The Jurisprudential Paradox: Re-Examining the Proportionality Requirement in the Defence of Provocation Under Nigerian Criminal Law

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Abstract— The defence of provocation in Nigerian criminal law has long been burdened by an internal inconsistency: the requirement that a provoked person's response must be proportionate to the provocation received. This doctrine, borrowed from English common law and consistently applied by Nigerian courts, demands rational restraint from an individual who, by the very definition of provocation, is said to have lost self-control and the mastery of his own mind. This study examines the jurisprudential foundation of the proportionality requirement and questions whether it can logically coexist with the core premise of the defence. Adopting a doctrinal legal research methodology, the paper analyses relevant Nigerian statutes (the Criminal Code and Penal Code), case law from the Supreme Court and lower courts, and comparative English authorities. The study finds that while the proportionality doctrine is firmly embedded in Nigerian judicial practice, neither the Criminal Code nor the Penal Code expressly incorporates it as an independent ingredient of the defence. Furthermore, the requirement creates a logical paradox: a person who has genuinely lost self-control cannot simultaneously be expected to measure the reasonableness of his response. Medical and psychological evidence on stress responses further undermines the doctrine's assumptions. The paper concludes that proportionality should be reframed as one evidentiary factor among several, rather than a mandatory separate requirement. It recommends legislative reform to resolve this paradox and bring Nigerian criminal law into greater coherence with its own foundational principles.

Keywords: Provocation; proportionality; self-control; criminal law; Nigeria.

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INTRODUCTION

There is a well worn thread running through the fabric of legal responsibility: that no man should answer for what he could not help. A person who neither chose nor caused a harmful outcome, whether because nature intervened or because another human being acted independently of him, stands outside the reach of legal blame (Fitzgerald, 1961; Ebiala, 2021). Against this backdrop, the doctrine of proportionality has quietly but firmly established itself as one of the more contentious features of Nigerian criminal law. Borrowed from English common law and woven into the Nigerian legal system over generations of judicial practice, the doctrine surfaces most prominently whenever an accused person raises the defence of provocation or self defence in a criminal trial. What this work sets out to do is to hold the doctrine up to scrutiny, to ask plainly and honestly whether it makes sense to demand proportionality from a person who, by the very logic of provocation, has lost the capacity for measured thought.

This question is no longer confined to dusty law journals. The Vanguard newspaper, writing on developments in Nigerian criminal courts, recently drew attention to the growing unease among legal practitioners about the continued application of the proportionality requirement in provocation cases, noting that the demand for rational restraint from someone in the grip of sudden passion strikes many observers as deeply contradictory (Vanguard, 2024).

WHAT DOES PROVOCATION MEAN?

Words often mean different things depending on who uses them and in what setting. In everyday conversation, to provoke someone simply means to make them angry, to needle them, or to stir up a reaction. But once that word crosses into a courtroom, its meaning becomes considerably heavier and more technical (Okpozo v The State, 1966).

The most quoted legal definition of provocation comes from the English case of *R v Duffy* (1949), where Devlin J described it as some act, or chain of acts, done by the deceased towards the accused, which would cause any reasonable person to suddenly and temporarily lose grip of their self control, and which actually did produce that effect on the accused, leaving him momentarily not the master of his own mind. Courts across England and later Nigeria received this definition warmly and applied it faithfully in case after case (see *Bedder v DPP*, 1954; *Phillips v R*, 1969).

Yet the definition left one important question dangling: could words alone, with no physical blow exchanged, be enough to found a provocation defence? For a long time, English courts said no. Their inclination was to restrict the defence to situations involving actual physical violence (*Holmes v DPP*, 1946; Ebiala, 2023a), with the lone

recognised exception being the case of a spouse discovered in the act of adultery (*R v Maddy*, 1671).

Parliament eventually stepped in to settle the argument. Section 3 of the Homicide Act 1957 declared, in terms that could not be misread, that provocation could arise from things said, things done, or a mixture of both, and that the question of whether any of these was sufficient to make a reasonable person act as the accused did was one for the jury to resolve by looking at the full picture. From that point on, words standing alone became capable in English law of grounding a provocation defence.

PROVOCATION AS THE CRIMINAL CODE SEES IT

Nigerian legislation has its own take on the matter. Section 283 of the Criminal Code defines provocation, within the context of offences that involve an assault as one of their constituent elements, as any wrongful act or insult serious enough that, if directed at an ordinary person, or done in the presence of an ordinary person against someone under his care or connected to him by a conjugal, parental, filial, fraternal, or employment relationship, it would be likely to strip that person of self control and push him into assaulting the one who caused the offence (Criminal Code Act, 2004). The section goes further to draw the boundaries, specifying what will not pass muster as provocation in the eyes of the law.

