality of the arrest.

But this decision contradicts the statutory provision of S.283 of the criminal code which provides:

> "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 by words:

Historically in English Law provocation by words of mouth were not regarded to change the verdict of murder to that of manslaughter. In R v. Mason,[24] it was held that mere words of provocation or abuse could not have the effect of reducing the crime from murder to manslaughter. In Holmes v. D.P.P.[25] the House of Lords held that, as a matter of Law, a confession of adultery is insufficient provocation where a husband kills his wife. Their Lordships added that

> "in no case should words alone, save in circumstances of a most extreme and exceptional circumstances."

From the authorities mentioned, provocation by words alone was not considered enough. Provocation should take the form of physical attack. According to Kelyng's Reports of cases in pleas of the Crown at P.135 - pulling a man by the nose and filliping up the forehead were held to be sufficient provocation. The one exception to the principle was the discovery of a spouse in the act of adultery.

But mere confession of adultery is not enough.

However, in the case of R v. Rothwell,[26]

Blackburn J. took a different approach.

He said:

> "no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such provocation of words as will have that effect, for instance if a husband suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before were thereupon to kill his wife, it might be manslaughter."

The Law in England is, however, now settled by Section 3 of the Homicide Act of 1957.

This section provides:

> "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 to do as he did shall be left to be determined by the jury."

In Nigeria it has always been the Law that an insult may amount to provocation.[27] However in R v. Maye Nungu,[28] Verity C.J. said that:

> "we are not of opinion that the use of words only of such nature and in such circumstances has ever been held by the courts of England or Nigeria to amount to such provocation as would reduce the crime from murder to manslaughter, and although it has been suggested in certain English cases that there may be circumstances in which words only would provide such provocation we do not think they can

> be said to exist in the present case. To do so would go much further than has ever been held to be the law of this country."

In the case of the Queen v. Hamman Mandara,[27] the Supreme Court held that to call a person "useless fellow" did not amount to provocation capable of reducing culpable homicide punishable with death to the one not punishable with death. In R v. Okriyi Igiri,[30] also a plea of provocation was rejected. In this case a wife spat on the face of her husband and taunted him as being impotent.

More recently, Nigerian courts complied with the provisions of section 283 of the criminal code which expressly justifies insults by words as amounting to provocation. In the case of Adebowale Alange v. The Attorney General Western Nigeria,[31] the accused was in love with the deceased. When he met her she said to him 'you've had it', referring to his illness. It was held that the words used were not sufficient provocation. But on appeal the Supreme Court held that words alone could amount to provocation.

Under the penal code, S.222(1), insulting words may amount to provocation. In Edache v. The Queen[32] deceased was accused's wife, who because of a marital dispute, had left him and gone to live in her mother's compound. When he

went to her she abused him by calling him "slave". He thereupon stabbed her. The Federal Supreme Court remarked that:

> "Insulting words may also amount to provocation under S.222 of the penal code of Northern Nigeria, provided that provocation otherwise comes within the provisions of that section."

In the case of R v. Adekaumi,[33] the accused was an illiterate and primitive peasant who killed his wife with a cutlass. The alleged provocation was that the wife jeered at him as being impotent and that she had sexual intercourse with other men. The court rejected the jeering as provocation but held that confession of adultery could amount to provocation.

Whatever the contradictions in the Supreme Court decisions may be, it is submitted that the recognition of words as capable of amounting to provocation is qualified by the requirement that the retaliation of the accused must not be out of proportion to the provocation, a test hardly obtainable in respect of words.

Finding in Adultery:

The Common Law however had traditionally been kind to the husband who discovers his wife committing adultery and kills either her or her paramour or even both. This early lenient attitude of the Common Law to

the husband in such situation was coloured by the idea that adultery consititued an infringement of the husband's proprietory interests in his wife. Hence the leniency of the Law was confined to situations in which a strictly legal marital tie existed between the offender and the woman he killed.[34] What does the finding mean? Does it mean to find the wife and the adulterer in flagrante delicto? Or does it mean to find them in circumstances that suggest adultery?. In the East African case of Chacha S/O Wamburu v. R.,[35] the court held that it is not necessary that the wife and the adulterer should be caught during the actual period of intercourse, but if they are found together in circumstances from which immediate recent intercourse is and can safely and correctly be inferred, they may be said to be found in the act of adultery within the meaning of the rule. In this connection a writer[36] said:

> "When it is said that one's finding his wife commiting adultery constitutes provocation sufficient to reduce a conviction of murder to manslaughter it is not thereby implied that one must meet his wife and the male intruder belly-to-belly(i.e. in the actual act of intercourse)."

Both English and Nigerian Law regard finding a mistress in an act of adultery and confession of adultery by a mistress as not justifying the verdict of manslaughter. In King v. Palmer[37],

the court held that a similar confession of illicit intercourse by a woman who was not the prisoner's wife but only engaged to be married to him cannot, if he kills her in consequence, justify such verdict (i.e. manslaughter).

In Islamic Law in case of finding in adultery the husband is supposed to bring four witnesses to adduce conclusive evidence that they have seen both the wife and the adulterer in the actual act of intercourse i.e. in flagrante delicto.[38] This heavy burden of proof is on the accused (i.e. husband) to discharge. If he discharges it his plea of provocation will be recognised and hence he will benefit from the partial defence of provocation if he kills the adulterer or his wife.

Dr. Aguda[39] suggested that Nigerian courts applying the code should take the view that the discovery of another man in the act of sexual intimacy with one's wife, fiancee or mistress should equally be regarded as sufficient provocation. A Sudanese Judge shared Aguda's suggestions in the case of Sudan Government v. El Amin Karama,[40] where he held that the question of provocation is purely a psychological one and questions of social morality are irrelevant.

I beg to disagree with Dr. Aguda's suggestions and the Sudanese Judge. Law and morality overlap a part from the normative language which is common to both. These norms derive strength and efficacy from each other. For instance the Criminal Law for its effectiveness depends upon the rule of morality which provides a cement of any human society and the law especially the criminal law should regard this as its primary function to maintain public morality.

If the Law avails the accused person the benefit from the plea of provocation in finding his mistress in the act of adultery, this will help in the degeneration of the social morals. And any person may raise a plea of provocation even for a common prostitute claiming to be his mistress. The law should enforce social morals and not to care for every human frailty. The Law should play its active role in the society by changing behaviour and call for a high standard of social morals and self-control.

<u>The mode of resentment must bear a reasonable relationship to the provocation</u>.

For a plea of provocation to succeed, the English Courts adopted a rule that the retaliation to the provocation offered should be proportionate. That is the mode of resentment must bear a reasonable relationship to the provocation offered.

In R. v. Duffy,[42] Devlin said:

> "Fists might be answered with fists, but not with a deadly weapon."

The leading case in this respect is the case of Mancini v. D.P.P.,[43] where the House of Lords stated the Law in general terms as follows:

> "... it is of particular importance to take into account the instrument with which the homicide was effected, for to resort, 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. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

If the relationship between provocation received and retaliation is said to be disproportionate, the plea of provocation will not be recognised by the court. A contemporary writer[44] commenting on the doctrine of proportionality, said:

> "proportionality has always had a rather loose meaning in the Law of provocation. It would be difficult to claim an intrinsic proportion between A's kicking B and B's killing A, but it is perhaps intelligent to say that there is greater proportion if A's initial act was either to inflict a stab wound or to commit adultery than if it was merely to make an insulting gesture..."

That the degree of loss of self-control should be related to the gravity of the provocation, is regarded as the true basis of the proportionality rule. It was argued that loss of self-control is not a matter of degree but absolute. Therefore, the proportionality rule should be of evidentiary value only and should not be a

determinant to the defence. In the case of R v. Phillips[45] Lord Diplock said:

> "Counsel contended, not as a matter of construction but as one of logic, that once a man has lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for whatever he did. This argument was based on the premise that loss of self-control is not a matter of degree but is absolute. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon..."

In 1969 in both Phillips[46] and Walker,[47] the privy council and the court of Appeal seemed prepared to accept that the "reasonable relationship" rule is not a rule of Law. However, section 3 of the Homicide Act 1957 has given the jury a power to determine whether the provocation was sufficient to make a reasonable man do as the accused did. This power of determination has been authoritative by the decision of the court of Appeal in the case of R V. Brown,[48] that "a jury should be instructed to consider the relationship of the accused's acts to the provocation."

The doctrine of proportionality in Nigerian Law:

The proportionality rule is specifically mentioned in S.284 of the criminal code i.e. "...provided that the force used is not disproportionate to the provocation." This proportionality in S.284 of the criminal code is required for cases of provocation in which an assault is an element. It is worthy mentioning that neigher S.222(1) of the penal code nor S.318 of the criminal code has incorporated the proportionality rule for homicide cases. It is unfortunate that the position of the proportionality rule is vague in the Nigerian Law. We find our Nigerian courts blindly borrowing the common law rules and applying them regardless of the absence of such rules in our Law. In the State v. Abba Mohammed,[49] the accused and deceased were both night watchmen at Ikeja. The accused demanded a debt of £3 from the deceased. An argument ensured and the deceased slapped the accused who being provoked, then stabbed the deceased to death. The court held that in the circumstances of the case, the retaliation offered is not disproportionate to the provocation offered as the accused is a Kanuri man from Bornu and Kanuris wear daggers on their arms as ornament.

The absence of the proportionality rule in S.318 of the criminal code has created many difficulties in homicide cases where the plea of

provocation is raised. Another point to be considered is that we find S.283 & 284 of the criminal code in chapter 25. This chapter mainly deals with cases of assault and violence, while S.318 of the criminal code is found in chapter 27 which deals with homicide.

This problem of irregularity in the chapters of the criminal code led the Nigerian courts into a dilemma in the enforcement of S.318 of the criminal code. It is not clear yet whether courts will read S.318 subject to S.283 of the criminal code or read S.318 with S.284 in order that the proportionality rule be included in homicide cases. In Babalola John v. Zaria N.A.,[50] it was assumed that S. 283 of the criminal code could be read as defining provocation for the purposes of S.318. In this case the appellant intentionally killed his wife. He acted under provocation when his wife showed him a photograph of her lover. He was tried in a court administering Moslem Law and convicted of intentional homicide. On appeal Mr. Justice Hurley held that:

> "provocation sufficient to reduce murder to manslaughter under the criminal code must be proportionate to the act which causes death, and the appellant's offence would have been murder under the criminal code."

This assumption of reading S.283 with S.318 of the criminal code is not free from doubt since S.283 of the code applies only to an offence of

which an assault is an element. Reading S.318 subject to S. 284 of the criminal code in order to incorporate the proportionality rule is also a misdirection. The courts cannot read S.284 subject to S.318 of the criminal code in all homicide cases, because assault is not an element of all homicide cases. Not only that but S.283 & S.284 of the criminal code were exclusively meant for cases of assaults and violence. The alternative remains for the courts either to read each section indepandently or in reading S.318 of the criminal code any other section which is relevant will be considered. In the case of Chukwu Obaji v. The State [51] the accused met the deceased in the house of one Ozu. The accused went to Ozu to demand his debt from Ozu who was not in the house. The deceased then came and held the accused and asked him to come and give him something. It was not stated what this thing was. The deceased then dragged the accused a few yards away, still making his demands, whereupon accused stabbed the deceased and took to his heels. In this case the trial judge directed himself that before the accused could avail himself of the provisions of S.318 of the criminal code, the mode of retaliation must be proportionate to the provocation. He held that the mode of resentment employed by the accused was [illegible] disproportionate to the provocation given him by

the deceased that therefore the provisions of S.318 of the criminal code could not apply. The direction was attacked by the counsel for the defence on appeal. The view was expressed that the "doctrine of retaliation" or "doctrine of proportionality" should not be read into section 318 of the criminal code, it was argued that the doctrine has no application to the law in Nigeria in considering the effect of provocation, the reason put forward being that expressions like "grave provocation" or extreme provocation" are not to be found in the Nigerian criminal code as they are to be found in Ceylon penal code.

The reviewing authority i.e. the Federal Supreme Court held as follows:

(i) the duty of the courts in Nigeria is to interprete the criminal code free from interpolation and refrain from propounding the common Law of England.

(ii) whilst the court agrees that the first part of S.284 of the criminal code is limited to cases of assault specifically, it feels that in reading any section of the criminal code, any other section which is relevant to the section under consideration cannot be disregarded.

(iii) reading S.283 and S.318 of the criminal together(and in the view of the court, they should be read together) makes it difficult to accept the view that "proportionality" must be excluded.

(iv) the correct direction in Nigerian Law is that in relation to murder, "provocation" in S.318 of the criminal code requires consideration of the nature of the weapon or force used as a mode of resentment bearing some reasonable relation to the provocation received, the disproportion being a factor for the jury to consider in determining whether the accused had completely lost control of himself or was acting for reason other than complete loss of self-control caused by sudden provocation.

(v) In applying the doctrine of "proportionality" the background of the accused and the circumstances of his locality are relevant facts for the jury to decide.

From this decision one can risk to conclude with the following points.

(A) In reading S.318 of the criminal code in

case of homicide where the plea of provocation is raised, any section under the code relevant to it cannot be disregarded.

(B) The proportionality rule remains as part of the Nigerian Law. For to exclude it a slight provocation might avail the accused the benefit of the mitigated sentence and this will be contrary to public policy.

(C) The proportionality rule will not be the sole determinant but of evidentiary value in determining whether the accused had completely lost control of himself or was acting for other ulterior motives.

Provocation by Sudden Quarrels:

In cases of mutual provocation in sudden quarrels it is immaterial which party first provokes the other or commits the first assault.[52] The penal code under S.222(4) provides:

> "Culpable homicide is not punishable with death if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. It is immaterial in such cases which party first provokes the other or commits the first assault."

In provocation involving sudden quarrels it is not easy to establish which of the two parties involved in the fight first provokes the other. It is due to this difficulty that the legislature provides S.222(4) of the penal code.

Before the defence of sudden fight can be established, section 222(4) requires three things. These are:

(i) sudden fight,

(ii) absence of premeditation and

(iii) No undue advantage.

The word "sudden" implies that the fight should not have been pre-arranged. In the case of Musa Arandum v. Bauchi N.A.[53], the Northern High Court on appeal held that although an appellant had used a knife in a sudden fight against an unarmed opponent, this was not an undue advantage as the knife was already in his hand for an innocent purpose at the moment the sudden quarrel arose. Commenting on this case Richardson[54] said:

> "This judgment presumes that normally when a man uses a deadly weapon against an unarmed opponent this will be an undue advantage. The distinction drawn here is that the accused was already holding the knife for another purpose when the sudden passion overtook him and he struck the fatal blow without premeditation. Had he picked up the knife subsequent to the onset of the quarrel, the situation might have been entirely different. The law here requires two things - first, that there should be provocation and, secondly, that the fatal blow should be clearly traced to the influence of the passion arising from the provocation."

Under the criminal code there is no section containing provisions similar to those in section S.222(4) of the penal code. Dr. Aguda[55] is of the opinion that this goal may be arrived at by the proper interpretation of section 318 of the

criminal code.

In the case of R v. Egbe Iboko Alo,[56] there was a challenge to fight which was accepted by the applellant who struck the first blow and killed the deceased. The trial judge said: "This, then was a duel, in which the slaying is prima facie murder." On appeal the West African Court of Appeal said:

> "We are of opinion that in so holding he misdirected himself. The essence of aduel is premeditation and pre-arrangement; there was none here. The proper question for the judge to have asked himself was "was the deceased killed in "the heat of passion caused by sudden provocation?" The challenge to fight undoubtedly provides the necessary provocation." The verdict of manslaughter was accordingly substituted for that of murder.

Under the English Law killing in sudden fight may be either murder, or manslaughter i.e. there is no special rules relating to provocation as a result of sudden quarrels. Each case should be treated on its merits on the basis of the established principles of the doctrine of provocation.

The Burden of Proof:

The persuasive burden of proof to negative a plea of provocation is always on the prosecution and not on the accused. In the case of

Chan Kau v. R,[57] where murder is charged and the evidence discloses a possible defence of self-defence or of provocation, the burden of proof remains throughout on the prosecution and it is not at any time on the accused to establish either defence. The same decision was reached by our Nigerian courts. In the Queen v. Oladipo,[58] it was held that where a defence of self-defence, accident or provocation is set up in a criminal case, the burden of proving the accused's guilt remains on the prosecution.

