

THE SOUTH AFRICAN CRIMINAL JUSTICE: DOES S v EADIE 2002 (1) SACR 663 (SCA) CREATE A BATTERING RAM IN REJECTION OF THE DEFENCE AFFORDED A BATTERED WOMAN OR RECOURSE OF VICTIMS TURNED ACCUSED?

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ABSTRACT

Our Criminal Law has experienced a new defence which was developed by our Courts, known as the defence of non-pathological criminal incapacity. This defence is grounded in the acceptance that the affective function, along with the cognitive and conative functions of a person, is to be considered to determine capacity of an accused. When the defence is raised the capacity of an accused person is not considered in the context of a person suffering from mental illness or mental defect.

The South African society is characterised, like so many other, by rampant and violent domestic violence. In many of these cases, the consequences are fatal. Women are generally at the receiving end of domestic violence. Victims of domestic violence suffer various forms of trauma including emotional, physical and psychological as a result of abuse. When this abuse is protracted these victims are generally classified as battered women. These intimate killings by abused victims of their abusers have seen them rely on this defence. The extent this defence is relied on could be distinguished by the killings in situations confrontational and non-confrontational where the basis for the reliance is not of a mental nature. Recourse and ultimate acquittal for these victims turned accused exists in some foreign jurisprudence.

In the matter of **S v Eadie 2002 (1) SACR 663 (SCA)** the Supreme Court took a swipe at provocation and the manner in which the Courts applied the principles thereof which consequently has an effect on the defence of non-pathological criminal incapacity. This judgment prevails and the *stare decisis* rule apply in the absence of a contrary ruling.

This dissertation considers inter alia the origin, development through the cases, the validity of the defence, the position of the battered woman and concludes with its finding that the judgment in *S v Eadie supra* does not exclude such victims turned accused from reliance on this defence.

DECLARATION

I do hereby declare that the dissertation titled "**THE SOUTH AFRICAN CRIMINAL JUSTICE: DOES S v EADIE 2002 (1) SACR 663 (SCA) CREATE A BATTERING RAM IN REJECTION OF THE DEFENCE AFFORDED A BATTERED WOMAN OR RECOURSE OF VICTIMS TURNED ACCUSED?**" is my own work and that all sources used and referred to were acknowledged in full.

Thus signed and dated on 28 October 2011 at Pretoria.

.....
Edmund Kelly Patterson

TABLE OF CONTENTS

CHAPTER 1:	p3
THE HISTORY OF THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY IN SA LAW.	
1.1 Introduction.....	p3
1.2 Definition.....	p3
1.3 Origin.....	p4
1.4 Some tendencies that have developed over the past twenty years.....	p5
CHAPTER 2:	p7
CASE LAW PERTAINING TO NON-PATHOLOGICAL CRIMINAL INCAPACITY	
2.1 Introduction.....	p7
2.2 Development of the defence through the cases.....	p7
2.3 Requirements of the defence.....	p15
2.4 The effect of the S v Eadie decision.....	p15
CHAPTER 3:	p17
THE VALIDITY OF THE DEFENCE	
3.1 Introduction.....	p17
3.2 Factors which contributed to the existence of the defence.....	p17
3.3 Court's inability to distinguish between forms of incapacity.....	p18
3.4 Sane automatism and non-pathological criminal incapacity.....	p19
3.5 Provocation in the light of S v Eadie.....	p21

3.6 Non-pathological criminal incapacity and the views of pathologists and psychiatrists.....p21

3.7 Additional comments.....p22

CHAPTER 4:.....p23

THE BATTERED WOMAN SYNDROME

4.1 Introduction.....p23

4.2 The disadvantages of abused persons.....p25

 4.2.1 Historical.....p25

 4.2.2 The present.....p26

4.3 Recognition of battered women's position: *R v Lavallee*.....p27

4.4 Factors crystallised in foreign jurisdictions.....p28

4.5 Battered Women in South African courts.....p29

4.6 Can it exist as a defence?.....p30

4.7 The requirement of imminence.....p32

4.8 Criticism against Battered Woman Syndrome.....p33

CHAPTER 5:.....p37

CONCLUSION

5.1 The impact of the judgment in *S v Steyn on S v Eadie*.....p37

5.2 Provocation and the requirement of 'imminence'.....p38

5.3 The role of the Legislature.....p40

5.4 Finding on the question for thesis.....p41

BIBLIOGRAPHY:.....p42

CHAPTER 1

1. THE HISTORY OF THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY IN SA LAW

1.1 Introduction

In this chapter a historical overview will be offered of the defence of non-pathological criminal incapacity in South African law. This will be done with reference to the definition, the origin and some tendencies¹ that have developed over the past twenty years. More specifically, this dissertation examines the application of the validity of the battered women syndrome in the context of non-pathological criminal incapacity. This will be done in a particular clinical chapter.

1.2 Definition

In his judgment of the defining *S v Laubscher*² case, Joubert JA refers to the condition where a person would have temporary incapacity due to a non-pathological condition: "...dws nie aan 'n geestesgebrek in die vorm van 'n patologiese versteuring van sy geestesvermoëns toe te skryf nie, te wyte sodat hy nie die onderskeidingsvermoë óf die weerstandskrag gehad het nie." Navsa JA in *S v Eadie*³ states: "*In our law, criminal incapacity due to mental illness is classified as pathological incapacity. Where it is due to factors such as intoxication, provocation and emotional stress, it is termed non-pathological incapacity.*" Snyman⁴ states that: "*Non-pathological criminal incapacity refers to cases in which X alleges that, although he lacked capacity at the time of the act, the incapacity was not attributable to a pathological ('emanating from a disease') mental disturbance.*" He continues by stating such incapacity is of a relatively brief duration.

With the aforementioned references to what the defence of non-pathological criminal incapacity entails it may be defined as follows: Where an accused committed an act and whereby he/she for a short time during the commission of such act, without being mentally ill or of a youthful age, was incapable to distinguish between right or wrong and to act in accordance with such appreciation.

¹ See however the comprehensive discussion in chapter 2 of all the case law.

² 1988 (1) SA 163 (A) op cit 167F-G.

³ 2002 (1) SACR 663 (SCA) op cit 673(j)-674(a).

⁴ C R Snyman, Criminal Law, 4th edition, p163.

1.3 Origin

Criminal capacity is an essential requirement for conviction. Such requirement must be proved by the prosecution beyond reasonable doubt. Therefore an accused person whom is said to have acted unlawfully must possess the required mental abilities. Capacity is the mental abilities of a person which are (a) the ability to appreciate the wrongfulness of his conduct (which is insight: otherwise known as the cognitive inquiry) and (b) the ability to conduct himself in accordance with such appreciation of the wrongfulness of his conduct (which is self control: also known as the conative inquiry).

To place this defence in context I wish distinguish non-pathological criminal incapacity from pathological incapacity. Pathological incapacity is defined by Burchell⁵ as follows: “*The requirement that the illness must be pathological means that only those mental disorders which are the product of a disease will qualify as a mental illness for purposes of s 78. In other words, the condition from which the accused suffers must be a result of some known or identifiable disease of the mind. Mental abnormalities that are not the result of disease but brought about by the temporary effect of external stimuli are diseases*”.

The lack of criminal capacity excludes criminal liability. Historically only immature age and insanity (mental disease or mental defect) excluded criminal capacity. Our common law does not recognise criminal actions which were provoked as a result of emotion as a basis for defence but merely as mitigation for sentence⁶. The defence of non-pathological criminal incapacity is characterised by the offender’s motivation as a result of factors which includes emotion. These grounds can be divergent. The affective functions of a person’s mind regulate emotions. In 1967 a report by The Rumpff Commission of Inquiry into Responsibility of Mentally Deranged Persons and Related Matters⁷ excluded the affective function of the mind as a legal test of criminal capacity. According to Burchell, the test for capacity was a recommendation by the Rumpff Commission which later became the norm for “...judging criminal responsibility in all instances, even where mental illness or youthfulness were not involved”.⁸

⁵Burchell, Principles of Criminal Law, Revised 3rd Edition, p375

⁶Burchell, *supra* 427

⁷ RP 69 of 1967

⁸Burchell, *supra* 147

In instances where an accused does not rely on incapacity due to factors other than mental illness or immature age, our courts have referred to it as non-pathological criminal incapacity. The concept of criminal capacity must not be confused with knowledge of intention or a person's inability to commit a crime.

As stated earlier, Joubert JA in *S v Laubscher supra* conceived the term non-pathological criminal incapacity. In this matter⁹ the court recognised that an accused may have non-pathological criminal 'unaccountability' based on total disintegration of a temporary nature. Joubert JA alluded to provisions regarding the mental state of an accused in the Criminal Procedure Act. It appears he expressly worded this defence to distinguish it from that of mental illness found in section 78(1) of the Criminal Procedure Act¹⁰.

In 1989 the affective function of a person was recognised by our highest court as part of the test for criminal capacity. In *S v van der Merwe*¹¹ the court per Joubert JA held that a distinction is drawn between the cognitive, conative and affective functions of a person's mental ability. As such this development in our law is relatively new but has quickly gained ground as various decisions¹² thereafter indicate our courts applied this defence in numerous decisions.

1.4 Some tendencies that have developed over the past twenty years

Whereas provocation started out as the basis for the defence of non-pathological criminal incapacity our courts recognised other factors to constitute grounds to rely on. In South African case law many accused raised the defence of non-pathological criminal incapacity where they have acted on emotion inspired by provocation and as a result thereof killed their partners or people close to them. It appears as if not only the recognition of the affective function as part of a person's mental ability¹³ contributed towards this developments but the finding that intoxication¹⁴ could exclude liability – and therefore factors which are not related to mental illness – could serve to justify this finding. Emotions

⁹ P167

¹⁰ Act 51 of 1977

¹¹ PH H.51 30 March 1989 p133

¹² See inter alia *S v Campher* 1987 (1) SA 940 (A); *S v Calitz* 1990 (1) SACR 119 (A); *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Kensley* 1995 (1) SACR 646 (A); *S v Di Blasi* 1996 (1) SACR 1 (A); *S v Francis* 1999 (1) SACR 650 (SCA)

¹³ See footnote 9.

