
**WOMEN'S VIOLENT CRIME AGAINST ABUSIVE PARTNERS IN ZAMBIA: A
CRITIQUE OF THE DEFENCE OF 'PROVOCATION'**

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Abstract

The objectives of this study, conducted by a Zambian law enforcement officer, were to:

(i) establish how women exposed to long-term domestic violence (DV) develop the '*baula*' reaction (i.e., slow anger reaction) resulting in their killing their abusive partners; (ii) investigate whether the defence of provocation discriminates against female offenders; (iii) interrogate whether judges have developed the defence of provocation in a gender-sensitive manner; and (iv) recommend the broadening of the defence of provocation in the Penal Code by catering for acts not done 'in the heat of the moment' (or as a result of the '*baula*' reaction). In order for an accused person to plead the defence of provocation successfully in terms of sections 205 and 206 of the Penal Code, the killing must have been committed 'in the heat of the moment,' which, unfortunately, does not fit into the lived realities of abused woman as revealed by the findings of this study. The research, which focused on the lived realities of 11 respondent women convicted of spousal homicide, was scientifically conducted within a strong gender-sensitive theoretical and methodological framework, in particular, the Women's Law Approach which embraced, among others, the Grounded Theory and Human Rights Approaches. Relevant data for the study included extensive desk research of the law, court case transcripts, literature, in-depth interviews and/or focus group discussions with the respondent women and members of the legal profession, judiciary, police force, church, teaching profession and the NGO community as well as researchers, cultural gate keepers and a psychologist. The findings of the study were that: (i) society does not expect a woman to react in a violent way towards her abusive partner due to the deep-rooted cultural belief that a man has absolute control over his wife; (ii) judges interpret provocative acts using double standards based on gender ideologies; (iii) men (as opposed to women) are usually the instigators of intimate partner violence; (iv) the '*baula*' (or slow anger) reaction causes women to kill their abusive partners at a time when they are not provoked; and (v) Section 205 of the Penal Code is too narrow and needs to be amended to include responses to provocative acts not done 'in the heat of the moment.' The study concluded that, generally, abused women have difficulties in successfully pleading the defence of provocation as they do not normally react 'in the heat of the moment'. In accordance with Zambia's regional and international Human Rights commitments, the study finally formulated an action plan: (i) on the need to amend by widening the provisions of sections 205 and 206 of the Penal Code; (ii) by using appropriate stakeholders to lobby for the amendment. (iii) After the amendment of the defence, workshops should be held for judges and magistrates to encourage them to take judicial notice of the fact that women are socialised against reacting to their abusive partners and that, when they eventually 'snap', they do not do so 'in the heat of the moment' but rather as a result of the '*baula*' (slow anger) reaction; and, (iv) the Anti-Gender Based Violence Act of 2011 should be included in the police training curriculum to help officers effectively reduce DV and, ultimately, spousal homicides.

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Dedication

To my beloved wife; Manda; my children, Musonda, Elijah, Elisha Natasha, Roydah and Katebe; for their understanding and support during the period that I left them in Zambia to study at SEARCWL-UZ.

Declaration

I, **CHARLES MUSONDA MBITA**, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this context that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the Masters Degree in Women's Law (MWL) at SEARCWL, University of Zimbabwe.

Candidate's signature: _____

Date: _____

I, **ROSALIE KATSANDE**, being the supervisor, have read this dissertation and approved it for partial fulfilment of the requirements of the Masters Degree in Women's Law (MWL), at SEARCWL, University of Zimbabwe.

