

How would an accused / defence successfully argue
Non-pathological criminal incapacity or alternative
defences, namely in the battered wife / partner
syndrome?

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LLM Dissertation Summary

Title

How would the accused/defence successfully argue a non-pathological criminal incapacity or alternative defences, namely in the battered wife/partner syndrome?

Introduction

This dissertation will discuss namely spouses/partners from relationships where domestic violence is prominent, and where they (the abused) murder or commit violent crimes against their abusers, I will link their crimes to limited or having no criminal capacity at the time of committing the crime due to prolonged abuse they have suffered.

Chapter 1: Introduction and important definitions.

Is a brief history of the defence of non-pathological criminal incapacity, from its roots in *Campher*¹ and *Wiid*² where both courts held that: extreme provocation could also exclude criminal capacity that will lead to a total acquittal. This meant the law recognised a form of incapacity, which is not as a result of a mental illness or mental disturbance.³

A brief discussion and criticism of the case that changed it all: *Eadie*⁴ which delivered a judgement that was a “death blow” for the defence of non-pathological criminal capacity.

How the nature of domestic violence and the strategies used to execute it resembles torture both in terms of the psychological consequences as well as the methods used.

¹ 1987 (1) SA 940 (A)

² 1990 (1) SACR 561 (A)

³ *Snyman* (2008) 164

⁴ 2002 (1) SACR 663 (SCA)

Chapter 2: The defence of non-pathological automatism.

A discussion on Automatism in which the law assumes that there is no act because what was done, was done involuntary, namely a person behaves in a mechanical fashion.⁵ The defence of temporary mental incapacity falls in the category of non-pathological incapacity. Attributed usually to a morbid or pathological disturbance of the mental faculties of temporary nature, the onus of proof rest on the state. This defense if raised properly will excluded liability on anyone who raises it successfully.

Chapter 3: The defence of non-pathological criminal incapacity. (Cognition and/or conation.)

A general discussion of capacity, its application to this dissertation, implications and misconceptions as well as commentary on criticism surrounding this defence.

Brief discussion in relation to triggers for non-pathological incapacity.

Chapter 4: Implications and an overview of raising mental illness or mental defect at the time of committing the crime.

A general discussion of the applicable Criminal procedure Act legislation, requirements and the use of expert evidence.

Possible implications of raising this defense successfully.

Chapter 5: The use of expert evidence and admissibility/inadmissibility of certain discloser/s made to experts, and whether admissible as evidence in a trial.

A general discussion of the Constitutional right to remain silent in contrast with legal privilege versus a duty to disclose certain information.

Chapter 6: If found guilty, whether diminished capacity will mitigated punishment.

A general discussion on factors the court consider in relation to the appropriate sentence. Aggravating versus mitigating factors and a recommended sentence if found guilty.

Chapter 7: Constitutional implications, recommendations and conclusion.

⁵ Snyman (2005) 55

An overview of the relevant constitutional rights applicable, recommendations regarding change in our law, possibly a different view regarding this specific type of crime.

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Chapter 1: Introductory remarks

(1.1) Introduction

This dissertation will discuss namely spouses/partners from relationships where domestic violence is prominent, and where they (the abused) murder or commit violent crimes against their abusers, I will link their crimes to limited or having no criminal capacity at the time of committing the crime due to prolonged abuse that they have suffered.

Regarding non-pathological criminal incapacity, prior to 1987 the law did not recognise this type of defence, in this situation it would afford a person a complete defence. The courts realised that such defence amounted to nothing else than the defence of provocation, and as far as this defence is concerned, our courts refused to regard anger caused by provocation as an absolute defence in the sense that it could lead to total acquittal. It could be at most a partial defence that one may be found guilty of a less serious offence.¹

This rule was based on as good a legal principle, that the law must treat all people equally. The law cannot differentiate between people who do not control their tempers and those who do. It would mean that undisciplined people are judged by a standard that completely differs from those people that are disciplined. In short the law expects adults to control their tempers and to be treated equally.²

Then came along a landmark case of *Chretien*³ where the court held that voluntary intoxication may constitute an absolute defence leading to a total acquittal.⁴

¹ Snyman (2008) 163.

² Snyman (2008) 163.

³ 1981 (1) SA 1097 (A).

⁴ Snyman (2008) 164.

Almost a decade later legislature had to intervene to limit the destructive consequences of this decision.

After the decision of Chretien⁵ a big question remained: if intoxication may completely exclude criminal capacity, why not also emotional stress caused by extreme provocation.

In Campher⁶ and Wiid⁷ both courts held that: extreme provocation could also exclude criminal capacity that will lead to a total acquittal.

This led to a new term, known as “Non-pathological criminal incapacity”. This means that it is a form of incapacity, which is not as a result of a mental illness or mental disturbance.⁸

This meant that people who were accused of crimes namely murder, and who have admitted, committing crime/s namely killing their victims unlawfully, could not be found guilty on the grounds that they lack criminal capacity due to factors like “emotional stress” or “emotional breakdown”.

Years later, the case that changed it all Eadie⁹ came along and delivered a judgement that was a “death blow” for the defence of non-pathological criminal capacity. The court held that if a person raises this defence on the grounds of extreme provocation, the defence should be treated the same as the defence of sane automatism.¹⁰

In general our law will hold people accountable for their criminal conduct, only when the prosecution proves beyond reasonable doubt that at the time of the conduct that was perpetrated, they possessed criminal capacity or, the psychological capacities for insight and for self control.¹¹

⁵ 1981 (1) SA 1097 (A).

⁶ 1987 (1) SA 940 (A).

⁷ 1990 (1) SACR 561 (A).

⁸ Snyman (2008) 164.

⁹ 2002 (1) SACR 663 (SCA).

¹⁰ Snyman (2008) 165.

¹¹ Burchell (2005) 358.

There are three main elements to normal human personality: cognitive, conative and affection.

Cognitive relates to the individual's capacity to think, perceive and reason, the capacity by which humans learn, solve problems and make plans.¹² The ability to distinguish between right and wrong.

Conative relates to the capacity for self-control and the ability to exercise free will.¹³ The ability to act accordingly.

Affective relates to the capacity for emotional feeling such as anger, hatred mercy and jealousy.¹⁴

Therefore a person, whose cognitive or conative capacities were impaired in a significant way, ought not to be held criminally responsible for their actions.

(1.2) Domestic Violence

The nature of domestic violence and the strategies used to execute it resembles torture both in terms of the psychological consequences as well as the methods used. The physical and psychological abuse common in both torture and domestic abuse often has serious traumatic consequences for victims.¹⁵

The South African Bill of Rights specifies the state's obligation towards women in respect of protection against violence, and specifically against sexual crimes, and the right to control over their bodies.¹⁶

¹² Burchell (2005) 358.

¹³ Burchell (2005) 358.

¹⁴ Burchell (2005) 358.

¹⁵ Gobodo-Madikizela and Foster (2005) 364.

¹⁶ Gobodo-Madikizela and Foster (2005) 365.

The Constitution also stipulates specific rights that uphold human dignity, the right to security, and the right to be free from criminal violence whether from public or private sources. Domestic violence, by its very nature, violates every single one of the rights we have highlighted here, in addition also complies with human right abuses.¹⁷

The Constitution not only address certain rights concerning the protection of its citizens against violence and abuse, but also imposes corresponding duties on the part of the state to promote and fulfil these rights and to the protect their infringement by others.¹⁸

Advocates of women's rights in South Africa have drawn significantly from the Bill of Rights to challenge the courts in their role as guardians of the constitution, to pay attention to the relevant Constitutional provisions when abused women face criminal charges for their actions against abusive partners.¹⁹

In the case of Anieta Ferreira, who was convicted in November 2000 and sentenced to life long with two men she had hired to kill her husband. In the Supreme Court of appeal, at the hearing of her life sentence, Ferreira described the abuse and humiliation she suffered at the hands of her husband, and the threats she endured to her life. Her attorneys used a combination of arguments based on the constitution, and psychology testimony regarding the patterns of behaviour observed in battered women.²⁰

The Supreme Court of Appeal upheld Ferreira's appeal and overturned the sentence of life imprisonment in favour of a suspended sentence.²¹

Domestic abuse became a sub-field of psychological research in the 1970's when psychological experts were increasingly called upon to explain the

¹⁷ Gobodo-Madikizela and Foster (2005) 365.

¹⁸ Gobodo-Madikizela and Foster (2005) 365 .

¹⁹ Gobodo-Madikizela and Foster (2005) 365.

²⁰ Gobodo-Madikizela and Foster (2005) 365.

²¹ Gobodo-Madikizela and Foster (2005) 365-366.

behaviour of victims of domestic abuse who had been charged with murder of their abusive husbands. Women who were living with repeated abuse were found to exhibit a pattern of psychological and behavioural symptoms. This is referred to as “battered women syndrome”. This conceptualised battered women syndrome as “learned helplessness” a situation in which a victim of domestic abuse not only is unable to protect herself, but also finds it difficult to leave the abusive partner. The cycle of violent abuse will reduce a woman to total submission, fear and an inability to retaliate.²²

While debates on the admissibility and the scientific validity of battered women syndrome are currently raging internationally, the concept seems to be playing a prominent role in South African courtrooms. The expert testimony on the battered women syndrome in the Anieta Ferreira case was accepted *in toto*. Judge Howie noted that in plotting the murder of her husband, Ferreira’s behaviour conformed to a pattern that has been documented and written about scientifically in the major English-speaking jurisdictions around the world.²³

In cases involving crimes committed by battered women, expert evidence/testimony presented in these cases should be as rigorous as for any other matter. The helplessness and powerlessness induced by abusive environments may produce symptoms similar to Post traumatic stress disorder. Battered women syndrome is not listed as a disorder in the DSM-IV²⁴, and so post traumatic stress disorder may be a diagnosis of choice for clinicians who want to present the complex behaviour of victims of abuse in terms of the DSM-IV diagnosis.²⁵

Many of the symptoms observed in the battered women are similar to those that form part of the Post traumatic stress disorder symptomatic picture. The reason of fear, hyper-vigilance and intrusive experiences of the abuse, would

²² Gobodo-Madikizela and Foster (2005) 366.

²³ Gobodo-Madikizela and Foster (2005) 367.

²⁴ The American Diagnostical & Statistical Manual for Mental Disorders (1994) Volume 4.

²⁵ Gobodo-Madikizela and Foster (2005) 368.

be expected, given the traumatic nature of cycles of abuse in some of these cases.²⁶

Some experts conceptualised battered women syndrome as post traumatic stress disorder. This suggests that a battered women's behaviour may not only be a reaction to the real threat of danger to her life, but a perception of danger, which would be consistent with symptoms of hyper vigilance. Further note that women who have experienced abuse are affected by it in the long term.²⁷

One must remember that complainants of domestic violence are likely to consult a psychiatrist or psychologist in the following circumstances:

- (1) When suffering from symptoms they know are due to domestic violence.
- (2) When suffering from symptoms they may not know are connected to or contributed to by domestic violence.
- (3) When referred by police or the legal profession for assessment in relation to being a complainant of such violence.²⁸

In assessing complainants of abuse one must look at symptoms and signs of mental illness or medical illness, coping strategies and safety issues.

Complainants of domestic violence are more likely to manifest the following symptoms and signs:

- (1) Depression.
- (2) Anxiety disorders such as post-dramatic stress disorder
- (3) Phobias and suicidal ideation and attempts

²⁶ Gobodo-Madikizela and Foster (2005) 368.

²⁷ Gobodo-Madikizela and Foster (2005) 368.

²⁸ Peter (2006) 159.

(4) Alcohol and drug abuse, together with eating and sleep disorders may be present, complainants may have feelings of guilt and shame and often have poor self esteem.²⁹

These are symptoms that ought to be elicited in a victim of domestic violence, and obviously included in the report to the court to support an assessment of the seriousness of the abuse.³⁰

Studies have confirmed that most abused women are not passive complainants but rather adopt active strategies to maximize their safety and that of their children. Some may resist, others flee, while some try to keep the peace by meeting the abusers demands. A person's response to abuse is often limited by the options available to them. Reasons why women may remain in abusive relationships include fear of retribution, a lack of alternative means of economic support, concern for the children, emotional dependence, a lack of support, concern for the children, emotional dependence, a lack of support from family and friends and a hope that the perpetrator will change.³¹

If an accused was examined by a Psychiatrist, and the Psychiatrist is of the opinion based on the classification of the DSM-IV that due to the beatings, the accused suffers from Post Traumatic Stress Disorder. Additionally hold the opinion that the accused suffers from a borderline personality disorder in conjunction with depression and during the incident had cognition although her conation might have been slightly impaired. What if a psychologist is of the opinion that the accused is a typical battered wife and suffers from "battered wife syndrome", one can go on further stating that the abuse over years had gradually disintegrated her personality and was exacerbated by severe depression.

(1.3) The Purpose of this Study Linked to a Set of Facts.

²⁹ Peter (2006) 159.

³⁰ Peter (2006) 159.

³¹ Peter (2006) 159.

One can only truly grasp the concept of “Battered women syndrome” or “learned helplessness” in context of Non-pathological criminal capacity, when one reads the story of a wife/partner who kills her abusive partner/husband.

