DEFENDING WOMEN WHO KILL

by

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SHFMAX002

A Dissertation

Submitted to the Department of Public Law

University of Cape Town

In Partial Fulfilment of the Requirements for a degree of Master of Laws

February 2022

Supervised by Professor Kelly Phelps and Professor Kelley Moult

Word Count (excluding bibliography): 24, 980 words

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirements for the LLM in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Signed on this 12th day of JANUARY 2022 in CAPE TOWN, SOUTH AFRICA

Signed by candidate

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I. INTRODUCTION

In 2002, Anne Marie Engelbrecht killed her husband. Whilst he slept, she restrained him to the bed with thumb cuffs and tied a plastic bag around his head. He subsequently suffocated to death.[1] She was convicted of premeditated murder, the mandatory minimum sentence for which is life imprisonment.[2] Deviation from the Mandatory Minimum Sentencing Act requires substantial and compelling circumstances.[3] Judge Satchwell sentenced Mrs Engelbrecht to 5 minutes of detention until the High Court rose for tea that afternoon.[4]

Mrs Engelbrecht was emotionally, sexually, physically, and mentally abused by Mr Engelbrecht for years. The particular evening of his death was characterised by all of the above, including the physical abuse of their daughter.[5] After numerous failed attempts at being granted protection orders, initiating divorce proceedings and moving homes, she was left with what she believed to be no other option but to permanently end the abuse by taking his life.[6] Despite this, the Court did not consider Mrs Engelbrecht's behaviour to satisfy the reasonableness requirement for private defence, choosing to rather exercise their discretion to mitigate her sentence.[7] This was despite extending the common law requirement of imminence to include inevitability of attack in instances of private defence.[8]

Inspired by *Englebrecht*, this minor dissertation explores the evidence led in cases in which women killed their abusive partners, and whether we ought to develop the legal defence framework to better reflect their culpability. I start by discussing my research questions, methodology and the limitations of the research. Thereafter, I consider the incidence of domestic violence in both South

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[1] *S v Engelbrecht* (2005) JOL 13771 (W).
[2] Criminal Law Amendment Act 105 of 1997 s 51(1)*(a)*.
[3] Ibid s 51(3)(a).
[4] *S v Engelbrecht* para 58 (sentencing judgment at the end of the judgment).
[5] Ibid para 2.
[6] Ibid.
[7] *Engelbrecht* supra note 1.
[8] Ibid.

Africa and abroad. Before delving into my data set, I deal with some key theories and concepts considering this backdrop, namely Battered Women's Syndrome. I also consider a woman's place in patriarchal society, especially impoverished women, and how that skews the help they have access to. Once the details of my data set are expanded upon, I consider the prevailing themes and patterns that derive thereof.

Lastly, I make some recommendations for the way forward and conclude that the *Engelbrecht* judgment's factual assessment of reasonableness and necessity was wrong. It ought to have finally and definitively expanded the requirements of private defence to cover certain instances in which a woman kills her husband. Namely, where another attack is considered inevitable, and considering the context surrounding her abuse, her behaviour was reasonable and necessary for the preservation of her/another intimate's life, dignity, or safety and security.

Despite the overwhelming evidence concerning the dire state of South Africa's violence against women, the data on those cases where a women defendant has killed a male abuser is lacking. Whilst some authors have done qualitative research on this in isolated provinces,[9] we have yet to get a full picture. The simple reality is that independent research statistics, police reports and court cases almost always underrepresent reality. This is because of a host of inadequacies, from underreporting to abysmal conviction rates. However, to justify any deviation from longstanding common law defences, the argument cannot only be theoretically sound but must make sense practically. In exploring the practical realities of abused women in South Africa, the following research question was considered: 'How have South African superior courts[10] dealt with evidence lead in cases whereby a female defendant has retaliated against her male abuser from 1994 to 2020?' The sub-questions relevant to this research question are as follows:

[9] Rachel Jewkes, Loveday Penn-Kekana, Jonathan Levin, Matsie Ratsaka and Margaret Schriever 'Prevalence of emotional, physical and sexual abuse of women in three South African provinces' (2001) *South African Medical Journal* 91(5), 421-428.

[10] Superior Courts include all high courts, the Supreme Court of Appeal and the Constitutional Court for the purposes of this paper.

I. To what degree is evidence concerning her experience of domestic violence considered in the ascertainment of a guilty conviction?

II. To what degree is evidence concerning her experience of domestic violence considered in the sentencing phase after a guilty conviction?

III. To what degree is evidence lead or adduced in either of these phases where there is a suggestion of ongoing abuse?

The issue of magnitude is an important one. Numerous papers have been written[11] about the theoretical possibility of amending common law defences, but few have attempted to demonstrate that South Africa is a society in which such deviation makes sense. My hypothesis was that the courts remain unnecessarily reluctant to develop the common law despite the lived reality of South African women necessitating such. *Engelbrecht* should have been a watershed moment for South African criminal law, but it did not elicit the change it could have because the High Court remains unnecessarily committed to a traditional framework of criminal law defences that do not serve victims of domestic abuse.

Despite every effort to enforce the South African Police Service's obligations towards victims of violence, cycles of abuse cases demonstrate that they can fail. This can be due to resource constraints or manipulation by the abuser when the police do arrive. Another common reason for this failure is cultural bias prevalent throughout South Africa which encourages a perception that women are at fault for their own abuse, that the man ought to have autonomy over their household, and that women ought not be believed when they speak out. When these scenarios arise, and abusers are eventually killed, the courts cannot simply rely on the traditional requirements of criminal law to ascertain whether exoneration is due. It is a basic tenet of

[11] Aileen McColgan 'In defence of battered women who kill' (1993) *Oxford Journal of Legal Studies* 13.4, 508-529; Thomas Crofts and Danielle Tyson 'Homicide law reform in Australia: Improving access to defences for women who kill their abusers' (2012) *Monash UL Rev* 39, 864; Janey Greene 'A provocation defence for battered women who kill' (1989) *Adel. L. Rev.* 12, 145; Samantha Krause 'Defences available to battered women who kill their abusers: a comparative analysis' (2009) Doctoral Dissertation.

democracy that citizens give up a degree of personal freedom to the sovereign government in a social contract concerning their own protection and security. However, it is not reasonable to expect them not to take their survival into their own hands when they are not afforded proper protection from the State.

Methodology

This project, given the need for better legal protection, analysed eighteen judgments in which women were charged with killing their intimate partners and where a history of domestic abuse was raised during the trial. My methodology comprised of a detailed case analysis utilising the search engines of Saflii, Juta Online and Lexis Nexis. The search criteria required at least one female defendant, a male victim as the deceased, and a history of abuse alleged as a causative factor in the criminal incident.

Once the cases relevant to my research were identified, they were chronologically ordered and with the salient points of the cases briefly summarised for ease of navigation in later analysis. The phase of exploratory research required Boolean Operator-assisted searching to access cases that fit my search criteria. Boolean Operators are suited to advanced searching in which the researcher seeks to access a category of cases not immediately available on search engines' various sub-categories. Once search results were accessed, I analysed each case to ascertain if it fit my criteria and created a tally of cases that ascribed. The research and methodology adopted was qualitative in nature and comprised two key steps: search and sorting, and thereafter analysing and coding. The intention behind the research was to conduct a wide-scale case review to create a picture of the nature and magnitude of these cases in South Africa.

The decision to limit the research to the superior courts was because of the practical difficulties of accessing magistrate court case documents, which are not immediately accessible to the public. I also had to ensure that I was comparing 'like' documents – comparing superior court

judgments to magistrate court documentation had the possibility of worsening the comparability of my cases. After the wide-scale search, I accumulated eighteen court judgments that fit my criteria.

Insofar as accessing other court documents, like transcripts, for these cases, practical and administrative difficulties prevented access. After contacting each Court in which the various judgments were heard, it became apparent that obtaining them (especially without being there physically to have them downloaded onto a hard drive) was an almost impossible task. Compounding this was the fact that Supreme Court and Constitutional Court (hereafter referred to as the SCA and CC respectively) judgments are not recorded, and so not transcribed in the same way high court judgments are. The same concerns about comparability were raised were I to use judgments and transcripts for some cases, and just judgments for others. After analysing the judgments, it was clear that there was a wealth of information upon which themes could be drawn. Nonetheless, transcripts would naturally have a lot more nuance and detail to draw upon, especially insofar as the way evidence was tendered and examined in court, and so a future research project should certainly investigate that.

The process for the analysis of the data collected was done in two stages: annotation and summary, and thereafter in-depth coding. Thematic analysis is a method within qualitative data analysis to gain insight into the patterns of themes within data.[12] The themes relevant to this research were those included in my research sub-questions in relation to the way evidence is lead in both conviction and sentencing phases of trials.

[12] Virginia Braun & Victoria Clarke 'Thematic Analysis' in *APA Handbook of Research Methods in Psychology* (2012) 2 American Psychological Association, 57-71 at 57.

Limitations and ethical considerations

Firstly, insofar as the case-review, despite efforts to create a comprehensive database, there are cases that may have been missed by the research. However, by utilising Boolean Operator searches, the risk of low retrievability was minimised. Secondly, the lived realities of women in South Africa are such that court cases are not all-encompassing. Much violence is left unreported, which is has been recognised and is being tackled via the National Strategic Plan on Gender Based Violence and Femicide.[13] Nonetheless, my concern is to ensure that, when incidents do find their way to courts, that the defendants are offered a fair and just legal defence.

Additionally, there are concerns relating to the selection of the data itself, insofar as bias is concerned. Regarding bias, the use of strict selection criteria limits the influence my own subjectivities on the inclusion and exclusion of cases. Furthermore, utilising Boolean Operator searching will avoid biased selectivity in a large majority of the cases selected. Lastly, I must acknowledge the gendered nature of my research in that I solely considered women defendants against male counterparts. Whilst I do not dispute that this research may benefit defendants whose domestic situation entails differing gender dynamics, my primary empirical aim was to explore the incidents of violent relationships that culminated in retaliation. Given the endemic of gender-based violence in South Africa against women and girls, I chose to focus on them.

I further limited the scope to post-1994 cases for fairness considerations relating to skewed race representations. That battered women's cases are under-represented by the courts has already been acknowledged, but that was especially true for black, Indian, coloured and Chinese women during Apartheid. Their representation was of absolute importance in my research. I recognise that their representation is still lacking given the persistent inequality in the country.[14] However,

[13] National Strategic Plan on Gender-Based Violence & Femicide of 2020.
[14] Department of Statistics South Africa 'How Unequal is South Africa' available at: http://www.statssa.gov.za/?p=12930.

my belief is that the post-democratic era of court cases reflected their lived realities more accurately than before 1994.[15]

Given that the research focused on publicly available case documents that, the ethical concerns of this dissertation were relatively low. However, myself and my supervisors endeavoured to hold the research to a high ethical standard because we acknowledged that the people in these cases run a risk if I were to misrepresent or pathologize their stories. For this reason, I applied for, and received, ethics approval from the University's Research Ethics Committee. My competence as a researcher in this dissertation is founded in my experience and time spent reading, analysing, and studying cases in my LLB. Whilst this is my first-time analysing cases for thematic purposes, I am well acquainted with reading and analysing case law. Further, I acknowledged my ethical duties as both a student of the law, and future legal professional, to conduct myself in a restrained and respectful manner.

[15] Insofar as semantics are concerned, the decision to refer to women, and not female, defendants, was to avoid the biological connotations of the word 'female' that habitually exclude trans-women.

II. LEGAL FRAMEWORK

The natural starting point in investigating this topic is to consider the existing legal framework, and specifically, the legal defences available to women who kill their abusers. Insofar as criminal law is concerned, there are three major components to any criminal act – which in turn inform the available defences for a specific crime. The components are the following[16]:

i. criminal capacity;

ii. unlawful, voluntary conduct causing the harm; and

iii. intent.

Criminal capacity has two major components to it, the first of which refers to a person's ability to understand the nature of, and difference, between right and wrong.[17] The second is the ability to act in accordance with this understanding.[18] Unlawful, voluntary conduct (also known as the *actus reus* component) requires that any conduct, which has been previously deemed[19] to constitute a criminal act, be as a result of that person's own volition.[20] The third and last general component of a crime is the requisite mental state (also known as *mens rea*) which mostly requires intention (certainly for the crime of murder[21]) and knowledge of unlawfulness.[22] Briefly, the crime of murder is defined as "the unlawful and intentional killing of another person."[23] The unlawfulness aspect of the crime derives from the correlating fundamental right to human life – and thus the

[16] Jonathan M. Burchell 'Principles of Criminal Law' 5 ed (2016) Juta and Company Ltd at 3.
[17] Ibid at 57.
[18] Ibid.
[19] This is known as the rule against retrospective application of the law and requires that at the time of the crime's commission, it was considered criminal by the eyes of the law. Where conduct is only declared criminal after an incident, it cannot retrospectively be considered a crime. This is based on the Principle of Legality, which is a component of the rule of law.
[20] Burchell op cit note 16 at 51.
[21] As opposed to culpable homicide which requires negligence.
[22] Burchell op cit note 16 at 57.
[23] Ibid.

deprivation thereof is *prima facie* an unlawful act unless proven otherwise (in other words, there is a recognised defence that is proven on the facts).

These components have a two-pronged purpose: on the one hand, they behave as a general checklist with which to determine if a crime has in fact been committed. On the other hand, they act as a justificatory exercise: any punishment meted out by the State is an infringement of rights in and of itself. For instance, imprisonment infringes on human rights, such as those relating to freedom of movement, privacy, and freedom of choice.[24] In order to justify the infringement of these constitutionally enshrined rights there has to be some other justifiably purpose. In the instance of the criminal sanction, this purpose is public safety and for the greater public good.

The defences available to women who kill their abusers can be numerous, but the three most pertinent ones will be discussed:

i. private defence (as a defence against the unlawfulness component);
ii. putative private defence (as a defence against *mens rea*);
iii. pathological incapacity (as a defence against the capacity component); and
iv. sane automatism/provocation and emotional stress (as a defence against the voluntariness component).

Private defence

Modern society hinges on a social contract between state and civilian in which the latter gives up their right to enact force in retaliation to another's force so that the former can provide the institutions to ensure a safe, secure and protected society. As the later chapters on the data collected will show, however, this social contract can be broken where the state fails in their obligation to protect. When this happens, the law recognises that someone may be compelled to

[24] Burchell op cit note 16 at 5.

take the law into their own hands, and thus provides a defence, subject to certain requirements being met.

Briefly, private defence exists where a victim of some unlawful act upon their person, property, or another legally recognised interest 'may resort to reasonable force to repel such attack'.[25] As a result of this, the counterattack is not considered unlawful, and therefore does not attract criminal liability. As per the basic tenets of a crime, private defence is thus a defence against the unlawfulness aspect. This defence requires, *inter alia*, the following, which are objectively assessed:

1. the defence must be meted out against the unlawful attacker[26];
2. the unlawful attack must be happening at the time of the counterattack, or a threat thereof must be imminent[27];
3. for the counterattack to be reasonable it must be more or less (as opposed to exactly) proportional to the unlawful attack;[28]
4. the defence must be necessary to avoid the unlawful attack[29] (though there exists no duty to flee in South African law);[30]and
5. the counterattack (in other words, the defence itself) must be to protect a legally protected interest which includes the victim's life, their property, their other interests, and interests of third[31] parties.[32]

[25] Burchell op cit note 16 at 121.
[26] Ibid at 126.
[27] Ibid at 122.
[28] Ibid at 127.
[29] Ibid at 126.
[30] In English law, the victim of an unlawful attack was required to retreat until their ability to do so was not possible – there exists no duty in South African law, see Frankline Stockdale 'Withdrawing a license to Kill: Why American Law Should Jettison Stand Your Ground and Adopt the English Approach to Retreat' (2016) BC Int'l & Comp. L. Rev, 39 at 454.
[31] By other interests, I make reference to South African constitutional rights such as dignity, personal freedom and sexual freedom; by third parties, I make reference to another person whom the defender may have a relationship to such as child. These concepts, unlike life and property, are less clear and there exists grey area into what can and cannot constitute a protected interest.
[32] Burchell op cit note 16 at 124.

