Criminal Justice for Female Victims of Domestic Violence: Time to Deal Defencelessness a Final Blow

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SUMMARY

At the Presidential Summit on Gender-based Violence (GBV) and Femicide in November 2022, President Cyril Ramaphosa instructed the Department of Justice and Correctional Services to implement criminal justice reforms that would prioritise the needs of domestic violence and GBV survivors. Ironically, from January to March 2023, shortly after the President's instruction, South Africa experienced yet another increase in violence against women, with 969 murders and 1 485 attempted murders. Carrying out the President's instruction may take the form of legislative amendments to offer stronger protection and/or reforming the defences available to survivors of abuse who, having lost confidence in the system, take the law into their own hands and end up as murder-accused in criminal proceedings. Two years following the President's instruction, this article takes stock of progress and recommends a potential way forward. In terms of reforms to the Domestic Violence Act, some noteworthy changes took effect in 2023, including the option to apply for a domestic violence safety monitoring notice. However, in light of the already overstretched police force and the poor track record of protection orders in keeping women in abusive relationships safe, the likelihood that the notice will bring dramatic change is slim. Shifting the focus to the defences available to battered women who face murder charges after killing their abusers, the article examines the plea of private defence as well as non-pathological criminal incapacity. With reforms in this area sorely lacking, South African authorities have two options: Lawmakers may follow the example of Australia and Canada, which countries extended the scope of private defence by way of legislative amendments to accommodate abused women. This, however, is the least preferred option. Unlike the two foreign jurisdictions, South Africa has a much narrower definition of private defence and employs a mainly objective test. Alternatively, and ideally, the defence of non-pathological criminal incapacity based on provocation and emotional stress could be revived from its slumber erroneously imposed by *S v Eadie* in 2002. This can be achieved through a clarificatory appeal court judgment, without the need for legislation. The subjective nature of the test to determine criminal (in)capacity means that the abused woman's state of mind – including what she perceived and believed to be true at the time of killing her abusive partner – can be taken into consideration.

KEYWORDS: domestic violence, battered women, defences, private defence, non-pathological criminal incapacity

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1 INTRODUCTION

Domestic violence is inherently paradoxical: While the family normally serves as a support structure to a victim of violent crime, the victim of domestic violence experiences the devastation of violence perpetrated from within this intimate inner circle. Women caught up in abusive relationships often continue to live with, and are in most instances financially dependent on, their abusers.

Statistics paint a bleak picture of the extent of the problem. Globally, 27 per cent of women aged 15 to 49 have reported "some form of physical and/or sexual violence" by an intimate partner.[1] South Africa, too, has been scourged by domestic violence. The World Health Organization (WHO) recently found that 60 000 South African women and children fall victim to violence in the home every year.[2] According to the South African Police Service's crime statistics, the period January to March 2023 saw yet another increase in violence against women, with 969 murders and 1 485 attempted murders recorded in a mere three months.[3] In fact, compared to the rest of the world, South Africa's numbers are disturbingly high. WHO data from 2016 suggests that South Africa's femicide[4] rate is five times higher than the global average.[5] Similarly, the results from the South African Medical Research Council's 2020 survey on femicide released in October 2024 put intimate partner femicide at a rate of 5,5 per 100 000 women – again more than five times higher than in the rest of the world at the time of the survey.[6]

As its response to this evil, the South African government hosted the country's first Gender-based Violence[7] (GBV) Summit in April 2018. On this occasion, GBV was declared a national crisis,[8] and the need to adopt a national plan of action to fight this scourge was emphasised.[9] The National Strategic Plan on GBV and Femicide followed in 2020 and aimed to achieve

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1 Integrated Emergency Response "Domestic Violence Statistics in South Africa" (27 September 2022) https://www.ier.co.za/domestic-violence-statistics-in-south-africa/ (accessed 2024-05-22).

2 *Ibid*.

3 Unicef "Crime Statistics – Devastating Violence Against Children and Women Continues" (31 May 2023) https://www.unicef.org/southafrica/press-releases/crime-statistics-devastating-violence-against-children-and-women-continues (accessed 2024-05-09).

4 The killing of women.

5 Republic of South Africa "The Report of the Presidential Summit Against Gender-based Violence and Femicide, 2018" (August 2018) https://gbvf.org.za/files/2024/05/The-Report-of-the-Presidential-Summit-against-Gender-based-Violence-and-Femicide_2018_29-03-2019.pdf (accessed 2025-12-04) 28.

6 Pretorius "Here's Where Women in SA Are Most Likely to be Murdered" (10 October 2024) https://mg.co.za/health/2024-10-10-heres-where-women-in-sa-are-most-likely-to-be-murdered/ (accessed 2024-10-15).

7 While "gender-based violence" and "domestic violence" are generally accepted to be two different concepts depending on who the aggressor is, the relationship with the victim and other factors, the response at societal level generally includes both. In this article, both terms are used in the context of violence perpetrated against women within the intimate setting of the home and family.

8 Singo "Coercive and controlling behaviour in the Domestic Violence Act" 2023 140(4) *South African Law Journal* 763 763.

9 Republic of South Africa https://gbvf.org.za/files/2024/05/The-Report-of-the-Presidential-Summit-against-Gender-based-Violence-and-Femicide_2018_29-03-2019.pdf 2.