PROVOCATION UNDER THE PENAL CODE

The Penal Code takes a noticeably different path. It offers no definition of provocation at all. Sections 38, 265, and 222, the provisions most closely associated with the subject, say nothing by way of definition. The closest any of them comes is section 222(1), which merely acknowledges that provocation can lead to a loss of self control, without explaining what provocation itself actually is or how wide its scope extends.

It fell to the courts to fill this gap. In *Biruwa v The State* (1992), Akpata JSC laid down the conditions that must be met before provocation can serve as a defence. The learned Justice held that there must have been some act or series of acts by the deceased targeted at the appellant, capable of causing a reasonable person, and which actually did cause the appellant, a sudden and temporary loss of self control so severe that he was no longer master of his own mind at that moment (Biruwa v The State, 1992, p. 158).

The Supreme Court struck a similar note in *Akpan v The State* (1994), where provocation was described simply as an act or chain of acts by the deceased towards the accused that rendered the latter temporarily incapable of controlling his own conduct (p. 155).

WHAT MUST BE PROVED: THE INGREDIENTS OF PROVOCATION

The building blocks of provocation were carefully assembled by Akpata JSC in *Biruwa v The State* (1992). According to his Lordship, three things must be present and provable before the defence can be taken seriously by any court: first, there must be a provocative act, one that is both grave in character and sudden in its occurrence; second, the accused must have actually and reasonably lost self control as a result; and third, whatever the accused did in response must bear some reasonable proportion to the provocation that triggered it (p. 158).

The Supreme Court confirmed this position in *Akpan v The State* (1994). Belgore JSC, delivering judgment in *Ekpeyong v The State* (1993), gave the ingredients an even fuller treatment. His Lordship held that the act complained of must be one that any right thinking observer would recognise as provocative; that its effect on the accused must have been to cause a genuine and objectively understandable loss of self control; and that the accused's retaliatory conduct must have been both immediate and proportionate to what was done to him (p. 195).

When all of these judicial pronouncements are drawn together, four clear requirements emerge: a provocative act must exist; the accused must have lost self control; the response must have been instantaneous; and the response must have been proportionate. It is that last requirement, the proportionality demand, that sits uneasily within the defence and which the remainder of this work examines.

THE PROPORTIONALITY DOCTRINE EXPLAINED

The common law has long insisted that provocation cannot excuse just any response, however violent or extreme. The mode of retaliation must, at the very least, bear some sensible relationship to what provoked it. *R v Duffy* (1949) put it memorably: fists might answer fists, but reaching for a deadly weapon in response to a bare handed confrontation is a step too far. This principle travelled through the courts in *R v Gauthier* (1943), *R v McCarthy* (1954), and *Mancini v DPP* (1942), gathering authority at each stop, and eventually became known as the proportionality doctrine or the reasonable retaliation rule.

It would, however, be a misreading of the doctrine to suppose that it demands an exact, blow for blow equivalence between provocation and response. That kind of mathematical precision is neither possible nor what the law has ever asked for. If strict equality were the test, then even the gravest verbal provocation could never justify the mildest physical reaction, and if the respective blows had to be perfectly matched, the defence of provocation would have nothing left to do, since only a deliberately murderous strike could balance a retaliatory blow intended to kill (Turner, 1962, p. 167). What the rule actually insists upon is that the response must not be so wildly and shockingly excessive that it bears no reasonable connection to the act that triggered it.

As Sir E.H. East (1803) put the matter with characteristic clarity, the penalty visited upon the provoker must not greatly exceed the offence he committed, though the law will not pick apart with surgical precision whether the accused collected the exact pound of flesh owed to him (p. 239). The point at which the law draws the line is where the retaliation is so outrageous relative to the provocation as to suggest not human frailty in a moment of passion, but something far darker and more deliberate (East, 1803, p. 234).

In *R v Hopper* (1915) and *R v Larkin* (1943), the courts were satisfied that the accused persons, though they caused death, had not responded with such excess as to lose the benefit of the partial defence, and so returned verdicts of manslaughter rather than murder. The opposite conclusion was reached in *R v Thomas* (1837) and *R v McCarthy* (1954), where the sheer degree of force used stripped the accused of the defence entirely. Lord Goddard CJ was pointed about the distinction: a man who returns a provocation with a single punch, even a punch that proves fatal by an unfortunate fall, may well be within the limits of what is excusable; but the man who rains repeated blows on a fallen victim, or grinds his head into the ground, has gone somewhere the law will not follow.

