

REPORTABLE

Judgment No. HB 100/2002
Case No. CRB 95-96/2000

THE STATE

versus

NAOMI NCUBE

and

EPHRAIM KHUMALO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 22, 23, 24 25 JANUARY, 18 FEBRUARY,
22, 23 AND 24 APRIL AND 6 AUGUST 2002

Mrs M Cheda for the state
M J Mellin for the 1st accused
Ms P Dube for the 2nd accused

Criminal Trial

KAMOCHA J: The two accused were charged with murder. It being alleged that on 13 November 1999 and at house number 2242 Emganwini, Bulawayo both accused or one or more of them did wrongfully, unlawfully and intentionally kill and murder Cephas Ncube, a male adult in his lifetime therebeing.

In her plea the first accused raised the defence of non-pathological “criminal incapacity”. She admitted that she had hacked the deceased with an axe but with no intention of killing him. She said she had struck him twice with the axe on the neck thinking that she was fixing him. She concluded that she was incapable of appreciating the wrongfulness of her actions as she acted under non pathological “emotional storm”. Accordingly a plea of not guilty was entered. The second accused denied the charge and a plea of not guilty was entered.

The state outline was read and produced as exhibit one. In her defence outline the first accused was brief as she sought to rely on the defence of non-pathological “criminal incapacity” which she had pleaded.

She stated that she was married to the deceased. While admitting that she killed him by striking him with an axe she said she was incapable of appreciating the wrongfulness of her act or acting in accordance with an appreciation of such wrongfulness as a result of a non-pathological “emotional storm” brought about by a sustained period of mental and physical abuse of her by her late husband.

She went on to say the deceased drank alcohol to excess and that, from the inception of their marriage he verbally and physically abused her whilst under the influence of alcohol and that sustained abuse led to the said non-pathological “emotional storm”.

The second accused’s defence outline was as follows. He said the deceased was his half brother. He was invited by the deceased to go and stay with him at number 2242 Emganwini suburb Bulawayo. He did not have any differences or quarrels with the deceased.

On the evening of 12 November 1999 he had supper with the first accused and other children. After 9pm he bade the first accused a good night and went to bed. Sometime during the night he woke up to find the first accused shaking him. She told him that she had had another quarrel with the deceased and that she had injured him with an axe. She then asked him to go and see him so that he could dress up and she did.

He got dressed and found the first accused standing in the living room. She then told him to go and see the deceased in their bedroom. He went there and found the deceased lying on the floor. There were two plastic bags and a pail with bloody water and swabs in the room. She told him that the plastic bags contained “the tools” a blanket and a bed sheet.

After repeating that she had had a quarrel with the deceased and she had injured him, she asked the second accused to help her carry the deceased outside, saying since he appeared lifeless, it was possible that he could be revived by the fresh breeze outside. He assisted in carrying the deceased outside hoping that he would be revived. It did not occur to him that the deceased was already dead.

A few minutes later, she said the deceased would never wake up. She then ordered the second accused to go into the house. She told him not to tell the neighbours or the police that she had injured the deceased. She said if he did he would be killed by a person he did not know, but the person knew the second accused very well and that person had in fact assisted her in committing the crime.

Thereafter she ordered him to go and hide the two plastic bags in the bush and warned him again that if he deviated and went to the police, he would be killed. He claimed that due to confusion and fear he obeyed and went to hide the items and returned to the house where he found her sitting on a sofa in the living room.

She allegedly ordered him to go to bed and warned him again that if he reported her, all that would happen to her was that she would be arrested and jailed, but he would be killed by the unknown person. He went back to his room but was unable to sleep for the rest of the night.

In the morning she ordered him to go to the police and report that they had found the deceased outside, next to his car. She again warned him that he would be killed if he reported something different. He accordingly went and reported as ordered.

He stated that he never struck any blow at all on the deceased and did not take part in the killing of the deceased. The assistance he rendered to her after she had killed the deceased was not rendered willingly, he was threatened with death and was in a state of shock and fear. He claimed to believe that there was another person involved who would kill him.

He notified the court that he would be challenging the production of his extrajudicial statement on the basis that it had not been made freely and voluntarily.

He alleged that he had been subjected to severe assaults and torture by the police at Bulawayo Central Police Station particularly by one Masuna, whose rank was unknown to him. He was denied food for two days. Parts of statements uttered by the first accused were incorporated into his statement and he was forced to admit them. When he was taken to the remand court he told the court about the above allegations resulting in the court refusing to confirm the statement.