"strengthened capacity within the criminal justice system to address all impunity, effectively respond to femicide and *facilitate justice for GBV survivors*"[10] within five years. At the second Presidential Summit on GBV and Femicide in November 2022, President Cyril Ramaphosa admitted that despite all efforts made, violence against women continued.[11] He instructed the Department of Justice and Correctional Services to implement "reforms in the criminal justice system to ensure that the system prioritises survivors and their needs".[12]

In the main, there are two ways in which the President's instruction can be carried out: The first is by implementing and enforcing effective domestic violence legislation; the second, by offering survivors of abuse proper defences where they take the law into their own hands and end up as accused in criminal proceedings. In light of this, this article explores the effectiveness of recent reforms to South Africa's domestic violence legislation. This is followed by an assessment of current and recommended defences to ensure justice for survivors of domestic violence who end up in the dock in criminal proceedings. Particular focus is on the plea of private defence, which is discussed with reference to Canadian and Australian jurisdictions, and on the potential "revival" of non-pathological criminal incapacity based on provocation and emotional stress.

2 RECENT AMENDMENTS TO SOUTH AFRICA'S DOMESTIC VIOLENCE LEGISLATION

The Domestic Violence Amendment Act,[13] which was implemented in April 2023,[14] introduced a few noteworthy changes. Among others, it extended the definition of domestic violence to provide broader protection to victims.[15] For instance, the definition now includes both coercive behaviour[16] and controlling behaviour,[17] which academic literature normally combines into the

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10 Republic of South Africa "National Strategic Plan on Gender-based Violence and Femicide" (2020) https://www.justice.gov.za/vg/gbv/nsp-gbvf-final-doc-04-05.pdf (accessed 2024-05-20) 48. Own emphasis added.

11 Republic of South Africa "President Cyril Ramaphosa: Second Presidential Summit on Gender-Based Violence and Femicide" (1 November 2022) https://www.gov.za/news/speeches/president-cyril-ramaphosa-second-presidential-summit-gender-based-violence-and (accessed 2024-05-20) 2.

12 Republic of South Africa https://www.gov.za/news/speeches/president-cyril-ramaphosa-second-presidential-summit-gender-based-violence-and 5.

13 14 of 2021.

14 Dhever "Addressing Domestic Violence in South Africa: An Overview of the Amendments to the Domestic Violence Act" (13 December 2023) https://www.fasken.com/en/knowledge/2023/12/overview-of-the-amendments-to-the-domestic-violence-act (accessed 2024-07-23).

15 Singo 2023 *South African Law Journal* 787–788.

16 "[T]o compel or force a complainant to abstain from doing anything that they have a lawful right to do, or to do anything that they have a lawful right to abstain from doing". S 2 of the Domestic Violence Amendment Act.

17 "[B]ehaviour towards a complainant that has the effect of making the complainant dependent on, or subservient to, the respondent and includes– (a) isolating them from sources of support; (b) exploiting their resources or capacities for personal gain; (c) depriving them of the means needed for independence, resistance or escape; or (d) regulating their everyday behaviour". S 2 of the Domestic Violence Amendment Act.

notion of "coercive control".[18] The broader definition is a step in the right direction to achieve a better understanding of the range of circumstances to which battered women may be subjected.

A further amendment offers victims the option of applying for a protection order online instead of having to visit a magistrate's office,[19] which is beneficial where physical access to court is problematic. Moreover, abusers who violate a protection order multiple times now face harsher sentences, namely a fine or ten years' imprisonment.[20]

Most relevant for purposes of this article, however, is the insertion[21] of section 4A in the Domestic Violence Act.[22] This section introduces the option of applying for a domestic violence safety monitoring notice in addition to a protection order in circumstances where the applicant shares a residence with the abuser. The notice, which could also be applied for online,[23] may be granted where the applicant is believed to share a residence with the respondent, who, on reasonable grounds, is suspected to pose a "threat to the complainant's personal safety".[24] Once the notice is granted, a member of the South African Police Service is tasked with making regular contact with the applicant to check on her well-being[25] and to visit the shared residence of the applicant and the alleged abuser to engage with the applicant in private.[26]

Although the notice is clearly intended to afford additional protection against domestic abuse, certain practical considerations regarding its enforcement raise doubts as to how effective it will ultimately be. The first consideration relates to inadequate staffing. With a femicide rate five times higher than the global average,[27] and a shockingly low police-to-population ratio of 1:413,[28] the likelihood that existing staffing levels in the country's police service will be sufficient to effectively enforce these notices seems slim.

Second, there is the risk that the notice, like a protection order, may have the opposite effect, escalating domestic violence instead of preventing it. It is entirely comprehensible that remedies of this kind could upset the abuser

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18 Singo 2023 *South African Law Journal* 773 774. Stark explains coercive control as "coercive and controlling behaviour against the victim, entailing a combination of violent and nonviolent tactics over time to dominate a partner, degrade them, exploit their resources and deprive them of rights and liberties".

19 S 7 of the Domestic Violence Amendment Act.

20 S 22 of the Domestic Violence Amendment Act.

21 By way of s 8 of the Domestic Violence Amendment Act.

22 116 of 1998.

23 S 4A(2)(*b*) of the Domestic Violence Act.

24 S 4A(6)(*a*-*b*) of the Domestic Violence Act.

25 S 4A(7)(*a*) of the Domestic Violence Act.

26 S 4A(7)(*b*) of the Domestic Violence Act.

27 Republic of South Africa https://gbvf.org.za/files/2024/05/The-Report-of-the-Presidential-Summit-against-Gender-based-Violence-and-Femicide_2018_29-03-2019.pdf 28.

