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INTIMATE PARTNER KILLINGS, CRIMINAL DEFENCES AND THE LAW

by

Patience Thandeka Sithole

Submitted in partial fulfilment of the requirements for the degree of

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To every woman, alive and otherwise who has experienced and endured any form of abuse at the hands of an intimate male partner. May justice prevail in this life and the next.

Acknowledgments

To the Father, the Son and the Holy Spirit, thank You for Your great favour that has carried me from the time You knit me together in my mother's womb. Yes, from the time I was being formed in secret, and intricately and skillfully formed in the depths of the earth. Apart from You I have no good thing.

To my mother, words elude me, all I can say is thank you for your unconditional love and prayers. I am because you are. This one is for you, Mshika lomuhle.

To my father, thank you for embodying and cultivating a life of endless possibilities for my siblings and I. May you continue to rest easy, sobonana kwelizayo, Jobe.

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To my colleagues, thank you for your support and willingness to extend a helping hand whenever I needed it. May the good Lord bless you endlessly.

Finally, 'I want to thank me. I want to thank me for believing in me, I want to thank me for doing all this hard work. I want to thank me for having no days off. I want to thank me for never quitting.'

And that's on being a Master of the Law, periodt!

Declaration

I, Patience Thandeka Sithole, declare that this report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

Word count: 9 574 [Incl. the body of my report, footnotes **BUT** excl. title page, declaration, acknowledgments, abbreviations, and acronyms page, abstract, table of contents and the bibliography].

Abbreviations and Acronyms

IPKs	Intimate Partner Killings
IPV	Intimate Partner Violence
NGOs	Non-Governmental Organisations
PTSD	Post-Traumatic Stress Disorder
RP	Reasonable Person
RPS	Reasonable Person Standard
RWS	Reasonable Woman Standard
SA	South Africa
SCA	Supreme Court of Appeal

Abstract

The Constitution of the Republic of South Africa, 1996 in section 9 resoundingly guarantees the 'equal protection and benefit of the law' to all who are within the Republic. This undertaking is a crucial part of the South African democracy, and it is a manifestation of the law's progression from being grossly and arbitrarily discriminatory, to becoming more inclusive and considerate of people from all walks of life. Contrarily though, a close analysis of some aspects of the law as it currently exists, shows that equality before the law is more aspirational than it is a reality. Women, in particular, are often overlooked and subjected to unfairness by the same law that, in theory, vows to protect them. The lack of accommodation of abused women who kill, by the private defence ground of justification, under criminal law is an apt example of the law's marginalisation of women. This marginalisation manifests itself in the rigid approaches to cases of abused women who kill. The typical approach is the objective 'reasonable person' standard which is effective in most instances but has fallen short in cases of abuse, as such cases require consideration of the abused woman's unique set of circumstances. This calls for a closer exploration of the specific and subjective factors of women's experiences in order to comprehend the nature and extent of the abuse. Although expert witness evidence is admissible in these cases, the weight placed on such evidence is minimal, often leading to a miscarriage of justice. In view of that, this paper serves to play a dual role of re-identifying the inadequacies that continue to exist under the private defence laws in South Africa, while simultaneously providing recommendations on how the law can be developed to successfully address these inadequacies.

Keywords: South Africa, intimate partner violence, abused women who kill, private defence, gendered law, reasonable woman standard.

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I INTRODUCTION

Every so often, intimate partner killings (IPKs) rear their ugly heads in many parts of the world, but in the recent past, this has happened more aggressively and frequently in South Africa, generating a substantial amount of condemnation from the public, together with the powers that be. This rampant nature of IPKs, mostly affecting women,[1] has caused an immense amount of research, reporting and activism over the years. Although this extensive focus on the IPKs of women is justified, it is equally important to draw attention to a long-neglected and rare form of IPKs where it is not women who are murdered by their intimate partners; but men, who fall victim to and die at the hands of women.

These IPKs carried out by women occur for a number of reasons including, but not limited to, jealousy, rage, infidelity and financial gain.[2] However, the most common and compelling reason is that of women killing their intimate male partner, as a way of averting or reacting to a pattern of abuse that has continuously been inflicted upon them by such intimate male partner.[3] It is instances such as these that will be the subject of discussion in this report, as opposed to instances where women kill for other reasons.

There are three significant cases worth noting in this regard, namely *S v Ferreira and Others* [2004] 4 All SA 373 (SCA) (*Ferreira*), *S v Engelbrecht* 2005 (2) SACR 41 (W) (*Engelbrecht*) and *Steyn v S* 2010 (1) SACR 411 (SCA) (*Steyn*). These cases have a number of things in common, first, all the accused women were subjected to severe and prolonged domestic violence by their intimate male partners.[4] Secondly, the women, as a result of the abuse, resorted to killing their intimate male partner;[5] and thirdly, in the two cases where the women were

[1] L Managa, TG Tshitangano & NS Mashau et al 'Mapping strategies to empower women against intimate partner violence occurrences in Limpopo province, South Africa: scoping review' (2022) 20 *Gender and Behaviour* 19931.

[2] Anni-Mari (Anni) Elizabeth Hesselink & Nontyatyambo Pearl Dastille 'A criminological assessment on South African women who murdered their intimate male partners' (2015) 25 *Journal of Psychology in Africa* 338.

[3] Ibid at 340.

[4] *S v Ferreira and Others* [2004] 4 All SA 373 (SCA) paras 19-24. See *S v Engelbrecht* 2005 (2) SACR 41 (W) paras 49-59. See *Steyn v S* 2010 (1) SACR 411 (SCA) paras 2-8.

[5] Ibid *Ferreira* para 27. See *Engelbrecht* paras 134-136. See *Steyn* para 10.

convicted of murder, the courts were lenient in the sentences that they handed down.[6] Conversely, *Steyn* was the outlier, wherein the abused woman was acquitted of murder.[7]

Inasmuch as these cases had relatively positive outcomes, *Ferreira* showed the push and pull relationship that exists between the courts' tendency to place extensive focus on deterring other women from murdering an abusive intimate male partner, and a consideration of the best way to approach this unusual set of circumstances. It is quite clear that there are inconsistencies in the protection of women who find themselves in these dire circumstances. This was criticised heavily, and it attracted urgent calls for the law to be developed accordingly.[8] However, since the *Engelbrecht* era, legal practitioners, scholars, and civil society alike have abandoned this quest and seem to have accepted the limited victories in regard to sentencing.

