

**A Critical Analysis of the Viability of the Reasonable Man Test in the Defence of  
Provocation**

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2012

By

**Mulenga Mwelwa R.**

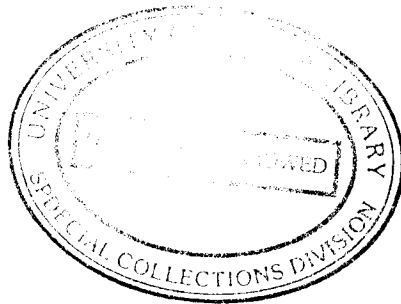
**(27068633)**



A dissertation submitted to the University of Zambia in partial fulfillment of the requirements of  
Bachelor of Laws degree (LLB)

## DECLARATION

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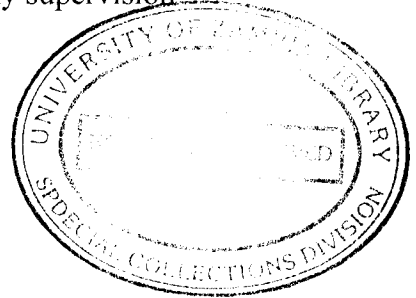
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## **DEDICATION**

To my siblings Mukuka, Chama, Deborah, Manasseh, Mwansa, Twachimvya, Kapola and Mapalo. I dread to think about how my life would have been if you guys were not around.

## ACKNOWLEDGEMENTS

There are so many people that I have to thank for my achievements in life thus far and more specifically, for the successful completion of this work. But before I individually thank all those people, I wish to thank someone who is responsible for even placing those people in my life: the almighty God. God, you are the source of my comfort, my courage, my inspiration and so many of my strengths and virtues. Even when the future looked bleak, God, you constantly renewed my strength and made me believe that one day I will successfully complete this work, well, that day is now here, and I can not thank you enough for that.

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To my supervisor, Miss. Lwatula, this work is as much your work as it is mine. This is because, without your expert input and your patience, this work would not have seen the light of day. Your guidance was invaluable. From phrasing the topic of my research paper to finally making the recommendations, you were there the whole way. For all the assistance rendered, I shall forever remain grateful.

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## ABSTRACT

The reasonable man test is a legal fiction used mostly in common law jurisdictions in which a hypothetical individual whose view of things is consulted when making legal decisions. The reasonable man is relied upon because he has foresight, he plans his actions, he is informed, he is aware of the law and he is fair minded. Whatever he does is always reasonable. The reasonable man test is therefore used as a yardstick against which everyone's behavior in society is measured. However, the strict adherence to the reasonable man test in some cases results in injustice. This paper thus undertakes to determine the extent to which the reasonable man test is still viable in the defence of provocation with reference to the *Zambian* jurisprudence.

This paper discusses the law of provocation in *Zambia*, *England* and *India* and makes a comparative study of the law in these three jurisdictions. In making the comparative study, the dissertation establishes that the *Zambian* law on provocation is inadequate as it does not provide for certain aspects of the defence. The dissertation for example discovers that the defence of provocation does not include self-induced provocation and also provocation that happens in the absence of the accused. Another inadequacy of the defence that the paper discovers is that the defence is limited only to unlawful provocative acts.

The paper also examines how the courts in *Zambia* apply the reasonable man test. The paper discovers that the *Zambian* courts adopt a strict approach when applying the reasonable man test as the accused is judged against an inflexible, constant and objective standard. The dissertation however, establishes that this is a standard that many accused persons may never reach or achieve. The paper therefore also gives criticisms of the strict application of the test and advocates for a less strict approach.

The discussion has recommended that the scope of the defence should be expanded to include self-induced provocation and provocation that takes place in the absence of the accused. It has also been recommended that a less strict approach should be adopted when applying the reasonable man test. A conclusion is also drawn to the effect that the reasonable person should be attributed with more of the personal characteristics of the accused other than age and sex which are the ones which are normally attributed to the accused.

## **TABLE OF STATUTES**

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## CHAPTER 1

### 1.0 PROVOCATION AS A DEFENCE TO A CHARGE OF MURDER

#### 1.1. General Introduction

Provocation was classically defined by Devlin, J. in the case of *R v. Duffy*<sup>1</sup> where he stated that, “Provocation is some act or series of acts, done by the dead man to the accused, which would cause in any reasonable man, and actually causes in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.” However, it must be pointed out from the onset that the common law position as stated above has undergone some statutory modifications as the study will later show.

The law on provocation in Zambia is provided for in sections 205 and 206 of the Penal Code. The provision of section 205 (1) is to the effect that when a person causes death in the heat of passion, caused by sudden provocation and before there is time to cool, he is guilty only of manslaughter. This defence will only apply if the act which results in death bears a reasonable retaliation to the provocation.<sup>2</sup> Section 206 statutorily defines provocation and provides that provocation means and includes any wrongful act or insult of such nature as to be likely, when offered or done to an ordinary person 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. An important feature of this section and one which is central to this study is that the section goes on to define an ordinary

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<sup>1</sup> [1949] 1 ALL ER 932

<sup>2</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 205 (1)

person. It provides that an ordinary person shall mean an ordinary person of the community to which the accused belongs.<sup>3</sup>

A critical analysis of sections 205 and 206 of the Penal Code shows that the defence of provocation has three elements which must be proved if the defence is to succeed<sup>4</sup>. These are: the provocative act, the loss of self-control and also that the act which caused the death bears a reasonable relationship to the provocative act which was done or offered by the deceased. In *Nyambe Liyumbi v. The People*<sup>5</sup>, Chomba, J.S. noted that there are three inseparable elements to the defence of provocation. For support, he relied on the case of *Lee Chun-Cheun v. R*<sup>6</sup>, where Devlin, L.J. said, “Provocation in law consists of mainly three elements: the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation.”

Provocation is a defence that is available only to a charge of murder. In *Cunningham*<sup>7</sup> it was reiterated that provocation was not a defence to a charge of wounding or any charge other than murder. It is a partial defence as it only reduces a charge of murder to manslaughter when it is successfully pleaded by the accused. However, the authors of Smith and Hogan on Criminal Law<sup>8</sup> have noted that the courts have struggled to reach an agreement on the scope of the defence and definitions of its terms. In this regard, this study will undertake to analyse the law on provocation with the aim of showing to what extent the defence is still applicable in Zambia.

## 1.2 Problem Statement

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<sup>3</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Sections 205 and 206

<sup>4</sup> Simon E. Kulusika, *Criminal Law in Zambia: Text, Cases and Materials*. (Lusaka: UNZA Press, 2006), 345

<sup>5</sup> (1978) Z.R. 25 (SC)

<sup>6</sup> [1963] 1 ALL ER 73

<sup>7</sup> [1959] 1 QB 288

<sup>8</sup> David Ormerod, *Smith and Hogan's: Criminal Law*, 12<sup>th</sup> ed. (Oxford: Oxford University Press, 2008), 489

The three elements of the defence of provocation entail that a dual test must be applied and satisfied if the defence is to stand. The dual test is comprised of the subjective test and the objective test. In applying the objective test, an ordinary or reasonable man is employed. Thus, the following questions must be asked: (a) was the accused provoked to lose his self-control? (b) Was the provocative act or insult of such a nature as would cause an ordinary person to lose his self-control? (c) Was the provocation enough to make a reasonable man do as the accused did? The question in (a) is what is referred to as the subjective test while the questions in (b) and (c) are what constitute the objective test.

The ordinary man test is cardinal as it provides a standard by which the act or insult of the victim and response of the accused may be judged. Although it is acknowledged that the ordinary man test was introduced so that one standard can be applied to its application, due to lack of proper definition and consistent application of its scope or terms, the reasonable man test has caused a number of problems. For example, in the case of *Rosalyn Thandiwe Zulu v. The People*,<sup>9</sup> were the appellant relied on provocation as her defence for having murdered her violent husband by firing six shots at him with four bullets hitting him. Her appeal was allowed by the Supreme Court holding that the retaliation was proportional to the provocation. However, in *Greyson v. R*,<sup>10</sup> although the court did allow the appeal, the court still held that the appellant's action of inflicting six stab wounds on his wife from which she later died was disproportionate to the provocation. Granted, no case is exactly similar in its facts with another, but a critical analysis of the two above cited cases still begs the question: what exactly is meant by the requirement that the retaliation should bear reasonable relationship with the provocation?

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<sup>9</sup> (1981) Z.R. 342

<sup>10</sup> (1961) R and N 337

Another concern raised by the application of the defence of provocation is that the accused is expected to behave like a reasonable man under the circumstances of the provocation. This means that the accused is expected to behave like an ordinary person of his community. But it is unfair and almost farfetched to reasonably expect this from someone who has lost his or her self-control and acts in the heat of passion, because once a person loses his or her self-control, his actions cease to be those of a reasonable person and he or she will no longer be able to control his or her actions for the duration that the person has lost his or her self-control. In these circumstances, the accused cannot surely be expected to behave like an ordinary person of his community. Therefore, strict adherence to the reasonable man test in such circumstances is more likely to result in injustice to the accused.