Only then can one truly grasp and understand why it was done, what went through their heads at the time and possibly the perpetrators emotions. If one puts one self in the possession of a battered wife/partner, would it be reasonable if you committed such an act? What if it was your mother, spouse, daughter, relative or friend? One can only imagine.

Take the set of facts of a forty-one-year-old Mrs. R, mother of 3 minors, thinks about her husband Mr. R everyday the one who continuously abused her physically, mentally and sexually. A black eye, bruised nose, once a broken arm, all mementos from her husband's beatings, until the night she killed him.

Everyday she carries buckets of sand and water, delivering them to builders to earn a living. Her right shoulder aches, reminding her of the days and nights her husband would tug her closer to hit her. Everyday she bends down to shovel the sand into her bucket, lifting it to balance the bucket on her head, her lower back twinges, making her reminisce about the times her husband would knee her closer in the small of the back.

Her husband started cursing and assaulting R early in the couple's relationship. The very last time, her husband of 15-years returned from a drinking spree and drunkenly and violently beat R with an iron spade for two hours.

"The crime I had committed that day?" she recalls. "I did not ask why he had come home late. I had resolved not to ask this time, because the last time I did I got severely beaten."

R recounts that she had bruises all over and blood oozed from her nose. In the midst of the beating, her husband furiously demanded she cook him a meal before he finished her off. He then fell asleep.

"I went to the kitchen while in pain and started preparing the food, but in vain. When he woke and saw that I failed to finish, he beat me some more and I got too angry," she said. R picked up an iron hammer and knocked J's head. He died immediately. She then turned herself in to police.

She says she never planned to kill her husband "I have always loved my husband, but he was too violent and his anger pushed me into action. I was scared that if he woke up he would have killed me as promised."

R says she presented herself to the police because she wanted them to understand that she did not kill intentionally. The High Court sentenced her to life imprisonment.

(1.4) Automatism differentiated from Criminal Incapacity.

Automatism is a state in which one finds oneself, where one's conduct is merely mechanical or a reflex action.

In respect the law assumes that there is no act because what was done, was done involuntary, namely a person behaves in a mechanical fashion.³²

Mere amnesia after the act is not to be equated to automatism. The question is not whether the accused can remember the events but rather whether the accused acted voluntarily at the critical moment.³³

Since muscular movements are more significant of the mechanical behaviour of an automaton than of the responsible conduct of a human being whose bodily movements are subject to the control of his/her will. The question simply remains whether it was involuntary, namely whether the person

³² Snyman (2005) 55.

³³ Snyman (2005) 56.

concerned was capable of subjecting his/her bodily movements or his/her behaviour to the control of his/her will.³⁴

In proving the defence of automatism due to involuntary conduct, the attitude of the courts towards this defence is of great circumspection. An accused who has no other defence will likely resort to this as a last resort. Where sane automatism is pleaded, and the onus is on the state, an accused must lay a basis if his/her defence on either medical and/or expert evidence which is sufficient to create a doubt as to whether the action was voluntary.³⁵

In contrast, Capacity has to do with ability. Incapacity is like impotence “you have the facility but not the ability” Non-pathological Incapacity: For a brief period due to: youth; intoxication; provocation are the three triggers for non-pathological incapacity.³⁶

There are two requirements for capacity:

The ability to appreciate the wrongfulness of the act (cognitive – ability to distinguish between right and wrong).

And

The ability to act in accordance with such an appreciation (conative/ self control and power of resistance).³⁷

A major difference is that Criminal capacity is assessed subjectively, while one’s voluntary conduct is assessed objectively.³⁸

An absence of liability because of mental liability because of mental illness must not be confused with the “evasion” of liability where an accused acted in

³⁴ Snyman (2005) 56.

³⁵ Snyman (2002) 57.

³⁶ Snyman (2002) 158.

³⁷ Snyman (2002) 158.

³⁸ Louw (2001) SACJ 207.

a state of automatism. Although in some cases of mental illness may closely resemble cases of automatism, they nevertheless be clearly distinguished.³⁹

If an accused relies on the defence of automatism, the onus of disproving it rest on the state. The basis of the non liability is that there is no act in criminal law, because the conduct is not voluntary. If this defence is successful, an accused will be found not guilty and discharged.⁴⁰

On the other hand, if an accused defence is one of mental illness, the onus rests on the accused. The basis of an accused non-liability in this case is absence of criminal responsibility (capacity), is if the defence is successful, the accused is not released but will be ordered to be detained in a psychiatric hospital or prison.⁴¹

The expression “sane automatism” relates to cases in which an accused conduct is only momentary involuntary and he does not “act” in the legal sense of the word. The expression “insane automatism” refers to cases in which the abnormal or involuntary conduct is from the result of a mental illness.⁴²

The essence of the defence of automatism is involuntary conduct which is not a manifestation of a mental disease.⁴³

(1.5) Conclusion

To recap, as previously mentioned it is extremely important to note the differences between criminal capacity and Automatism, as the two are completely different and deal with separate elements of criminal liability. Even if a person lacks the conative ability (the capacity for self-control and the

³⁹ Snyman (2002) 171.

⁴⁰ Snyman (2002) 171.

⁴¹ Snyman (2002) 171.

⁴² Snyman (2002) 172.

⁴³ Snyman (2002) 171.

ability to exercise free will.⁴⁴) one will none the less have voluntary control of ones muscular movements, it is only one mental insight which is impaired.

A state of automatism excludes one's voluntariness where one loses intelligent control of their muscular movements. Their actions will not be regarded as conscious control of their muscular movements, because the action is not under the conscious control of that person due to external non-pathological factors not attributed to mental illness or mental defect.⁴⁵

For a person to have acted in an automatic state due to a non-pathological stimuli, one must be subjected to a grand amount of stress that emanates from internal tension, after years of building up to a point of climax which will have its roots in enduring and being subjected to prolong humiliation and stress, Automatism will then be triggered by an unusual event or unplanned occurrence.

⁴⁴ Burchell (2005) 358.

⁴⁵ Kaliski (2006) 107.

Chapter 2: The defence of non-pathological automatism

(2.1) Introduction

Automatism is a defence available to someone who did not act voluntarily. Examples of automatism are sleep walking/talking, epileptic fit, mental disease and hypnosis.

The defence of automatism is not available if the accused intentionally or negligently creates situation in which he acts involuntarily (e.g. driving a car when you know you are prone to epileptic fits).

(2.2) Definition

Automatism can be defined as: “A state in which one finds oneself where one’s conduct is merely mechanical or a reflex (movement)” which has the effect of Excluding the Act.

(2.3) Explanation of legal terms and principles

An act is: Voluntary human commission or omission. “Voluntary” is the crux of the definition of the act.

The act/deed requirement consists of two elements, an act and a consequence.

The act is the formally defined crime. Formally defined means that only the conduct is punished, the consequence is of no importance. Driving under the influence of alcohol is an example of a formally defined crime.

The consequence is the materially defined crime. Materially defined, one looks at what it caused. (This is very important as the State must prove causation) Consequential crimes are for instance, murder, where the causing

of the event is punished, the conduct itself is irrelevant, and only the consequence of the act is of importance.

(2.4) Reasons why it is important to distinguish between sane automatism and insane automatism

The onus of proof with sane automatism is that the state must prove beyond reasonable doubt that the accused acted voluntarily, thereafter the state has presented *prima facie* evidence then there is an onus of rebuttal on accused to prove involuntariness on a preponderance of probabilities. To provide the basis of such defence one must use expert evidence/testimony.

With insane automatism, the accused must prove on a balance of probabilities that he/she acted involuntarily.

What are the consequences if the defence is raised successfully? With sane automatism an accused will be acquitted, and may return to his/her normal life.

With Insane automatism, an accused will be admitted to a mental institution.

The supreme court of appeal confirmed that it is trite law that a cognitive or voluntary act was an essential element of criminal responsibility, and that where the commission of such an act was put in issue on the ground that the absence of voluntariness was attributed to a cause other than mental pathology, the onus was on the state to establish that element beyond reasonable doubt.⁴⁶

The courts approach the defence of sane automatism or insane automatism with great circumspection, you have to lead expert evidence in order to raise the defence of automatism successfully.

(2.5) Applicable Case Law

⁴⁶ S v Henry 1999 (1) SACR 13 (SCA) at 14 h-i.

In Henry⁴⁷ and McDonald⁴⁸ the court held that defence such as non-pathological automatism required careful scrutiny. Further that one must judge if the accused's act was involuntary and unconsciously committed, and must be weighed up and considered in the light of all the circumstances and particularly against the alleged criminal conduct viewed objectively. It is insufficient that there was merely a loss of temper.⁴⁹

Loss of temper, might in appropriate circumstances mitigate punishment, but will not exonerate one from the charge. Automatism resulted in amnesia, the opposite is not true. The court also further held that “amnesia is not necessarily indicative of automatism.”⁵⁰

What is also required is that there must be a “stimulus or trigger” of an extreme nature. It is not sufficient that there had merely been a loss of temper, because losing one's temper is a common occurrence, it must be a non-pathological loss of cognitive control or consciousness arising from an emotional stimulus and resulting in involuntary conduct which is not a common occurrence. There must be some emotionally charged event or provocation of extraordinary significance to the person concerned, and the emotional arousal it caused had to be of an extreme nature as to disturb the consciousness of the person to such extent resulting in unconscious or automatic behaviour with consequential amnesia.⁵¹

Expert evidence of a psychiatrist/psychologist will to a large extent assist the court in pointing to the factors which maybe inconsistent or consistent, with involuntary conduct which is non-pathological and emotionally induced.⁵²

In Henry⁵³, McDonald⁵⁴ and Kok⁵⁵ the courts view the defense with circumspection and this defense will not easily succeed, however Kok⁵⁶ goes

⁴⁷ 1999 (1) SACR 13 (SCA).

⁴⁸ 2000 (2) SACR 493 (N).

⁴⁹ 1999 (1) SACR 15 (SCA).

⁵⁰ 1999 (1) SACR 15 (SCA).

⁵¹ 1999 (1) SACR 13 (SCA).

⁵² 1999 (1) SACR 20 (SCA).

on saying further that the onus rest on the state to prove the act committed by the accused was accompanied by his/her will, the state is assisted by natural inference, therefore the defense must lay proper basis to upset the inference.

In Henry⁵⁷, McDonald⁵⁸ and Kok⁵⁹ it is of great importance, to study the actions of the accused immediately before and after the incident.

Many women do leave eventually leave an abusive relationship. Factors which contribute to this are an escalation in the violence, and emotional and logical support from family and friends. Understanding of the complex factors involved may help the court understand why an abused women did not take steps to remove herself from the abusive situation, thereby acting as a counter balance to a possible contention by the popular belief that fact that the women did not leave is indirect evidence that she was not abused as seriously as she alleges.⁶⁰

It is important to note that leaving an abusive situation is a complex process, and most women leave and return several times. This process includes periods of denial. Self blame and suffering before women come to realise the reality of their situation and identity with other women in their situations. The report on the impact of the abuse on the complainant should guide the court on the seriousness of the abuse and provide recommendations for her long term security and rehabilitation.⁶¹

In Henry⁶² the distinction between true amnesia and psychogenic amnesia is as follows and possible implications: psychogenic amnesia is the subconscious repression of unacceptable memory and accepted by courts as

⁵³ 1999 (1) SACR 13 (SCA).

⁵⁴ 2000 (2) SACR 493 (N).

⁵⁵ 1998 (1) SACR 532 (N).

⁵⁶ 1998 (1) SACR 532 (N).

⁵⁷ 1999 (1) SACR 13 (SCA).

⁵⁸ 2000 (2) SACR 493 (N).

⁵⁹ 1998 (1) SACR 532 (N).

⁶⁰ Peter (2006) 159.

⁶¹ Peter (2006) 160.

⁶² 1999 (1) SACR 13 (SCA).

not Automatism, True amnesia is inability to recall any memory of the event and accepted by courts as Automatism.

As Henry⁶³ indicates to us, is that: what will be assessed is loss of control and not loss of memory.

(2.6) Conclusion

Claims of sane automatism are viewed with caution by South African courts because a diagnosis of dissociation relies heavily on the accused's account of the event. There are no objective psychological measures for assessing whether he or she experienced a discrete dissociative episode or the concomitant amnesia. While the factual evidence is central to the court's deliberations, the psychologist's diagnosis hinges on the accused's account.

The difficulty which arises is that expert psychological evidence is based on a claim of a discrete period of dissociation which occurred some time before the assessment. The reliability and truthfulness of the accused are crucial factors in laying a factual basis for the defence.

⁶³ 1999 (1) SACR 13 (SCA).

Chapter 3: Non-Pathological Criminal Incapacity

(3.1) Introduction

Capacity has to do with ability. Incapacity like impotence – “you have the facility but not the ability” Non-pathological Incapacity: For a brief period due to: youth; intoxication; provocation are the three triggers for non-pathological incapacity.

(3.2) Explanation of Legal Terms and Principles

Two requirements for capacity:

(1) The ability to appreciate the wrongfulness of the act (cognitive – ability to distinguish between right and wrong).

AND

(2) The ability to act in accordance with such an appreciation (conative/ self control and power of resistance).

Where $1 + 2 = X$ has criminal capacity.

Where X has inability (mental) with regards to 1 or 2: X is not criminally capable due to the fact that he lacks capacity. The effect is X is Not Guilty.