The state adduced *viva voce* evidence from four witnesses. The evidence of the doctor who performed the post mortem on the remains of the deceased and Glen Gumbo was formerly produced by consent. The post mortem report was listed as exhibit 12. Other exhibits produced by consent are these:

Exhibit 7 is the axe with which the first accused chopped the deceased twice on the neck. It is a very sharp axe with a metal handle whose measurements were as follows:

Length of metal handle - 70 centimeters

Length of blade 25 centimetres

Width of blade 13 centimetres

Weight of axe 3,240 kilograms

Exhibit 8 is a smaller axe also very sharp with a metal handle

Exhibit 10 is a blood soaked towel

Exhibit 11 are 4 blood soaked pieces of a mattress

The first prosecution witness was the deceased's sister Edinah Nyoni who is aged 19 years. In 1996 she went to live with the deceased and his wife - the first accused. She said the second accused was deceased's half brother.

Her evidence on the background information was that the marriage of the deceased and the first accused was not a happy one. She said the deceased used to assault the 1st accused very regularly. He assaulted her every week at least once a week. At times she would be assaulted twice or more times per week. Not only did he assault his wife he also assaulted the two little children. The witness herself was also not spared. She was assaulted on three occasions during her stay with the couple. On one occasion she had to be hospitalised. She told the court that the first accused was also hospitalised as a result of a bad assault perpetrated on her in September 1999. The first accused used to be assaulted with an electrical cord. On one occasion she heard the deceased threatening to kill the first accused. She said the deceased used to go drinking quite often and most of the assaults used to occur after he had been drinking. The assaults mainly took place in their bedroom during the night.

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Her evidence as regards the crime was that on the evening of 12 November

1999 she went to bed and left both accused in the sitting room. The next morning at 7am the first accused went to tell her to go and do some laundry. She then told the witness that the deceased had not returned home the previous night but that did not make sense to the witness since the deceased car was parked outside. He was however, found lying next to the car. The first accused created a story that deceased had been beaten up by thugs. But, some blood was seen on the stoep and she ordered the witness to quickly clean up the blood. The witness complied. Thereafter she was sent to go and call a certain neighbour. On her return the first accused sent the second accused to go and report the matter to the police.

When the police arrived the first accused told them that her husband had been beaten up by thugs but her story was quickly found to be untrue as the murder was found to have taken place inside the house. Thereafter the police went with both accused to collect the exhibits that had been hidden in the bush.

The next witness was Detective Constable Jack Banda who attended the scene. On arrival he found the body of the deceased lying next to the car. The first accused initially told the police that she did not know what happened. However when an investigation was carried out it was found out that the murder had occurred in the house. When asked after that discovery she allegedly told the police that the deceased had been killed by the second accused who in turn allegedly said she was the one who had committed the murder.

Both accused were then arrested. Thereafter the two accused led them to the bush where the two plastic bags containing the exhibits were recovered.

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The witness examined the body of the deceased and noticed a deep cut on the

left side of the neck. He allegedly also noticed some bruises on the left leg. The officer must have made a mistake on that point because the post mortem report does not show any bruises on the leg. What is in the post mortem report is this:

“(a) very pale body
(b) Left lateral supra orbital wound 4cm with a 4cm fracture running antero posteriorly.
(c) Left (upper and anterior) parietal wound 8cm long
(d) There is a 120cm long wound of the left upper neck running 3cm below and obliquely parallel to left ear. The wound cuts through all left and part of right neck tissues, blood vessels with total complete fracture separation of cervical spine at cervical vertebral body C1 and C2. A very fatal merciless force was applied.”

Both accused challenged the admissibility of their extra curial statements on the grounds that the statements were not made freely and voluntarily. The first accused stated that she made an initial statement which was read by a police officer who rejected it. He then told her to put in the statement certain facts which she had not put in her initial statement.

The officer wanted her to include in her statement the participation of the second accused in the killing of the deceased. When she refused to put those facts she was harassed by the officer concerned and other officers present. She was told that if she persisted with her refusal she would be taken to Harare where her head was going to be cut.

After a lengthy coercion she agreed to put the suggestions in the statement. She was not physically assaulted. At the first available opportunity when she went to court she challenged the statement. That was the first accused’s outline on the separate issue.