The Australian case of Parker v. R,[59] reaffirmed previous position which established that the onus is always on the prosecution to establish his case and not for the accused to prove that he was provoked.

The evidentiary burden on the accused person, requires him only to introduce evidence of provocation. If such evidence of provocation is disclosed, the onus is on the prosecution to negative it and prove beyond reasonable doubt that the accused killed the deceased not under the heat of passion as would extenuate the offence. According to the principle laid down in Woolminton v. D.P.P.,[60] and Mancini v. D.P.P.[61], in self-defence no less than in the defence of provocation the onus of proof never shifts and rests throughout on the prosecution. This is so in all cases except

in cases of insanity which strictly speaking is not a defence or where it is expressly provided by statute.

In cases where the accused person has alternative defences such as self-defence or accident, he may not plead provocation because it is an inconsistent plea and may weaken the alternative defence.

However, the law requires the judge to take account of provocation where the evidence of it is available. In the case of Ukoh v. The State,[62] it was said that:

> "It is settled law that an accused person particularly in murder cases should be assisted by the court in considering defences not specifically raised if such defences ought to have been raised in the light of the evidence before the court."

FOOTNOTES

1. (1968) 1 ALL N.L.R. 361.
2. Smith and Hogan, Criminal Law 4th edition at page 294.
3. (1837) C & P at p. 185.
4. (1951) V.L.R. 298
5. (1866) 10 Cox 370.
6. Smith & Hogan, op. cit. at p. 295
7. (1942) 16 N.L.R. 63.
8. See Section 283 C.C.
9. (1942) A.C. 19.
10. (1955) 15 W.A.C.A. 73.
11. (1961) N.N.C.N. 27.
12. Thuku v. Republic (1965) E.A. 496
13. (1953) A.C. 200
14. (1938) A.I.R. Lahor 355;
15. (1946) 2 ALL E.R. 124.
16. Supra
17. (1962) 3 W.L.R. 1461
18. Section 244 P.C.
19. Section 245 P.C.
20. Section 266 P.C.
21. Kharisu S. Chukkol, Defences to Criminal Liability in Nigerian Lae: A critical Appraisal at P. 77.
22. (1886) A.I.R. All 635.
23. (1944) 10 W.A.C.A. 226.

24. (1912) 8 Crim. App R. 121

25. Supra

26. S(1871) 12 Coz, C.C. 145

27. See S. 283 C.C.

28. (1953) 14 W.A.C.A. 379.

29. (1962) F.S.C. 108/62.

30. (1958) 12. W.A.C.A1 377.

31. (1964) 1 All N.L.R. 115.

32. (1962) 1 All N.L.R. 22.

33. (1944) 17 N.L.R. 99.

34. King v. Palmer (1913) 2 K.B.29

35. The case was quoted by J.W.C. Turner in Kennys outlines of Criminal Law 8th Edition at P. 173

36. Kharisu S. Chukkol, op. cit. at p. 82

37. Supra.

38. Muwatta Imam Malik, trans - by Prof. Muhammad Rahimuddin at P. 318.

39. T. Akinola Aguda, Principles of Criminal Liability in Nigerian Law at P. 312.

40. (1961) S.L.J.R. 95.

41. See Patrick Devlin, 'The enforcement of morals' (Oxford) 1959.

42. (1949) 1 All. E.R. 932.

43. Supra

44. A.J. Ashworth, 'The doctrine of provocation' Cambridge Law Journal(1976) Vol. 35, P. 302

45. (1969) 2 A.C.130

46. Ibid.

47. (1969) 1.W.L.R.311.
48. (1972) 2 Q.B. 229.
49. (1969) N.M.L.R. 296.
50. (1959) N.L.R. 43.
51. (1965) N.M.L.R. 417.
52. See explu of S222(4) of the penal Code.
53. (1961)N.R.L.R. 50.
54. Notes on the Penal Code Law 3rd edit.
55. See T. Akinola Aguda, op. cit. at P.317
56. (1942) 8. W.A.C.A. 13.
57. (1955) 1 All. E.R. 266.
58. (1961) All. N.L.R. 453
59. (1964) 3 W.L.R. 70.
60. (1935) A.C. 462.
61. Supra
62. (1971) 1 N.M.L.R. 140 at 144.

CHAPTER III

THE DEFENCE OF PROVOCATION IN THE SUDAN

The Law in the Sudan has recognised provocation as a ground mitigating the punishment of murder. In doing so, the Law takes into consideration the human frailty and recognised that if a man was provoked to such an extent that in the heat of passion he might react to the provocation offered by causing the death of the provoker or the death of any other person by mistake or accident he should be liable to a lesser offence of manslaughter.

In the case of Sudan Government v. Wall Noke Adwear[1], the supreme court of the Sudan defined provocation as follows:

> "Provocation is any unlawful act or abuse capable of depriving the person of the power of controlling his passion of anger and consequently derives him to assault the source of provocation."

The defence of provocation in the Sudan not only applies to homicide cases but to charges of voluntarily causing hurt,[2] grievous hurt,[3] and cases of criminal assault[4] or attempted culpable homicide.[5] Unlike the English Law where provocation is applicable only to a charge of murder and cannot be pleaded as a defence to a minor charge.[6]

Section 249(1) of the Sudanese Penal Code provides:

> "Culpable homicide is not murder 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."

Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.[7]

Forms of Grave and Sudden Provocation:

(i) Grave provocation:

The gravity of the provocation has been defined as the effect produced on the mind by the external circumstances.[8]

In Sudan Government v. Magzoub Bashir,[9] Osman El Tayeb C.J. noted that:

> "Of course, the Law does not tabulate the acts that are likely to cause, create or produce provocation, the Law is concerned about the creation and existence of the provocation, but by what act is a matter depending on the unlimited human conduct and activities, and their effect on the human temperament and passions."

It is said that no provocation can be grave unless it would cause a reasonable man to act as the accused did. A man of excitable temperament, quick anger and easily offended cannot claim the benefit of grave provocation under S. 249(1) of the Sudan Penal Code.[10] The question as to

whether the Sudanese courts applied the objective test of a reasonable man or the subjective test will be treated later in this disertation.

(ii) Sudden Provocation:

In Sudan Government v. Mohammed Ahmed Gadir,[11] Mr. Justice Soni explained the meaning of "sudden provocation" as follows:

> "Sudden it means the accused is confronted with the provocation. If a thing happens or comes on without warning, it is then called "sudden." A person acts "suddenly" when he acts without forethought or deliberation. An act is done "suddenly" when it is performed without delay, when it is speedy, prompt and immediate. If a man thinks over what he is going to do, when he plans an action, when he is acting with forethought and deliberation, and his action is not sudden."

It is of relevance to mention that S. 294 of the Ceylon penal code is identical with S. 249(1) of the Sudanese Penal Code.

In Sudan Government v. Hassan Talfan Hassan,[12] Mr. Abu Rannat the then Sudanese C.J. quoted in toto the consideration laid down by the privy council in Perera's case.[13] He said:

> "the words 'grave' and 'sudden' are both of them relative terms and must, at least, to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor or trival provocation might be thought to excuse the use of a deadly weapon."

In this connection grave and sudden provocation can be examined under the following sub-heading:

(i) Finding in adultery

(ii) Provocation by words

(iii) Cumulative Provocation

Finding in Adultery:

In the Sudan, the rule relating to discovery in adultery does not only apply to wives but also has been extended to cover a divorced wife, mistress and finding in homosexuality. It is not necessary to find one's wife and the adulterer in flagrante delicto or belly-to-belly. If the husband can infer from the circumstances that an immediate intercourse might have taken place, it is enough to avail him with the partial defence of provocation if he kills either his wife or the adulterer or both.[14] In the case of Sudan Government v. El Tom Saddik Abbakar,[15] the accused met deceased drinking marissa(a locally brewed gin) with his wife at night at one desolate place. He thereupon struck the deceased to death and pleaded provocation at his trial for murder. The court upheld the plea and convicted him of manslaughter.

In Sudan Government v. Babikar Mohammed Mabloul,[16] the accused had been married to one Um Kheir Fadlel Seed. He suspected the deceased of having relations with his wife in bed and stabbed both of them.

The court held that the divorce not being proved there was sufficient provocation to reduce the finding to culpable homicide not amounting to murder.

If the provocation is as a result of sudden confirmation of the suspicion of adultery the accused will be entitled to the defence. In Sudan Government v. Mohammed Ahmed Gadir,[17] the accused had suspected his wife of marital misconduct for a year, and on the day in question suspected the deceased.

Accused hid in his house to watch. Deceased entered the house followed by accused's wife. When deceased pulled her toward him, accused jumped out, wrestled, stabbed and killed the deceased. Accused pleaded grave and sudden provocation under the penal code, S.249(1) to the charge of murder. The court held that suspicious of his wife's marital misconduct accused, lying in wait, was provoked by sudden confirmation of his suspicions, and is entitled to the partial defence under the penal code, S. 249(1).

From the above case we can realise that the decision might be to the contrary if the accused knows of the marital misconduct of his wife and he lies in wait with intent to kill, and then kills.

In this respect the conviction will be murder. Because it is a clear case of premediation and therefore the accused will not be entitled to the defence.

The discovery of a divorced wife in the act of sexual intercouse was held to amount to provocation. In Sudan Government v. Hussein Idris Abdalla,[18] Accused found his divorced wife having illicit relations while she was still in her Idda period and accused was trying to revoke the divorce. He killed her lover. This was held to be grave and sudden provocation. The then Acting Chief Justice, M.I. El Nur J, stated in his judgement that:

> "I do not agree with the court that the accused by coming to his wife at the late hour of the night was stalking her. One cannot exclude the possibility that accused's intention is visiting his divorcee at the late hour of the night was to have sexual intercourse with her. There is no evidence at all that he expected to find deceased with his divorcee. In my view, therefore accused killed deceased while he was deprived of his self-control by grave and sudden provocation."[19]

It seems that this decision recognises the right of a husband to visit his divorcee in her premises only during the idda period. It might be that Justice El Nur has considered in his decision or motivated by the Islamic principles that when the divorce is revokable the husband still have the right to restore the normal relations with her

before the expiration of the Idda period.

Mr. Justice El Nur further remarked that:

> "In my view, to find a man in the course of a sexual act with one's divorcee, is capable of provocation, particularly when one considers the attempt by accused to revoke that divorce."20

In English Law finding in the act of adultery does not apply to persons engaged to be married or persons not married but cohabiting together as man and mistress.[22] But in the Sudan finding a mistress in the act of adultery amounts to provocation.

In Sudan Government v. Abdulla Abdel Rahman Osman,[23] the accused and the deceased who were not married, had been living together for a period of twelve years. The deceased bore him four children. Before the date of the killing the accused knew that the deceased had been 'carryingon' with one Fadl EL Mula for many months, and yet he took no steps to complain to anyone in authority. On the night of the incident the accused lost his control when he found the couple in bed together. He inflicted grievous wounds on Fadl EL Mula and stabbed the deceased to death. The trial court found him guilty of murder.
However, in the court of Appeal, Watson J and Lindsay C.J. did not agree with the decision of the trial court. Watson J. stated:

> "If a man has kept as a mistress a slave girl since she reached the age of puberty, if they have openly lived together, and if she has given him four children, I submit that she is defacto accepted as his wife; and thought intimacy with another man may not constitute adultery, it is not a freedom which the 'husband' is prepared to recognise. To find the woman in bed with another man, in my view, undoubtedly constituted grave provocation."

A writer[24] commented on the above case. He said:

> "It seems to me that in this case under consideration, Watson J's view that the woman should, for the purpose of the finding, be de facto accepted as the accused's wife is realistic and accords with my observation in my judicial experience of these relationships. The girl was taken into the accused's house from puberty, and she had given him four children. There is no reason to suppose that the accused intended to allow the woman to be sexually free, or that the accused failed in his obligations to support her. I find it difficult to believe that after such a long period of cohabitation, living as a family, there was any sort of right locally recognised for the woman to start an illicit relationship with Fadl EL Mula. In short, I consider in this particular case that the actual provocation given to the accused by both the deceased was every bit as grave as if the accused and the woman had been legally married."

In Sudan Government v. EL Amin Karama EL Hag,[25] the deceased had been living with accused as his mistress. She decided to abandon him. When he tried to persuade her to return she hit him in the face with a slipper. He stabbed her to death and was tried and convicted to murder under the penal code, S. 251.

However, the then learned Sudanese Chief Justice Mr. Abu Rannat was fond of the philosophy that provocation is purely a psychological element. He stated:

> "the consensus of opinion in India is that there should be no differentiation between lawful wife and mistress when the question of grave and sudden provocation is in issue. The Madras High Court held[26] that the question of provocation is a purely a psychological question and one cannot apply consideration of social morality to such a purely psychological question. Consequently, where a man sees a woman in the arms of another and loses control over himself, the circumstances that she was his mistress and not his wife does not make any real difference for the purpose of penal code, S.249(1)."

I beg to disagree with the Sudanese Chief Justice and all those who shared the same view.

The Law is kind enough for the husband who discovers his wife in the act of adultery if he kills her or her lover or both. That is, because the law regards the legal relation and the sacredness of the contract of marriage.

What is moral and immoral is usually determined according to the test of the majority in the specific society.

In some societies adultery is an immoral act and in some others it is a criminal offence.[27]

A person who is staying with a mistress, is living in a continuous act of adultery. There I see no difference between him and an animal since animals have no legal bondage i.e. contract of

marriage.

To say provocation is a purely psychological element and questions of morality are irrelevant is unacceptable. Because it contradicts the primary function of criminal law in the society. One of the function of the criminal law is to enforce morals and control natural human instinct. The criminal law for its effectiveness depends upon morality. A man charged with rape could not be heard to say he couldn't help it, and if a man is provoked into commiting any other offence against the human body, though the law will not hold him guiltless, it will recognise adminished degree of responsibility.

The Law should not recognise each and every human frailty. The law has to promote the human behaviour to the standard that each person could be able to control himself and forgives for whatever amount of provocation he receives. The Law in giving the partial defence of provocation should exclude the person who kills another person in finding him with his mistress. The law should not legalise what God has made illegal. A mistress might be a common prostitute with many customers and so the law should not give the benefit of the partial defence to any one of those customers upon finding her in the act of adultery.

In short since the relation with the mistress is not legal the law should not help the human weakness and frailty in this respect. So the role of morality is not only giving the criminal law effectiveness, but in determining the guilt and the criminal responsibility.

In the Sudan finding in the act of adultery is not restricted to one's wife only but it arises when one's moral conscience is shocked by seeing a homosexual act in operation.
In the case of Sudan Government v. Magzoub Bashir Abu Hisses,[28] Accused saw his uncle having an unnatural intercourse with his friend in private. He could not bear it and rushed at them with his knife. The uncle jumped off the bed and the accused found himself stabbing his friend who died instantaneously.
The court held that seeing such operation of unnatural intercourse butween the accused's uncle and his friend, although it is not an offence, it is considered an immoral act which is generally not acceptable by the society of the accused. As such it creates a provocative act under the penal code, S. 249(1).
It is of relevance to mention that when this case was decided in 1969, homosexuality in the Sudan between consenting adults in private was

not an offence. That is why the decision of the case was based on social morality.

According to Osman El Tayeb C.J.:

> "This is not an offence, but it is certainly an immoral act that is generally not acceptable by the society of accused, and it is a source of resentment and contempt. As such it is capable of provocation in the position of accused."29

The Law in the Sudan now is that homosexuality between consenting adults in private is an offence as according to section 318 of the Sudan penal code(as amended in 1974).[30] Homosexual advances in the Sudan amounts to provocation. In Sudan Government v. Hasb EL Rasoul Husseini,[31] the deceased stood behind accused, placed his arm tenderly round his neck and put his chin on his shoulder. When asked what he was trying to do, the deceased laughed, and thereupon the fight ensured. The court held that a homosexual advance constitutes grave and sudden provocation. Then it has been judicially remarked that:

> "A normal reasonable man values his manliness to a great extent so that a sexually trainted tickle, a touch on the lip, a caress on the check or tender romantic embaracing and such similar preludes to an act of sodomy or acts pertaining to sexuality would certainly excite the passion of such a man and would amount to grave provocation."