Three Functions of a person’s mental faculties:

(1) Cognitive Function (awareness):

- Directed towards X’s intellect/insight.
- Ability to distinguish between right and wrong.
- Awareness.

(2) Conative Function (will):

- Self-control, and
- Power of resistance against temptation to act unlawfully

(3) Affection (emotion):

Pertains to X's emotions and emotional life e.g. hate, anger, jealousy etc.

1+2+3 = Psychological normality.

Inability of X with regards to 1 or 2 takes away his/her psychological normality (brings about psychological abnormality) and renders X incapable.

The defence of temporary mental incapacity falls in the category of non-pathological incapacity. Attributed usually to a morbid or pathological disturbance of the mental faculties of temporary nature, the onus of proof rest on the state.

(3.3) Applicable Case Law

In *S v Rittmann*⁶⁴ the court held that where the defence of temporary non-pathological incapacity is properly raised, the onus rest on the state to prove that the accused is in fact criminally responsible.

Only psychiatrist and psychologist may give evidence in terms of the Criminal Procedure Act⁶⁵ on whether an accused is fit to stand trial or was criminally responsible at the time of commission of the alleged act.⁶⁶

In *S v Wiid*⁶⁷ The court on appeal found that the onus rest on the state to rebut the defence of temporary non-pathological incapacity, but that a

⁶⁴ 1992 (2) SACR 110 (NmHC).

⁶⁵ Act 5 of 1977.

⁶⁶ Kaliski (2006) 343.

foundation should be laid in evidence for the raising of the defence. This issue is dealt with evidence, if there is a reasonable doubt whether the accused at the time of the commission of the offence, had criminal capacity, he/she should be given the benefit of the doubt.

In *S v Kalogoropoulos*⁶⁸ the court held that the defence of temporary non-pathological incapacity is to be based on a factual foundation, laid by the accused in evidence and sufficient at least to create reasonable doubt, it was then intimately for the court to decide the accused's criminal responsibility for his/her actions having regard to expert evidence and to all the facts of the case, including the nature of the accused's actions during the relevant period.

In *S v Els*⁶⁹ the court held that in respect of a defence of temporary non-pathological lack of criminal capacity such as sane automatism, the accused must lay a foundation for the defence. Where the accused alleges that they cannot remember what had happened, it may mean that the accused's actions were not immediately impulsive, which would be distinctive of a person who acted in a condition of automatism and where the partial loss of memory was irreconcilable with such condition, and may be convicted of such crime.

*S v Kensley*⁷⁰ in respect of non-pathological criminal incapacity the *ipse dixit* of an accused that in the given situation he/she was unable to control his/her self is normally sufficient to lead to an acquittal. The evidence on which a defence of sane criminal incapacity is based on should be viewed with circumspection by the trial court. It should also be viewed in the totality of evidence.

*S v Di Blasi*⁷¹ the court found that it was necessary for the accused to lay a factual foundation that non-pathological causes resulted in diminished criminal

⁶⁷ 1990 (1) SACR 561 (A).

⁶⁸ 1993 (1) SACR 12 (A).

⁶⁹ 1993 (1) SACR 723 (O).

⁷⁰ 1995 (1) SACR 646 (A).

⁷¹ 1996 (1) SACR 1 (A).

capacity: the fact that he did not give evidence reduced the weight of expert evidence given on his behalf. This was so because the expert evidence was based on the assumption that the accused's version was truthful. Objective facts showed no signs of inability to appreciate wrongfulness of the killing and the actions of the accused did not lead to an inference of diminished criminal capacity.

In *S v Moses*⁷² the accused had a history of poor control and anger and came from a dysfunctional family. The court held that the state did not prove beyond reasonable doubt that the accused had the requisite criminal capacity at the time of the killing and was accordingly acquitted of murder.

In *S v Gesualdo*⁷³ the accused was so emotionally overwrought at the time of the shooting that he acted in a state of diminished responsibility. As the accused was unable to act in accordance with the distinction between right and wrong by virtue of emotional factors he was found Not Guilty for the lack of mental capacity to commit the crime.

If the accused is able to distinguish between right and wrong and no medical scientific or psychiatric reason is advanced for his loss of control at the time of the killing then the court must consider if the mind was capable of unconsciously creating retrograde amnesia. Because the mind could not tolerate an appreciation of what it had done, it was possible that it could also have been unable to exercise control over a person's conscious actions in certain circumstances⁷⁴.

In *S v McDonald*⁷⁵ The appellant admitted firing the shots which killed the deceased but denied that he had fired consciously and deliberately and denied that at the time of firing he was capable of forming the intention to kill or that he had the necessary intention.

⁷² 1996 (1) SACR 701 (C).

⁷³ 1997 (2) SACR 68 (T).

⁷⁴ 1997 (2) SACR 68 (T).

⁷⁵ 2000 (2) SACR 493 (N).

He contented that the shooting had occurred at the time when he was experiencing a disassociative episode or state of mind (sane automatism). The court held that no trigger of extraordinary significance was discernable and that the appellant was acting consciously immediately after the shooting so that he was correctly convicted of murder and attempted murder⁷⁶.

*S v Adams*⁷⁷ there was forced unprotected sexual intercourse, the deceased reveals he is suffering from AIDS, the accused then experiences severe shock and emotional storm and kills the deceased. The court held that the accused behaved in such a manner in which he did because he was incapable of acting in accordance with an appreciation of the wrongfulness of his acts. His ambitions were completely disintegrated. The court gave the appellant the benefit of doubt and the appeal was upheld.

In *S v Swanepoel*⁷⁸ and *S v Arnold*⁷⁹ there was similar “Rage reaction” and “Extreme emotional distress” in set of facts. Namely in Arnold’s case the court held that at the time when the fatal shot was fired, because of emotional stress, he did not have criminal capacity at the time and hence cannot be held criminally liable for the shooting.

An expert testified that there was a consistent pattern, taking into account the background and the severe emotional stress of the accused. Normally the accused could appreciate the wrongfulness of his actions, but at the relevant time that was the last thing on his mind, his conscious mind was so flooded by emotions that it interfered with his capacity to appreciate what was right or wrong and because of his emotional state, he may have lost the capacity to exercise control over his actions.⁸⁰

Rage reaction can exclude intent similarly extreme emotional stress can lead to discharge.

⁷⁶ 1997 (2) SACR 68 (T).

⁷⁷ 1986 (4) SA 882 (A) Para I.

⁷⁸ 1983 (1) SA 434 (A) 454 D-H.

⁷⁹ 1995 (3) SA 256 (C) 264.

⁸⁰ *S v Arnold* 1995 (3) SA 256 (C) 264.

The defence of non-pathological criminal incapacity is used in almost exclusively as a defence in murder cases. Typically the individual would have endured over some period increasing degrees of stress, usually caused by interpersonal conflict, in which he/she was subjected to humiliation or abuse, somehow a climax was reached just before the offence, when an intensity distressing precipitant (trigger) occurred, usually a provocation or emotional rejection that was somehow unexpected in its occurrence or intensity, which was then followed by automatic behaviour.⁸¹

Subsequently when the period of the automatism has passed he/she should have responded to the situation with bewilderment or horror and should not have tried to escape from the scene, but ideally should have attempted to get help for the victim (or call the police). He/she should have amnesia for the period of the offence (as he acted while in an automatism) but still be able to provide good details about the preceding and subsequent events, including being able to describe the 'trigger'.⁸²

In *S v Ferreira*, the court held that the court must put one's self in shoes of accused" and reason why battered women feel trapped.⁸³ "We have been told by counsel for the appellant that those of us who are men are not capable of stepping into the shoes of battered women and of understanding the feelings of utter helplessness which they often experience and what drives them to desperate measures such as killing their partners." If that contention is sound, judges (whether male or female) will have to stop doing what they have been doing for generations, namely, attempting as best they can, to put themselves in the shoes of the persons who testify before them, whether they be the witnesses, the litigants themselves, or, in a criminal case, the accused.⁸⁴

⁸¹ Kaliski "The Criminal Defendant" in *Psychological Assessment in South Africa* (2006) (ed Kaliski) 93-112 at 105.

⁸² Kaliski "The Criminal Defendant" in *Psychological Assessment in South Africa* (2006) (ed Kaliski) 93-112 at 105.

⁸³ *S v Ferreira* 2004 (2) SACR 454 (SCA) at 464 d and e, 473 g-j and 474 a and b.

⁸⁴ *S v Ferreira* 2004 (2) SACR 454 (SCA) at 464 d and e, 473 g-j and 474 a and b.

One must remember that the nature of domestic violence and the strategies used to execute it resembles torture both in terms of the psychological consequences as well as the methods used. The physical and psychological abuse common in both torture and domestic abuse often has serious traumatic consequences for victims, women living with repeated abuse found to exhibit pattern of psychological and behavioural symptoms often similar to post traumatic stress disorder.⁸⁵

Poverty makes it harder for women to leave violent or otherwise unsatisfactory relationships, on the other hand in communities in which women begin to assume non-traditional roles and enter the workforce, domestic violence reaches its peak.⁸⁶

Domestic violence has immediate and long-term consequences, which are diverse and far reaching. Living in violent relationships affects a person's sense of self esteem and ability to participate in the world. Significant health consequences result, which persist long after abuse has stopped. Injuries, chronic pain syndromes, psychosomatic disorder occur commonly together with a host of reproductive disorders, unwanted and sexual transmitted diseases including HIV/AIDS. Mental health consequences included depression, anxiety and phobias, together with significant increases in suicide and suicide attempts.⁸⁷

Complaints of domestic violence are likely to consult a psychiatric or psychologist in the following circumstances:

(1) When suffering from symptoms they know are due to the domestic violence.

⁸⁵ Gobodo-Madikizela and Foster "The aftermath of Domestic Abuse" in *Psychology and the Law* (2005) (eds Tredoux et al) 364-383 at 364 and 365.

⁸⁶ Peter "Domestic Violence" in *Psychology Assessment in South Africa* (2006) (eds Kaliski) 146-161 at 148-149 and 158.

⁸⁷ Peter "Domestic Violence" in *Psychology Assessment in South Africa* (2006) (eds Kaliski) 146-161 at 148-149 and 158.

(2) When suffering from symptoms they may not know are due to the domestic violence.

(3) When being referred by the police or the legal profession for assessment in relation to being a complainant of such violence.⁸⁸

In assessing complaints of the abuse one must look at symptoms and signs of mental illness or medical illness, coping strategies and safety issues.

Complainant's of domestic violence are more likely to manifest the following symptoms:

- (1) Depression;
- (2) Anxiety disorders such as post-dramatic stress disorders;
- (3) Phobias and suicidal ideation and attempts;
- (4) Alcohol and drug abuse, together with eating and sleep disorders may be present;
- (5) Complainants may have feelings of guilt and shame and often have a poor self-esteem.⁸⁹

Qualitative studies have confirmed that most abused women are not passive complainants but rather adopt active strategies to maximise their safety and that of their children. Some may resist other flee, while some try to keep the peace by meeting the demands. A person's response to abuse is often limited by the options available to them. Reasons why women may remain in abusive relationships include fear of retribution, a lack of alternative means of economic support, concern for the children, emotional dependence, a lack of support from family and friends, and hope that the perpetrator will change.⁹⁰

Understanding of the complex factors involved may help the court understand why an abused women did not take steps to remove herself from the abusive

⁸⁸ Peter "Domestic Violence" in Psychology Assessment in South Africa (2006) (eds Kaliski) 146-161 at 148-149 and 158.

⁸⁹ Peter "Domestic Violence" in Psychology Assessment in South Africa (2006) (eds Kaliski) 146-161 at 148-149 and 158.

⁹⁰ Peter "Domestic Violence" in Psychology Assessment in South Africa (2006) (eds Kaliski) 146-161 at 148-149 and 158.

situation, thereby acting as a counterbalance to a possible contention by the respondent that the fact that the women did leave is indirect evidence that she was not abused (or so seriously as she alleged.)⁹¹

In *S v Wiid*⁹² the court held that as previously mentioned regarding the defence on non-pathological criminal incapacity, the onus is on the state to prove all the elements of the crime, however a foundation has to be laid in the evidence for the defence, if there is a reasonable doubt whether the accused, at the time of the offence had criminal capacity, he/she should be given the doubt.⁹³

In *S v Calitz*⁹⁴, the court held here an accused killed a deceased whilst he/she was in a state of raging anger, the court found on the facts that his fit of anger could have reduced his capacity for self-control with the result that diminished criminal responsibility could be imputed to the accused, thus not a consideration in the determination of criminal liability but a factor relevant to imposition of sentence.⁹⁵

Evidence was led from a psychiatrist and a psychologist who had both examined the accused and where of the opinion that what happened on the evening in question was a singular combination of circumstances that faced the accused, with his vulnerability of make-up, with a sudden and immediate threat to him of devastating proportion.⁹⁶

Occurring in the context of the previous history of the abuse, it triggered off a state of altered consciousness, which manifested itself in a markedly reduced

⁹¹ Peter “Domestic Violence” in *Psychology Assessment in South Africa* (2006) (eds Kaliski) 146-161 at 148-149 and 158.

⁹² 1990 (1) SACR 561 (A) at 561 g, h and I and 562 a.

⁹³ 1990 (1) SACR 561 (A) at 561 g, h and I and 562 a.