Having considered that, this research report will explore the phenomenon of abused women who kill their intimate male partners, as opposed to the widely investigated issue of femicide. Part II of the report will analyse this phenomenon by discussing the reasons why abused women kill. Following from that, part III of this paper will briefly map out how abused women kill. Additionally, this research paper will, in part IV, evaluate private defence and lesser sentences as measures that are currently in place to vindicate women who kill. Thereafter, part V will look at Canadian and Australian self-defence laws as examples that South Africa (SA) can draw from, to develop its laws. Finally, part VI of the report will make recommendations on how the criminal law should be developed to better protect women who have had to resort to taking matters into their own hands.

II WHY ABUSED WOMEN KILL

It has been well over a decade since *Ferreira, Engelbrecht* and *Steyn* were first brought before the courts. Since then, violence against women and children, inside and outside of the home, has intensified in the most gruesome of ways. In the present day, SA is notorious for its high rates of

[6] *Ferreira* supra note 4 para 56. See *Engelbrecht* supra note 4 paras 4-8.
[7] *Steyn* supra note 4 para 25.
[8] Catherine Albertyn, Lilian Artz & Heléne Combrinck et al 'Women's freedom and security of the person' in Elsje Bonthuys (ed) & Catherine Albertyn (ed) *Gender, law, and justice* (2007) 342.

sexual violence,[9] exacerbated by 'dominant social norms that contribute to the…high levels of controlling behaviour and violence by men and tolerance of this by women…'[10] in romantic relationships.[11] It is these norms and high rates of violence against women that make it seem uneventful for women to be at the receiving end of abuse. Indeed, there is almost an expectation that women should be able to endure this kind of treatment, as this has been their experience in society since the beginning of time. This breeds a sinister environment for both the abused woman and her intimate male partner, where in most cases the woman is killed by her abuser or she must make the decision to kill him in order to protect herself and her children, where there are children involved.

According to Hallie Ludsin and Lisa Vetten, this can be explained, at least partly, by the 'social judgement theory'[12] which asserts that 'people order their experiences or perceptions along a continuum that ranges from acceptable to unacceptable.'[13] The theory provides that a person can go through a process of adapting to experiences that they previously deemed unacceptable, further that it is easier for them to adapt to these experiences if they had prior exposure to a similar situation at some point in their life.[14]

In other words, the theory explains that something like abuse is an experience that should be deemed, by the abused person, to be unacceptable; however, socialisation and exposure to abuse in childhood or in a previous relationship can cause the abused person to 'feel they must adjust to their partner's abuse.'[15] Regardless of that though, the prolonged nature and severity of an incident(s) of abuse can cause it to 'fall… significantly outside the range of what… [the abused person is] prepared to assimilate.'[16] An example of this is an instance where the abuser no longer just threatens or harms the woman, but starts to exhibit abusive behaviour towards a child or children in the home, or the abuser employs new abusive, often deadly, tactics towards the abused

[9] Matolwandile M Mtotywa, Matsobane Ledwaba & Bekezela T Mambo et al 'A conceptual framework of gender-based violence and femicide drivers in South Africa' (2023) 12 *International Journal of Research in Business and Social Science* 318.
[10] Ibid.
[11] Mtotywa, Ledwaba & Mambo et al op cit note 17 at 318.
[12] Hallie Ludsin & Lisa Vetten *Spiral of Entrapment: Abused Women in Conflict with the Law* (2005) 89.
[13] Ibid.
[14] Ludsin & Vetten op cit note 12 at 89.
[15] Ibid.
[16] Ludsin & Vetten op cit note 12 at 90.

woman.[17] This is deemed to be the possible turning point for the abused woman, where she goes from 'victim to perpetrator…'.[18] The theory further states that this shift occurs at the culmination of a continuous cycle of abuse that is endured by the abused woman, coupled with a new unacceptable incident that causes her to believe that 'she cannot escape the abusive situation and cannot survive within the relationship as it exists.'[19]

This was seen in full effect in *Ferreira* where the accused woman endured a long and grueling seven-year relationship, pervaded with verbal, physical, psychological, financial and sexual abuse.[20] Her partner, the abuser, did not stop at that, however, he went on to threaten Ms. Ferreira with further violence, stating that he would 'hire black men to rape the accused if she ever tried to leave him again…'.[21] This threat was made after two events had occurred, the first, when the accused woman was ordered by the abuser to show her genitals to his employees and the second when she was raped by said abuser.[22] Similarly in *Engelbrecht*, the accused woman had experienced a immense amount of abuse over a number of years, however, circumstances escalated when her husband, the abuser, lashed out and chastised their young child for accidentally bumping into him.[23] The abuser further physically assaulted Mrs. Engelbrecht and instructed her to not engage with the child otherwise he would kill her.[24] Consequentially, when putting the social judgement theory and the abovementioned series of events, side by side, the reasons for these women's decision to kill their intimate male partners,[25] start to become apparent.

A further analysis of these cases shows a peculiar, yet prominent, fascination with probing why the accused woman did not leave the abuser instead of killing him. Respectfully, this consideration is both irrelevant and, to a great degree, trivialises the effects of the abuse on the victim. According to Susanne Lohmann, Sean Cowlishaw & Luke Ney, consistent abuse can lead to 'coercive control',[26] 'where the main goal [of the abuser] is to degrade, isolate, and deprive a

[17] Ibid.
[18] Ludsin & Vetten op cit note 12 at 89.
[19] Ibid at 90.
[20] *Ferreira* supra note 4 paras 17-23.
[21] Ibid para 26.
[22] *Ferreira* supra note 4 para 26.
[23] *Engelbrecht* supra note 4 para 130.
[24] Ibid.
[25] *Ferreira* supra note 4 para 27. See *Engelbrecht* supra note 4 para 134.
[26] Susanne Lohmann, Sean Cowlishaw & Luke Ney et al 'The trauma and mental health impacts of coercive control: A systematic review and meta-analysis' (2023) 25 *Trauma, Violence and Abuse* 630 & 640.

person of their rights to physical security, dignity, and respect, which puts the victim in a state of terror and entrapment…'.[27] Lohmann et al argue that mental health issues such as depression and post-traumatic stress disorder (PTSD) are highly likely to stem from or to be triggered by this type of abuse.[28] Furthermore, Ludsin et al explain that continued abuse, which often leaves the abused woman isolated and without financial resources, creates '[a]"funnelling" of women's vision…'[29] and '[a] sense of entrapment within the relationship may come to dominate their thinking…'.[30] In addition to that, instances where the abused woman is unable to get help from authorities further cause her to believe that chances of leaving the abusive relationship are slim to none.[31]