¹⁴ *S v Chretien* 1981 (1) SA 1097 (A)

of a wide-ranging nature inter alia anger, jealousy and fear distinguished these crimes committed. According to Nel¹⁵ our courts progressively tried to curtail the increasing popularity of this defence by adjusting and setting the criteria higher for a successful reliance on this defence. Nel emphasises that various decisions by our courts illustrate the lack of knowledge or misguided perceptions or interpretations of this defence to that of sane automatism, dangerous incapacity and diminished capacity.

In recent case law our courts were provided with opportunities to deal with the defence of non-pathological criminal incapacity. The Supreme Court in *S v Ferreira*¹⁶ recognised the position of an abused woman who kills her abuser in non-confrontational scenarios. This matter was followed by *S v Engelbrecht*¹⁷ where a Provincial Division of the High Court exhaustively reviewed the law and principles of liability applicable to women who kill their abusers.

It appears as if our courts are hesitant to effectively address this issue, especially due to the *emotive non-pathological underlying* reasons (my emphasis) which motivate accused to act in this manner. In *S v Mnisi*¹⁸ and *S v Steyn*¹⁹ the courts had ample opportunity to pronounce on this defence, yet failed to do so and did not mention the defence. It could be argued that our law has regressed and failed to capitalise on the opportunities these cases presented, to develop this field of law. In the matter of *S v Eadie supra* the court cast doubt whether reliance of provocation for this type of defence will readily be available or upheld.

¹⁵ P W Nel *Toerekeningsvatbaarheid in die Suid-Afrikaanse Strafreg*, UP Masters Dissertation, p13

¹⁶ 2004 (2) SACR 454 (SCA)

¹⁷ 2005 (2) SACR 41 (WLD)

¹⁸ 2009 (2) SACR 227 (SCA)

¹⁹ 2010 (1) SACR 411 (SCA)

CHAPTER 2

CASE LAW PERTAINING TO NON-PATHOLOGICAL CRIMINAL INCAPACITY

2.1 Introduction

In this chapter certain cases are considered which significantly contributed to the defence of non-pathological criminal incapacity. The defence of non-pathological criminal incapacity originated in our courts. In 1981 a decision by the Appellate Division²⁰ recognised that a person may be so drunk that there is no act as is required in terms of the criminal law. The court thereby extended lack of criminal liability to cases of intoxication. This decision in *S v Chretien supra* opened the door to defences for criminal capacity other than mental illness. It impacted on the requirements of legality as conduct is a requirement for legality. Previously the approach of the courts was to reduce the impact of the crime where alcohol played a role or that it served as mitigation. Never before had the courts acquitted an accused due to the influence or effect of intoxication. The decision is further important in that the Appellate Division rejected the specific-intent theory. One may ask whether this decision created the climate for our courts to rethink and reassess the law which led to the development of the defence of non-pathological criminal incapacity. Even though the grammatical wording of the court in this matter is not specifically phrased along these lines it is evident from the judgment that the court applied criminal incapacity as basis for its finding.

2.2 Development of the defence through the cases

The matter of *S v Van Vuuren*²¹ illustrates that our courts were ready to capitalise on the advances made into the recognised principles of provocation. The old entrenched principles and thoughts were revisited and elaborated on to the extent that it may be argued this decision heralded a new phase on provocation. Shortly thereafter in *S v Lesch*²² the court held that provocation may inter alia negative criminal capacity where it renders the accused incapable of appreciating the wrongfulness of his or her conduct. It endorsed the sentiments expressed in the judgment of *S v Van Vuuren supra* and followed its finding. Van

²⁰ *S v Chretien* 1981 (1) SA 1097 (A)

²¹ 1983 (1) SA 12 (A)

²² 1983 (1) SA 814 (O)

Oosten²³ opines on this case that the wording of the defence by court is a new phase of development of provocation. Van Oosten concludes²⁴ that the principle that criminal incapacity can be determined by a purely psychological test in the absence of a biological condition was established.

The defence distinguishes specific situations in which crime is committed from that of pathological situations. The scope and ambit of this defence were developed in matters our courts had to pronounce on. The late 1980's and 1990's were particularly productive and progressive periods for the development of this defence. Many of the matters decided on were steeped in domestic violence. In 1982²⁵ the highest court gave recognition to fear as a factor which could be the cause of criminal capacity. Similarly we see in *S v Van Vuuren supra* the same court held that an accused person "...should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress....Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account."

Since 1985 our courts have applied the defence of criminal incapacity to matters excluding mental illness and immature age. Much progress was made to lack of criminal capacity in certain instances by recognising it as a complete defence. Prior to the matter of *S v Laubscher supra*, the cases of *S v Arnold*²⁶ and *S v Campher*²⁷ were decided in this manner.

In *S v Campher supra* an 'irresistible impulse' was held to be the cause of the act. The accused endured both physical and verbal abuse. On the fateful day she believed the deceased, her husband, would attack her with a screwdriver and fatally shot him. The court held²⁸ that the defence is available wherever the essential conditions for exercising insight and self-control are absent, whether because of mental illness or any other cause such as intoxication or severe emotional stress. The court held further that the determination if

²³ FFW Van Oosten "Non-pathological criminal incapacity versus pathological criminal incapacity", SACJ (1993) 6 p127-147

²⁴ P140

²⁵ *S v Bailey* 1982 (3) SA 772 (A) op p796C

²⁶ 1985 (3) SA 256 (C)

²⁷ 1987 (1) SA 940 (A)

²⁸ 955B

criminal capacity was temporary or permanent should not be compartmentalized. Of importance further is the finding that criminal incapacity not only is found in s 78 (1) of the Criminal Procedure Act.

In this matter all three judges gave separate judgments. Jacobs JA and Boshoff JA on the facts agreed that the conviction must be upheld but reasoned differently on the law. Viljoen disagreed with the finding of the majority but reasons same as Boshoff AJA on the law. Viljoen and Boshoff held that an irresistible impulse or ‘tydelike verstandelike beneweling’ which is not rooted in mental disease or – effect caused the accused to commit the crime. Viljoen JA does not believe it to be provocation. Geldenhuys²⁹ opines in an article on this matter that in respect of the systematic of the criminal law we should along with mental disease, youthfulness, and intoxication also recognise ‘affective emotive conditions’.

In many cases accused relied on this defence which proved fertile ground for the defence of non-pathological criminal incapacity. Their reliance on this defence was upheld in cases where incapacity was not as a result of mental illness, immature age or intoxication.

Provocation was never before successfully held to be a ground for acquittal.

In *S v Arnold supra* provocation succeeded for the first time as a complete defence. The defence raised was criminal incapacity due to ‘emotional stress.’ In this matter the accused had killed his wife. Initially the couple had a good relationship but after his mother-in-law moved in with them this relationship soon deteriorated. The bond between the deceased and the disabled son of the accused suffered for worse. After an argument she had left him. Subsequent thereto they met at his residence. She taunted him and a disagreement later ensued. The accused fired a shot at the deceased which killed her. The court held that provocation had rendered the killing an involuntary and unconscious act, thereby not acting consciously. The accused suffered extreme emotional stress and the finding of court was that this condition could lead to a state of criminal incapacity. The state did not lead any expert evidence to rebut the evidence and findings of the defences’ expert nor did it contest such opinions. The court further held that even if there had been a legal act, the state failed to prove the accused had been criminally liable at the hand of the test for capacity.

²⁹ T Geldenhuys ‘Oorsig van Beslissings ten opsigte van die Strafreg’ SACC 1988 p177

The accused in *S v Laubscher supra* was a young medical student with a low tension tolerance threshold. His marriage failed due to financial hardship and alienation of his estranged wife and young child. On the fateful day he went to the house of his in-laws and upon denial by his in-laws to see his child he went from room to room, firing twenty one shots in total, killing his in-laws. The Appellate Division held that he acted voluntary and could distinguish between right and wrong and accordingly so acted but that he had diminished responsibility. The accused was convicted but his condition contributed to mitigation of sentence. The court proceeded to recognise “non-pathological diminished incapacity” that could ensue. On p167F the court recognised that an accused may have non-pathological criminal unaccountability based on total disintegration of a temporary nature. Joubert JA alluded to the provisions in the Criminal Procedure Act pertaining to the mental state of an accused. It appears he expressly worded this defence to distinguish it from that of mental illness found in section 78(1) of the Criminal Procedure Act *supra*. This judgment illustrates how quickly this defence gained ground and to what extent our courts would apply it.

In *S v Wiid*³⁰ the court doubted whether the accused had criminal capacity when she committed the killing of her husband. The accused had suffered physical, emotional psychological abuse at the hands of the deceased. The court held that the foundation of temporary non-pathological incapacity has to be laid in the evidence for the defence. In this matter the accused placed in issue her criminal capacity, not in terms of section 78 of the Criminal Procedure Act, at the time of the commission of the crime. On the evidence presented to court it held that firing seven shots at the deceased signifies uncontrolled action on the part of the accused.

In *S v Nursingh*³¹ the court found the accused had a personality make-up which predisposed him to violent emotional reaction wherein he would not be able to distinguish right from wrong. His mental state was described as a separation of intellect and emotion with temporary destruction of the intellect. This condition could cause a stimulus which would lead to a rage and a consequent disruption and displacement of logical thinking. This condition ultimately caused him to act in killing his family members whilst lacking criminal

³⁰1990 (1) SACR 561 (A)

³¹1995 (2) SACR 331 (D)

capacity. The court held that the factual foundation which had been laid established doubt as to his capacity to form criminal intent.