⁹⁴ 1990 (1) SACR 119 (A) at 120 h-i.

⁹⁵ 1990 (1) SACR 119 (A) at 120 h-i.

⁹⁶ *S v Nursingh* 1995 (2) SACR 331 (D) at 331 i-j and 332 a and b, 332 g-j, 333 c-e and h-j, 338 k-g and h.

or even wholly incomplete awareness of normality, with accompanying loss of judgment and self-control.⁹⁷

The resulting mental state was identified by the psychiatrist as a separation of intellect and emotion with temporary destruction of the intellect. This was a syndrome which was well-known and documented in contemporary psychiatric literature and research. The psychologist identified the situation as a known and identical mental trauma which occurred in the context of a particular relationship of people, like husband and wife and parent and child, when a person with a particular emotional vulnerability was incited by some stimulus, resulting in an overwhelming of the normal psychic equilibrium by an all consuming rage and a consequent disruption and displacement of logical thinking.⁹⁸

Both experts explained that such an occurrence was not a pathological one in that it did not stem from a mental disorder in the normal sense of the word, it was a non-recurring event, particularly if the cause of it was thereby removed. During its occurrence, ordinary motor movements of the body could take place with normal efficiency.⁹⁹

The court held, after examining the evidence, that a factual foundation had been laid which at least established a reasonable doubt as to the accused's capacity to form a criminal intent. The court accordingly acquitted the accused on all counts.¹⁰⁰

⁹⁷ S v Nursingh 1995 (2) SACR 331 (D) at 331 i-j and 332 a and b, 332 g-j, 333 c-e and h-j, 338 k-g and h.

⁹⁸ S v Nursingh 1995 (2) SACR 331 (D) at 331 i-j and 332 a and b, 332 g-j, 333 c-e and h-j, 338 k-g and h.

⁹⁹ S v Nursingh 1995 (2) SACR 331 (D) at 331 i-j and 332 a and b, 332 g-j, 333 c-e and h-j, 338 k-g and h.

¹⁰⁰ S v Nursingh 1995 (2) SACR 331 (D) at 331 i-j and 332 a and b, 332 g-j, 333 c-e and h-j, 338 k-g and h.

In *S v Moses*¹⁰¹ the accused had a history of poor control and anger and came from a dysfunctional family. He testified that he was so angry, however he was aware of what he was doing but could not stop himself.¹⁰²

The accused had a history of poor control and anger and was susceptible to anger outbursts and violence. He came from a dysfunctional family and had been sexually abused by his father.¹⁰³

The court accepted that the accused had no motive or reason to kill the deceased and the killing had clearly not been premeditated. On the night in question the accused was subjected to extreme provocation and the killing itself was the crystallisation of a number of factors such as the suppressing anger related to his dysfunctional family background and sexual abuse by his father.¹⁰⁴

The court held that it was reasonably possibly true that the accused lacked criminal capacity at the time of the killing: although the accused might possibly have retained some measure of control over his actions by the time of the infliction of the final wound, the state had failed to prove beyond reasonable doubt that his control even at that stage was not significantly impaired. The accused was accordingly acquitted.¹⁰⁵

In *S v Engelbrecht*¹⁰⁶ the court held that expert testimony is admissible to assist the court in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of a lay person.¹⁰⁷

¹⁰¹ 1996 (1) SACR 701 (C).

¹⁰² *S v Moses* 1996 (1) SACR 701 (C) at 708 i-j, 709 a-b and c-e and g-h, 710 b-c, f-g, h-j, 712 c, 714 a-c and e-i.

¹⁰³ *S v Moses* 1996 (1) SACR 701 (C) at 708 i-j, 709 a-b and c-e and g-h, 710 b-c, f-g, h-j, 712 c, 714 a-c and e-i.

¹⁰⁴ *S v Moses* 1996 (1) SACR 701 (C) at 708 i-j, 709 a-b and c-e and g-h, 710 b-c, f-g, h-j, 712 c, 714 a-c and e-i.

¹⁰⁵ *S v Moses* 1996 (1) SACR 701 (C) at 708 i-j, 709 a-b and c-e and g-h, 710 b-c, f-g, h-j, 712 c, 714 a-c and e-i.

¹⁰⁶ 2005 (2) SACR 41 (W) at 42.

¹⁰⁷ *S v Engelbrecht* 2005 (2) SACR 41 (W) at 42.

Where there are stereotypes which may adversely affect consideration of battered woman's claim to have acted in self-defence in killing her mate and expert evidence can assist in dispelling these myths.¹⁰⁸

Expert testimony relating to ability of accused to perceive danger from his/her mate may go to issue of whether she 'reasonably apprehended' death or grievous bodily harm on particular occasion.¹⁰⁹

Expert testimony pertaining to why accused remained in battering relationship may be relevant in assessing nature and extent of alleged abuse.¹¹⁰

By providing explanation as to why accused did not flee when she perceived her life to be in danger - Expert testimony may also assist in assessing reasonableness of belief that killing her battered is only way to save her own life.¹¹¹

(3.4) Battered Women Syndrome and Non-Pathological Criminal Incapacity

Carstens & Le Roux¹¹² are of the opinion that generally speaking a battered woman is any woman who has been a victim of physical, sexual and/or psychological abuse by her partner. Specifically battered women syndrome is a collection of specific characteristics and effects of abuse on the battered women. Not all women who are battered suffer from battered women syndrome, but those who do typically are less able to respond effectively to the violence against them.¹¹³

Consequently they become psychologically entrapped in a violent relationship. Indicators of battered women syndrome can be divided into three major categories:

¹⁰⁸ S v Engelbrecht 2005 (2) SACR 41 (W) at 42.

¹⁰⁹ S v Engelbrecht 2005 (2) SACR 41 (W) at 42.

¹¹⁰ S v Engelbrecht 2005 (2) SACR 41 (W) at 42.

¹¹¹ S v Engelbrecht 2005 (2) SACR 41 (W) at 42.

¹¹² Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

¹¹³ Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

- (1) Traumatic effect of victimisation by violence;
- (2) Learned helplessness deficits resulting from the interaction between the battered women's repeated victimisation by the violence and the battered women's and others' reactions to it; and
- (3) Self-destructive coping responses to the violence for example suicide or homicide.¹¹⁴

There may be a link between Post-traumatic stress disorder linked to battered women syndrome and a psychiatric diagnosis. An American psychologist, Walker suggests that some traumatic effects of victimisation by violence (as in the case of battered women syndrome) can be identified by using the DSM-IV¹¹⁵ diagnostic criteria for the post-traumatic stress disorder.¹¹⁶

The criterion for diagnosis is a recognisable stressor that would evoke significant symptoms in almost anyone is clearly met from the occurrence of violence. Re-experiencing trauma, the second criteria occurs for battered woman in the form of nightmares and fear that violence will recur. When added to the violence actually being experienced, this can create feelings of terror and desperation leading to homicide or suicide. The third criterion, numbered responsiveness and reduced involvement with the world occurs when the battered women withdraws from others, including her family and friends, believing that nobody would understand her situation and that others might blame her. The final criterion of the post-traumatic disorder is a collection of symptoms, including autonomic arousal, evidenced by hyper alertness or an exaggerated startle response, sleep disturbance and memory impairment or difficulty in concentrating. In extreme cases these indicators may mimic disorder or even a psychotic reaction.¹¹⁷

¹¹⁴ Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

¹¹⁵ The American Diagnostic and Statistical Manual for Mental Disorders (1994).

¹¹⁶ Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

¹¹⁷ Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

A battered woman who has killed her abuser may develop strong defences to protect herself from the full impact of what has occurred. The battered accused often suffers from memory loss for a time period that may extend from the moment she picks up the weapon until she realises that the man has been killed.

These memory gaps usually coincide with the time at which the fear and panic were at its highest. Such gaps often lead to inconsistencies in the women's stories when she attempts to give statements to the police after the incident.¹¹⁸

It is imperative, in the interest of justice, that the battered accused is carefully evaluated, counseled and assisted by all professionals in preparing her defence, collecting relevant evidence, and preparing the accused for the trial. It is specifically in the case of the 'abandoned' battered accused, facing a charge of murder, that mainly due to the system and financial constraints, these objectives are not easily attained.¹¹⁹

Battered women syndrome should be considered and advanced and in this respect much can be gained from the American experience. The expert evidence of psychologists, criminologists, psychiatrists and organisations and individuals involved in assistance of victims of violence are paramount importance.¹²⁰

Why Battered Women Stay? There is no ready, simplistic reason why men beat their wives, there is no easy answer to why battered women stay with their abusive husbands. Emotional dependency has been suggested as a primary reason. Often a battered woman is not only emotionally dependant on her assailant but also on the marriage itself.¹²¹

¹¹⁸ Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

¹¹⁹ Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

¹²⁰ Carstens & Le Roux 2000 *SACL* 180 at 185-186-187 and 189.

¹²¹ Eber "The Battered Wife Syndrome" 1981 *Hastings Law Journal* 895 at 901-902 and 931.

Low self-esteem and fear of their husbands, frequently characterised battered women and force them to stay with their battering husbands. Some women even feel that somehow they must deserve the beatings. Shame is a common emotion among battered women and keeps them from taking the steps necessary to extricate themselves from the situation. Others are trapped in the abusive environment because they do not feel confident enough to reach out to persons who may be able to help them with their problems. Moreover many wives justifiably fear reprisals from their angry husbands if they leave or even call the police.¹²²

Although sex discrimination and all that it causes can never justify a battered wife killing her husband, the law of self-defence must recognise the impact of such discrimination on the battered wife's perception of her opinions. Therefore in determining the reasonableness of the battered wife's conduct when she kills her husband, all the surrounding circumstances, including those perceptions that derive from sex discrimination, must be evaluated.¹²³

(3.5) The importance of S v Eadie¹²⁴ Judgment

In S v Eadie¹²⁵ reference was made to criminal capacity and temporary non-pathological incapacity. The court found that it was absurd to postulate that succumbing to a temptation may excuse one from criminal liability. It was held that courts must be careful to rely on sound evidence and to apply the principle/s set out in the decisions of the Supreme Court of Appeal. The message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law¹²⁶.

A summary of the importance of the Eadie¹²⁷

¹²² Eber "The Battered Wife Syndrome" 1981 *Hastings Law Journal* 895 at 901-902 and 931.

¹²³ Eber "The Battered Wife Syndrome" 1981 *Hastings Law Journal* 895 at 901-902 and 931.

¹²⁴ 2002 (1) SACR 663 (SCA).

¹²⁵ 2002 (1) SACR 663 (SCA).

¹²⁶ 2002 (1) SACR 663 (SCA).

¹²⁷ 2002 (1) SACR 663 (SCA).

- (1) After this judgment there is no distinction between Non-pathological criminal incapacity (on account of provocation) and sane automatism.
- (2) There is no distinction between the second leg of incapacity (conative) and involuntariness with sane automatism.
- (3) The defence of non-pathological criminal incapacity still exists and was not abolished.
- (4) If an accused raises the defence of provocation, according to the judgment it should be treated as sane automatism which will not easily succeed and not as one of non-pathological incapacity.

Louw¹²⁸ is of the opinion the logic too dictates that we cannot draw distinction between automatism and lack of self control. If the two were distinct, it would be possible to exercise conscious control over one's actions (the automatism test) while simultaneously lacking self-control (the incapacity test). Burchell and Milton also argue that the two concepts are not distinct.¹²⁹

If there is no distinction, then the second leg of the capacity inquiry should logically fall away. Capacity should then be determined solely on the basis of whether a person is able to appreciate the difference between right and wrong. Once an accused is shown to have capacity, the accused may then raise involuntariness as a defence.¹³⁰

Our law clearly holds that the capacity enquiry is a subjective one, however in *Eadie*¹³¹ the court introduced an element of objectivity into the enquiry.

¹²⁸ Louw "S v Eadie: Road Rage, Incapacity and Legal Confusion" 2001 *SACL* 206 at 207-208 and 211.

¹²⁹ Louw "S v Eadie: Road Rage, Incapacity and Legal Confusion" 2001 *SACL* 206 at 207-208 and 211.

¹³⁰ Louw "S v Eadie: Road Rage, Incapacity and Legal Confusion" 2001 *SACL* 206 at 207-208 and 211.

¹³¹ 2002 (1) *SACR* 663 (SCA).

Louw¹³² believes that the problem may not be so much in the subjective aspect of the provocation defence but rather in its application.

(3.5.1) The Legal implications of the Eadie¹³³ judgment

The Supreme Court of Appeal comprehensively reviewed the jurisprudence on provocation and emotional stress, and indicated that, although the test of capacity might still remain, in principle, essentially subjective, the test had to be approached with caution. The Supreme Court of Appeal affirmed the decision of the High Court that the accused could not successfully raise the defence of non-pathological incapacity where he had battered another to death in a fit of purported road rage. Both the High Court and the Supreme Court of Appeal in Eadie¹³⁴ drew pragmatic distinction between loss of control and loss of temper.¹³⁵

There can be no doubt that the High Court and the Supreme Court of Appeal in Eadie¹³⁶ reached the correct conclusion on the facts (finding the accused guilty of murder). However, the central issue is the extent to which the judgment of Navsa JA goes in revising the approach of the courts to provocation as a defence to criminal liability.¹³⁷

(3.5.2) Possible Interpretations of the Eadie¹³⁸ judgment

(3.5.2.1) The first interpretation:

The first interpretation which is submitted is the most likely to find resonance in future courts, is entirely compatible with existing precedent on the subjective assessment of capacity, because it focuses only on the accepted

¹³² Louw “S v Eadie: Road Rage, Incapacity and Legal Confusion” 2001 *SACL* 206 at 207-208 and 211.