Another concern arises from the acknowledgement that the ordinary person has some characteristics which may be taken into consideration by the courts in determining the reaction to the provocation and although the courts seem to insist that for a characteristic to be relevant for the purpose of the defence of provocation, it should affect the gravity of the provocation of the accused, the question that should still be asked is why should some personal peculiarities or idiosyncrasies such as sex, age and impotency be taken into account while similar personal peculiarities such as mental or physical abnormalities be refused to be taken into account? This goes against the rationale for applying the objective test which is that the same standard has to be applied when determining the guilty of all accused persons who rely on the defense.

These inefficiencies resulting from the application of the reasonable man test raise the need to adequately define the scope of the defence, for example, adequately defining what is meant by the requirement that the retaliation should bear a reasonable relationship with the provocation so as to avoid the situation resulting from the two cases referred to above.



### **1.3 General Objective**

This paper intends to show to what extent the defence of provocation is still viable or applicable in Zambia. It further intends to analyse to what extent the scope of the reasonable man test can sufficiently be defined in its application in the defence of provocation.

### **1.4 Specific Objectives**

- I. To highlight the law on provocation in Zambia.
- II. In Zambia, the reasonable man is statutorily defined and limited to the ordinary person of the community to which the accused belongs.<sup>11</sup> The research will thus, attempt to analyse the extent to which the defence is still applicable in Zambia.
- III. To highlight the challenges faced by both the judges in applying the defence and those accused who plead it.
- IV. To highlight the deficiencies of the law of Provocation in Zambia by carrying out a comparative study of the defence with that of England and India.
- V. To highlight the consequences of adopting a strict approach when applying the reasonable man test.
- VI. To show or give recommendations as to how the defence can be improved or made more applicable so that those who come within its scope can easily rely on it or can do so with less difficulties.

### **1.5 Research Questions**

- I. Who is the ordinary or reasonable man?

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<sup>11</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206

- II. Does the strict reliance on the reasonable man test almost render it impossible to successfully rely on provocation as a defence?
- III. What are the legal implications of limiting the ordinary man test to a reasonable man of the community of the accused?
- IV. To what extent is the defence of provocation applicable in Zambia?
- V. What amounts to a provocative act capable of causing a reasonable person to lose his self-control?
- VI. Is the list of personal peculiarities or idiosyncrasies such as sex, age and impotency that may be considered by the court an exhaustive list?
- VII. What actually is meant by proportional retaliation?

## **1.6 Rational and Justification of the Study**

Although the Zambian Penal Code in Section 206<sup>12</sup> does define an ordinary person as an ordinary man of the community from which the accused comes, however, the requirement of the reasonable man test is still unchanged as the reasonable man is synonymous with the ordinary man and as already pointed out, there is no agreement on the scope and definition of the reasonable man. This paper is therefore, important as it will highlight the injustice that will result from the strict application of the reasonable man test.

The carrying on of this study or research is justified as it will interpret and analyse the law providing for the defence and to what extent the law is still applicable in Zambia. The research is also important as it will highlight the difficulties the accused is likely to encounter when relying

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<sup>12</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206

on the defence. The paper will also provide the recommendations on the aspects of the law of provocation which have to be reformed.

### **1.7 Research Methodology**

Owing to the fact that the research for this paper will be conducted by desk research, the objectives of the paper as aforementioned will be achieved by analysing the applicable laws and a bulk of judicial decisions. This paper will further rely on information from authors who have analysed the law on the defence of provocation and the reasonable man test. That is, textbooks, scholarly articles as well as journal articles where the text books and the relevant legislation fall short.

### **1.8 Definitions of Operational Terms**

- I. Provocation: words or conduct which are sufficient to prevent the exercise of reason and which would temporarily deprive a reasonable person of his self-control.<sup>13</sup>
- II. Accused: one charged with an offence.
- III. Murder: the crime of unlawful killing with malice aforethought.
- IV. Penal Code: Chapter 87 of the laws of Zambia.
- V. Ordinary man: an ordinary person of the community to which the accused belongs.
- VI. Defence: the arguments used by an accused person to defend himself or herself in a court of law.

### **1.9 Chapter Layout**

#### **Chapter 1: Provocation as a Defense to Murder.**

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<sup>13</sup> Michael Woodley, ed. *Osborn's Concise Law Dictionary* (London: Sweet and Maxwell, 2005), 323

This chapter covers the basic aspects of the research. These are the introduction, statement of the problem, research questions, and the general and specific objectives of the study and the importance of the study.

## **Chapter 2: The Defence of Provocation: A Comparative of the Law with that of India and England.**

This chapter discusses the law of provocation in Zambia, England and India. This includes both statutory and case law. It compares the law on provocation in the aforementioned countries; point out the differences and similarities and also modifications in application.

## **Chapter 3: A Critical Analysis of the Extent to which the Defense is still Applicable in Zambia.**

This is the chapter that considers the applicability of the defence of provocation in the Zambian criminal law. It critically analyses the individual elements of the defence and point out the challenges which judges face in determining that each element is established. The chapter also considers the consequences of strictly applying the reasonable man test through a critical analysis of the available case law.

## **CHAPTER 4: Conclusions and Recommendations**

This chapter gives the conclusions on the applicability of the defence of provocation and puts forward suggestions and recommendations as to law reform on the defence of provocation in order to ensure the attainment of ultimate justice all accused persons who fall within the sphere of the defence.

### **1.10 Conclusion:**

In conclusion, the foregoing discussion has attempted to give a brief insight into the defence of provocation and the Doctrine of the Reasonable Man. The discussion has thus, defined the defence of provocation, has explained what is meant by the Doctrine of the Reasonable Man and has outlined the elements of the defence which in effect have to be successfully established before the court by the person attempting to rely on the defence. Although this has not been done in great detail as a much broader and comprehensive analysis of the doctrine will be given in the subsequent chapters. The discussion has also shown that the doctrine is not perfect and therefore, its strict application in certain situations will result in injustice. This has been done through the presentation of the introduction, the problem statement and the rationalisation of the research.

## CHAPTER 2

### 2.0 A COMPARATIVE ANALYSIS OF THE ZAMBIAN LAW OF PROVOCATION WITH THAT OF ENGLAND AND INDIA

#### 2.1 Introduction:

One of the settled tenets of justice is that everybody should be allowed a fair trial during which he or she can try to prove that he did not commit any crime or try to explain the reasons for him having committed the crime in question. These reasons may include special circumstances that he may have been in while committing the crime. One such special situation is the situation where the accused has been provoked by the victim before his killing. This chapter will therefore, essentially discuss the law on the defence of provocation as it applies in Zambia. This will include both statutory and case law. The chapter will begin by making a brief presentation of the history of the defence. The chapter will also after the discussion of the law, proceed to compare the Zambian law on provocation with that of other jurisdictions. These will include England and India. In so doing, the chapter will point out the similarities, the differences and the modifications in application of the law in these jurisdictions.

#### 2.2 Origins of Provocation as a Defence:

The early common law presumed all killings to be the consequence of malice aforethought and uniformly applied the penalty of death. However, courts were unwilling to convict accused persons where, for example, the killing occurred in the confusion of a brawl, which they saw as a less morally objectionable form of homicide.<sup>14</sup> In the absence of evidence of malice

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<sup>14</sup> E. J. Philip, *Criminal Law : Cases, Materials and Text*, 3<sup>rd</sup> ed. (London: West Publishing Co. 1985), 341

aforethought, courts began to carve out exceptions to the rule and excused the defendant for his crime. In the seventeenth century, however, England's draconian law began to change after Parliament passed a series of statutes differentiating between types of homicide.<sup>15</sup> A killing that occurred "upon a sudden brawl or contention by chance" was no longer believed to involve malice aforethought. The moral culpability of the defendant, therefore, provided the basis for drawing the distinction between murder and manslaughter.

The law, under the rubric of provocation, now recognised the infirmity of human nature and allowed an accused to rebut the presumption of malice with evidence of the provocative conduct of the deceased.<sup>16</sup> Provocation theory thus introduced a new factor into the equation determining the degree of culpability of a defendant. As a result, it came to be thought that if the deceased had given the accused enough reason to react in the manner that he did, then there was no malice in his actions and the killing was not murder but rather manslaughter, a non-capital offence. As the provocation theory evolved, the most important task the courts faced was determining what acts of the victim could constitute adequate provocation. In 1707, Lord Holt specified four categories of acts that constituted legally sufficient provocation.<sup>17</sup> These were: hearing angry words followed by a physical assault, seeing a friend being assaulted, observing a citizen detained by force and seeing one's wife in bed with another man.<sup>18</sup>

Similarly, there were clear ideas on what acts did not qualify as provocative acts in order to prevent the weakening of the normative force of law. The acts legally insufficient at common law to constitute provocation included: mere words, insulting gestures, trespass to property and

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<sup>15</sup> E. J. Philip, *Criminal Law : Cases, Materials and Text*, 3<sup>rd</sup> ed., 341

<sup>16</sup> E. J. Philip, *Criminal Law : Cases, Materials and Text*, 3<sup>rd</sup> ed., 342

<sup>17</sup> R v. Mawridge [1707] J Kel 119

<sup>18</sup> R v. Mawridge [1707] J Kel 119

misconduct by a child or servant and breach of contract.<sup>19</sup> When the allegedly provocative act fell within one of these categories, the act of the accused of killing the provocateur was considered a disproportionate response and, therefore, malicious.

