

THE DEFENCE OF PROVOCATION UNDER THE NIGERIAN CRIMINAL CODE AND THE CRIMINAL CODE OF GHANA: A COMPARATIVE ANALYSIS

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Abstract

The jurisprudence that surrounds the defence of provocation in criminal trials is no doubt an enterprise that has been judicially adjudicated in the Nigerian Courts. It is a defence often raised by the accused person when charged with murder. In the Nigerian criminal law system, it is trite that no amount of provocation can ground an acquittal in a criminal trial. This position is not largely different from the position under the Criminal Code of Ghana except with the concept of 'Extreme Provocation' which is ably codified in the Criminal Code of Ghana. A critical examination of the provisions of the law relating to the defence of provocation in the Criminal Code of Ghana and the Nigerian Criminal Code presents quite a number of legal dynamism. It is the position of the researcher that owing to the nature of the defense of provocation and recent dynamics in the Criminal justice system, provocation should not be met with some trite principle of reducing murder to manslaughter alone nor left to the unfettered perception of the

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Courts while ignoring some other important parts of the Law. The provisions of the relevant Criminal laws will be examined to test the impact such provisions have had in the criminal jurisprudence of the countries involved in this study. This study seek to examine both legal systems to the end of achieving a more comprehensive approach to determining criminal trials especially when the defense of provocation is raised by the accused person.

Keywords: Provocation, Murder, Manslaughter, Extreme Provocation

1. Introduction

The defence of provocation is a highly raised defense to the criminal charge of murder. To a layman the circumstances that give rise to the defence may sometimes be justifiable and it is an acid test in criminal trials that conviction can only be safely done using a reasonable man's test. In Nigeria, provocation is one of the defenses that may be raised in criminal trial,¹ and the Supreme Court has made several pronouncements on the effect of a successful plea of the defence which results in the reduction of murder to manslaughter. This position is affirmed basically on the belief that no amount of anger should make a man take the life of another person. It may be argued that even if a person argues that he was provoked, it is a fact that he intended the consequences of his actions in which case the 'mens rea' element of a crime would have been proven. The beauty of comparative analysis is that it exposes a researcher to a divergent approach to a particular issue

¹ See Section 318 of the Criminal Code of Nigeria Cap LFN 2004

by examining the position in another jurisdiction. In Ghana the concept of 'extreme provocation' is crucial in understanding successful plea of the defense. In fact, the Criminal Code of Ghana in its provisions on provocation codified some actions which may be construed as being extremely provocative. These provisions will be further examined in this study.

2. Defining the Concept of 'Provocation' as a Defence to Murder

Sir Edward East writing in 1803, expressed the law to be that provocation to reduce the crime of murder to manslaughter, must be

such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact; so that the party may rather be considered as having acted under a temporary suspension of reason than from any deliberate malicious motive"²

The Criminal Code of Ghana provides that

Provocation is any unlawful assault or battery committed on someone by any other person in an unlawful fight or otherwise, which is of a kind in respect of its violence or by reason of accompanying words, gestures or other circumstances of insult or aggression that is likely to deprive a person of ordinary character, and in the

² *R v Hayward* 6 C.& P. 157, 172 E.R, 1188.

circumstance in which the person was of the power of self control'³

The above provision from the Criminal Code of Ghana will be subjected to proper scrutiny in the course of this study. The definition above differs in certain major ways from the provisions of Section 318 and 283 of the Nigerian Criminal Code which indeed fails to define the concept of 'provocation'. However, a community reading of Section 318 and 283 of the Criminal Code presents a similar provision with that of Ghana. But it is noteworthy that in both provisions of the law, whatever might have caused the accused person to kill the deceased must have been such that he was deprived of his ability to control himself.