Provocation by Words:

Since 1930, the Sudanese courts have taken the view that whether provocation by spoken words is grave and sudden depends on when and how those words were used as upon the mentality of the person to whom they were addressed.[32] The difficulties which the cases created in deciding to what extent if at all words alone or words or gesture combined with blows could in Law constitute sufficient provocation, are now disposed of by the English Homicide Act, S.3 which has declared that provocation may be "whether by things done, or by things said, or by both together." In the Sudan words alone could amount to provocation. It is not necessary that words should be followed by an assault. In the case of Sudan Government v. Ismail Ahmed Gargara,[33] Accused, gravely provoked by words alone, stabbed a man and was thereupon beaten by the stabbed man's relatives. One of the villagers who soon arrived, the deceased, tried to take the knife from the accused who stabbed and killed him, thinking was one of his earlier assailants. It was held that provocation may be "things said" alone; although deceased did not give the provocation, accused killed him by mistake.

In Sudan Government v. Suleiman Mohamud Hassab EL Rasoul,[34] Accused was in charge of the cultivation of the village's Sheikh, which was in the neighbourhood of the cultivation of deceased. Accused found some water-melons were served and removed. He suspected that they were stolen by the deceased. Accused divulged his suspicion to deceased's aunt, and the latter brought it to the knowledge of the deceased. When accused and deceased met, deceased inquired about what accused said to her aunt, and when he confirmed what he said, deceased insulted him by saying that he is " a man of bad reputation" and " a man of no merits". Then she slapped him on the cheek with her hand and further she pushed him.

Osman EL Tayeb C.J., substituting a finding of guilty of culpable homicide not amounting to murder, stated:

> "I think that the abusive words by deceased coupled with the slap on the face, and moreover pushing accused until he fell down on the sarif all taken together, are too much, and especially when emanating from a woman. In the society of accused the woman is looked upon as a person of lower grade than that of a man, and any insult by words or other acts to a man is considered as condemnation to that man.

> The slap on the face is universally taken a serious provocative act, and it was not alone, it was preceded by abusive words, and succeeded by a push into a sarif. And all that was done by a weak woman. Accused was subjected to great humiliation and contempt. In these circumstances I am of opinion that there was grave and sudden provocation in this case, entitling the accused to the benefit of that subsection, and so his conviction has to be reduced from murder to culpable homicide not amounting to murder."

In Sudan Government v. Gadeem Ragab Ali,[37] the plea of provocation was upheld when the deceased, the accused's wife taunted at him that she was pregnant by another man.

What is the position of the law if the deceased i.e. the male adulterer has confessed of adultery in the presence of the aggrived husband? There is no decision on the point either by the Sudanese Courts or by the Nigerian Courts. In this respect since the relation between the husband and the wife is a scared one, a husband will be provoked upon a confession by the male-adulterer and he might be highly provoked than if his wife confesses to him. Therefore the Law should treat confession of adultery by the male-adulterer the same as the confession by wife.[38]

Cumulative Provocation.

According to Krishna Vasdev,[39] the first reference to the term 'cumulative provocation' appears in the Sudan in the unreported case of Sudan Government v. Pamba S/O Badari,[40] which arose in 1945. The accused detected the presence of an adulterer in his wife's hut and waited outside, armed with a spear. When he emerged, the accused attacked him with bare hands, but the deceased, a more powerful man, threw him and attempted to escape, leaving behind his spear and axe. The accused picked up the spear and threw it at him, causing his death. He was convicted by a Major Court of murder but Bennet C.J. substituting a finding of culpable homicide not amounting to murder, said:

> "I think it must be allowed to the accused that he found the deceased in the hut in which his wife was sleeping in circumstances in which the purpose of adultery was certain... His final act was clearly premeditated, and I think it must be allowed that it was due to the cumulative provocation of the adultery, the struggle and the deceased's imminent escape. Committed on the spur of the moment in those circumstances, I think that there was considerable excuse for his act."

Provocation may be an accumulative one and the last incident may be the last straw.[41] In Sudan Government v. Gadeem Ragab,[42] it was also held that when a man does not act on, but broods over, provocation which at the time

given was grave, further provocation though less grave in degree may "throw him off his balance" and thus grave and sudden within the meaning of S.249(1) of the penal code.

In Sudan Government v. EL Tahir Adam Ahmed,[43] Attig J, said:

> "Deceased, no doubt, had constantly behaved in the most insolent and provocative manner. Though the last act of the deceased may be insufficient to mitigate the crime, yet it was the climax which, when taken with his previous conduct, rendered the provocation sufficiently grave to be the mitigating factor required under the section."

It is well established now that the gravity of the provocation must be measured by what preceded it and not merely by what it amounted to in itself.[44]

The limitation on the defence of Provocation in the Sudan:

Under S. 38, such grave and sudden provocation as under any section of the code modifies the nature of an offence or mitigates the penalty which may be inflicted shall not be deemed to include:

(i) Provocation sought or voluntarily provoked by the offender as an excuse for committing an offence; or

(ii) Provocation given by anything done in obedience to law or by a public servant in the lawful exercise of

the powers of such public servant; or

(iii) Provocation given by anything in the lawful exercise of the right of private defence.

The provocation must not be sought or provoked. In Sudan Government v. Musa Samara Musa,[45] accused heard his mother-in-law leave his house to meet her lover. He followed her to where he found her with her lover and killed the lover.
It was held that where accused was aware of the purpose for which his mother-in-law left the house, the provocation for finding her with a lover after following her could not be so grave or sudden to make available the partial defence.

In the unreported case of Sudan Government v. Iyeru Lojok,[46] Creed C.J. bearing in mind the difficulty faced by the Sudanese Courts in dealing with S.38, quoted Sir Hari Singh Gour's commentary on the Indian Penal Code on the effect of the first proviso to S. 38 as follows:

> "The effect of this proviso read with the exception(i.e. section 249(1) of the Sudan Penal Code) is that the provocation must come to him; he must not go to the provocation. The rule may be illustrated by reference to the case of adultery, in some of which the aggrieved husband followed his wicked wife to a place of assignation, a way from his house and where he killed either her or her paramour, and those in which the paramour visited her in his house,

> when he killed him on the spot. In the former case, the accused goes deliberately in search of the provocation. In the latter case the provocation comes to him and his act is outside the proviso."

This distinction by Gour in practice is not attainable. Because not all acts of adultery take place in the husband's house. Secondly the husband has the right to look for his wife at any place he suspects her to be. Practically speaking a wife prefers to commit adultery outside her matrimonial home.

The provocation must not be given by anything done in obedience to law or by a public servant in the exercise of his legal powers. According to KrishnaVasdev[47] the Sudanese Courts have not been called upon too frequently to deal with the second proviso to S. 38 of the Sudan Penal Code. He said the point seems to have been touched only in two unreported cases. In Such Government v. Khamis Suleiman Guma'a[48] the accused a soldier, while on escort duty, left the train at Um Ruwaba to find his wife, whose conduct had given him anxiety. He was taken into custody having resisted arrest. Four days later he got out of prison and snatched a knife. He was surrounded by police and seized by Adam Fadl, a police man, who he stabbed in the stomach causing his death. It was held that there was

no provocation whatever in this case and the accused was guilty of murder.

In the other case of Sudan Government v. Kerker,[49] the accused, who had been a thorn in the side of the local authority for some months, persisted in his refusal to surrender his pet bull, as required by the local court. He fatally speared his group leader, the deceased, who had ordered his arrest for non-payment of a court award and for being insulting to the deceased. Shortly before the accused snatched the spear to kill the deceased, the accused apparently was prepared to surrender to local authority provided he was detained at Aweil and not sent to Meer, where, according to his allegation, he had suffered the unpleasant experience of being held in a storeroom for three days. He was then bitten by snakes and found difficulty in controlling his excreta while in confinment.
The accused was found guilty of murder. His plea of provocation failed, because it was given by a public servant acting within his lawful powers in obedience to the law.

The provocation must not be given by anything done in the lawful exercise of the right of private defence. That is to say if a person lawfully exercising his right of private defence may give provocation to his aggressor, but the aggressor

is not entitled to take shelter behind the defence of grave and sudden provocation. A, attempts to pull Z's nose. Z, not exceeding the right of private defence, pushes A aside and A falls. A, moved to sudden and violent passion, kills Z. The defence is not available.[50]

The proportion rule of retaliation in the Sudan:

In the Sudan old English decisions prior to the coming into force of the homicide Act, 1957 have been followed, though in the current English Law the proportionality rule of retaliation seems to have lost some of its significance especially after the homicide Act, 1957.[51] The rule prevailing in England at one time was that "it is not every slight provocation which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter."[52] This has been followed in the Sudan. In Sudan Government v. Ibrahim Ahmed EL Faki Abdulla,[53] the deceased asked the accused to have homosexual relations with him. Accused responded by beating and stabbing him to death. It was held that deceased's request to have homosexual relations is not sufficiently "grave" provocation to reduce murder to caulpable homicide not amounting to murder under penal code, S. 249(1). Retaliation must be reasonably commensurate with the provocation received.

A writer[54] commented on the proportionality rule of retaliation in the Sudan. He said:

> "The attitude of the Sudan Courts to the proportion rule of retaliation seems unsettled. In some cases the rule has been followed with full rigour and rigidity while in others the courts hardly seem to have addressed their minds to the relationship between provocation and retaliation."

In Sudan Government v. Awad Adam Omen,[55] after a fight broke out in which deceased and accused were involved, all but the accused used sticks. In the fight, accused stabbed deceased in the back. It was held that since the retaliatory stabbing was far out of proportion to the provocation, the accused cannot plead grave and sudden provocation under penal code, S.249(1).

In the Sudan the old English decision of Lord Devlin [56] that "fists might be answered with fists, but not with a deadly weapon" was adhered to. In Sudan Government v. Hassan Talfan Hassan[57] the deceased suspected the accused of having illicit relations with his wife and warned his wife that he did not like to see the accused in his house. The accused was seen by the deceased with a light stick. The accused drew his knife and stabbed the deceased. Accused then took the deceased's knife from its sheath and stabbed the deceased with both knives. The deceased died

two days later. It was held that accused's reaction to the attack with a light stick did not justify retaliation with a knife, the retaliation must bear some relation to the provocation.

In Sudan Government v. Omer Teirab Rhama,[58] where the accused stabbed the deceased to death when the latter uttered some abusive remarks about certain female members of the family of the accused. It was held that retaliation was not disproportionate and the accused was convicted of manslaughter.

It is pertinant to mention that S.249(1) of the Sudanese Penal Code does not mention the proportionality rule in its provisions. The courts were only fond of importing the Common Law principles in their decisions.

The Burden of Proof:

The general rule is that the prosecution has the burden of proving the actus reus and mensrea beyond reasonable doubt, but the burden of adducing evidence sufficient to raise a defence is normally borne by the accused in the first instance.

The rule that the prosecution must prove the accused's guilt beyond reasonable doubt means that it is generally incumbent on the prosecution to

negative any defence raised by the accused. In the case of Woolmingtom v. D.P.P.[59] Lord Sankey said that the prosecution bears the burden of negativing a plea that a verdict of manslaughter should be returned on a charge of murder because of provocation caused by the conduct of the deceased.

In the Sudan, once the court is satisfied beyond reasonable doubt that the accused caused death either intending to do so or with the knowledge that death would be the probable consequence, the court then considers the mitigating circumstances, such as provocation, whether or not the accused had pleaded them specifically.[60]

In Sudan Government v. EL Tom Siddik Abbakar[61] it has been held that it is the duty of the court to consider the question of absence of provocation before reaching a finding in all cases involving charges of murder.

The Criminal Court Circular No. 3 issued on 8 August 1950 provides as follows:

> "the prosecution has to prove the offence of murder; and that before a court may convict, it has to be satisfied the whole of the evidence; including any explanation by the accused; that the mitigating

> circumstances which constitute any of the exceptions do not exist, since the absence of such circumstances is an essential part of the proof of murder."[62]

If from the evidence adduced before the court there is possibility of a plea of provocation, the court duty is to help the accused in raising it.[63]

The standard of proof:

In the Sudan it has been held that the standard of proving grave and sudden provocation is not beyond reasonable doubt. It is sufficient if the circumstances are such as to render the accused's story preponderant.[64]

Different examples of grave provocation in the Sudan:

The refusal of a wife to have sexual intercourse with her husband does not constitute a grave and sudden provocation under the Sudan Penal Code, S. 249(1)[65]

According to Sudan Penal Code, S.443, where a person sends a written letter through which he intentionally insults the receiver, there is no direct provocation to cause such receiver, to break the peace, because there is time to cool down.[66]

In the Sudan if the plea of provocation is raised against the acts of the father or uncle, it will not be recognised by the court. In Sudan Government v. EL Amin Kajo Hamied,[67] the accused was busy escorting the grazing cattle of his father. The deceased(the accused's uncle) had a particular cow and started leading it away. The accused stood on the way and refused the deceased to take the cow. The deceased slapped the accused on his face with his left hand, while carrying an axe on the right. The Supreme Court of the Sudan held that an uncle, like a father, has a legitimate power of discipline over his nephews, and hence any act incidental to that power causing slight injury in body or property does not constitute sudden and grave provocation within S. 249(1) of the Sudan Penal Code.

I really agree with the above decision because the court has considered the African realities that the power of discipline is vested in the hands of the father as well as the uncle. But in such cases it is very difficult where to draw a line. Let us suppose that the uncle is not the owner of that specific cow, only he depended on the bloodrelationship in taking it. Is it fair not to avail the

accused with the right to defend his property? Also is it fair that the uncle should be allowed to use his bloodrelationship to take the Law into his hands and to inflict any injury or insults on his nephew depending on the so-called bloodrelationship?

FOOTNOTES

1. (1973) S.L.J.R. 67 at P.68.
2. S. 275 S.P.C.
3. S. 276 S.P.C.
4. S. 297 S.P.C.
5. S. 261 S.P.C.
6. R.V. Cunningham(1959) 1 Q.B. 288
7. Explanation to S. 249(1), Sudan Penal Code.
8. Per Soni J. in Sudan Government v. Mohammed Ahmed Gadir(1961) S.L.J.R. 46 at P. 50.
9. (1969) S.L.J.R. 111 at P. 114.
10. Sudan Government v. Barakia Wajo(1961) S.L.J.R.
11. (1961) S.L.J.R. 46 at P.50.
12. (1956) S.L.J.R. 40 at P.41.
13. (1953) A.C. 200.
14. See Kharisus Chukkol, Defences to Criminal Liability in Nigerian Law: A critical appraisal at P. 82.
15. (1956) S.L.J.R. 39.
16. (1956) S.L.J.R. 36.
17. Supra
18. (1961) S.L.J.R. 116.
19. Ibid at 117
20. Ibid at 117
21. R V. Palmer(1913) 8 Cri. App. R. 207.
22. R v. Greening(1913) 8 Cri. App. R. 105
23. Quoted by Krishua Vasdeu, The Law of Homicide in the Sudan at P. 179.
24. Krishna Vasdeu, op. cit at P. 180

25. (1961) S.L.J.R. 95.

26. Kota Potharaju v. Emp(1932) A.I.R. Mad. 25

27. See S.387 of the Northern Nigeria Penal Code.

28. (1969) S.L.J.R. 111

29. Ibid at P. 115

30. See also the Penal Code of Northern Nigeria, S. 284, N.N.P.C.

31. (1963) S.L.J.R. 163

32. Krishua Vasdeu, op. cit. at P. 190

33. (1962) S.L.J.R. 148.

34. (1969) S.L.J.R. 85

35. Ibid at 87-88.

36. (1957) S.L.J.R. 72 at 73.

37. (1962) S.L.J.R. 126.

38. In Nigerian see the Case of R v. Adekanmi (1944) 17 N.L.R. 99, In the Sudan, see the case of S.G. v. Adam Salih Tibin(Supra); In English Law see R v. Rothwell (1871) 12 Cox, C.C. 145.

39. Krishua Vasdeu, op. cit. at P. 204.

40. Ibid at P. 204.

41. Sudan Government v. Abbakar Khatir(1968) S.L.J.R. 86

42. Supra.

43. (1969) S.L.J.R. 140 at 141.