28 Western Cape Government "Police Resourcing Allocation Behind by 20 Years and Almost 90 000 Officers Short" (29 January 2023) https://www.westerncape.gov.za/community-safety/article/police-resourcing-allocation-behind-20-years-and-almost-90-000-officers-short (accessed 2025-12-04).

and have a negative impact on the safety of the female victim.[29] Research supports this:[30] During one investigator's interviews with 503 applicants for protection orders, 44 per cent indicated that they had been threatened with death if they continued to seek legal assistance.[31]

In the third instance, victims who do find the courage to obtain legal assistance often find that police are reluctant to intervene when protection orders are violated.[32] Of 65 applicants interviewed in Brisbane, Australia, many indicated that police delays and failure to act had resulted in greater levels of abuse and increased danger.[33] This is also apparent from South African case law. In *S v Ferreira*,[34] Mrs Ferreira testified that she had approached the police for assistance with domestic violence on three occasions, but that they turned up only once, and only to instruct her to get the inebriated accused sober again.[35] There is no reason to believe that there will be less reluctance to act on instances of violence in a home that is subject to a safety monitoring notice.

The above indicates that a protection order on its own cannot be relied on. Indeed, the fact that protection orders are wholly inadequate to protect women against abuse is public knowledge. In the 2018 GBV Summit report already,[36] protection orders were included under the heading "Things that did not work well so far" because of the many women who continued to lose their lives despite having obtained protection orders. This may very well extend to the safety monitoring notice.

3 COMING TO THE ABUSED-TURNED-ACCUSED'S DEFENCE?

Although rare,[37] there are cases[38] where abused women lose trust in the criminal justice system, take the law into their own hands, and kill their abusers. When this happens, the abused becomes the accused and faces a murder charge. For conviction, the State bears the onus to prove the

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29 Botha "Strafregtelike Struikelblokke in die Mishandelde Persoon se Stryd om Geregtigheid" 2014 11(3) *LitNet Akademies* 189 201.

30 Artz "Fear of Failure? Why Victims of Domestic Violence Retract from the Criminal Justice Process" 2011 37 *SA Crime Quarterly* 3 8.

31 Artz 2011 *SA Crime Quarterly* 6–7; Botha 2014 *LitNet Akademies* 201.

32 Mckenzie "Do Orders of Protection Actually Shield Domestic Violence Victims?" (23 January 2018) https://thecrimereport.org/author/vmckenzie/page/2/ (accessed 2024-05-20) 5.

33 Shircore, Douglas and Morwood "Domestic and Family Violence and Police Negligence" 2017 39(4) *Sydney Law Review* 1 2.

34 2004 (2) SACR 454 (SCA).

35 *S v Ferreira supra* par 25.

36 Republic of South Africa https://gbvf.org.za/files/2024/05/The-Report-of-the-Presidential-Summit-against-Gender-based-Violence-and-Femicide_2018_29-03-2019.pdf 33.

37 Naylor and Tyson "Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question" 2017 6(3) *International Journal for Crime, Justice and Social Democracy* 72 73.

38 See, for example, *S v Ferreira supra*; *S v Engelbrecht* 2005 (2) SACR 41 (W); the Canadian matter of *R v Lavallee* [1990] 1 SCR 852; unreported Canadian matter of *R v Falls*, 2010.

presence of the requirements for criminal liability – voluntary conduct, unlawfulness, criminal capacity, and fault – beyond a reasonable doubt.[39]

In raising a defence, most of these battered women opt for private defence,[40] although the alternative defence of non-pathological incapacity[41] was also tolerated up to 2002.[42] The question explored in the following paragraphs is therefore whether these defences have undergone any reforms in recent years to better serve survivors' needs. Unfortunately, while South Africa's National Strategic Plan on GBV and Femicide has clear objectives for preventing domestic violence (albeit with limited success), it is silent on reforming defences to accommodate abused women who find themselves in the dock in criminal proceedings.[43]

3 1 Private defence

In South Africa, the requirements to succeed with private defence can be divided into requirements for the attack and for the defence, respectively. The attack must be against an interest that is recognised by law and must be imminent and unlawful.[44] The defensive act, in turn, must be directed at the attacker, must be necessary, must be reasonably proportionate to the attack, and must be a conscious act in private defence.[45]

It is the requirements of imminence of the attack and necessity of the defensive act that female abuse survivors struggle most to prove in criminal proceedings.[46]

3 1 1 Imminence of the attack

The challenge with complying with the "imminence" requirement is that abused women, in some instances,[47] wait until their abusive partners fall asleep, pass out intoxicated, or have their backs turned on them before they strike, simply because they do not stand a chance of overpowering the abuser otherwise. This may lead the State to argue that there was no

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39 Burchell *Principles of Criminal Law* (2016) 51.

40 Nash and Dioso-Villa "Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners" 2023 30(9) *Violence Against Women* 1 2.

41 The option of non-pathological incapacity was first acknowledged in *S v Campher* 1987 (2) SA 940 (A).

42 There are other avenues to explore, such as putative private defence, where a person thinks that they are in danger while they are not, or mistakenly believes that there is an unlawful attack against them. Such a misperception may exclude fault, but not unlawfulness. Snyman *Criminal Law* (2020) 93–94. Yet although putative private defence may exclude fault in the form of intention, it will not always result in a complete acquittal. If the court believes that the accused was negligent, (s)he may still be convicted of culpable homicide. Nevertheless, this article is limited to private defence and non-pathological criminal incapacity based on provocation and emotional stress.

43 Republic of South Africa https://gbvf.org.za/files/2024/05/The-Report-of-the-Presidential-Summit-against-Gender-based-Violence-and-Femicide_2018_29-03-2019.pdf 35.