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The second accused had included the outline of his case on the separate issue in his defence outline on the main issue. He adhered to that and just emphasised that

his extra curial statement contained untruths which he did not utter at all.

The state called two police officers to give evidence during the trial within a trial. Detective Sergeant Refias Masuna said the accused were brought to him at Bulawayo Central Charge Office for the recording of their statements. He first saw the second accused and a statement was recorded soon after he had been brought to the station on the day of his arrest. It was his evidence that each accused made only one statement. He said it was not possible for him to tell any of the accused what to say since he had not been to the scene at the time of the recording of the statements.

He went on to say none of the accused was threatened with assault. They were not assaulted at all. The witness said he had no reason to assault or threaten any of the accused with assault as he did not know how the crime was committed. He also denied ever telling the first accused to implicate the second accused since he had not been to the scene and did not know how the crime was committed.

If any of the accused was assaulted by anybody else that assault was not brought to the attention of the witness neither was it brought to the attention of the witness that any of the accused had been denied food.

The next witness was Detective Constable Jack Banda whose evidence corroborated that of Masuna. He emphasised that the responsibility of giving food to detainees lay with the uniformed branch of the police at Bulawayo Central Police Station. It was not brought to his attention that any of the accused was denied food. Both accused made their statements on the day of their arrest which was 13 November

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1999. His evidence was that the suggestion that the statements were made on Sunday 14 November 1999 was false.

Both accused had no witnesses to call on the separate issue but they each gave evidence. The first accused told the court she had initially refused to make a statement until she was forced to do so. One wonders why she would have refused to make a statement when it was her evidence that she was admitting having killed her husband but without the aid of the second accused.

She went on to say as she was writing her statement Masuna went to her and took her statement and read it and tore it up and ordered her to write another one implicating the second accused. This in my view is difficult to believe. How could Masuna tear up the statement before she had completed it? How did he know that she was not going to implicate the second accused in the paragraphs that were going to follow?

She said what influenced her to make a statement was that she saw Masuna striking the second accused with an open hand. Thereafter Masuna took the 2nd accused to another room where she heard him crying. This does not appear in the outline of her case on the separate issue. Also left out in the outline of her case was the allegation that she was denied food the entire period she was in police custody. There was clearly no reason why the police would pick on her out of the 4 or 5 women who were detained with her. The detainees were being fed by different teams of police officers who had nothing to do with the investigations of this case.

The first accused was so untruthful that while admitting that the signature on the statement was hers she denied appending it thereon.

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She was a bad witness whose evidence must be rejected.

The second accused did not fare any better. He claimed to have been assaulted on two consecutive days by many police officers yet the outline of his case only

mentioned Masuna. In his evidence he mentioned being assaulted underneath his feet and in his rib cage with a button stick. Thereafter his mouth was stuffed with a piece of cloth while another piece of cloth was used to gag his mouth. He alleged that his head was covered with a plastic meal bag and then immersed into a bucket of water. At the same time the police officers told him that they would make him disappear without trace. He was ordered to lie into a metal coffin used for carrying dead bodies but he refused resulting in the assault being intensified. All these allegations were coming up for the first time as the accused gave his evidence. A final new allegation was that he was even assaulted at the time of his arrest at the scene. The assault damaged his ear.

Like the first accused he denied his own signature and claimed that it had been forged by the police who even forced him to write Saturday 13 November 1999 instead of Sunday 14 November 1999.

Both accused were bad witnesses who were clearly being untruthful to the court. They were not worth to be believed. I therefore accept the evidence given by the police who had no reason to tell lies. They did not assault the accused in anyway. Neither did they threaten them with assault. The recording details could not have denied them food because the giving of food to detainees is done by another section. In the light of the foregoing I hold that the statements made by both accused persons were made freely and voluntarily and are admissible as evidence.

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The accused' statements were marked exhibits 13 and 14 respectively and are quoted in *extenso infra*:

The first accused said,

“I Naom Ncube do indeed admit the charge, I am the one who killed my husband. What made me kill my husband was that he was giving me a hard time, he always beating me up and saying that he no longer loved me, and that my child Lisa is not his own. More over he was saying I should move out of the house, since he no longer loved me and also that his parents were urging

him to reject me because I am unemployed. The reason why I hacked him is because, he wanted to hack me since he had threatened to kill me if I remained in his house, so when I saw an axe under the bed, I took and hid it in another room.