This was depicted in *Ferreira* where the police failed to assist Ms. Ferreira and instead told her to go back to the abuser and 'get him to sober up…'.[32] Likewise in *Engelbrecht*, the police failed to show up on numerous occasions and when she asked for assistance from abuse victim programmes, the abuser's version of events was considered and believed, while hers was disregarded.[33] Thus, it was the abuser who was later encouraged to get a protection order 'because he was upset that she [Mrs. Engelbrecht] wanted to have him arrested.'[34]

The compound effect of the abuse, combined with the mental health issues that develop as a result of the abuse and the unavailability of a way out of the relationship, can cause extreme fear and helplessness in the abused woman.[35] Ultimately, this impairs the abused woman's ability to function optimally and results in her killing her intimate partner because it seems to be the only way out.[36] Hesselink and Dastille assert that another significant point worth noting is that abused women are most likely to kill their intimate male partners if they had exposure to abuse either in childhood or in former relationships.[37] This deepens the fears and thoughts of being unable to escape from the abuse, considering that it keeps recurring in the woman's life.[38] Overall, therefore,

[27] Ibid at 630.
[28] Lohmann, Cowlishaw & Ney et al op cit note 26 at 639.
[29] Ludsin & Vetten op cit note 12 at 87.
[30] Ibid.
[31] Ludsin & Vetten op cit note 12 at 87.
[32] *Ferreira* supra note 4 para 25.
[33] *Engelbrecht* supra note 4 paras 82-87.
[34] Ibid para 86.
[35] Hesselink & Dastille op cit note 2 at 340.
[36] Ibid.
[37] Hesselink & Dastille op cit note 2 at 340.
[38] Ibid.

abused women kill their abusive partners because the abuse has resulted in a situation where they believe that there is no other way out.

Following from this, it is quite clear that there are many complexities to an abusive relationship, which means that reliance on a consideration such as the reasons why the woman did not just opt to leave the relationship is dangerous. It is particularly dangerous because it essentially tells the abused woman that she has made her bed and she must lie in it, as opposed to striving towards correcting the way the abused woman has been let down by authorities and the like.

III HOW ABUSED WOMEN KILL

There is an important consideration that the courts have neglected in cases of abused women who kill, and that is the way these women commit such killings. Abused women typically kill in ways that reduce their extreme vulnerability. In *Ferreira*, for example, the accused woman hired other parties to murder her partner;[39] while the abused woman in *Engelbrecht* first tied her husband's hands together and then put a plastic bag over his head while he was asleep.[40] In *Steyn,* the accused woman fired a single shot at her ex-husband, in response to her life being threatened by him.[41] The way in which these women killed their intimate male partners is interesting, for instance, Miss Ferreira, as mentioned above, contracted with two men to kill the abuser, instead of killing him, herself.[42] This was possibly because of the risk that came with attempting to kill him herself and failing, which would have put her in even more danger. Likewise, with Mrs. Engebrecht, had she not tied her husband's hands behind his back, he might have managed to remove the plastic bag and potentially deliver on his promise to kill her.[43] Further, in *Steyn,* the abused woman's decision to shoot the abuser, even though he was holding a knife,[44] was one that took into consideration that the abuser would have most likely overpowered her and stabbed her to death, had he reached her before she shot him.

[39] *Ferreira* supra note 4 para 27.
[40] *Engelbrecht* supra note 4 para 10.
[41] *Steyn* supra note 4 para 10.
[42] *Ferreira* supra note 4 para 27.
[43] *Engelbrecht* supra note 4 para 130.
[44] *Steyn* supra note 4 para 10.

Another striking point is that the women in these cases did not kill their intimate male partners in the ways that men typically kill women, which is often brutal and aggressive, ranging from fatal beatings to strangulation, burning, mutilation and multiple stab or gunshot wounds.[45] This difference indicates that these killings were not motivated by rage, passion or putative ownership of someone else's body, but that they were acts of desperation and an attempt at ending the abuse. It is crucial for the courts to take these factors into account because it will give insight into and prove the fact that abused women who kill their intimate male partner only do so as a response to the abuse and to protect their own lives and those of their children, not because they are somehow entitled to harm the body of another, unable to control their temper or because they enjoy killing.

IV PRIVATE DEFENCE AND SENTENCING AS MEASURES CURRENTLY IN PLACE TO VINDICATE ABUSED WOMEN WHO KILL

There are currently two possibilities for women who kill their abusive partners. Either they might seek to justify the killing and avoid criminal liability, or they might avoid harsh sentences given the context of the abuse. First, the law in SA generally frowns upon and severely punishes the killing of a person, by another; however, in the same breath, the criminal law contains grounds of justification for such killing, namely private defence, necessity and consent, among many others.[46] These grounds of justification serve the purpose of negating the unlawfulness element under the general requirements that have to be met for a person to be held criminally liable.[47] Where a ground of justification successfully negates unlawfulness, then the person's conduct is deemed to be 'justified and therefore not unlawful'.[48] The ground of justification that is applicable to this enquiry is that of private defence, and it will be considered in section (a) insofar as it affects the conviction stage of a matter. Secondly, the Criminal Law Amendment Act 105 of 1997 (The Amendment Act) prescribes a minimum sentence for murder, unless there are substantial and compelling

[45] *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014) 3288. See *S v Shoba* (SS36/2021) [2022] ZAGPJHC 174 (25 March 2022) para 1.
[46] CR Snyman *Criminal Law* 6ed (2014) 97.
[47] Ibid at 53 & 95.
[48] Snyman op cit note 46 at 95.

circumstances that justify a lesser sentence. How this applies to abused women who kill their abusive male partners is discussed in section (b) below, insofar as it affects sentencing.

(a) Private defence – the conviction stage: consideration of whether the accused will be convicted of murder.

Private defence is defined as a person's response to an 'unlawful attack',[49] that is aimed at protecting that person's own life, the life of another, or an interest such as 'bodily integrity, property or other interest which deserves to be protected…'.[50] Furthermore, the 'defensive act is [required to be] necessary to protect the interest threatened… [it has to be] directed against the attacker, and [it] is [required to be] reasonably proportionate to the attack.'[51] Additionally, the attack, to which the person reacts, must already be in motion or it should at least be imminent.[52]

As mentioned above, there have been numerous attempts to rely on the self-defence ground of justification, where an abused woman has killed her intimate male partner.[53] For the sake of clarity, self-defence forms part of private defence and the main difference is that it is a narrower form of private defence, which limits a person to only protecting their own interests, as opposed to those of other people.[54] Beyond this, the requirements of private defence and self-defence are the same.[55] Therefore, the all-encompassing nature of private defence makes it more appropriate to use in this discussion, when referring to SA law. Otherwise, self-defence will be used when referring to foreign law. I now turn to examining the requirements in relation to abused women who kill their abusive partners, including a discussion of the case where private defence was evaluated: *Engelbrecht.*

(i) Was there an unlawful attack on the person claiming private defence?