In common law jurisdiction like Nigeria and Ghana, it is apparent that most of the problems encountered by vague provisions of the law receives judicial pronouncement which then becomes the law. On this issue of provocation, the House of Lords in the case of *Holmes v Director of Public Prosecutions*⁴ discussed extensively on how to safely arrive on when provocation may be said to have occurred. In this case, 'Holmes (defendant) got into an altercation with his wife after a night out, which began when someone winked at her. Holmes had previously been suspicious of his wife in regards to other men and had heard stories about it as well. The fight reached a violent point when Holmes's wife told him she had been unfaithful to him and that she had reason to believe he had been untrue to her as well. At trial, Holmes stated that at that point, he lost his temper and hit his wife in the head with a hammer. Holmes stated that because she was suffering, he strangled her

³ Section 53 of the Criminal Code of Ghana.

⁴ (1946) A.C. 588

until she stopped breathing. During cross-examination, when asked if he intended to kill her when he had his hands on her neck, Holmes responded "yes." In charging the jury, the trial judge instructed that, based on the evidence and the law, a conviction for manslaughter may not be considered and that Holmes's wife's statement to him that she had been unfaithful was not sufficient provocation to justify a conviction of manslaughter instead of murder. Holmes was subsequently convicted of murder. The court of appeal affirmed that conviction, and Holmes again appealed to the House of Lords.⁵

The House of Lords in demystifying the concept of provocation and its application did an analysis between provocation occasioned by words and provocation occasioned by physical violence. Viscount Simon explained in vivid terms that "mere words" can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicide committed upon the speaker in consequence of such verbal provocation. He stressed the contrast with provocation by physical attack saying that a blow may in some circumstances arouse a man of ordinary reason and control to a sudden retort in kind, but as the proverb reminds hard words break no bones, and the law expects a reasonable man to endure abuse without resorting to fatal violence. However he went on to draw a distinction between vituperative words and words used as a means of conveying information, and referred to earlier judicial views that a husband suddenly hearing from his wife that she had committed adultery might be thereupon so angered as to kill her in circumstances which might amount to only manslaughter.⁶

⁵ Ibid 597

Without prejudice to the legal analysis of Viscount Simon, it is no doubt that provocation in itself is a subject left to the discretion of the Court because whether or not an act amount to provocation cannot be determined except in the context of the case as it is presented before the Court. In the Nigerian case of *Abbas Muhammad v The State*⁷, the Court stated that:

It is also settled that words can constitute provocation but this depends on the actual words used, and what they mean to a reasonable person having a similar background with the accused person...'

Sometimes, it is very important to pay attention to the words used both by the statutes and in different definitions proposed by Judges in different circumstance of the case. Provocation was defined by Lord Goddard in *R. v Duff*⁸ as “some act or series of acts done by the dead man to the accused, which could cause in any reasonable person and actually caused in the accused a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment, not master of his mind. Circumstances which could induce a desire for revenge or a sudden passion for anger are not enough.” The phrase ‘not master of his mind’ may be suggestive of something in relation to insanity which is a complete defense to a murder charge. Some circumstances in the perception of the sitting judge may appear so gross that to a reasonable man it is unjust. In some other

⁶ Viscount Simon’s long analysis of his perception in the case of *Holmes* especially with whether or not “mere words” is sufficient to ground a reduction in the charge of murder to manslaughter.

⁷ (2017) LPELR-42098(SC)

⁸ (1946) AC 583

circumstances, it is just. The question comes whether or not the reasonable man's test suffices in the context of the defense of provocation. In the position of Viscount J. there are words that are not expected to cause a provocative response on the other side but he fails to take note that even Psychologists will agree that we all have different dispositions to issues and temperaments. Should the accused person not be found guilty based on his own natural make up?

The Court of Appeal of New Zealand has made some pronouncement with respect to the above question in the following words:

The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristics must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as some-thing constituting part of the individual's character or personality. A disposition to be unduly suspicious or to lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility. These matters are either not of sufficient significance or not of sufficient permanency to be regarded as

'characteristics' which would enable the offender to be distinguished from the ordinary man. The "unusually excitable or pugnacious individual" spoken of in *R. v. Lesbini* is no more entitled to special consideration under the new section than he was when that case was decided. Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor..."⁹

In examining the above situation, it is clear that a newer dimension is being brought to the discourse. It is the position in New Zealand that the accused person must be able to show that he possesses certain features that may exempt him from the general feature of an ordinary man. This discourse is not unlikely to delve into some jurisprudential realm. However, the novelty of this study is to examine some growing trends in the Criminal justice system in Nigeria and also that of Ghana. The traditional approach to the defense of provocation may need to be accorded some changes in the light of societal dynamics. Up till now, whether or not the parameters for granting the plea of provocation is different, simple or complex, it still does not ground an acquittal. There may be a need to change perspective in this regard.