Accordingly, the adequacy of provocation became a question of fact for the jury to determine according to an objective standard. Courts explained that the jury was better able to make the moral decision as to what constituted sufficient provocation because the jury was more experienced in “the workings of passion.”<sup>20</sup> In order to determine the adequacy of provocation, however, the jury was to use the Reasonable Man Test.

### **2.3 The Law of Provocation in Zambia:**

As already stated in the introductory chapter, the law of provocation in Zambia is provided for in sections 205 and 206 of the Penal Code. The first limb of section 205 is to the effect that a person will be guilty of manslaughter only, where he unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder. The section further provides that for the accused to be availed of the defence, the accused must have so acted in the heat of passion which must have been caused by sudden provocation and before there was time for his passion to cool.<sup>21</sup> The second limb of section 205 provides for the rule that the defence is only to succeed where the act which causes the death bears a reasonable relationship to the provocative act.<sup>22</sup>

Section 206 (1) gives the statutory definition of the defence and it provides that:-

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<sup>19</sup> R v. Mawridge [1707] J Kel 119

<sup>20</sup> Y. Stanley, *Unrestrained Killings and the Law: Provocation and Excessive Self-defense in India, England and Australia* (Delhi: Oxford University Press, 1998), 83

<sup>21</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 205

<sup>22</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 205



The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such nature as to be likely, when done or offered 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 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.<sup>23</sup>

The section then proceeds to define an ordinary person by providing that, "For the purposes of this section, an 'ordinary person' shall mean an ordinary person of the community to which the accused belongs."<sup>24</sup>

#### **2.4 The Law of Provocation in England:**

Provocation which was a defence at common law was modified in 1957 by the Homicide Act.

Section 3 of the Homicide Act in particular provides as follows:-

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 both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man<sup>25</sup>

#### **2.5 The Law of Provocation in India:**

In India, the Penal Code, 1860 governs the law on provocation. The provisions for provocation in the Indian Penal Code are largely based on English common law, but certain changes have been brought up keeping in mind the heterogeneous and multi-cultural communities that exist in India.

Section 300 in effect provides that culpable homicide is murder when the person who commits such homicide intends to cause such death or if he causes any serious bodily injury knowing that

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<sup>23</sup> The Penal Code, Cap 87 of the Laws of Zambia, Section 206 (1)

<sup>24</sup> The Penal Code, Cap 87 of the Laws of Zambia, Section 206 (1)

<sup>25</sup> Homicide Act, 1957 of England, Section 3

in all probability, it will result in death.<sup>26</sup> However, there are a number of exceptions to section 300 of the Indian Penal Code of 1860. The exception is of interest to this study and deals with the issue of murder resulting from provocation is to the effect that 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.<sup>27</sup>

## **2.6 Discussion of the law in detail:**

With reference to the above stated statutory provisions on provocation in the three jurisdictions: India, England and Zambia, it will be stated that provocation will come into question or operation where the offender intentionally struck the blow but did so in the heat of passion, the passion being that he is deprived of his self-control and therefore acts in a state of ungovernable anger, thus negating malice aforethought.

Provocation is a defence to murder, and if successful, reduces the charge to manslaughter. Therefore, unlike other defences like that of self-defence, provocation is not a full or complete defence and does not lead to complete acquittal of the accused if successful.<sup>28</sup> The defence is also not available to a charge of attempted murder. However, in relation to offences other than murder, provocation is not a defence, although, it can be taken into account at the sentencing stage.<sup>29</sup>

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<sup>26</sup> The Indian Penal Code, 1860 Act No. 45 of 1860, s 300

<sup>27</sup> The Indian Penal Code, 1860 Act No. 45 of 1860, s 300

<sup>28</sup> Ormerod, *Smith and Hogan's Criminal Law*, 12<sup>th</sup> ed. 491

<sup>29</sup> Ormerod, *Smith and Hogan's Criminal Law*, 12<sup>th</sup> ed. 491

The burden of proof in respect of provocation is on the prosecution. In *R v. Cascoe*<sup>30</sup> it was affirmed that if there is evidence raising the possibility of provocation, the burden is upon the prosecution to prove beyond reasonable doubt that the accused was not provoked. If the court is left feeling that there is a reasonable possibility that the elements of the defence existed, it must not convict of murder but manslaughter. An accused will also not be allowed to rely on past provocation. Allen<sup>31</sup> observes that while there may have been a history of provocative acts or words, if at the time of the killing, the defendant was not provoked to lose his self control, he cannot rely on past provocation.

The provocative act must arise from a human agency and such agency must have legal capacity. Kulusika<sup>32</sup> notes that section 206 of the *Zambian Penal Code* restricts provocative conduct to human beings and therefore, circumstances such as traffic chaos and sudden failure of a car's engine do not amount to a sufficient provocative act. Thus, anyone involved in the traffic chaos and as a result kills another motorist cannot invoke the defence of provocation. This is also observed by the authors, Smith and Hogan<sup>33</sup> who state that mere circumstances, however, provocative they may be, do not constitute a defence to murder. Therefore, a farmer who loses his self-control after his crops are destroyed by a flood or his flock by foot and mouth disease cannot successfully rely on the defence.

The provocation should have come from a person to whom the retaliatory act had been aimed by the accused. In support of this proposition, Kulusika<sup>34</sup> observes that the provocative act or insult must come from the victim. He further points out that, "The phrase, 'to assault the person by

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<sup>30</sup> [1970] 2 ALL ER 833

<sup>31</sup> Michael J. Allen, *Criminal Law* (London: Blackstone Press, 1995), 259

<sup>32</sup> Kulusika, *Criminal Law in Zambia: Text, Cases and Materials*, 351

<sup>33</sup> Ormerod, *Smith and Hogan's Criminal Law*, 12<sup>th</sup> ed. 491

<sup>34</sup> Kulusika, *Criminal Law in Zambia: Text, Cases and Materials*, 351

whom the provocative act or insult is done or offered' may be construed to require that the act should emanate from the victim." In the case of *R v. Gross*<sup>35</sup> the accused, provoked by blows from the husband, fired at him, intending to kill him but missed and instead killed P. it was held that if the firing at the person intended to be hit would be manslaughter, then if the bullet strikes a third person not intended to be hit, the killing of that person will be manslaughter and not murder.

## **2.7 Similarities of the Law in the Three Jurisdictions:**

**Lawful acts as provocation:** In all the three jurisdictions under consideration, lawful acts do not amount to provocation. The Indian position is such that although the exception to section 300 of the Indian Penal Code does not have an express provision stating that the provocative conduct must be unlawful, the provisos to the exception do provide that anything lawful cannot be considered provocative conduct. The second proviso to the first exception of section 300 provides that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.<sup>36</sup>

English common law held that lawful acts could not amount to provocation. However, there could be some exceptions like adultery which is not a crime per se under English criminal law but which could certainly amount to provocation. However, in section 3 of the Homicide Act, 1957, there is no express restriction against lawful acts but the matter is supposed to be left for the consideration of the jury to decide whether a reasonable man would have done as the accused did.

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<sup>35</sup> [1913] 23 COX CC 455

<sup>36</sup> Indian Penal Code, 1860 Act No. 45 of 1860, s 300

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<sup>35</sup> [1913] 23 COX CC 455

<sup>36</sup> Indian Penal Code, 1860 Act No. 45 of 1860, s 300

As already stated above, the Zambian law of the defence of provocation with regards to lawful acts which result in assault is not different from that of India and the England. Subsection (3) of section 206 of the Zambian Penal Code without any ambiguity provides that, “A lawful act is not provocation to any person for an assault.”<sup>37</sup>

This then therefore means that nothing is an offence which is done by any person who is justified by law, or who by reason of mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing so.

**Adultery Considered:** Adultery will amount to sufficient provocation whether the provocateur is caught in *flagrante delicto* or he makes a confession of the adultery. In the case of *Greyson v. R*,<sup>38</sup> Briggs, J. delivering the judgment of the Supreme Court put the position of the law thus, “To be found in adultery has in the English common law always been considered to be one of the gravest forms of provocation. In Northern Rhodesia and other territories, a confession of passed adultery has been held to be the equivalent of being found in adultery. There is a difference but little distinction between a confession to past adultery and stating that one is about to or has just committed the adultery.”

Initially, the defence of provocation only applied to couples who were married. The defence did not even apply to couples who were engaged to be married. Allen<sup>39</sup> points out that the accused would not have a defence of provocation in an adultery case unless he had been lawfully married

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<sup>37</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206 (3)

<sup>38</sup> (1961) R and N 337

<sup>39</sup> Allen, *Criminal Law*, 262

to her. In the case of *Holmes v. Director of Public Prosecutions*<sup>40</sup> the court held that the defence would apply in the converse case of a wife killing her husband or paramour.

In Zambia, the earlier position regarding adultery was that for it to amount to provocation, it must be adultery of a lawful wife or fiancé. This position was changed by the case of *Banda v. The People*.<sup>41</sup> In this case, the accused found his girlfriend in an act of sexual intercourse with another man. The accused killed both of them with an axe. The trial judge rejected the plea of provocation on the ground that the adultery must be of a legal spouse. On appeal however, Baron, DCJ, correctly observed that it seemed quite unrealistic to confine provocation to cases of legal spouses and that the provocation would also cover situations where parties were living together in a stable relationship though not married.