The type of weapon used has always been a significant consideration. In *Mancini v DPP* (1942), Lord Simon refused to accept that a fist aimed at the accused could justify the sudden production of a dagger in response; the gap between provocation and retaliation was simply too wide to bridge. But the courts have also recognised that extreme provocation can expand the range of what is permissible. In *Phillips v R* (1969), Lord Diplock acknowledged that when provocation reaches a sufficient level of gravity and a dangerous weapon happens to be within reach, its use may not automatically forfeit the defence, though walking a distance to deliberately fetch one would be an entirely different matter.

HOW NIGERIAN LAW HAS HANDLED THE DOCTRINE

Some commentators have pointed out that proportionality does not appear as an express requirement in any Nigerian penal statute (Chukkol, 1988; Ofem, et al., 2026). Neither the Criminal Code nor the Penal Code explicitly requires that the mode of retaliation be proportionate to the provocation before the defence can succeed. The closest either statute comes is section 284 of the Criminal Code, which deals with assault and references disproportionate force, but this falls short of a clear, general codification of the doctrine for all provocation cases. Professor Ofori-Amankwah (1986), however, made a persuasive case that the doctrine must nonetheless be read into the statutes by implication, since criminal law has always served a guiding, civilising role in society, and a more civilised society necessarily demands a higher standard of self restraint from its members (p. 291).

Despite this statutory silence, Nigerian courts have embraced the doctrine and applied it consistently. The case of *George v The State* (1993) is a telling illustration: the appellant and the deceased had quarrelled over something as minor as what the appellant was cutting in his own room. When the deceased pressed the point, the appellant responded by striking him on the neck with a matchet, fatally wounding him. The Supreme Court had no difficulty concluding that the retaliation bore no reasonable proportion to whatever provocation, if any at all, had been offered. The court also emphasised that the choice of instrument mattered: a matchet, used with force, is by its very nature a lethal tool.

In *Aganmonyi v Attorney-General of Bendel State* (1988, unreported), the deceased struck the appellant with a rod, causing injuries to two of his fingers and his front teeth, painful, certainly, but not life threatening. The appellant responded by striking the deceased so hard on the head with the same rod that he died of intracranial injuries. The court held that the retaliation was so far out of proportion to the provocation as to defeat the defence entirely.

In *Umana v The State* (1972), the court found it impossible to accept that hacking a person to death with a matchet could be a proportionate response to the slight discomfort caused by a bunch of palm fruits. In *Wonaka v Sokoto Native Authority* (1956), a slap by the deceased led the accused to retaliate with an axe wound that proved fatal; the court was unimpressed with the plea of provocation. And in *Nkenchor v The State* (1985), bringing a matchet to a stick fight was, predictably, held to go beyond what the doctrine permits. The same principle runs through *Fadubi v The State* (1983) and *R v Akpakpan* (1956). In a recent report, the Vanguard newspaper covered a Court of Appeal decision in which a manslaughter plea was dismissed on the ground that the accused's use of a broken bottle against an unarmed opponent during a quarrel was far too extreme to qualify as proportionate retaliation, a decision that underscores just how vigorously Nigerian courts continue to enforce the doctrine (Vanguard, 2024).

THE CASE AGAINST THE DOCTRINE

The proportionality doctrine has never been short of critics, and with good reason. Glanville Williams (1983) put his finger on the central problem: there is a deep internal contradiction in asking someone who has lost self control to nonetheless exercise the kind of measured, rational judgment that proportionality requires (p. 543). This very argument was put to the court in *Phillips v R* (1969), where defence counsel submitted that the moment a reasonable man genuinely loses his self control, his conduct ceases to be that of a reasonable man, and holding him fully responsible for whatever follows becomes logically indefensible (pp. 137-138).