Regarding the availability of this defence to abused women, these requirements are very narrow, and often preclude an abused woman from succeeding in claiming this defence. As will be demonstrated in the further discussion of the *Engelbrecht* judgment, the requirements of imminence, reasonableness, and necessity, have been construed to unfairly exclude many abused women from this class of defenders.

Putative private defence

Whereas private defence is a defence against the unlawfulness aspect of a criminal act, a putative defence is a defence against the *mens rea* aspect of a criminal act. Putative private defences excludes intention on the part of the defender by arguing that they acted in a genuine, albeit mistaken, reasonable belief that they were acting in private defence.[33] Unlike private defence, which is an objective test, putative private defence is a subjective enquiry and requires the courts to consider a defender's state of mind at the time of impugned defensive behaviour.[34] In order to exclude a charge based on negligence, such as culpable homicide, the defenders genuinely mistaken belief must also have been held on reasonable grounds.[35]

Pathological incapacity

Pathological incapacity, previously referred to colloquially as the 'insanity defence', is an umbrella term to describe defences whereby one pleads some sort of mental disease or illness. The disease is that which prevents the accused from appreciating the difference between right and wrong, or preventing them from acting in accordance with their understanding of the difference between

[33] Francisco Munoz Conde *About Putative Self Defence* in 'The Quest for Core Values in the Application of Legal Norms' (2021) Springer, Charm at 186.
[34] Burchell op cit note 16 at 131.
[35] Ibid.

right and wrong.[36] The accused is required to prove the operation of a mental illness at the time of the offence, which negates their criminal capacity[37] Important in this description is the key word 'pathological' – the mental illness invoked to raise this defence must be a product of a recognised disease.[38]

This defence takes law into the world of psychiatry, which can lead to conflict where there is disagreement in the medical community itself as to whether something is considered a mental illness. The next chapter considers the origins Battered Women's Syndrome which, in brief, is generally considered a sub-type of Post-Traumatic Stress Disorder. It is in this context that the potential for pathological incapacity to act as a defence for women who kill their abusers will be discussed.

Provocation and emotional stress

In the absence of pathological incapacity, exists a defence of non-pathological incapacity – this applies to specific defences such as provocation, intoxication and youthfulness. South African law recognises that one may be provoked sufficiently so as to induce states of such severe stress that one's capacity to act in accordance with right and wrong in the critical moment of a crime's commission.[39] Unlike the other defences, whose requirements and scope are generally met with consensus across the legal field, this defence has been muddled because of case law jurisprudence.

[36] Burchell op cit note 16 at 275; Criminal Procedure Act, 51 of 1977 s 78.
[37] Ibid at 278; Shannon Hoctor 'Tracing the Origins of the Defence of Non-Pathological Incapacity in South African Criminal Law' (2011) Fundamina 17(2) at 70.
[38] Ibid at 280.
[39] *S v Chretien* 1981 (1) SA 1097 (A) para 15 – this case introduced voluntary intoxication as potentially forming part of this defence.

The *S v Wiid* case is the obvious starting point since it would have fallen within the scope of my dataset, had it not been adjudicated before the timeframe in which my dataset falls.[40] In this matter, Ms Wiid appealed against her conviction of murder in the court *a quo* and the Appellate Division exonerated her on the basis of severe emotional stress.[41] During evidence in both the court *a quo*, and during the appeal, it was demonstrated how the deceased abused her repeatedly and meted out severe blows to her body before she fired the fatal shots.[42] She claimed, and it was found, that she temporarily lost capacity to distinguish between, and act in accordance with, right and wrong and it was on this basis that she relied on non-pathological incapacity.

This precedent was a promising piece of jurisprudence until *S v Eadie* significantly muddied the waters for future cases. *Eadie* was also an appeal case in which Mr Eadie appealed against his conviction of murder. The deceased had frustrated him on the road and after both of them stopping their respective vehicles, the appellant exited his car, fetched his hockey stick from his boot, went up to the deceased's car and beat him to death.[43] He claimed non-pathological incapacity due to emotional stress, provocation and intoxication in that he was so overcome with rage in that moment that he could not act in accordance with his understanding of right and wrong.[44]

The SCA disregarded the appeal and developed the law surrounding this defence by finding that provocation is a defence in instances where the person in question either lacks cognitive capacity (the ability to distinguish between right and wrong) or demonstrates automatism – that is, they acted involuntarily.[45] Here lies the confusion: voluntariness forms part of the 'voluntary wrongful conduct' component of criminal liability. However, the non-pathological

[40] *S v Wiid* 1990 (1) SACR 561 (A) at 562. Notably, three High Court cases were instrumental in solidifying non-pathological capacity in our legal framework, namely due to severe emotional stress and provocation – namely, *S v Arnold* 1985 (3) SA 256 (C); *S v Nursingh* 1995 (2) SACR 331 (D); and *S v Moses* 1996 (1) SACR 701.
[41] Ibid at 569
[42] Ibid at 563
[43] *S v Eadie* 2002 (3) SA 719 (SCA) at 723.
[44] Ibid.
[45] Ibid at 752.

incapacity defence is a defence against capacity.[46] Not only did this precedent reduce the ambit of the provocation defence, but it conflates and confuses the different components of criminal liability. It has essentially equated conative capacity with automatism which conflates two different elements of criminal liability and renders the conative test redundant.

These four legal defences were at the forefront of my mind as I dealt with the literature and data relating to my dissertation. They will be revisited at the end of this paper insofar as their potential in defending abused women.

[46] Burchell op cit note 16 at 329.

III. KEY CONCEPTS AND INCIDENCE OF CYCLICAL DOMESTIC ABUSE

The South African domestic violence landscape

That domestic violence, and gender-based violence, is rife in South Africa is an uncontested reality. This is important to consider as any legal defences must not be theorised in isolation of the context in which they may operate. It is thus essential to have a nuanced understanding of domestic violence in the South African landscape.

Vetten describes the violent atmosphere directed against women as all-encompassing and pervasive. Intimate partner abuse is severely underreported, and it is not a distinct category in the crime statistics released by the South African Police Service (hereafter referred to as the 'SAPS').[47] As a result, independent research, court cases and community-based surveys must be relied on to ascertain what the prevalence and severity is of domestic violence.

The Domestic Violence Act[48] places a positive duty on the police to assist victims of abuse in a number of ways, from assisting and informing complainants of their rights[49] to the right to arrest any person they reasonably suspect offended against a complainant without a warrant.[50] Despite this Act, and the National[51] Crime Prevention Strategy[52], the SAPS has a reputation of lacklustre policing in this regard.[53] This is due to inadequate resources and training, amongst other issues like ingrained patriarchal norms.[54] For instance, failures to make arrests, open criminal cases, assist victims, issuing protection orders, and removing abusers from within reach of their victim,

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[47] Lisa Vetten 'Domestic Violence in South Africa' (2014) Institute for Security Studies, Policy Brief 71 at 2.
[48] Domestic Violence Act, 116 of 1998.
[49] Ibid s 2.
[50] Ibid s 3.
[51] A strategy tasked to, amongst other things, deal with the incidence of gender-based violence, including domestic violence.
[52] National Crime Prevention Strategy of 1996.
[53] Vetten op cit note 47 at 4.
[54] Lisa Vetten 'Addressing domestic violence in South Africa: Reflections on strategy and practice' (2005) Expert paper by the Centre for the Study of Violence and Reconciliation, South Africa for the UN Division for the Advancement of Women in collaboration with the UN Office on Drugs and Crime, Vienna, Austria at 6.

are all apparent in the South African policing response to domestic violence.[55] Vetten additionally notes that the poverty-stricken reality of so many South Africans creates a number of obstacles for women seeking redress,[56] and this, along with the aforementioned police inaction, has created the space in which intimate partner violence flourishes.[57]

Aside from the resources issue, government policy addressing domestic violence does not properly address the cultural and religious misogyny that make it so pervasive. Bassadien and Hochfield discredit the myth that domestic violence in South Africa is a hidden crime that occurs in the private sphere[58] but point out that both policy and service providers operate from the basis that it is.[59] They conducted a national survey and a variety of focus groups in which they found that domestic violence often takes place in public, or quasi-public spaces, and that family and friend circles are often aware of it.[60]

Thus, the idea that domestic violence occurs 'behind closed doors' is a fallacy. The very public nature of intimate partner violence is attributed to various key issues: poor socio-economic circumstances and the religious and cultural sphere which so often enforce patriarchal norms.[61] These factors contribute to women staying in abusive spaces and so is an essential consideration when confronting the very common rhetoric of '*why didn't she just leave him?*'

This also links to Meth's work on the understanding of 'domus' in domestic violence. Much like Bassadien and Hochfield, she seeks to dismantle the notion of the home as a private and secluded space in which intimate partner violence occurs.[62] The presentation of the

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[55] Vetten op cit note 47 at 5

[56] For instance, those living in rural areas living remotely and not within close proximity to health and security services; and the costs of transport to repeatedly attend at a medical centre or police station.

[57] Vetten op cit note 47 at 6.

[58] Shahana Rasool Bassadien & Tessa Hochfeld 'Across the public/private boundary: contextualising domestic violence in South Africa' (2005) Agenda 19(66) at 5.

[59] Ibid.

[60] Ibid at 6.

[61] Ibid at 7-8.

[62] Paula Meth 'Rethinking the 'domus' in domestic violence: Homelessness, space and domestic violence in South Africa' (2003) Geoforum 34(3) at 317.

public/private sphere as mutually exclusive does not appear to reflect the lived realities of many women in South Africa. Without that traditional existence of a 'home,' leaving abusive spaces is not always possible.

Artz, Hoffman-Wanderer and Moult conducted research which included the lives of seven women who either killed or contracted for the killing of their abusive husbands.[63] They emphasise South Africa's violence as pervasive, both inter-generationally and heavily skewed against women.[64] However, a major concern is that cycles of abuse seem to be left unattended to by those sectors of public service that are expected to notice them. Six of their participants had been hospitalised as a result of intimate violence and the medical services did not consider the possibility that it was repetitive abuse – as a result, the authorities were never contacted.[65]

Statistics are not infallible, however the research into the prevalence of gender-based violence in this country is extensive. It has been approximated that 1 in 4 women are assaulted by their intimate partners, most often male, and that a woman usually suffers abuse 39 times before attempting to seek assistance.[66] This number, in part, can be attributed to pervasive cultural norms that entrench sexist narratives of what a man is entitled to do, and what a woman ought to put up with. Idemudia's paper on battered women in Gauteng focuses on the cultural and religious effects that compel women to stay in abusive spaces, and she argues that it is because of these social mores, along with lack of assistance from civil society, that the effects of loss of dignity, loss of self-worth, depression, anxiety, and helplessness set in.[67]

Though the South African scenario is dire, it is not unique. Of all the foreign jurisdictions considered in this research perhaps the most significant one is Hedge's case study of previously

[63] Lillian Artz, Yonina Hoffman-Wanderer & Kelley Moult 'Hard Time(s) Women's Pathways to Crime and Incarceration' (2012) Gender, Health and Justice Research Unit, University of Cape Town at 148.
[64] Ibid at 150.
[65] Ibid at 153.
[66] Erhabor S. Idemudia 'Self-concepts and demographic characteristics of battered women in Gauteng, South Africa' (2009) University of Limpopo, Curationis 32(1) at 45.
[67] Idemudia op cit note 66 at 46.

abused women in a shelter in South India.[68] Her main arguments centre around those mechanisms of silencing women which disinvest them of their rights to recourse and agency.[69] Much like in South Africa, we see cultural and religious patriarchal norms at play here, which are not adequately accounted for in policy attempts to combat gender-based violence. This is evident in one of the most chilling quotes from her interviews: "It is a crime to be born a woman... it is as if I had no mouth.[70]" Her arguments emphasise reinstating the sense of agency over her body and self is. To do this requires education on all spheres, and empowering women to take their autonomy into their own hands if it is not respected. This includes having safe spaces and creating safe spaces in existing security institutions to allow her to assert herself.[71]

Insofar as Northern perspectives[72] concerning defences for women who kill their abusers, one can look to jurisdictions like Canada and England. Wannop, for instance, critically compared England and Canada's legal approaches to the defence of battered women who kill their abusers, and argues for the approach of the latter.[73] His justification focuses on the afore-mentioned criticisms of Battered Women's Syndrome, in that he finds England's defence framework to be largely focused on emphasising an abused woman's psychological state as abnormal or insane in the commission of retaliation.[74] On the other hand, Canadian law, whilst still recognising Battered Women's Syndrome, does not consider the psychological effects of abuse as abnormalities but rather, reasonable and 'normal' reactions one would exhibit in abusive circumstances.[75] The

[68] Radha S. Hedge 'Narratives of silence: Rethinking gender, agency, and power from the communication experiences of battered women in South India' (1996) Communication Studies, Education Database 47(4) at 303.
[69] Ibid at 304.
[70] Ibid at 308.
[71] Ibid at 309.
[72] By Northern, I refer not strictly to geography but to the Global North as encompassing predominantly Western, developed countries, largely with a colonial background.
[73] Alexandra L. Wannop 'Battered Woman Syndrome and the Defense of Battered Women in Canada and England' (1995) 19 Suffolk Transnational Law Review at 251.
[74] Ibid at 252.
[75] Ibid.

traditional concept of reasonableness in a self-defence plea could greatly benefit from this perspective.

Insofar as the imminence requirement, Australian law may be a useful framework to consider as well. Sheehy, Stubbs and Tolmie consider a number of Australian court cases to reflect on the development of defence law in that jurisdiction.[76] Specifically, the *Zanker v Vartozakas* case proposed that the test moves away from imminence towards necessity, where the latter requires that the defendant was in a situation in which she was unable to perceive of any other means of escaping the constant violence.[77] This exact line of reasoning was argued by Murdoch[78] who has a primarily Northern perspective[79]. In challenging the traditional self-defence doctrine, he makes two arguments: first, that it does not adequately protect battered women, and as a result, ought to be reconsidered.[80] Secondly, that the incidence of these types of cases is not an anomaly, and as a result, justifies amending the doctrine.[81] Can the same be said in a South African context? That is the crux of the empirical component of this dissertation: to explore whether the cases in which the women end up killing the abusive partner are not so rare so as to justify leaving the law as is.

Battered Women's Syndrome and its inception

To fully appreciate the history behind this phenomenon, some key concepts have to be acknowledged: cycles of violence/abuse and Battered Women's Syndrome. They were not only the key theoretical concepts referenced in *Engelbrecht* but are also the principles upon which novel defences are conceptualised in this paper. Battered Women's Syndrome is defined as the

[76] Elizabeth A. Sheehy, Julie Stubbs & Julia Tolmie 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 Criminal Law Journal at 373.
[77] Ibid; *Vartzokas v Zanker* (1989) 51 SASR 277 at 277.
[78] Jeffrey B. Murdoch 'Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine with the Battered Woman Syndrome' (2000) 20 Northern Illinois University Law Review at 191.
[79] The pertinence of his perspective is the caution with which one can simply apply it to the Global South, that has different challenges and perspectives as a result of colonial domination from the Global North
[80] Sheehy et al op cit note 76 at 373.
[81] Sheehy et al op cit note 76 at 737.

'measurable psychological changes that occur after exposure to related abuse.'[82] Its foundation is in Seligman's 'Learned Helplessness' theory, which argues that continuous, uncontrollable trauma significantly interferes with a person's ability to perceive any method through which they may find reprieve from that trauma.[83] This 'failure to escape' feeling[84] is used by Walker to explain why abused women resort to killing their abusers.