Pursuant to the above referred to case, the current position of the law in Zambia is that finding one's girlfriend or boyfriend in an act of sexual intercourse is capable of causing provocation, provided the other elements are present, if the parties were living in a stable relationship. However, the problem with this rule is that it adds another qualification which is the requirement that the parties involved must have been in a stable relationship. The question which this position raises is that how about parties who have just fallen in love, parties who have not been in a stable relationship, can they not be provoked by such acts? It is to be thought that the legal status or the duration of the relationship is not to be a factor but rather the fact that one is deprived of his power of self-control by the provocative act of sexual intercourse or adultery. This problem will however, be considered in great detail in the subsequent chapter when the reasonable man test which is the main focus of this research will be considered.

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<sup>40</sup> [1946] AC 588

<sup>41</sup> (1968) Z.R. 111



## 2.8 Differences of the Law in the Three Jurisdictions:

Self-induced Provocation: This occurs where the accused seeks the provocation with the intention of killing or doing harm to any person. Herring<sup>42</sup> has noted that this can occur where the accused seeks provocation in the sense of making it up with the intention of making an excuse to kill the deceased and also where the accused risks being provoked by any acts of his which he knows might cause the deceased to react in a provocative manner but which he does not commit with the intention of causing the deceased to react in a provocative manner.

In respect of self-induced provocation, the position of the law in Zambia differs with that of India and England. The Indian position under the first exception to section 300 of the Indian Penal Code of 1860, expressly disallows the defence from succeeding when the accused has sought the provocation. The first proviso to this provision states that, “The provocation should not be sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.”<sup>43</sup>

In English law, earlier case law showed that the plea of provocation was not available where the offender either sought the provocation as a pretext for killing or doing great bodily harm, or endeavoured to kill or did great bodily harm before provocation was given. This therefore, meant that where a person acted with malice towards another, with the intention of killing the other, in circumstances where more likely than not, the other would react in a provocative manner, the person who so acted was not allowed to avail himself successfully of the defence of provocation.

In the case of *R v. Mason*<sup>44</sup> for example, it was opined that any act which was of the nature that

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<sup>42</sup> Jethro Herring, *Criminal Law*, 5<sup>th</sup> ed. (New York: Palgrave MacMillan, 2007), 257

<sup>43</sup> Indian Penal Code, 1860 Act No. 45 of 1860, s 300

<sup>44</sup> [1756] Fost 132

seemed malicious and like a deliberate pretence to kill the deceased was not allowed the defence of provocation.

However, the position of self-induced provocation in English law was later properly settled by the Court of Appeal in the case of *R v. Johnson*<sup>45</sup>, where it was held that section 3 of the Homicide Act 1957 provides that anything can amount to provocation, and there is no reason to exclude responsive actions provoked by the defendant. Therefore, a defence of provocation should not fail merely because the accused had induced the victim into provoking him.

A critical analysis of section 206 of the Zambian Penal Code<sup>46</sup> also shows that where the accused incites another to provoke him, he will not succeed on the defence of provocation. Therefore, no one is to be deemed to have given provocation to another by having done anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person. Subsection (4) of section 206 of the Penal Code, expressly provides that:-

An act which a person does in consequence of incitement 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.<sup>47</sup>

What constitutes the provocative act?: Under Indian law, it is well established that words alone, whether in the form of insults or abuses or whether in the form of providing information regarding adultery among other things can amount to provocation. In the case of *State v. Mullan*,<sup>48</sup> it was held that it is an indisputable fact, that gross insults by words or gestures have as great a tendency to move many persons to violent passion as dangerous or painful bodily

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<sup>45</sup> [1939] 2 ALL ER 839

<sup>46</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206

<sup>47</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 205 (4)

<sup>48</sup> [1993] Cr. LJ 1512

injuries; nor does it appear to us that passion as excited by insult is entitled to less indulgence than passion excited by pain.

The English position regarding mere words is similar to that of India as words alone are taken to be able to amount to provocation especially in circumstances of exceptional and extreme character and also where words of a violently provocative character are used. This is evident from the provision of Section 3 of the Homicide Act, 1957 which provides that 'things said or done or both' amounts to provocation.<sup>49</sup> The gravity of the verbal provocation, although, may depend upon the particular characteristics or circumstances of the person to whom a taunt or an insult is addressed.

To taunt a man because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however, equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not.<sup>50</sup> Thus the jury may use this provision to judge whether 'things said' alone would provoke a reasonable man or not. In *R v. Acott*<sup>51</sup> it was held that there must be something said or done. Here, there was evidence that the defendant had lost his self-control but there was no evidence that anything had been done or even said to cause this. As the evidence on record had showed that he had suddenly flipped, the defence failed.

The position of the law on provocation in Zambia on the question of mere words being capable of causing sufficient provocation is different from that of both England and India. Although section 206 does acknowledge that words may amount to provocation, the section adds a further

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<sup>49</sup> Homicide Act, 1957 of England, Section 3

<sup>50</sup> Allen, *Criminal Law*, 242

<sup>51</sup> [1997] 1 ALL ER 706

qualification by requiring that such words be 'wrongful' in character. Section 206 (1) in part provides that the term provocation means and includes any 'wrongful act or insult.'<sup>52</sup> This is clearly not provided for under English law.

Kulusika<sup>53</sup> has correctly observed that the term 'wrongful' in its everyday usage leaves no doubt that only wrongful conduct or insult are capable of constituting a provocative act. There must also be evidence of the wrongful act or insult. Since the position in England is that the provocation need not be illegal or wrongful, it may thus be caused by something as natural as a baby crying as was the case in *R v. Doughty*.<sup>54</sup> In this case, a father killed his seventeen days old baby who had been extremely restless and crying persistently. There was evidence that he had lost his self-control because of the crying of the baby. The Court of Appeal quashed the conviction for murder and substituted it with one of manslaughter as the Act made it mandatory to leave the issue of provocation to the jury where there was any evidence that the accused was provoked to lose his self-control.

Provocation in the presence of the defendant: Indian courts recognise the possibility of provocation even in the absence of the defendant. This sort of provocation is called 'hearsay provocation'. In the case of *Chanan Khan v. Emperor*,<sup>55</sup> the court was prepared to regard the provocation although it was not in the presence of the accused on the basis that he received the provoking information from a very reliable source and the fact that the act was committed in very close proximity to the accused, itself meant that the act could be verified immediately.

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<sup>52</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206 (1)

<sup>53</sup> Kulusika, *Criminal Law in Zambia: Text, Cases and Materials*, 348

<sup>54</sup> [1986] 83 Cr App R 319

<sup>55</sup> [1944] Cr LJ 595

Thus, the court held that the provocation in this case was just as much as if the person provoked had seen it happen with his own eyes.

However, in English law, the accused is required to be present for the act to be considered truly provocative. In the case of *R v. Fisher*<sup>56</sup> the court rejected the defence of provocation on the grounds that the accused himself had not seen the provocative act. Similarly, in the case of *R v. Kelly*<sup>57</sup> the accused who had killed the deceased on the basis of suspicion that provoked him was convicted of murder and the court rejected the plea of the accused to reduce the charge of murder to manslaughter on the basis of suspicion. The court stated that suspicion did not amount to provocation however strong it might have been.<sup>58</sup>

The Zambian position on the requirement that the provocation must be directed against the accused for it to be accepted is the same as that of England. Kulusika<sup>59</sup> points out that the provocative act or insult must be directed at the accused person or in the presence of the accused person at someone who is under his direct care or stands in special relationship with him. This means that where, for example, the provocation is directed at a person who the accused does not know very well but then he reacts violently against the provocateur and kills him, the defence of provocation will not stand or be accepted in these circumstances. The provocation must be directed at the accused himself or at least at his wife, child, sibling or any other person who is directly under his care.

## **2.9 The Nature of the Defence:**

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<sup>56</sup> [1837] 8 C and P 182

<sup>57</sup> [1842] 2 Car and Kir 814

<sup>58</sup> [1842] 2 Car and Kir 814

<sup>59</sup> Kulusika, *Criminal Law in Zambia: Text, Cases and Materials*, 351

The nature of the defence of provocation is such that it has two elements, that is, the subjective and the objective tests, commonly referred to as the dual test of provocation. The first test, the subjective test relates to the accused himself or herself, and requires the accused to show that he or she suffered a sudden and temporary loss of self-control which rendered him or her no longer in control of his or her mind, and consequently unable to control his or her actions. The other test, the objective test, deals extensively with the relation of the defendant's behavior to that of the reasonable man. Not only must the defendant have been provoked, but also the circumstances must be such that the ubiquitous reasonable man would have acted in the same manner under those circumstances. However, these two tests, with particular reference to the objective test which is the subject matter of this research, the main interest being how the *Zambian courts* have interpreted and applied the test will be discussed in great detail in chapter three.