3. The Nigerian Criminal Code and Provocation

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 passion to cool, he is guilty of not of murder but of manslaughter.¹⁰ It is clear that this section of the law did not

⁹ *Regina v McGregor* (1962) N.Z.L.R 1051 (C.A)

¹⁰ Section 318 Criminal Code of Nigeria LFN Cap 2004

attempt to define the word 'provocation' but merely mentioned it. A more elaborate provision is Section 283 which provides that:

The term "provocation", used with reference to an offence of which an assault is an element, includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in 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.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

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

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence

of provocation to a person who knows of the illegality'¹¹

Without much ado on the legal implications of the provisions above Section 318 provides that 'When a person who unlawfully kills another in circumstances which, but for the provisions of this section, would constitute murder does the act which causes death in the heat of passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only'. The Nigerian Code used the word 'grave' to qualify the provocation like the Criminal Code of Ghana used the word 'extreme'. They may be implying the same thing but the Nigerian Courts never did pay attention to whether the provocation was grave or not. This may mean a lot in the criminal jurisprudence in Ghana.

The Supreme Court of Nigeria in the case of *Muhammad v State*¹², gave a list of ingredients of the defense of provocation, thus:

To succeed in proof of the defence of provocation, a person accused must prove the following ingredients, to wit: 1. Sudden fight between the appellant and the deceased which was continuous with no time for passion to cool down. 2. That in the course of that fight the accused was deprived of his self control. 3. That the provocative acts came from the deceased. 4. That the force used by the accused person in repelling the provocation was not disproportionate in the given circumstance. The provocation must be grave and sudden and *must be*

¹¹ Section 283 of the Criminal Code Act Cap LFN 2004

¹² (2017) LPELR-42098(SC)

such as to take away from the accused the power of self control.

Like it has been earlier discussed that the Nigerian Courts have indeed not examine the defence of provocation to the end of bringing about a change in the criminal jurisprudence as it relates to provocation. It is noteworthy to bring to discourse the innovative provisions of the Administration of Criminal Justice Act 2015 of Nigeria which expressly provides for some other ways justice may be achieved beyond the traditional punitive measures. By the import of Section 468 of the Administration of Criminal Justice Act 2015, the Court may order the release of a convict who is sentenced to a term of imprisonment for at least 15 years or for life. The court makes this order based on the recommendation of the Comptroller-General of the Correctional Facilities. It should be noted that with the novel Nigerian Correctional Services Act 2019, inmates are deemed to be of good behavior having served one-third of the jail term.

In Nigeria the appropriate sentence for the charge of manslaughter is life imprisonment. The innovation of the ACJA should impact a situation where a successful plea of the defence of provocation in criminal trials of murder enables the accused person to enjoy the benefits of a Parole order from the Court. It is a fact that it cannot be safely concluded that the accused person intends the consequences of his actions. He may have been so deprived of his power of self control. Hence, in the criminal jurisprudence of Nigeria, the Criminal Code is not enough for the Courts to rely on, the Courts should safely and progressively arm itself with the arsenal of legal provisions in various Statutes in our criminal law. Change they say is the constant thing in life.