Battered Women's Syndrome first gained traction in the 1970s. The United States Woman's Movement devoted a huge amount of attention to women who were in abusive circumstances.[85] Lenore Walker championed its cause and was the primary theorist to argue for its classification as a sub-category of Post-Traumatic Stress Disorder (hereafter referred to as 'PTSD'), and as a legal defence.[86] She identified a gap in the legal framework which provided no defence to women who killed their male intimate partners as a result of ongoing abuse, save for pleading an insanity defence.[87] Her theories remain key theoretical frameworks upon which various foreign legal jurisdictions consider issues around these defences today. Despite praise, it has also received widespread criticism for creating the stereotype that abused women suffer from a mental disorder.[88]

At the time of the Battered Woman Movement was the case of Francine Hughes who burned down her house in 1977, along with her abusive husband, after dousing the bed in which he was sleeping with gasoline.[89] She was exonerated of first-degree murder based on temporary insanity. Despite this, the atmosphere in the aftermath was one of antagonism by feminists who argued for

[82] Lenore E.A. Walker 'Battered Women Syndrome and Self-Defense' (1992) Notre Dame Journal of Law, Ethics and Public Policy 6(2) at 326.
[83] Seligman op cit note 52 at 408.
[84] Ibid at 409.
[85] Bess Rothenberg 'We Don't Have Time for Social Change: Cultural Compromise and the Battered Woman Syndrome' (2003) 17 Gender and Society 5 at 772.
[86] Walker op cit note 82 at 321.
[87] Walker op cit note 82 at 321.
[88] Rothenburg op cit note 85 at 772.
[89] Ann Jones 'The Burning Bed and Man Slaughter' (1986) 9 Women's Rights Law Reporter at 296.

a self-defence plea instead.[90] This would provide long-overdue recognition that an abused woman's behaviour was not a product of mental incapacity but a survival response to domestic abuse.

Aldrige and Browne, some 26 years after the Hughes case, argued that predicting the incidence of spousal homicide can be linked to a number of major risk factors, one of which is spousal assault.[91] Of the nine factors they list, eight of them were apparent in *Engelbrecht*.[92] Whilst the homicides they were referring to generally pertained to the abuser eventually killing the victim of the ongoing abuse, it is interesting to consider that these same factors are common in 'cycles of violence cases' as well, a concept explained below. Briefly, the factors they considered are the following: history of family violence, married relationships, substance abuse, sexual jealousy, periods of separation, stalking, personality disorders, and previous domestic violence.[93]

These factors tie-in with the other key concept mentioned: namely, cycles of violence or abuse. The cyclical nature of the abuse is often characterised, as Walker states, by minor incidents of abuse, thereafter a major abuse episode, and lastly, a honeymoon phase in which the abuser ceases all abuse and begs for forgiveness (which eventually ends, and the cycle repeats).[94] The impact of this cycle leads depleted self-worth, depression, disassociation, anxiety, thoughts of self-harm and suicide, helplessness and trauma responses.[95]

A Critique of Battered Women's Syndrome

Battered Women's Syndrome and Walker's theories concerning the psychology of violence against women are not without their criticisms. The major concern of the theory is the medicalisation of

[90] Rothenburg op cit note 85 at 773.
[91] Mari L. Aldridge & Kevin D. Browne 'Perpetrators of Spousal Homicide: A review' (2003) 4.3 Trauma, Violence & Abuse at 267.
[92] *Engelbrecht* supra note 1.
[93] Aldridge & Browne op cit note 91 at 268.
[94] *Engelbrecht* supra note 1 para 169.
[95] Burchell op cit note 16 at 333-334.

the term, and the subsequent impact of stereotyping abused women's behaviour as relating to mental illness or insanity.[96] For instance, Africa criticises the manner in which gender and violence are perceived by society at large, and how stereotypes of femininity prevent us from considering violent females as a reality.[97] A clear theme apparent is the inherent assumption of psychopathological issues in violent women – violence, which goes against the gentle and subdued feminine norm, must be a product of madness.[98]

Not only does this 'mad woman' mentality discredit a woman's behaviour as legitimate and serious, but it disenfranchises women of agency.[99] This entrenches the notion that the only available defences to these women are to plead to their capacity by claiming insanity. Africa links this to Walker's semantics around 'syndromes' and argues that this medicalisation exacerbates these stereotypes.[100]

Goosen specifically argues from a South African legal perspective and discredits any deviation of current common law criminal defences in relation to battered women killing their abusers.[101] She argues that developing the concepts of reasonableness and imminence in the case was unnecessary, and reasons that a putative private defence is suitable protection for women who mistakenly believe that they are killing their abusers in self-defence.[102] I am sceptical of Goosen's alternative. A putative private defence as the only defence available would unjustly narrow the legal relief available to battered women in South Africa. Only those who can raise evidence to support a genuine belief that they were acting within the confines of self-defence could utilise it. What of

[96] Ibid at 334.
[97] Adelene Africa 'Standpoint: Murderous women? Rethinking gender and theories of violence' (2010) Feminist Africa 14 Rethinking Gender and Violence at 79.
[98] Ibid at 80.
[99] Africa op cit note 97 at 81.
[100] Ibid at 82.
[101] Samantha Goosen 'Battered women and the requirement of imminence in self-defence' (2013) PEJ/PER 16(1) at 79.
[102] Ibid.

a woman who knows she is not acting within the strict traditional definition of self-defence and nonetheless kills her abuser out of desperation?

Whilst Africa and Goosen write from a Southern African perspective, Rothenburg writes from a North American perspective and echoes many of the sentiments mentioned thus far. However, she goes a step further by arguing that the weakness associated with the 'syndrome' has an additional consequence of narrowly defining who 'counts' as a victim of cycles of abuse.[103] In other words, an archetype of what a victim 'looks' like is created, and anyone who seems to fall out of that is discounted. This has important legal implications – it would be extremely unfortunate for a woman to only claim any of the defences discussed in this proposal provided she clearly fits into the definitional concepts associated with Battered Women's Syndrome. Because of the stereotypes Battered Women's Syndrome has the propensity to evoke, it is not a useful defence in its own rite.

Rothenburg discusses two key additional criticisms: first, she states that the concern should shift away from the question of why women stay in abusive spaces, to why abusers continually beat their intimate partners.[104] What she is alluding to here is the common discussion in both academia and caselaw alike that criticises an abused woman's decision to stay with an abuser. Her second criticism is that Walker's theory assumes that 'normal' women are passive, and it is their cycles of abuse that creates the resultant violence.[105] As opposed to the 'giving up' perception that learned helplessness evokes, her survivor theory considers the actions of abused women to be a product of their own survivor instincts in the face of a society that has failed to protect them.[106]

The important takeaway from these critiques is that the multiplicity of reactions and effects of abuse cannot be adequately accounted for by the Battered Women's Syndrome theory.[107] Reddi

[103] Rothenberg op cit note 85 at 771.
[104] Ibid at 780.
[105] Ibid.
[106] Ibid at 789.
[107] Managay Reddi 'Battered woman syndrome: Some reflections on the utility of this 'syndrome' to South African women who kill their abusers' (2005) South African Journal of Criminal Justice 18(3) at 259.

not only criticises the lack of 'criteria' for a battered woman, but makes the pertinent claim that categorising it as a sub-category of PTSD limits the scope of the defence to being purely pathological; and that there is no evidence to suggest that other PTSD related diagnoses are always considered pertinent in legal defences.[108] And so, while it has been considered quasi-legal insofar as the defences for women who kill in abusive relationships, it should not be considered the only lens through which the characterisation, and therefore defence, of these women are seen. Thus, my exploration of self-defence, and whether the evidence of abuse in previous cases could allow for self-defence to be justifiably extended.

[108] Ibid at 263.

IV. DATA SET – JUDGMENTS INVOLVING APPARENT CYCLICAL DOMESTIC ABUSE IN SOUTH AFRICA POST-1994

The Case Law

Engelbrecht

The outcome of these research efforts culminated in 18 court cases. Before going into the analysis, each case is briefly described below. Though I will summarise these cases chronologically, it seems only fitting to start with the case that inspired this research, the jurisprudential potential of which has not been fully realised. Jaco and Anne-Marie Engelbrecht's marriage was fraught with sexual, psychological, physical, emotional, financial and child abuse.[109] It shed light on the incidence of domestic violence in South Africa and the extent to which it plagues the women of this country daily. Insofar as the law is concerned, it made important strides in the realm of private defence, specifically the component of reasonableness.[110]

The marriage that formed the background to Mrs Engelbrecht's murder conviction entailed years of abuse at Jaco's hands. Though the details of the abuse are too numerous to provide a detailed account in this paper, brief recounting is needed to provide the reader with an idea of what Ms Engelbrecht endured. Firstly, their child, Chanté was born as a product of sexual abuse at the hands of Mr Engelbrecht.[111] Though Mrs Engelbrecht felt neither financially nor emotionally ready for a child, her husband went to great lengths to ensure they conceived, including throwing away her contraceptive pills and forcing sex when she was unwilling (though the evidence referenced does refer to later rape incidences, it is implicit that this bout of sexual abuse was tantamount to rape as per the current legal definition).[112] The birth of their daughter

[109] *S v Engelbrecht* supra note 1 para 2.
[110] Ibid.
[111] Ibid para 40.
[112] Ibid; Criminal Law (Sexual Offences and Related Matters) Act, 32 of 2007 s 3.

made an already financially strained family unit more economical stressed.[113] This financial strain was key in keeping Anne-Marie in the abusive marriage.

Her mental health, plagued by depression, anxiety and exhaustion, and for which she was medicated, was only worsened by the monetary stresses she felt.[114] Furthermore, she was isolated from her family, ostracised by his, and slowly detached from her friends and colleagues as her husband's efforts at marginalising her from her community succeeded.[115] Despite this social isolation, a number of her colleagues testified to the abuse they were personally privy to, which included verbal and physical abuse, harassment and stalking behaviours, and her mental state.[116] Jaco would keep watch over her all day – often driving multiple times past the medical clinic in which she worked and calling her.[117] Friends and security officials who were involved in her life testified to the first-hand abuse they witnessed, and sometimes experienced at Jaco's hands.[118] This sustained pattern of domestic violence provided the Court the impetus to consider the psychological trauma faced by Mrs Engelbrecht, which included a discussion of Battered Women's Syndrome.

As the assaults increased, Anne-Marie called the police frequently though they often did not show up.[119] A component of the physical abuse would often comprise of Jaco strangling her and threatening to kill her.[120] After especially gruesome incidences, she would try to lay charges and secure his arrest,[121] sought protection orders,[122] tried to leave him and initiated divorce

[113] *S v Engelbrecht* supra note 1 para 40.
[114] Ibid at 43.
[115] Ibid para 45.
[116] Ibid.
[117] Ibid para 49.
[118] Ibid.
[119] Ibid para 58.
[120] Ibid para 63.
[121] Ibid para 67.
[122] *S v Engelbrecht* supra note 1 para 71.

proceedings.[123] Whether due to inefficiencies by the authorities or Mr Engelbrecht's control over her, none of it seemed to relieve the situation.

Anne-Marie and Jaco were married from 1993 till 2002, and on the evening of Saturday, 29 June 2002, she killed him in his sleep.[124] The evening was characterised by both physical and sexual abuse towards Ms Engelbrecht but the court found that the turning point came when Jaco abused their daughter and prevented Anne-Marie from consoling her.[125] Once he was asleep, she restrained him with thumb cuffs behind his back and suffocated him.[126]

The crux of the Defence's case was that as a battered woman, Anne-Marie acted in self-defence. The Prosecution made several arguments against this by attempting to excuse Mr Engelbrecht's behaviour and trying to discredit the evidence of the abuse.[127] None of this held muster. However, the key decision insofar as the conviction was concerned was largely based on the legal requirements of self-defence, which, *inter alia,* include that there be an attack that has commenced, or that an attack is imminent;[128] secondly, that the measures taken in self-defence be proportional to the level of attack or threat thereof and thus, be reasonable; and additionally, that the actions were necessary as well.[129]

The court held that private defence is a justification against unlawfulness where abused women have killed their spouses, though it is a question of fact on the circumstances of each case whether the requirements of the defence are met.[130] The concern with the imminence requirement is the very strict temporal nature of it. Though Mrs Engelbrecht was habitually abused for years, that key moment in which she ended her abuser's life was not characterised by imminent attack –

[123] Ibid para 73-74.
[124] Ibid para 123.
[125] Ibid para 130.
[126] Ibid para 134.
[127] Ibid para 140.
[128] Burchell op cit note 16 at 122.
[129] Ibid.
[130] Ibid para 340.

he was asleep. However, the Court considered foreign jurisprudence, namely the seminal Canadian court case of *Lavallee,* which argued that imminence can include behaviour that can be expected or foreseen.[131]

Judge Satchwell thus extended the notion of imminence to include instances in which there is inevitability of attack.[132] This is where the evidence of cyclical abuse demonstrates that a near future event of abuse is almost guaranteed. In this way, we can describe her scenario as always being under threat of attack. As a result, the court indeed found this requirement to be satisfied because of the way Mr Engelbrecht meted out constant abuse, almost on a daily basis.[133]

It happened to be the latter concepts, that of reasonableness and necessity, that formed the crux of this case.[134] This test is traditionally an objective standard that has the Court ask what the reasonable person would do had they been in the position of the accused.[135] Judge Satchwell was assisted by two assessors, who argued that on the facts, Mrs Engelbrecht did not afford society and its institutions sufficient opportunity to help her and as a result, her conduct was neither reasonable nor necessary. Judge Satchwell, on the other hand, found in the minority judgment that there was nothing unreasonable about her conduct in the circumstances and that it was indeed necessary given the extent to which she had sought help time and again, and was repeatedly let down. It is important to note here inherent discomfort that her acquittal hinged on a decision by two assessors, as opposed to the Judge herself. Her conviction was solely based on the fact that the assessors overruled the Judge. Whilst assessors do act as a safeguard against the judicial inarticulate premise,[136] one must question their competence in adjudicating facts and facts of a case, when it is not their career path to do so.

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[131] *S v Engelbrecht* supra note 1 para 348.
[132] Ibid.
[133] Ibid para 398.
[134] Ibid para 214.
[135] Ibid para 327.
[136] The inarticulate premise is described as that aspect of a Judge's decision that is necessarily influenced by their own bias and subjective outlook.

Though she was found guilty of murder, the court used its sentencing discretion considering the mitigating factors in the case. In my years as a law student, no final paragraph of a judgment has struck me as this one did: 'Mrs Engelbrecht, you are detained until the rising of this Court.' Despite finding her guilty of murder, the Court did not see fit to subject her to any more punishment than that to which she had been subjected during her marriage with Mr Engelbrecht.

Potgieter

One of the most salient points made in Judge Satchwell's judgment is right at the beginning: "once there has been a single assault, the fabric of the relationship changes irrevocably. It is thereafter possible … that the violence may be repeated with equivalent or greater levels of injury."[137] *Potgieter,* though the judgment is dated in 1993, was a case I had to include. I recognise my methodology had dated parameters, but I do not believe the integrity of my research is too marred by the inclusion of this case – the reasons for which are exemplified in its facts and legal discussions.

Constance Eileen Potgieter appealed her murder conviction at the SCA on the basis of a sane automatism defence which, if proven, rebukes the requisite legal capacity to prove the commission of a crime.[138] In her marriage with the deceased, from which three children were conceived, he assaulted her on a regular basis and imprisoned her into staying in the marriage via financial means.[139] The judgment, however, repeatedly emphasises that she stayed with him because she loved him and hoped he would change.[140] His abuse was so severe that he caused a miscarriage when he assaulted her while she was pregnant.[141]

[137] *S v Engelbrecht* supra note 1 para 52.
[138] *S v Potgieter* (355/92) [1993] ZASCA 186; [1994] 3 All SA 432 (A) (29 November 1993) at 2.
[139] *S v Potgieter* supra note 138 at 2.
[140] Ibid.
[141] Ibid at 6.