Supervisor's signature: _____

Date: _____

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List of Acronyms

‘D’	Defendant
ACPHR	African Charter on Human and People’s Rights
BWS	Battered Woman Syndrome
CEDAW	Convention for the Elimination of All forms of Discrimination Against Women
DEVAW	Declaration on the Elimination of Violence Against Women
ED	Executive Director
FNDP	Fifth National Development Plan
GIDD	Gender in Development Division
GRZ	Government of the Republic of Zambia
HRC	Human Rights Commission
MMD	Movement for Multi Party Democracy
MWL	Masters Degree in Women’s Law Program
NGO	Non Governmental Organisation
NGOCC	Non Governmental Organisations Coordinating Council
PAOG	Pentecostal Assemblies of God
PF	Patriotic Front
SADC	Southern African Development Community
SEARCWL	Southern and Eastern Africa Regional Centre for Women’s Law
UNZA	University of Zambia
UTH	University Teaching Hospital
VSU	Victim Support Unit
YWCA	Young Women’s Christian Association
ZWPC	Zambia Women’s Parliamentary Caucus

Zambian Statutes cited

The Anti Gender Based Violence Act of 2011
The Constitution of Zambia, Chapter 1 of the Laws of Zambia
The Penal Code, Chapter 87 of the Laws of Zambia

Statutes from other Jurisdictions cited

Australia' New South Wales Crimes Act of 1990
The Kenyan Penal Code, Chapter 63 of the Laws of Kenya

International Human Rights Instruments cited

African Charter on Human and People's Rights
Convention for the Elimination of All forms of Discrimination Against Women
Declaration on the Elimination of Violence Against Women
Protocol to the African Charter on the Rights of Women in Africa
SADC Declaration on Gender and Development
The African Charter
Universal Declaration of Human Rights

List of Zambian cases cited

Esther Mwiimbe v The People (1986) ZR 15 (SC)
Liyumbi v The People (1978) ZR 25 (SC)
Makomela v The People (1974) ZLR 254
The People v Mary Nalwimba (2007: unreported)
The People v Paulo Katolo (1987: unreported)
The People v Phillia Chisokonono (2009: unreported)
The People v Christopher Mwandabai (1984: unreported)
The People v Enock Mafuta (1986: unreported)
The People v Jennifer Chipasha (2009: unreported)
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Bruzas (1972) 1 Crim.LR 367
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Farrar (1992) 1 VR 207
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R v Duffy (1949) 1 ALL ER 932
R v Thornton (No.2) 1996 (2) ALL ER 1023
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CHAPTER ONE

1.0 BACKGROUND TO THE STUDY

1.0 Introduction

The essence of the study was to examine the interface between the circumstances leading to women's involvement in spousal homicide and whether the defence of provocation discriminates against women on the basis of their gender. The study analysed the lived realities of six (6) and five (5) women incarcerated at *Lusaka Central* and *Kabwe Female Maximum* prisons, respectively, drawn from all over the country, who had killed male partners. Using their own voices, the women gave detailed accounts of their respective situations which led to these killings or homicides and the termination of the intimate social relationships which were deeply imbedded in the culture they shared with their victims (Bohannon, 1960). It was therefore essential to analyse the situations which may predispose women to commit violent crime against their abusive partners. Hence, this research focuses more on these situations than simply studying the individual offenders' personal characteristics. Tibatemwa-Ekirikubinza (1999) points out that:

It is important to remember the essential rationality of most women who commit crime, for to label them irrational or more specifically mad, as 'society' would want us to do, is...more complex and dangerous (than labelling them), more damaging in its restrictions, more wide-ranging in its' implications. Not 'bad'? Then definitely 'mad' [such label]...is a smear, a dismissal of the women underneath.

She further argues that feminists may object to the use of adjectives such as 'passive' in reference to women's roles in society. Meena, (1992) asserts:

The African woman who carries heavy loads on her head and a baby on her back, who tills the land with the crudest tools, and grinds the grain, who walks kilometres to fetch firewood and water for domestic use, is far from being docile, humble or dependant. It takes a lot of courage to do what rural African women do for the survival of their families.

In the same vein, this study is in no way intended to be derogatory towards women. The term 'passive' is often used to refer to the fact that most Zambian women experience suffering at the hands of men for long periods without opposition and society expects them to be

submissive towards their partners. Homicide (and violence in general) is assumed to have a particular meaning in relation to the offender and her situation. The act is preceded by conditions, circumstances, events and processes making her behaviour a probable consequence. This entails consideration of an abused woman's past experiences as these determine how she defines her situation.