44. Per Abu Rannat C.J., in Sudan Government v. Adam Salih Tibin(Supra)

45. (1961) S.L.J.R. 107

46. Krishua Vasdeu, op. cit. at P. 165

47. Ibid at P. 174.

48. Ibid

49. Ibid at P. 174-175

50. Illustration 111(c) of the Sudan Penal Code.

51. See A.J. Ashworth, 'The doctrine of provocation' Cambridge Law Journal(1976) Vol.35,292 at P. 303.

52. R v. Duffy (1949) 1 ALL E.R. 932.

53. (1961) S.L.J.R. 11

54. Krishua Vasdeu, op. cit, at P. 219

55. (1961) S.L.J.R. 75.

56. R v. Duff Supra

57. (1961) S.L.J.R. 75

58. (1972)S.L.J.R. 10

59. (1935) A.C. 462.

60. Criminal Court Circular No. 3

61. (1956) S.L.J.R. 39.

62. Clause 2(b) of the Criminal Court Circular 3.

63. See Clause 3, Criminal Court Circular No.3

64. Sudan Government v. Wall Noke Adwear (1973) S.L.J.R. 67.

65. Sudan Government v. Ibrahim Bireima Shiteita (1968) S.L.J.R. 38.

66. Sudan Government v. Saeed Abdel Fatah Mohammed (1968) S.L.J.R. 30.

67. (1973) S.L.J.R. 90.

CHAPTER IV

PROVOCATION AS A DEFENCE TO OFFENCES OTHER THAN HOMICIDE - A COMPARATIVE STUDY

In Nigeria, murder may be reduced to manslaughter when there exists sufficient provocation. This is because homicide committed under provocation ought to be punished, but in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain respect for human life. To treat a person guilty of such a homicide as murderer would shock the univeral feeling of mankind and would engage the public sympathy on the side of the delinquent against the Law.[1]

Section 318 of the criminal code provides that if a person kills another in the heat of passion caused by sudden provocation and before there is time for passion to cool, he is guilty not of murder but of manslaughter.
It must be understood however, that unless the provision of section 318 of the criminal code apply, it would be murder to kill another person.

The penal code also provides exceptions to culpable homicide punishable with death. These exceptions are to be found under section 222 of the penal code. It is pertinent to mention that section 222(1) of the Northern Nigeria penal code is identical with section 249(1) of the Sudanese penal code; and also identical with

Section 294 of the Ceylon Penal Code and S.300 of the Indian Penal Code. All these sections provide that culpable homicide is not punishable with death if committed under a grave and sudden provocation and before there is time for passion to cool.

In all cases, murder attracks a mandatory punishment of death sentence and provocation has for centuries voiced "the Laws concession to human infirmity."[2] Provocation when legally adequate, will therefore reduce murder to manslaughter in Nigeria.[3] Provocation which reduces what would otherwise amount to murder to manslaughter is a legal concept made up of a number of elements which must co-exist. In the case of State v. Obaji,[4] the Supreme Court of Nigeria held that for a person charged with murder to avail himself of the plea of provocation, as provided under S. 318 of the criminal code, the accused must have done the act for which he is charged:

(i) in the heat of passion;

(ii) this must have been caused by sudden provocation, and;

(iii) the act must have been committed before there is time for his passion to cool.

The courts emphasised the presence of these elements to show that provocation in Law means something other than a provocative incident.

As a general rule, provocation is not a complete defence to a criminal charge. At best, it reduces murder to manslaughter and in other cases, might be relevant in mitigating sentence. In R v. Cunningham,[5] the court held that the defence of provocation was not opened to the appellant on a charge of malicious wounding. The defence of provocation under English law arises only in a murder case as a defence which will reduce murder to manslaughter. Lord Simon had also put the matter perfectly clear when he said:

> "In the case of lesser crimes, provocation does not alter the nature of the offence at all, but it is allowed for in sentencing."[6]

But there is a curious departure from the Common Law position under the Nigerian Criminal Code. Under this Code, provocation is a complete defence to a charge of assault. Under the Northern Nigeria Penal Code and the Sudanese Penal Code, provocation is only a mitigating factor and not at all a complete defence in cases of homicide as well as in cases of assault.

Provocation in Assault:

Section 284 of the Criminal Code provides:

> "A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is deprived by provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to coll;..."
> "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."

Section 1 of the criminal code defines the term "criminally responsible" as meaning "liable to punishment as for an offence". Section 284 of the criminal code therefore means that a person who commits assault is not liable to punishment for it, if the assault is committed upon a person who gives him provocation for the assault.

Section 252 of the criminal code defines assault as follows:

> " A person who strikes, touches or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly,without his consent, or with his consent if the consent is obtained by fraud, or who by and bodily actor gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or arrarently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault. The term "applies force" includes the case of applying heat, light, electrical forces, gas, odour, or any other substance or thing whatever if applied in such a degree to cause injury or personal discomfort."

Mere words can never amount to an assault. There must be some bodily act or gesture associated with the words indicating an intention of assaulting or which an ordinary person might reasonably construe as indicating such an intention.

Section 283 of the criminal code defines provocation for the purposes of section 284 of the code. Provocation is not a qualified defence in assault as it is in the Law of homicide. In practice, provocation is allowed a wider ambit as a defence to assault. But there is no reported case on this topic.

The penal code does not contain a corresponding provision as section 284 of the criminal code. It might be infered that under the penal code, provocation is not a complete defence to a criminal charge. The penal code however, contains a number of provisions providing for situations where provocation may modify the sentence for certain kinds of assault. An assault is a threat of criminal force intended to be taken seriously and made in circumstances suggesting apparent ability to carry out the threat at once.[7] It is important to note the effect of provocation in assault under the Northern Nigeria and the Sudanese Penal Code. If the provocation is grave and sudden, it is a partial defence to a charge

of assault or criminal force; having the effect of mitigating punishments. Thus section 266 of the Northern Nigeria penal code which is identical with section 297 of the Sudanese Penal Code, provides:

> "Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with imprisonment for a term of 3 months or a fine which may extended to £20. (N.N.)(one month or with fine which may extend to £5 (Sudan) or with both (S.266, N.N.,297, Sudan P.C.)."

Section 266 of the Northern Nigeria Penal Code has drastically reduced the punishment prescribed by section 265 of the penal code for assaults or criminal force otherwise than on grave and sudden provocation.[8]

In cases of assaults provocation can only be pleaded where the person assaulted or on whom criminal force is used, is the person who gave the provocation.

Is the defence of grave and sudden provocation available when an accused is charged with one of the aggravated assaults punishable under sections 267-270, Northern Nigeria, 298-301, Sudan Penal Code? It is not likely that the defence of provocation will avail in regard to an assault on a public servant as provided by

Section 267 of the Northern Nigeria penal code and Section 298 of the Sudan penal code. This is because provocation given in the exercise of lawful powers cannot be pleaded in defence.[9] Assaults of the kind punished under sections 267-270 Northern Nigeria, 298-301, Sudan penal code, are not, in the ordinary course of human experience, usually provoked by the person assaulted. But the defence of grave and sudden provocation should be considered in such cases where there is evidence of it.

In cases of voluntarily causing hurt under Section 248, Northern Nigeria, section 279 Sudan penal code, there are words expressly excluding the defence of provocation except as provided under sections 244, 245, N.N., and 275 of the Sudan penal code (voluntarily causing hurt on provocation). There are no such words in the other sections prescribing punishment for aggravated cases of voluntarily causing hurt.[10] It would seem that grave and sudden provocation is no defence to a charge under the sections last mentioned.[11] Professor Gledhill is of the opinion that the defence of provocation is not available as a defence to a charge of aggravated assault. He said this is supported by the changed

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[illegible] 248, N.N. 279, Sudan penal code.

in the order of the sections in the Sudan and Northern Nigerian Codes. He further said that in the Indian Code the sections defining assault and criminal force are followed by the penal sections, then come the sections dealing with aggravated assaults and finally the section punishing assault and criminal force on provocation. But in the Sudan and Northern Nigerian Codes the section punishing assault and criminal force on provocation comes after the section punishing assault and criminal force without provocation and before the sections dealing with aggravated assaults, suggesting that it is a proviso to the section it follows, but not to those it precedes.[12]

One can say that the position in cases of assault under the Northern Nigeria penal code and the Sudan is similar to the position in English Law, except that under the latter system the extent of the mitigation depends upon the good sense of the trial judge and it is not laid down by Law. Another factor that has to be borne in mind, is that the provocation for the purpose of reducing murder to manslaughter is quite distinct from the provocation for the purpose of reducing the punishment of a charge of assault or exemption from the criminal liability if the plea is upheld as a complete defence under the criminal code.[13]

So provocation which will not be sufficient for reducing murder to manslaughter may be sufficient for the purposes of mitigating the sentences in cases of assault.[14]

Provocation and attempted Murder:

Suppose A shoots at B, misses him altogether, and is charged with attempted murder. Can A validly rely on provocation as an excuse to this assault? Can such an act be brought within the ambit of section 284 of the criminal code? Apparently, the Nigerian codes are silent on this issue. It is respectfully submitted that there is nothing in the criminal code to preclude the application of section 284 of the criminal code to justify an "attempted murder" in so far as it is an assault as defined in section 252 of the criminal code. Also, it is logical to think that the doctrine of provocation will apply in such a case of attempted murder. Proof of provocation would negative the intent to murder and would therefore require A to be acquitted of the attempt. A could not be convicted of an attempt to murder unless it would have been murder if he had succeeded; and it would not have been murder if he had been provoked. But if as the facts are, A cannot be convicted of an attempt, he has to be acquitted altogether, for there is no power to convict him

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[illegible] (1928) 3 Cr. [illegible] 125

of anything else. Even if there is such a thing as "attempted manslaughter," it could hardly apply in these circumstances because attempt requires an actual intention and a further act towards the commission of the offence. In Newzealand provocation is a qualified defence to a charge of attempted murder.

The social significance of the effect of provocation on the defendant's mind is not diminished merely because the victim by good fortune escapes death. Provocation therefore ought to diminish or extenuate guilt in any offence which depends on a state of mind identical with the mental element in murder. In the case of Smith,[15] the New Zealand court held that provocation is a defence to a charge of attempted murder, the reasoning being that if the death would have been manslaughter, the attempt cannot be murder. In R v. Sleep,[16] Hart J. held that provocation is a complete defence to manslaughter of which an assault is an element.

The common Law position is illustrated by the case of R v. John Bruzas,[17] in which the accused pushed his wife from a window at second floor level

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with the result that she suffered wounds. There was evidence of provocation. On a two count indictement for attempted murder and wounding with intent. It was submitted on behalf of the accused that there was no case to answer in relation to attempted murder. The counsel contended that if there was provocation, such as would reduce the full offence from murder to manslaughter, it was impossible to convict of attempted murder. This was rejected by Eveleigh, J. According to him, "provocation is not a defence to count 1 or 2 but is a factor to be taken into account withall the other evidence indeciding what the accused's actual intention was."[18]

The better view however, is that unsuccessfully advanced by counsel for the accused.

Section 229 of the Northern Nigeria penal code, which is identical with section 257, Sudan penal code, is an express provision relating to an attempt to commit culpable homicide punishable with death. This section applies when the offender does an act, which does not result in death, with such intention or knowlege and in such circumstances that, if the act caused death, he would be guilty culpable homicide. There is divergence of judicial opinion in jurisdictions having identical provision in their codes such as India and Sudan.

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18. Ibid ... .

However, it has been submitted that the words must be interpreted to mean that they refer to circumstances excluding the absence of any general exception in chapter 2 of the penal code and any special exception in section 222 of the penal code, such as grave and sudden provocation.[19] What is important is the intention or knowlege which must be such that, if the attempt had succeeded, the offender would have been guilty of the capital offence owing to the absence of circumstances giving the benefit of a general or special exemption from liability. This section (i.e. S.`229 of the penal code) applies in most cases where the act consist of shooting at another or attacking with a sharp or pointed weapon and either missing him or causing injury short of death.

There is also section 230 of the penal code relating to attempt to commit culpable homicide not punishable with death. The language used in this ection is similar to that used in the preceding section. Liability is incurred when the intention or knowledge are such as prima facie would have involved liability for capital homicide, if death had resulted, but one or more of the exceptions in section 222 of the penal code apply.[20]

Effect of Provocation:

Under the penal codes provocation is no ground for exempting one absolutely from criminal responsibility for his acts, but may be a ground for finding him guilty of a crime of lesser degree or for mitigating the punishment. A person cannot escape liability altogether by showing that he was provoked, but the fact that an offence was committed under provocation may constitute evidence of an absence of malice and thus result in his conviction for a crime of lesser degree or be a ground for inflicting less severe punishment.

Under the criminal code however, provocation may constitute a full defence to an assault. This means that provocation under the criminal code, can make up adequately for an assault, entitling the offender to be set free unconditionally. But under the Northern Nigeria and the Sudanese penal code provocation is a mitigating factor only. In this connection a writer[21] commented vividly on the stand of the penal code. He said:

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

1. Penal Law in India 9th ed. Vol. 4 P.2246.
2. Broadfoot's case (1743) Fost 154.
3. See section 318 C.C.; S.222(1) P.C.
4. (1965) N.M.L.R. 417.
5. (1957) 2 Q.B. 396.
6. (1946) A.C. at P. 601.
7. See section 264 of the penal code and section 296, Sudan P.C.- Both sections are identical.
8. Section 265 provides punishment (q) with imprisonment for a term which may extend to one year or with fine or with both;
9. See S.38 of N.N.P.C.
10. See sections 249, 250, 251, N.N., 280,281, 282, 283, Sudan Penal Code.
11. A Gledhill, The Penal Codes of Northern Nigeria and the Sudan at P. 431
12. Ibid.
13. Section 284 C.C.
14. See R v. Garner (1924) 18 Cr. App. R. 125.
15. (1964) 2 N.L.R. 834.
16. (1966) Qd R. 47.
17. (1972) C.L.R. 367.
18. Ibid at P 269
19. A Gledhill, op cit. at P. 497
20. Ibid at P 498
21. Kharisu S. Chukkol, Defence to Criminal Liability in Nigerian Law: Acritical appraisal at P. 77.

CHAPTER V

THE TEST OF PROVOCATION

Provocation and the reasonableman:

It is to be observed that section 3 of the Homicide Act of 1957 provides that the test to be applied is that of the effect of the provocation on a reasonable man. Under the criminal code section 283 talks of an ordinary person and not a reasonable man. The penal code has not been explicit on the test to be applied to ascertain whether, in any given situation, a person who pleads provocation was in fact due to the grave and sudden provocation lost his power of self-control and kill the source of provocation. However, as Dr. Kharisu S. Chukkol[1] said:

> "... as the nucleus of Nigeria's criminal Law is the English Common Law the notion of the reasonable man in the latter has crept into our law"

It is pertinent to examine the position of the reasonable man under the English law since our law has borrowed the notion of the reasonableman from the Common Law.

At Common Law, in regard to the defence of provocation, "reasonable man" seems to have made its appearance in 1837 in the case of R V. Kirkham[2] which is considered as the beginning of the application of the objective standard. Before 1837 it is generally believed that the subjective test was applied. In the case of R v. Welsh[3] the reasonable man was well recognised by Justice Keating.

The learned Judge said:

> "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man .... In Law it is necessary that there should have been a serious provocation in order to reduce the crime to manslaughter, as for instance, a blow, and a severe blow - something which might naturally cause an ordinary and reasonable man to lose his self-control and commit such an act."

Professor Glanville Williams, Commented on the above case. He said:

> "It seems absurd to say that the reasonable man will commit a felony the possible punishment for which is imprisonment for life. To say that the "ordinary" man will commit this felory is hardly less absurd."

What colour is the reasonable man?

In the words of Lord Goddard C.J.[4]

> "No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the good sense of the jury."

In the case of Hardy v. Motor Insurance Bureau[5]

Pearson L.J. has stated as follows:

> "Normally in legal mythology the reasonable man is idealised average man, behaving always as the average man behaves in his good moments. The average man may have his bad moments when, for no sufficient reason, he loses his temper or suffer from panic, or when he becomes careless, or when he is stupid or biased or hasty in his judgements. The reasonable man, as normally understood, has no such bad moments."