Though she tried to leave him, her dependence on him and deteriorating mental state had her stay with him.[142] Though the case does not mentioned it, I would not hesitate to argue that some of the assaults against her actually posed real threats to her life, and could constitute attempted murder.[143] As with the *Engelbrecht* case, her attempts at securing police assistance were met with subpar responses.[144] The day of his murder, counsel for the appellant demonstrated that she planned on leaving him and retrieved her pistol from the safe with the help of a locksmith.[145] That evening, however, after another bout of his abuse, she recalls coming to and realising that she had shot him after the bang from the gun went off.[146]

The State tendered evidence, including that of forensic experts, to dismantle her account of events, which the Court found convincing and found her version of events improbable – they found that she premeditated the murder and so did not find for her defence of sane automatism.[147] However, the appeal against her original seven year sentence succeeded insofar as the Court found her circumstances sufficiently mitigating to confirm that the court a quo's imprisonment sentence was unduly harsh.[148] They remitted it to the trial court for re-sentencing but made clear arguments for correctional supervision to be imposed in lieu of imprisonment.[149]

Larsen

A year later came the *Larsen* judgment. Another appeal case at the SCA whereby the appellant, Mrs Wesselina Andrias Johanna Larsen, appealed her conviction of murder and subsequent five year partly suspended sentence. As with the previous two cases the appellant was married to the

[142] Ibid at 6.
[143] Ibid at 12-18.
[144] Ibid at 19.
[145] Ibid at 14.
[146] Ibid at 24.
[147] Ibid at 38, 48 & 89-90.
[148] Ibid at 85.
[149] Ibid at 90.

deceased, and they had three children.[150] Though the marriage was not a happy one initially, it did eventually deteriorate into an abusive one in which Mr Larsen inflicted physical abuse upon the appellant.[151] The day before the fated evening, which was plagued by the deceased's usual bouts of abuse, Mrs Larsen spent the evening in her daughter's bedroom after hiding a pistol she had retrieved from their safe under her daughter's mattress.[152] That day, he came home and verbally abused Mrs Larsen – she fetched the pistol and fired three shots, one of which hit and killed Mr Larsen.[153]

At the trial she pleaded not guilty based on lack of intent. She argued that the shots were fired during the course of a scuffle with the deceased and were discharged accidentally.[154] As to why she had the gun, Mrs Larsen stated that she wanted to scare him and that she had believed it was unloaded.[155] The court found these assertions unconvincing, especially during her cross-examination and other witness testimony, which shed light on the fact that she seemed to make reference to "killing Mike if she found he was having an affair" previously.[156]

Aside from the evidentiary references to her abuse, which were primarily based on testimony, there was no evidence tendered regarding her mental state or the toll being habitually battered had on her well-being, both physically and mentally. In fact, aside from general references, the history of assaults as weighing in mitigation was only mentioned right at the end of the judgment.[157] The SCA affirmed her conviction but remitted the matter back to the trial court to reconsider sentencing given the mitigating circumstances surrounding her abuse.[158] The judge explored and encouraged the possibility of correctional supervision, using the *Potgieter* case as

[150] *S v Larsen* (78/92) [1994] ZASCA 61; [1994] 4 All SA 380 (A) (5 May 1994) at 2.
[151] Ibid at 3.
[152] Ibid.
[153] Ibid at 4.
[154] Ibid at 7.
[155] Ibid at 18.
[156] Ibid at 21.
[157] *S v Larsen* supra note 150 at 27.
[158] Ibid at 26.

persuasive precedent. In both *Potgieter*, *Larsen* and *Engelbrecht*, the Court emphasised that these women did not pose threat to society.

Ferreira

Though I have reiterated that it was *Engelbrecht* that provided the impetus for this research, it would be a mistake on my part not to acknowledge that the *Ferreira* judgment has been as much, if not more, of a persuasive authority in this area. Given the South African legal framework's system of precedent and stare decisis,[159] this is unsurprising: whereas *Engelbrecht* was a high court judgment, *Ferreira* was an SCA judgment (though noting that precedent is insofar as convictions are concerned, whereas sentencing judgments do not create that same precedent). As will be evident in all these cases, the factual scenarios are disturbingly similar. Anieta Natasha Ferreira (first appellant), along with Boston Thys Chilambo and George Koesyn (second and third appellant respectively) were convicted of the premeditated murder of Cyril Parkmen – the intimate partner of the first appellant.[160] The appeal was not against their conviction but against their sentences, in which counsel for the Appellants argued that 'substantial and compelling' circumstances[161] existed to justify a deviation from the mandatory minimum sentence, which was life imprisonment.[162] My focus remains on Ms Ferreira's appeal for the purpose of this research, though it is important to note the reality that many battered women do seek external assistance with the killing of their abusers, and that is a reality that does complicate the legal defence arguments to be later discussed.

The first appellant had hired the second and third appellant to kill her husband. Mrs Ferreira's financial, physical, and emotional abuse was extensive and relentless at the hands of the

[159] François du Bois *Sources of law: Common law and* precedent, Chapter 1 in François du Bois's 'Wille's Principles of South African Law' 9th ed (2007) at 86-90.
[160] *S v Ferreira and Others* (245/03) [2004] ZASCA 29; [2004] 4 All SA 373 (SCA) (1 April 2004) para 1-3.
[161] S51(3)(a) of the Criminal Law Amendment Act 105 of 1997 read with Schedule 2 Part 1
[162] Criminal Law Amendment Act, 105 of 1997 s 51.

deceased, who also threatened to take her life repeatedly and left her destitute.[163] She eventually handed her children over the foster care system and left him. However, her destitution led her to take up a position as his housekeeper to survive.[164] She eventually moved in with him again and the abuse reignited. The power imbalance between them was stark – it was facilitated in all aspects of her existence and is encapsulated in his demands that she refers to him as 'Mr Parkman.[165]'

At times, her survival depended solely on other farm workers who would smuggle her food when he locked her in her room for weeks on end.[166] He isolated her from everyone, including her children and abused her to within an inch of her life, breaking multiple of her bones, attempting to stab her and pointing a firearm at her.[167] She was never allowed to receive medical attention and he repeatedly raped her, during which he would often beat her, to the point of needing surgery.[168] She tried to leave him, placate him and call the police, all to no avail.[169] The court found her turning point to be one particular incident in which he raped her, and then threatened to hire other men to rape her should she try and leave him again.[170] She perceived no other option but to end his life and enlisted the help of the other two appellants in this regard.[171] They strangled him, removed his body and received money and his car in remuneration for the deed.[172]

The crux of the legal issue for the SCA was not whether she was abused, but whether the contract killing was objectively justifiable in self-defence, or if not, justifiable as mitigation in sentencing.[173] The court, though recognising her plight, did not find her behaviour to constitute self-defence on the law. Noting the legal requirements discussed in *Englebrecht* (which came a year

[163] *S v Ferreira* supra note 160 para 15
[164] Ibid.
[165] Ibid para 17.
[166] Ibid para 18.
[167] Ibid para 20.
[168] Ibid para 22.
[169] Ibid para 24-25.
[170] Ibid para 26.
[171] Ibid para 26.
[172] Ibid para 27.
[173] *S v Ferreira* supra note 160 para 38.

later), this is disappointing but unsurprising. The Court, however, did find her abuse to constitute substantial and compelling circumstances to justify a deviation from the prescribed sentence.[174] At this point in time, the first appellant had already served three years imprisonment and the court thus substituted her initial life sentence to six years imprisonment, 3 years of which to be suspended.[175] The second and third appellant, however, failed in their appeals because the court did not find mitigating circumstances, aside from poor economic situations which prompted them to take the money. Their appeals were thus dismissed.[176]

Hoare

Most cases either squarely fit my search criteria or did not. There were, however, some 'theoretical cuspers' whose facts seemed to fit the criteria, but 'only just.' In deciding whether to disregard or keep them, I chose the latter – primarily because I think there is utility in discussing those aspects that do fit. *Hoare* is one such case. This was an appeal case at the Transvaal Provincial Division (now the North Gauteng High Court in Pretoria). The appellant was one John Charles Hoare who, along with his mother, was found guilty of the murder of his mother's intimate partner.[177] Both were sentenced to life imprisonment. The appellant does not fit the criteria of an abused woman. His mother, however, did. And though she did not appeal her sentence, the references to her abuse in this appeal case are worth consideration.

This case also brings up an interesting corollary discussion to be had in the realm of battered women defences: where it is not the abused woman, but a close relation of hers, that purports to act in self-defence on her behalf. Though this is not the topic of my thesis, it is an avenue that could be investigated in another paper. They both pleaded guilty to murder but the

[174] Ibid para 43.
[175] Ibid para 46.
[176] Ibid para 56.
[177] *S v Hoare* (A1959/04) [2005] ZAGPHC 206 (11 April 2005) para 1.

appellant here argued in mitigation of his sentence that the deceased repeatedly abused his mother, physically, emotionally, and sexually.[178] He stated that "he could not stand the abuse of his mother" and so hired another, the third accused in the court a quo, to kill his mother's husband.[179]

The SCA agreed with the court a quo that the mother exaggerated her abuse and stated that the deceased was not violent by nature.[180] No reference to evidence was stated in making this determination. The court only reasoned that the marriage had been a long one and that they found it "strange" that she chose to live with him if it was so unbearable.[181] The court argued that there was "clearly a commercial motive for the killing," by referencing an insurance policy that was received by the mother after the killing.[182] The appeal was dismissed.[183]

Van Dalen

Though an appeal judgment naturally deals with evidence in less detail than a trial court judgment does, one only need to compare the *Ferreira* case and the *Hoare* cases, both of which were appeals, to see a clear discrepancy insofar as the different courts' attitudes towards evidence is concerned. This will be expanded upon in my analysis chapter. The *Hoare* case is a good example of a trend of cases that make bold findings on scant evidence, as was the case in *Van Dalen.* There were three accused charged and convicted of the murder of Antonio Van Dalen, the first accused's husband.[184] The murder was a violent one with 47 stab wounds inflicted upon the deceased as per the expert witness.[185] The third accused was part of the commission of the murder in that he, along with others actually meted out the killing while Emily Van Dalen and her daughter hid in the

[178] *S v Hoare* supra note 177 para 4.
[179] Ibid.
[180] Ibid para 5.
[181] Ibid para 5.
[182] Ibid para 8.
[183] Ibid para 10.
[184] *S v Van Dalen and Others* (SS57/2008) [2008] ZAWCHC 82 (20 October 2008) at 1.
[185] Ibid at 4.

room.[186] The court did find that there existed an agreement between the parties for the killing.[187] The court equally found what they referred to as "a common thread" between the statements of the accused that the primary motive was because of the ongoing abuse at the hands of the deceased.[188] No further evidence was called in this regard, and it seems bizarre that the defence did not seek to tender more evidence concerning the abuse in mitigation. All three accused were found guilty of murder.[189]

In the sentencing judgment, the court considered the *Zinn* triad[190] and the principle of deterrence in deciding the individual sentences.[191] Though the court did consider the interests of the child, who was a minor, there was next to zero reference to the evidence of the abuse.[192] In fact, the only statement the court made to this effect was that there was unhappiness in the marriage.[193] The accused were sentenced to periods of imprisonment ranging from five to seven years.[194]

Manyaapelo

Ms Nompumelelo Manyaapelo appealed against her sentence of 30 years imprisonment to the High Court after she pleaded guilty to, and was convicted of, murder.[195] She was married to the deceased and had three children with him, one of whom tragically passed from drowning at the age of two.[196] At the outset of the appeal, the court noted that her marriage was troubled by her

[186] Ibid at 8.
[187] Ibid at 9.
[188] Ibid at 10.
[189] Ibid at 13.
[190] Zinn triad: interests of the community, the seriousness of the offence and the personal circumstances of the accused.
[191] *S v Van Dalen and Others* (SS57/2008) [2008] ZAWCHC 84 (31 October 2008) at 2.
[192] Ibid at 3.
[193] Ibid.
[194] Ibid at 4.
[195] *Manyaapelo v S* (CA 40/2009) [2009] ZANWHC 22 (10 September 2009) para 1.
[196] *Manyaapelo v S* supra note 195 para 1.

abuse at the deceased's hands, primarily emotionally and financially at first.[197] This initial period included massive infidelity on his part and isolating her from family and friends.[198] This quickly escalated however to physical and sexual abuse including chasing her with a knife, punching her and raping her.[199]

Despite this, she felt she was beholden to him and saw no option but to persevere.[200] However, after speaking to a friend about the abusive relationship she was confronted with his offer to hire hitmen to kill her husband, which she dismissed at the time.[201] There was, however, more physical and emotional turmoil which lead to a period of depression that culminated in her drinking sleeping tablets.[202] The judgment did not clarify if this was an attempted suicide or not. There was an attempt during this time to enlist the help of the hitmen, but it fell through. She reenlisted their help and managed to facilitate the killing in his place of work.[203] They staged the scene to make it look like a robbery.[204] She immediately took full responsibility for the murder and told the police who assisted her.[205]

The basis of the appeal was, *inter alia*, the mitigating circumstances concerning the deceased's abuse and the rights of the children, which counsel for the appellant argued were justifications for a lesser sentence.[206] The court considered the various mitigating circumstances and came to the conclusion that firstly, a non-custodial sentence (correctional supervision) was not an appropriate alternative to imprisonment because of the aggravating factors, such as the premeditation of the murder.[207] But further, agreed that the appeal ought to be upheld because of

[197] Ibid para 4-5.
[198] Ibid para 7.
[199] Ibid para 7-8.
[200] Ibid para 8.
[201] Ibid para 9.
[202] Ibid para 14.
[203] Ibid para 19.
[204] Ibid.
[205] Ibid para 20.
[206] Ibid para 23.
[207] *Manyaapelo v S* supra note 195 para 51.

the mitigating circumstances. Despite the years of abuse she was privy to, she was still sentenced to 20 years imprisonment.[208]

Steyn

From the cases described thus far, it is evident that there is no consistent approach that counsel takes in defending abused women when they have retaliated against their abusers. The *Steyn* case was another appeal at the SCA. Ms Steyn appealed her culpable homicide conviction – she shot and killed her husband who had abused her for many years.[209] The High Court, considering the abuse, sentenced her to three years imprisonment, wholly suspended.[210] She had argued that she acted in self-defence, and continued this line of defence in her appeal. The judgment detailed, albeit briefly, the type of abuse she was privy to, which included mental and physical torture, threats of murder, and locking her in a room without food.[211] She divorced her husband and was institutionalised for depression, after which she eventually had to return to the deceased because of financial constraints.[212] The abuse thus continued, and her physical and mental health deteriorated rapidly.[213]

The night of the murder was characterised by more verbal and physical abuse, with the deceased grabbing her by the neck and repeatedly hitting her.[214] She alleged that she escaped to her room and took her revolver which she hoped would scare him from continuing the onslaught

[208] Ibid para 53.
[209] *Steyn v S* (105/09) [2009] ZASCA 152; 2010 (1) SACR 411 (SCA) (27 November 2009) para 1.
[210] Ibid para 1.
[211] Ibid para 2.
[212] Ibid para 4.
[213] Ibid para 4 -6.
[214] Ibid para 8.

of battering.[215] It did not and he charged towards her screaming promises of killing her – it was at this point that she said she shot him.[216]

This version of events, however, was not accepted by the court a quo based on evidence of a police forensic scientist who argued that the nature of the bullet wound suggested the deceased was not rushing at the appellant when she fired the shot.[217] As a result, there was no threat or attack at that exact moment and so, the self-defence plea failed.[218] The SCA took great issue with this line of reasoning and stated that the expert opinion was based on facts that could not be accurately proven and as a result, the court a quo could not make such a determination. The appeal was upheld, and the self-defence plea prevailed.