44 Burchell *Principles of Criminal Law* 122–125.

45 Snyman *Criminal Law* 88–93.

46 Botha 2014 *LitNet Akademies* 189.

47 See Nash and Dioso-Villa 2023 *Violence Against Women* 1 15, 20. Only a small portion of the researchers' study sample killed in non-confrontational circumstances.

imminent attack immediately preceding the conduct, rendering the conduct "unreasonable".[48]

Internationally, there appears to be a move towards expanding this requirement to accommodate abused women.[49] Even in South Africa, the court in *S v Engelbrecht* was willing to do so, arguing that in the event of a pattern of abuse, the "imminence" requirement should be expanded to include abuse that is inevitable.[50] Therefore, although the defensive act may have been premeditated, private defence should not be excluded.[51] Following this line of reasoning, the minority in *Engelbrecht* found that the domestic violence at the hands of Mr Engelbrecht was indeed imminent at the time of the killing, even though the deceased was asleep.[52] However, this development had not yet been confirmed by the Supreme Court of Appeal (SCA), and Mrs Engelbrecht ultimately did not succeed with private defence, as the majority of the court held that her conduct had not been necessary.[53]

3 1 2 Conduct must be necessary

This requirement emphasises that the defender (in this instance, the abused woman) can only take the law into her own hands "if ordinary legal remedies do not afford effective protection".[54] It is safe to say, therefore, that the inefficacy of national domestic violence legislation to protect against abuse would help build a stronger case of private defence. Another logical assumption is that it would count in favour of the abused-turned-accused if the violence was reported, a protection order (and now also a safety monitoring notice) was obtained, and other attempts to seek assistance were made prior to the killing action.

From the few foreign case law examples where abused women succeeded with private defence, it is also clear that compliance with the "necessary" requirement is aided by a proper understanding of the term "coercive control", which now forms part of South Africa's extended domestic violence definition,[55] and reliance on experts to explain the concept to the court.[56] This may help the court understand why abused women lose

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48 Nash and Dioso-Villa 2023 *Violence Against Women* 1 2.

49 A brief discussion of foreign developments in this area of law follows in par 3 2.

50 *S v Engelbrecht supra* par 349.

51 *S v Engelbrecht supra* par 350; Botha 2014 *LitNet Akademies* 197.

52 *S v Engelbrecht supra* 396; Botha 2014 *LitNet Akademies* 197.

53 *S v Engelbrecht supra* 48.

54 Snyman *Criminal Law* 88.

55 See fn 15 and 16 above. See also s 2 of the Domestic Violence Amendment Act.

56 In the unreported case of *R v Falls*, 2010 (Queensland), for instance, details about the fear and isolation experienced by the victim as well as reasons for her loss of confidence in the police were explained to offer the court a better understanding of "coercive control". Sheehy, Stubbs and Tolmie "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in R v Falls" 2014 38(2) *Melbourne University Law Review* 666 685–686, 688. For another example, see the Canadian case of *R v Lavallee supra* 852–853, where the court explained that a lack of expert evidence would leave the jury with insufficient insight as to why the accused believed that her conduct was necessary and that there was imminent danger at the time when she killed the deceased.

confidence in the police,[57] as well as why it is difficult for them simply to leave the abusive relationship.[58]

Yet, to date, there has not been a single reported case in South Africa where an abused woman succeeded with private defence for killing her abusive partner in non-confrontational circumstances. *Engelbrecht*[59] came closest with the expansion of the "imminence" requirement. Nevertheless, the majority did not regard Mrs Engelbrecht's conduct as reasonably necessary and argued that she had not allowed the legal system, police, and society a fair chance to assist her[60] even though various third parties, including police officers, confirmed the abuse, the injuries that she had sustained, the obtainment of a protection order, and reports made to the police.[61] Mrs Engelbrecht's plea of private defence failed, and she was convicted of murder. One could regard this case as a missed opportunity for formal reform of South Africa's requirements for private defence to accommodate victims of domestic violence: Instead of definitely developing the law, the court chose to exercise its discretion to mitigate the sentence of the abused-turned-accused.[62]

3 2 International developments in the field of private defence

Further afield, jurisdictions have indeed been developing their criminal justice response to GBV and domestic violence.[63] Of specific relevance to this article are the legislative amendments introduced in the Australian states of Victoria and Western Australia, as well as in Canada, to accommodate abused women with the plea of private defence.

3 2 1 The legal position in the state of Victoria, Australia

Legislative amendments to the general self-defence laws in Victoria took effect on 14 September 2014.[64] The amendments included the insertion of section 322M in Victoria's Crimes Act,[65] which reads as follows:[66]

> "**Family violence and self-defence**
> (1) Without limiting section 322K,[67] for the purposes of an offence in circumstances where self-defence in the context of family violence is in

[57] Sheehy *et al* 2014 *Melbourne University Law Review* 688.

[58] Sheehy *et al* 2014 *Melbourne University Law Review* 690–691.

[59] *S v Engelbrecht supra*.

[60] *S v Engelbrecht supra* 48; Botha 2014 *LitNet Akademies* 197.

[61] *S v Engelbrecht supra* 60–61.

[62] *S v Engelbrecht supra* 178.

[63] Newton "Not Ready, Not Right: Key Objections to Criminalising Coercive Control in New South Wales" 2023 45(1) *Sydney Law Review* 121 122.

[64] Naylor and Tyson 2017 *International Journal for Crime, Justice and Social Democracy* 77.

[65] 6231 of 1958.

[66] All italics added for emphasis.

[67] Section 322K, too, was inserted by the 2014 amendments and regulates self-defence in the following terms: "**Self-defence** (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence. (2) A person carries out conduct in self-defence if– (a) the person believes that the conduct is necessary in self-defence; and

issue, *a person may believe that the person's conduct is necessary in self-defence*, and the conduct may be a reasonable response in the circumstances *as the person perceives them*, even if–

(a) the person is responding to a harm *that is not immediate*; or

(b) the response involves the *use of force in excess* of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether–

(a) a person has carried out conduct while *believing it to be necessary* in self-defence; or

(b) the conduct is a reasonable response in the circumstances *as a person perceives them*."