[49] Ibid at 102.
[50] Snyman op cit note 46 at 102.
[51] Ibid at 102.
[52] Snyman op cit note 46 at 102.
[53] *Engelbrecht* supra note 4 para 222. See *Steyn* supra note 4 para 16.
[54] Jonathan Burchell *Principles of Criminal Law* 5ed (2016) 121.
[55] Ibid at 122-130.

In *Engelbrecht*, the High Court considered whether there was an unlawful attack upon the person defending themselves.[56] It concluded that psychological and emotional abuse, together with the threats to the abused woman's life constituted an unlawful attack on her.[57]

Nevertheless, scholars such as CR Snyman, are of the view that accepting abuse and threats to the victim's life, as an unlawful attack would lead to 'the rules relating to private defence becoming too vague, and lead to misuse of private defence…'.[58] Further, Snyman argues that there were other ways in which Mrs. Engelbrecht could have escaped the abuse, without killing her husband.[59] These arguments are problematic insofar as they downplay the experience of abused women. I argue below that, instead of disregarding the abuse as constituting an unlawful attack, an argument can be for the development of the law to ensure that there is no room for uncertainty. Further, the courts often warn against being armchair critics and approaching a matter 'with after-the-fact wisdom…'.[60] Yet this is often the dominant approach in cases of abused women, where women are expected to have made different choices, thus excluding them from the ambit of private defence. Once it has been established from a set of facts that the abused woman approached the police or any other abuse victim services and was unable to get the help that she needs, it should not be for the law to scrutinise her actions further.

(ii) Was the attack directed at a legally protected interest?

The second requirement that needs to be taken into account is whether the attack was 'directed at an interest which legally deserves to be protected.'[61] This requirement is uncontroversial as the law permits the use of private defence to protect one's life, dignity, sexual and bodily integrity.[62] So Mrs. Engelbrecht's act of killing her husband met this requirement, considering how she had been assaulted and forced to engage in sexual acts that she did not want to engage in.[63]

(iii) Was the attack imminent or had it already commenced?

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[56] *Engelbrecht* supra note 4 para 344.
[57] Ibid at 344, 361 & 364.
[58] Snyman op cit note 46 at 104.
[59] Ibid at 105.
[60] *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4 para 23.
[61] *Engelbrecht* supra note 4 para 105.
[62] Snyman op cit note 46 at 105.
[63] *Engelbrecht* supra note 4 paras 71, 128 & 129.

The third requirement, which looks at whether the attack was imminent or if it had already commenced,[64] has been more controversial. The majority in *Engelbrecht* made several confusing and misdirected remarks. The majority provided that the unlawful attack, that Mrs. Engelbrecht argued she was protecting herself and her child from, was not objectively imminent.[65] This came after the majority agreed with the minority judgement by Satchwell J on how the law could be developed, considering that abuse that is cyclical and frequent meets the requirement of imminence because '"imminence" should extend to encompass abuse which is "inevitable".'[66] However, the majority disagreed on the facts and decided that there was no imminent threat on Mrs. Engelbrecht and her child's life because '"[d]omestic violence" in this context does not include the physical death of either Mrs. Engelbrecht or C…'.[67]

Assumptions that domestic violence would not result in murder are flawed considering how continued and severe domestic violence often does result in death for many women.[68] In *Engelbrecht*, for example, the abuser had repeatedly told Mrs. Engelbrecht that he would kill her, and the abuse had reached a different level that was no longer just towards her but involved her child as well. This ultimately points towards the fact that the abuse was becoming more and more dangerous, which makes the court's conclusion rather unusual and causes one to question whether the court expected Mrs. Engelbrecht to be at death's door for the majority to realise that her life was, indeed, in danger. In addition to that, this finding essentially contradicts the court's assertion that '[t]o require Mrs. Engelbrecht to wait for a further bout of domestic violence to be "underway" before she could claim the protection of the law for her defensive act would be, as already pointed out, placing her at additional risk.'[69]

(iv) Was the defensive act necessary?

The next requirement to be considered is whether the defensive act was necessary.[70] This requirement enquires into whether the person claiming private defence should have done the act

[64] Snyman op cit note 46 at 102 & 105.
[65] *Engelbrecht* supra note 4 para 398.
[66] Ibid para 349.
[67] *Engelbrecht* supra note 4 para 398.
[68] Georgia Zara & Sarah Gino 'Intimate partner violence and its escalation into femicide. Frailty thy name is 'violence against women' (2018) 9 *Frontiers in Psychology* 7.
[69] *Engelbrecht* supra note 4 para 396.
[70] Snyman op cit note 46 at 106.

of defending themselves or another, in the first place.[71] In other words, the requirement seeks to find out whether there was another way for the victim of the unlawful attack to avoid such attack without standing up to the attacker.[72] The majority in *Engelbrecht* reasoned that the accused woman should have given the legal system a chance to help her instead of killing the abuser.[73] The court ultimately decided that her defensive act was not necessary.[74] This reasoning is troubling considering the fact that Mrs. Engelbrecht tried, on many occasions, to get the police to intervene, to get protection orders and even tried to leave her home,[75] which she had no duty to do in terms of the law.[76] In all of this, she was unsuccessful and had to continue to suffer through the unending harassment and abuse that her husband inflicted upon her.[77]

(v) Was the defensive act reasonable and proportional to the attack?

The last requirement requires the defensive act to be reasonable and proportional to the attack.[78] In *Engelbrecht*, the court found, without providing much detail, that it was unreasonable for Mrs. Engelbrecht to kill her husband.[79] This conclusion is problematic as it disregards a principle set out in *Ex parte Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A) (*Van Wyk*), where the court decided that, as a result of continued burglaries in the accused's store, his pre-emptive defence of setting up a shotgun in his store was allowed.[80] There is no reason why a woman who has proven that she suffered abuse for a prolonged period of time, that she further reached out to authorities for help but did not receive any, and no longer has a way out of the abusive relationship should not be afforded the same liberty to preemptively defend herself.