In *S v Moses*³² the accused murdered his homosexual lover who had AIDS. They had engaged in unprotected penetrative intercourse after which the deceased informed the accused that he had AIDS. The accused became extremely angry and picked up an ornament and hit the deceased twice on the head. He then stabbed the deceased, went to the kitchen to collect a larger knife whereupon he cut the deceased's throat and wrists. The court found the accused was subjected to extreme provocation. A number of factors contributed to his condition. These include factors such as suppressed anger relating to his dysfunctional family background and sexual abuse by his father led to his lack of criminal capacity. In the abovementioned matters the court heard evidence that the accused were either provoked or suffered from emotional stress. The court acquitted the accused because the state did not prove criminal capacity beyond reasonable doubt.

In *S v Mnisi supra* the accused shot and killed the deceased who had an adulterous relationship with his wife. This incident was preceded through his wife's similar conduct with the deceased. After intervention by family members and a promise by his wife not to continue the relationship he had come across his wife and the deceased embracing in a car. This crime was committed whilst the accused's acted with diminished responsibility due to lack of restraint and self-control. The court held that the accused had acted with diminished responsibility. In his assessment of the matter Carstens³³ contends that it is regrettable that a defence of non-pathological automatism and/or non-pathological criminal incapacity was not invoked. He argues that it was necessary for the court to consider the appellant's state of mind during the commission of the murder to determine whether his criminal capacity due to provocation was diminished. This judgment illustrates the lack of court to act and pronounce in a progressive manner on the defence of non-pathological criminal incapacity. The court failed to capitalise on the fertile ground to consider and embroider on the defence of non-pathological criminal incapacity. Clearly, the emotive state of the accused gave rise to his actions and could have served as basis for defence of non-pathological criminal incapacity.

³² 1996 (1) SACR 701 (C)

³³ P A Carstens 2010 De Jure 388 -394 on *S v Mnisi* 2009 (2) SACR 227 (SCA)

In *S v Steyn supra* the accused shot and killed her husband. The court applied the rules of private defence and acquitted the accused. This marriage was characterised by domestic violence, the deceased's habitual drinking, and continuous mental and physical abuse of the accused. The court accepted her version and held³⁴ that "...she was obliged to act in circumstances of stress in which her physical integrity and indeed her life itself were under threat." She was acquitted on murder. A significant aspect of this case was that the Court did not refer to any case law on the topic; neither did it – when the facts call for a consideration of the defence of non-pathological criminal incapacity - deal with the established principles of this defence. Rather, it focused solely on private defence and held that there is no precise test to determine the legality of defensive action. It held further that there must be a reasonable balance between the attack and the defensive attack. It took into account various factors to consider whether the defender had acted reasonably in the manner in which he had defended himself and his property. *In casu* the court listed nine factors to be considered to wit: (a) the relationship between the parties; (b) their respective ages, genders and physical strengths; (c) the location of the incident; (d) the nature, severity and persistence of the attack; (e) the nature of any weapon used in the attack; (f) the nature and severity of any injury or harm likely to be sustained in the attack; (g) the means available to avert the attack; (h) the nature of the means used to offer defence; and (i) the nature and extent of the harm likely to be caused by the defence. The court held that private defence justification is available to abused's persons. The wording of court in many regards places this matter square in the ambit and extent of what is required for a successful reliance on non-pathological criminal incapacity; either on the merits or for mitigation for sentence.

In *S v Ferreira supra* the accused pleaded guilty to the charges levelled at her. The court held that abused women could well kill their partners other than in self-defence, thereby recognising an extension of the recognised law. In this case domestic violence led to the abused woman killing her husband. Seven years of mental, sexual, physical and financial abuse culminated in the most harrowing degradation of the accused in front of known and unknown men. This triggered the stimulus to kill. This was done by contracting two killers. Ferreira sought help on many occasions by contacting the Police but to no avail. According

³⁴ Para 24

to Ludsin³⁵ the court acknowledged a women’s experience with violence and their reasons for killing when determining whether any mitigating circumstances exist at the sentencing stage. Ludsin holds the view that the test for mitigation is whether there are any factors that decrease the appellant’s moral blameworthiness. Secondly, women who kill their abusers in non-confrontational situations might be able to prove putative self-defence. Thirdly, abused women who kill using a hired killer are accorded some understanding by the law, as are those women who do not kill their abusers in the midst of a confrontation.

In *S v Engelbrecht supra* the accused asphyxiated the deceased whilst he was asleep. The facts of the matter showed the accused had endured much abuse, physical, sexual, emotional and psychological, at the hands of the deceased. In addition to the domestic violence it was clear that various state institutions failed to protect her interests. The court concluded that defences are justified in the context of domestic violence where various criteria are met. This far-reaching judgment developed the law on private defence in respect of an imminent attack and when force in response to an attack, is necessary. The court held that where the attack is inevitable, it is in law imminent. The law requires no more of the accused to avert the attack so that force in response was necessary. It progressed on the entrenched principles of the requirement of “imminence”.

In DPP, *Transvaal v Venter*³⁶ the court recognised the state of mind of the accused at the time of the commission of the crimes as temporary non-pathological diminished criminal responsibility. It held that even if such state of mind of the accused was rejected it still remained relevant to sentence.

In *S v Eadie supra* a motorist drove home after spending an evening at his sports club. There he had consumed a large amount of alcohol. Whilst driving he was harassed by another driver who, driving behind him drove with his headlights on bright or, after being overtaken, slowed down. At a set of traffic lights where both vehicles stopped the accused alighted from his vehicle with a hockey stick in his hand. He approached the other vehicle and the door opened. The accused struck at it with his hockey stick, breaking it in half. He tried to open the door which was kicked back at him. Eadie kicked the driver with both feet and

³⁵ H Ludsin ‘*Ferreira v The State: A Victory For Women Who Kill Their Abusers in Non-Confrontational Situations*’, SAJHR, 2004, 642

³⁶ 2009 (1) SACR 165 (SCA)

punched him on the head. The driver slumped toward the passenger seat. Eadie proceeded to punch him repeatedly on the face, pulling him out the vehicle, stamped on his face with the heel of his shoe and then kicked the bridge of his nose. The driver died as a result of the assault. Eadie relied on the defence of non-pathological criminal incapacity resulting from a combination of severe emotional stress, provocation and a measure of intoxication. He alleged that at the commission of the crime he could not distinguish between right and wrong and therefore could not act in accordance with that distinction. In its finding the court rejected this defence and made it clear it had little regard for the contention that to succumb to a temptation may excuse an accused from criminal liability. It held further that he had acted in a goal-directed and focussed manner; even though it found the accused was provoked and the deceased had behaved badly the message that must reach society is that consciously giving in to one's anger or to other emotions and endangering lives of motorists or other members of society will not be tolerated and will be met with the full force of the law. In addition it held that an accused can only lack self control when he is acting in a state of automatism. It cautioned courts to rely on sound evidence and to apply the principle set out in the decisions of the Supreme Court of Appeal.

From the foregoing it is clear that our courts have pronounced on non-pathological criminal incapacity in matters of intoxication, emotional stress³⁷, irresistible impulse³⁸, stimulus/trigger of an extreme nature³⁹; total personality disintegration⁴⁰; anger due to provocation⁴¹, fear or shock. Our courts have held that non-pathological criminal capacity entails situations where a person's incapacity was either brief⁴² or acted involuntarily⁴³ and is not a manifestation of mental disturbance⁴⁴.

Our courts have repeatedly stated that it is the inability itself and not the cause of the inability. Viljoen JA contends⁴⁵ that criminal capacity is different from mens rea.

³⁷ *S v Arnold* 1985 (3) SA 256 (C)

³⁸ *S v Campher* 1987 (1) SA 940 (A)

³⁹ *S v Henry* 1999 (1) SACR 13 (SCA)

⁴⁰ *S v Laubscher supra*

⁴¹ *S v Eadie supra*

⁴² *S v Campher supra*

⁴³ *S v Moses supra*

⁴⁴ *S v Nursingsh supra*

⁴⁵ *S v Campher supra* 955C-F

2.3 Requirements of the defence

A factual basis⁴⁶ must be laid by an accused for reliance on the defence of non-pathological criminal incapacity to at least create a reasonable doubt. The evidence of expert witnesses and a consideration of all the facts of the case including the accused's actions⁴⁷ and *ipse dixit*⁴⁸ are to be decided. Such evidence requires careful scrutiny. The State bears the onus to prove the criminal capacity of the accused⁴⁹. The State is assisted by the natural inference that in the absence of exceptional circumstances a sane person, who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily. When the court decides the criminal capacity of the accused it takes into account all the evidence of the case, which include the actions of the accused and expert evidence. Where there is reasonable doubt that the accused is criminally liable, he must be given benefit of such doubt⁵⁰. Expert evidence is a requisite⁵¹.

The test for capacity is subjective.

2.4 The effect of the S v Eadie decision

Louw⁵² holds the view that the second leg of the test of capacity has caused much controversy. This requirement of self-control and how to determine it has been differently interpreted by courts and academic writers. In Eadie the SCA held that the test for loss of control is the same as that for automatism. According to Louw, Navsa JA "...both cautioned against confusing sympathy with principle but also tellingly exposed the fallacy of many of the loss-of-control defences." Louw argues further that in Eadie the court introduced an objective test in determining criminal capacity, thereby also loss of control. The court accepted that the application of the test for provocation created many problems. He opines that the introduction of an objective policy-based test for provocation does not make legal sense. Once it is found that the accused is acting as an automaton that should be the end of the enquiry and the accused should be acquitted. He believes that by equating the loss of

⁴⁶ S v Potgieter 1994 (1) SACR 61 (A); S v Kalogoropolus 1993 (1) SACR 12 (A); S v Wiid *supra*

⁴⁷ S v Francis 1999 (1) SACR 650 (SCA)

⁴⁸ S v Kalogoropolus *supra*; S v Kensley 1995 (1) SACR 646 (A)

⁴⁹ S v Campher *supra*; S v Calitz 1990 (1) SACR 119 (A); S v Moses *supra*

⁵⁰ S v Campher *supra* 966G-1; S v Wiid *supra* 564b-h;

⁵¹ S v Arnold *supra* 264H; S v Wiid *supra* 564e-f

⁵² Ronald Louw *S v Eadie: Road Rage, Incapacity and Legal Confusion* SACJ (2001) 14 206

control with automatism, the court comes close to eliminating provocation as a defence, whether partial or complete.