3 2 2 The legal position in the state of Western Australia

Legislative reform in Western Australia took place in 2008[68] when the Criminal Law Amendment (Homicide) Act[69] introduced certain changes to the state's Criminal Code Act Compilation Act.[70] Section 248(4) now reads as follows:[71]

"(4) A person's harmful act is done in self-defence if–

(a) the *person believes the act is necessary* to defend the person or another person from a harmful act, *including a harmful act that is not imminent*; and

(b) the person's harmful act is a reasonable response by the person in the circumstances *as the person believes them to be*; and

(c) there are reasonable grounds for those beliefs."[72]

(b) the conduct is a reasonable response in the circumstances as the person perceives them. (3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury."

68 Tarrant "Self Defence in the Western Australian Criminal Code: Two Proposals for Reform" (2015–16) https://api.research-repository.uwa.edu.au/ws/portalfiles/portal/9286487/SSRN_id2660073_Self_Defence_.pdf (accessed 2024-05-20) 1.

69 29 of 2008.

70 028 of 1913.

71 All italics added for emphasis.

72 The full s 248 reads as follows: "Self-defence (1) In this section – harmful act means an act that is an element of an offence under this Part other than Chapter XXXV. (2) A harmful act done by a person is lawful if the act is done in self-defence under subsection (4). (3) If – (a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and (b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder. (4) A person's harmful act is done in self-defence if – (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and (c) there are reasonable grounds for those beliefs. (5) A person's harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful. (6) For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it."

3 2 3 Synopsis of Australian self-defence reform

From the provisions above, it is clear that the intention behind the reform in Australian self-defence laws has been to improve women's access to private defence,[73] and more specifically, to accommodate women who kill their abusive partners in non-confrontational scenarios.[74] What is also evident from these two states' self-defence provisions is the strong focus on whether the person responding to the harm subjectively believed the conduct to be necessary, even where the harm was not imminent.

This is in direct contrast to South Africa, where the test to succeed with private defence is mainly objective.[75] Here, a person responding to an attack, believing the defensive act to be necessary (even though, in reality, it is not) or the attack to be imminent (even though it is not), would not succeed with private defence. Their chances might be better if they rely on putative private defence, which may exclude fault but not unlawfulness.[76]

However, a recent study of 69 abused women in Australia who killed their abusive partners in the period 2010 to 2020[77] revealed that despite the legal development of the plea of self-defence, most women still opted to plead guilty to manslaughter.[78] This is consistent with a previous finding[79] that women prefer to plead guilty to manslaughter or lesser charges instead of facing a murder charge, to which minimum sentences apply. Altogether, 34 of the 69 women studied eventually proceeded to trial. Fifteen of them were convicted of manslaughter, seven of murder, and only eleven were acquitted, mostly based on self-defence.[80]

Ironically, though, all acquittals in Victoria and Western Australia were based on traditional self-defence, and not the amended self-defence plea for non-confrontational scenarios, where imminence is no longer required.[81] In Victoria, most women also opted to plead guilty to manslaughter instead of proceeding to trial and risking a conviction of murder.[82] Western Australia, in turn, had the highest number of murder convictions for the studied sample of women.[83] This does raise questions as to the effectiveness of the legislative developments in these two Australian states.

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73 Nash and Dioso-Villa 2023 *Violence Against Women* 1 4.

74 Tarrant https://api.research-repository.uwa.edu.au/ws/portalfiles/portal/9286487/SSRN_id2660073_Self_Defence_.pdf 1.

75 Snyman *Criminal Law* 94.

76 Snyman *Criminal Law* 84. For an explanation of putative private defence, see fn 43 above.

77 Nash and Dioso-Villa 2023 *Violence Against Women* 2.

78 Nash and Dioso-Villa 2023 *Violence Against Women* 8.

79 Sheehy, Stubbs and Tolmie "Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?" 2012 45(3) *Australian & New Zealand Journal of Criminology* 383 386; Nash and Dioso-Villa 2023 *Violence Against Women* 1 8.

80 Nash and Dioso-Villa 2023 *Violence Against Women* 8.

81 Nash and Dioso-Villa 2023 *Violence Against Women* 9.

82 *Ibid.*

83 *Ibid.*

3 2 4 The legal position in Canada

The amendment of Canada's definition of self-defence in 2013[84] placed female victims of abuse in that jurisdiction in a better position than before. Section 34(1) of the Criminal Code,[85] currently reads as follows:

> "Defence of Person
> **Defence – use or threat of force**
> **34(1)** A person is not guilty of an offence if:
> **(a)** *they believe*[86] on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
> **(b)** the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
> **(c)** the act committed is reasonable in the circumstances."

For the first core element of the defence, namely a "reasonable perception of force or a threat of force against the accused or other person",[87] the accused's "subjective perception … is objectively verified".[88] This combination of a subjective and objective test allows misperception on the part of the accused/defender, as long as it is reasonable.[89] In South Africa, a mistaken belief of force or a threat of force will resort to putative private defence, and not private defence.

The second element, a "defensive purpose associated with the accused's actions",[90] focuses on the defender's subjective state of mind.[91] This represents a departure from the previous provision, which provided only for an objective test.[92]

The third and final element to succeed with a plea of self-defence under the amended Canadian law is that the accused's actions must be "reasonable in the circumstances",[93] constituting an objective assessment. To help determine this, section 34(2) of the Criminal Code lists a number of factors to be considered, two of which[94] are particularly relevant to this article, namely:[95]

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84 By way of Bill C-26 (S C 2012 c 9) Reforms to Self-Defence and Defence of Property (Bill C-26).
85 Criminal Code (R S C, 1985, c C-46).
86 Own emphasis.
87 Bill C-26 2.
88 *Ibid.*
89 Bill C-26 10.
90 Bill C-26 2.
91 *Ibid.*
92 Bill C-26 10.
93 Bill C-26 2.
94 Derived from *R v Lavallee supra*, one of a few cases where an abused woman killed her husband when he turned his back on her (in a non-confrontational situation) and succeeded with self-defence.
95 Bill C-26 11.