Marais

Positive examples like the *Steyn* judgment are few and far between. Ms Marais was serving a life sentence after she was convicted of "the contract murder" of her husband.[219] The judgment begins by recognising the "horrific spectre of domestic violence" that creates situations whereby abused women kill their abusers, or engage others to do so.[220] The judgment also recognised that the *Ferreira* judgment created a precedent for recognising that such killings may be defended with a plea of self-defence depending on the woman's state of mind and motive, and whether it was an objectively justifiable action to take.[221] Ms Marais appealed both her conviction and sentence,

[215] *Steyn v S* supra note 209 para 9.
[216] Ibid para 10.
[217] Ibid para 12.
[218] Ibid para 14.
[219] *S v Marais* (CCT 54/10) [2010] ZACC 16; 2010 (2) SACR 606 (CC) 2011 (1); SA 502 (CC); 2010 (12) BCLR 1223 (CC) (21 September 2010) para 1.
[220] Ibid para 1.
[221] Ibid.

though the application for leave to appeal against her sentence was still pending before the High Court at the time of this judgment, so it was the conviction appeal that was dealt with.[222]

The court a quo convicted both the appellant and five others for the murder, during which the appellant argued that she was a battered woman.[223] The evidence tendered in this regard was lengthy and gruesome. She was repeatedly beaten and raped by him, which lead her to hire four others to assist in giving him "a hiding."[224] She claimed that at the time of arranging this, she was abusing tranquilizers and so was not herself. Her line of defence was unclear– it seems as though there were arguments of self-defence, being a battered woman and of the soundness of her mind in organising the hit. There was also an argument made that she did not intend to kill him but to scare him so that he would treat her better.[225]

The High Court disputed all this and stated that she was not battered and killed him for financial gain.[226] In her appeal she argued that the trial court infringed on her constitutional right to fair trial when it dismissed her defence as a battered woman.[227] It is trite that for the CC to accept leave to appeal, the matter must either raise a constitutional issue or is in the interests of justice.[228] The CC was not persuaded by her argument and so dismissed the appeal on the basis that she did not raise a constitutional issue, but rather entailed factual discrepancies she found within the trial court's reasoning.[229]

[222] *S v Marais* supra note 219 para 3.
[223] Ibid para 5.
[224] Ibid.
[225] Ibid.
[226] Ibid para 6.
[227] Ibid Para 7.
[228] Ibid Para 9.
[229] Ibid Para 15.

Noorman

The *Noorman* case was yet another appeal, this time from a Regional Magistrate Court decision in which Gerda Noorman was charged and convicted of murdering Heinrich Titus.[230] Though she pleaded not guilty in the court a quo, she appealed against her sentence only.[231] On the night in question, the judgment describes the deceased as 'searching for the appellant.[232] I think a more accurate verb to use would be "hunted." The judgment describes him kicking down the front door and viciously assaulting her.[233] The neighbours, who testified in the court a quo, entered the house, and described the appellant begging him to stop.[234] She sustained multiple injuries, both from his fists and him using broken broomstick.[235]

The witnesses fled the scene, fearing for their own lives.[236] They witnessed from their balcony the appellant arm herself with a knife and stab the deceased who was lying on his bed at that point.[237] It was during this stabbing that he received a wound which proved fatal, but only some weeks after the incident. The appellant had immediately called for help after realising what happened, and the judgment described her as both hysterical and remorseful.[238] Perhaps most disturbingly, the deceased was allowed to return home and cohabit with the appellant and their young child.[239]

The SCA considered whether her sentence of 13 years imprisonment was inappropriate. Aside from the *Zinn* triad, key to the court's analysis was the rights of the child, as enshrined in the Constitution.[240] As the now sole parent to a minor child, the court considered the impact of

[230] *Noorman v S* (A 532/10) [2011] ZAWCHC 120 (27 January 2011) para 1-2.
[231] Ibid para 4.
[232] Ibid para 7.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Ibid para 8.
[237] Ibid para 9.
[238] Ibid para 11.
[239] Ibid para 12.
[240] *Noorman v S* supra note 230 para 28.

incarceration on the child and considered the sentence as shockingly inappropriate.[241] Though this investigation into the impact of imprisonment on the child is laudable, I find it shocking that there was no enquiry as to the abuse or her mental state as equally mitigating in respect of her sentence. And there does not appear to be evidence in the judgment that it was raised by her counsel. The appeal was upheld and her sentenced was reduced to four years.[242]

Piedt

The next case came only a few months later. The *Piedt* case concerned three appellants appealing their conviction of murder in the Division of the Western Cape High Court in Swellendam.[243] They were sentenced to different periods of imprisonment for the murder of the third appellant's (Mrs Ruby Marais') husband.[244] As discussed above, the CC had already issued a decision dismissing Mrs Marais's appeal of her conviction on the grounds that it did not give rise to constitutional issues. This judgment, which occurred just over a year later, concerned the appeal of her sentence. Only three of the original six appealed their sentences in this court: the first and third for their life sentences, and the second for his sentence of 16 years imprisonment.[245]

The judgment noted at the outset the failed applications for leave to appeal against their convictions in the SCA and CC.[246] Though the latter's judgment detailed some of the abuse she endured and the nature of the murder, the *Piedt* judgment went into greater detail. In deciding whether to uphold the appeals, the Court considered whether substantial and compelling circumstances existed to justify a deviation from the minimum sentence of life imprisonment.[247]

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[241] Ibid para 28-46.
[242] Ibid para 52.
[243] *S v Piedt and Anders* (A393 / 10) [2011] ZAWCHC 502 (22 December 2011) para 1.
[244] Ibid para 2.
[245] Ibid.
[246] Ibid para 3.
[247] *S v Piedt and Anders* supra note 243 para 15; Criminal Procedure Act, 105 of 1997 s 51 & s 51(3)(a).

Unlike the court a quo, this Court recognised that she was a victim of abuse and found the trial court incorrect in its findings.[248]

In referencing the third appellant's arguments in the CC case, this judgment also dealt with the *SARFU*[249] precedent, insofar as the fact that most of this evidence was not seriously challenged in cross-examination, and so ought to have been accepted by the trial judge.[250] This judgment described the trial court's finding as "outrageous."[251] In light of these mitigating factors, the court upheld the appeal and reduced Mrs Marais's sentence to 20 years imprisonment.[252]

Mapeyi

The *Mapeyi* case saw three accused being charged and convicted with, inter alia, murder of the first accused's husband.[253] Along with other charges, there was an additional charge against the first accused, Mrs Tamara Mapeyi, of the attempted murder of the deceased via poisoning at an earlier time.[254] Though all three accused made minor admissions, primarily concerning the usage of cell phones that were part of the evidence tendered by the State, all three pleaded not guilty to the main charges.[255] It was not in dispute that the deceased died from a gunshot wound to the head and the State led witness testimony concerning the presence of two men, namely accused 2 and 3, near the scene of the crime.[256]

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[248] Ibid para 21 & 22.

[249] *President of Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999): case concerning Presidential powers and the ambit of the courts' powers to review the exercise thereof.

[250] *S v Piedt and Anders* supra note 243 para 37.

[251] Ibid para 40.

[252] Ibid para 74.

[253] *S v Mapeyi and Others* (SS07/2011) [2012] ZAWCHC 256 (9 February 2012) at 1-2.

[254] Ibid at 3.

[255] Ibid at 2-3.

[256] *S v Mapeyi and Others* supra note 253 at 5-7.

Much of the testimony concerned linking the three accused via evidence accumulated from the text messages on their phones. There was also a trial-within-a-trial concerning allegations of police brutality and coercion by the other accused. This is of less concern for the purposes of this research paper, but it is important to note that of this 153-page judgment there was scarce emphasis placed on corroborating or investigating the alleged abuse meted out to Mrs Mapeyi.

It is necessary, however, to note the importance of witness testimony in corroborating allegations of abuse where no other concrete evidence like medical records exist – this is because it otherwise becomes a situation of 'he said, she said'. The *Piedt* judgment displays this. The daughter of the first accused, in her testimony, disputed knowing of any problems between the deceased and her mother – she stayed with them during this period.[257] Though this does not totally rule out the allegation of abuse, it understandably cast serious doubt on the voracity of the claims. All three were found guilty of murder.

Khumalo

In stark contrast to the length of the *Mapeyi* case is the *Khumalo* case, though the latter was a sentencing judgment (there did not appear to be any record of the trial court judgment publicly available from my research). The appellant in this matter was Mrs Sibongile Khumalo who was convicted of murdering her husband (she hired a man to shoot him) after pleading guilty.[258] This matter concerned an appeal against her sentence of life imprisonment.[259] The court noted that her plea of guilt recorded her personal circumstances in which she alleged that the deceased abused her and financially neglected her, and that she suffered from depression and desperation as a result.[260]

[257] Ibid at 22.
[258] *Khumalo v S* (2013 (1) SACR 96 (KZP)) [2011] ZAKZPHC 62; [2011] ZAKZPHC 8 (4 March 2011) para 1.
[259] Ibid para 1.
[260] *Khumalo v S* supra note 258 para 2.

The court a quo argued that the statement alone was insufficient to constitute evidence of substantial and compelling circumstances to deviate from the minimum sentence, though she did testify.[261] Most disturbing was the judge stating in her trial that what she had said was "not different from what most women in this country have to endure.[262]" The SCA found that the trial court's reasoning for not accepting certain aspects of the appellant's statement as sufficiently mitigating was flawed.[263] There was no further discussion regarding mitigating circumstances and they upheld the appeal.[264] The sentence was reduced to 20 years.

Kisten

In a similar vein to the *Hoare* case, *Kisten* was the other 'theoretical cusper' prevalent in my data set. As was the case with *Hoare*, a child of the deceased played a part in the abused woman's retaliation against the abuse. Shandel Anne Kisten appealed her conviction and sentence for the murder of her stepfather.[265] She had pleaded guilty at the outset of the case and was assisted by her mother because she was a minor at the time.[266] Because of her plea of guilt, the magistrate convicted her without further questioning and awaited the sentencing hearing for mitigating factors, by which point she had turned the age of majority.[267] However, before sentencing could commence, her counsel brought an application to amend her plea to one of not guilty, which the magistrate rejected in the absence of explanation.[268] She was thus called to testify, at which point she alleged that she did not perpetrate the murder but was an accomplice to her mother who

[261] Ibid para 3 – 6.
[262] Ibid para 7.
[263] Ibid para 18.
[264] Ibid para 19.
[265] *Kisten v S* (AR686/13) [2015] ZAKZDHC 5 (28 January 2015) para 1.
[266] Ibid.
[267] Ibid para 3.
[268] Ibid para 5.

planned the entire episode.[269] The magistrate rejected her amended plea and retained the conviction on her original plea of guilty statement. She was sentenced to 10 years imprisonment.[270]

Botha

Mrs Gloudina Botha, the appellant, was convicted of the murder of her husband and sentenced to 12 years imprisonment after the court a quo found substantial and compelling circumstances to deviate from the prescribed minimum sentence.[271] This judgment concerned her appeal against conviction and sentence, on the basis that the State did not prove beyond a reasonable doubt that she killed him – she alleged that he had committed suicide.[272]

The judgment at the outset acknowledges the history of abuse and cruelty the family of the deceased experienced at his hands. The day on which he died was no different: the judgment described him as in an "enraged state" and that he assaulted the appellant, as witnessed by his stepson.[273] His abuse was so extensive that the appellant had wet herself during the onslaught.[274] The couple lived alone at their farm and so the events of that evening, after their guests left, were only privy to the deceased and the appellant. As a result, the State's case was based on circumstantial evidence.[275] On the appellant's version of events, she had gone to fetch a Disprin for the deceased after he had complained of a headache, amongst other symptoms, and upon her return to the bedroom, heard a gunshot.[276] However, when she did enter the bedroom, the deceased was still alive at the time, with blood on his head.[277]

[269] *Kisten v S* supra note 265 para 6.
[270] Para 7.
[271] *Botha v S* (901/2016) [2017] ZASCA 148 (8 November 2017) para 1.
[272] Ibid.
[273] Ibid para 4.
[274] Ibid.
[275] Ibid para 7.
[276] *Botha v S* supra note 271 para 8-10.
[277] Ibid para 10.

He drank the disprin but after she had tried to remove the gun from his hand, she claimed he got agitated and told her to get out the bedroom whilst pointing the gun at her.[278] She alleged that it was after she changed out of her pyjamas and left the bedroom that she heard the second gunshot and ran back to see the deceased with a second bullet wound to the head.[279] She removed the gun from his hands and rushed to call her children, who returned and put her pyjamas in the washing machine.[280]

It was these facts in the appellant's version of events that the SCA took issue with, finding that her version was not only improbable but false.[281] The court argued that her conduct, if her version was true, was inconsistent with that of a reasonable person in that situation.[282] The SCA thus partially upheld the appeal by dismissing the appeal against conviction but upholding the appeal against the sentence. It was remitted to the court a quo for sentencing.[283] Rogers AJA, in his dissent, argued that the appeal against conviction ought to have also succeeded on the basis that the trial court made unfair assessments on the credibility of the witnesses, and an unbalanced assessment.[284] In sum, the dissent found the court a quo's approach to both evidence and procedure irregular.

Shandu

As stated in my limitations chapter, a drawback to relying on publicly reported judgments is the inherent inconsistencies with the availability of documents in a case. For instance, the *Shandu* case only appears to have the sentencing hearing judgment publicly available. Whilst this does limit the ability to comprehensively assess the Court's approach to evidence, there is nonetheless utility in

[278] Ibid para 11-12.
[279] Ibid para 13.
[280] Ibid para 14-15.
[281] Ibid para 17.
[282] Ibid para 21.
[283] Ibid para 47.
[284] Ibid para 48.

considering a sentencing court's reasoning because of the emphasis placed on the accused's personal circumstances insofar as mitigation/aggravation is concerned.

Ms Shandu was convicted for murdering her husband.[285] She pleaded self-defence.[286] She was nonetheless convicted, after which specialist reports came in which presented evidence of her mental capacity as a battered woman.[287] This evidence was presented in mitigation. Shortly after the accused and deceased wed, he deteriorated into an extremely abusive spouse.[288] His behaviour included emotional, financial and sexual abuse – all of which were known to their family and doctors.[289] As he was a police officer, he was in possession of a firearm with which he continuously threatened her life.[290] Ironically, he worked within the domestic violence department at the SAPS and the accused was made to believe that he was 'untouchable' insofar as the law was concerned.[291]

The sentencing court, unlike the court a quo, placed emphasis on the abuse in mitigation of her sentence. They also referenced the constitutional rights of her three minor children in considering the potential imposition of a non-custodial sentence.[292] She was indeed sentenced to a non-custodial sentence and placed under correctional supervision for five years with several conditions.[293]

Solomons

The final case in my dataset was that of Ms Dawida Solomons who was convicted in the Regional Magistrate Court for murdering her life partner, Mr Barnwell Sebenja.[294] She pleaded not guilty on

[285] *S v Shandu* 2019 JDR 0006 (KZD) para 1.
[286] Ibid para 2.
[287] Ibid.
[288] Ibid para 5.
[289] Ibid.
[290] Ibid para 6.
[291] Ibid para 6-7.
[292] Ibid para 20.
[293] *S v Shandu* supra note 285 para 32.
[294] *Solomons v S* (CA & R 21/2020) [2021] ZANCHC 4 (29 January 2021) para 1.

the basis of self-defence.[295] She was nonetheless convicted and sentenced to eight years' imprisonment.[296] This appeal in the High Court was against both her conviction and sentence.[297] Counsel for the appellant argued that her behaviour was consistent with the requirements of self-defence and if not, that she did not act with the requisite intent, and so ought to be convicted of culpable homicide.[298]

On the day in question, the couple had an argument, after which the appellant stabbed him with the knife. It was not in dispute that at this precise moment their argument had largely subsided.[299] At her arrest, the appellant alleged that she had been abused by the deceased, though a later medical report provided no evidence to corroborate her allegations.[300] Nonetheless, she had argued that her relationship with the deceased was one characterised by ongoing physical and verbal abuse, along with financial neglect.[301] For the most part, the trial court made their findings because the magistrate found that the appellant was not a credible witness. They attributed this to her general vagueness and contradictions made during her testimony.[302] The Court upheld the appeal on the basis of their eventual acknowledgment of the ongoing abuse she was privy to during her marriage.[303] The sentence was reduced to a period of eight years imprisonment, three of which were suspended on conditions.[304]

[295] Ibid para 2.
[296] Ibid para 3.
[297] Ibid.
[298] Ibid para 4.
[299] Ibid para 6.
[300] Ibid para 9.
[301] Ibid.
[302] Ibid para 12.
[303] *Solomons v S* supra note 293 para 33.
[304] Ibid.