Burchell⁵³ believes that the test of capacity might still remain, in principle, essentially subjective, the test had to be approached with caution. According to him the extent to which the judgment goes in revising the approach of the courts to provocation as a defence to criminal liability is of the utmost importance. Burchell submits that there are three possible interpretations of the judgment. The first interpretation is compatible with existing precedent on the subjective assessment of capacity. Secondly, it implies a restriction of the ambit of the defence of lack of capacity to a situation where automatism is present and involves a dramatic redefining of the actual subjective criterion of capacity thereby shifting the entire test of capacity from the subjective to the objective domain. Lastly he interprets the judgment as an intermediate position between interpretations one and two and could develop the common law without infringing the principle of legality or having to resort to lengthy and unpredictable legislative reform.

⁵³*Supra* p430

CHAPTER 3

THE VALIDITY OF THE DEFENCE

3.1 Introduction

The defence of non-pathological criminal incapacity developed with rapid strides once our courts acknowledged the affective function needs to be considered as part of the test for criminal capacity. This new defence and the progress thereof can almost be declared to be intense given the number of judgments on this defence. This defence became well settled in our law but it had its critics. The matter of *S v Eadie supra* threw the proverbial cat among the pigeons and in at least two decisions by the Supreme Court of Appeal⁵⁴ this defence was not even mentioned where the facts of the matter call for it. This chapter reflects on some comments on the defence, commentary by various jurists and the position after the *S v Eadie* decision.

3.2 Factors which contributed to the existence of the defence

Our law has developed to the extent that specific defences could be raised in a particular instance. This is of importance as criminal capacity is a requirement for legality. The principle of legality serves to protect the interest of a person as punishment follows if a crime or offence is committed and such contravention is of a prior legislation or common law.

Section 78 (1) of the Criminal Procedure Act⁵⁵ sets out the criteria for establishing whether a person possesses criminal capacity. These requirements are also used for determining mental illness or mental defect, which is pathological incapacity. If one of the two capacities is absent then an accused lacks criminal capacity. As far back as in 1987 Viljoen JA in *S v Campher* held that capacity is distinct from mens rea. When lack of capacity is raised this issue must first be decided and only if the court has clarity thereon must intention be considered. The knowledge of unlawfulness, which is an element of mens rea, arises out of the capacity to tell right from wrong and can only occur if that capacity exists⁵⁶.

⁵⁴ *S v Mnisi* 2009 (2) SACR 227 (SCA); *S v Steyn* 2010 (1) SACR 411 (SCA)

⁵⁵ Act 51 of 1977

⁵⁶ JRL Milton (ed), Annual Survey of South African Law, Criminal Capacity, Chapter 23, 1987, 363

Expert evidence is of the utmost importance when such defence is raised. The onus rests on an accused, to prove on a balance of probabilities that he or she acted without criminal capacity. Its test for criminal incapacity was a convenient means for our courts to formulate the defence of non-pathological criminal incapacity. This test is twofold and one must agree with Louw⁵⁷ that it is the second leg of the test that has been controversial. I believe that in most of these matters – emotional stress and provocation - where the defence was raised are of a nature that grabs the public and media attention. The test for determining whether the accused acted with the appreciation of right and wrong has therefore been under harsh scrutiny much more than one would ordinarily expect.

It appears that in certain matters our courts were unable to clearly distinguish between forms of incapacity. This manifested itself in eg. between non-pathological criminal incapacity and other forms of capacity related defences. In many of the matters the courts referred to diminished responsibility, and equated sane automatism with non-pathological criminal incapacity.

Burchell⁵⁸ defines diminished responsibility as follows: “....is usually the finding in cases of mental deficiency that do not amount to legal insanity.” Snyman⁵⁹ conceptualises sane automatism as instances where an accused’s conduct is only momentarily involuntary and such person accordingly does not “act” in the legal sense of the word.

3.3 Factors leading up to the SCA decision in Eadie

Louw described the application of non-pathological criminal incapacity by courts as ‘confusing’⁶⁰. This is due to the lack of its precise nature which has not been clarified in our law. Louw submits that not only the development of this defence but its application cause confusion. Commenting on the matter of *S v Eadie (1)*⁶¹ Louw states that the court contributed to the confusion by failing to clearly distinguish between automatism and incapacity and also in the implied assumption of an objective test for provocation defences.

⁵⁷ R Louw *S v Eadie: The end of the road for the defence of provocation?*, SACJ (2003) 16 p200

⁵⁸ *Supra*, p401

⁵⁹ *Supra*, p173

⁶⁰ *Supra* p207

⁶¹ 2001 (1) SACR 172 (C)

In his discussion on automatism and incapacity Louw illustrates the point⁶² by way of two provincial decisions that the two defences are distinct or should be regarded as the same: they cannot be both the same in some circumstances and distinct in others.

Louw continues in the article by stating that there is no clear understanding of the nature of lack of self-control. Louw submits that the conundrum might lie in the fact that it is a legal construction without a psychological foundation. Louw makes reference to the implied objective test adopted in *S v Eadie* as well the untenable and wrongly decided matters in its application of provocation.

These criticisms levelled by Louw precipitated the judgment of *Eadie* in the Supreme Court of Appeal.

3.4 Sane automatism and non-pathological criminal incapacity

Our courts had diverging interpretations and determinations what loss of self-control is. In *S v Eadie*, Navsa JA held that there is no distinction between loss of control and automatism. In reaching its finding the court revisited many judgments where the courts in the past have pronounced on what constituted and/or gave rise to loss of control. He severely criticised the approach of courts for their determination of what such loss constitutes and concluded that our courts have held that the “...uncontrolled act happened to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred.”⁶³

Snyman⁶⁴ defines automatism as “...there is no act because what is done, is done involuntarily, is where a person behaves in a mechanical fashion.” Snyman states⁶⁵ that the question must be whether conduct was voluntary, i.e. such person was capable of subjecting his bodily movements or his behaviour to the control of his will. Snyman further states a distinction must be drawn between automatism due to involuntary conduct not attributable to mental pathology (otherwise known as sane automatism) and automatism due to a mental disease (also known as pathological loss of consciousness). Where automatism is due to involuntary conduct (sane automatism) there is no conduct whereas if

⁶² Op 208-211

⁶³ Para 61

⁶⁴ *Supra* p55

⁶⁵ P56

the court finds the defence of non-pathological criminal incapacity to succeed, capacity is absent. Sane automatism thus excludes voluntariness which qualifies it as a ground of justification.

The finding in *S v Eadie supra* cannot pass without criticism. The judge clearly equated sane automatism with non-pathological criminal incapacity but as stated above there is a clear distinction to be drawn between the two forms of conduct. Capacity and voluntariness have different requirements. A person may lack capacity because he may not comprehend the nature of his actions or the unlawfulness thereof or because he did not have the mental abilities to realise unlawfulness to act accordingly. Therefore automatism is not the same as loss of control. Le Roux⁶⁶ concludes that a person who is temporarily non-pathological incapacitated because he temporarily lost his loss of control, still acts voluntarily and therefore cannot be in a state of sane automatism. What is clear from the judgment is that stricter requirements for determining lack of self-control in must be exercised. The courts will scrutinize an accused's version very closely when it is alleged that (s)he was unable to control him or herself.

Grant⁶⁷ points out that Navsa JA did not warn against the two legs of capacity being regarded as separate defences, but was instead recognising the similarity between a claim to involuntariness and incapacity for a lack of self-control. Grant criticised the approach of the court in *S v Scholtz*⁶⁸ on capacity. In this matter the court referred to and adopted the two legs of test for capacity. It followed the decision in *S v Eadie*. Grant submits Navsa JA recognised the similarity between a claim to involuntariness and incapacity for a lack of self-control. Grant states further that the court erred in rejecting the accused's claim to incapacity. Grant states that the court did not have to pronounce on this subject. Rather, the accused's failed to place any basis for a finding of incapacity before a court and cautioned that an accused who disputes capacity bears the onus of doing so. Grant believes, even though the court held otherwise, that the alcohol content in the blood of the accused

⁶⁶ J Le Roux Strafregtelike Aanspreeklikheid en die Verweer van Tydelike Nie- Patologiese Ontoerekeningsvatbaarheid – Verlies van Konatiewe Geestesfunksie Onderskei van blote verlies van humeur *S v Eadie* (1) 2001 1 SACR 172 (K)

⁶⁷ James Grant (ed), Annual Survey of South African Law, Criminal Capacity, Chapter 24, 2006, 668

⁶⁸ 2006 (1) SACR 442 (E)

at 0.18g/100ml at two and a quarter hours after an accident is an exceptional circumstance precludes the natural inference that a sane person acted consciously and voluntarily.