> "imminence of the attack is not a rigid requirement that must be present for the defence to succeed, but rather is a factor to consider in assessing the reasonableness of the accused's actions;[96] and
>
> an abusive history between the accused and the victim is a relevant factor in assessing the reasonableness of the accused's actions".[97]

Therefore, as in the states of Victoria and Western Australia, Canada's amended definition of self-defence also encompasses a stronger focus on the subjective state of mind of the person acting in defence, with a greater balance between subjective and objective considerations.[98] Again, this contrasts sharply with South Africa, where the test to succeed with private defence is chiefly an objective one.

However, in Canada, too, success with private defence remains the exception rather than the rule, despite the legislative amendments.[99]

3 3 Non-pathological criminal incapacity based on provocation and emotional stress

The challenges posed by private defence and its limited success in accommodating abused women who kill in non-confrontational circumstances emphasise the need for an alternative defence. In South Africa, the defence of non-pathological criminal incapacity based on provocation and emotional stress used to serve this purpose.[100]

However, as explained earlier, to convict someone of a criminal offence, the State needs to prove voluntary conduct, unlawfulness, criminal capacity, and fault beyond a reasonable doubt.[101] The test for criminal capacity is defined in section 78 of the Criminal Procedure Act,[102] which states the following:

> "A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable–
> (*a*) of appreciating the wrongfulness of his or her act or omission; or
> (*b*) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,
> shall not be criminally responsible for such act or omission."

Soon after the formulation of section 78, its application was extended from mental illness, which is a pathological incapacity, to non-pathological incapacity.[103] Section 78(2) confirms this extension by stipulating:

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96 S 34(2)(*b*) of the Criminal Code.
97 S 34(2)(*f*) of the Criminal Code.
98 Bill C-26 3.
99 Sheehy *et al* 2012 *Australian & New Zealand Journal of Criminology* 391.
100 Until the uncertainty brought about by *S v Eadie* 2002 (1) SACR 663 (SCA).
101 Burchell *Principles of Criminal Law* 51.
102 51 of 1977.
103 Hoctor "Sharpening the Subjective Element of Criminal Liability in South African Law" 2023 36(3) *South African Journal of Criminal Justice* 462 468; Snyman *Criminal Law* 140.

> "If it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability *or for any other reason*[104] not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or intellectual disability, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79."

The benefit of the defence of non-pathological criminal incapacity for abused women is that the test to determine the presence of criminal capacity is subjective.[105] This means that the state of mind of the abused woman – including her experience of the abuse, and what she perceived and believed at the time of the killing – is taken into consideration. Among the scholars who have expressed support for such a subjective test are Hoctor[106] and Burchell,[107] with the latter stating:

> "It is fair that only persons who have the capacity to appreciate the wrongfulness of their conduct and the capacity to act in accordance with this appreciation should be subjected to criminal liability. It is the capacity to act differently in the circumstances that provides the essential element of subjective blameworthiness."

The historical roots of the defence of non-pathological criminal unaccountability in South Africa can be traced back to *S v Chretien*,[108] which, although it dealt with intoxication, played an important part in the development of the defence.[109] Not long after *Chretien*, the court in *S v Campher*[110] recognised the defence, based on provocation and emotional stress, in respect of a battered woman. The framework for this defence was formulated in *S v Laubser*,[111] which confirmed the two-step test for non-pathological incapacity, namely the mental ability to appreciate the wrongfulness of the conduct, and acting in accordance with such appreciation.[112] Shortly thereafter, the appellate division in *S v Wiid* for the first time granted an abused-turned-accused an acquittal on the charge of murder of her abusive husband based on this defence.[113]

But then came *S v Eadie*. One of the most criticised decisions in South African criminal law, the *Eadie* judgment has plunged the validity of this defence into uncertainty,[114] arguably setting the country back in terms of criminal justice for battered women.

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104 Own emphasis.

105 Burchell *Principles of Criminal Law* 253.

106 Hoctor 2023 *South African Journal of Criminal Justice* 462.

107 Burchell *Principles of Criminal Law* 253.

108 1981 (1) SA 1097 (A).

109 Maharaj and Hoctor "The Defence of Provocation – Where Are We Now?" 2019 49(2) *Obiter* 307 308.

110 1987 (1) SA 940 (A).

111 1988 (1) SA 163 (A). See Hoctor "Interrogating Irresponsible Driving. S v Scholtz 2006 1 SACR 442 (E)" 2006 27(3) *Obiter* 636 639.

112 *S v Laubser supra* 166G–167A; Maharaj and Hoctor 2019 *Obiter* 309.

113 *S v Wiid* 1990 (1) SACR 561 (A) 569; Snyman *Criminal Law* 206.