To support what I have said earlier about the reasonable man, it is worth looking briefly at some of the earlier authorities. In Alexander's Case,[6] it was held that a person who is mentally deficient is subject to the ordinary Law of provocation, in the sense that "matter which is outside the category of provocation for an ordinary person (e.g. words) will not avail him. In R v. Lesbini[7] the court of Appeal convicted the accused who had shot his victim to death and rejected counsel's argument that the accused was suffering from a defective control and want of mental balance. In Smith's case,[8] a pregnant woman killed a child by hitting it over the head, on account of some act on its part which had annoyed her; her pregnant state was held irrelevant, when something done by a child of two-and-a-half years could clearly not amount to provocation in Law.
In R v. McCarthy,[9] the accused who was drunk alleged that the deceased had indecently assaulted him whereupon he struck the latter to death. The defence of provocation was rejected and he was convicted of murder. His drunkeness was not taken into account and he was judged by the standard of a sober man.

As mental peculiarities do not give a privileged position in the Law of provocation, so neither do physical peculiarities. The harshness of the test of the reasonable man was reflected in the

case of Bedder v. D.P.P.,[10] a youth of 18 years who was impotent tried unsuccessfully to have sexual intercourse with a prostitute who later taunted and jeered at him. He became enraged that he stabbed her with a knife, and killed her. The house of Lords held that, in determining whether there had been provocation sufficient to reduce the crime from murder to manslaughter, the test to be applied was the effect of the alleged provocation on the mind of an ordinary reasonable man, and, in applying this test, it was hot right notionally to invest the hypothetical ordinary reasonable man with the physical peculiarities of the person charged.

The reasonable man test has received many severe criticisms. It has been argued that the reasonable man rule in provocation should be abolished.[10(a)] Since the rule is purely a judicial creation, and a fairly recent one at that, there is no obvious reason why in a purely common law jurisdiction it should not be judicially abolished. Where, however, the rule has received legislative recognition(as by section 3 of the Homicide Act), it would doubtless require legislative eradication.[11] Lord Simmonds in Bedder's Case [12] thought that the rigid application of the objective test was not the best approach. He said:

> "It would plainly be illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet recognize for that purpose some unusual characteristics be it impotence or another ...The proposed distinction appears to me to ignore the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation is or may be itself conditioned by some physical defect ..."[13]

Another criticism has been singled out by Dr. Turner as a form of question. He asked:

> "If the reason for excusing the normal man is that his innate control mechanism has been paralysed by events how can it be ethically proper to refuse the like benignity to a sub-normal man when his innate control mechanism has so paralysed, and thus to deal leniently with a man to whom nature has been moderately unkind while treating with ruthless severity the man to who nature has been immoderately unkind?"[14]

Section 3 of the Homicide Act 1957 provides:

> ".....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..."

The further effects of S.3 of the Homicide Act on the objective test remained uncertain until the decision of the House of Lords in the case of Camplin v. D.P.P.[15] In this case the accused, a fifteen year old boy was charged with murder in having killed a man who had allegedly buggered (and subsequently laughed) at him. The defence counsel argued that what the jury ought to consider was not whether a reasonable adult would have been provoked but the reaction of a

reasonable boy of the accused's age. The lower court, following the test laid down in Bedder, rejected his contention and the boy successfully appealed to the court of Appeal. On further appeal by the prosecution to the House of Lords their Lordships accepted the Court of Appeal's view that the entire factual situation must be considered including the characteristics of the accused - his age, colour, sex and other physical or mental disabilities.

In the words of Lord Morris,

> "It must now seem unreal to tell the jury that the notional reasonable man is someone without the characteristics of the accused - this would be to intrude into their province..."[16]

One could say the result of Camplin is to bring the Common Law, as modified by the Homicide Act, into line with the New Zealand Crimes Act 1961. Section 169(2) of the New Zealand's Crimes Act provides as follows:

> "Provocation can be deemed sufficient if it would deprive a person having the power of self-control but otherwise having the characteristics of the offender."

Having examined the position of the reasonable man under the Common Law, I would like to examine it under the Nigerian and the Sudan respectively.

The question as to whether the test of provocation was objective or subjective was first raised in Nigeria in R V. Nwanjoku.[17] This case

given was grave, further provocation though less grave in degree may "throw him off his balance" and thus grave and sudden within the meaning of S.249(1) of the penal code.

In Sudan Government v. EL Tahir Adam Ahmed,[43] Attig J, said:

> "Deceased, no doubt, had constantly behaved in the most insolent and provocative manner. Though the last act of the deceased may be insufficient to mitigate the crime, yet it was the climax which, when taken with his previous conduct, rendered the provocation sufficiently grave to be the mitigating factor required under the section."

It is well established now that the gravity of the provocation must be measured by what preceded it and not merely by what it amounted to in itself.[44]

The limitation on the defence of Provocation in the Sudan:

Under S. 38, such grave and sudden provocation as under any section of the code modifies the nature of an offence or mitigates the penalty which may be inflicted shall not be deemed to include:

(i) Provocation sought or voluntarily provoked by the offender as an excuse for committing an offence; or

(ii) Provocation given by anything done in obedience to law or by a public servant in the lawful exercise of

the powers of such public servant; or

(iii) Provocation given by anything in the lawful exercise of the right of private defence.

The provocation must not be sought or provoked. In Sudan Government v. Musa Samara Musa,[45] accused heard his mother-in-law leave his house to meet her lover. He followed her to where he found her with her lover and killed the lover.
It was held that where accused was aware of the purpose for which his mother-in-law left the house, the provocation for finding her with a lover after following her could not be so grave or sudden to make available the partial defence.

In the unreported case of Sudan Government v. Iyeru Lojok,[46] Creed C.J. bearing in mind the difficulty faced by the Sudanese Courts in dealing with S.38, quoted Sir Hari Singh Gour's commentary on the Indian Penal Code on the effect of the first proviso to S. 38 as follows:

> "The effect of this proviso read with the exception(i.e. section 249(1) of the Sudan Penal Code) is that the provocation must come to him; he must not go to the provocation. The rule may be illustrated by reference to the case of adultery, in some of which the aggrieved husband followed his wicked wife to a place of assignation, a way from his house and where he killed either her or her paramour, and those in which the paramour visited her in his house,

> when he killed him on the spot. In the former case, the accused goes deliberately in search of the provocation. In the latter case the provocation comes to him and his act is outside the proviso."

This distinction by Gour in practice is not attainable. Because not all acts of adultery take place in the husband's house. Secondly the husband has the right to look for his wife at any place he suspects her to be. Practically speaking a wife prefers to commit adultery outside her matrimonial home.

The provocation must not be given by anything done in obedience to law or by a public servant in the exercise of his legal powers. According to KrishnaVasdev[47] the Sudanese Courts have not been called upon too frequently to deal with the second proviso to S. 38 of the Sudan Penal Code. He said the point seems to have been touched only in two unreported cases. In Such Government v. Khamis Suleiman Guma'a [48] the accused a soldier, while on escort duty, left the train at Um Ruwaba to find his wife, whose conduct had given him anxiety. He was taken into custody having resisted arrest. Four days later he got out of prison and snatched a knife. He was surrounded by police and seized by Adam Fadl, a police man, who he stabbed in the stomach causing his death. It was held that there was

no provocation whatever in this case and the accused was guilty of murder.

In the other case of Sudan Government v. Kerker,[49] the accused, who had been a thorn in the side of the local authority for some months, persisted in his refusal to surrender his pet bull, as required by the local court. He fatally speared his group leader, the deceased, who had ordered his arrest for non-payment of a court award and for being insulting to the deceased. Shortly before the accused snatched the spear to kill the deceased, the accused apparently was prepared to surrender to local authority provided he was detained at Aweil and not sent to Meer, where, according to his allegation, he had suffered the unpleasant experience of being held in a storeroom for three days. He was then bitten by snakes and found difficulty in controlling his excreta while in confinment.
The accused was found guilty of murder. His plea of provocation failed, because it was given by a public servant acting within his lawful powers in obedience to the law.

The provocation must not be given by anything done in the lawful exercise of the right of private defence. That is to say if a person lawfully exercising his right of private defence may give provocation to his aggressor, but the aggressor

is not entitled to take shelter behind the defence of grave and sudden provocation. A, attempts to pull Z's nose. Z, not exceeding the right of private defence, pushes A aside and A falls. A, moved to sudden and violent passion, kills Z. The defence is not available.[50]

The proportion rule of retaliation in the Sudan:

In the Sudan old English decisions prior to the coming into force of the homicide Act, 1957 have been followed, though in the current English Law the proportionality rule of retaliation seems to have lost some of its significance especially after the homicide Act, 1957.[51] The rule prevailing in England at one time was that "it is not every slight provocation which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter."[52] This has been followed in the Sudan. In Sudan Government v. Ibrahim Ahmed EL Faki Abdulla,[53] the deceased asked the accused to have homosexual relations with him. Accused responded by beating and stabbing him to death. It was held that deceased's request to have homosexual relations is not sufficiently "grave" provocation to reduce murder to caulpable homicide not amounting to murder under penal code, S. 249(1). Retaliation must be reasonably commensurate with the provocation received.

A writer[54] commented on the proportionality rule of retaliation in the Sudan. He said:

> "The attitude of the Sudan Courts to the proportion rule of retaliation seems unsettled. In some cases the rule has been followed with full rigour and rigidity while in others the courts hardly seem to have addressed their minds to the relationship between provocation and retaliation."

In Sudan Government v. Awad Adam Omen,[55] after a fight broke out in which deceased and accused were involved, all but the accused used sticks. In the fight, accused stabbed deceased in the back. It was held that since the retaliatory stabbing was far out of proportion to the provocation, the accused cannot plead grave and sudden provocation under penal code, S.249(1).

In the Sudan the old English decision of Lord Devlin [56] that "fists might be answered with fists, but not with a deadly weapon" was adhered to. In Sudan Government v. Hassan Talfan Hassan[57] the deceased suspected the accused of having illicit relations with his wife and warned his wife that he did not like to see the accused in his house. The accused was seen by the deceased with a light stick. The accused drew his knife and stabbed the deceased. Accused then took the deceased's knife from its sheath and stabbed the deceased with both knives. The deceased died

two days later. It was held that accused's reaction to the attack with a light stick did not justify retaliation with a knife, the retaliation must bear some relation to the provocation.

In Sudan Government v. Omer Teirab Rhama,[58] where the accused stabbed the deceased to death when the latter uttered some abusive remarks about certain female members of the family of the accused. It was held that retaliation was not disproportionate and the accused was convicted of manslaughter.

It is pertinant to mention that S.249(1) of the Sudanese Penal Code does not mention the proportionality rule in its provisions. The courts were only fond of importing the Common Law principles in their decisions.

The Burden of Proof:

The general rule is that the prosecution has the burden of proving the actus reus and mensrea beyond reasonable doubt, but the burden of adducing evidence sufficient to raise a defence is normally borne by the accused in the first instance.

The rule that the prosecution must prove the accused's guilt beyond reasonable doubt means that it is generally incumbent on the prosecution to

negative any defence raised by the accused. In the case of Woolmingtom v. D.P.P.[59] Lord Sankey said that the prosecution bears the burden of negativing a plea that a verdict of manslaughter should be returned on a charge of murder because of provocation caused by the conduct of the deceased.

In the Sudan, once the court is satisfied beyond reasonable doubt that the accused caused death either intending to do so or with the knowledge that death would be the probable consequence, the court then considers the mitigating circumstances, such as provocation, whether or not the accused had pleaded them specifically.[60]

In Sudan Government v. EL Tom Siddik Abbakar[61] it has been held that it is the duty of the court to consider the question of absence of provocation before reaching a finding in all cases involving charges of murder.

The Criminal Court Circular No. 3 issued on 8 August 1950 provides as follows:

> "the prosecution has to prove the offence of murder; and that before a court may convict, it has to be satisfied the whole of the evidence; including any explanation by the accused; that the mitigating

> circumstances which constitute any of the exceptions do not exist, since the absence of such circumstances is an essential part of the proof of murder."[62]

If from the evidence adduced before the court there is possibility of a plea of provocation, the court duty is to help the accused in raising it.[63]

The standard of proof:

In the Sudan it has been held that the standard of proving grave and sudden provocation is not beyond reasonable doubt. It is sufficient if the circumstances are such as to render the accused's story preponderant.[64]

Different examples of grave provocation in the Sudan:

The refusal of a wife to have sexual intercourse with her husband does not constitute a grave and sudden provocation under the Sudan Penal Code, S. 249(1)[65]

According to Sudan Penal Code, S.443, where a person sends a written letter through which he intentionally insults the receiver, there is no direct provocation to cause such receiver, to break the peace, because there is time to cool down.[66]

In the Sudan if the plea of provocation is raised against the acts of the father or uncle, it will not be recognised by the court. In Sudan Government v. EL Amin Kajo Hamied,[67] the accused was busy escorting the grazing cattle of his father. The deceased(the accused's uncle) had a particular cow and started leading it away. The accused stood on the way and refused the deceased to take the cow. The deceased slapped the accused on his face with his left hand, while carrying an axe on the right. The Supreme Court of the Sudan held that an uncle, like a father, has a legitimate power of discipline over his nephews, and hence any act incidental to that power causing slight injury in body or property does not constitute sudden and grave provocation within S. 249(1) of the Sudan Penal Code.

I really agree with the above decision because the court has considered the African realities that the power of discipline is vested in the hands of the father as well as the uncle. But in such cases it is very difficult where to draw a line. Let us suppose that the uncle is not the owner of that specific cow, only he depended on the bloodrelationship in taking it. Is it fair not to avail the

accused with the right to defend his property? Also is it fair that the uncle should be allowed to use his bloodrelationship to take the Law into his hands and to inflict any injury or insults on his nephew depending on the so-called bloodrelationship?

FOOTNOTES

1. (1973) S.L.J.R. 67 at P.68.
2. S. 275 S.P.C.
3. S. 276 S.P.C.
4. S. 297 S.P.C.
5. S. 261 S.P.C.
6. R.V. Cunningham(1959) 1 Q.B. 288
7. Explanation to S. 249(1), Sudan Penal Code.
8. Per Soni J. in Sudan Government v. Mohammed Ahmed Gadir(1961) S.L.J.R. 46 at P. 50.
9. (1969) S.L.J.R. 111 at P. 114.
10. Sudan Government v. Barakia Wajo(1961) S.L.J.R.
11. (1961) S.L.J.R. 46 at P.50.
12. (1956) S.L.J.R. 40 at P.41.
13. (1953) A.C. 200.
14. See Kharisus Chukkol, Defences to Criminal Liability in Nigerian Law: A critical appraisal at P. 82.
15. (1956) S.L.J.R. 39.
16. (1956) S.L.J.R. 36.
17. Supra
18. (1961) S.L.J.R. 116.
19. Ibid at 117
20. Ibid at 117
21. R V. Palmer(1913) 8 Cri. App. R. 207.
22. R v. Greening(1913) 8 Cri. App. R. 105
23. Quoted by Krishua Vasdeu, The Law of Homicide in the Sudan at P. 179.
24. Krishna Vasdeu, op. cit at P. 180

25. (1961) S.L.J.R. 95.

26. Kota Potharaju v. Emp(1932) A.I.R. Mad. 25

27. See S.387 of the Northern Nigeria Penal Code.

28. (1969) S.L.J.R. 111

29. Ibid at P. 115

30. See also the Penal Code of Northern Nigeria, S. 284, N.N.P.C.

31. (1963) S.L.J.R. 163

32. Krishua Vasdeu, op. cit. at P. 190

33. (1962) S.L.J.R. 148.

34. (1969) S.L.J.R. 85

35. Ibid at 87-88.

36. (1957) S.L.J.R. 72 at 73.

37. (1962) S.L.J.R. 126.

38. In Nigerian see the Case of R v. Adekanmi (1944) 17 N.L.R. 99, In the Sudan, see the case of S.G. v. Adam Salih Tibin(Supra); In English Law see R v. Rothwell (1871) 12 Cox, C.C. 145.

39. Krishua Vasdeu, op. cit. at P. 204.

40. Ibid at P. 204.

41. Sudan Government v. Abbakar Khatir(1968) S.L.J.R. 86

42. Supra.

43. (1969) S.L.J.R. 140 at 141.