The test for reasonableness is an objective one, but in *S v T* 1986 (2) SA 112 (O) (*S v T*) the court considered subjective factors such as the age and body weight of the person acting in self-defence and the court also considered that the victim of the unlawful attack was afraid of the

[71] Ibid.
[72] Burchell op cit note 54 at 126-127.
[73] *Engelbrecht* supra note 4 para 418.
[74] Ibid para 418.
[75] *Engelbrecht* supra note 4 para 82 & 445.
[76] *R v Zikalala* 1953 (2) SA 568 (A) 573.
[77] *Engelbrecht* supra note 4 para 100.
[78] Snyman op cit note 46 at 108.
[79] *Engelbrecht* supra note 4 para 448.
[80] *Ex parte Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A) 513-514.

attacker.[81] This is important in instances of abused women because it is impossible to reach a conclusion as to whether her defence against the attack of her abuser is reasonable, without taking subjective factors into account. For example, Mrs. Engelbrecht weighed 70 kilograms, compared to Mr. Engelbrecht's 110 kilograms, furthermore, there was testimony that a policeman would have required assistance to arrest him because of his large physique.[82]

Mrs. Engelbrecht had also been assaulted and stalked enough times to develop a fear of the abuser,[83] which is something that cannot be disregarded when deciding whether her defensive act was reasonable. It was a disservice on the court's part to keep the test purely objective, together with its omission of a detailed explanation as to why the defensive act was unreasonable. In the end, the way in which the court carried out the test led to Mrs. Engelbrecht being convicted of murder;[84] which highlights a major gap around private defence.

(b) Substantial and compelling circumstances – the sentencing stage: consideration of whether the accused person will be given the prescribed minimum sentence.

In *Ferreira,* the experts and counsel for the accused woman, argued that the Supreme Court of Appeal (SCA) should give Miss Ferreira a lenient sentence because the domestic violence that she endured ought to be considered as substantial and compelling circumstances that warrant a lesser sentence as opposed to the prescribed minimum sentence.[85] The afore argument was the starting point in the feminist scholars and practitioners' quest to persuade the courts to treat cases of this nature differently. Ultimately, the court did indeed take the abuse into account and consequentially deviated from the minimum life sentence prescribed for murder in section 51 of the Amendment Act.[86] This was a pivotal moment that set precedent for sentencing in succeeding cases like *Engelbrecht*, where the court was prompted to release Mrs. Engelbrecht on time served, which was only a period of 18 months.[87]

[81] *S v T* 1986 (2) SA 112 (O) 129-130.
[82] *Engelbrecht* supra note 4 para 276.
[83] Ibid.
[84] *Engelbrecht* supra note 4 para 472.
[85] Ibid *Ferreira* paras 7 & 10-12. See section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997. See section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007.
[86] *Ferreira* supra note 4 para 74.
[87] Ibid para 4.

The fact that the abuse the women were subjected to in *Ferreira* and *Engelbrecht* caused their sentences to be less than what is prescribed by legislation is undoubtedly a positive outcome that cannot be understated. Particularly when one considers that Mrs. Englebrecht, for example, had a minor child under her care, meaning that it would have been unfavourable for her to be imprisoned for 15 years or more, as her daughter would have had to go into the foster care system, exposing her to instability and further increasing her propensity to be abused.

Nevertheless, the abuse serving merely as a mitigating factor that is only considered upon sentencing is insufficient as it reduces a severe circumstance to something less compelling than it really is. Moreover, it paints a vivid picture of the limited protection that abused women who kill their intimate male partners have under the criminal law.

V WHAT CAN SOUTH AFRICA LEARN FROM OTHER COUNTRIES?

Several countries, including Canada and Australia, have changed the legal situation of abused women who kill, either through court development of their self-defence laws to better accommodate abused women who find themselves in conflict with the law (Canada) or by statutory reform (Australia). Although the literature is clear that there is still more to be done in these countries, SA still stands to learn from their reforms.

(a) Canadian law

The decision in *R v Lavallee* [1990] 1 S. C. R. (*Lavallee*) was a watershed moment for Canadian self-defence laws. The facts of the case mirror those of the abovementioned cases, where Ms. Lavallee was abused and tormented by her partner for years on end,[88] until she eventually made the decision to kill him after he had assaulted her, handed her a loaded gun,[89] and followed up with a threat 'that either she kill him or he would get her.'[90] Additionally, the case considered the admissibility and weight of expert witness evidence in cases of abuse.[91]

[88] *R v Lavallee* [1990] 1 S. C. R. 857-858.
[89] Ibid at 866.
[90] *Lavallee* supra note 88 at 852.
[91] Ibid at 856.

The court judgement

The court provided that expert evidence is crucial in cases of abuse because judges are not as knowledgeable as an expert in matters relating to the effects of abuse on the abused person.[92] Furthermore, the bench decided that expert testimony is 'both relevant and necessary…'[93] because making a decision without this information would not only hinder the court from making a decision, but it would cause the accused woman to be at risk of being convicted erroneously and sentenced inappropriately. The court did not change the requirements of self-defence but rather interpreted and applied them with due regard to subjective factors and expert witnesses. An example of this is that the court considered the imminence of the unlawful attack from her perspective as opposed to the reasonable man standard.[94] In doing so, the court took account of the abused woman's size in contrast to the abuser and her state of mind, which was explained in depth by the expert witness.[95] The court found that expert evidence is crucial for disproving the myths and stereotypes that are held by society about abused women.[96] Further, the court asserted that the when the opinion of an expert witness is based on factual, admissible evidence and not simply hearsay, then a substantial amount of weight ought to be attached to such opinion.[97]

It has been 34 years since this judgement was handed down, however, it is as topical today as it was in 1990. The court in *Lavallee* set precedent that thoroughly explained the importance of expert evidence in intimate partner violence (IPV) cases. The most outstanding point the court made was that 'expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts.'.[98] In addition to that, the court highlighted that '[t]he issue is not…what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.'.[99] Consequentially, this afforded women a

[92] *Lavallee* supra note 88 at 871.
[93] Ibid at 889.
[94] *Lavallee* supra note 88 at 883.
[95] Ibid at 883-885.
[96] *Lavallee* supra note 88 at 889-890.
[97] Ibid at 894-895.
[98] *Lavallee* supra note 88 at 882.
[99] Ibid at 883.

fighting chance to have their individual set of circumstances considered from their perspective as opposed to the 'reasonable man' standard.

(b) Australian law

The changes made to Australian self-defence laws began with the Crimes (Homicide) Act 77 of 2005 (Crimes Act) which was enacted by the Parliament of the state of Victoria in order to 'expand the scope of self-defence to apply more effectively to women who kill their abusive partners.'.[100] At first glance, the Crimes Act contains two provisions, namely sections 9AC and AD, that are structured in a manner that is very similar to that of the private defence ground of justification, that exists in SA law. Above and beyond that, however, there is a distinctive provision in section 9AH that is titled 'family violence.' The title alone shows the intentionality with which this provision was drafted, as it indicates that it was custom-made for instances of violence within one's intimate space(s).