114 Snyman *Criminal Law* 206.

3 3 1 Eadie: the facts and chief criticism

The facts in *Eadie* did not involve domestic violence, but a road rage incident. Having attended a function, Mr Eadie (the appellant) was driving home with his family in the early hours of the morning. He became aware of the headlights of another vehicle behind him.[115] The vehicle overtook Eadie, flashing its headlights, and then slowed down to 40 km/h in front of him. Eadie, in turn, overtook the other driver, and the incident repeated itself. When both motorists stopped at a traffic light, Eadie got out of his car and approached the other driver, dealing him a blow to the head while still in the car. He went on to pull the driver out of the vehicle and continued to assault him until he died.[116] Eadie stood trial on a charge of, among others, murder. He admitted that he had assaulted and killed the deceased, but raised the defence of non-pathological incapacity based on provocation and emotional stress.[117] The defence was rejected, and Eadie was convicted of murder.[118] His appeal against the conviction was also rightly dismissed[119] based on expert evidence.[120]

However, the main point of criticism against the *Eadie* decision is that Navsa JA equated the test for criminal capacity – specifically the mental ability to act in accordance with one's appreciation of the wrongfulness of one's conduct – with automatism/involuntary conduct[121] and argued that a person who raises a lack of capacity should rely on the defence of sane automatism.[122] In criminal law terms, involuntary conduct and incapacity are two vastly different concepts, and different tests are used to determine the presence of each. To determine involuntary conduct, an objective test is used to assess the person's physical control over their bodily movements at the time of the incident.[123] For criminal capacity, a subjective test is used to determine the person's mental ability to act in accordance with their appreciation of wrongfulness or to refrain from certain conduct at the time of the incident.[124] In *Eadie*, therefore, Navsa JA suggested employing an objective test for a subjective matter. As Snyman[125] puts it: "One has to wonder whether the learned judge understands the basic building blocks of criminal liability."

Compounding *Eadie*'s negative effect in terms of accommodating battered women who kill their abusers is the fact that sane automatism or involuntary conduct is one of the most difficult defences to rely on, as courts generally view it with "great circumspection".[126]

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115 *S v Eadie supra* 666.
116 *S v Eadie supra* 667–668.
117 *S v Eadie supra* 664.
118 *Ibid.*
119 *S v Eadie supra* 693.
120 *S v Eadie supra* 669–670.
121 Snyman *Criminal Law* 144.
122 *S v Eadie supra* 693.
123 Hoctor 2006 *Obiter* 641.
124 *Ibid.*
125 Snyman *Criminal Law* (2014) 163.
126 Snyman *Criminal Law* 48 143; Maharaj and Hoctor 2019 *Obiter* 312.

3 3 2 Different interpretations of Eadie

Although criminal law writers differ on *Eadie*'s exact effect, there can be no doubt that the case has caused great uncertainty as to any future reliance on the defence of non-pathological incapacity based on provocation and emotional stress.

Snyman argues that the decision has, in effect, abolished the defence[127] – a view supported by Kemp and colleagues.[128] According to Burchell, *Eadie* may be interpreted in the following three ways:

> "1) That it is compatible with existing precedent on the subjective assessment of capacity, because it focuses only on the accepted process of judicial interference of the presence or absence of subjective capacity from an examination of objective facts and circumstances
> 2) The second interpretation is more radical and implies a possible restriction of the ambit of the defence of lack of capacity to a situation where automatism is present
> 3) The third possible interpretation, is that Navsa JA did not replace the entire existing subjective test of capacity with an objective one in provocation cases, but rather, in fact, succeeded in identifying an essential, qualified objective aspect in an otherwise subjective test of capacity."[129]

Hoctor reckons that the reason for the *Eadie* decision was to mitigate the risk that non-pathological incapacity based on provocation and emotional stress would be "accepted too facilely by the courts".[130] Burchell[131] supports this view, referring to judges' concern prior to *Eadie* that this defence "could allow a hot-headed person to escape criminal liability for conduct committed while in that state".

However, Patterson[132] correctly points out that Navsa JA's criticism of the courts' application of this test was an overreaction, as the defence had only been raised successfully in a very limited number of cases.[133] Hoctor[134] supports this by explaining that non-pathological incapacity as a result of provocation would only succeed in exceptional cases where the defence is genuine, and the accused manages to provide a factual foundation for it.

Arguing for the defence to be retained for victims of domestic violence, Patterson goes on to say that domestic violence cases should be distinguished from a person acting in a "goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control

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127 Snyman *Criminal Law* (2014) 163.

128 Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* (2022) 217.

129 *Principles of Criminal Law* (2006) 430.

130 Hoctor 2006 *Obiter* 639.

131 Burchell *Principles of Criminal Law* 330.

132 Patterson *The South African Criminal Justice: Does S v Eadie 2002 (2) SACR 663 (SCA) Create a Battering Ram in Rejection of the Defence Afforded a Battered Woman or Recourse of Victims Turned Accused?* (LLM thesis, University of Pretoria) 2011 22.

133 *S v Wiid supra*; *S v Arnold* 1985 (3) SA 256 (C); *S v Nursingh* 1995 (2) SACR 331 (D); *S v Moses* 1996 (1) SACR 701 (C).

134 2023 *South African Journal of Criminal Justice* 475.

his actions".[135] Burchell, too, finds justification for distinguishing domestic violence cases from other cases involving a "narrow conception of provocation".[136]

Unfortunately, though, there has not been a single case since *Eadie* where an accused (including female victims of domestic violence) succeeded with the defence of non-pathological criminal incapacity based on provocation and emotional stress.

3 3 3 Post-Eadie case law

From an overview of case law since *Eadie*, it is evident that our courts are inconsistent in following Navsa JA's suggested interpretation of the test for criminal capacity. These days, provocation or emotional stress mostly serves as a mitigating factor only.[137]

Various high court judgments have "dutifully echoed"[138] Navsa JA's opinion that sane automatism and non-pathological incapacity are one and the same defence. This may be the result of the *stare decisis* doctrine, which states that courts should respect superior courts' decisions in a particular field of law,[139] including criminal law. The doctrine was inherited from English law and continues to apply in the South African jurisdiction through section 2(1) of Schedule 6 to the Constitution.[140] Hahlo and Kahn[141] offer the following explanation of *stare decisis*:

> "(a) [A] court is absolutely bound by the ratio of the decision of a higher or larger court on its own level in the hierarchy, in that order, unless the decision was rendered per incuriam (for instance, a governing enactment was overlooked), or there was subsequent overriding legislation. In the above circumstances the precedent is deemed to be absolute.
> (b) [A] court will follow its own past decision unless satisfied it is wrong, when it will refuse to abide by it and so in effect overrule it."