¹³³ 2002 (1) *SACR* 663 (SCA).

¹³⁴ 2002 (1) *SACR* 663 (SCA).

¹³⁵ Burchell (2005) 429.

¹³⁶ 2002 (1) *SACR* 663 (SCA).

¹³⁷ Burchell (2005) 429.

¹³⁸ 2002 (1) *SACR* 663 (SCA).

process of judicial inference of the presence or absence of subjective capacity from an examination of objective facts and circumstances.¹³⁹

Support of the first interpretation is based on the following passage, towards the end of Navsa JA's judgment:

"I agree that the greater part of the problem lies in the misapplication of the test (of capacity). Part of the problem appears to me to be too-ready acceptance of the accused's *ipse dixit* concerning his state of mind. 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 behavior and social interaction. Critics may describe this as a principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence"¹⁴⁰

Later in the judgment, Navsa JA states that, although accused persons will continue to raise the defence of provocation, the "law, if properly applied and consistently applied, will determine whether that claim is justified."¹⁴¹

Quite clearly the Judge of Appeal was not talking about revising the test of capacity but rather applying it correctly, using permissible inferences from objective facts and circumstances¹⁴².

As he acknowledged, courts must not too readily accept the accused's own evidence regarding provocation or emotional stress, and the court is entitled to draw a legitimate inference, from what 'hundreds of thousands' of other people would have done under the same circumstances (i.e. looking at objective circumstances). This inference could lead to the court disbelieving

¹³⁹ Burchell (2005) 430.

¹⁴⁰ 2002 (1) SACR 663 (SCA).

¹⁴¹ 2002 (1) SACR 663 (SCA).

¹⁴² Burchell (2005) 430.

the accused when he/she simply says that he/she lacked capacity or acted involuntary under provocation or emotional stress.¹⁴³

Navsa JA's comprehensive examination of the judicial precedent on provocation also supports the view that the essence of the Eadie¹⁴⁴ judgment challenges only those few judgments of the courts in the past where too much deference was paid to the accused's version of the facts and not enough weight was given to a broader evaluation of the accused's evidence in the light of the surrounding circumstances.¹⁴⁵

The Eadie¹⁴⁶ judgment signals a warning that in the future the defence of non-pathological incapacity will be scrutinised most carefully. Persons who may in the past have been fortunate enough to be acquitted, in the circumstances where they killed someone who had insulted them will now find the courts ready to evaluate, against objective standards of acceptable behavior, the evidence adduced by them to support their standard of provocation/emotional stress.¹⁴⁷

Implicit in the judgment of Navsa JA is a distinction between instances of provocation (emotional stress) that have built up over a period of some time and those instances where a sudden flare-up results from insulting conduct. Naturally, a gradual disintegration of one's power of self-control is more condonable than a sudden loss of temper. The evidence adduced by an accused who, as a result of a sudden flare up of temper, kills someone, would have to be sufficiently cogent to create a reasonable doubt in his favour, before a court would consider acquitting him. Furthermore, the court would be entitled to factor an evaluation of the accused's version against judicial expectations of behaviour into the sequence of inferential reasoning, leading to its conclusion on the credibility of the accused's evidence.¹⁴⁸

¹⁴³ Burchell (2005) 431.

¹⁴⁴ 2002 (1) SACR 663 (SCA).

¹⁴⁵ Burchell (2005) 431.

¹⁴⁶ 2002 (1) SACR 663 (SCA).

¹⁴⁷ Burchell (2005) 431-432.

¹⁴⁸ Burchell (2005) 431.

In terms of Eadie¹⁴⁹, capacity would seem to remain subjectively tested in principle, but the practical implementation of this test would accommodate the reality that the policy of the law, at least in regard to provoked killings, must be one of reasonable restraint. Navsa JA states explicitly that it is not the test of capacity that is at fault, but rather its misapplication. It is the ‘too-readily acceptance of the accused’s *ipse dixit* concerning his state of mind’ that is the problem.¹⁵⁰

It is in the actual process of the application of the legal criteria to the facts of the Eadie¹⁵¹ case that we gain the best insight into how objective factors will infiltrate the process. Persons will continue to claim that they lacked capacity as a result of provocation, but according to Navsa JA, the courts will still have to determine whether this claim is justified.¹⁵²

In Eadie,¹⁵³ and in previous cases such as Henry,¹⁵⁴ Kensley¹⁵⁵ and Kok¹⁵⁶ the Supreme Court of Appeal has ‘in assessing an accused person’s evidence about his state of mind, weighed it against his actions and the surrounding circumstances and considered it against human experience, social interaction and social norms’.

It is all too easy to focus on the objective norms referred to in this passage, and simply conclude that the test of capacity has now been changed from subjective to objective¹⁵⁷.

Navsa JA explains why he thinks the accused in Eadie¹⁵⁸ should be held responsible, namely the accused ‘goal directed and focused behavior, before,

¹⁴⁹ 2002 (1) SACR 663 (SCA).

¹⁵⁰ Burchell (2005) 432.

¹⁵¹ 2002 (1) SACR 663 (SCA).

¹⁵² Burchell (2005) 432.

¹⁵³ 2002 (1) SACR 663 (SCA).

¹⁵⁴ 1999(1) SACR 646 (A).

¹⁵⁵ 1995 (1) SACR 646 (A).

¹⁵⁶ 2001 (2) SACR 106 (SCA).

¹⁵⁷ Burchell (2005) 433.

¹⁵⁸ 2002 (1) SACR 663 (SCA).

during and after the incident in question as indicating presence of mind' and his intentions to be 'violent and destructive',¹⁵⁹

The judge of Appeal's conclusion indicates clearly that the objective standards or societal norms that he invoked throughout his judgment come into play in determining whether the accused's *ipse dixit* is to be believed.¹⁶⁰

The test of capacity remains subjective, otherwise Nasva JA would have had to specifically over-rule all of the provocation cases since the early 1980's, including not only those cases where the defence of non-pathological incapacity (tested subjectively) succeeded, but also those where the defence failed, but the court accepted that the defence could in principle have been available on other facts. Navsa JA did not specifically over-rule the subjective approach to capacity. In fact, he acknowledges that it was not the principle that was at fault, merely its application.¹⁶¹

His criticisms of Arnold¹⁶² and Moses¹⁶³ was based on the court's misapplication, in those cases, of the subjective principle of capacity, by placing too much reliance on the *ipse dixit* of the accused.¹⁶⁴

Navasa JA could not really have been expected to overrule recent, fairly widespread judicial authority, including erstwhile Appellate Division precedent, to the effect that criminal capacity, whether it be intoxication, provocation or emotional stress, can serve to impair such criminal liability. The route that the Judge of Appeal took was entirely acceptable and his emphasis on inferential reasoning would, of course, apply to all other instances where, in fact, an element of criminal liability is disputed.¹⁶⁵

¹⁵⁹ 2002 (1) SACR 663 (SCA).

¹⁶⁰ Burchell (2005) 433.

¹⁶¹ Burchell (2005) 433.

¹⁶² 1995 (3) SA 256 (C).

¹⁶³ 1996 (1) SACR 701 (C).

¹⁶⁴ Burchell (2005) 433.

¹⁶⁵ Burchell (2005) 434.

A realistic way for a court to rein in the application of the purely subjective concept of capacity, short of engaging in overt judicial legislation to make the test objective in nature, would be to fall back on the drawing of legitimate inferences of the presence or absence of subjective-assessed capacity from objective circumstances.¹⁶⁶

It may be difficult for the courts in the future to maintain the clear line between, on the one hand, drawing legitimate, exceptional inferences of individual subjective capacity from objective, general patterns of behaviour, and on the other hand, judicially converting the current subjective criterion for judging capacity into an objective one.¹⁶⁷

At the outset, the state in a criminal trial is assisted by ‘the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which ordinarily give rise to criminal liability, does so consciously and voluntary. This is the general inference applying to all accused persons and must be distinguished from specific inferences drawn from the facts in particular cases.’¹⁶⁸

There are strict limits to the drawing of inferences from the facts. In criminal trials it is trite that the inference can only be drawn if it is consistent with all the proved facts and it is the only reasonable inference that can be drawn on the facts. The facts not only include events and circumstances prior to and at the time of the alleged commission of the crime, but also events and circumstances occurring after the alleged crime.¹⁶⁹

Inferential reasoning not only incorporates negative inference being drawn against, but also positive inferences in favour of the accused. For instance a court could also (as in *Eadie*¹⁷⁰) draw the inference that criminal capacity had been proved beyond reasonable doubt, or could, on other facts, draw an

¹⁶⁶ Burchell (2005) 433.

¹⁶⁷ Burchell (2005) 433.

¹⁶⁸ Burchell (2005) 434.

¹⁶⁹ Burchell (2005) 434.

¹⁷⁰ 2002 (1) SACR 663 (SCA).

inference that capacity had been lacking, or not proved by the prosecution beyond reasonable doubt. For instance, in an exceptional case of persistent and brutal spouse over a fairly lengthy period of time an inference could more readily be drawn that capacity was lacking or at least not proven beyond reasonable doubt to be present, than would be the case in regard to a person who claimed to have suddenly and unexpectedly flared up and assaulted another who had insulted him.¹⁷¹

In determining whether an inference is reasonable or not, the court could have regard, not just to the facts of the case, but also to broader issues of the court's expectations or assessment of societal behaviour. Such policy issues could include, on one hand, the norm that the criminal law requires a person to exercise some control over emotions and temper and, on the other hand, the policy that extreme, sustained emotional stress might in exceptional circumstances, excuse the person who commits unlawful conduct while in such an emotional state.¹⁷²

Every person is presumed to act voluntary and should control his/her emotions but, in very special circumstances, a person who succumbs to persistent emotional abuse might escape liability by leading evidence of non-pathological incapacity or automatism, sufficient to raise a reasonable doubt as to the existence of criminal liability. This evidence would, however have to be tested at the outset, against the court's expectations drawn from experience.¹⁷³

Despite the dangers implicit in drawing inferences of subjectivity held capacity from the court's expectations based on experience (for instance blurring the line between a subjective and objective test, and possibly infringing the reasonable certainty by the principle of legality) this accepted form of judicial reasoning might nevertheless provide the best route for court genuinely about curbing an unbridled, subjective test of capacity, As always though any

¹⁷¹ Burchell (2005) 435.

¹⁷² Burchell (2005) 435.

¹⁷³ Burchell (2005) 435.

objective factors taken into account in the process of inferential reasoning must be articulated with reasonable clarity. Inferential reasoning must never become a cloak for concealing the norms of individual judges.¹⁷⁴

(3.5.2.2) The second interpretation:

The second interpretation is more radical and implies a restriction of the ambit of the defence of lack of capacity (in particular, in the context of lack of conative capacity) to a situation where automatism is present, and further involves a dramatic redefining of the actual subjective criterion of capacity, shifting the entire test of capacity from the subjective to the objective domain.¹⁷⁵

A perplexing feature of the judgment in *Eadie*¹⁷⁶ is the conclusion of Navsa JA on the interrelation between the defences of automatism and lack of capacity. The judgment regards the second part of the capacity inquiry (i.e. the conative enquiry) as equivalent to the enquiry into voluntariness. But ultimately the Judge of Appeal appears to take the approach the conative inquiry does, nevertheless have an independent reason for existence. He admits that he is 'not persuaded' that the second leg of the capacity inquiry 'should fall away'.¹⁷⁷

It is submitted that this cautious separation of the two tests is warranted because, in essence the conative inquiry relates to the capacity to act voluntary or rationally and the voluntariness inquiry is focused on whether the accused actually did act voluntarily i.e. control his/her conscious will. A particular person may have the capacity to act voluntarily but fail, in fact to do so. If a particular person lacks the capacity to act voluntarily in the circumstances of the case, there would seem to be no reason to inquire into whether he/she in fact acted voluntarily because an acquittal on the basis of non-pathological incapacity would result, such an acquittal would of course be

¹⁷⁴ Burchell (2005) 435.

¹⁷⁵ Burchell (2005) 430.

¹⁷⁶ 2002 (1) SACR 663 (SCA).

¹⁷⁷ Burchell (2005) 436.

subjected to the possible successful invocation by the prosecution of the *actio libera in causa* rule, where there was capacity to act voluntarily and, in fact there was voluntary conduct at some prior time.¹⁷⁸

In *Eadie*¹⁷⁹ Navsa AJ draws attention to the fact that numerous judgments prior to *Eadie*¹⁸⁰ (namely *Potgieter*¹⁸¹, *Henry*¹⁸², *Cunningham*¹⁸³, and *Francis*¹⁸⁴) tend to elide the defences of automatism and non-pathological incapacity.¹⁸⁵

Navsa AJ states “I am however not persuaded that the second leg of the test expounded in *Laubscher*¹⁸⁶ case (namely the second leg of the traditional capacity formulation) should fall away. Later he says “ whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong, yet loses the ability to control one’s actions, it appears notionally possible”.¹⁸⁷

It is too simplistic to equate the voluntariness aspect of capacity entirely with the second part of the capacity inquiry. At the outset the voluntariness inquiry deals with whether the conduct of the accused was actually controlled by the accused’s conscious will, while the preliminary inquiry into the second part of the capacity test ask whether the accused had the capacity to act voluntarily. In addition, the second part of the capacity test covers more than the subjective capacity of the accused to control his conscious will (i.e. act voluntarily)¹⁸⁸

(3.6) Conclusion of the *Eadie*¹⁸⁹ Judgment:

¹⁷⁸ Burchell (2005) 436.