## **2.10 Conclusion:**

In conclusion, the foregoing discussion has given a brief historical background to the defence of provocation. The discussion has also given a general discussion of the law on the defence, being both legislative and case law. Apart from discussing various aspects of the law in detail, the discussion also has given a comparative study of the law in *Zambia* with that of both *India* and *England*. The comparative study has highlighted a number of similarities and differences regarding certain aspects of the defence in these jurisdictions. Lastly, the chapter has given a brief introduction to the subject matter of the next chapter: the reasonable man test.

## CHAPTER 3

### 3.0 A CRITICAL ANALYSIS OF THE EXTENT TO WHICH THE DEFENCE OF PROVOCATION IS STILL APPLICABLE IN ZAMBIA

#### 3.1 Introduction:

The defence of provocation has in the past given rise to a great deal of academic and judicial discussion, and has been the subject of widespread criticism on a number of grounds. The 'ordinary person' requirement is regarded by some as unworkable in practice, as well as inherently discriminatory and unfair. This chapter will therefore, consider the applicability of the defence of provocation in the Zambian criminal law system. The chapter will also consider the consequences of strictly applying the reasonable man test through a critical analysis of the available case law. Consequently, a critique of the reasonable man test will be given.

#### 3.2 Brief Insight into the Reasonable Man:

The reasonable man or reasonable person is a legal fiction used mostly in the common law in which a hypothetical individual whose view of things is consulted in decisions of the law.<sup>60</sup> The question, 'How would a reasonable person have acted under the circumstances?' performs a critical role in legal analysis in areas such as negligence and the defence of provocation. The basic rationale behind the reasonable person doctrine is that because the law exists to serve the public at large, it must deal with a member of the public that is rational, that is, one who is reasonable. A reasonable person is one who has foresight, plans his or her acts and is able to get along with others. He is informed, capable and aware of the law and he is fair minded. This

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<sup>60</sup> Andrew Toczec, "The Action of the Reasonable Man," *New Law Journal* 146, no. 3 (May 1996): 835

therefore, means that the reasonable man is not an average man. He might do something extraordinary under certain circumstances, but whatever he does or thinks is always reasonable.<sup>61</sup>

### **3.3 Construction of Sections 205 and 206 of the Penal Code and Application of the Defence by the Courts in Zambia:**

A critical analysis of the Zambian jurisprudence on provocation clearly reveals that after it has been pleaded and therefore, established that the accused will rely on the defence, as he alleges that he was indeed provoked, the court will then be faced with two distinct questions;

- I. Had the defendant lost his or her self-control as a result of something said or done?
- II. Was the provocation enough to make a reasonable person do as the defendant did?<sup>62</sup>

This means that in considering the defence of provocation, the court should not stop at the point at which it is satisfied that the accused was provoked into losing his self-control, instead, the court should go further and determine whether the stimulus to which he reacted as it has been proved would have had the same effect on a reasonable person.

In the case of *Nyambe Liyumbi v. The People*,<sup>63</sup> Justice Chomba citing Lord Diplock's dictum in *Phillips v. R*,<sup>64</sup> stated that what the court has to consider once it has reached the conclusion that the person charged was in fact provoked to lose his self-control, is not only whether in the opinion of the court, the provocation would have made a reasonable person lose his self-control, but also, whether having lost his self-control, he would have retaliated in the same manner as the person charged in fact did. The same position had been stated in an earlier case of *Makomela v.*

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<sup>61</sup> Kevin Heller, Beyond the Reasonable Man: A Sympathetic but Critical Assessment of the use of Subjective Standards of Reasonableness in Self-defence and Provocation Cases, *Criminal Law Journal* 26, no. 1 (1998): 57

<sup>62</sup> For example *Greyson v. R* (1961) R and N 337 and *Liyumbi .v The People* (1978) Z.R. 25

<sup>63</sup> (1978) Z.R. 25

<sup>64</sup> [1969] 53 C. App. R 132



*The People*.<sup>65</sup> The court in this case put it the following words: "It is important not to overlook that the question is not merely whether an accused person was provoked into losing his self-control but also whether a reasonable man would have lost his self-control and, having done so, would have reacted as the accused did."

The test of provocation being an objective one and the question in this regard being whether the provocation was of such a nature as to be likely to deprive an ordinary person of the community to which the accused belongs of his power of self-control, it will be noted that the courts in Zambia have observed that the defence of provocation consists mainly of three elements, these being; the act of the provocation, the loss of the self-control and reasonable retaliation proportionate to the provocation.<sup>66</sup>

### **3.4 The Interpretation and Application of the 'Reasonable Man Test' by the Courts in Zambia:**

What is of interest here, is the definition of an ordinary or reasonable person which is provided in section 206 (1) of the Penal Code, which is that an ordinary person is an ordinary person of the community to which the accused belongs.<sup>67</sup> What this means is that whenever the objective test is being applied by the court, whether when considering whether or not an ordinary person would have lost self-control due to the provocative act in question or whether an ordinary or reasonable person would have reacted in the same manner as the accused, the objective person being referred to must be of the same community as the accused.

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<sup>65</sup> (1974) Z.R. 54

<sup>66</sup> *The People v. Njovu* (1968) Z.R. 132

<sup>67</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206 (1)

The argument being advanced here is that adopting a strict approach when applying the reasonable man test, that is, stripping the reasonable man of all personal attributes of the accused results in injustice against the accused, as this chapter will attempt to show. Since the basic objective of the law is to ensure justice and since the initial argument for statutorily providing for the defence of provocation was so as to mitigate to some degree the harshness of the common law, it will be argued that a less strict approach should be adopted, that is, the courts should legitimately give weight to factors personal to the accused when considering the plea of provocation.

The statutory definition of an ordinary man referred to above seems to be the starting point of the controversies surrounding the reasonable man test. This is because of the way the phrase ‘the community to which the accused belongs’ has been interpreted by the courts in Zambia. The interpretation attributed to this phrase seems to be that the reasonable man in the reasonable man test should be regarded as having the power of self-control of an ordinary person of the ethnic or cultural background or gender of the accused. This is evident in a number of provocation cases. By way of example, the case of *Greyson v. R*<sup>68</sup> will be referred to. In this case, the court was of the view that a confession of adultery by a wife was sufficient to cause a Zambian man sudden provocation. It was put thus:

To be found in adultery has in the English common law always been considered one of the gravest forms of provocation. In Zambia and other African territories a confession of adultery has been held to be the equivalent of being found in adultery and to be grave and sudden provocation.

This position has been upheld by a number of cases such as *Kalinda v. The People*,<sup>69</sup> and the more recent case of *The People v. Mwendaweli Nyambe*.<sup>70</sup> A possible explanation for this

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<sup>68</sup> (1961) R and N 337

<sup>69</sup> (1966) Z.R. 29

interpretation is that the interpretation seems to be based on the idea that there may be differences in capacities for self-control between the sexes and amongst various communities or cultural groups, which differences should be acknowledged in the ordinary person test in order to avoid injustice and discrimination. However, while this may be true, the interpretation accorded to the definition of the ordinary man by the courts in Zambia as demonstrated above, will be criticized on account that it is questionable whether the application of the defence of provocation should depend on the likelihood of provocation by a particular provocative act of the members of the community to which the accused belongs. This is because different people of the same community react differently to the same or similar circumstances and these differences in reactions as observed by Baker<sup>71</sup> are accounted for by genetic and environmental factors.

Baker<sup>72</sup> further notes that it is difficult to identify the average response by people of the same community to a particular set of circumstances. It will therefore, be suggested that what should be material is whether the provocative act did indeed cause him to lose self-control, and in making this determination, the reasonable man should be attributed with the personal characteristics of the accused. This will for example, ensure that a man who loses control and kills his wife will not be able to rely on the defence of provocation simply because it can be shown that an ordinary man of his community can be provoked by an act of adultery by his partner.

It will also be argued that it is unfair that people should have a greater or lesser chance of success in raising the defence of provocation depending on whether members of their community can

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<sup>70</sup> HT/17/2010

<sup>71</sup> Brett Baker, 'Provocation as a Defense for Abused Women who Kill' *Canadian Journal of Criminal Law and Jurisprudence* 32, no. 9 (October 1998): 193-211

<sup>72</sup> Baker, 'Provocation as a defence for Abused Women who Kill,' 193-211

generally be shown to have a greater or lower capacity for self-control in relation to a particular provocative act. For example, it will be unfair to hold that a woman who finds her husband in the act of adultery, which act causes her to lose self-control and to kill her husband, cannot successfully rely on the defence simply because the community where she comes from tolerates the infidelities of the man. In these circumstances, the law will be seen to be applying different standards of criminal behavior to different groups in the same society and will surely result in injustice on the person that fails to rely on the defence.

### **3.5 Strict Application of the Objective Test by the Courts in Provocation Cases:**

It will be pointed out that the interpretation of the ordinary man as provided by section 206 (1) should be such as to mean a person having the power of self-control to be expected of an ordinary person of the sex and age of the defendant and in all respects showing such of the defendant's characteristics as they would affect the gravity of the provocation to him or her. However, apart from construing the phrase 'of the community to which the accused belongs' as explained above, the *Zambian* courts have adopted a strict application of the objective test. That is, they have not subjected the reasonable man with any characteristics of the accused apart from his age, sex and community (interpreted as shown above).