With this in mind, the high courts' tendency to follow the SCA's *Eadie* judgment is understandable. It is the "safe option", and in line with what is expected in terms of the *stare decisis* rule.

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135 *S v Eadie supra* par 61; Patterson *The South African Criminal Justice* 40.

136 Burchell *Principles of Criminal Law* 332.

137 See, for example, *S v Rasengani* 2006 (2) SACR 431 (SCA); *S v Mnisi* 2009 (2) SACR 227 (SCA); *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA). See also Botha and Van der Merwe "Die Tergende Toekoms van Provokasie as Verweer in die Suid-Afrikaanse Strafreg" 2013 10(2) *LitNet Akademies* 81 91.

138 Maharaj and Hoctor 2019 *Obiter* 314. These cases include *S v Beukes* 2003 JDR 0788 (T); *S v Ngobe* 2004 JDR 0216 (T); *S v Hughes* 2004 JDR 0263 (T); *S v Scholtz* 2006 (1) SACR 442 (E); *S v Marx* 2009 (1) All SA 499 (E).

139 Maswazi "The Doctrine of Precedent and the Value of s 39(2) of the Constitution" 2017 (April) *De Rebus* 28 29.

140 S 2(1) of schedule 6 to the Constitution of the Republic of South Africa, 1996, reads as follows: "All law that was in force when the new Constitution took effect, continues in force, subject to– any amendment or repeal; and (b) consistency with the new Constitution." See also Devenish "The Doctrine of Precedent in South Africa" 2007 28(1) *Obiter* 1 1.

141 Devenish 2007 *Obiter* 3 5.

Nevertheless, when looking at the SCA case law dealing with diminished capacity, it would seem that the defence of non-pathological incapacity lives on in its pre-*Eadie* form.[142] In *S v Van der Westhuizen*,[143] for instance, the court referred to this defence and cited the original test for establishing non-pathological criminal incapacity, as laid down in *Laubser*, without any indication that *Eadie* had in effect amended, cancelled, or abolished this defence.[144] In the more recent *Director of Public Prosecutions v Peli*,[145] the court again referred to the same test in determining whether the accused had diminished capacity.

In this regard, it is important to note that the *stare decisis* rule very clearly provides for a departure from a court's own past decisions where the court is satisfied that the decision was wrong. According to Devenish,[146] departure would also be acceptable where dictated by "the interest of both rationality and justice". There is no doubt that the court in *Eadie* erred in conflating the defences of sane automatism and non-pathological incapacity. The SCA can correct this by departing from this conflation in future judgments. It would not only be the rational thing to do, but would restore justice to the many abused women who have been left largely defenceless since 2002.

4 THE WAY FORWARD

In South Africa's current constitutional era with its strong emphasis on human rights, including the right to a fair trial,[147] and a criminal justice system where the benefit of the doubt is always in favour of the accused, it is ironic that a vulnerable group such as female victims of domestic violence remain, for the most part, defenceless.

This may be addressed in one of two ways. South African lawmakers may choose to follow the example of Australia and Canada, extending the scope of private defence by way of legislative amendments to accommodate abused women. Alternatively, the defence of non-pathological criminal incapacity could simply be revived from its *Eadie*-imposed slumber for victims of abuse who end up as accused in criminal proceedings.

Although either development would represent an improvement on the current state of affairs, taking a similar approach to that in Australia and Canada would be the least preferred option. As the brief comparison of the jurisdictions revealed, South Africa has a much narrower definition of private defence than the two foreign jurisdictions, with our putative private defence seemingly incorporated into private defence in both Australia and Canada. In addition, unlike the combined subjective–objective test employed in Australia and Canada, the test applied to succeed with private defence in South Africa is mainly objective,[148] making it much more challenging to justify the killing of another human being (even more so in non-confrontational scenarios).

142 Maharaj and Hoctor 2019 *Obiter* 314.
143 2011 (2) SACR 26 (SCA).
144 Maharaj and Hoctor 2019 *Obiter* 314.
145 2018 (2) SACR 1 (SCA) par 9; Maharaj and Hoctor 2019 *Obiter* 314.
146 2007 *Obiter* 19.
147 S 35(3) of the Constitution.
148 Snyman *Criminal Law* 94.

Moreover, the true effectiveness of the extension of private defence abroad remains to be seen: To date, success with private defence remains very limited.[149]

On the other hand, reviving non-pathological criminal incapacity as a defence for battered women can be achieved by the judiciary itself, without the need to implement new, or amend existing legislation. The subjective nature of the test[150] to determine criminal (in)capacity also means that the state of mind of the abused woman – including her experience of the abuse, and what she perceived and believed to be true at the time of the killing – can be taken into consideration.

It is my hope, therefore, that the country's judges of appeal will find the courage to provide a clarificatory judgment on the issue of non-pathological criminal incapacity and set right what went wrong in *Eadie*. This is long overdue and will not only be a definite step forward in the fight against GBV and domestic violence, but will also answer the President's call for criminal justice reforms that "prioritise survivors and their needs".[151]

[149] Sheehy *et al* 2012 *Australian & New Zealand Journal of Criminology* 391.

[150] Burchell *Principles of Criminal Law* 253.

[151] Republic of South Africa https://www.gov.za/news/speeches/president-cyril-ramaphosa-second-presidential-summit-gender-based-violence-and 5.