The court rejected that submission, and some academic writers have aligned themselves with that rejection (White, 1970). But with the greatest of respect, the

argument deserves more credit than it has been given. The law itself says, in the very definition of provocation drawn from *R v Duffy* (1949), that a provoked person is not the master of his mind. How, then, can that same person be simultaneously expected to weigh his response and ensure it does not exceed what the provocation warranted? Beyond this logical difficulty, there is a physiological one: human beings do not respond to extreme stress in uniform ways. Medical research has consistently shown that stress tolerance varies enormously from person to person; some individuals are overwhelmed by stimuli that others would absorb without difficulty (Brett, 1970, p. 637). Once someone is consumed by passion in the heat of provocation, Peter Brett (1970) observed, firing four shots rather than one reveals nothing more sinister than that the person had a strong rather than a weak nervous system; it does not, of itself, reveal a murderous heart (p. 638).

There is another dimension to this critique that is sometimes overlooked. The defence of provocation is, by definition, available only where the accused had no premeditated plan to kill or cause grievous bodily harm. If there was no plan, if the killing was entirely the product of hot blooded passion, then it seems arbitrary and somewhat cruel to single out the manner of killing as a basis for denying the defence. A person seized by sudden fury will reach for whatever is closest to hand. Distinguishing between weapons in that context, as Glanville Williams (1954) pointed out, serves no meaningful purpose (p. 748).

Critics have also argued, and with some force, that the courts have become overly fixated on how the accused retaliated, treating the mode of response almost as if it were the whole question, when the real question ought to centre on the nature and severity of what provoked the accused in the first place (Aguda & Okagbue, 1990; Ebiala, 2023b). The Vanguard newspaper, in a recent piece drawing on commentary from legal practitioners and academics, reported a growing consensus that the proportionality requirement needs to be fundamentally reconsidered, with many voices arguing that it sits in irreconcilable tension with the foundational premise of the defence it purports to regulate (Vanguard, 2025).

It is finally submitted, and this view commends itself as the most intellectually honest one, that proportionality is not a rule of substantive law at all. It is, at best, a piece of evidence: one consideration among many that helps a court determine whether the accused truly lost self control, or whether the violence was in fact the product of cool, calculated malice dressed up in the language of passion (see *R v Bassey*, 1963; *Obaji v The State*, 1965). The Supreme Court took precisely this view in *Chukwu Obaji v The State* (1965).

CONCLUSIONS AND A CALL FOR REFORM

The law, like any traveller worth their salt, must always be prepared for what lies around the next corner. It cannot stand still while the world it governs moves on (Cardozo, quoted in Lloyd, 1964, p. 326; Ebiala, 2023a). The foregoing analysis has shown that the proportionality doctrine, as received from English common law and applied by Nigerian courts, demands that the manner of retaliation bear a reasonable relationship to the provocation that inspired it. It is equally clear that neither the Criminal Code nor the Penal Code has expressly incorporated this requirement, yet Nigerian courts have, through years of accumulated judicial practice, treated it as if it had been written into the statutes all along (see *Babalola John v Zaria Native Authority*, 1959).

Two opposing camps have formed on the question of whether this state of affairs is acceptable. Those who support the doctrine argue, not without reason, that some limit must be placed on what provocation can excuse, lest the defence become a licence for extreme violence. But those who challenge the doctrine make a point that is harder to answer: if a person has genuinely lost mastery of his mind, he cannot logically be expected to be master of his actions either. To say that his response was disproportionate is really just another way of saying that no reasonable person would have reacted as he did, which collapses the proportionality requirement back into the general reasonableness test for provocation and renders it redundant as a separate rule (White, 1970). It is therefore submitted, with respect, that the call of the Honourable Justice A.G. Karibi-Whyte of the Supreme Court deserves to be translated into legislation. In his Lordship's own words:

> The meaning of provocation seems to me paradoxical with the requirement of proportionality of the reaction. It seems reasonable to assume that whilst smarting justifiably in the passion resulting from the provocative incident, it is hardly reasonable to conceive of the ability to weigh the action whilst under loss of self control. Reason is still too remote and could not be a composite member of the decision to retaliate. The accused was not at this stage master of his passion. Passion is in control. (Karibi-Whyte, 1990, pp. 56-57)

The reform proposed here is a modest but important one: the Nigerian legislature should address the proportionality question expressly in criminal legislation, not to abolish it altogether, but to reframe it. Rather than treating proportionality as a mandatory, independent ingredient of the defence, the law should treat it as one relevant factor among several that a court may weigh in determining whether a genuine loss of self control actually occurred. This approach would preserve the protective function of the doctrine while stripping away its internal contradiction.

Until that reform is made, the proportionality doctrine will remain exactly what Justice Karibi-Whyte described it as: a jurisprudential paradox sitting uncomfortably at the centre of one of criminal law's most human defences.

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