¹⁷⁹ 2002 (1) SACR 633 (SCA).

¹⁸⁰ 2002 (1) SACR 633 (SCA).

¹⁸¹ 1994 (1) SACR 61 (A).

¹⁸² 1999 (1) SACR 13 (SCA).

¹⁸³ 1996 (1) SACR 631 (A).

¹⁸⁴ 1999 (1) SACR 650 (SCA).

¹⁸⁵ Burchell (2005) 436.

¹⁸⁶ 1988 (1) SA 163 (A).

¹⁸⁷ Burchell (2005) 436.

¹⁸⁸ Burchell (2005) 436.

¹⁸⁹ 2002 (1) SACR 663 (SCA).

Failing legislative intervention, the judgment of Eadie¹⁹⁰ case provides court with a salutary reminder of how the legitimate process on inferential reasoning can help to bring some common sense back into the judicial approach to cases where provocation or emotional stress are raised as defences.¹⁹¹

The conative or second part of the capacity inquiry rooted as it is in the subjective assessment of capacity of the accused to act in accordance with his/her appreciation of the unlawfulness (or wrongfulness of his/her conduct inevitably contains an evaluation or normative dimension. It would seem that the court can only judge whether an accused had the capacity to control irrational conduct (or perhaps more accurately whether he/she could have acted differently) by assessing his/her conduct against a standard outside of the accused's own capacities. It would seem to involve a tautology to inquire whether an accused could have acted differently or could have controlled irrational conduct according to his/her own lights.¹⁹²

Every departure from rational standards of behaviour by the accused would inevitably serve to demonstrate the self-fulfilling prophecy that he/she was in fact not capable of controlling irrational conduct and the inevitable result would simply turn on the respective cogency of competing psychological evidence.¹⁹³

In essence Eadie was convicted because he simply lost his temper when he battered the deceased to death, violently losing one's temper is a reprehensible characteristic that is to use rightly the target of the criminal law.¹⁹⁴

(3.7) Conclusion

¹⁹⁰ 2002 (1) SACR 663 (SCA).

¹⁹¹ Burchell (2005) 444.

¹⁹² Burchell (2005) 445.

¹⁹³ Burchell (2005) 445.

¹⁹⁴ Burchell (2005) 445.

The Court in *S v Eadie*¹⁹⁵ accepted that the appellant was provoked and that the deceased behaved badly. However, they had no business being on the road in their state of insobriety. The deceased's aggressive and provocative behaviour did not entitle the appellant to behave as he did. The court warned that "It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered. In future, courts must be careful to rely on sound evidence and to apply the principles set out in the decisions of the Supreme Court of Appeal. The message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law".¹⁹⁶

As previously stated, that 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.

Severe emotional stress, in combination with factors such as provocation and/or intoxication resulting in non-pathological criminal incapacity, has become a very popular defence. The defence of non-pathological incapacity is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions. Courts have accepted such versions of events from accused persons but since the decision in *Eadie* below, such a defence will be difficult to succeed.¹⁹⁷

¹⁹⁵ 2002 (1) SACR 663 (SCA).

¹⁹⁶ Petro Swanepoel "Criminal Law & Criminal Procedure"
http://www.law24.com/index.php?option=com_fastcontent&view=layman&Itemid=168&domid=slucb/9kmdb/9seeb/h6mfb/dg1rb (accessed 08 October 2012).

¹⁹⁷ Petro Swanepoel "Criminal Law & Criminal Procedure"
http://www.law24.com/index.php?option=com_fastcontent&view=layman&Itemid=168&domid=slucb/9kmdb/9seeb/h6mfb/dg1rb (accessed 08 October 2012).

Chapter 4: Implications and overview of raising mental illness or mental defect at the time of committing the crime.

(4.1) Introduction

Mental illness is one of several factors recognised by South African law as negating criminal responsibility. Statutory provision in the form of the insanity defence has been made for people who suffer from mental illness, and they cannot be held responsible for their actions. Consequently, the law acknowledges that mentally ill offenders cannot be sanctioned in the same way as sane offenders.¹⁹⁸

Thus, where mental illness and criminal responsibility are concerned, the law is clear as to the legal test which has to be applied, the nature of expert testimony which has to be adduced, and the disposition of such offenders. Psychologists (and psychiatrists) play an important role in assisting the court with expert testimony regarding the mental state of the offender. In some instances, this role may be problematic because the nature of psychological evidence adduced in cases concerned with questions of 'sanity' can be contentious.¹⁹⁹

Since 1977 the defence of mental illness (insanity) has been governed by statute, namely the provisions of section 77 to 79 of the Criminal Procedure Act 51 of 1977. These sections are the direct result of recommendations contained in the Report of the Commission of inquiry into the Responsibility of Mental Deranged persons and the Related Matters²⁰⁰ (hereafter referred to the Rumpff Report) after Rumpff then judge of appeal, who headed the commission. This report clarified the law relating to the effect of mental abnormality on criminal liability.²⁰¹

¹⁹⁸ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 1.

¹⁹⁹ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 1.

²⁰⁰ RP 69/1967.

²⁰¹ Snyman (2008)167.

Before 1977 this defence, which was then known as the “defence of insanity”, was largely based upon so-called M'Naughton rules, derived from English Law.

In the U.S.A one would be found guilty but insane, our law system one would be insane and therefore not guilty.

(4.2) Definition

The term ‘insanity’ refers to a legally defined state of mind and does not refer to a particular psychological disorder or state. In fact, as will be shown, legal conceptions of insanity may be far removed from psychiatric or psychological conceptions of mental illness.²⁰²

Mental Illness is about the human condition, Permanent or temporary mental illness or defect emanating from organic brain disease.

(4.3) Explanation of Legal Terms and Principles

It is not necessary to prove that a mental illness or defect originated in the accused’s mind: the defence may be successful even if the origin was organic, as in the case of arteriosclerosis. Nor is the duration of the mental illness relevant: it may be either a permanent or temporary in nature. In the latter case it must of course have been present at the time of the act. Whether the mental illness is curable or incurable is irrelevant. If the accused was mentally ill before and after the act but he/she committed it during a *lucidum intervallum* (sane interval) he/she is criminally responsibly for the act.²⁰³

The term “mental illness” or “mental defect” refers to a pathological disturbance of the mental faculties, not to a temporary clouding of the mental

²⁰² Africa “Insanity and Diminished Capacity Before the Court” (2006) (eds Tredoux et al) Chapter 8 at page 1.

²⁰³ Snyman (2008)169.

faculties which cannot be ascribed to a mental disease, but merely to external stimuli such as alcohol or drugs or even provocation. However continual consumption of alcohol may result in a condition known as *delirium tremens*, which is acknowledged to be a form of mental illness.²⁰⁴

The DSM IV is the Diagnostic and Statistical Manual of Mental Disorders (4th ed), is used to make diagnosis of patients regarding brain disease and disorders.

Psychiatrist – Prescribe medication to mentally ill people and identify organic brain disease.

Psychologist – Identifies behavioural patterns.

Post-Traumatic Stress Disorder (PTSD) is an anxiety disorder that develops after experiencing a terrifying event or ordeal in which grave physical harm occurred or was threatened. Such traumatic events include violent personal assaults, torture, natural or human-caused disasters, accidents, military action, or other war situations such as bombing and insurrection, including terrorist attacks.

The condition is often seen in survivors of accidents, rape, physical and sexual abuse and other crimes, sufferers may endure several symptoms following the trauma, sleep disturbances, depression, anxiety, irritability and anger, or terrifying thoughts, especially when they are exposed to anything reminiscent of the trauma. Emotional distancing and “failure to connect” are also signs of Post-Traumatic Stress Disorder. It is often connected with inability to work out grief and anger over injury or loss during the traumatic event itself. If untreated, the condition may persist for many years, with worsening depression and possibly suicide.

Borderline personality disorder is psychologically unstable condition, an indeterminate psychological condition commonly featuring aggression,

²⁰⁴ Snyman (2008) 169.

impulsive behaviour, emotional instability, suspicion of others, and unexpected mood swings.

Depression (psychology) is a mental disorder characterized by feelings of worthlessness, guilt, sadness, helplessness, and hopelessness. Clinical depression is sadness and is persistent and severe.

Symptoms may include inability to concentrate or to make decisions, feelings of worthlessness, guilt, hopelessness, and helplessness and recurrent thoughts of suicide and death, sometimes leading to suicide.

The fact that a person has been declared or may be declared mentally ill in terms of the Mental Health Act 18 of 1973 does not mean that he/she is therefore also mentally ill for the purpose of section 78(1) of the Criminal procedure Act. Such a declaration in terms of the former act is something completely different from criminal non-responsibility and “mental illness” or “mental defect” as intended in section 78(1). Such a declaration is a factor which, together with others, a court may take into consideration when dealing whether a person lacks criminal responsibility.²⁰⁵

If it is alleged in the course of criminal proceedings that the accused by reason of mental illness or mental defect was not criminally responsible at the time of the commission of the alleged crime, the court must direct that a psychiatrist inquiry into the manner be held in the manner prescribed in the act. This is prescribed in section 79 of the Criminal Procedure Act.²⁰⁶

The fact that a person suffers from a mental illness or defect is not in itself sufficient to warrant a finding that he/she is not criminally responsible. The mental illness or defect must have a certain effect on his/her abilities: he/she must lack the capacity to (1) appreciate the wrongfulness of his/her act or (2) act in accordance with an appreciation of the wrongfulness of his/her act.²⁰⁷

²⁰⁵ Snyman (2008) 169.

²⁰⁶ Snyman (2008) 170.

²⁰⁷ Snyman (2008) 170.

The burden of proof of proving that the accused was mentally ill at the time of the commission of the crime and therefore cannot be convicted of the crime charged, rests on the accused. He/she discharges it by proving on a preponderance of probabilities that he/she was mentally ill.²⁰⁸

This is a departure from normal principles, according to which the onus rests on the state to prove all the requirements for liability. The question arises whether this onus on the accused is compatible with the Constitution of the Republic of South Africa, and more in particular with the presumption of innocence provided for in section 35(3)(h) of the constitution. It has been argued that it would burden the state with the onus of proving that the accused was not mentally ill at the time of the conduct in question, but to place a duty on an accused who raises this defence to place evidence before the court which would be sufficient to create at least a reasonable doubt as to whether he/she was mentally sound.²⁰⁹

Such a rule would accord with the general rule relating to the onus in criminal matters as well as the presumption of innocence. Such a rule would also accord with the rule relating to the onus of proof in both the defences of automatism and non-pathological criminal incapacity.²¹⁰

If the defence of mental illness is successful, the court must find the accused not guilty by reason of mental illness or mental defect, as the case may be. Such a verdict must invariably be accompanied by an order that the accused be detained in a psychiatric hospital or a prison pending the signification of the decision of a judge in chambers.²¹¹

He/she then becomes a "state patient". If the accused is found not guilty because mental illness, the court has no choice but to issue the above order: It is obliged to do so, even though the accused's mental illness was only of a

²⁰⁸ Snyman (2008) 172.

²⁰⁹ Snyman (2008) 172.

²¹⁰ Snyman (2008) 172.

²¹¹ Snyman (2008) 173.

temporary nature. This may lead to the peculiar situation that a person who committed a crime while mentally ill, but who at the time of his/her trial is completely normal again, must be declared a “state patient” even though he is not in need of any treatment.²¹²

(4.4) Section 77 of the Criminal Procedure Act 51 of 1977

Concerns the accused mental status now at the time of trial, either the inability to stand trial or ability to stand trial.

In terms of criminal procedure, every person is presumed to be sane until the contrary is proven. However in the case of mental illness or defect, when an accused’s capacity to follow court proceedings is compromised, he or she cannot be tried in a court of law.²¹³

Section 77 of the Criminal Procedure Act 51 of 1977 (CPA) therefore makes provision for an inquiry and report on the accused’s fitness to stand trial. Further statutory provision is made for expert testimony to establish the presence of mental illness or defect and the extent to which it impacts on the accused’s ability to follow proceedings. Where the offence has been violent, as in the case of murder, rape or culpable homicide, Section 79 of the CPA provides for the inquiry to be conducted by a panel of psychiatrists at a psychiatric hospital. Psychiatric evidence regarding the presence of mental illness and its impact on the capacity of the accused to understand proceedings is contained within the report presented to the court.²¹⁴

However, the court may also require psychological evidence - for example, evidence pertaining to the accused person’s level of intellectual functioning. This inquiry is conducted and reported on by a psychologist². If the findings of the psychiatrists and psychologist conclude that the accused is not fit to stand

²¹² Snyman (2008) 173.

²¹³ Africa “Insanity and Diminished Capacity Before the Court” (2006) (eds Tredoux et al) Chapter 8 at page 3.