(i) The provisions

Upon zeroing in on the family violence provision, it is noteworthy that sections 9AH (1)*(a)* and *(b)* provide that a person is allowed to defend not only themselves and their own liberty, but that they may defend another person, together with such person's liberty. Moreover, section 9AH(1)*(c)* states that the defensive act is permitted 'even if…he or she is responding to a harm that is not immediate…'.[101] Following from that, it is permitted for 'his or her response [to] involve…the use of force in excess of the force involved in the harm or threatened harm.'[102]

Additionally, section 9(2) of the Crimes Act, read with section 9(3), enables the person who has employed a defensive act, against an abuser, to provide an unlimited amount of evidence. Such evidence can range from providing information on the history of the abuse, the overall impact of the abuse, the potential consequences of leaving the abusive relationship and considerations of the 'social, cultural or economic factors that impact on the person or a family member who has

[100] Kellie Toole 'Self-defence and the reasonable woman: Equality before the new Victorian law' (2012) 36 *Melbourne University Law Review* 251.
[101] Section 9AH(1)*(c)* of the Crimes (Homicide) Act 77 of 2005.
[102] Ibid section 9AH(1)*(d)*.

been affected by family violence…'.[103] Furthermore, according to section 9(2)(*a*) and (*b*) of the Crimes Act, this information is used to establish whether the defensive act was necessary or reasonable.

The language used in the Crimes Act is interesting in that it provides a template that can be used to fill in the gaps that exist in the private defence laws in SA. For example, section 9AH(1)*(c)* allows the abused person to act in defence of themselves or another person even when the harm is not immediate, which means that someone like Mrs. Engelbrecht would have been protected from being convicted for killing her husband in his sleep. Further, section 9AH(1)*(d)* provides that the force used in defence need not be proportional to the force threatened or used by the abuser. This is significant because it would have changed the outcome in *Ferreira* and the lower court in *Steyn* would not have been able to convict the accused woman of culpable homicide, as in both cases the abused women would have been able to avoid criminal liability for killing their abusers. Another notable point is that the type of evidence that is admissible by the court is unlimited in its nature, and it consists of subjective factors which will better equip the court to make an informed and appropriate decision.

VI RECOMMENDATIONS ON HOW THE CRIMINAL LAW SHOULD BE DEVELOPED IN ORDER TO PROTECT WOMEN WHO KILL

It is long overdue for these shortfalls within the criminal law to be addressed considering the amount of time that has lapsed since the case of *Ferreira* was first heard by the courts. The amicus curiae in *Engelbrecht* had argued that 'the elements of… [an existing] defence should be developed in order to promote the spirit, purport and object of the Bill of Rights.'[104] This proposed development is not a request for lawmakers to create a defence that is foreign and completely unheard of. Private defence has been a part of the criminal law in SA for as long as human beings have been around, therefore, all that needs to be done is for it to be transformed, from its male-oriented form, into a defence that also includes and caters to women in the often-volatile intimate spaces where they need it the most. These changes can be made by attaching more weight to (a) the subjective factors and the expert witness testimony of a case. Additionally, the reasonable

[103] Section 9(3)*(c)* of the Crimes Act.
[104] *Engelbrecht* supra note 4 para 17.

woman standard (RWS) discussed in (b) below must be the leading approach to these cases. Finally, section (c) will identify and dispel myths and stereotypes held about abused women in general, and those who kill.

(a) Subjective factors and expert witness testimony

In *Lavallee* it was averred that 'the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality.'[105] This statement goes to the heart of the fact that it is virtually impossible for a court to decide correctly on a matter relating to abused women who kill, without taking into account and attaching a considerable amount of weight to the case's subjective set of factors and circumstances that led up to the killing.

The courts in SA are still heavily reluctant to consider subjective factors to an extensive degree, mainly because of the objective reasonable person standard (RPS). Although the standard is deemed to be useful and indicative of the 'law's devotion to justice…',[106] it is insufficient in cases of abuse; instead, a court needs to be alive to the bigger picture by means of a thorough and holistic consideration of the subjective factors of the abused woman and the case.

Furthermore, in *Ferreira*, the court agreed with the expert witness on the fact that the accused woman's psychological functioning was impaired because of the constant abuse,[107] but in the same breath, the same court expected her to reason and logically weigh her options.[108] She was expected to decide to go back to the police, who repeatedly dismissed her when she needed them most, instead of having her abuser killed.[109] The stance taken by the court shows an overwhelming disregard of and unwillingness to give the amount of consideration that is owed to the subjective factors and expert witness evidence. These issues with the court's reasoning make it apparent that there is still room for improvement in the general approach to cases of this nature.

Whitley Kaufman argues that:

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[105] *Lavallee* supra note 88 at 880.

[106] Raheel Ahmed 'The standard of the reasonable person in determining negligence – comparative conclusions' (2021) 24 *Potchefstroom Electronic Law Journal* 6.

[107] *Ferreira* supra note 4 para 66.

[108] Ibid para 36.

[109] *Ferreira* supra note 4 paras 25 & 64-65.

> '[i]t is doubtful whether we want juries making highly subjective judgements about what "image" fits a battered woman, for the tendency would be towards an inevitable loosening of standards for the use of force, and hence a substantial erosion of the imminence rule.'[110]

Although the jury system is not used in SA, a discussion of this argument is still relevant in that the author is essentially rejecting a reliance on the subjective factors related to the abused woman. Kaufman's argument loses sight of the fact that the main point is for the standard of self-defence to become more responsive to women's realities and move away from catering primarily to men and male standards of behaviour.

To illustrate the point more clearly, there is evidence of the fact that a difference in weight and size between men and women influences their strength relative to each other.[111] In other words, where a man is bigger in build than the woman, then the man is more likely to be stronger. In abusive relationships, the dynamic in size tends to be one where the woman is smaller, which leads to the typical trend of women resorting to using weapons such as a firearm or waiting for the abuser to fall asleep, as opposed to getting into a physical fight with him.[112] These are crucial subjective factors that must be taken into account and they, as a result, require flexibility in the standards of self-defence because the playing field is not level. Another example is the *Engelbrecht* assessors' assumption that domestic violence cannot be deemed to have a causal relationship with death.[113] Expert evidence would have dispelled this inaccuracy by drawing the court's attention to *S v Van As* 1976 (2) SA 921 (A) wherein, it was shown that something as 'minor' as a slap can cause someone to fall, hit their head on a hard surface and die.[114]

(b) The reasonable woman standard

The RPS was introduced in South Africa as a means to change the gendered reasonable man standard, and it has indeed come a long way, however, its current form still needs to be developed.