4. The Criminal Code of Ghana and Provocation

The Criminal Code of Ghana has a somewhat similar provision with respect to the defence of Provocation just as provided in the Nigerian Criminal Code. However, the provision of the Criminal Code of Ghana slightly differs in some respect. In Ghana, the law seeks to do some codification of what may amount to provocation. It also differs in the sense that the term ‘provocation’ is used with the adjective ‘extreme’. The emphasis of the Law is on the word ‘extreme’ in which case what is extreme was provided for in Section 3. It is not however clear whether the law situations of extreme provocation listed in Section 53 are exhaustive or they are to serve as a guide to determine what the court may consider as extreme in the circumstance. The Code provides thus:

A person who intentionally causes the death of another person by unlawful harm shall be guilty only of manslaughter, and not of murder or attempt to murder, if—

(a) he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in succeeding sections; or ...¹³

The provision of this code is so clear that ‘mere’ provocation may not ground a reduction of a murder charge to manslaughter. In Nigeria, the provisions of the law have no such emphasis despite the fact that it does mention the word ‘grave’. There has been no such case before the court where emphasis of such is placed on whether or not the provocation is ‘extreme’ or ‘grave’. This matter of extreme provocation is so important in Ghana criminal

¹³ Section 52 of the Criminal Code of Ghana

jurisprudence on provocation that it went ahead to examine some matters that may be considered as extreme provocation, thus:

Matters which Amount to Provocation-

The following matters may amount to extreme provocation to one person to cause the death of another person namely—

- (a) an unlawful assault and battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind, either in respect of its violence or by reason of accompanying words, gestures, or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character and being in the circumstances in which the accused person was, of the power of self-control;
- (b) the assumption by the other person, at the commencement of an unlawful fight, of an attitude manifesting an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner.
- (c) an act of adultery committed in the view of the accused person with or by his wife or her husband, or the crime of unnatural carnal knowledge committed in his or her view upon his or her wife, husband, or child; and
- (d) a violent assault and battery committed in the view or presence of the accused person

upon his or her wife, husband, child, or parent, or upon any other person being in the presence and in the care or charge of the accused person.¹⁴

The above provision can be said to be implied in the Section 283 of the Criminal Code of Nigeria. However, the express mention of issues of adultery is considered a circumstance where an extreme provocation may occur. Adultery as a concept involves sexual relations outside wedlock, it differs from casual sex which occurs between consenting adults who are not in a legally recognized sexual relations. In the case of *Zinitege v Republic*¹⁵ where the defence of provocation was granted on the grounds that the behaviour put up by the deceased towards the appellant was that which could cause any reasonable person and in actual fact cause the appellant to suddenly and temporarily lose his self control by sleeping with his girl friend and also casting Insinuations at him. The case here is not one of adultery but what can safely be put as 'fornication'. The position of the court here is independent of the statutory provisions of what may be considered as an extreme provocation or it may be said that the court examined the parts where insults were offered by the deceased to the accused person and thereafter considered the matter one of extreme provocation. Some aspects of judicial decisions in some selected cases in both jurisdictions will be examined under the next caption. The provisions of the law of Ghana with respect to provocation seem to be more vivid and clear than the provisions of the Criminal Code of Nigeria. The major challenge that may however be posed by the provision of some specific cases of extreme provocation as

¹⁴ Section 53 of the Criminal Code of Ghana

¹⁵ (1993) JELR 63607 (C.A)

‘adultery’ may present some limitations on sexual related provocations. Nigerian Courts exercise wide discretionary powers in understanding the circumstance of the case.

5. Judicial Decisions on the Defence of Provocation in Nigeria and Ghana

At this point it may be important to do some critical appraisal of some cases that have been adjudicated by the Courts of both jurisdictions paying close attention to how issues of provocation has been addressed in the circumstances and context of each case. In the case of *Daniel Ibanga v The State*¹⁶, the evidence in the case shown that the accused person has parted with his wife and a divorce granted by a court of competent jurisdiction. The divorce has occurred 3 years before the accused person committed murder against his half brother that he knew had been having illicit sexual relations with his wife before they were divorced. The accused person in his evidence stated that he had lost 4 children basing the incidence on the consequence of the sexual intercourse his wife had with his half brother. It is also crucial to state that the accused person belongs to an ethnic group called Abak known for machet slashing and arguably the group still live like in the primitive age. In deciding the matter the court rejected the argument of the defence that the Abak people should not be subjected to the standards of the test of provocation as the people should be understood in their own context. The court simply put ‘...the jurisprudence of this country’s legal system does not permit, in this year and age, a singling out of Abak for special consideration outside the laws and the constitution of this country’. The conviction of murder was affirmed by the Supreme Court of Nigeria.