Themes emerging from the dataset

The importance of a turning point

> *"That evening, Mr Parkman repeated what the accused had said and said he would 'show her.' He then proceeded to rape her. That same evening, Mr Parkman threatened to hire black men to rape the accused if she ever tried to leave him again. This was a crucial turning point as the accused cognitively appraised the threat as real, especially given the events of the day…"*[305]

A turning point is considered as that point of no return whereby a situation has changed irreparably so that the trajectory of future events may be pinpointed to that exact event.[306] There appears to be an implicit trend in certain cases in which the courts seek evidence of a turning point to explain the conduct of the woman. Consider the quote from the *Ferreira* case above: despite the fact that Mrs Ferreira was subject to years of pervasive and extreme abuse, the Court referenced this one incident in which her abuser threatened to hire men to rape her to explain her subsequent actions to kill him.[307] Why the previous incidents of abuse, or indeed the previous threats against her life, were not considered as sufficiently real by the Court to explain her subsequent behaviour is nonsensical. This is arguably linked to the patriarchal norms in which a woman's perceived traditional sensibilities (the vulnerable, weak, and subdued woman) are incompatible with her retaliation. Consider Africa's argument relating to the idea that a violent woman must be a product of extreme motives, even bordering on pathological 'madness'.[308]

In the *Botha* judgment, aside from the State's apparent obsession with dismantling her defence based on circumstantial evidence (which the minority convincingly criticised), the majority's very first remarks referenced evidence of a turning point: her wetting herself after a torrent of slaps and punches to her torso and face.[309] Similarly, in *Engelbrecht* it was the abuse Mr Engelbrecht meted

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[305] *S v Ferreira and Others* supra note 160 para 26.
[306] Merriam-Webster Online available at: https://www.merriam-webster.com/dictionary/turning%20point.
[307] *S v Ferreira and Others* supra note 160 para 26.
[308] Africa op cit note 97 at 80.
[309] *S v Engelbrecht* supra note 1 para 4.

out the night of his murder, which included threatening their daughter's life, that the court referenced as the turning point for her.[310]

The notion of referencing turning points is not inherently problematic, but it is important to note two things in the Court's approach. First, their understanding of what constituted the turning point is rarely made with reference to the woman's testimony but rather imputed from their perception of the evidence. Secondly, the implicit search for an 'excusableness factor' based on their perceptions of what would constitute the point of no return. This second factor links to the first in that their perceptions of what would constitute the point of no return is informed by their position in society, as opposed to that of an abused woman's position in society.

Though I agree that pathologizing an abused woman's reactions hinders more than helps her cause, there is a balance to be had. Her own mental state ought at least to be considered in the Court's decision as to what constituted a turning point. Furthermore, the relevance of searching for that turning point at all can be queried. Consistent and cyclical abuse, and the detrimental effects thereof, has been described in both the case law and research. Whether implicit or explicit, I do not see the utility of a turning point in ascertaining whether the violence a woman experienced was of sufficient gravity to mitigate (or outright extinguish) her culpability in the face of sustained and cyclical abuse.

Playing the armchair expert and disregarding evidence

> *"Either she was not as badly beaten as she claims, or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it.*[311]*"*

Courts have begun to emphasise the importance of determining reasonableness in line with the context in which the accused found themselves.[312] Despite this, there is a very real pattern of South

[310] Ibid para 130.
[311] *Lavallee v The Queen* 55 CCC (3d) 97; *S v Engelbrecht* supra note 1 para 144.
[312] *S v Engelbrecht* supra note 1 para 214.

African courts discounting expert evidence, discounting witness testimony and assuming what was reasonable for a woman to do in those circumstances without placing themselves in her shoes. Of all the themes drawn from the data set, this one was the most pervasive and prevalent.

In *Larsen* only she was witness to the shooting. She claimed that the shot was fired in a scuffle with the deceased in which he yanked the gun she was holding.[313] The court agreed that the "probabilities [were] rather in favour" of the shot being fired in a scuffle for the possession of the gun.[314] It is trite that the evidential burden for the State to discharge is to prove the material elements of the crime beyond reasonable doubt, including intent. The court, despite acknowledging these probabilities, confirmed her murder conviction.[315]

As has been discussed, a hallmark of abusive circumstances is the inability to escape them. In *Piedt*, the SCA condemned the court a quo for accusing Ms Marais for not leaving her husband.[316] In the *Ferreira* court a quo, the crucial question, so the trial judge put it, was why she had the deceased killed instead of leaving him.[317] The bench did not accept her evidence, nor the expert testimony, that she was both physically and psychologically unable to leave him.[318]

"What you have given us is no different from what most women in this country have to endure."[319] This statement from the court a quo's judgment in the *Khumalo* case encapsulates the nonchalance abused women are faced with. In her statement, Mrs Khumalo alleged abuse, financial neglect, and emotional turmoil.[320] Whereas the Court could have called for further evidence, they disregarded it as "not very convincing" and "not really substantial.[321]" Whilst one could certainly

[313] *S v Larsen* supra note 150 at 21.
[314] Ibid at 25.
[315] Ibid at 25.
[316] *S v Piedt and Anders* supra note 243 para 47.
[317] *S v Ferreira* supra note 160 para 13.
[318] Ibid para 31.
[319] *Khumalo v S* supra note 258 para 7.
[320] Ibid para 2.
[321] Ibid para 6.

look to her counsel as ineffective for not sufficiently tendering evidence to this effect, the Court's total disinterest in her abuse was appalling.

In *Botha*, in appealing against both her conviction and sentence, the Court recognised her cyclical abuse at the outset of its judgment, and that the State's case was based on circumstantial evidence.[322] Where circumstantial evidence exists any inferences drawn must first, be consistent with all proven facts and secondly, be the only reasonable inference to be drawn.[323] The appellant's defence was that the deceased committed suicide[324] and, as the minority pointed out, this was consistent with the evidence tendered, including the testimony of two experts.[325] Despite this the State, based on evidence that was not conclusive, found that she likely killed him.[326] Not only was this finding inconsistent with the rule in *R v Blom*, it was held despite the evidence leaning towards the appellant's version of events.[327]

The Court seemed set on dismantling her version based on the minutia of her account – everything from her conduct regarding her clothing, to her conduct regarding the deceased's clothing after the event. The Court additionally considered some procedural irregularities alleged by the appellant, the first of which was that the court materially misdirected itself in respect of the finding of premeditation for financial greed and motive.[328] There was scant evidence to this effect, which the SCA reiterated and so found that no premeditation was established. Furthermore, the trial court disregarded all evidence of the appellant's emotional and mental state at the time of the deceased's murder.[329] This was so even though the trial court was privy to both witness testimony

[322] *Botha v S* supra note 271 para 3-7.
[323] *R v Blom* 1939 AD 188 at 202.
[324] *Botha v S* supra note 271 para 16.
[325] *Botha v S* supra note 271 para 81.
[326] Ibid para 19-22.
[327] *R v Blom* 1939 AD: the rule from this case is that inferences drawn must be consistent with all the facts of the case.
[328] *Botha v S* supra note 271 para 37-38.
[329] Ibid para 41.

and expert evidence regarding the impact of the prolonged abuse that the deceased meted out to the appellant.[330]

In *Manyaapelo*, the basis of the appeal against her sentence hinged on the evidence of her abuse, which the court a quo barely accounted for in mitigation. There was ample evidence of abuse referenced in the appeal judgment – including the fact that she had entered into a state of depression.[331] It was her cross-examination evidence that was most damning to her character – she attested to the fact that she believed the deceased did love her because of the material compensation he offered her.[332] Further, that she did not want to lose him to another woman.[333] The court a quo seemed to hinge their judgment of her culpability on this, despite the overwhelming amount of evidence pointing to her deteriorated mental state and cyclical abuse. The appeal court indeed recognised this discrepancy, and thus found her initial sentence inappropriate.[334] This court noted that she was a reliable witness, an abused woman, no threat to society and suffered psychologically.[335] Nonetheless, they also found that she was motivated by jealously.[336] Even so, it remains perplexing how a jealousy motive, even if true, could counteract the effects of cyclical domestic abuse – and how in turn this could possibly diminish her position as an abused woman.

In *Hoare*, the third accused stated that his motive in killing the deceased was because of the brutal abuse he witnessed.[337] In the court a quo, the first accused corroborated this by saying that the deceased was an abusive alcoholic who inflicted physical and sexual abuse onto her for many years.[338] It was nonetheless found that the evidence of "bad behaviour" on the part of the deceased

[330] Ibid.
[331] *Manyaapelo v S* supra note 195 para 14.
[332] Ibid para 21.
[333] *Manyaapelo v S* supra note 195 para 22.
[334] Ibid para 38.
[335] Ibid.
[336] Ibid.
[337] *S v Hoare* supra note 177 para 4.
[338] Ibid.

was exaggerated.[339] This finding was based on testimony of the third accused's sister, whose testimony seemingly weighed far heavier than that of the two accused mentioned. The court a quo stated the following, as agreed upon by the appeal court: "that it was strange that if [the first accused] found it unbearable, that accused no.1 chose to live with the deceased for so long.[340]" This is the epitome of presuming an abused woman's free will to choose to leave her abuser, when in reality, we know that is very rarely the case.

Though the appeal in *Steyn* was a positive turn in the jurisprudence thus far, the court a quo's approach as attested to in the appeal judgment warrants scrutiny. The abuse Ms Steyn received at the hands of the deceased bordered on physical and psychological torture: "He often told her that he would slit her throat with a smile on his face.[341]" In the trial court, the State convinced the bench that the appellant's version could not be believed because of the nature of blood spills that indicated that he was stationary behind the table at the time of the bullet firing.[342] This was based on an expert's opinion, however the facts upon which this opinion was formed were not proven.[343] Nonetheless, the strict temporal nature of self-defence requirements, along with the Court problematically taking this opinion, meant that they convicted her.

Another very concerning aspect of the trial court's finding was that the appellant was unreasonable because "a reasonable person in [her] position would have foreseen the possibility that the deceased, in the condition and mood he was in, might attempt to attack her.[344]" This statement is tantamount to victim blaming and only further entrenches the patriarchal norms that continue to exonerate men from their abusive behaviour.

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[339] Ibid para 5.
[340] Ibid para 5.
[341] *Steyn v S* supra note 209 para 2.
[342] Ibid para 12.
[343] Ibid para 12.
[344] Ibid para 17.

In *Shandu*, the psychological evidence presented in the sentencing hearing referenced Battered Women's Syndrome and that her behaviour, by shooting and killing the deceased, was consistent with the emotional distress of someone suffering from trauma.[345] The evidence, however, stated that she made no effort to escape – which is a common argument tendered by courts in rejecting a battered woman's retaliation.[346] The Court, despite this wealth of evidence, argued that there was nothing on that day to justify the accused's killing of the deceased.[347] The Court, in fact, described *her* as the aggressor because it could be "reasonably concluded" that she felt ashamed by her husband's mistress.[348]

In *Solomons*, counsel for the State argued that her motive was that of revenge because the deceased was with another woman.[349] Without providing reasoning, the appeal judgment simply stated that this made "logical sense.[350]" Their problematic attitudes towards abused women is exemplified in their snide remark that "the appellant was no shrinking violet" – as though attempting to stand her ground on the day of the incident somehow ought to work against her in sentencing.[351] Insofar as the appeal against sentence, the court had to consider whether the requisite circumstances existed so as to justify a deviation from the sentence. What is most frustrating is that the trial court in fact acknowledged the history of abuse between the couple as mitigation during the sentencing hearing, but almost completely disregarded it during the trial.[352] This inconsistency is emblematic of the ways that Courts tend to deal with evidence of abuse when the primary source of evidence is the testimony from the battered woman. It seems to be used sporadically, and often disregarded as a possible source of enquiry into justifications or defences for her behaviour.

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[345] Ibid para 8.
[346] Ibid para 9.
[347] Ibid para 18.
[348] *S v Shandu* supra note 285 para 18.
[349] *S v Shandu* supra note 285 para 14.
[350] Ibid.
[351] *Solomons v S* supra note 293 para 30.
[352] Ibid para 20.

In *Potgieter*, there was ample evidence regarding the abuse the deceased meted out against the appellant. Ms Potgieter's downfall was on the basis that she claimed sane automatism, a notoriously difficult defence to establish (along with pathological incapacity). The court a quo stated that "she went out of her way" to tell others about her assaults in order for their testimony to corroborate her defence – "she paved the way for the murder."[353] This is a very damning and calculated motive attributed to what could just as easily be characterised as repeated pleas for help from others. There is also a double standard here. On the one hand, an abused woman will often be criticised for not leaving or seeking help from others, but here we see that very behaviour being used against her.

The SCA disregarded this characterisation and stated that, at the outset, no evidence of premeditation was proved.[354] Even if there was evidence of planning, reaching out to others for help in no way suggests a nefarious conspiracy to corroborate her defence. Further evidence of the court a quo's problematic attitude was their description of the incident "as a crime of passion" as a result of the deceased's abuse.[355] The connotations with this description lend themselves to the 'mad woman' rhetoric and only serve to disenfranchise her further. All of this, however, pales in comparison to the court a quo's final statement that so fully encapsulates playing armchair expert: "You [Ms Potgieter], to a certain extent, were the author of your own misfortune. In spite of the fact that the deceased abused you, you decided to stay with him."[356]

Whilst this thesis focuses on the Court's attitudes and manner of dealing with evidence, it must be recognised that all legal practitioners are arbiters of justice and contribute to the jurisprudence of a country. The State certainly has a tough duty to discharge in criminal matters, however flagrant mischaracterisation, and unfair criticism of an abused woman to discredit her

[353] *S v Potgieter* supra note 138 at 41.
[354] *S v Potgieter* supra note 138 at 43-44.
[355] Ibid at 81.
[356] Ibid at 82.

case ought to be harshly condemned. In *Engelbrecht*, the State argued that Mr Engelbrecht's behaviour was excusable on a number of grounds.[357] It was argued that he was reasonable for following Mrs Engelbrecht everywhere because he was concerned about her; that he may have not wanted her to have a drivers licence for financial reasons; and that he was not obsessed with either Mrs Engelbrecht or their child but just had "a desire" to see them.[358] Further, the State sought to argue that Mrs Engelbrecht exaggerated her situation and, because she had sexual relations with another, Mr Engelbrecht's behaviour "was not unfounded."[359] To reiterate: the extent of abuse Mrs Engelbrecht experienced was tantamount to torture. The victim-blaming, gaslighting and implicit misogyny in the State's case was deplorable.

Furthermore, the *Engelbrecht* bench's judgment, specifically in its characterisation of reasonableness, and thus necessity, deserves criticism. The State submitted that there were avenues of support Mrs Engelbrecht had not exhausted to escape from the abuse and that she chose not to pursue them, and "lost interest" in the process.[360] Judge Satchwell acknowledged *S v Ferreira*, which argued that courts ought to avoid playing 'armchair expert' and must appreciate the gendered nature of these situations – they must place themselves in the position of the woman concerned.[361] As a result there is a subjective aspect to the test.

Though the court found it entirely inappropriate to expect a victim of abuse to flee and abandon her life to escape abuse, they found that she did not afford society a fair enough chance to help her and as a result, her killing of Mr Engelbrecht was not the only reasonable avenue available to her, and thus it was not necessary.[362] This was the majority decision on the facts made by the court's two assessors, Advocate Opperman and Professor Naude. Judge Satchwell's

[357] *S v Engelbrecht* supra note 1 para 140.
[358] Ibid.
[359] Ibid.
[360] *S v Engelbrecht* supra note 1 para 216.
[361] Ibid para 133.
[362] Ibid para 406.

minority decision on the facts was that she repeatedly attempted to garner society's assistance, which repeatedly failed, and so she was reasonable in losing faith and acting as she did.[363]

The practical, fiscal, and psychological barriers that prevent victims from leaving abusive relationships have been well documented. Especially in a place like South Africa with severe inequality and poor infrastructure, leaving is often not an option.[364] Vetten notes obstacles that ought to be at the forefront of policy amendments: expensive and unreliable public transport; under resourced and unresponsive emergency services; the isolation of poorer communities due to gentrification; patriarchal norms that contribute to female unemployment; and the fact that official documents, such as protection orders, are often written in English only.[365] Not only is this a stark reality which requires the immediate action of the executive, but it ought to be explicitly recognised by our Courts when dealing with the infamous question: 'why didn't she leave?'