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[110] Whitley R.P. Kaufman 'Self-defense, imminence, and the battered woman' (2007) 10 *New Criminal Law Review: An International and Interdisciplinary Journal* 362.

[111] Sandro, Bartolomei, Giuseppe Grillone & Rocco Di Michele et al 'A comparison between male and female athletes in relative strength and power performances' (2021) 6 *Journal of Functional Morphology and Kinesiology* 9.

[112] *Lavallee* supra note 88 at 875 & 883.

[113] *Engelbrecht* supra note 4 para 398.

[114] *S v Van As* 1976 (2) SA 921 (A) 925H.

The court in *Lavallee* pointed out that '[i]f it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse it is probably because men do not typically find themselves in that situation. Some women do, however.'[115] A critic might argue that this does not apply to SA law since the standard has evolved from being the 'reasonable man' standard to the gender-neutral RPS, however, it still remains that the reasonable woman is left out of this ostensibly objective standard, as illustrated by the minority in *Engelbrecht.*[116] Further, the standard has been criticised for not only continuing to be 'favourable to men…'[117] but for also falling short of being objective because often '[w]hen the standard is interpreted by adjudicators, there is a tendency at times for them to reflect their subjective views in judgements'.[118]

The flawed nature of the RPS raises obvious concerns regarding the suitability of its application in cases of abused women who kill. The challenge of using the RPS was in full display in the High Court judgement of *Steyn.* The case dealt with Mrs. Steyn, a woman who was physically and mentally abused by her ex-husband during and after the course of their relationship.[119] The abuser was often intoxicated and would lash out at their child, assault Mrs. Steyn or he would lock her in bedroom, sometimes for days on end.[120] In addition to that, her ex-husband often threatened 'that he would slit her throat with a smile on his face.'[121] Mrs. Steyn managed to divorce the abuser but due to financial constraints, she had to move back into her matrimonial property and the abuse continued.[122] On a fateful Friday night, after enduring a bout of insults and beatings by the abuser, the accused woman was again ordered to stay in her room but the effects of the abuse made her dependent on medication, which she could only take after eating.[123] So, the abused woman attempted to go to the kitchen to get food, taking into account the assault from earlier on, she took her firearm in hopes to 'dissuade the deceased [her ex-husband] from attacking her again.'[124] However, upon seeing her outside of her room, the abuser became furious, told her that she would not get any food and lunged at her with a steak knife 'shouting that

[115] *Lavallee* supra note 88 at 874.
[116] *Engelbrecht* supra note 4 para 358.
[117] Ahmed op cit note 106 at 5.
[118] Ibid at 6.
[119] *Steyn* supra note 4 paras 2-4.
[120] Ibid para 2.
[121] *Steyn* supra note 4 para 2.
[122] Ibid paras 3-4.
[123] *Steyn* supra note 4 para 9.
[124] Ibid para 9.

he was going to kill her…'.[125] In response to this threat, Mrs. Steyn shot the abuser who later collapsed and died.[126]

Falling short of convicting her of murder, as charged by the state, the High Court decided that the abused woman put herself in a position where she needed to defend herself against the unlawful attack of the abuser and was as a result convicted of culpable homicide.[127] The reasoning of the court essentially provided that the accused woman should have stayed in her room because the abuser had told her to do so and ultimately her act of leaving her room to get food so she could take her medication was not something that a reasonable person (RP) would have done.[128] This line of reasoning is clearly not a reflection of objectivity, but rather demonstrates a male point of view. It shows that the court expected the abused woman to heed the instructions of her former husband, as women are traditionally expected to do. The question then remains as to whether we are prepared to go ahead with looking at IPV cases from a predominantly male perspective, as opposed to looking at the full set of facts and also viewing the matter from the perspective of an abused woman, which will never be encompassed, even remotely by an ordinary RP.

In the 2000s, feminist lawyers attempted to nudge the courts towards revisiting the current form of self-defence and develop it in such a way that abused women who kill are included and accommodated. Unfortunately, this call for a development of the law was only considered by the minority in *Engelbrecht*, while the majority settled on it being unjustifiable for domestic violence to even be perceived as a threat to one's life.[129] Furthermore, on appeal in *Steyn*, it could be argued that the SCA only accepted that it was indeed self-defence because the way in which the abused woman killed her husband resembled that of the classic, male-oriented way of killing. As a result, the SCA decided that the accused woman could escape liability for murder.[130]

There is a stark contrast between the decisions in *Engelbrecht* and the SCA decision in *Steyn*, even though it was argued in both cases that the women had been acting in self-defence. This inconsistency shows that the RPS is limited and requires supplementing, which is why the RWS, that was mentioned in *Engelbrecht*,[131] was such a noteworthy point. The RWS is not a new

[125] *Steyn* supra note 4 para 10.
[126] Ibid para 20
[127] *Steyn* supra note 4 para 17.
[128] Ibid.
[129] *Engelbrecht* supra note 4 paras 395 & 398.
[130] *Steyn* supra note 4 paras 24-25.
[131] *Engelbrecht* supra note 4 para 358.

concept considering that it was discussed in literature from as long ago as the 1990s,[132] and possibly even earlier than that. The standard 'shows the need to include women's experiences in a system with asymmetrical power relations that has historically excluded women's participation.'[133] The RWS would consider a myriad of issues that the RPS does not, for example that abuse is a very particular experience that the apparently gender-neutral nature and language of the RPS does not grasp.

In *S v Mnisi* 2009 2 SACR 227 (SCA) the court cautioned against 'plac[ing] undue emphasis on the element of deterrence as an object of punishment…'[134], which is something the court lost sight of in *Ferreira* as the court substituted the lower court's six years suspended sentence and instead sentenced Miss Ferreira to eight years in prison,[135] in order to deter others from killing.[136] It is certainly important for society to be aware that taking someone's life is wrong and carries severe consequences, however, it is also an injustice to use a matter, particularly one concerning IPV, as an example. This is something that the RWS would have countered and enabled the court's sentence to reflect that the effects of abuse on a person are truly understood and taken seriously.