I got the axe which I hacked him with from a small room. I hacked him twice in the neck as he slept. When I hacked him, Ephraim was by the doorway when he had died Ephraim and I dragged him outside. When we had left him outside I proceeded to scrub off the blood, Ephraim went to dispose of the blanket, sheet, pillow and axes in the bush. The reason that made me kill him is that he wasted my time, I have two children by him and I have lived with him for ten years.

It was because I had come to realise that my chances of re-marriage were nil, since I now had two children and he had also worn me out. The children were going to be bothering me saying they want to go to their father and when I would no longer be living with him. Oh goodness how unbearable it is to be jilted. I felt bitter because I still loved him and that is why I was driven by the devil to kill him, because I still loved him whereas he no longer loved me. My husband often slept out.

I apologise most sincerely because I did it in a fit of rage without premeditation. I hacked my husband with Ephraim’s participation.”

The second accused had this to say,

“I admit the charge of killing my brother, because my brother had told me to leave saying that I was finishing his food moreover he had been brought up by his maternal uncle. He did not want me to talk to the wife. On a certain day, he came in and queried what I had been discussing with his wife, what will I be discussing with his wife as she is a goblin. I admit the charge, my brother’s wife came over and she said she had seen an axe under the bed which would indicate that he wanted to kill her, she then brought the axe from the bedroom and she said she was going to hack him. She said as well as in your case, he does not like the Khumalos but he prefers the Nyonis. She told me that if she

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killed him I should not tell, she would give me an amount of \$700,00 or I would live with her there without wanting anything, she would give me money to go and do a course and on completing the course I would then live with her.

She went out with the axe, I followed her and she then hacked him and he died. I reversed the axe and struck him on the waist. My reason for striking him was that he hated me saying what did we Khumalos want, we were after his wife. After he had died we took him and placed him outside. My brother’s wife told me to dispose of the pillows and the blankets, I also disposed of the axe whilst she remained cleaning up the blood. She took all the blood stained articles and washed everything, she made up the

bed and everything else.

We retired to bed and I got up in the morning, then a neighbour suggested that I go to the police, I proceeded there and on arrival I reported that my brother had been found dead in the morning. I went with the police.”

Both accused did not have any witnesses to call on the main issue but they each gave evidence.

In her evidence the first accused told the court that she married deceased on 15 August 1989 and the couple has two children. She gave the details of the very serious problems that the couple used to have. The deceased would not come home on a number of occasions. On his return he would assault her even when she had not done anything wrong. If she asked him where he had slept the reply would be an assault on her. The assaults varied. He would assault her with clenched fists and other times he used an electrical cord. On two occasions she had to be hospitalised. The assaults used to take place every week. At times she would be assaulted twice a week.

On one occasion the deceased threatened to kill her. He told her to get into the car and he drove the car saying he was going to kill her but as they quarrelled and argued in the car the deceased lost control of the vehicle and had a collision. That is how she survived the attempt to go and kill her. It was her evidence that the threats to

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kill her used to be uttered on many occasions. The deceased did not spare the two little children and his sister Ednah Nyoni. He would beat them up each time they pleaded with him not to assault the accused. Her evidence is supported by that of Ednah in so far as it relates to the assaults. Ednah agreed with the first accused that the assaults took place every week and at times accused would be assaulted twice per week. Ednah and the accused had to be hospitalised on some occasions. That the

marriage was a very unhappy one admits of no doubt.

The accused sought for assistance from the deceased's parents and friends to no avail. Their go-between was also unable to solve the problem.

According to the first accused the deceased never assaulted the second accused even when he intervened. She said the relation between the deceased and 2nd accused was good.

When relating the events leading to the death of the deceased she said on the fateful day the deceased arrived home from the beer garden when she had gone to bed and had fallen asleep. He had to knock at the bed room window in order to wake her up. She went to open the door for him. As soon as he got in he struck her with an open hand and said, "I told you to leave the house but you are still here. Why are you still here?" That made the accused to cry as she warmed his sitshwala and gave it to him. He swore at her as he ate. She left him in the kitchen and went into the bedroom.