While it is acknowledged that the justification for adopting the reasonable man test is so as to apply one standard to all, in turn avoiding differences in application according to each person's temperamental peculiarities, it will be advanced that if the objective test is applied strictly, that is where the accused is judged against an inflexible, constant and objective standard, this is something that many defendants may never be able to achieve and to the extent that the test may deprive many of a fair defence, its strict application will result in injustice. This was evident in

the case of *Simutenda v. The People*<sup>73</sup> where the Supreme Court strictly applied the objective test. In this case, the Supreme Court after considering the psychiatrist's report which was to the effect that the accused had a history of drinking which had left a mark on him and after acknowledging that this had significantly reduced his ability to control his reaction, still went ahead to hold against him. Baron D. C. J. put it thus:

There is no question in our mind but that the appellant's drinking history and the probabilities are that his self-control was affected; more importantly it seems possible from the psychiatrist's report that his history of drinking may have left some mark on him. These considerations are however matters for the legislature and not for us. Our duty is to apply the law, and we would be failing in that duty if we were to find provocation in circumstances such as these. We have long felt that our law of homicide, which has not kept pace with modern thinking in other parts of the world, leads to harsh results.<sup>74</sup>

The Supreme Court in this case simply admitted that the strict application of the reasonable man test leads to harsh results but then, the court was bound to apply the law as it was on the statute books. The Supreme Court Justices in fact went as far as stating that if it were up to them, they would have found for the appellant, but for the express provisions of Penal Code. This was clear when Baron D. C. J. stated that:

It may be that we could come closer to doing real Justice in cases such as the present if it were open to us to convict of an offence less serious than murder, which carries the mandatory death penalty. But while our law remains in its present state the appeal by the accused can not succeed.<sup>75</sup>

It will be argued that the court, instead of applying the objective test strictly, should instead judge the defendant's loss of self-control by reference to the standard of the degree of self-control to be expected of an ordinary person and taking into account all those factors or the entire factual situation which would affect the gravity of the provocation. This means that the court should ask

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<sup>73</sup> (1975) Z.R. 294

<sup>74</sup> (1975) Z.R. 294

<sup>75</sup> (1975) Z.R. 294

what could reasonably be expected of a person with the characteristics of the accused. This will not in any way eliminate the objective standard that everyone is entitled to expect from his fellow citizens in society to exercise. It will however, enable the court to decide whether in all the circumstances, people with the characteristics of the accused would reasonably be expected to exercise more self-control than the accused did. Where for example, the accused is a chronic alcoholic, what the court should do is to establish whether the accused has exercised the degree of self-control that is to be expected of someone who is in his situation.

### **3.6 Critique of the Strict Application of the Objective Test:**

As correctly observed by the Supreme Court in the Simutenda case referred to above, the law on provocation needs to undergo serious reformation. This is because it provides for a strict application of the reasonable man test, since apart from the age, sex and community of the accused, no other attributes of the accused are attributed to the ordinary person when applying the test despite being relevant to the provocation as has been shown in the Simutenda case. The strict application of the objective test will be criticized on the following grounds which in turn are the justifications for the requirement of reformulation of the defence:

Unfairness: First, it will be argued that it is unfair to assess criminal liability for the serious offence of murder according to an objective standard which ignores the particular capacities of the individual accused. An accused person may genuinely have lost self-control in response to provocation, but if his or her capacity for self-control falls below the standard of an ordinary

person, the law deems the accused to be a murderer. Arguably, that approach is inconsistent with a conception of the defence of provocation as a partial excuse for an impaired mental state.<sup>76</sup>

It has been recognized that it is unfair and contrary to fundamental principles of criminal responsibility to judge a person for a serious offence by taking a strict approach when applying the objective standard.<sup>77</sup> As indicated above, in as much as the reasonable man test should be applied, it should be applied less restrictively, so as to take into account the personal characteristics of the accused. Such reasoning must apply to assessing culpability for murder, which is generally regarded as the most serious offence in our criminal justice system, as reflected in the mandatory penalty of death.

Uncertainty in characterising the 'ordinary person': Secondly, it may be questioned whether the characteristics or capacities of an ordinary person can be defined with any certainty, or whether, in fact, the notion of an ordinary person is pure fiction. It is difficult to apply the standards of a hypothetical 'ordinary person' in the context of a multicultural society. As already stated, the purpose of the ordinary person test in the defence of provocation is ensuring that all persons are judged according to a uniform standard of behavior under a governing principle of equality before the law. However, in a society comprising a number of different cultural groups, it may be questioned whether every group shares the same values and the same standards and modes of behavior.

The argument here is that, to provide that the ordinary man shall be the ordinary man of the community to which the accused belongs as provided by section 206 [1] of the Penal Code<sup>78</sup> is

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<sup>76</sup> Jeremy Horder, *Provocation and Responsibility*. (Oxford: Clarendon Press, 1992), 127

<sup>77</sup> Simon Bandalli, 'Provocation: A Cautionary Note.' *Journal of Law and Society* 22, no. 1 (May 2001): 398-409

<sup>78</sup> The Penal Code, Cap 87 of the Laws of Zambia, Section 206 (1)

unfair. This is because it is not everything that is associated with a particular community that the accused may ascribe to. For example, though it is generally accepted that African men do not take kindly to confessions of adultery by a wife, it would be wrong to assume or to require that all ordinary men of the African community will react in the same manner to such a confession. It is possible that a man despite coming from such a community will react differently to the confession of adultery. He may for example be more receptive to the idea of reconciling with his wife. Even if the majority of the members of the community of the accused would react in a particular manner to a provocative act, such reaction does not necessarily become the correct response. To avoid causing the accused any injustice as he may be coming from the minority group of the community, what should be done is to determine how the reasonable person bearing, the characteristics of the accused which affect the gravity of the provocation would react under the circumstances.

It may be discriminatory to import the standards of one group to the “ordinary person”, when those standards may not be shared by other groups in the community. It has been suggested that real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.<sup>79</sup> A rule which tests people’s reactions according to values which are alien to them may give rise to injustice.

Complexity: Thirdly, it will be argued that the reasonable man person test is inherently complex. This is because, as already mentioned, the objective test has two elements:

1. The first element calls for an assessment of the gravity of the provocation: ‘whether the provocative act is such as would provoke a reasonable man’.

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<sup>79</sup> Bandalli, ‘*Provocation: A Cautionary Note.*’ 398-409



2. The second element calls for application of an external standard of self-control: 'whether the provocation was enough to make a reasonable man do as he did'.

The test is complex in the sense that it requires that the personal characteristics of the accused must be considered for the purpose of assessing the gravity of the provocation, and then also that those characteristics for the purpose of determining the ordinary person's power of self-control must then be ignored. In other words, the personal characteristics of the accused must be considered when determining the first element but must then be ignored when determining the second element. However, it has been argued that it may be artificial to dissect human behavior so as to apply one standard to a person's perception of conduct and another standard to his or her reaction to that conduct.<sup>80</sup> Those factors which make a person particularly sensitive to certain conduct, such as taunts about his or her physical attributes, may also affect that person's ability to exercise self-control when faced with insults of that kind. For example, a person who is beaten as a child may now not only perceive forms of physical aggression as particularly grave but may also react more strongly to them than other people.<sup>81</sup>

It is also confusing to judges in cases where the accused does not suggest, and no sensible person could suggest, that an ordinary person might have acted as the defendant is alleged to have done. The judge nevertheless has to take into account the law of provocation if there is any evidence that the defendant acted in loss of self-control.<sup>82</sup>

Other criticisms: Other criticisms leveled against application of the reasonable man test and the defence of provocation in general, include; the argument that the defence is inherently

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<sup>80</sup> Kimberly Ferzan, *Justifying Self-defence and Provocation*, *Journal of Law and Philosophy* 24, no. 1(2005): 711

<sup>81</sup> Glanville Williams, *Textbook on Criminal Law* (London: Stevens, 1983), 346

<sup>82</sup> Kenneth Simons, *Self-control and Provocation: Reasonable Beliefs or Reasonable Self-control*, *New Criminal Law Review* 11, no.1 (2008): 51-90

contradictory.<sup>83</sup> The defence has inherent contradictions because it is a compromise. Glanville Williams<sup>84</sup> once described the operation of the defense in this sense as "a compromise, neither conceding the propriety of the act nor exacting the full penalty for it." The defence raises the question whether a reasonable person should ever respond to provocation by killing. The defence of provocation has also been criticised on account that it blames the victim of the murder.<sup>85</sup> This is because the defence attempts to portray the accused as being less culpable because he was provoked by the victim and thus blames the victim for the defendant's inability to exercise control.