²¹⁴ Africa “Insanity and Diminished Capacity Before the Court” (2006) (eds Tredoux et al) Chapter 8 at page 3.

trial, he or she will be admitted to a state psychiatric hospital for an indefinite period of time.²¹⁵

Where fitness to stand trial is concerned, the psychologist may play a role at the court's request. Psychological knowledge regarding factors such as intellectual functioning, personality functioning and emotional functioning may therefore be admitted as testimony so that the court is put in a position to make a finding regarding the accused person's capacity to follow proceedings.²¹⁶

The impact which the accused person's mental state has on his or her functioning is relevant to both the capacity to understand and to follow court proceedings, as well as his or her criminal responsibility. However, as will see, an inquiry into an accused's fitness to stand trial has no bearing on the inquiry into his or her responsibility.²¹⁷

Sometimes it is not the accused's mental condition at the time of the commission of the alleged crime which is put at issue, but his/her mental condition at the time of his/her trial. It stands to reason that a court cannot try a mentally ill person. Such a person is incapable not only of giving evidence properly, but also of either defending him/her self or of properly instructing his/her legal representative. This is the position no matter what his mental condition was at the time of the commission of the alleged crime. An allegation the accused is mentally ill at the time of his/her trial must therefore not be confused with an allegation that he/she was mentally ill at the time of the commission of the alleged crime. The criminal Procedure Act makes separate provision for each of the above two possibilities.²¹⁸

²¹⁵ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 3.

²¹⁶ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 3.

²¹⁷ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 3.

²¹⁸ Snyman (2008) 175.

The procedure to be followed if it is alleged that because of mental illness the accused lacks the capacity to understand the proceedings, and can therefore not be tried, is set out in section 77 read with section 79. As the provisions of these two sections are primary of procedural importance, they will not be set out and discussed.²¹⁹

It is sufficient to mention that the investigation basically follows the same pattern as the investigation by experts where it is alleged that the accused was mentally ill at the time of the commission of the alleged crime.²²⁰

Section 79 contains provisions relating to the number of psychiatrist who must conduct the investigation, the committal; of the accused to a mental hospital or other place for the purpose of observation or investigation, the report to be draw up by the psychiatrist, and the adjudication of the report by the court. If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings are continued in the ordinary way.²²¹

If however the court finds that the accused lacks capacity, it must direct that the accused be detained in a psychiatric hospital or a prison pending the signification of a judge in chambers. After such a direction has been made, the accused may subsequently at any time when he/she is no longer mentally ill, be prosecuted and tried for the alleged crime.

Section 79 of the Criminal procedure Act, stipulates that in non-violent offences the inquiry should be conducted by a psychiatrist appointed by the court. Where the offence/s have been violent, as in the case of murder, rape or culpable homicide, the enquiry should be conducted by a panel of three psychiatrists. In some cases the court may require the expertise of a psychologist and will direct that he/she form part of the panel.²²²

²¹⁹ Snyman (2008) 175.

²²⁰ Snyman (2008) 176.

²²¹ Snyman (2008) 176.

²²² Africa "Psychological evaluations of mental state in criminal cases" in Psychology and the Law (2006) (eds Tredoux et al) 388.

The role of the panel is to establish whether the accused's current functioning is impaired by either mental illness or mental defect.²²³

'Mental illness' or 'mental defect' are not defined in the Act as the nature of these impairments is determined by psychiatrist and psychologists and not by the court.²²⁴

In addition to information gathered from family or significant others, the clinician can also obtain information regarding the offence from the police – this may include crime scene information and reports of the accused's behaviour upon arrest. The nature of the crime can provide indicators of mental state – was it frenzied and impulsive or is there evidence that it was planned? This is useful in helping to determine to what extent either cognitive functioning or self-control was impaired. Reports of the accused's behaviour upon arrest are useful in assessing symptoms at the relevant time.²²⁵

(4.5) Section 78 of the Criminal Procedure Act 51 of 1977:

(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable-

- (a) Of appreciating the wrongfulness of his or her act or omission; or
- (b) Of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

Shall not be criminally responsible for such act or omission.

(1A) Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of **section 78 (1)**, until the contrary is proved on a balance of probabilities.

²²³ Africa "Psychological evaluations of mental state in criminal cases" in Psychology and the Law (2006) (eds Tredoux et al) 388.

²²⁴ Africa "Psychological evaluations of mental state in criminal cases" in Psychology and the Law (2006) (eds Tredoux et al) 388.

²²⁵ Africa "Psychological evaluations of mental state in criminal cases" in Psychology and the Law (2006) (eds Tredoux et al) 397.

(1B) whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of **section 79**.

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under **section 79** enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under **section 79** enquired into the mental condition of the accused.

(5) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under **section 79** enquired into the mental condition of the accused.

(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act-

(a) The court shall find the accused not guilty; or

(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

By reason of mental illness or intellectual disability, as the case may be, and direct-

(i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in **sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007**, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be-

(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of **section 47 of the Mental Health Care Act, 2002**;

(bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental care health [sic] user contemplated in **section 37 of the Mental Health Care Act, 2002**;

(dd) released subject to such conditions as the court considers appropriate; or

(ee) released unconditionally;

(ii) in any other case than a case contemplated in subparagraph (i), that the accused-

(aa) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in **section 37 of the Mental Health Care Act, 2002**;

(cc) be released subject to such conditions as the court considers appropriate;

or

(dd) be released unconditionally.

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

(8) (a) An accused against whom a finding is made under subsection (6) may appeal against such finding if the finding is not made in consequence of an allegation by the accused under subsection (2).

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the finding and the direction under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary course.

In order to make a diagnosis of mental illness, the psychologist uses a variety of tools as part of the clinical assessment process. The clinical interview provides the psychologist with the opportunity to gather salient aspects of the accused's psychosocial history. This history-taking includes information such as the nature of the symptoms, the level of distress which is experienced, family history and occupational functioning. In addition the clinician (psychologist) may make use of measures such as psychological tests which provide objective information about the accused's functioning.²²⁶

Collateral information (third party information) may be gathered from significant others so as to provide additional insight into the accused's functioning in various spheres. This information may be provided by family members, work colleagues or other professionals (such as general practitioners, psychiatrists and psychologists) whom the accused has consulted.²²⁷

An important diagnostic tool which psychologists in South Africa use to make diagnoses, is the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV TR) 8(APA, 2000). This system classifies mental disorders in terms

²²⁶ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 6-7.

²²⁷ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 6-7.

of their diagnostic criteria (symptoms) and provides clinicians with the information necessary to make diagnoses.²²⁸

The evidence which the psychologist presents in court will therefore allude to the presence of mental illness (for example, Schizophrenia) and how this impacts on the accused's functioning.²²⁹

(4.6) Applicable Case Law

In *R v Harris*²³⁰ the court held that 'in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the court itself'.²³¹

This dictum highlights that the issue of determining criminal responsibility is a legal question while the evaluation of mental state is a psychological question.²³²

In *S v Kavin*²³³ The accused was charged with murdering his wife, daughter and son. He was also charged with attempted murder of another daughter. His defence was that he was suffering from a mental illness which rendered him non responsible. He was examined by three psychiatrists who concurred with a diagnosis of 'severe reactive depression superimposed on a type of personality disorder displaying immature and unreflective behaviour'. Two psychiatrists were of the opinion that he was able to appreciate the wrongfulness of his act while a third was uncertain. However, all three concurred that his depressive state rendered him incapable of acting in accordance with an appreciation of wrongfulness. In this case the accused's self control was impaired by a depressive disorder.²³⁴

²²⁸ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 6-7.

²²⁹ Africa "Insanity and Diminished Capacity Before the Court" (2006) (eds Tredoux et al) Chapter 8 at page 6-7.

²³⁰ 1965 (2) SA 340 (A) at 365 B-C.

²³¹ *R v Harris* 1965 (2) SA 340 (A) at 365 B-C.

²³² Africa "Psychological evaluations of mental state in criminal cases" in *Psychology and the Law* (2006) (eds Tredoux et al) 398.

²³³ 1978 (2) SA 731 at 733 b-c and d and 734.

²³⁴ *S v Kavin* 1978 (2) SA 731 at 733 b-c and d and 734.

(4.7) Conclusion

The legal test for insanity in South Africa has a biological component (ie the presence of mental illness) and a psychological component (the impairment of cognitive and/or conative functioning).

The diagnosis of mental illness falls within the domain of psychiatrists and psychologists while the assessment of criminal responsibility falls within the domain of the court.

A successful insanity plea results in an indefinite hospitalisation in a mental institution, and the accused is not free to resume his/her normal life.

Chapter 5: Sentencing

(5.1) Introduction

Where a court finds that an accused does not lack capacity either for pathological or non-pathological reasons, the accused must be convicted. However, in terms of Section 79 of the Criminal Procedure Act, if there is evidence of diminished capacity or responsibility, this may be taken into account in respect of sentence, although the degree of such diminished capacity may be difficult to quantify.²³⁵

By definition, diminished responsibility is the diminished capacity to appreciate the wrongfulness of the particular act in question, or to act in accordance with an appreciation of its wrongfulness.²³⁶

Where appropriate, diminished capacity must result in a lesser sentence, in other words it may be a mitigatory factor.²³⁷

Before a judicial officer imposes sentence on the offender in any given case, he/she first has to determine which sentences may be imposed, through interpretation of the relevant penalty clauses. The court also has to collect all the information that may be relevant to the determination of a suitable sentence. Thereafter the court has to exercise its sentence discretion to choose the most appropriate sentence from the list of possibilities.²³⁸

(5.2) Explanation of Legal terms and principles

The basic summary of principles to which sentencing is imposed are the following:

²³⁵ Louw, Recent developments in the defence of non-pathological criminal incapacity, in *Psychological Assessment* (2006) (ed Kaliski) 54.

²³⁶ *S v Di Blasi* 1996 (1) SACR 1 (A).

²³⁷ Louw, Recent developments in the defence of non-pathological criminal incapacity, in *Psychological Assessment* (2006) (ed Kaliski) 54.

²³⁸ Terblanche. *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 page 137.

1. The sentencing court has to impose an appropriate sentence, based on all the circumstances of the case. The sentence should not be too light or too severe.²³⁹
2. An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender; in other words, the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender.²⁴⁰ These two factors, the crime and the offender, are the first two elements of the triad of Zinn.²⁴¹
3. An appropriate sentence should also have regard to or serve the interest of society, the third element of the Zinn²⁴² triad. The interest of society can refer to the protection society needs, or the order or peace it may need, or the deterrence of would-be criminals, but it does not mean that the public opinion be satisfied.²⁴³
4. In the interest of society the purposes of sentencing are deterrence, prevention and rehabilitation, and also retribution.²⁴⁴
5. Deterrence is the most important of the purposes of punishment,, although this has been shown to be an oversimplification. Deterrence has two components, namely deterring the offender from re-offending and deterring other would-be offenders.²⁴⁵
6. Rehabilitation should be pursued as a purpose of punishment only if the sentence actually has the potential to achieve it. In the case of

²³⁹ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 137.

²⁴⁰ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 137.

²⁴¹ 1969 (2) SA 537 (A).

²⁴² 1969 (2) SA 537 (A).

²⁴³ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 137.

²⁴⁴ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 137.

²⁴⁵ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 138.

very serious crime, where long terms of imprisonment are appropriate, it is not an important consideration.²⁴⁶

7. Prevention as a separate purpose of punishment is rarely discussed any longer.²⁴⁷
8. Retribution, as an expression of society's outrage at the crime, has been held not to be as important as it was in the past but may nevertheless be of great importance, depending on the facts of the case. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence. Retribution can also be related to the requirement that the punishment should fit the crime, or that there should be a proportional relationship between the punishment and the crime.²⁴⁸
9. Mercy is contained within a balance and humane approach to consideration of the appropriate punishment. This appropriated punishment is not reduced in order to provide for mercy. There is no room for a vindictive and vengeful attitude from the sentence officer.²⁴⁹

Section 78 (7) of the Criminal Procedure Act ²⁵⁰states that:

If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his/her capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of wrongfulness of the act was diminished by reason of mental illness or defect, the may take the fact of such diminished responsibility into account when sentencing the accused.

²⁴⁶ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 138.

²⁴⁷ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 138.

²⁴⁸ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 138.

²⁴⁹ Terblanche. Guide to Sentencing in South Africa (2007) (2nd ed) Chapter 6 page 138.

²⁵⁰ Section 78 (7) of the Criminal Procedure Act.

Section 51 (3)(a) of the Criminal Law Amendment Act²⁵¹ contains the main exception to the sentences prescribed by the Act. It reads as follows:

“if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exists which justify the imposition of a less sentence than the sentence prescribed in those subsection, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence”.²⁵²

There is no onus on the accused to prove such circumstances, but he should at least “pertinently raise such circumstances for consideration” if he/she wants the court to consider them seriously.²⁵³

(5.3) Applicable case Law

The seminal judgment on how courts should deal with “substantial and compelling circumstances” is *S v Malgas*²⁵⁴. The court specifically decided against defining ‘substantial and compelling’ in greater detail.²⁵⁵

It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case can call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoyed not to depart from them unless they are satisfied that there is weighty justification for doing so.²⁵⁶

In *S v Mhlakaza*²⁵⁷ the court held that the object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that creates predominantly or exclusively for the public opinion is inherently flawed. It

²⁵¹ Act 105 of 1997.