After he had finished eating he went to the bedroom. As soon as he got there he commenced to assault her and accused her of being a witch like her mother. He hit her with clenched fists until he got tired. He then took an electrical cord and severely

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belaboured her with it. She said the assault was so severe that she felt she was going to be killed. While beating her up he was saying one of their children Lisa was not his daughter. She believed that he wanted to kill her because she had seen him in the morning, before he went to work, taking the axe exhibit 7 from one room bringing it into their bedroom and had threatened to kill her. She said the assault was sustained and it rendered her powerless. When this was happening all the other people in the

house were sleeping and did not seem to hear anything.

After the alleged sustained and severe assault the deceased went to sleep. After some time he seemed relaxed but she said she was not sure whether he was still awake or had fallen asleep. She claimed that due to anger she started trembling and was overcome by anger. She then took the axe exhibit 7 and chopped him on the neck twice. She alleged that she had not done that deliberately but it was due to anger.

She went to wake the second accused and told him that she had injured his brother. The two then took him outside in the hope that he would gain consciousness. It was only when they had taken him outside that she realised that he had died.

She then instructed the second accused to go and dispose of the exhibits in the bush. She warned him that if he did not comply he would be killed by someone unknown to him. She remained cleaning the blood from the house. After that she said she sat in the sitting room and cried until the next morning.

The next morning she told her neighbour that the deceased had died but she said she did not know what had killed him. She admits that when the police came she first denied knowing what happened to the deceased. She said it was the neighbour

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who had suggested that the police should be called. She denied ever implicating the second accused.

Under cross examination she admitted using excessive force when chopping the neck of the deceased but explained that she did what she did because of anger. For the first time she alleged that the deceased had assaulted her that evening before she chopped him. She did not mention that in her warned and cautioned statement when events were still fresh on her mind. It was the alleged assault which had

triggered the events leading to the death of the deceased. She would not have left out that vital point in her statement. That material point was also not included in her defence outline. I am quite satisfied the allegation of her being assaulted was just an after thought and is rejected.

The first accused was a bad witness and was clearly untruthful. For instance she said she did not know whether or not the deceased had fallen asleep when she chopped him yet she told a doctor that she chopped him when he had fallen asleep. She also said so in her extra curial statement. The finding I make is that she was quite aware that he was fast asleep when she chopped him. What she did was to wait for him to fall asleep and then chopped him as he slept. It cannot be said her powers of self-control snapped. Even if I had found that the deceased had assaulted her earlier on I would not have been prepared to accept that she acted under a non-pathological “emotional storm” because the evidence shows she planned the murder. She waited for the deceased to fall asleep. Finally, she was adamant that the second accused did not participate in the killing of the deceased. What is difficult to understand, however, is why the smaller axe was also thrown away in the bush.

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In his evidence the second accused told the court that the deceased was his half brother who had invited him (accused) to go and stay with him and his wife. He began staying with the couple in June 1999. The couple had an unhappy marriage. They had frequent quarrels and fights.

On the fateful day he was awakened by the first accused who told him that she had had a quarrel with the deceased and told him to go and see the deceased in their bedroom. He proceeded to the bedroom and found deceased lying on the floor. He

noticed a pail with bloody water and a mopper. The first accused repeated that they had had a quarrel and she had injured deceased. I wish to digress here and observe that the first accused did not mention to the second accused that she had been severely assaulted by the deceased prior to her chopping him. She said they had had a quarrel. If she had been subjected to a severe assault before she attacked him she would have mentioned that to her co-accused.

The second accused said she told him not to tell neighbours and the police. She warned him that he would be killed by some unknown person if he reported. She allegedly claimed that the unknown person had assisted her in killing the deceased. The unknown person knew him although he did not know him.

She ordered him to assist her to carry the body out of the house. He complied. The deceased had already died when they took his body out.

Thereafter she ordered him to go and hide the exhibits in the bush. He went to do as ordered and returned to the house. He found the first accused in the sitting room and she told him to go and sleep. He, however, failed to fall asleep until the next morning when the first accused instructed him to go and report the matter to the

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police. She again reminded him of the unknown person if he told the police something else. She said she would only go to prison if he told the police the truth but he would be killed by the person he did not know. She then ordered Ednah to wipe off the blood from the stoep.