Lack of calling of evidence

There exists a common thread between many of these cases whereby there is a suggestion or allegation of cyclical abuse, but there is very little emphasis placed on it, nor do the Courts ask for more evidence of it. The *Marais* case is an example of this – it is the only CC judgment under review. As explained above, the *Piedt* case was the subsequent judgment relating to Ms Marais. Insofar as lack of calling for evidence is concerned, *Piedt* is more indicative of this trend. In the CC case, Ms Marais argued that the High Court infringed on her constitutional right to a fair trial on a few evidential discrepancies. Ms Marais's arguments comprised of five key points:[366]

1. That the trial court ignored her evidence of abuse.

[363] Ibid para 418.
[364] Department of Statistics South Africa op cit note 14.
[365] Vetten op cit note 54 at 6.
[366] *S v Marais* supra note 219 at 13.

2. They misunderstood and mischaracterised Battered Woman's Syndrome which lead to them deciding that she did not constitute a battered woman.
3. They took into account evidence that ought to have been disregarded as inadmissible.
4. They ignored evidence that supported her defence and erroneously characterised her as a liar.
5. Lastly, they failed to follow precedent from the *SARFU*[367] judgment which held that "if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's evidence is accepted as correct". She claimed that her evidence tendered in regard to her abuse was never seriously contested.

These lines of argument were not disputed in the case, but the CC nonetheless found that they did not pertain to her constitutional rights which is erroneous, since it is evident that they did affect her procedural and trial rights.

In *Kisten*, her grounds of appeal were largely procedurally based – counsel argued that the court a quo ought not have convicted on her original statements, as she had withdrawn them, and that the State made no effort to prove or lead evidence to the effect that the original statement was a) voluntary and b) to be preferred over the changed plea.[368] An additional procedural irregularity mentioned was that the magistrate questioned both the appellant and witnesses themselves.[369] On a substantive basis, counsel also argued that the conviction was not sustainable on the merits of the case and that the sentence was nonetheless inappropriate.[370] Counsel for the State in the appeal conceded that the proceedings in the court a quo were fatally flawed and that the matter ought to be heard de novo.[371]

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[367] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* supra note 250.
[368] *Kisten v S* supra note 265 para 10.
[369] Ibid.
[370] Ibid.
[371] Ibid para 11.

The appeal did take issue with many of the trial court's procedures, including the fact that during sentencing no motive for the murder was proffered by the State and they only referred to alleged sexual abuse towards the appellant by the deceased.[372] There was no clarification of these allegations. Naturally because her second plea in which she implicated her mother was disregarded, no evidence or investigation was lead in that regard. In sum, the appeal court did find that a failure of justice resulted from the irregularities and stated the matter be remitted for a hearing de novo.[373]

Regarding prosecutor's behaviour, the court noted that she was under an obligation to reveal her awareness that the appellant may have only been an accomplice to the murder, especially in respect of sentencing.[374] I think the appeal court should have gone further in this condemnation to argue that the prosecutor also had a duty, given this information, to investigate what the true motive of the murder may have been. Given the allegations of sexual abuse towards the appellant, it is certainly not out of the realm of possibility that, whether as accomplice or perpetrator, abuse may have been the underlying cause of the murder, and potentially he meted this out towards the mother as well.

As reiterated in *Ferreira*, "imposition of a sentence is … heavily influenced by each offender's motive and intention."[375] Though the judgment for the re-trial was not apparently publicly reported (per lack of locating despite extensive research efforts), news reports stated that Kisten was retried and found guilty.[376] Her mother was never charged despite being definitively implicated in the murder as well at the time of the news report (2016).[377] It is not clear whether any advancements were made regarding the alleged abuse.

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[372] Ibid para 20.
[373] Ibid para 28.
[374] *Kisten v S* supra note 265 para 30.
[375] *S v Ferreira and Others* supra note 160 para 54.
[376] Mervyn Naidoo 'Stepfather's death: relief for mom, 22' available at: https://www.pressreader.com/south-africa/sunday-tribune-south-africa/20160522/282617441983453.
[377] Ibid.

In *Noorman*, the Court did not query why they were allowed to cohabit by the authorities in the same household again, despite the abuse. The magistrates court argued that her behaviour was motivated by revenge and did not constitute self-defence.[378] Neither the appeal court nor the court a quo queried evidence of previous abuse at his hands, which surely seriously impacted the viability of her defence. There was equally no evidence led as to her mental state. In fact, the judgment only states that "she appear[ed] to have been systematically abused … for some length of time.[379]" That this was only recognised, and so briefly, right at the end of the judgment is evidence of the lack of proper consideration courts often afford survivors of abuse.

In *Van Dalen,* the conviction was made based on the State's evidence, given that the defence did not lead any. The fact that the defence did not lead any is a serious concern given the reference to cyclical abuse the first accused experienced at the hands of the deceased. The evidence of abuse was both corroborated and disputed by testimonies of the accused and witnesses. For instance, the deceased's son referenced molestation charges laid by the second accused (the first accused's daughter), which were purportedly withdrawn because she was promised a vehicle by the deceased.[380] In one of the Inspector's testimonies, he referenced an incident where the second accused told him that the deceased touched her breasts and expressed his love for her.[381]

That the court did not see it fit to call for more evidence of these issues regarding their relevance to the allegations of abuse is baffling. It is equally concerning that the Defence did not lead any evidence to further this claim. In the sentencing judgment, the court found it aggravating that the first accused's domestic relationship with the deceased was tumultuous, and that the deceased "was in the way of their happiness.[382]" How the pattern of intermittent separating

[378] *Noorman v S* supra note 230 para 16.
[379] Ibid para 49.
[380] *Noorman v S* supra note 230 at 3.
[381] Ibid at 6.
[382] *S v Van Dalen and Others* supra note 191 at 3.

between the accused and deceased served against her in the Court's eyes is unexplained and seemingly inexplicable.

In *Mapeyi*, most of the evidence tendered in this case came from both witness and expert testimony. One of the State witnesses, Ms Nomfele, cast aspersions on the character of Mrs Mapeyi by attesting to conversations she had had with the first accused whereby the latter made claims of wanting to kill the deceased.[383] At the outset, the judgment cast doubt on any notion of prior abuse at the hands of the deceased against the first accused and suggested that they "lived in a friendly environment."[384] Only on page 85 did the judgment begin to deal with the personal faculties of Mrs Mapeyi. They noted that at the beginning stages of her arrest, she overdosed and was subsequently hospitalised.[385] It described her as "not in a right state of mind."[386] No further evidence was tendered as to whether this was an attempted suicide or indicative of a mental health issue. In fact, the first point at which the motive of abuse was mentioned was on page 109. Both accused 2 and 3, and another witness, mentioned the fact that Mrs Mapeyi had approached the former two to murder her husband because "he was abusive and assaulted her."[387]

No further evidence was tendered to this effect or requested by the court. It is equally concerning that the defence did not try to examine the first accused on this alleged abuse. Both the cases of accused 1 and 2 were closed without them electing to testify or call other witnesses, though argument was made by Mrs Mapeyi's counsel that the State failed to show motive.[388] However, as the judgment correctly notes, it is trite that motive is irrelevant to prove criminal intent.[389] Had they tried to tender evidence of abuse it may have weighed far better in her favour.

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[383] *S v Mapeyi and Others* supra note 253 at 5.
[384] Ibid.
[385] Ibid at 85.
[386] Ibid.
[387] *S v Mapeyi and Others* supra note 253 at 109.
[388] Ibid at 132.
[389] Ibid at 133.

Though access to this case's transcripts would have shed better light on the first accused's legal representation, the judgment suggests real deficiencies in her counsel. Unlike other cases where the court has simply disregarded evidence of abuse, this case is an example of a court unable to consider alleged abuse because next to no effort was made in tendering such evidence (though the court could have, and arguably should have, exercised their discretion in calling for further evidence).

Another concern with this judgment, that repeatedly occurred, was the way the judgment described certain witnesses. For instance, two witnesses were described as obviously lacking "sophistication and cognitive ability."[390] Another witness's testimony, on the other hand, was characterised as "intelligent and good."[391] The language of the court used to describe the credibility of various witnesses was demeaning and inappropriate and is a bad reflection on the general attitude it afforded various parties to the case. This brings into question the trust society can safely place in the judiciary to deal with all citizens alike and fairly. This is especially true for the vulnerable place abused women find themselves in.

Recognising the evidence, including references to Battered Woman's Syndrome

"Once there has been a single assault, the fabric of the relationship changes irrevocably."[392]

The last three sub-headings have explored significant trends in the courts attitudes and methods of dealing with the allegations and evidence of abuse. However, certain aspects of the judgments under review demonstrate positive approaches, and this ought to be noted and considered for future application. The pertinence of recognising the evidence of abuse is not a new notion – as early as 1993 and prior, we saw Courts taking steps in this direction.

[390] Ibid at 19.
[391] Ibid at 113.
[392] *S v Engelbrecht* supra note 1para 53.

For instance, though the *Potgieter* case did not mention Battered Women's Syndrome, the evidence pertaining to her mental state and the cyclical pattern of his abuse is evidence of the theories on battered women.[393] Most notably, the *Engelbrecht* judgment must be commended for its extensive consideration of both the evidence of abuse the deceased meted out to Mrs Engelbrecht and for explicitly dealing with the psychological implications thereof. At the outset, the Court reiterated that cyclical violence, often interspersed with periods of reprieve and apologies, renders victims exhausted, terrified and desperate.[394] Nonetheless, both trauma and reason can exist to dismantle the aforementioned 'mad, irrational woman' trope.[395]

Extensive evidence concerning her own deterioration was also dealt with, namely that her physical and mental state were badly impacted by the ongoing abuse. This lead to her being medicated for depression and huge weight loss.[396] This was accompanied by explicit analysis of Battered Women's Syndrome and the psychological impact on a victim of abuse.[397] Perhaps one of the most important statements from the judgment was the following: "this Court freely admits that we do not ourselves have knowledge or experience of the tragedy of domestic violence so as to make findings thereon without the assistance of persons with special knowledge."[398] As important was the Court's emphasis that abused women are not a monolithic category upon which a single character profile may be thrust.[399]

As with *Engelbrecht*, the *Ferreira* case demonstrated the important role of *amicus curiae*, who often are pivotal in providing the court with nuanced and specialised research on abused women who kill their abusers and Battered Women's Syndrome. Most notably, one of the key experts to tender evidence in this case was Lisa Vetten, whose papers were demonstrated as ground-breaking

[393] *S v Potgieter* supra note 138 a 10.
[394] *S v Engelbrecht* para 52.
[395] Ibid para 167.
[396] Ibid para 121.
[397] *S v Engelbrecht* supra note 1 para 168-182.
[398] Ibid para 143.
[399] Ibid para 166.

in my literature review section.[400] The court reviewed expert evidence regarding the psychological trauma Mrs Ferreira experienced, including Walker's theory of Battered Women's Syndrome. This was especially important given that the decision to kill the deceased "fitted a well-known pattern of behaviour of abused intimate partners."[401]

A noteworthy feature of her abuse, and something the Court did not explicitly recognise, was that the abused made multiple attempts on her life. He would lock her away for weeks on end without food (her survival was only due to farm workers sneaking her food).[402] He tried to stab her with a knife[403] and he threatened her with a firearm.[404] When she was severely hurt, he prevented her from seeking medical help.[405] The Court did recognise this abuse as extensive and contributing to her deterioration but they arguably ought to have gone a step further in explicitly recognising this as multiple attempted murders on his part. The extent to which the evidence of abuse in this case was discussed ought to be compared to cases where abuse is alleged but scant to no evidence is lead or interrogated by the Court.

The reasoning from minority judgments, though not binding, is worth considering. In his dissent in the *Botha* judgment, Judge Rogers went into far greater detail concerning her abuse, emphasising that her abuser's cruelty spanned many years and extended to the children as well.[406] Furthermore, there was past evidence of the deceased expressing suicidal ideation which corroborates the appellant's version of evidence.[407] There was one incident where their daughter-in-law found the deceased weeping with his rifle on his lap.[408] Another incident occurred where he drove the car recklessly saying he did not care if he crashed it.[409] This was further supported by

[400] Ibid para 9-10.
[401] *S v Ferreira and Others* supra note 160 para 10 & 37.
[402] Ibid para 18.
[403] Ibid para 20.
[404] Ibid.
[405] Ibid para 21.
[406] *Botha v S* supra note 271 para 53-54.
[407] Ibid para 55.
[408] Ibid.
[409] Ibid para 61.

evidence that he had drastic mood swings, erratically changing from rage to depression.[410] The appellant also testified to this, and suffered terrible emotional distress during her testimony.[411]

The reasoning the trial court gave for dismissing this evidence, and the expert evidence regarding the deceased's mental state, was that it could not carry weight "because it was premised on factual evidence of poor quality from family members who had an axe to grind with the deceased."[412] The dissenting judgment found this reasoning entirely without merit, especially considering the fact that both the forensic psychologist and doctors' testimony found the appellant's version of events entirely in-keeping with the evidence and that "there was no scientific reason" to believe that the shots were fired by anyone other than the deceased.[413] From the dissenting dissection of the factual matrix of the incident, it is clear that the appellant's version was likely, if not even probable. I tend to agree with the minority in pronouncing the majority's dismissal of the appeal regarding conviction as a problematic outcome. On the facts, the 'beyond all reasonable doubt' standard was not met.

In *Steyn*, her conviction was set aside by the Appeal Court.[414] This judgment was one of the few that demonstrated a positive attitude of the courts towards the appellant/defendant. They determined her to be a reliable witness and because of the extensive abuse she suffered, criticised the court a quo for the far-reaching judgments they made concerning the event and her reliability. The importance of avoiding painting an abused woman as mad and irrational is emphasised here – there is a difference between psychologically abused and mad. If she is deemed sufficiently capable of standing trial, then the Courts ought to be called out on their tendency to disregard or dismiss an abused woman's testimony without sufficient cause.

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[410] Ibid.
[411] Ibid para 63.
[412] Ibid para 69.
[413] Ibid para 81.
[414] *Steyn v S* supra note 209 para 24.

In *Piedt*, the judgment dealt with the evidence that was placed before the trial court regarding the abuse the third appellant endured. It was affirmed that several independent witnesses testified to witnessing abuse during the marriage.[415] Further, the court disputed the reasons tendered by the trial court to justify disregarding the allegations of abuse.[416] The evidence relating to the abuse included physical assaults, rape, attempted strangulations, threats with weapons at the deceased's disposal, threats to the life of their daughter, emotional abuse, verbal abuse, locking both the third appellant and their daughter in rooms for prolonged periods of time, abusing their animals, and sexually abusing their daughter.[417] This was corroborated by witness testimony that was recounted in this judgment, including suggestions of Battered Women's Syndrome.[418]

The Court correctly found that the trial court was wrong in its determination that she had not been an abused woman.[419] The Court emphasised the importance of considering evidence of abuse as a ground of appeal.[420] In light of these mitigating circumstances, they reduced her sentence to 20 years. After the extent to which they detailed the abuse, this sentence, in comparison to the some of the other cases dealt with, was still extremely harsh. The decision of a sentence is an individualised exercise. But the degree of discrepancy between some of the sentences in these cases is indicative of the lack of clarity of approach the courts have in dealing with cases of cyclical domestic abuse.

It is important, though, to note that this paper does not synonymise evidence of abuse with evidence of Battered Women's Syndrome. The latter forms part of the psychological component of evidence of abuse and, as reiterated by Reddi, is not necessarily helpful to the abused woman's cause. By describing the experiences of a woman in a state of distress, trying to survive ongoing

[415] Ibid.
[416] *S v Piedt and Anders* supra note 243 para 25.
[417] Ibid para 27.
[418] Ibid para 35.
[419] Ibid para 22.
[420] *S v Piedt and Anders* supra note 243 para 24.

abuse, as a 'syndrome' squarely places the issue with her mental state.[421] Thus, evidence of abuse generally is championed here. Nonetheless, the cases' references to Battered Women's Syndrome, however controversial it may be, at least shows a willingness to consider the lived realities of abused women. Suffering from mental illness, though a requirement for a defence of pathological incapacity, should not be treated as a prerequisite for the evidence of someone's abuse to be considered relevant when the Courts consider criminal liability and sentencing.