The defence has also been said to be sexually biased.<sup>86</sup> By providing a partial defence where the response to provocation is to kill in sudden anger, but not where a killing is planned, the defence has been said to favour men who react in violent anger over women who kill with premeditation from fear rather than rage.<sup>87</sup> A case in point here is the case of *Esther Mwiimbe v. The People*<sup>88</sup> where, the appellant killed her husband by pouring hot cooking oil on him. The issue in this case was whether on the facts and in the circumstances, the appellant's action was justified as lawful so as to absolve her of any criminal liability or if any grounds existed which the law accepts as reducing the charge to one of manslaughter only. The evidence before the court showed that the couple's marriage was an unhappy one. The husband was given to extreme violence and frequently assaulted and injured his wife. The court refused to hold that her reaction to the constant violence was due to provocation stating that the appellant had embarked on a course of

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<sup>83</sup> Andrew Toczec, 'Self-control and the Reasonable Man' *New Law Journal* 155, no. 8 (May 2000): 1222

<sup>84</sup> Williams, *Textbook on Criminal Law*, 352

<sup>85</sup> Tokzek, 'The Action of the Reasonable Man' 146,835

<sup>86</sup> A. Young, 'Conjugal Homicide and Legal Violence: A Comparative Analysis' *Osgoode Hall Law Journal* 31, no. 4 (1991): 741-808.

<sup>87</sup> Diana Roe, *Criminal Law*, 3<sup>rd</sup> ed. (London: Arnold Horder, 2005), 81

<sup>88</sup> (1986) Z.R. 15

action which was dispassionate and deliberate and certainly not in the heat of passion upon a sudden provocation.

The defence of provocation has also been said to elevate the emotion of anger over other emotions such as fear, despair, compassion and empathy.<sup>89</sup> It is questionable whether, in moral terms, a killing is necessarily less culpable when performed in anger as a result of provocation. Indeed there is an argument that it is morally unsustainable for anger and sudden loss of self-control to found a form of defence to murder.<sup>90</sup>

### **3.7 A Less Strict Approach to the Ordinary Person's Power of Loss of Self-Control:**

As already pointed out, the ordinary person test has three components, these being; the ordinary person's perception of the gravity of the provocation, the ordinary person's power to exercise self-control in response to that provocation and the form of the ordinary person's response after losing self-control in comparison to the response of the accused. The component that is of interest here is the second one.

The second component of the ordinary person test requires the judge or the court to consider whether an ordinary person could have lost self-control as a result of the provocation. In this context, the "ordinary person" means a person with ordinary powers of self-control, falling within the common range of human temperaments.<sup>91</sup> For the purpose of assessing whether an ordinary person could have reacted in the same way as the accused, the personal characteristics

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<sup>89</sup> L. Welchman and S. Hossain, *Honor Crimes, Paradigms and Violence and Women* (London: Zed Books, 2005), 69

<sup>90</sup> Kenneth Simons, Does Punishment for Culpable Indifference Simply Punish for Bad Character? Examining the Requisite Connection Between Mens Rea and Actus Reus, *Criminal Law Review* 6, no. 2 (2002): 219,247-57

<sup>91</sup> Anthony Duff, The Fiction of the Reasonable Man, *Journal of Law and Philosophy* 12, no. 1 (1993): 345, 358

of the accused, such as a particularly excitable temperaments are not considered.<sup>92</sup> For example, evidence that an accused has an intellectual disability which reduces his or her power to exercise self-control is not considered by a judge when assessing whether an ordinary person could have lost self-control in response to the same provocation.

However, it will be contended that if the defence of provocation is not to be contrary to the contemporary standards of human behavior, courts have to adopt a less strict approach when applying the objective test. This will mean that certain characteristics of the defendant, beyond simply their age, sex and the community of the accused, which are the characteristics normally considered, could be taken into account when applying the objective test. If justice is to be done, personal characteristics have to be taken into account in order to avoid the negative aspects of the objective test and the defence of provocation in general enumerated above. A more progressive approach is that pointed out by Lord Slynn in the case of *Regina v. Smith (Morgan James)*<sup>93</sup> where he stated that:

If the concept of the reasonable man were accepted without any qualification, successful pleas of provocation would be rare indeed, since it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation. It is in recognition of human frailty that the scope of the defence of provocation has to some extent, be enlarged.<sup>94</sup>

While it is argued that personal characteristics subject to very limited exceptions must be excluded, that only in that way can the test of the reasonable man objectively regarded be applied and also that only in that way can a uniform assessment be made.<sup>95</sup> It will be contended that it is

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<sup>92</sup> Cynthia Lee, Murder and the Reasonable Person: Passion and Fear in the Criminal Courtroom, *Criminal Law Review* 2, no. 1 (1998): 191

<sup>93</sup> [2000] 4 ALL ER 289

<sup>94</sup> [2000] 2 ALL ER 289

<sup>95</sup> Williams, *Textbook on Criminal Law*, 346

one thing to invoke the reasonable man for the standard of self-control which the law requires and it is quite another to substitute some hypothetical being from all mental and physical attributes (except the age, sex and community of the accused) have been abstracted. It will also be submitted that in the interest of justice, apart from the characteristics which are taken into account, other characteristics such as physical abnormalities, culture, addictions, the background of the accused and characteristics relating to the mental or personality of the accused have to be taken into account. What has to be avoided is transforming the reasonable man into a replica of the individual defendant.

By way of example, if a defendant has a physical disability such as a speech impediment and is taunted about the way he speaks, when considering if a reasonable person would have been provoked, it is submitted that the speech impediment should be attributed to the reasonable man. Thus in these circumstances, the reasonable person should be a person of the same age and sex as the defendant who has a speech impediment since the speech impediment affects the gravity of the provocation in that it makes it more provoking. It may also, were relevant, be taken into account as going to the gravity of the provocation, were the accused is taunted with his addiction, for example, that he is an alcoholic, or a drug addict, or a glue-sniffer. The House of Lords in *Morhall*<sup>96</sup> held that the defendant's history of glue-sniffing could be relevant to determining the gravity of the provocation offered by the deceased.

### **3.8 Conclusion:**

In conclusion, the foregoing discussion has given a critical analysis of the interpretation and applicability of the defence in Zambia. Apart from showing how the courts have construed the

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<sup>96</sup> [1995] 3 ALL ER 890

ordinary man as being an ordinary man of the community to which the accused belongs, the chapter has also discussed the main objections or criticisms to the defence of provocation and the strict application of the objective test. Lastly, it has also been submitted in this chapter that if justice is to be attained, the scope of the characteristics of the accused which has to be attributed to the reasonable man when applying the objective test has to be extended beyond the age, sex and community of the accused.

## CHAPTER 4

### 4.0 CONCLUSIONS AND RECOMMENDATIONS

#### 4.1 Introduction:

Having discussed the law of the defence of provocation and the reasonable man test in the previous chapters, this chapter will give recommendations and the conclusion of the research. As correctly observed by the Supreme Court in the case of *Simutenda v. The People*<sup>97</sup> when it stated that the law on provocation in Zambia needs to undergo serious reformation, the research in this chapter therefore seeks to provide remedies to the imperfections in the law governing the defence of provocation and the complexities of the reasonable man test.

#### 4.2 General Conclusion:

The research having set out to discuss the viability of the application of the reasonable man test in the defence of provocation in Zambia, has made the following conclusions: firstly, the discussion has established that for the defence, as provided for under section 206 of the Penal Code to succeed, three inseparable elements have to be proved, these elements being, the provocative act, the loss of self-control and also the act which bears reasonable relationship to the provocative act.<sup>98</sup> The research has also shown that the defence can only be relied upon in murder cases and that it is a partial defence as it only reduces murder to manslaughter in the event that it is pleaded successfully.

The research has further established that the defence of provocation is made up of a dual test comprising of the subjective and the objective test. The subjective test first has to be satisfied

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<sup>97</sup>(1975) Z.R. 294

<sup>98</sup> *Nyambe Liyumbi v. The People* (1978) Z.R. 25 (SC)

before the objective test can be applied. The objective test is also referred to as the Doctrine of the Reasonable Man Test. Another conclusion being drawn from the discussion is that although the reasonable man test was introduced so that one standard can be applied to everyone who falls within the scope of the defence, due to lack of the definition of its scope and the strict application of the test, it has in certain situations caused a lot of problems and sometimes resulted in injustice.

The research also made a comparative analysis of the law of the defence of provocation in Zambia with that of India and England. It was therefore discovered that there are certain aspects of the defence that are present in all the three jurisdictions and also that the Zambian defence of provocation is defective in certain regards. It was for example discovered that section 206 of the Penal Code Act<sup>99</sup> does not provide for hearsay provocation, that is, where the provocation happens in the absence of the accused. It was also discovered that the law on provocation in Zambia does not provide for self-induced provocation.

One of the research questions asked was what are the legal implications of limiting the ordinary man test to a reasonable man of the community of the accused? Although it is acknowledged that the application of the test needs to be standardised, the research has however, questioned whether the application of the defence should depend on the likelihood of provocation by a particular provocative act of the members of the community to which the accused belongs as there are different people in the community whose response to a provocative act may differ.

Lastly, the essay has established that taking a strict approach when applying the reasonable man test, as is done by the courts in Zambia, in some cases results in injustice. Also that stripping the

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<sup>99</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206 (1)



reasonable man of all the personal attributes of the accused goes against the reason for which the defence was in the first place statutorily provided for, which was mitigating the harshness of the common law. It has therefore been established in chapter three of the research, that if just results are to be achieved, the reasonable man should be clothed with the personal attributes of the accused, though it has been cautioned that this does not entail making the reasonable man a replica of the accused.