3.5 Provocation in light of S v Eadie

Whereas emotional stress is regarded as a build-up of circumstances over a period of time, provocation is held to be a non-recurrent incident that causes the accused to act in a certain manner. The Transkeian Penal Code of 1886 made provision for an objective approach to provocation. This Code was abolished in 1971⁶⁹ when the Appellate Division distinguished between provocation and emotional stress. In this matter the court held: "*Provocation and anger are different concepts, just as cause and effect are. But, in criminal law, the term provocation seems to be used as including both concepts, throwing light on an accused's conduct.*"⁷⁰ Louw holds the view that in S v Eadie the Supreme Court of Appeal applied an objective test whereas generally the subjective test is the criterion. Louw cites Navsa JA's comments in para 64 to qualify his statement: "*It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social integration.*" Louw continues by stating his approach to be 'policy yielding to principle'. Louw states one should be weary to apply policies that to the wishes of public as it does not always lead to good law. Such objective test for provocation does not make legal sense.

3.6 Non-pathological criminal incapacity and the views of pathologists and psychiatrists

Burchell⁷¹ holds the view that in S v Potgieter the factual foundation for the defence of non-pathological incapacity was absent. This contrasted with the evidence of the psychiatrist that the accused was acting in a state of automatism was based on the assumption that the accused's evidence was truthful in all material respects. Clear from this case is that the evidence will be carefully scrutinised. If the version of the accused is held to be unreliable or untruthful, the psychiatric evidence based on the supposed truthfulness of the accused's version must be rejected. In the matter of S v Nursingh *supra* the accused was an emotional vulnerable person. Evidence led by both psychiatrist and psychologist in the defence case

⁶⁹ S v Mokonto 1971 (2) Sa 319 (A)

⁷⁰ 324F-G

⁷¹ J Burchell 'Non-pathological incapacity – evaluation of psychiatric testimony, SACJ, Vol 8, No1, 1995, p37-44

was not challenged by the prosecution. The psychiatrist identified the accused's condition as a separation of intellect and emotion with temporary destruction of the intellect. The psychologist declared inter alia that the accused's condition during the commission of the crime as a known and identified mental trauma. The court held on the evidence that reasonable doubt as to the accused's capacity to form intent and acquitted him on the charges. Burchell⁷² calls for a reassessment of the subjective test of capacity without any '*normative evaluation of how a reasonable person would have acted under the same strain and stress, particularly where provocation and emotional stress are raised as defences.*'

3.7 Additional comments

The meaning of 'lack of control' is still unclear. From the judgments where the courts pronounced on emotional storm and provocation where the defence of non-pathological criminal incapacity was raised it is uncertain what the exact meaning is. Before S v Eadie lack of self-control was different from automatism. It is not amenable to psychological analysis. It was constructed in law. The judgment in Eadie is widely regarded that non-pathological criminal incapacity is the same as automatism, thereby making the defence of non-criminal incapacity redundant.

Van Oosten⁷³ states that the defence of non-pathological criminal incapacity has four advantages if compared to pathological criminal incapacity. They are: 1) the onus lies with the prosecution to establish the accused's criminal capacity beyond reasonable doubt; 2) a successful defence of non-pathological criminal incapacity will result in an acquittal of the accused; 3) such defence is not dependent upon proof of a mental illness or mental defect and lastly, it is not dependent on psychiatric evidence.

The criticism by Navsa JA on the application by our courts to test capacity seems harsh. The defence of non-pathological criminal incapacity was successfully raised in only a limited number of cases⁷⁴. If one considers the number of times this defence was raised then it is clear our courts were vigilant to the dangers not to accept the reliance on this defence too easily. I am of the opinion that in a constitutional dispensation our preferences should not

⁷² Supra 41

⁷³ Supra p146

⁷⁴ S v Wiid 1990 (1) SACR 561 (A); S v Nursing 1995 (2) SACR 331 (D); S v Moses 1996 (1) SACR 701 (C)

outweigh the realities of the application of legal principles even if it does not accord with our opinions. More so, it appears the court clear misinterpreted the sentiments expressed in criticism of the finding of the Provincial Division of *S v Eadie* as Louw, on whose opinions it appears Navsa JA largely relied, he sets out in a later article.

CHAPTER 4

4. BATTERED WOMEN SYNDROME

4.1 Introduction

Repetitive abuse and violence towards women were initially identified as “battered wife syndrome” by Dr L Walker⁷⁵. She categorised the three cycles of abuse as: (i) Tension-building phase: characterised by minor abusive acts; (ii) Acute battering phase: characterised by uncontrollable explosions of brutal violence and (iii) Contrition phase: characterised by calm and loving behaviour and pleas for forgiveness. Battered women syndrome has its origin in domestic violence perpetrated by partners in close relationships. It is commonly acknowledged that such victims endure constant fear and suffer physically or otherwise, of their abusers. Reddi⁷⁶ describes battered woman syndrome as the pattern of psychological and behavioural symptoms commonly found in women living in violent relationships.

In our current constitutional dispensation the battering of women violates sections 9 (gender equality) and 10 (human dignity) of the Constitution⁷⁷. According to Wolhuter⁷⁸ it is the internalisation of the hope that abuse will not recur, coupled with feelings of shame and guilt, that lock the woman into the abusive relationship. This condition leads to what is known as “learned helplessness”. Peterson, Maier and Seligman⁷⁹ are of the view that learned helplessness consists of three essential components. The first component is contingency: it deals with the objective relationship between a person’s actions and the outcome which he experiences. According to the authors, the continued disparaging actions of the abuser make the abused feel inferior than her husband and she therefore becomes accustomed to the situation. The second component is cognition which is how the learned helplessness contributes to the way in which the victim perceives, explains and extrapolates

⁷⁵ Lenore E Walker, “Battered women and learned helplessness” (1984) 2 *Victimology: An International Journal* 525

⁷⁶ M Reddi “Domestic Violence and Abused Women who kill: Private Defence or Private Vengeance?” SALJ, 2007 p22

⁷⁷ Act 108 of 1996

⁷⁸ Lorraine Wolhuter, Excuse them though they do know what they do- the distinction between justification and excuse in the context of battered women who kill, SACJ, (1996) 9, p151-166

⁷⁹ Peterson C, Maier S F, Seligman M E P (1993), Learned Helplessness: A Theory for the Ages of Personal Control. New York, Oxford Press on p8

the contingency. Thirdly, her expectation of what she can expect in future is borne by her perception and explanation of the abuse.

In South African law, section 1 of the Domestic Violence Act, Act 116 of 1998, defines domestic violence. Such ‘violence’ is not only physical but includes non-physical forms of abuse such as harassment, stalking, emotional, verbal, psychological and economic abuse. Pieterse-Spies⁸⁰ submits that the Act emphasises the effect of particular conduct on the victim as opposed to the specific form that such conduct takes. Also, violence suffered by women differs in type and form from the violence that men suffer. Matthews and Abrahams⁸¹ declares violence to be viewed as a pattern of abusive behaviour rooted in power, with direct link to culture, tradition and gender norms perpetuated by society.

Evidence on the battered woman syndrome was admitted in foreign jurisdictions. This type of evidence was also declared admissible in South Africa. It is submitted that the admissibility thereof in court helps in the finding why abused victims do not act or make choices which are perceived to be available to them.

The Constitutional Court in *S v Baloyi*⁸² recognised the prevalence of domestic violence in South Africa. In the judgment⁸³ it expressed the need to afford protection to abused partners as the state is under a constitutional mandate which includes the obligation to deal with domestic violence. It follows that the concomitant thereof is to provide means to address the effects of such violence. Not only is there common acceptance and recognition in foreign jurisdictions of battered women syndrome but various cases and academics have pronounced on this topic. It is strange to note that in various decisions⁸⁴ by South African courts, in determining the liability of the battered woman, the courts failed to mention the underlying syndrome by name. This position is lamented. It is unclear whether these courts were merely hesitant in mentioning battered women syndrome by name or whether it deemed the existing law to effectively address the issue. Either way, I am of the opinion that it is required of our courts – if not imperative - to pronounce on contemporary and

⁸⁰ A Pieterse-Spies: A South African Perspective on Battered Women Who Kill Their Abusive Partners, THRHR, May 2006, p309

⁸¹ Combining stories and numbers: An analysis of the impact of the Domestic Violence Act (No. 116 of 1998) on Women (The Gender Advocacy Programme and the Medical Research Council) (2001) 8

⁸² 2000 (2) SA 425 (CC)

⁸³ Para 11

⁸⁴ *S v Ferreira* *supra*, *S v Mnisi* *supra*, *S v Steyn* *supra*

applicable tendencies which have a bearing on such judgments. These judgments are framed along the lines of provocation and self-defence and, where applicable, it serves as mitigation.

4.2 The disadvantages of abused partners

4.2.1 Historical

The law recognises certain legal defences available to murder. This may, in the experiences and situations of abused women, be either private defence or provocation. Advocacy groups have long argued that our courts and even those who represent such victims are unable to place the abuse and violence of such victims within the requirements of available defences. Cases abound where victims not only kill their abusers when attacks occur but also in non-confrontational situations. The elements of such crime cannot be accommodated within the traditional grounds of justification which, one may say, by default led to recognition of the recently formulated defence of non-pathological criminal incapacity in these matters. As earlier alluded to, this defence is underscored by the affective function of humans which includes emotion. South African case law have recognised such abuse and mitigated sentence for these offenders.

The pressure of feminist and advocacy groups on available defences to women who kill increased with civil rights properly enunciated in the constitution. As expected, the media was used to good effect to raise awareness thereof. Their arguments included that this sector of society are effectively excluded from means and method to defend themselves properly to such charges. The view that gender bias is prevalent is commonly mooted as men were the originators of these defences but also largely the custodians thereof. This predominantly male perspective to law is entrenched by perceptions that not only could the abused partner have escaped her ordeal but that she could exercise discretion to avoid their lethal reaction to such attacks.