When he returned with the police the first accused was questioned about the matter. She denied knowing what had happened to the deceased and went on to suggest that he could have been killed by thugs. She eventually confessed that she was the one who had killed her husband. She did not implicate him in the

commission of the crime. The second accused said he was not happy with what the first accused had done. He denied taking part in the killing but he said he told the police that it was the first accused who had done so. This, however, was only after she had confessed to the killing. He said at no stage did the first accused implicate him. He concluded by emphasising that he never struck the deceased at all since he was asleep when the incident occurred.

Under cross examination he said he did not know what was contained in the plastic bags which he was ordered to go and dispose of. He noticed the bigger axe but he was not aware that the smaller one was also inside one of the plastic bags. It was his evidence that he had never quarrelled with deceased and that he related well with him. He confirmed that deceased used to assault the first accused at least twice a week with fists and an electrical cord. The assaults used to take place in the bedroom and he did not witness them but he noticed she had been beaten up because of swellings on her body.

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When the first accused told him to go and see the deceased in their bedroom she had made up the bed and had already cut off the portion of the mattress which had been drenched in blood. The deceased was, at that stage, lying on the floor. The portion of the mattress that was cut off was already in one of the plastic bags which he was told to go and throw away.

The second accused maintained that he was ordered to assist in carrying out the body of the deceased and did so in fear. It was the fear that made him to go and dispose of the exhibits. Further, he did not tell the police the truth when he went to

report due to the same fear. He claimed to be afraid of the unknown person. The accused's fear was unreasonable and childish. The accused was 18 years at the time and was in form 4. Two opportunities presented themselves. The first one was when he went alone to the bush to dispose of the exhibits. He could have gone to report the matter to the police. Secondly when he was finally sent to go and report the matter to the police he should have told the police the truth. The police would have dealt with the unknown person without any problem since the first accused would have been asked to name him. If he was not a willing participant in assisting the first accused he would have reported the matter to the police at the first opportunity that presented itself. If he was afraid to report during the night he would have certainly done so in the morning when he went to report. He claimed deceased had never assaulted him or quarrelled with him and that they related well. He further claimed that he was pained by what the first accused had done to his brother. These claims become meaningless because if they had any substance the accused would have been so angry that he would have told the neighbours and would have been too willing to tell the police what he

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knew. He would have told them that first accused ordered him to remove the body from the house and place it next to the car and that she had ordered him to go and dispose of the exhibits. I am satisfied that the accused assisted his co-accused willingly.

The second accused was also a bad witness who was not worth to be believed. The first accused called doctor Poskotchinova a psychiatrist with 29 years experience. She examined the first accused and concluded that when she killed her husband she did not have any abnormal behaviour and had no mental problem. She told the doctor that her husband used to ill-treat her. She told the doctor that on the fateful night her

husband had beaten her up and she got angry. She decided to kill him when he was asleep. It should be noted that the accused first mentioned that she had been assaulted by the deceased to the doctor when she was examined on 22 January 2001. This was after a period of over one and half years. The assault should have been mentioned to the police and the second accused when matters were still fresh on her mind. It seems to me, that, that was an

after thought which accordingly must be rejected.

Defence of Non-Pathological Criminal Incapacity

The first accused raised the defence of non-pathological “criminal incapacity”.

This has been accepted as a complete defence by the South African Appellate Division and High Court in cases such as *S v Chretien* 1981(1) SA 1097(A); *S v Campher* 1987(1)SA 940(A); *S v Arnold* 1985(3)SA 256(c); *S v Laubscher* 1988(1) SA 163(A).

When dealing with the defence of non-pathological criminal incapacity C R Snyman in *Criminal Law* third edition at page 153 says,

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“For successful reliance on the defence of non-pathological incapacity it is in fact not necessary to prove that X’s mental disability was the result of certain specific causes or pathological states; if X does not rely on the specific defences of mental illness in terms of section 78(1) of the Criminal Procedure Act, or of immature age, but the court is satisfied on the evidence as a whole that at the time of the act an accused was incapable of appreciating the wrongfulness of his act or of conducting himself in accordance with such an appreciation, he must be found not guilty, irrespective of the cause of his mental inability.

The cause may perhaps be what can be called “emotional collapse”, “emotional stress”, “total disintegration of the personality”, or it may be attributable to factors such as shock, fear, anger or tension. Such a condition may be the result of provocation by Y or somebody else, and the provocation may in turn be linked to physical or mental exhaustion resulting from insulting behaviour towards X over a long period, which increasingly strained his powers of self control, until these powers eventually snapped - a condition which is sometimes present in an unhappy marriage which is on the point of disintegrating. Intoxication may also be a cause of the inability. The inability

may further more be the result of a combination of factors, such as provocation and intoxication ... but the exact description of the cause of the condition is not important. What is important is not the cause of the inability or the description of this cause, but the inability itself.”