Furthermore, the RWS would consider arguments such as that women who 'experience remarkably severe and frequent violence…'[137] in an intimate relationship become used to the pattern of abuse to a point where they are able to differentiate between when the violence falls within the ordinary and when it is unusual and more dangerous.[138] This means that more often than not, they are aware that their lives might be in danger. This would lessen the danger that the court in *Lavallee* cautioned against by providing that '[expecting] that a battered woman wait until the physical assault is "under-way" before her apprehensions can be validated in law would…be tantamount to sentencing her to 'murder by installment…'.[139]

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[132] Naomi R Cahn 'Looseness of legal language: The reasonable woman standard in theory and in practice' (1992) 77 *Cornell Law Review* 1407-1409. See Robert S Adler & Ellen R Peirce 'The legal, ethical, and social implications of the "reasonable woman" standard in sexual harassment cases' (1993) 61 *Fordham Law Review* 801-802.

[133] Ibid Cahn at 1401.

[134] *S v Mnisi* 2009 2 SACR 227 (SCA) para 7.

[135] *Ferreira* supra note 4 para 74.

[136] Ibid paras 72-73.

[137] *Lavallee* supra note 88 at 881.

[138] Ibid.

[139] *Lavallee* supra note 88 at 883.

Critics such as Kaufman argue that it would be difficult to ascertain who a battered woman really is, making the development of the law difficult to regulate.[140] However, the application of the RWS would assist in that because battered women would no longer be looked at from a male perspective that is unable to discern between battered women and those who are not. Furthermore, a collaboration between experts from different fields ranging from psychology to law would aid in providing guidelines on who constitutes a battered woman.

(c) Dispelling myths and stereotypes

There is an innumerable amount of widely held stereotypes and myths about abused women. *Lavallee* pointed out the difficulties that society typically has with understanding why women do not leave abusive relationships. The court stated that people make assumptions such as that the abused woman is exaggerating the abuse because if it was indeed as bad as she claims, then she would have left the abuser.[141] Alternatively it is believed that abused women who do not leave the abusive relationship enjoy the abuse and that is why they stay.[142] Instead of fostering reflection or sympathy in society, these stereotypes and myths are exacerbated when abused women resort to killing their abusive partner.

This largely stems from viewing 'domestic violence as an "event" or as a story divided into instances of brutality…'[143] which is incorrect because IPV is a continuous cycle that the abused woman lives in and often cannot escape. Further, it is assumed that abused women kill their abusive partner because of some ulterior motive such as economic gain. It is true that some women kill their partners for financial gain and use domestic violence as an excuse, however, the three cases mentioned above disprove the prevalence thereof. For example, in *Ferreira* the accused woman and her partner were unmarried, Mrs. Engelbrecht was educated, had a good reputation and she earned more compared to her husband.[144] In *Steyn*, the abused woman and her abuser were divorced so there is no reason to believe that the killings were committed with motives other than to ward off the tyranny that the women faced for years on end.

[140] Kaufman supra note 110 at 362.
[141] *Lavallee* supra note 88 at 853.
[142] Ibid.
[143] Ludsin & Vetten op cit note 12 at 85.
[144] *Engelbrecht* supra note 4 paras 37-42.

Additionally, there are arguments stating that the proposed leniency of the law will open the floodgates for women to kill their intimate male partners. This is a misplaced and exaggerated fear considering that women rarely kill.[145] Furthermore, the argument disregards the fact that there would be no automatic acquittal of the accused woman, simply because she was in an abusive relationship. Instead, the law would be developed to allow severely and systematically abused women the chance to be treated in a manner that is fair, inclusive and capable of taking every facet of the relationship, into account.

Consequentially, it is crucial that the courts challenge their own perceptions and avoid using the fact that the abused woman stayed in the abusive relationship as a reason for limiting her right to make use of private defence. Instead, an abused woman cannot be barred from defending herself simply because she chose not to leave the abusive relationship.[146] Furthermore, the courts need to be careful to use language that appropriately describes the horrific nature of the experiences of abused women. For example, in *Engelbrecht* the court did not describe the instances when Mrs. Engelbrecht was forced to engage in sexual intercourse as rape.[147] This is problematic because it perpetuates the myth that forced sexual acts that are committed within a marriage are not rape.

Winston J in *Lavallee* compares a woman who is in an abusive relationship to a hostage and asserts that it would be considered reasonable by most for a hostage to preemptively kill the person who captured her, in response to him threatening to kill her at a later stage.[148] Therefore, it is incomprehensible why abused women who kill their captors are held to a different standard.

VII CONCLUSION

It is quite disheartening to learn that there has been very little literature in the recent five to ten years that advocates for the development of the existing criminal law defences, compared to the early 2000s. There was, and continues to be, an urgent need for legal and non-legal minds to sound the alarm about the long-forgotten inadequacies related to the protection of abused women who kill their intimate male partners. Therefore, this research report has sought to play a role in

[145] Lenore E Walker, Amanda E Temares & Brandi N Diaz et al 'Women who kill, Intimate partner violence, and forensic psychology' (2023) 32 *Journal of Aggression, Maltreatment & Trauma* 5.
[146] *Lavallee* supra note 88 at 888.
[147] *Engelbrecht* supra note 4 para 40 & 119.
[148] *Lavallee* supra note 88 at 889.

reigniting the activism and advocacy that is so desperately needed for the law to become better equipped to approach cases of abused women who have found themselves in conflict with the law.

The report began by providing a comprehensive explanation of the most significant cases and used these cases to show that the law does not give the courts guidance on how to deal with abused women who kill. The cases further indicated that these gaps in the judges' knowledge and understanding limit their ability to decide on these matters in a way that is just and equitable. Thereafter, this paper provided a detailed account of the reasons why abused women resort to killing their intimate partners, in order to help the reader to understand that the basis of this paper is not to trivialise the killing of another nor to encourage women to kill their partners. Rather, it is to illustrate the severity of the abuse that some women endure in their intimate relationships and, further, the hostility they experience at the hands of the law which often fails to help such women escape the abuse and also fails to protect them once they have resorted to killing their abuser.

In addition to that, this research report highlighted the contrast between the way in which men and women kill their partners, to show that abused women kill, often as a last resort, to escape the abuse and that they kill in a way that is not as brutal. The report went on to discuss the fact that private defence is terribly limited and fails to protect women from conviction, indeed, the only noteworthy protection that abused women who kill have is at the sentencing stage where the abuse is considered as mitigating factor that warrants a lighter sentence. This paper acknowledged that a lesser sentence in these cases is a remarkable start but argued that more can be done considering that countries such as Canada and Australia have successfully reformed their self-defence laws to accommodate women. Finally, this research report provided several recommendations on how the law should ideally be developed to ensure that the promise of equality of all before the law is upheld, not only in theory but also in practice.

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