In addition to these arguments is the reality that South African society is conservative and patriarchal structures exist which permeates domestic violence. Our historical, social and political history must take into account the nature and extent when such violence is considered. Experience has taught that people are weary to get involved in what many

believe to be private affairs. The structures, institutions and support systems to those in need are lacking. Furthermore, the assistance of police to victims of domestic violence to curb the abuse are inadequate or ineffective which give rise to lack of confidence in their abilities to effectively deal with such matters. Such victims are under severe physical and emotional strain and endure psychological trauma. Another disadvantage abused women face, is the process to involve outsiders for help. Women are required to report abuse to strangers, thereby enduring shame. Further shortcomings identified in the system are people who are not educated or equipped with knowledge and skills to properly assist and guide. The position is compounded due to women's economic dependency on their abusers and their fear for future reprisals. Moreover, courts have a poor conviction rate for these types of crimes.

Another factor which arises is that the abused victims are regarded as pathological and do not take into account that it is a social issue. Opponents regard this abuse as an individual problem and some criticise these victims as mentally ill. Women do not have equal physical strength as men; cannot respond equally to threats or harm. Attacks occur in the privacy of their homes, seldom in public.

4.2.2 The Present

The emancipation of women is manifested in many spheres of our society. The South African government has implemented schemes to address imbalances of the past where women were either excluded or discriminated against. Transformation in respect of women appointees in especially government positions is noticeable. Our constitution provides that all its citizens are equal and should not be discriminated against. The latter years have seen women take their rightful place in society and even stereotypical vacancies are eradicated. What is required is for the law to progress to the extent that all constitutional values are embraced and accommodated to the extent that it may be argued the application of law in respect of these critical issues, are gender neutral.

The pillars of our patriarchal society still remain; men still dominate in *inter alia* economic, financial, legal, political, technological and agriculture. One wonders whether the perception that females are unequal to men will ever be denounced. Also, repeated beatings over a long period of time could result in the belief of the victim that she might

have to defend her even though the attack does not occur at that moment in time. In the mind of the battered woman she never feels safe. The fear women endure as a result of such abuse is rational. Recognition for women's rights is manifested in many activities and societies. Moreover, various forms of society have acknowledged abuse of women; why not take it further?

4.3 Recognition of Battered Women's Position: R v Lavallee⁸⁵

The matter of R v Lavallee is possibly the most commonly directive and widely known case on battered women syndrome. The facts of the matter are as follow⁸⁶: The accused and deceased were in a relationship for a couple of years. This relationship was characterised by arguments and violence and the accused suffered physical abuse by the deceased. To this extent she had to receive medical assistance on numerous occasions. On the fateful night, having endured a beating by the deceased, she had shot the deceased. The evidence of a psychiatrist, an expert witness on battered women, was heard in the matter. His evidence was that Lavallee was left vulnerable, worthless and trapped in a relationship from which she was unable to escape. Lavallee did not testify in the defence case but was acquitted by the jury. On appeal to the Supreme Court of Canada, the court had regard to the 'imminence requirement'. The court held that unique rules of self-defence apply to the battered spouse which an expert can explain. Furthermore, where no actual assault is in progress, violence by the accused may be excused. The psychological effect of battering of partners could be explained by expert witnesses. This would assist members of the jury to avoid using logic based on their own experiences. The court held further that the mental state of the accused at the time she pulled the trigger was a result of the cumulative effect of months or years of brutality which led to feelings of escalating terror on the part of the accused. According to court, expert evidence will serve to explain that such victims can predict the onset of violence before the first blow is struck. As to the imminence requirement, the court held that the accused had to believe on reasonable grounds that that it not possible to otherwise preserve him or her from death or grievous bodily harm. As to why such victim did not leave the relationship, the expert witness will explain the learned

⁸⁵(1990) 55 CCC (3d) 97 (SCC)

⁸⁶ Summary of facts broadly copied as stated in article "The Battered Wife Defence: The Lavallee Case" (MR60e) on <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/MR/mr60-e.htm>

helplessness of the battered woman whose self-esteem has been so damaged by protracted abuse that she quickly and repeatedly forgives her batterer in return for apology and expression of love proffered at the end of each cycle of violence⁸⁷.

4.4 Factors crystallised in foreign jurisdictions

In *R v Ahluwalia*⁸⁸ evidence was led in support of a plea for provocation which serves to confirm the view that in the United Kingdom such evidence will only be used to strengthen available defences. Pieterse-Spies⁸⁹ argues that the matter of *State v Koss*⁹⁰ serves to prove that battered women syndrome does not constitute a separate defence in the United States of America, but it merely assist the court to determine if the requirements of self-defence are met. Reddi⁹¹ states that battered women syndrome is not a criminal defence in Australia. According to him it is simply viewed as one facet of all the evidence that must be considered by a jury or judge when making a decision.

Wolhuter⁹² is of the opinion that in *State v Felton*⁹³, an American decision, the court held that by virtue of the absence of the cognitive and voluntative elements of criminal capacity, therefore a defence of not guilty by reason of mental illness or defect is open to a battered woman who kills her abusive partner. Wolhuter further states that the effect of domestic violence on a battered woman is incorporated into the requirement of reasonableness in the context of provocation.

Labuschagne⁹⁴ refers to *R v Mallot*⁹⁵, a decision in Canada where killing in abusive relationship took place and private defence was raised. Section 34(2) of the Canadian Penal Code applies. The court held that three requirements for private defence are required: the existence of an unlawful attack, a reasonable fear for risk of death or serious bodily injury

⁸⁷ Morris and Pilon, *The Battered Wife Defence: The Lavallee Case* (MR60e)

⁸⁸ [1992] 4 All ER 889, 96 Cr App Rep 133

⁸⁹ Supra 309

⁹⁰ (1990) 49 Ohio St 3d 213, 551 NE 2d 970

⁹¹ M Reddi "Domestic Violence and Abused Women who kill: Private Defence or Private Vengeance?", SALJ 2007 22-36 on p25

⁹² Supra 9

⁹³ 329 NW 2d 161 at 175

⁹⁴ JMT Labuschagne "Die Mishandelde Vrou-Sindroom, die Redelike Persoon-Standaard en die Grense van Noodweer' 1998 THRHR p538-541

⁹⁵(1998) 121 CCC (3d) 456 (SCC)

and a reasonable belief that the death or inflicting of serious bodily injury is the only means of self protection.

4.5 Battered women in South African courts

In *S v Ferreira supra* a South African court admitted evidence of experts on domestic violence. Ludsin *supra* submits that the court has finally acknowledged the differences between male and female experiences with, and responses to, violence. In *S v Engelbrecht supra* the court comprehensively dealt with the position of abused women and the applicable law. The court acknowledged the importance of expert evidence on abuse in order to reach a just decision. The Engelbrecht and Ferreira cases illustrate the impact on the abused woman will be determining factor of accused's blameworthiness⁹⁶.

The finding of court in the Ferreira case is not without criticism. The actions of the accused are criticised to be goal directed in many ways. According to Tania McAnearney⁹⁷ the finding of the court in the Ferreira matter leaves the following questions unanswered: why did Ferreira not seek legal advice? The police were called out three times and arrived only once but did she properly advise them to the extent of her situation? Where did she obtain the R5700.00 to pay the contract killers and why not use it to flee? In respect of the Engelbrecht decision the presiding judge held that Engelbrecht did all she could to prevent the abuse but the assessors were of the opinion that she did not exhaust all avenues to seek help.

The evidential proof of such abuse is high. The nature of the abuse is private and there is seldom a witness to corroborate the version of the accused; neither is the extent and ambit of the abuse/domestic violence known to parties outside the relationship. The result thereof is the accused as single witness of the abuse in her own case and such evidence to be complimented by expert evidence. Scepticism among psychiatrist is rife and also by many on the legal bench.

⁹⁶ M Reddy 'Domestic Violence and Abused Women who kill: Private Defence or Private Vengeance' SALJ 2007 22

⁹⁷ T McAnearney "When women kill their partners: the reasonable woman" 2004 Without Prejudice 11

Ludsin *supra*⁹⁸ states the constitution guarantees rights to dignity, freedom from violence and bodily integrity. Ludsin opines that a correction of gender bias that favours men is necessary. Recognition to the fact that men and women experience violence differently and that the legal system needs to account for these differences when determining culpability is needed. Ludsin submits that the court's reasons in *S v Ferreira* mirror an analysis of putative self-defence. According to her the court accepted credible reasons why Ferreira could not have acted otherwise and that she had no choice but to kill him to escape further abuse.

4.6 Can it exist as a defence?

When murder in the context of battered woman who kill occurs, the traditional rules of private defence do not adequately address the interests at stake. This is mainly due to situations when the commonly-held requirement of imminent danger is not present.

Wolhuter *supra* believes the employment of a separate standard of reasonableness for women entrenches established gender stereotypes. She states that the battered women as pathological obscures the existence of the structural power imbalances that underpin the incidence of domestic violence.

What is apparent from foreign and local case law is the recognition that expert evidence is not only necessary but also peremptory to contextualise and understand the conduct of abused women. In *R v Lavallee* *supra* the court held the perspective of women, previously ignored, must equally inform the 'objective' standard of the reasonable person in relation to self-defence. For that reason the imminence requirement must not be viewed in the normal context of imminence.

In *S v Engelbrecht*⁹⁹ the court inter alia held that in the context of an abused woman who killed her abuser, it required that the court have regard to her experience of abuse as well as the impact of the abuse on her. It also held that the defence of private defence as justification against the unlawfulness was available to abused women who killed their abusive spouses and partners¹⁰⁰. More importantly it held that where abuse was frequent and regular such that it could be termed a 'pattern' or a 'cycle' of abuse then it would seem

⁹⁸ P5

⁹⁹ Supra para's 330, 332 and 333

¹⁰⁰ para 340

that the requirement of ‘imminence’ should extend to encompass abuse which is inevitable¹⁰¹. Reddi¹⁰² states that the court, in discussing the objective standard that is used when reliance is placed on self-defence, stated the test is one of ‘reasonableness’ with the following resultant questions being posed: What would the reasonable man have done? Was the force used reasonably necessary in the circumstances? Did the accused act reasonably and legitimately to protect himself against the deceased?