44. Per Abu Rannat C.J., in Sudan Government v. Adam Salih Tibin(Supra)

45. (1961) S.L.J.R. 107

46. Krishua Vasdeu, op. cit. at P. 165

47. Ibid at P. 174.

48. Ibid

49. Ibid at P. 174-175

50. Illustration 111(c) of the Sudan Penal Code.

51. See A.J. Ashworth, 'The doctrine of provocation' Cambridge Law Journal(1976) Vol.35,292 at P. 303.

52. R v. Duffy (1949) 1 ALL E.R. 932.

53. (1961) S.L.J.R. 11

54. Krishua Vasdeu, op. cit, at P. 219

55. (1961) S.L.J.R. 75.

56. R v. Duff Supra

57. (1961) S.L.J.R. 75

58. (1972)S.L.J.R. 10

59. (1935) A.C. 462.

60. Criminal Court Circular No. 3

61. (1956) S.L.J.R. 39.

62. Clause 2(b) of the Criminal Court Circular 3.

63. See Clause 3, Criminal Court Circular No.3

64. Sudan Government v. Wall Noke Adwear (1973) S.L.J.R. 67.

65. Sudan Government v. Ibrahim Bireima Shiteita (1968) S.L.J.R. 38.

66. Sudan Government v. Saeed Abdel Fatah Mohammed (1968) S.L.J.R. 30.

67. (1973) S.L.J.R. 90.

CHAPTER IV

PROVOCATION AS A DEFENCE TO OFFENCES OTHER THAN HOMICIDE - A COMPARATIVE STUDY

In Nigeria, murder may be reduced to manslaughter when there exists sufficient provocation. This is because homicide committed under provocation ought to be punished, but in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain respect for human life. To treat a person guilty of such a homicide as murderer would shock the univeral feeling of mankind and would engage the public sympathy on the side of the delinquent against the Law.[1]

Section 318 of the criminal code provides that if a person kills another in the heat of passion caused by sudden provocation and before there is time for passion to cool, he is guilty not of murder but of manslaughter.
It must be understood however, that unless the provision of section 318 of the criminal code apply, it would be murder to kill another person.

The penal code also provides exceptions to culpable homicide punishable with death. These exceptions are to be found under section 222 of the penal code. It is pertinent to mention that section 222(1) of the Northern Nigeria penal code is identical with section 249(1) of the Sudanese penal code; and also identical with

Section 294 of the Ceylon Penal Code and S.300 of the Indian Penal Code. All these sections provide that culpable homicide is not punishable with death if committed under a grave and sudden provocation and before there is time for passion to cool.

In all cases, murder attracks a mandatory punishment of death sentence and provocation has for centuries voiced "the Laws concession to human infirmity."[2] Provocation when legally adequate, will therefore reduce murder to manslaughter in Nigeria.[3] Provocation which reduces what would otherwise amount to murder to manslaughter is a legal concept made up of a number of elements which must co-exist. In the case of State v. Obaji,[4] the Supreme Court of Nigeria held that for a person charged with murder to avail himself of the plea of provocation, as provided under S. 318 of the criminal code, the accused must have done the act for which he is charged:

(i) in the heat of passion;

(ii) this must have been caused by sudden provocation, and;

(iii) the act must have been committed before there is time for his passion to cool.

The courts emphasised the presence of these elements to show that provocation in Law means something other than a provocative incident.

As a general rule, provocation is not a complete defence to a criminal charge. At best, it reduces murder to manslaughter and in other cases, might be relevant in mitigating sentence. In R v. Cunningham,[5] the court held that the defence of provocation was not opened to the appellant on a charge of malicious wounding. The defence of provocation under English law arises only in a murder case as a defence which will reduce murder to manslaughter. Lord Simon had also put the matter perfectly clear when he said:

> "In the case of lesser crimes, provocation does not alter the nature of the offence at all, but it is allowed for in sentencing."[6]

But there is a curious departure from the Common Law position under the Nigerian Criminal Code. Under this Code, provocation is a complete defence to a charge of assault. Under the Northern Nigeria Penal Code and the Sudanese Penal Code, provocation is only a mitigating factor and not at all a complete defence in cases of homicide as well as in cases of assault.

Provocation in Assault:

Section 284 of the Criminal Code provides:

> "A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is deprived by provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to coll;..."
> "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."

Section 1 of the criminal code defines the term "criminally responsible" as meaning "liable to punishment as for an offence". Section 284 of the criminal code therefore means that a person who commits assault is not liable to punishment for it, if the assault is committed upon a person who gives him provocation for the assault.

Section 252 of the criminal code defines assault as follows:

> " A person who strikes, touches or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly,without his consent, or with his consent if the consent is obtained by fraud, or who by and bodily actor gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or arrarently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault. The term "applies force" includes the case of applying heat, light, electrical forces, gas, odour, or any other substance or thing whatever if applied in such a degree to cause injury or personal discomfort."

Mere words can never amount to an assault. There must be some bodily act or gesture associated with the words indicating an intention of assaulting or which an ordinary person might reasonably construe as indicating such an intention.

Section 283 of the criminal code defines provocation for the purposes of section 284 of the code. Provocation is not a qualified defence in assault as it is in the Law of homicide. In practice, provocation is allowed a wider ambit as a defence to assault. But there is no reported case on this topic.

The penal code does not contain a corresponding provision as section 284 of the criminal code. It might be infered that under the penal code, provocation is not a complete defence to a criminal charge. The penal code however, contains a number of provisions providing for situations where provocation may modify the sentence for certain kinds of assault. An assault is a threat of criminal force intended to be taken seriously and made in circumstances suggesting apparent ability to carry out the threat at once.[7] It is important to note the effect of provocation in assault under the Northern Nigeria and the Sudanese Penal Code. If the provocation is grave and sudden, it is a partial defence to a charge

of assault or criminal force; having the effect of mitigating punishments. Thus section 266 of the Northern Nigeria penal code which is identical with section 297 of the Sudanese Penal Code, provides:

> "Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with imprisonment for a term of 3 months or a fine which may extended to £20. (N.N.)(one month or with fine which may extend to £5 (Sudan) or with both (S.266, N.N.,297, Sudan P.C.)."

Section 266 of the Northern Nigeria Penal Code has drastically reduced the punishment prescribed by section 265 of the penal code for assaults or criminal force otherwise than on grave and sudden provocation.[8]

In cases of assaults provocation can only be pleaded where the person assaulted or on whom criminal force is used, is the person who gave the provocation.

Is the defence of grave and sudden provocation available when an accused is charged with one of the aggravated assaults punishable under sections 267-270, Northern Nigeria, 298-301, Sudan Penal Code? It is not likely that the defence of provocation will avail in regard to an assault on a public servant as provided by

Section 267 of the Northern Nigeria penal code and Section 298 of the Sudan penal code. This is because provocation given in the exercise of lawful powers cannot be pleaded in defence.[9] Assaults of the kind punished under sections 267-270 Northern Nigeria, 298-301, Sudan penal code, are not, in the ordinary course of human experience, usually provoked by the person assaulted. But the defence of grave and sudden provocation should be considered in such cases where there is evidence of it.

In cases of voluntarily causing hurt under Section 248, Northern Nigeria, section 279 Sudan penal code, there are words expressly excluding the defence of provocation except as provided under sections 244, 245, N.N., and 275 of the Sudan penal code (voluntarily causing hurt on provocation). There are no such words in the other sections prescribing punishment for aggravated cases of voluntarily causing hurt.[10] It would seem that grave and sudden provocation is no defence to a charge under the sections last mentioned.[11] Professor Gledhill is of the opinion that the defence of provocation is not available as a defence to a charge of aggravated assault. He said this is supported by the changed

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[illegible] 244, N.N. 245, 275, Sudan penal code.

in the order of the sections in the Sudan and Northern Nigerian Codes. He further said that in the Indian Code the sections defining assault and criminal force are followed by the penal sections, then come the sections dealing with aggravated assaults and finally the section punishing assault and criminal force on provocation. But in the Sudan and Northern Nigerian Codes the section punishing assault and criminal force on provocation comes after the section punishing assault and criminal force without provocation and before the sections dealing with aggravated assaults, suggesting that it is a proviso to the section it follows, but not to those it precedes.[12]

One can say that the position in cases of assault under the Northern Nigeria penal code and the Sudan is similar to the position in English Law, except that under the latter system the extent of the mitigation depends upon the good sense of the trial judge and it is not laid down by Law. Another factor that has to be borne in mind, is that the provocation for the purpose of reducing murder to manslaughter is quite distinct from the provocation for the purpose of reducing the punishment of a charge of assault or exemption from the criminal liability if the plea is upheld as a complete defence under the criminal code.[13]

So provocation which will not be sufficient for reducing murder to manslaughter may be sufficient for the purposes of mitigating the sentences in cases of assault.[14]

Provocation and attempted Murder:

Suppose A shoots at B, misses him altogether, and is charged with attempted murder. Can A validly rely on provocation as an excuse to this assault? Can such an act be brought within the ambit of section 284 of the criminal code? Apparently, the Nigerian codes are silent on this issue. It is respectfully submitted that there is nothing in the criminal code to preclude the application of section 284 of the criminal code to justify an "attempted murder" in so far as it is an assault as defined in section 252 of the criminal code. Also, it is logical to think that the doctrine of provocation will apply in such a case of attempted murder. Proof of provocation would negative the intent to murder and would therefore require A to be acquitted of the attempt. A could not be convicted of an attempt to murder unless it would have been murder if he had succeeded; and it would not have been murder if he had been provoked. But if as the facts are, A cannot be convicted of an attempt, he has to be acquitted altogether, for there is no power to convict him

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[illegible] (1928) 8 Cr. [illegible] 125

of anything else. Even if there is such a thing as "attempted manslaughter," it could hardly apply in these circumstances because attempt requires an actual intention and a further act towards the commission of the offence. In Newzealand provocation is a qualified defence to a charge of attempted murder.

The social significance of the effect of provocation on the defendant's mind is not diminished merely because the victim by good fortune escapes death. Provocation therefore ought to diminish or extenuate guilt in any offence which depends on a state of mind identical with the mental element in murder. In the case of Smith,[15] the New Zealand court held that provocation is a defence to a charge of attempted murder, the reasoning being that if the death would have been manslaughter, the attempt cannot be murder. In R v. Sleep,[16] Hart J. held that provocation is a complete defence to manslaughter of which an assault is an element.

The common Law position is illustrated by the case of R v. John Bruzas,[17] in which the accused pushed his wife from a window at second floor level

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with the result that she suffered wounds. There was evidence of provocation. On a two count indictement for attempted murder and wounding with intent. It was submitted on behalf of the accused that there was no case to answer in relation to attempted murder. The counsel contended that if there was provocation, such as would reduce the full offence from murder to manslaughter, it was impossible to convict of attempted murder. This was rejected by Eveleigh, J. According to him, "provocation is not a defence to count 1 or 2 but is a factor to be taken into account withall the other evidence indeciding what the accused's actual intention was."[18]

The better view however, is that unsuccessfully advanced by counsel for the accused.

Section 229 of the Northern Nigeria penal code, which is identical with section 257, Sudan penal code, is an express provision relating to an attempt to commit culpable homicide punishable with death. This section applies when the offender does an act, which does not result in death, with such intention or knowlege and in such circumstances that, if the act caused death, he would be guilty culpable homicide. There is divergence of judicial opinion in jurisdictions having identical provision in their codes such as India and Sudan,

However, it has been submitted that the words must be interpreted to mean that they refer to circumstances excluding the absence of any general exception in chapter 2 of the penal code and any special exception in section 222 of the penal code, such as grave and sudden provocation.[19] What is important is the intention or knowlege which must be such that, if the attempt had succeeded, the offender would have been guilty of the capital offence owing to the absence of circumstances giving the benefit of a general or special exemption from liability. This section (i.e. S. 229 of the penal code) applies in most cases where the act consist of shooting at another or attacking with a sharp or pointed weapon and either missing him or causing injury short of death.

There is also section 230 of the penal code relating to attempt to commit culpable homicide not punishable with death. The language used in this ection is similar to that used in the preceding section. Liability is incurred when the intention or knowledge are such as prima facie would have involved liability for capital homicide, if death had resulted, but one or more of the exceptions in section 222 of the penal code apply.[20]

Effect of Provocation:

Under the penal codes provocation is no ground for exempting one absolutely from criminal responsibility for his acts, but may be a ground for finding him guilty of a crime of lesser degree or for mitigating the punishment. A person cannot escape liability altogether by showing that he was provoked, but the fact that an offence was committed under provocation may constitute evidence of an absence of malice and thus result in his conviction for a crime of lesser degree or be a ground for inflicting less severe punishment.

Under the criminal code however, provocation may constitute a full defence to an assault. This means that provocation under the criminal code, can make up adequately for an assault, entitling the offender to be set free unconditionally. But under the Northern Nigeria and the Sudanese penal code provocation is a mitigating factor only. In this connection a writer[21] commented vividly on the stand of the penal code. He said:

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

1. Penal Law in India 9th ed. Vol. 4 P.2246.
2. Broadfoot's case (1743) Fost 154.
3. See section 318 C.C., S.222(1) P.C.
4. (1965) N.M.L.R. 417.
5. (1957) 2 Q.B. 396.
6. (1946) A.C. at P. 601.
7. See section 264 of the penal code and section 296, Sudan P.C.- Both sections are identical.
8. Section 265 provides punishment (q) with imprisonment for a term which may extend to one year or with fine or with both;
9. See S.38 of N.N.P.C.
10. See sections 249, 250, 251, N.N., 280,281, 282, 283, Sudan Penal Code.
11. A Gledhill, The Penal Codes of Northern Nigeria and the Sudan at P. 431
12. Ibid.
13. Section 284 C.C.
14. See R v. Garner (1924) 18 Cr. App. R. 125.
15. (1964) 2 N.L.R. 834.
16. (1966) Qd R. 47.
17. (1972) C.L.R. 367.
18. Ibid at P 269
19. A Gledhill, op cit. at P. 497
20. Ibid at P 498
21. Kharisu S. Chukkol, Defence to Criminal Liability in Nigerian Law: Acritical appraisal at P. 77.

CHAPTER V

THE TEST OF PROVOCATION

Provocation and the reasonableman:

It is to be observed that section 3 of the Homicide Act of 1957 provides that the test to be applied is that of the effect of the provocation on a reasonable man. Under the criminal code section 283 talks of an ordinary person and not a reasonable man. The penal code has not been explicit on the test to be applied to ascertain whether, in any given situation, a person who pleads provocation was in fact due to the grave and sudden provocation lost his power of self-control and kill the source of provocation. However, as Dr. Kharisu S. Chukkol[1] said:

> "... as the nucleus of Nigeria's criminal Law is the English Common Law the notion of the reasonable man in the latter has crept into our law"

It is pertinent to examine the position of the reasonable man under the English law since our law has borrowed the notion of the reasonableman from the Common Law.

At Common Law, in regard to the defence of provocation, "reasonable man" seems to have made its appearance in 1837 in the case of R V. Kirkham[2] which is considered as the beginning of the application of the objective standard. Before 1837 it is generally believed that the subjective test was applied. In the case of R v. Welsh[3] the reasonable man was well recognised by Justice Keating.

The learned Judge said:

> "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man .... In Law it is necessary that there should have been a serious provocation in order to reduce the crime to manslaughter, as for instance, a blow, and a severe blow - something which might naturally cause an ordinary and reasonable man to lose his self-control and commit such an act."

Professor Glanville Williams, Commented on the above case. He said:

> "It seems absurd to say that the reasonable man will commit a felony the possible punishment for which is imprisonment for life. To say that the "ordinary" man will commit this felory is hardly less absurd."

What colour is the reasonable man?

In the words of Lord Goddard C.J.[4]

> "No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the good sense of the jury."

In the case of Hardy v. Motor Insurance Bureau[5]

Pearson L.J. has stated as follows:

> "Normally in legal mythology the reasonable man is idealised average man, behaving always as the average man behaves in his good moments. The average man may have his bad moments when, for no sufficient reason, he loses his temper or suffer from panic, or when he becomes careless, or when he is stupid or biased or hasty in his judgements. The reasonable man, as normally understood, has no such bad moments."