¹⁶ (1983) LPELR-1383(SC)

It can be safely concluded that the reason for the above matter was because the accused person accused his half brother of sexual relations with his wife on the ground of which he believed he had lost his four children. Understanding the plight of a man in this position may defy all features of an ordinary man. The sight of the man that committed adultery with his wife may erupt some resentment causing his passion never to cool. The major weakness to the case of the accused in my view is that the period of 3 years is far too long to cause him to commit murder except he can prove insanity occasioned by a depression caused by the death of his four children. On the part of the Court, much attention is not paid to the ordinary man's test which should be a major discourse in the context of the case. It is advised that the Courts should pay more attention to the words of the Statute when provocation is raised as a defence in a murder trial.

In a bid to re-emphasizing why the Criminal Code of Ghana seems more helpful in matters regarding the defence of provocation, we shall be examining the case of *Agyeman v The Republic*¹⁷ where the accused heard a noise from the room and assumed the wife was making love with another person and killed her, his plea for provocation as a defence was not granted as in his case he must sight them. The focus of the Court in this instance is the fact that it is a requirement under the law that where adultery is involved an accused person cannot claim the defence of extreme provocation when he could not see them. The question comes if this position can be maintained in the case of a blind man?

¹⁷ (1993) JELR 69428 (CA)

In the case of *Kekey v Republic*¹⁸, Kekey was a blind man and he has nursed the idea that his wife was having sexual intercourse with another man. Premised on this he went to stab and kill her under the presumption that she was preventing him from fighting her lover. The Court convicted him of murder and he put up the defence of extreme provocation which failed on the ground that being that in his state as a blind man he only needed to hear the sound or noise from their love making and not feeling their presence in the room. In this case, the court was of the opinion that hearing sounds may suffice for a blind man in detecting adultery but in the case of *Agyeman*, for a man that is not blind, he must see the person in adultery. From the discourse so far, it is clear that different circumstances will give rise to different results based on judicial perception of the matter. It is arguable that for both blind and otherwise, sexual noise is perceptible and distinct. In Ghana, different standards have been used for different persons. The Courts in Nigeria have not so much given attention to important words that make up the definition of provocation such as ‘presence’ similar to ‘view’ in the Criminal Code of Ghana and the ‘ordinary man’s test’. To some extents, the Courts of Ghana have been quite keen in their approach to the defence of provocation; this cannot safely be said of Nigerian Courts.

6. Conclusion and Recommendations

The discourse here is to examine the statutory provisions of the Criminal Code of Nigeria and the Criminal Code of Ghana to the end of examining the defence of provocation under both statutes. The countries under consideration are common law countries and these accounts for the reason why the influence of the Court is higher than Statutes in all circumstance. Emphasis has been placed

¹⁸ (1968) GLR 53 (CA)

on the words of the Statute making up for the definition of provocation. In Nigeria the definition of the defence of provocation has been richly described in Section 283 but it is yet to be thoroughly dealt with by the Courts. The Courts pay more attention to the copious requirement of provoked anger, no time for passion to cool amongst others but largely ignore the parts of the definition that has to do with 'ordinary man' and the 'presence' whether physical or spiritual. In Ghana, the Courts have paid close judicial attention to the fact that the accused must see the actions that provoked him and where he cannot see, the court adopt a standard of his own context to him. This clarity of approach is also needed in Nigeria and it is recommended that the judicial attitude to the defence of provocation in Nigeria should not be so conventional that it does not examine other details in the provisions of the law. In recent times and based on the advocacy of the international legal order, the crusade going on for the abolition of death sentence should make municipal courts take more precaution in dealing with capital offences where life may be cut short. There is a need for development in our laws and this sole responsibility in a common law jurisdiction is on the Courts.