The evidence on battered woman syndrome may be used in support of private defence, necessity or provocation. It could also mitigate the actions of the accused due to diminished responsibility or perhaps be a cause for insanity.

Foreign jurisdictions do not recognise battered women syndrome as a defence. The use of battered women syndrome or battering is used to substantiate existing defences. I am of the opinion that the interpretation of existing rules in respect of defences and grounds for justification allow for such evidence on battering to be accommodated. In *S v Engelbrecht* the court stated that the criteria as used under private defence would remain the most relevant tests even when using such a general defence. In addition thereto, legislation may be a means to address the shortcomings in the criminal justice system to ensure that the interests of such victims are fairly dealt with.

In *R v Lavallee*¹⁰³ the Supreme Court in Canada admitted evidence of experts on the psychological effect abuse had on the victim in marriage. The purpose of reception of this evidence is to enlighten the court to why a victim remained in an abusive relationship, the nature and extent of the abuse which existed in the relationship, the accused’s means to anticipate the danger from her husband and whether the accused on reasonable grounds believed that she could not free herself by other means¹⁰⁴.

Pieterse-Spies¹⁰⁵ considers the possibility of introducing battered woman syndrome as a defence. She refers to foreign jurisdictions and submits¹⁰⁶ that many of the criticism levelled against the battered woman syndrome is focussed on the psychiatric health of a battered

¹⁰¹ para 349

¹⁰² P337

¹⁰³ (1990) 55 CCC (3d) 97 (SCC)

¹⁰⁴ *R v Mallot* *supra*)

¹⁰⁵ Supra pp312-314

¹⁰⁶ P313-314

woman rather than looking at the circumstances surrounding her actions. Such criticism ignores important social, economic, cultural and political circumstances. She advocates that the focus should not only be on a woman's psyche but also on structural inequality, the systemic nature of women's oppression and the harms associated with domination and resistance. She states that acceptance of battered woman as a defence can also create the notion of a 'reasonable battered woman'. Such criterion can be measured against the 'reasonable battered woman'. The importance of expert evidence to educate the judiciary of battered women cannot be ignored. The actions of accused are therewith placed in social context.

Some jurisdictions have recourse to the traditional criminal law defences to determine the liability of the battered woman, without reference to the concept of the battered woman syndrome. Others invoke the syndrome either to render the act justified on account of self-defence or partially to excuse the accused on account of provocation.

What is needed is to reform the law on women who, by virtue of killing their abusive partners, rely on the private defence. It would not be improper to set itself the goal that a standard for the reasonable woman who behave or kill in these circumstances, could develop. To this extent the Lavallee case *supra* pioneered the acceptance that battered women may kill even if not confronted. What is important is that the state of mind of such a woman needs to be determined by court. The realities of abuse suffered by victims are clearly documented.

4.7 The requirement of imminence

The court in *S v Engelbrecht* stated¹⁰⁷ that domestic violence in all its manifestations may establish a pattern of coercive control over the abused woman, such control being exerted during the abuse as well as in the periods when the abuse is in abeyance. This provides compelling justification for focussing not merely on the nature of the abuse but more appropriately on the effect of the abuse 'upon psyche, make-up and world view' of the abused woman. It accepted the fact that the unlawful attack from which the abused woman may have been defending herself or others could be a single act of violence, a series of violations or an ongoing cycle of abuse.

¹⁰⁷ Para 231

Nicholson J states in his analysis¹⁰⁸ of S v Ferreira *supra* that "...any wife who can prove the existence of such imminent danger of death or great bodily harm and that she has no alternative, will have a good defence if she kills her spouse." He states further that if such an accused does not succeed then it will be relevant in mitigation of sentence. Reddi *supra* comments on S v Ferreira that the innovative aspect of the ruling relates to its statement that abused woman accused must be treated with due regard for gender difference in order to achieve equality of judicial treatment. He believes that it leaves unanswered the question what the attitude of our courts will be in the case of an abused woman who raises private defence as a justification for killing her abuser in circumstances that do not meet the objective criteria currently employed in making the determination.

Expert evidence will establish the core finding whether imminent danger exists in a particular matter. Such evidence will enlighten the court on the effect of a cycle of abuse on the victim. This evidence is necessary if deadly force was used in non-confrontational situations. In a relationship characterised by ongoing abuse the threat of abuse is always imminent¹⁰⁹. She submits therefore that the legal definition of imminence should accommodate an examination of the defendant's actions in context. According to her the abused victim's state of mind is abnormal due to abnormal living conditions and thus the legal doctrine was not originally intended to recognise such claims. Expert evidence explains her subjective understanding of imminent threat/reasonable belief. The dynamics of such a relationship can only be explained by an expert/despite battering relationship continues.

4.8 Criticism against Battered Woman Syndrome

According to Dutton¹¹⁰ the concept of battered woman syndrome has evolved from its inception from "learned helplessness", the cycle of violence and more recently, as post-traumatic stress disorder. She lists five points of criticism: 1. There is no single profile of a battered woman. 2. The term 'battered woman syndrome' is vague. 3. Posttraumatic stress disorder, compared to other psychological reactions to battering, is not uniquely relevant for understanding legal (or other) domestic violence-related issues. 4. The relevant

¹⁰⁸ Nicholson J "When wives kill their husbands" 2004 De Rebus 27 op p30

¹⁰⁹ Cynthia Gillespie, Justifiable Homicide: Battered Women, Self-Defence, and the Law 76 (1989) p68

¹¹⁰ Mary Ann Dutton, "Critique of the 'Battered Woman Syndrome'",
http://new.vawnet.org/category/main_doc.php?docid=375

information relied upon for expert testimony in legal cases, advocacy, and clinical interventions involving battered victims extends beyond the psychological effects of battering. 5. The term ‘battered woman syndrome’ creates an image of pathology.

Opponents¹¹¹ of the battered woman syndrome claim that there is no empirical evidence that this syndrome meets the rigorous diagnostic criteria of psychology or the law. There is also no reliable means to identify it from those who merely claim it as a legal defence and that it originates from legal advocacy and not science. Dixon states that an unintended consequence of the syndrome is that courts may interpret battered woman syndrome as the victims suffering from mental deficiencies. Dixon concludes that courts will realise battered woman syndrome expert testimony lacks a scientific, or even a reliable technical basis, and as women advocates realise that this testimony is inimical to their cause, the battered woman syndrome should begin to fall into disuse.

The terminology of the syndrome should perhaps be changed from the confines of battered women syndrome to ‘battering’. The reference to ‘syndrome’ indicates that something is wrong with the complainant. Thus, negative connotations are linked to the term. However, the wording that includes syndrome is a result from the battering itself. In the USA, Congress published a report titled *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials* after an investigation on battered woman syndrome. It rejected all terminology related to the battered woman syndrome. The terminology “battering and its effects” became acceptable. Research showed that there is more than one pattern to battering and a more inclusive definition was necessary to accurately represent the realities of domestic violence.

Psychiatrists do not accept this defence¹¹². It is believed they suffer from psychological disorders. The fact that such accused undergo psychological examinations strengthens the thoughts that one cannot place reliance on the averments of such accused. In addition they are of the view that rigorous research in this field of study did not yield any empirical findings. Their criticism to this condition is that there is no reliable means to identify those who suffer from it. Courts contribute to this perception as it orders those who raise the

¹¹¹ Joe Wheeler Dixon, Battered Woman Syndrome, [http://www.expertlaw.com/library/domestic_violence/
battered_women.html](http://www.expertlaw.com/library/domestic_violence/battered_women.html)

¹¹² See inter alia S Kaliski *Psycholegal Assessment in South Africa*, 2006, (ed Kaliski)

syndrome to undergo psychological evaluations. The critique against this practice is that it may be perceived that the diagnosis of a victim is not reliable to determine who suffers and who not.

There is the perception that victims of abuse must naturally react to and resist abuse. Questions abound why they do not seek help at an earlier stage. These reservations to acceptance of the realities to such abuse, let alone the lack of assistance are judged from the comfort chair and lack of understanding that a person's psyche is moulded by abuse. When private defence is raised by such victims turned accused, the nature and effect of the battering is not part of usual training and expertise of a presiding officer. Therefore, the actions of such accused must be explained by experts to prove they have acted justifiably in using deadly force when provoked. In *R v Lavalee supra* the court warned against a male-centred concept of reasonableness and held that it requires reformulation.

Reddi¹¹³ is of the opinion that if battered woman syndrome evidence is introduced in assessing the reasonableness of a woman's actions, it means that the woman is placed in a special category of battered women and that the reasonableness of her conduct is then measured against that of a person belonging to that category of individuals. He states that the admission of battered woman syndrome evidence, however, compels the view that the woman, though not suffering from a mental disease, defect or illness, is in some way mentally incapacitated. He reasons further if so, how it is argued that a battered woman must be viewed as having responded reasonably to the threat of harm, which is what is required by the self-defence standard. The finding of court was that the accused's conduct did in fact meet the 'imminence' requirement of private defence. This signifies an unequivocal acknowledgment that the impact of abuse on an accused woman will be an important factor in determining the accused's blameworthiness/gendered nature of the law/innovative approach indicate how much judiciary strives for this.

In the United States of America battered woman syndrome is regarded as a subcategory of post-traumatic stress disorder. This entails that during court proceedings evidence must be led to support another defence. It therefore has a limited application. There is a swell of support for the idea that courts must be gender sensitive by placing itself in the position of

¹¹³ *supra* p25

the woman; thereby creating room for the objectivity of a reasonable person not to be confined to a male perspective.