To support what I have said earlier about the reasonable man, it is worth looking briefly at some of the earlier authorities. In Alexander's Case,[6] it was held that a person who is mentally deficient is subject to the ordinary Law of provocation, in the sense that "matter which is outside the category of provocation for an ordinary person (e.g. words) will not avail him. In R v. Lesbini[7] the court of Appeal convicted the accused who had shot his victim to death and rejected counsel's argument that the accused was suffering from a defective control and want of mental balance. In Smith's case,[8] a pregnant woman killed a child by hitting it over the head, on account of some act on its part which had annoyed her; her pregnant state was held irrelevant, when something done by a child of two-and-a-half years could clearly not amount to provocation in Law.
In R v. McCarthy,[9] the accused who was drunk alleged that the deceased had indecently assaulted him whereupon he struck the latter to death. The defence of provocation was rejected and he was convicted of murder. His drunkeness was not taken into account and he was judged by the standard of a sober man.

As mental peculiarities do not give a privileged position in the Law of provocation, so neither do physical peculiarities. The harshness of the test of the reasonable man was reflected in the

case of Bedder v. D.P.P.,[10] a youth of 18 years who was impotent tried unsuccessfully to have sexual intercourse with a prostitute who later taunted and jeered at him. He became enraged that he stabbed her with a knife, and killed her. The house of Lords held that, in determining whether there had been provocation sufficient to reduce the crime from murder to manslaughter, the test to be applied was the effect of the alleged provocation on the mind of an ordinary reasonable man, and, in applying this test, it was hot right notionally to invest the hypothetical ordinary reasonable man with the physical peculiarities of the person charged.

The reasonable man test has received many severe criticisms. It has been argued that the reasonable man rule in provocation should be abolished.[10(a)] Since the rule is purely a judicial creation, and a fairly recent one at that, there is no obvious reason why in a purely common law jurisdiction it should not be judicially abolished. Where, however, the rule has received legislative recognition(as by section 3 of the Homicide Act), it would doubtless require legislative eradication.[11] Lord Simmonds in Bedder's Case [12] thought that the rigid application of the objective test was not the best approach. He said:

> "It would plainly be illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet recognize for that purpose some unusual characteristics be it impotence or another ...The proposed distinction appears to me to ignore the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation is or may be itself conditioned by some physical defect ..."13

Another criticism has been singled out by Dr. Turner as a form of question. He asked:

> "If the reason for excusing the normal man is that his innate control mechanism has been paralysed by events how can it be ethically proper to refuse the like benignity to a sub-normal man when his innate control mechanism has so paralysed, and thus to deal leniently with a man to whom nature has been moderately unkind while treating with ruthless severity the man to who nature has been immoderately unkind?"14

Section 3 of the Homicide Act 1957 provides:

> ".....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..."

The further effects of S.3 of the Homicide Act on the objective test remained uncertain until the decision of the House of Lords in the case of Camplin v. D.P.P.[15] In this case the accused, a fifteen year old boy was charged with murder in having killed a man who had allegedly buggered (and subsequently laughed) at him. The defence counsel argued that what the jury ought to consider was not whether a reasonable adult would have been provoked but the reaction of a

reasonable boy of the accused's age. The lower court, following the test laid down in Bedder, rejected his contention and the boy successfully appealed to the court of Appeal. On further appeal by the prosecution to the House of Lords their Lordships accepted the Court of Appeal's view that the entire factual situation must be considered including the characteristics of the accused - his age, colour, sex and other physical or mental disabilities.

In the words of Lord Morris,

> "It must now seem unreal to tell the jury that the notional reasonable man is someone without the characteristics of the accused - this would be to intrude into their province..."16

One could say the result of Camplin is to bring the Common Law, as modified by the Homicide Act, into line with the New Zealand Crimes Act 1961. Section 169(2) of the New Zealand's Crimes Act provides as follows:

> "Provocation can be deemed sufficient if it would deprive a person having the power of self-control but otherwise having the characteristics of the offender."

Having examined the position of the reasonable man under the Common Law, I would like to examine it under the Nigerian and the Sud respectively.

The question as to whether the te provocation was objectiv raised in Nigeria in R V. Nwanjoku.[17] This case

was argued on the assumption that section 318 alone was the relevant section dealing with provocation on a charge of murder. Relying on that section counsel for the accused argued that the test was subjective, but this was rejected by the court which held that the broad and well established principles of English Law applied. In mitigating the harshness of the objective test of the reasonable man Francis J. in R v. Okoro,[18] said:

> "Provocation must be judge from the point of view of what would amount to provocation in the case, of an ordinary reasonable man of the same standing in life and degree of civilization as the accused man, and that what might not be regarded as sufficient provocation in the case of an educated and civilised person, might be reasonably considered as sufficient when it concerned an uneducated and primitive peasant whose passions would naturally hot be so much under control as those of the more educated person."19

It appears from the above case that this modified test of "the reasonable man" which was adopted by Francis J. took only two factors into account i.e. "the standing in life of the accused", and "the degree of his civilization." One could say this decision suggests two tests of "the reasonable man." One test is for illiterates and the other one is for the educated. But this seems illogical and unacceptable. The English reasonable man might not kill in finding his wife in the act of adultery. But the African reasonable

man will in most probability kill his wife or the adulterer if he is not educated. But in case of an educated person the reaction to the provocation may be the same as the uneducated, thouth education may have some effect to the degree of reaction. Two years later Fracis J. delivered a similar ruling in R v. Adekanmi.[20] In this case the accused killed his wife who had jeered at him and taunted him with being impotent.

Francis J. observed:

> "It is my considered opinion that the words "the effect it would be expected to have on a reasonable man' must be taken to mean the effect it would be expected to have on a reasonable man of the accused's standing in life; for it would I think be improper to examine the question in the light of an educated and civilized person. The accused, be it noted, is an illiterate and primitive peasant of this country and it must be beyond doubt that persons of such a type are far more readily aroused than those of the civilized and enlightened class..."[21]

Okonkwo and Naish[22] commented on the above case. -

They said:

> "The courts have assumed that an illiterate and primitive person is more easily angered than an educated and enlightened person. This is very debatable if not fallacious. Clearly, whether a person is peevish or not has nothing to do with his standard of education or civilization..."

However, it is submitted that the decision in Adekaumi should not be restricted to cases where the accused is an illiterate. It is quite wrong to assume that a confession of adultery to an educated husband or spithing in his face will not provoke him to at least the same extent as it does an illiterate husband.

In the case of Adamu Kumo v. State,[23] the plea of provocation succeeded because it was observed that an average moslem in Kumo could have been provoked if referred to as a pagan.

From the above mentioned authorities one could say that Nigerian courts modified the rigid application of the objective test and evolved a modified objective test. In Dr. Chukkol[24] words:

> "The Nigerian judges and their Sudanese counterparts on realizing the harshness the reasonable man concept can bring have been able to evolve a modified form of objective test in cases of provocation. Reasonableness is judged, not on the basis of what any hypothetical member would regard as provocative, but what a hypothetical member of the accused's community will regard as provocative..."

The reasonable man test has also found its way into the Sudanese Jurisprudence. In the case of Sudan Government v. Ahmed Ismail Hamad,[25] the court of Appeal stated this part of the Law as follows:

> "The standard by which the behaviour of the accused should be measured is that of a reasonable and sober man: This is an objective standard, and such factors peculiar to the accused as an excceptionally excitable temperament or

> self-imposed intoxication rendering him unusually susceptible to provocation are wholly irrelevant. The social status and environment of the accused and the habits and customs of the community to which he belongs, may properly be taken into consideration in deciding how a reasonable man in accused's position could be expected to behave."

In Sudan Government v. Bakhtan Bayu Bakhtan,[26] Salah Hassan J. Emphasised the same point mentioned in the previous case. He said:

> "A man of excitable temperament, quick to anger and easily offended, cannot claim the benefit of this exception by virtue of his psychological defects."

In Sudan Government v. Barakia Wajo,[27] the accused, who was "extremely excitable" and "irritable" and "afflicted with defective control of his nerves because of his being epileptic" killed his half-sister because she insisted on being heard in a family discussion of a will.
The partial defence of grave and sudden provocation, was raised. The court held that the test to be applied under the penal code, S.249(1) is whether the provocation was sufficient to deprive a reasonable man of his self-control, not that of the particular accused.

The decisions of the earlier cases seem to be harsh. One could say the sudanese courts seemed to be fond of the English reasonable man and not the test of the reasonable man of the same locality which is regarded as a modification to the rigid objective test.

The test of the reasonable man of the same locality has since 1958, been introduced by Abu Rannat C.J. in the case of Sudan Government v. El Baleila Balla Baleila,[28] M.A. Abu Rannat C.J. said:

> "The reasonable man referred to in the text books is the man who normally leads such life in the locality and is of the same standard as others. In my opinion the facts of this case are distinguishable from the hypothetical case given as an example by the learned president of the court. The example given by the learned president is this: "If 'A' was driving his brand new Cadillac car, and deceased, a driver of a lorry, accidently collides with it and destroys it, are we to give 'A' the benefit of provocation, if he loses his self-control and kills deceased? of course we should not. We believe that the position of the 'A' in this case is not very much different from that of the owner of the Cadillac....with respect to the learned president, the accused in this case is an unsophisticated nomadic Arab who knows little about the world, while the owner of the Cadillac is at least a man who knows much about the world. The real test is whether an ordinary Arab of the standard of A would be provoked or not. I have no doubt that he would be highly provoked."

One could risk to conclude that the reasonable man should be the reasonable man having the characteristics of the offender. The law in Nigeria and Sudan should codify S.169(2) of the New Zealand crimes Act of 1961 which takes into account the infirmities and deformities of the accused person.

Drunkenness and Provocation:

Drunkenness may impair a man's powers of self-control so that he may more readily give way to provocation than if he were sober.

In the Nigerian case of Chutuwa v. R.,[29] the West African Court of Appeal in considering the effect of Section 29(4) of the Criminal Code on Section 318 of the criminal code adopted the views expressed by the court of Appeal in the case of R v. McCarthy,[30] where it was laid down that:

> "A part from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner in which no reasonable man would do, cannot assist to make out a defence of provocation..."

In Sudan Government v. Mohamed Saad Suleiman,[31] Cummings C.J. remarked:

> "In assessing whether the accused suffered grave provocation, it is, I think, settled that we follow India in not taking the drunkenness into account. The provocation to be grave must be such as would so upset a normal reasonable man."

Voluntarily intoxication is not regarded as a mitigation factor in cases of provocation. In the words of Professor Hall,

> "The Law does not grant any indulgence to a person who had taken the quantity of liquor requisite to make him a savage."[32]

Evidence of drunkenness which merely establishes

that owing to his state of intoxication the accused himself would more readily give way to some violent passion cannot be relied upon in so far as provocation is concerned.[33]

The fact that drunkenness made a man more negligent or more mistaken than he otherwise would have been, is irrelevant to the question of provocation. Provocation must be such as to deprive a reasonable man, not a drunkenman or a violent tempered man of self-control and must infact deprive the accused of self-control.[34]

In R v. Newell,[35] the appellant who lost his woman killed his drinking friend after he made disparaging remarks about the woman. He raised the defence of provocation but the defence was rejected.

However, the plea of provocation which may be raised by a durnkard person would not be considered by the court, but only evidence of drunkenness which renders the accused incapable of forming the specific intention may be t ken into consideration.[36]

Provocation and Witchcraft:

Mary Douglas[37] said:

> "The term witchcraft is used to cover all forms of belief in spell binding, fascination of evil eye, and bewitching. In contemporary literature, sometimes the expression is used to refer exclusively to internal spychic power to harm-sorcery is used to indicate bewitching by means of external symbols, whether by spells, charms or potions."

An interpretation has been given to section 283 of the criminal code that the section failed to bring within its provisions acts brought by witchcraft to constitute provocation.

A writer[38] said:

> "When section 283 of the criminal code mentions acts and insults in its definition of provocation, it can hardly have been envisaged by its framers that an ' act' in the Nigerian or even African context needs not be an event that can be easily discerned by the traditional senses of hearing and seeing. An event brought about by witchcraft may not be as tangible as slap on the face. Can situations springing from the belief in and the practice of witchcraft or other supernatural powers be brought within the ambit of provocation?"

One could say that acts brought about by witchcraft sometimes is more provocative than the slap on the face or whatever insult can be imagined. It is the very realistic direction that in African communities acts brought about by witchcraft should be regarded as constituting grave and sudden provocation especially when the witch is found performing his super powers. In the case of Konkomba v. The Queen,[39] the appellant killed the deceased because he feared that the deceased who had killed one of his brothers by witchcraft was in the process of killing another who at the time was sick. There was evidence that the deceased was asked to relieve the patient but he replied by saying that he has no medicine for relief. The appellant struck him dead with an axe and relied on provocation.

The trial court referred briefly to the issue of provocation and ruled:

> "In murder cases a defence (of provocation) founded on witchcraft has always been rejected except in cases where the accused himself had been put in such fear of immediate danger to his own life that the defence of grave provocation has been proved."[40]

In the East African case of R v. Kumwaka wa Malumbi,[41] the accused on a charge of murder pleaded, among other defences, provocation. The plea was rejected and the trial judge remarked:

> "Threat of witchcraft has been consistently rejected by the court except where accused has been put in such fear of immediate danger to his own life that the defence of grave and sudden provocation has been held proved. For courts to adop any other attitude to such cases would be to encourage the belief that an aggrived party may take the Law into his own hands and no belief could be more mischievous or fraught with greater danger to the public peace and tranquility."

The other East African case which laid down a second qualification for the plea of provocation on witchcraft is the case of R v. Fabiano Kinene.[42] In this case the accused (appellants) woke up one night to find deceased crawling in their compound naked. They honestly believed that deceased had bewitched their relations and that they had caught him in the act of bewitching them. They then killed him by forcibly inserting some banana stems into his bowel through the anus - a method considered proper for killing witches by the community.

In accepting the defence of provocation the East African Court of Appeal observed:

> "We think that if the facts proved establish that the victim was performing in the actual presence of the accused some act which accused did genuinely believe and which an ordinary person of the community to which the accused belongs would genuinely believe to be an act of witchcraft against him or another person under his immediate care(which act would be a criminal offence under the criminal Law, witchcraft ordinance and similar legislation in the other East African territories) he might be angered to such extent as to be deprived of the power of self-control and induced to assault the person doing the witchcraft. And if this be the case a defence of provocation is open to him."[43]

From the above mehtioned authorities, one could say the defence of provocation on witchcraft in East Africa and perhaps in Nigeria can successfully be upheld if the following qualifications are satisfied.

(1) That the accused himself must have been threatened by the act of whitchcraft.

(ii) that the deceased's provocative act must have amounted to a criminal offence.

(iii) that the accused must have been present during the time of bewitching.

(iv) All other requirements of the doctrine of provocation i.e. grave and sudden and the proportion rule of retaliation.

A writer[44] commented on the above qualifications as follows:

> "...To require the accused to be present at the time of bewitching is no less illogical for in a case of killing by witchcraft it matters not whether a powerless father is present at the time of bewitching or is informed subsequently. In both cases he will be provoked. To insist on condition(c)is most unfair and indicates the courts' non-realization of the effect witchcraft is believed to have among the African population. To apply the notions of suddenness and short lapse of time will be to underestimate the powers witchcraft has on its victims."

However, in the case of Tunde Garke v. The State,[45] the Kaduna Federal Court of appeal division held that there cannot be provocation through juju or witchcraft.

To me it seems illogical and contrary to the principles of natural justice to say an act of witchcraft is a criminal offence and then not to avail those who are affected by it when they have reacted upon a grave provocation to the act of withchcraft. It is in consonance with the principles of justice if the defence of provocation be recognised in cases of witchcraft after satisfying the requirements laid down by the West African and East African courts of Appeal.

Provocation and third Parties:

In English Law there are certain limitations in the defence of provocation which have been formulated in the case of R.v. Duffy.[46] Those limitations are:

(i) the provocative acts must be done by the dead person to the accused;

(ii) Evidence of acts done by third parties or to third parties would not be admissible.

However, there is no such limitations under section 3 of the Homicide Act 1957. The only question of relevance is whether the accused was provoked to lose his self-control.