Emphasis on financial motive/greed as linked to premeditation

Returning to concerning themes that emerged from the dataset, a surprising pattern emerged – that of presuming motive. There were several cases whereby abuse was hinted at as a motive, but not definitively explored, which resulted in the State and courts presuming motives that were very unlikely on the facts. The most common presumed motive that emerged from this was that of greed and financial gain. As has been stated, the financial destitution and dependence of a victim on her abuser is commonplace, and often the reason for her inability to escape the abuse. This has been taken to impute a presumption of financial gain, where scant evidence exists to definitively assert this. There are very large leaps of logic where a court makes such a firm determination on motive in this way.

In the court a quo's judgment, Mrs Botha was found to be "motivated by greed." There was no evidence to this effect, which the appeal court, to its credit, found at the outset.[422] In *Hoare*, even though the Court disregarded allegations of abuse though there was evidence tendered to this effect, the Court did find it suitable to argue financial benefit as the motive for the killing. The

[421] Reddi op cit note 91 at 259.
[422] *Botha v S* supra note 271 para 38.

evidence offered was that there were about four "plots to get rid of the deceased"[423] and that accused no.1 received an insurance pay out after his death.[424]

First, it is hard to see how evidence of several attempts on the deceased's life corroborates a financial motive. Secondly, just receiving an insurance pay-out is insufficient evidence to link the premeditation to financial motive. Thirdly, both the court a quo and appeal court relied on this evidence without hesitation while seemingly ignoring the evidence of abuse. This is not to suggest that the possibility of financial motive was not there but rather to problematise the cherry picking of evidence without justifying why some aspects had a heavier probative value over the evidence of abuse.

In the CC judgment of *Marais* it was noted that the court a quo rejected her defence as a battered woman and argued that her motive was "financial greed and gain."[425] Even in this judgment, that only briefly touched on the extensive abuse she faced, it appears unquestionable that cyclical abuse was the more likely motive rather than financial gain. In a similar vein to *Hoare*, the State referenced her premeditation as indicative of financial motive.[426] In the *Piedt* judgment, the Court affirmed that the trial court was incorrect in its assumption that her motive was monetary.[427]

Insofar as the notion of premeditation is concerned, the *Ferreira* judgment shed light on this. The Appeal Court affirmed that premeditation is a severely aggravating factor.[428] Nonetheless, the moral reprehensibility of the accused is contingent "on the motive and subjective state of mind with which a contract killer is engaged."[429] Presuming that premeditation has a financial motive without any cogent evidence is not only damning on an accused's character, but detrimental to her

[423] *S v Hoare* supra note 177 para 8.
[424] Ibid.
[425] *S v Marais* supra note 219 para 6.
[426] Ibid para 8.
[427] *S v Piedt and Anders* supra note 243 para 25.
[428] *S v Ferreira and Others* supra note 160 para 33.
[429] Ibid.

entire case. As in *Ferreira*, the premeditation in these cases is directly related to the abused woman's attempts at survival. Expert evidence especially is necessary to understand the motives and reasonableness of an abused woman's behaviour.[430] Where this is not done, Court's seem too willing to presume nefarious motives based on very little evidence, which seriously affects the abused person's prospects in a case.

Deterrence emphasised during sentencing

A concerning trend in the data set regarded using deterrence as a justification to serve these women arguably harsher punishments than they deserve. Deterrence is all too often inappropriately and unjustifiably relied on by Courts in crafting their sentences, with very little evidence to back its utility and effectiveness. It is long accepted in academic literature that deterrence is not achieved through crafting harsher sentences.[431] The notion that criminal behaviour is conducted after careful consideration of the possible consequences is usually a fallacy.[432] Furthermore, the abysmal incarceration rate in this country renders any deterrent efforts redundant as most offenders are well aware they have a good chance of avoiding conviction.[433]

Insofar as battered women are concerned, deterrence as a principle in punishment is even less applicable for the simple fact that where a woman perceives her life, or the life of her child, to be at serious risk she cannot be expected not to take matters into her own hands where society has repeatedly failed to protect her. In many of the sentencing judgments in the dataset the Courts posited two conflicting considerations. First, that many, if not all, of these women did not pose a threat to society because their motive for offending was to escape ongoing abuse from the deceased. But secondly, that a 'message' ought to still be sent to deter future offenders from the

[430] Reddi op cit note 107 at 267.
[431] SS Terrblanche 'A Guide to Sentencing in SA' 2nd ed at 159.
[432] Ibid at 160.
[433] Ibid at 161; Justice Edwin Cameron 'Imprisoning the Nation: Minimum Sentences in South Africa' (2017).

same behaviour. These conflicting considerations were relied on by the courts to impose the sentences they did.

The court in *Botha*, in crafting her sentence, made it apparent that they had to send out "a clear message that the crime of murder would not be countenanced."[434] In *Noorman*, both the court a quo and appeal court emphasised that the purpose of sentencing is to "act as a deterrent to other criminals."[435] In the *Van Dalen* sentencing judgment, the Court reiterated that an appropriate sentence is one that deters future offenders.[436] In *Potgieter,* deterrence was emphasised by both the trial court and appeal court in crafting sentences.[437] The court in *Engelbrecht* stated that it was "trite that the purpose of punishment includes specific deterrence of the offender, [and] general deterrence of other members of society" amongst the principles of retribution and rehabilitation as well.[438]

The only Court to consider the reality of deterrence as a justification in sentencing was *Solomons*, where the Court acknowledged that "in spousal killings where there has been a history of abuse, general deterrence does not appear to be meaningful", as per Canadian jurisprudence.[439] That abused persons ought not be deterred from escaping their abuse, and indeed attempting to ensure their survival, is an obvious statement that the Courts appear concerningly ignorant to.[440] Lastly, it is important to note that improving the protection offered by the state would have a far greater deterrent effect than the utilitarian-based sentencing of individually abused women.

[434] *Botha v S* supra note 271 para 41.
[435] *Noorman v S* supra note 230 para 17.
[436] *S v Van Dalen* supra note 191 at 2.
[437] *S v Potgieter* supra note 138 at 82.
[438] *S v Engelbrecht* supra note 1 para 44 (sentencing judgment at the end of the judgment).
[439] *Solomons v S* supra note 293 para 23.
[440] This is an avenue that could be fully explored in research endeavours and contribute to the growing evidence that deterrence is not a principle the Court's should consider whatsoever in crafting sentences.

Rights of the child during sentencing

A positive trend revealed in the dataset is emphasis placed on the interests of children, as enshrined in the Constitution when the courts consider the appropriate sentence. This is aside from the emphasis on the *Zinn* triad and principles of punishment (with deterrence clearly being demonstrated as the foremost principle in consideration). Section 28(2) of the Constitution states that "a child's best interests are of paramount importance in every matter concerning the child."[441] The defendants/appellants in many of these cases are left as the sole providers and caregivers for children or dependants when their abusers are killed. It is important to recognise that children born within these abusive relationships are themselves victims of abuse, and their future stability and safety ought to be of paramount importance to the courts.

In *Noorman*, the interests of the three dependent children in having their sole parent in their lives was of paramount importance when the Court considered sentencing.[442] As with many Constitutional issues, there is always a balance to be had. Thus, the rights of the children were weighed up against the interests of society to protection from what the Court deemed a dangerous woman.[443] The degree to which the rights of the child are weighed in sentencing is contingent on their ages at the time of sentencing. For instance, in *Manyaapelo*, her children had already reached the age of majority by the time the appeal court had to consider the sentence. Even though they were minors when the court a quo passed their decision, they nonetheless disregarded their interests in crafting the initial sentence because they were adults at that time.[444] In *Shandu*, due consideration was given to the fact that the accused was the primary caregiver to three minor

[441] Constitution of the Republic of South Africa, 1996 s 28(2).
[442] *Noorman v S* supra note 230 para 42.
[443] Ibid at 43.
[444] *Manyaapelo v S* supra note 195 para 36.

children.[445] Despite the appalling manor in which the sentencing court characterised and victim-blamed the accused, she avoided imprisonment and was sentenced to correctional supervision.[446]

Abused women without children ought to still be afforded the compassion and understanding of the courts. This goes without saying. It is, however, important to note that children who stand to suffer from incarcerated parents ought to be especially considered by the Courts, as it is their Constitutional obligation to consider the best interests of the child.

[445] *S v Shandu* supra note 285 para 20.
[446] Ibid para 32.

V. DISCUSSION, RECOMMENDATIONS AND CONCLUDING REMARKS

Considering the above analysis drawn from the dataset, this final chapter considers prospects for this area of the law. As with the introductory chapters, each defence will now be revisited. The aim is to critique the prospects of each defence's ability to protect abused women, considering the lessons drawn from these cases.

Insofar as private defence is concerned, *Engelbrecht* already developed the traditional requirements so as to expand the concept of 'imminence' to include 'inevitability' of attack.[447] These deal with the concerns relating to the strict temporality requirement of 'imminent' and allows the courts to recognise that private defence can be invoked where cycles of violence occur. However, the issues surrounding the courts' perceptions of reasonableness and necessity must be revisited if this defence is to assist abused women, and to this effect, we must consider the minority judgment.

As I have stated already, the finding against reasonableness and necessity in *Engelbrecht* was a product of the two assessors' judgment, and not that of the Judge.[448] There is no legal gymnastics required to overcome the reasonableness and necessity requirement in future cases though. The assessors' judgment was that, on the facts, Mrs Engelbrecht did not give society enough of a chance to help her escape her abuse.[449] Upon a reading of the lengthy abuse she dealt with, and the repeated attempts to seek help, their finding is simply not sustainable. It is necessary to reiterate that South Africa, unlike prior English laws, does not have a duty to retreat in order to rely on private defence.[450] A better approach (taken by the Judge Satchwell) is to consider reasonableness and necessity in the context of the abused woman in question.[451] The real issue is that the courts

[447] *S v Engelbrecht* supra note 1 para 349.
[448] Ibid para 418.
[449] Ibid.
[450] Burchell op cit note 16 at 126.
[451] *S v Engelbrecht* supra note 1 at 418.

do not seem to have a realistic and comprehensive understanding of the true circumstances of the abused woman.

Private defence is the most suitable and effective defence available to abused women. Its constant failure to succeed as a defence is not because it's a bad defence in these scenarios, but because its traditional application was never designed to recognise the habitually abused woman. With the amendments I have mentioned, specifically regarding inevitability and recognising the true realities of abused women, it can and ought to lead to full acquittals, where its contemporary requirements are met. Nonetheless, I will still consider the other defences discussed earlier in the paper to demonstrate why private defence is the best option available.

Insofar as putative private defence is concerned, I consider them the least effective defence available to abused women. Surprisingly, this is the defence that Goosen believes is a suitable and effective defence available to women who kill their abusers.[452] I, however, am unconvinced by its efficacy because it requires the abused women to hold a genuine belief that she is acting in the realms of private defence.[453] This is problematic for several reasons.

Firstly, it seems to only apply to the class of women who genuinely lack knowledge of the law – broad knowledge that what they are doing is wrong is sufficient to negate this as a defence. But more importantly, it does not recognise the lived realities of women in South Africa. In many instances, women seek assistance to no avail and though they know that their conduct is criminal, they nonetheless kill their abusers out of desperation. Their knowledge that what they are doing is wrong necessarily precludes them from the defence. This is an argument made by Professor Phelps

[452] Goosen op cit note 101 at 79.
[453] Burchell op cit note 16 at 131.

at the University of Cape Town, and it demonstrates that a putative private defence would have very limited application in these cases.[454]

Pathological incapacity also offers some issues because it fundamentally requires a medical diagnosis that an abused woman acted as a product of mental illness.[455] This is problematic for two reasons. Firstly, it requires an existing medical illness to justify a finding of incapacity. This would require us to either 'squeeze' a woman into a medical diagnosis or it would require coming up with a novel mental illness to specifically describe the abused women's symptoms. This brings us back to the topic of Battered Women's Syndrome.

Battered Women's Syndrome, though broadly describing the afflictions faced by abused women, has not been definitively agreed upon by the global medical community as a sub-category of PTSD. Even if it were, the mental illness would still need to be defined in certain parameters. Attempting to ringfence the characteristics of an abused woman will almost certainly exclude those who are genuinely abused, but do not present symptoms/sufficient symptoms to be diagnosed.

There is, however, a bigger problem with the concept of a mental illness as a defence in this scenario: it further entrenches the perception that only a mad, or insane, or mentally ill, woman could possibly kill her abuser. The medicalisation of an abused woman's reactions reduces them to unreasonable, irrational and in need of a cure. Though a Battered Women's Syndrome defence could help in specific scenarios, it does have the propensity to exacerbate these stereotypes. As initially stated, I consider the theory useful insofar as it sheds light on the psychiatric effects of abuse. But am unconvinced by its capacity to form a suitable defence in its own rite.

Lastly, we must consider non-pathological incapacity – or the 'provocation and emotional stress' defence. From the earlier discussion of *Wiid*, the potential for this defence to protect abused

[454] Professor Kelly Phelps, 'When the protection mechanisms under the Domestic Violence Act fail, what are the options available to abused partners who have killed their abusers under South African Criminal Law' Criminal Law lecture at the University of Cape Town, 4 October 2019 at Cape Town, South Africa.
[455] Ibid at 275.

women who retaliate against their abusers was strong. However, *Eadie* unnecessarily muddied the waters by apparently collapsing the tests for conative capacity and automatism. Even without *Eadie*, though, this defence has challenges that would limit its utility in these sorts of cases. It still requires proof that an abused woman was in a state where she either temporarily could not distinguish between right or wrong, or she could not act in accordance with her understanding thereof.[456] This defence would only cover a sub-set class of abused women – but what of the aforementioned class of women who, with total agency, take the law into their own hands because society has repeatedly failed her? Non-pathological capacity could certainly assist in instances where the abused has been so worn down, as with in *Wiid*, that she does indeed act in a state of automatism.

However, on a more principles level, what this issue boils down to is what the law considers 'right and wrong' in these scenarios. An abused women retaliating against her habitual abuser, where the contemporary[457] requirements of private defence are met, ought not be considered wrong by the law. If the law does consider it to be wrong, and she knows it, non-pathological incapacity does not cover her unless she acts in a state of automatism. If the law does consider it to be right, then private defence is a suitable defence, and non-pathological incapacity is unnecessary. This is especially exacerbated by the *Eadie* precedent, and the defence would require significant clarity before it could be an effective defence.

The defence in *Engelbrecht* argued that not one of the existing defences in law "articulate comprehensively the variety of experiences that constitutes the phenomena of intimate murders.[458]" In their traditional iteration this is certainly true. However, private defence, when tempered by the expansion of the 'imminence' requirement, and with a realistic understanding of reasonableness and necessity, has great potential. It has the potential to defend a woman adequately

[456] Burchell op cit note 16 at 275.
[457] Per *S v Engelbrecht* supra note 1 minority.
[458] *S v Engelbrecht* supra note 1 para 13.

and comprehensively. Where someone exists in a cyclically abusive relationship, and who kills her abuser, which is reasonable and necessary for her to protect her life, her dignity, the life and dignity of her child, or any other legally protected interest.

When Judge Satchwell sentenced Mrs Engelbrecht to a five-minute detention until the Court rose for tea, it sent a clear message: the law of South Africa, as informed by the Constitution, cannot condemn a woman to imprisonment for protecting herself and her child against decades of abuse. Considering the abysmal failure of state protective mechanisms, in the absence of a sufficient defence courts will continue to undermine the symbolic seriousness of a murder conviction by imposing menial sentences. A woman ought not be labelled a murderer if the court cannot bring itself to sentence her to a day in prison. Our current defences need to better reflect the real lack of blameworthiness in these cases, so that symbolic 'detentions until teatime' are no longer the best option we have.

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