As I earlier alluded to, Navsa JA criticised the application of the test for provocation as giving rise to the criticism but also the mere acceptance of the ipse dixit of the accused. We should not rule out the effect of legal bias and the reluctance to embrace proactive course of law for benefit of such victims. Justice must be seen to be done for such victims and this entails breaching legal barriers. Meaningful reforms are necessary.

CHAPTER 5

CONCLUSION

5.1 The impact of the judgment in *S v Steyn* on *S v Eadie*

The criticism by the court in *S v Eadie supra* against the application of the second leg of the test for capacity may be alleviated by the finding of court in *S v Steyn supra*. The defence of provocation was harshly criticised by court but it should not be viewed as a rejection of the defence of non-pathological criminal incapacity. The sentiments expressed in *S v Eadie* leads one to think that a restriction was placed on the application and ambit on the provocation but also the defence of non-pathological criminal incapacity. I believe if the factors the court prescribed to are considered and applied correctly, then the courts have further ground to implement this defence. In *S v Steyn* the court clearly acknowledged the plight of victims of domestic violence. The bottom line of the approach of *S v Steyn* is the reasonableness criteria that need to be applied when considering the actions of the accused. This ‘criteria of reasonableness’ will supplement and strengthen all factors which are conducive to the defence of non-pathological criminal incapacity. Its application of the rules pertaining to private defence is based on a logical, objective standard employed to determine guilt. Therefore the factors which apply and which the court must consider there must be a reasonable balance between the attack and the defensive attack. These factors are ideal to be used to strengthen the defence of non-pathological criminal incapacity.

The first factor alluded to by court in *S v Steyn* is the relationship between the parties. Such relationship is that underlies the defence is either partner-related or one where abuser and abused parties have a close relationship. The psychological mindset could lead to partners struggling to come to terms with such abuse. This fits in squarely by the finding of Walker’s three cycles of pattern of abuse. Secondly, their respective ages, genders and physical strengths are to be considered. In many of the matters ruled on by courts the male partner was older and stronger than the victim. Biological age is relevant as it denotes an indication of probable level of maturity and development. The bigger the age differences the more readily accepted will one infer that the older partner could wield control over the other. A stronger male would be a dominating party in a position of attack which could be intimidating if not dangerous to the physical, emotional and bodily integrity of his female

victim. It is generally accepted that males have an advantage of physical strength over females. Females thus cannot resort to measures on the same scale as the attack against them. Expert evidence in respect of matters where the defence of non-pathological criminal incapacity is raised in relation to domestic violence may thus contribute on a finding of battering and secondly on battered woman syndrome.

The third factor is the location of the incident. Domestic violence occurs mostly in the privacy of their own homes and intimate surrounds. At such places defences are let down, people are complacent if not passive and reliance on the other partner apply. Seldom is there witnesses to incidents of the abuse; the indications of abuse are mostly seen. Unexpected and unprovoked attacks will be suffered to a larger degree by victims. Fourthly the nature, severity and persistence of the attack are to be considered. Human experience teaches us that the degree, violence and continued attack could cause response to the extent that a person might act against his nature. It is in these circumstances that the ‘emotional trigger’ causes abused partners to snap and counter attack or contributes to later attack by the victim. The requirement of imminent danger is then invoked to determine the lawfulness of the act. Fifth, the nature of any weapon used in the attack is crucial if the reasonableness of the attack is considered to the counter attack. Sixth, the nature and severity of any injury or harm likely to be sustained in the attack. The seventh factor is the means available to avert the attack. Eighth, the nature of the means used to offer defence. Ninth, the nature and extent of the harm likely to be caused by the abuse. The court held that private defence justification is available to abused’s persons.

5.2 Provocation and the requirement of ‘imminence’

Provocation is described as follow¹¹⁴: “*Provocation, or severe emotional stress, may deprive a person of the capacity to appreciate the wrongfulness of his or her conduct or to act in accordance with this appreciation*”. The authors continue by stating that emotion is a natural response to some circumstance that has driven or ‘provoked’ the actor into doing what he or she does. As previously mentioned, in general provocation does not excuse from criminal liability. People are expected to control their emotions and not to act in the heat of

¹¹⁴Burchell and Hunt, South African Criminal Law and Procedure, Volume 1, General Principles of Criminal Law, 3rd Edition, Juta and Co, Ltd, 1997, p201

the moment. In the judgments of *S v Van Vuuren*¹¹⁵ and *S v Lesch*¹¹⁶ however recognition for provocation or emotional stress was *inter alia* considered relevant in determining the accused's criminal capacity. Our courts were from the outset weary in the application of the defence of non-pathological criminal incapacity. It is clear that such defence would carefully be scrutinised by court. Clearly, the accused has to lay a foundation for the finding that the defence apply; expert evidence was crucial to such finding. Even so, courts have to consider the version of the accused and if found unreliable or untruthful then the court will not accept it. The cause and result of the action in provocation were closely linked and the requirement of imminent danger is inherent to such defence.

The judgment in *S v Engelbrecht* is a welcome qualification on what constitutes imminent danger. This judgment draws on foreign jurisprudence and the interpretation of the requirement of imminent danger. In a pattern of cycle or behaviour the victim expects or foresees the behaviour of her abuser. Such victim cannot wait until a physical assault occurs before her apprehension can be validated in law. Satchwell J for those reasons found¹¹⁷ that "*where abuse is frequent and regular such that it be termed a 'pattern' or a 'cycle' of abuse then it would seem that the requirement of 'imminence' should extend to encompass abuse which is 'inevitable'*".

The swell of support of acceptance for the plight of abused women was acknowledged in the matter of *S v Ferreira and Others*. Provocation within the context of domestic violence, if raised, must be distinguished from other situations. Expert evidence will necessarily serve as basis for the courts to understand the position of an abused woman caught in a pattern or cycle of violence. This will expel any bias towards women who act in such circumstances and who ultimately kill their partners. Much of the criticism levelled by Navsa JA in *S v Eadie supra*¹¹⁸ can be circumvented by clearly setting out the distinction of a battered woman versus a person acting in a "...*goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, ... that at some stage during the directed and planned manoeuvre he lost his ability to control his actions.*"

¹¹⁵ 1983 (1) SA 12 (A) at 17G-H

¹¹⁶ 1983 (1) SA 814 (O)

¹¹⁷ Para 349

¹¹⁸ para 61

Navsa JA's judgment on the difference between sane automatism and non-pathological criminal incapacity¹¹⁹ were clearly clouded. Involuntariness of an act can never be equated to appreciation (or not) of the wrongfulness of an act.

5.3 The role of the Legislature

The Domestic Violence Act¹²⁰ criminalises certain conduct and prescribes various measures, procedures and recourse to abused victims. These provisions are clearly not sufficient to effectively deal with such matters. Recurring abuse and breach of protection orders are the order of the day. The shortcomings may be ascribed to various factors. Ineffective policing, lack of court assistance and the general disregard of abusers to court orders are rampant. Legislature is ideally placed to assist by enacting amendments to the Act that will assist and promote the rights of abused people. Amendment of this Act can allow for evidence on such abuse, thereby making it relevant and compelling to consider by presiding officers. In terms of the constitutional entrenched rights which must be valued and upheld by all, institutionalised discrimination cannot be tolerated. S 7(1) & (2), s 9, s 12 and s 39(2) of the Constitution¹²¹ guarantees various rights to citizens. I believe that certain conduct must be criminalised and sentences prescribed as a first step which will inadvertently strengthen the defence of non-pathological criminal incapacity where it relates to domestic violence.

The South African Law Reform Commission is an institution which is ideally placed to be the instrument to investigate avenues as a platform to elicit comment for the way forward. A cornerstone of objection is the absence of empirical findings what constitutes the battered woman syndrome. Our courts have expressed – impliedly and expressly – support for this notion. Foreign jurisdictions have acknowledged this type of abuse. Various guidelines this could be the starting-point for the framework of research by the SALC. This possibility may pave the way for a uniform approach to the defence of non-pathological criminal incapacity in the context of domestic violence. These legal reforms could be the measures to support such defence if raised where battered woman syndrome apply. The extent to which such recommendations are to be made might include a list of factors or requirements for accused to adhere acceptance of the defence?

¹¹⁹ Para 57

¹²⁰ Act 116 of 1998

¹²¹ Act 108 Of 1996

The Judiciary needs to be educated as it carries baggage of societal prejudice. Evidence of experts will shed light on domestic violence which is not akin to an individual. Only in these circumstances will the judiciary understand what is meant by ‘learned helplessness’. In *S v Ferreira supra* the court was at pains not to mention ‘battered woman syndrome’ by name. Equity must be of a substantive nature even if there is an absence of medical or clinical records. Only then can we have judicial recognition of the gendered nature of the law in respect of battered women and give effect to entrenched rights to equality and equal treatment.

5.4 Finding on the question for thesis

The welfare of abused women who kill should be redressed by positive application of the law and factors which support it. The judgment in *S v Eadie supra* is not a means to an end; rather, it creates opportunities to reconsider and apply the legal rules. South African courts are not only limited to local precedent; this was never the case and our courts regularly draw from foreign jurisprudence to substantiate or develop the law. The rules of natural justice cannot allow that the development of our law - which development is to the benefit of abused women who kill – be a nullity. The defence of non-pathological criminal incapacity is accepted and widely followed by our courts. On an interpretation of the defence of provocation, *S v Eadie* qualifies the stricter application of the criteria to be used by courts in assessing the merits and the law to come its ruling. This finding did by no means make the defence redundant. Domestic violence is a reality and the abuse in all its various forms is rife and difficult to address and prevent. The standard of a reasonable abused woman needs to consider in all matters of a similar nature and this defence is the instrument most suited to assist in assisting these accused. On a conspectus of the totality of the arguments raised herein I believe that recourse in the defence of non-pathological criminal incapacity does exist for abused women who kill their abusive partners.

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