The limitation of provocation to acts done by the deceased was adopted by the English Court of Appeal in the case of R. v. Simpson.[47] In this case, the accused a soldier, returned home on leave to discover that his home, andhis children had been neglected by his wife. The husband thus became greatly provoked and killed his son who was seriously sick and neglected. It was held that he could not set up the defence of provocation as it was not the child who offered the provocation even if there was provocation.

In R v. Ebok,[48] the Supreme Court of Nigeria followed the view in Simpson's case and held that although the accused did lose his self-control and killed his ex-wife and another woman, the provocation given by the wife which might have reduced his killing her to manslaughter, could not alleviate the offence of killing to the other woman without provocation.

Prothero J. stated as follows:

> "The woman herself had given no provocation and it would be stretching the law to a dangerous extent to say that provocation by one person would justify the killing of another..."

The plea of provocation will be recognised by the court only if the provocation have flown from the victim to the accused.[49]

Section 222(1) of the Nigerian Penal Code is different from the position under the criminal code and under the English Law. This section clearly state that provocation given by a person other than the person killed cannot be sufficient under the code to reduce culpable homicide from one punishable with death to one not so punishable. For example, A under the influence of passion excited by grave and sudden provocation given by B, intentionally kills the child of B. This is culpable homicide punishable with death, inasmuch as the provocation was not given by the child.[50]

Under the section it was further stated that, if a man who can successfully plead provocation kills another person by mistake or accident, such killing will be culpable homicide not punishable with death. A gives grave and sudden provocation to B, who on account of this provocation fires a pistol at A, neither intending nor knowing himself to be likely to kill C who is near him

but out of sight. B kills C. B has committed culpable homicide not punishable with death under the section.[51] The position under the Sudanese Law can be represented by the case of Sudan Government v. Ismail Ahmed Gargara.[52] In this the accused was gravely provoked by words alone. He stabbed a man and was thereupon beaten by the stabbed man's relatives. One of the villegers who soon arrived, the deceased, tried to take the knife from the accused who stabbed and killed him, thinking was one of his earlier assailants. It was held that provocation may be "things said" alone; although deceased did not give the provocation, accused killed him by mistake.

Section 318 of the criminal code did not talk about provocation to their parties. But Dr. Aguda[53] suggested that under appropriate circumstances provocation offered by A to B should be sufficient justification for reducing to manslaughter by his killing of C.

FOOTNOTES

1. Kharisu S. Chukkol, Defences to Criminal Liability in Nigeria Acritical Appraisal at P. 92.
2. (1857) 8 C&P 115.
3. (1869) 11 COX 336.
4. Per Lord Goddard C.J. in R v. McCarthy (1952) 2Q.B. at 112.
5. (1964) 2 Q.B. 745
6. (1913) 9 Cr. App. R. 139.
7. (1914) 3 K.B. 1116.
8. (1914) 11 Cr. App. R. 36.
9. (1952) 2 Q.B. 105.
10. (1954) 2 ALL. E.R. 801.

10(a) Smith Hogan, Crimin
4th Edit. 292.

11. See Brett, 'The physiology of provocation" (1970) Criminal Law Journal Review at P.638.
12. Supra
13. Ibid at P 803-804.
14. J.W.C. Turner, Russel on Crime 1964 at P.537
15. (1978) 2 All. E.R. 168.
16. Ibid at P.172
17. (1937)3 W.A.C.A. 208.
18. (1942) 16 N.L.R. 63.
19. Ibid at P. 65
20. (1944) 17 N.L.R. 99.
21. Ibid at P. 101.
22. Okonkwo & Naish, Criminal Law in Nigeria at P. 242.
23. (1967) ALL N.L.R. 287.

24. Kharisu S. Chukkol, op. cit at P. 93

25. Lindsay's Report (1954) 81 at 85.

26. (1967) S.L.J.R. 90 at 91.

27. (1961) S.L.J.R.

28. (1958) S.L.J.R. 12.

29. (1952) 14 W.A.C.A. 590.

30. (1954) 2 W.L.R. 1044,(1954) 2Q.B.105.

31. (1946) AC CP 209 46; KTM18 46, Unrep.

32. Jerome Hall, General Principles of Criminal Law, (Indianapolis, 1947), 347.

33. Brett and Mclean's, The Criminal Law and Procedure of the six southern states of Nigeria (second edit).

34. See R v. Wardrope(1960) Crim. L.R. 770

35. (1981) C.L.R. 576.

36. See A. Gledhill, The penal Code of Northern Nigeria and the Sudan at P. 127

37. Mary Douglas, (ed.) Witchcraft, Confession and accusation, (London, 1970), Introduction at 36.

38. Kharisu S. Chukkol op. cit. at 38.

39. (1952) 14 W.A.C.A. 236.

40. Ibid at P. 237.

41. (1932) 14 K.L.R. 137.

42. (1941) 8 E.A.C.A. 96.

43. Ibid.

44. Kharisu S. Chukkol, op. cit at P. 84

45. (1979) FCA/K/54/78 Unrep.

46. (1949) 1 ALL E.R. 932

47. 1915) 25 COX 269.

48. (1950) 19 N.L.R. 84.

49. Sunday Omeninu v. The State (1965)N.M.L.R.356

50. Illustration(a) to section 222(1) of the penal code.

51. Illustration (b) to section 222(1) of the penal code.

52. (1962) S.L.J.R. 148.

53. T. Akinola Aguda, Principles of Criminal Liability in Nigerian Law at P. 306.

CONCLUSION

THE FUTURE OF PROVOCATION IN NIGERIAN LAW

In England there has been an argument on the future of provocation as a line of defence. This largely emanates from the problems associated with the reasonable relationship rule and the question of objectivity in the doctrine of provocation. Such problems are equally inherent in the law of provocation in Nigeria. Provocation as a defence has given rise to many conceptual difficulties and no easy solution presents itself. It is therefore necessary to review the law on this subject in an attempt to put it on a more rational basis.

(1) A critical Appraisal of the Law of Provocation in Nigeria

(a) Proportionality rule:

According to the decision in the case of Obaji v. State,[1] reading sections 283 and 318 of the criminal code together makes it difficult to accept the view that "proportionality" must be excluded, the disproportion being a factor to be considered in determining whether the accused had completely lost control of himself or was acting for a reason other than complete loss of self-control caused by sudden provocation.

The nature of the weapon or force used as a mode of resentment bearing reasonable relationship to the provocation received must also be considered. The danger is that the courts have tended to place undue emphasis on the nature of that act resulting from the provocation and not on the provocative act itself. Consequently, where 'B' who is provoked by 'A' kills him by hitting one blow on the head, the courts, may hold that this is manslaughter. But where 'B' after the blow struck many other blows and then hacked 'A' to pieces with a knife, the court may consider this to be murder because the mode of resentment was disproportionate to the provocation, without considering whether 'A' died of the first blow only or the other blows and the mutilation were done in a single minute. In fact, one may question the relevance of the subsequent retaliatory acts after the initial fatal blow.[2]

In R v. Bassey,[3] the Federal Supreme Court disagreed with the conclusion of the trial judge. They said:

> "We are unable to agree. All four blows were delivered within a matter of seconds of each other and if the first blow was, as the learned judge found, given in the heat of passion caused by sudden provocation we cannot see how the other blows can be treated differently."[4]

Also, the degree of response to a stress situation varies considerably from one individual to another. "It would be perverse for the law to ignore these teachings of science, and absurd for it to doubt their validity."[5] The reasonable relationship rule has developed on the assumption that loss of self-control is not absolute. But a number of cases on provocation reveal that frequently the defendant does not remember what happened exactly during loss of self-control.[6]

According to Simon L.C. one had

> "to take into account the instrument with which the homicide was effected, for 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."[7]

This statement of Lord Simon has been followed by many courts in Nigeria.[8]

The requirement that the resentment must bear reasonable relationship to the provocation received is only mentioned as a requirement in cases of assault under section 284 of the criminal code.[9] All that the codes require is the loss of self-control arising from the provocation.[10] And if the defendant is described as losing his self-control, then the proportionality

rule is not included. After all loss of self-control does not indicate what has been done.

These criticisms stem from the assumption of the law that a reasonable man continues to be reasonable even after loss of self-control. It is a misconption to compare the provocation which causes loss of self-control and the retaliatory acts which followed. In Hume's words:

> "reason is....the slave of the passion, and can never pretend to any other office than to serve and obey them."[11]

So far, it can be inferred that the reasonable relationship rule is to a large extent inconsistent with established physiological and psychological notions of the behaviour of an individual. It is even thought to be illogical and contrary to common sense.

The penal code is not exempted from these criticisms. The word "grave" has been held to imply into section 222(1) of the penal code that the retaliation must be reasonably commensurate with the provocation received.[12] Furthermore, it is not easy to comprehend the dictum of Lord Groddard that,

> "it is impossible to determine whether provocation was grave without at the sametime considering the act which resulted from the provocation."[13]

It is submitted that the reasoning in the dictum

is absurd and misleading. The resulting act is not a good test for the degree of loss of self-control. From the foreging, it is evident that this area of the law requires urgent attention of the legislature.

(b) The reasonable man rule:

It is the accepted law in most jurisdictions including Nigeria that not every provocation will modify the nature of an offence. To have this effect, the provocation must be such as to cause a reasonable person to lose his self-control. The test is the effect of the provocation on an average individual in the same community, not the effect which it did actually have on the accused. Thus, a reasonable man is a person having the power of self-control of an ordinary person, but otherwise, having the characteristics of the offender.

Provocation is a concession to the frailty of human nature. Therefore, Brett[14] suggested that the reasonable man rule in provocation should be abolished since the rule is purely a judicial creation. Also worth mentioning is that the objectivity inherent in the reasonable man has attracted a great deal of criticism from academic writers. There are two main lines of

criticism in this regard. The first is the bad-tempered man argument. This arises from comparison between individuals and their feelings of justice. It is unjust to have the same standard of reasonableness in a society where there are bad-tempered persons. In such cases, the scale of reasonableness weighs against the bad-tempered man. The second argument is that although provocation is based on purely subjective considerations, the test is the objective effect on a reasonable man. The objective standard of provocation deals unfairly with those persons who are congenitally incapable of attaining the reasonable level of self-control. The doctrine of provocation is thus, reproached with a cruel inconsistency, being a concession to human weakness and yet applying the same standard to persons of unequal capacity.[15] It must be noted that the codes in Northern Nigeria and the Sudan lay down a subjective test for provocation but the courts seem to have imported the objective standard.[16]

(2) Should the defence of provocation continue or should it be abolished?

Since the defence of provocation is a concession to the frailty of human nature it will be harmful and unjust if it is ablished. It also will offend against the people's moral sense of justice. This is because the compassion

to human infirmities implicit in the defence of provocation is generally accepted.

Since the offence of murder attracts death sentence, it will be too harsh in the absence of the plea of provocation or any other defence. The argument for the abolition of the defence rest on the alleged complexity and unfairness associated with the doctrine of provocation. Also provocation does not correspond with the positive requirements of criminal liability. In most cases, a successful plea of the defence does not result in acquittal but merely mitigation of punishment.

Despite these inherent difficulties, it would be better the defence of provocation survives as a defence mitigating the capital offence to that of manslaughter.

(3) Suggestions towards reform:

The defence of provocation in Nigeria must be considered under the Nigerian codes. Although the defence of provocation under the Nigerian Codes is substantially the same as the Common Law doctrine of provocation, Nigerian Courts should apply the defence from the stand point of the criminal and penal codes. We should therefore desist from assuming that the Law of provocation in Nigeria is a restatement of the English Common Law doctrine. This does not meant that English decisions would no longer be resorted to in interpreting the codes.

English decisions should be of persuasive nature to our courts and not binding. In other words our courts should be guided by the English and any other decisions from any country of Common Law Jurisdiction. For example our courts should be guided by the West African court of Appeal in the case of Konkomba v. The Queen[17] and the East African Court of Appeal in the case of Fabiano Kinene,[18] as regards provocation founded on the accused belief in witchcraft. Nigerian courts being guided by the two above mentioned cases, witchcraft cases can be easily disposed of by our courts.

In the area of the reasonable man the Nigerian and Sudanese Courts should adopt the decision of the House of Lords in D.P.P. v. Camplin[19] where it was held that the jury should be directed that the reasonable man:

> "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 each of the accused's characteristics as they think would affect the gravity of the provocation to him."20

The courts in Nigeria and the Sudan will have to make up their minds whether to come out for the purely subjective test or the test of a reasonable man of the same locality as the accused. Because of the almost universal outcry against the reasonable man test,[21] and also because it is

contrary to the letter and spirit of sections 222(1) N.N.P.C. S.318 C.C. and S. 249(1) of S.p.C.

The propcrtion rule of retaliation works unfairly to the detriment of the accused. Under it, the accused is expected to make an impossible choice of weapon if, for instance, at the time the provocation is given to him, he happens to be armed with a sword, a dagger and a spear. When punched on the face with great force, he would not normally stop to think whether to use his fists in retaliation or to use any of the several weapons at his disposal. Therefore the proportionality rule in Nigeria should be mofified and not be excluded. For to exclude it will mean that a slight provocation might earn the mitigated sentence and this will be contrary to public policy.

The law seems to have been applied very liberally in favour of aggrived husbands who kill their wives upon the slightest suspicion of adultery. The law should have recognised <u>inflagrante delicto</u> cases of adultery and not cases of mere suspicion.[22]

The defence of provocation should be extended to cover offences like defamation and malicious damage to property. As Dr. Aguda[23] Said:

"If someone is provoked under the circumstances defined under the code, and as a result of such provocation utters in the heat of passion before his passion cools, some defamatory matter about the man giving the provocation, he should be able to rely on such provocation, in the same way as he would be able to under section 284 of the code had he assaulted the person offering the provocation. Similarly, a person who is provoked as a result of assaults on his servant and who, before his passion cools, damages the property of the person offering the provocation which is at hand, should be entitled to similar consideration if instead of so acting he had assaulted the person offering the provocation. This point is made to expose the irrationality of allowing provocation to be a defence to one offence and not to others."24

Since the defence of provocation is the sole concession to loss of self-control by persons who are not classified as mentally disordered, one would suggest that not every human frailty should be taken into account. The law should aim in regulating human behaviour and demand a high standard of self-control. In considering the defence of provocation the evolution of society must be considered; social habits and feelings have to be taken into account.

Finally one can risk to conclude that the courts in Nigeria should interprete the criminal code and the penal code free from interpolation and refrain from propounding the Common Law of England. Also the legislature has to look into the inadequacées of drafting and irregularity of

sections in the criminal code not only in the sections concerning the defence of provocation(i.e. S.283, S.284, 318 C.C.) but also in the sections concerning the right of private defence.[25]

FOOTNOTES

1. (1965) N.M.L.R. 417

2. See Okonkwo & Naish, Criminal Law in Nigeria at P. 249.

3. (1963) 1 ALL N.L.R. 280.

4. Ibid.

5. Peter Brett, "The physiology of provocation' (1970) Criminal Law Review P.637.

6. See Bedder v. D.P.P.(1954) 1 W.L.R. 1119.

7. Mancini v. D.P.P.(1942) A.C. 1 at p.9.

8. See R. v. Nwanjoku (1937) 3 W.A.C.A. 208., Obaji v. State (Supra)

9. The Penal Codes of Northern Nigeria and the Sudan have not mentioned in its provisions the proportionality rule neither in cases of assault nor in homicide cases.

10. See S.318 C.C. and section 222(1) P.C.

11. A treatise on human nature(1888) P.415

12. See perera's case (1953) A.C. 200.

13. Ibid.

14. Brett, op. cit at p. 638

15. A.J. Ashworth, 'The doctrine of provocation' (1976) Cambridge Law Journal vol.35 292 at 311.

16. See Krishua Vasdeu, The Law of Homicide in the Sudan at p.222.

17. (1952) 14 W.A.C.A. 236.

18. (1941) 8 E.A.C.A. 96.

19. (1978) 2 All E.R. 168.

20. Ibid.

21. Russel on Crime, vol.1. (12th edit. 1964) by Turner at P.535, Smith & Hogan, Criminal Law, (1965) 215; Williams, (1954) Criminal L.R.740.

22. See Chapter II Supra

23. T. Akinola Aguda, Principles of Criminal Liability in Nigerian Law at P.318-319.

24. Ibid.

25. See Kharisu S. Chukkol op. cit at P,76.