The South African courts have laid down that the defence ought not to succeed easily. Where an accused person raises this defence he must lay a foundation for it in the evidence. In *S v Chretien supra* RUMPF CJ emphasised that a court should not easily conclude that X lacked capacity due to intoxication, otherwise the criminal justice system would easily become discredited. What the learned Chief Justice said in that case equally applies to other instances of non-pathological incapacity.

C R Snyman in his book quoted *supra* at page 154 says this on the point that the defence should not succeed easily;

“The chances of X’s succeeding with this defence if he became emotionally disturbed for only a brief period before and during the act, are slender. It is significant that in those cases in which the defence was raised or in which the court was at least prepared to consider it seriously, X’s act was preceded by a very long period - months or years in which his level of emotional stress

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increased progressively. The ultimate event which led to X’s firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow.”

The defence succeeded in *S v Arnold* and *S v Campher supra*. In *Arnold’s* case the court found he had been under extreme emotional stress and found him not guilty and discharged. He had been charged with the murder of his wife by shooting her but at the time of the shooting he was in a state of severe emotional stress. The prosecution had failed to prove that when he shot her he was acting consciously and not sub-consciously.

The court further held, on the assumption that the accused had acted consciously when he killed the deceased, that, on the evidence, it could not be said to have been proved that he either could have appreciated the wrongfulness of his act or,

if he did so appreciate it, that he was able to act in accordance with such appreciation of the wrongfulness of his act.

The accused was in a state of extreme emotional stress because of the couple's turbulent marriage. The cause of the unhappy marriage was the deceased. She was very volatile and subject to extreme feelings. She had an interest in men and a desire to be admired. She further had a desire to be a striptease artist, so that she could display her charms and enjoy the attention of an audience.

A further problem with her was that her mother had too much control over her. At one stage the mother went to stay with the couple. Her stay there was leading to the disintegration of the couple's marriage. When the accused finally asked the mother to leave them alone that did not go down well with the deceased. She left the matrimonial home. The accused had a son out of his first marriage who had a serious

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disability - he was hard of hearing. The deceased's attitude towards the boy had become so hostile that the accused was forced to make arrangements for the boy to be placed in a home for committed children. All this came from the mother who exercised strong but unfavourable influence over the deceased.

On the day she was shot he found her at home with her friend. He asked the friend to leave as he wanted to speak to her alone and not subject to any outside influence. The friend left and went to wait outside. The two remained in the house. When the accused asked the deceased what they could do about the situation she appeared disinterested. He told her that he was prepared to have the mother of the deceased back if that was going to resolve their problem. The deceased, however, did not seem to be prepared to discuss the matter. Instead she became provocative by

telling him that she wanted to return to stripping and had already got that job. She did not tell him where she had got the job as a striptease artist. While she repeatedly told him about her new job as a striptease artist she bent forward displaying her bare breasts. She refused to return home. A combination of the above factors seems to have caused the accused's self control powers to snap resulting in him shooting his wife.

Immediately after shooting her the accused was very upset and took her in his arms, held her hands and touched her lips and she gasped. He then rushed out of the house in an attempt to get the police and an ambulance, he also called a neighbour to come. He sat with her in his arms speaking to her and sat like that till the police arrived.

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The trial judge BURGER J made these remarks at page 262B-H;

“It is clear that the accused was emotionally extremely upset by all the prior events and that, at the time of his final conversation with the deceased, he could have been at a breaking point. He says that he is unable to give a full account of what happened - so for instance he is unable to explain how the holster of the gun landed in front of the couch.

The question arised to what extent the accused was truthful when he says that he cannot remember certain events. The case is remarkable in that not a single statement made by the accused was found to be untrue. A large number of the statements made by him were corroborated from other sources and, except for the statement that he, can't remember, all the rest of his evidence fits logically and has all the appearances of being highly probable. The state correctly conceded that throughout the accused was an honest witness except that it would not conceded that he was truthful when he said he could not remember, nor when he said he did not intend to kill her. The state could, however, not point to any fact or reason why these statements should not be accepted except to say that they were improbable.