²⁵² Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 3 at page 64.

²⁵³ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 3 at page 64.

²⁵⁴ 2001 (1) SACR 469 (SCA), 2001 (2) SA 1222 (SCA).

²⁵⁵ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 3 at page 64.

²⁵⁶ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 3 at page 65.

²⁵⁷ 1997 (1) SACR 515 (SCA).

remains the court's duty to impose fearlessly and an appropriate and fair sentence even if the sentence does not satisfy the public.

In *S v de Kock*²⁵⁸ the judgment begins by stating that the court has to determine an appropriate sentence and that the Judge alone, using all the experience, objectivity and integrity at his/her disposal, has to decide on this sentence. After substantial quotations from *S v Zinn*²⁵⁹ the court takes a careful look at the offender, as a unique person. All the personal factors need to be considered, and his/her character and general conduct in life should be viewed removed from the crimes which have been committed. All the factors relating to the offender are referred to, the facts determined from the provided evidence and an assessment made of the personality of the offender.²⁶⁰

Most prisoners have to return to society one day, and the longer the sentence the more likely society is to be troubled by the person again.²⁶¹

The triad (three basic elements) of *S v Zinn* 1969 (2) SA 537 (A) with regard to sentencing can be summarised as follows:

1. The crime:
 - 1.1 the crime (nature);
 - 1.2 the seriousness of the crime;
 - 1.3 tailoring the sentence to the crime.

2. The Criminal:
 - 2.1 the convicted persons circumstances;
 - 2.2 blameworthiness or culpability;
 - 2.3 getting to know the offender;
 - 2.4 the effect of personal factors.

3. The interest of society:

²⁵⁸ 1997 (2) SACR 171 (T).

²⁵⁹ 1969 (2) SA 537 (A) .

²⁶⁰ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 at page 145.

²⁶¹ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 at page 146.

- 3.1 general interest of society;
- 3.2 the community's reaction, demands and expectations;
- 3.3 serving the interest of society.

The relationship between the seriousness of the crime and the sentence is also expressed by the proportionality requirement.²⁶²

When considering the crime component, the court has to consider in each individual instance the offender's particular crime and seriousness, and not make generalised assessments of the severity of a certain crime.²⁶³

The process of looking specifically at the offender is often referred to as individualisation. Many factors are involved when the offender is considered, including age, marital status, the presence of dependants, level of education, employment and health. Ideally the sentencing officer should get to know the character and motives of the offender.²⁶⁴

Since the personality of the accused is an important component of an appropriate sentence, it is essential that the sentencing officer know as much about the accused as possible. It has been held to be of particular importance that the court should attempt to understand the offender's motive for committing the crime. Very often, if the accused provides a reason for the crime, it will make some sense to the analytically and logically minded presiding officer. Many appeals have succeeded because the trial court did not have sufficient regard to the personal circumstances of the offender.²⁶⁵

The interest of society can operate both to increase and decrease the punishment. When the interest of society will not be served by sending the offender to prison, causing him/her to lose his/her job and his/her dependants

²⁶² Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 at page 147.

²⁶³ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 at page 148.

²⁶⁴ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 at page 150.

²⁶⁵ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 at page 151.

to have to be supported by the state, society's interests can mitigate a sentence.²⁶⁶

With regard to the 'battered women syndrome' or other non-pathological factors identified in the DSM IV, in *S v Mabutho*²⁶⁷ the court considered whether ill health may affect a sentence. It was indicated that:

- (a) depending on the circumstances, ill health may be a good reason not to sentence an offender to imprisonment;
- (b) there is no rule that ill health will automatically prevent an accused from being sentenced to imprisonment;
- (c) adequate medical facilities are generally available to prisoners;
- (d) there must be a demonstrable medical evidence indicating the nature of the illness and the treatment required;
- (e) a court is competent to direct that medical treatment be given and
- (f) recourse may be had to the courts if there is a failure to provide essential health care.

Illness per se does not entitle an accused to avoid imprisonment but in certain circumstances should be considered in order to do both justice to society and to the accused. A particular sentence may become more burdensome because of the convict's state of health.

Section 29(2) of the Constitution of the Republic of South Africa, requires that a child's best interest have paramount importance in every matter concerning the child.

In *S v M*²⁶⁸ the court held that "it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the

²⁶⁶ Terblanche, *Guide to Sentencing in South Africa* (2007) (2nd ed) Chapter 6 at page 152.

²⁶⁷ 2005 (1) SACR 485 (W).

²⁶⁸ 2007 (2) SACR 539 (CC).

imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so.²⁶⁹

The majority was satisfied that correctional supervision without further imprisonment (correctional supervision in terms of section 176 (1)(h) of Act 51 of 1977) would be appropriate because in light of the circumstances of the case, the convicted mother, her children, the community and the victims who will be repaid from her earnings, stood 'to benefit more from her being placed under correctional supervision than from her being sent to prison.'²⁷⁰

In *S v Potgieter*²⁷¹ the accused was convicted of murder and was sentenced to seven year imprisonment. It was assumed in favour of the accused that over a period of six years, she was subjected to assaults, humiliation and psychological abuse by the deceased. It appeared that she was 37 years of age, a first offender and the mother of four children; it also appeared that the accused was assaulted by the deceased on the day of the murder and that the deceased was lying in bed at the time of the murder. The Appellate division set aside the sentence of the trial court of seven years' imprisonment and remitted the case to the trial court to reconsider the sentence afresh after compliance with the provision of Section 276A(1)(a).²⁷²

In *S v Larsen*²⁷³ the appellant was sentenced to five years imprisonment, half of which was suspended, for shooting and killing her husband. It appeared that she had been assaulted and abused by the deceased over many years and that the marriage was under severe strain in the period leading up to the fatal incident. The appellant confronted the deceased in the kitchen of their home and aimed a pistol at him, a struggle ensued during which three shots went off, one of which fatally wounded the deceased, Nicholas AJA considered the facts and decided that the matter should be remitted to the trial

²⁶⁹ 2007 (2) SACR 539 (CC).

²⁷⁰ 2007 (2) SACR 539 (CC).

²⁷¹ 1994 (1) SACR 61 (A).

²⁷² 1994 (1) SACR 61 (A).

²⁷³ 1994 (2) SACR 149 (A) at 149 f-j and 150 a-d and 157 a-h.

court for the consideration of the imposition of a sentence of correctional supervision in terms of Section 276A(1)(a).²⁷⁴

In *S v Ingram*²⁷⁵ the appellant was convicted of murder and sentenced to eight years imprisonment. It appeared at the trial that her defence was that of non-pathological criminal incapacity, the evidence showed that the deceased had an alcohol problem and was unfaithful on several occasions, the accused was also frequently abused by her husband. The deceased and the accused were intoxicated at the time of the shooting. It was held that for a murder such as this the imposition of appropriate conditions can render the sentence of correctional supervision suitable severe and the sentence of eight years in prison was set aside on appeal. The matter was remitted to the trial court to reconsider the sentence afresh after compliance with the provisions of Section 276 A(1)(A).²⁷⁶

In *S v Aspeling*²⁷⁷ the appellant was convicted of murder in that he shot and killed his brother after a long history of acrimony between them and after the brother had again acted in a highly provocative manner towards him by smashing windows at home. The accused snapped and lost control. He was afterwards aware of the gravity of his conduct and experienced an acute sensation of guilt. It was held that correctional supervision in terms of Section 276(1)(i) was appropriate.²⁷⁸

In *S v Malejane*²⁷⁹ the accused stabbed his wife with a knife after he discovered her committing an act of infidelity. He was a 26-year-old first offender and a sentence of 8 years' imprisonment in terms of the provision of Section 276(1)(b) of the Act was set aside and replaced with a sentence of five years' imprisonment in terms of the same provision.²⁸⁰

²⁷⁴ 1994 (2) SACR 149 (A) at 149 f-j and 150 a-d and 157 a-h.

²⁷⁵ 1995 (1) SACR 1 (A).

²⁷⁶ 1995 (1) SACR 1 (A).

²⁷⁷ 1998 (1) SACR 561 (C).

²⁷⁸ 1998 (1) SACR 561 (C).

²⁷⁹ 1999 (1) SACR 279 (O).

²⁸⁰ 1999 (1) SACR 279 (O).

In *S v Engelbrecht*²⁸¹ it was established that the murder of an abusive spouse may in certain circumstances lead to a finding that substantial and compelling circumstances exist. Satchwell J indicated that any person who seeks to ‘ameliorate’ any sentence imposed for murder must discharge ‘an extraordinary evidentiary burden of proving to the court the existence, the extent, the nature, the duration and the impact of domestic violence upon which such person would seek to rely when sentence is passed. In *casu* it was found that the accused did not need to be deterred, retribution was not appropriate and community service not applicable as the nature of her work as a trainee nursing sister was more beneficial to the community. The accused was sentenced to be detained until the rising of the court.²⁸²

(5.4) Conclusion

It must be accepted that punishment and sentencing can only play a small role in managing crime. The emphasis must be placed on other efforts by the government and civil society to reduce crime. Particular attention should be paid to social conditions that contribute to crime. There needs to be acceptance of the limited potential of punishment and sentencing to manage crime.

²⁸¹ 2005 (2) SACR 163 (W).

²⁸² 2005 (2) SACR 163 (W).

Chapter 6: Conclusion and Recommendation

(6.1) Conclusion

This dissertation makes it timely to raise the issue of the "battered-woman syndrome" as a useful topic for discussion in our modern day society.

By using the term 'the battered-woman syndrome', I put the emphasis on the situation of women in society. This does not mean one should exclude the reality that a very small number of heterosexual men in most societies experience battering at the hands of their female spouses, and another small sample of gay men and lesbians are battered by their 'male-centric' partners.

In all societies, women are overwhelmingly the victims of spousal abuse of every form (physical, sexual, psychological and economical).

This syndrome has been clearly articulated, researched and written about in both formal academic and popular literature.

A woman is defined as a 'battered woman' when she experiences at least two of the following three-step battering cycles:

(1) The tension building phase.

This is the stage when the romance is not as romantic anymore, men often start to get irritable, blame their partner for something that is beyond her control, often verbal abuse is the order of the day.

(2) The explosion or acute battering phase.

At this stage, the abusive suffered by the women is at its peak, physical, mental, sexual and or verbal abuse is at its most unpleasant.

(3) The calm, loving honeymoon phase.

This is when the batterer appears remorseful and sorry. He brings flowers, jewellery and other gifts, apologises and might even offer marriage if this ritual had not yet been experienced. This, indeed, is the stage when the victim is lulled into complacency and unfortunately she is being set up for the next round of violence.

A women's natural and socialised tendency to make peace and to try and make the relationships work. In considering adverse economic consequences, this is particularly true of most women who have not acquired the requisite education and training to give them choices and economic independence. Fear, oftentimes it is more dangerous for the woman to leave than to stay. It is not unusual for a batterer to make threats against the children or the woman's parents. Batterers oftentimes threaten to commit suicide if the woman leaves.

Battered women tend to present a profile characterised by low self-esteem. This does not mean that such a woman has always had a low estimation of herself. It means that she can lose her sense of self and her dignity through the cycle of violence.

In this process, she has no psychological energy to leave her batterer. She indeed exhibits what psychologists' term "learned helplessness" and "psychological paralysis".

The battered woman comes to a point where she believes that the battering is her fault. It is because she has not done the right thing. It is she who has provoked her man.

Everyone is affected; the educated, the uneducated, rich, poor, middle class, all colours and creeds, 30% of violent crimes reported to the South African Police Service involve domestic violence, and approximately 40% of divorce cases at the Family Advocate's office involve domestic violence.

1 400 women die at the hands of their partners in South Africa every year.

As a community we must show that we do not provoke domestic violence by ignoring it. If the perpetrator knows the community is going to confront the

situation and the police are held accountable for omitting to act accordingly, the perpetrator might think more about his abusive behaviour.

The only way out of an abusive relationship is to leave the communal home with the abuser, sadly very few women do.

(6.2) Recommendation

My recommendations are as follows:

A more detail enquiry of the nature of abuse suffered by complainant/s, to record a database of when the complainant/s reported the abuse, the extent of the abuse and any information relating to the abuser to be easily and readily available to the police officer/s attending to the scene of the domestic violence abuse.

Clearer guidelines be devised for police on when to effect an arrest when confronted with a domestic violence incident.

That to protect the woman from retaliation by the abuser, section 3 of the Domestic Violence Act be amended to direct the peace officer to arrest ('must arrest') instead of offering s/he the option to arrest ('may arrest').

That police question witnesses at the scene of a domestic violence incident, search for a firearm or dangerous weapons and remove it, regardless of the state of the alleged abuser or alleged threats with a firearm.

Provide abusers with speedier and more effective protection orders.

I believe that it is in the interest of justice that the Department of Justice and Constitutional Development should lodge a commission of inquiry into the subject of why battered women commit crimes against the abuser and should advance possible recommendations similar to the mental Health enquiry.

Recognise battered women syndrome as a psychological factor that may exclude or render one's capacity absent or diminished.

Courts should subjectively test the capacity of the battered women with regard to her crime/s.

Finally for courts to consider alternative means of punishment other than imprisonment for offenders the commit crimes against their abusers.

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