#### **4.3 Recommendations:**

One of the specific objectives of this research was to give recommendations as to how the defence can be improved or made more applicable so that those who come within its scope can easily rely on it or can at least do so with less difficulty. The research now proceeds to give the following recommendations:

#### **4.4 Adopting a Less Strict Approach:**

It is recommended that a less strict approach should be adopted when applying the reasonable man test. Although it is admitted that the law in general does not that, it is submitted that this should be done to avoid the problems that are encountered and the injustices that are caused when the reasonable man test is strictly applied in provocation cases as has been shown in the foregoing chapters. This will ensure the attainment of justice in provocation cases. By taking a less strict approach, the court will be considering whether, taking into account all the characteristics and circumstances of the accused, he or she should be excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm or to act with reckless indifference to human life as to warrant the reduction of murder to manslaughter.<sup>100</sup>

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<sup>100</sup> Simon Bandalli, 'Provocation: A Cautionary Note.' *Journal of Law and Society* 22, no. 1 (May, 2001): 398-409

It is further recommended that the ordinary person test should be expanded in order to allow for the consideration of personal characteristics of the accused such as his or her race, background, culture, addictions and physical abnormalities, either when assessing the ordinary person's power of self-control or, alternatively, when assessing the form of the ordinary person's likely reaction after losing self-control the third component. . This recommendation is based on the idea that there may be differences in capacities for self-control between, for example, people of different backgrounds, races or even different physical abnormalities despite coming from the same community and being of the same age, which differences should be acknowledged in the ordinary person test in order to avoid injustice and discrimination.

In taking a less strict approach, the recommended test is therefore, that where a person suffers a loss of self-control as a result of provocation, whether by things done or words said and whether by the deceased or by someone else and intentionally kills or is a party to the killing of another, he or she should not be guilty of murder but guilty of manslaughter if, in all the circumstances, including any of the defendant's personal characteristics, there is sufficient reason to reduce the offence from murder to manslaughter.

The court should direct its attention to the degree of loss of self-control of the accused, with reference to all the relevant factors and whether or not that loss of self-control should be excused to the extent of reducing liability to manslaughter. Allen<sup>101</sup> points out that taking a less strict approach will allow the court to avoid the complexities of the ordinary person test while still making a value judgment about whether or not a particular accused should be convicted of murder or manslaughter, in light of the particular mitigating circumstances of the provocation and the blameworthiness of the accused. All of the personal characteristics of the accused may be

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<sup>101</sup> Allen, *Criminal Law*, 273

considered, without broadening the ambit of the defence to the extent that any provoked killing will result in a verdict of manslaughter.

#### **4.5 Provocation in the absence of the defendant:**

It is recommended that provocation that happens in the absence of the accused be included as part of the defence. Under the defence of provocation in section 206 of the Penal Code Act,<sup>102</sup> conduct amounting to provocation must occur within the sight or hearing of the accused. The requirement is that the provocative act or insult must be directed at the accused person or in the presence of the accused person, at someone who is under his direct care or stands in special relationship with him. Although it is admitted that one of the requirements for the defence to succeed is that the provoked person should have acted in the heat of passion, it is however, submitted that failure to recognise that provocation may occur even in the absence of the accused is failure to recognise that a person's honest belief that some provocative incident has occurred may affect that person's capacity for self-control to the same extent as if he or she witnessed the conduct personally. This clearly will result in injustice.

In the alternative, it is recommended that a qualification at least be added to the definition of provocation that, if the accused does not witness the provocative conduct personally, then he or she must have reasonable grounds for believing both that the provocation has occurred and that it was committed by the victim. This will ensure that defendants who fall within the definition of provocation but who are not present when the provocative is done are not made to suffer the consequences of being found guilty of murder.

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<sup>102</sup> The Penal Code, Cap. 87 of the Laws of Zambia, Section 206

This recommendation is consistent with the general approach to the defence of provocation, that it is primarily a partial excuse for killing on the basis of a loss of self-control, and should not therefore be restricted to provocation occurring in the presence of the accused. The legislation should be amended to make it clear that the defence of provocation may apply to provocative conduct occurring outside the presence of the accused. Where the accused loses self-control as a result of a belief in provocative conduct, which provocative conduct the accused does not witness personally, then the belief of the accused in the conduct must be based on reasonable grounds.<sup>103</sup>

#### **4.6 Unlawful Provocative Act:**

It is recommended that the legislation should be amended to the extent that what is meant by a provocative act should not be limited to only an unlawful act. As noted in chapter two, it is required that for the defence of provocation to succeed, the provocative act needs to be an unlawful act. However, it will be submitted that there should be no such restriction prohibiting lawful conduct from amounting to provocation in the appropriate cases. Thus, it is recommended that section 206 of the Penal Code Act should be amended to the effect that the defence of provocation should not require the provocative conduct to be unlawful. To support this recommendation, the following reasons will be given: Firstly, to focus on the lawfulness or otherwise of the victim's conduct is to adopt an essentially justification based rationale for the defence of provocation and as has been shown, the rationale of the defence is that it is excused based. The nature of the provocative conduct, including for example, whether it was lawful, are factors to be considered by the court when determining whether the accused should be excused for losing self-control.

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<sup>103</sup> Markus Funk, *Justifying Justifications*, Oxford Journal of Legal Studies 19, no. 4 (1999): 637,638-42

Secondly, any automatic exclusion of lawful conduct may lead to arbitrary and arguably unjust results in individual cases. This is because there may be cases where the victim's conduct is apparently lawful, but nevertheless the court may empathise with the loss of self-control of the accused. For example, if an accused suffers from a severe physical disability about which he or she is very sensitive, and the victim, aware of that sensitivity, teases the accused incessantly about that disability, it is unjust to prohibit consideration of the special circumstances of that case because the victim's conduct was "lawful".<sup>104</sup>

#### **4.7 Self-induced Provocation:**

The Zambian law on provocation should be amended to the extent that in situations where the accused is provoked by the victim into losing his self-control and before cooling-off after the accused induces the victim into provoking him, kills the victim, the accused should be able to avail himself of the defence as long as all the elements of the defence are met. This is the position in England. Thus, in *R v Johnson*,<sup>105</sup> the defendant had become involved in an escalating argument with the deceased and his female companion. When the victim threatened the defendant with a beer glass, the defendant fatally stabbed him with a knife. The judge held that the threatening situation had been self-induced. The Court of Appeal held that section 3 of the Homicide Act 1957 provides that anything can amount to provocation, and there is no reason to exclude responsive actions provoked by the defendant. A conviction of manslaughter was substituted. Therefore, a defence of provocation should not fail merely because the accused had induced the victim into provoking him.

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<sup>104</sup> Herring, *Criminal Law*, 5<sup>th</sup> ed. 261

<sup>105</sup> [1939] 2 ALL ER 839

However, it is noted that it is not all types of self-induced provocation that must be included as part of the defence of provocation. Therefore, the statutory definition should be amended to clarify the circumstances where self-induced provocation is excluded as a ground giving rise to the defence. The test for exclusion should be whether the accused incited the victim in order to provide an excuse for murdering the victim.<sup>106</sup> Where for example, the accused deliberately induces the provocation with a premeditated intention to kill or cause grievous bodily harm or to act with reckless indifference to human life, or with actual foresight of the likelihood of killing, he should not be allowed to successfully rely on the defence. But there is no justifiable reason why the defence should fail were the accused induces the provocation but did not have any premeditated intention to cause any death or indeed were he did not reasonably have actual foresight that the inducement would cause the victim to retaliate in a provocative manner.<sup>107</sup>

The recommendation being made here is that where an accused person provokes another with the pre-existing mental state for murder, that person should not receive the benefit of the defence of provocation. But where however, he does not have such a mental state for committing murder, although having induced the provocation himself, he should be allowed to rely on the defence provided the other elements of the defence are met. It is therefore, submitted in this research paper that although the accused ought to have foreseen that the victim would retaliate, he should not be automatically excluded from raising the defence, what should be material is that he acts as a result of a loss of self-control and without premeditation.

While it is admitted that these recommendations do not completely overcome the risks already involved in the reasonable man test and the defence of provocation in general, it is however.

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<sup>106</sup> L. Welchman and S. Hossain, *Honor Crimes, Paradigms and Violence and Women*, 69

<sup>107</sup> J. Herring, *Criminal Law*, 5<sup>th</sup> ed. p261

hoped that the recommended reformulation of the defence of provocation is clearer and therefore easier to apply and avoids much of the complexity generated by the reasonable man test, and focuses attention on the principal question, which is whether murder should be reduced to manslaughter. It is also hoped that the recommendations made will to a greater extent assist in overcoming the complexities and confusion of the existing reasonable man test, since it continues to rely on arguably artificial and subtle distinctions which are unlikely to be workable in practice and thus results in injustice.

#### **4.8 Conclusion:**

The foregoing discussion has given the general conclusions of the research and has also made recommendations which are hoped to help to improve the defence of provocation as it is currently contained in the Penal Code, Chapter 87 of the laws of Zambia. The chapter on the whole has concluded that the research has established that the strict application of the reasonable man test in the defence of provocation results in injustice in some cases. The discussion has thus recommended that a less strict approach should be adopted, which approach will entail attributing personal characteristics of the accused to the reasonable man.

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