The fact that the accused did not adapt his evidence to take advantage of the possibility that the firearm was accidentally discharged with the first shot, as suggested by the ballistic expert, reflected favourably on the accused.

The events after the shooting, in particular when the accused made his report to the police and a statement to the magistrate, all very shortly after the fatal event, indicate that the accused was extremely shocked and sincerely regretted the event. The accused was then still in a highly emotional state and it is unlikely that he was in such a state as to be able to feign any feelings or able to fabricate any lies. He was perfectly open with the police, fully co-operated with the investigating officer and the next day assisted *inter alia* in the search for the bullets. In our view the events prior to the alleged loss of memory by the accused, as well as all subsequent events, all unequivocally demonstrate a sincere love and affection for the deceased, completely negating any desire or reason on his part to kill the deceased.” Emphasis added.

In casu when the first accused killed her husband was she acting consciously and not sub-consciously? If she acted consciously did she have the criminal capacity to appreciate the wrongfulness of her act and act accordingly?

The evidence before the court shows clearly that the accused was subjected to ill-treatment by her husband who used to assault her every week - sometimes twice a

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week. Their marriage was a very unhappy one. This went on for a period of more than 4 years. She reported the ill-treatment to the deceased’s friends and parents to no avail. The deceased used to even assault the two little children and his own half sister Ednah.

The question to be answered is whether or not the defence she raised should avail her. In order to do that the court must examine closely the events immediately preceding the killing and after. It seems to us that the accused pre-planned the killing. She waited for him to fall asleep and then chopped him twice in the neck as he slept. Before chopping him she had to remove the little girl Lisa from the bed on which the couple used to sleep with her. She took the child to the room where Ednah and the other girls were sleeping.

After she had chopped him to death while he was asleep in bed, she removed him from the bed and placed the body on the floor. She then cut off the piece of

mattress on which he had bled and then turn over the mattress and made up the bed. She took the bed sheet and blanket on which he had bled and pillow case and put them in a plastic bag. She looked for two plastic bags in which she put all the exhibits.

Thereafter she awakened the 2nd accused and told him not to tell anybody that she had killed the deceased. She, instead told him that the story they should tell people was that the deceased was killed by thugs who left him by his car. The same story was to be told to the police. Indeed upon the arrival of the police she told them that the deceased had been killed by thugs.

She was untruthful to her neighbours, the police and even to the court. She told the court that before she killed him he had assaulted her severely for a long period

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and accused her of being a witch like her mother. This, she never mentioned to the police at the time of her arrest and when she made her extra curial statement.

Her actions are not consistent with those of a person who acted sub-consciously. What her actions reveal is that she had criminal capacity. Consequently, in the circumstances the defence raised is of no benefit to her.

The participation of the second accused in the actual killing has not been established with any satisfactory clarity. The evidence is confused on his alleged participation after the killing. What admits of no doubt, however, is his participation after the killing. He assisted the first accused in her attempt to conceal the crime. He carried the body out of the house and placed it next to the car so as to mislead people into believing that the murder had been committed by thugs outside the house. He went to dispose of the exhibits into the bush. He went to report the matter to the police and attempted to mislead them by saying the deceased had been killed by thugs.

His puerile story that he was afraid of an unknown person is rejected. If he

had not been a willing accessory he would have told the police the truth when he went to report. He voluntarily associated himself with the first accused and the crime.

The verdict of the court is as follows:

The first accused is found guilty of murder with actual intent while the second accused is guilty as an accessory after the fact of murder.

The state counsel has in my view, properly conceded that there are extenuating circumstances in this matter. I am therefore, at liberty to impose a sentence which I consider appropriate. I take into account that the first accused was subjected to ill-treatment by the deceased for a period of over 4 years. She used to be beaten

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up on a weekly basis and sometimes twice per week. She is a first offender. The second accused is a youthful first offender because of his youthfulness I shall treat him differently from the first accused. Both accused have been in custody for 2 years 9 months. This should be taken into account. In all the circumstances it seems to me that the justice of the case would be met by sentencing each accused as follows;

Accused 1 - 9 years imprisonment

Accused 2 - 6 years imprisonment.

Attorney-General counsel for the state
Ben Baron & Partners first accused's legal practitioners
Coghlan & Welsh second accused's legal practitioners