1.1 Statement of the Research Problem

Under the provisions of sections 205 and 206 of the Penal Code,¹ in order to successfully plead the defence of provocation, it must be proved that: (i) the offender acted in the heat of passion arising from loss of self control; (ii) the loss of self control (by the offender) must be a direct result of an unlawful act committed by the victim; and (iii) the offender must have reacted immediately after the provocation (without having had time to cool from passion caused by the provocation). In considering the question of provocation, Zambian courts apply both a subjective and objective test. The court considers the question: did the unlawful act of the deceased as a matter of fact lead the accused to lose self control (the subjective test)? But it also asks the following question: would any other reasonable person have lost his/her power of self control and acted as the accused did (the objective test) (*Tibatemwa-Ekirikubinza*, 2011)? It is a fact that women often fail when they put forward the defence of provocation as they normally kill at a time when they are not necessarily provoked by their husbands, as was the case with *Esther Mwiimbe*². This validates *Naffine's* observation [quoted by *Tibatemwa-Ekirikubinza* (2011:193)] that:

Law's reasonable man... represents the male point of view. That is to say, the mythical man of law is intended to be ungendered, an objective standard of human conduct, and yet the characters are invariably men. And of course, they are deemed to be reasonable men. In (the law's) search for a perfectly impartial standard of reasonable human behaviour, (courts) have retained in their mind's an image of a man and not a woman.

Women do not fall into the bracket of a reasonable man, who is expected, upon being provoked, to react in the heat of the moment, as women are socialised in Zambia not to react to their husband's provocative acts on the basis of cultural values. And when they do react,

¹ Chapter 87 of the Laws of Zambia.

² (1986) ZR 15 (SC).

very often it is not in the heat of the moment. This then clearly demonstrates the fact that the defence of provocation discriminates against women, as social arenas are not taken into account by courts which bar women from reacting in the heat of the moment against abusive partners.

1.2 Objectives of the Study

The objectives of this study were to:

1. Establish how women develop 'baula' (slow anger reaction) resulting into their killing abusive partners.
2. Investigate whether the defence of provocation discriminates against female offenders who kill abusive partners as a result of a prolonged abusive relationship with the victim.
3. Interrogate whether the defence of provocation has been well developed by judges to the extent of not discriminating against female offenders. The defence appears to favour men who, upon being provoked, very often react 'in the heat of the moment' as opposed to women, who do not.
4. Recommend the broadening of the defence of provocation in the Penal Code by catering for acts not done in the heat of the moment.

1.3 Justification for the Study

It was the case of *Esther Mwiimbe v The People*³ that sparked my interest in the subject and led me to investigate whether the defence of 'provocation' discriminates against women. The accused had suffered an abusive relationship with her deceased husband over a long period of time as he was extremely violent and frequently assaulted and injured her. On the fateful day, the deceased ordered her to cook some chips and sausages for him. She noticed that under the

³ Supra note 2.

bed, he had a hammer, a pounding stick and a knife with which he threatened to kill all the children and the appellant. She went into the kitchen and fetched some hot cooking oil and told him that if he had stopped his ill intentions against them, he should surrender all the weapons to her. He picked up a knife and, instead of giving it to her gently and in a civil manner, he threw it at her injuring her on the arm as he advanced towards her. She then threw the hot cooking oil at him, burning him extensively. He was taken to the hospital where he subsequently died. The learned High Court Judge found among other things that; (i) her actions did not demonstrate the fact that she did not fight as the deceased made no immediate attempt to harm her, (ii) the court found that she had every opportunity to run away and that her action was not instinctive but deliberate and unreasonable, (iii) the court disbelieved her and found that she poured cooking oil on the deceased as he lay in bed and, (iv) the court further rejected pleas of self-defence and, in the alternative 'provocation', holding that; both were unavailable on the facts of the case. The Supreme Court upheld the High Court's reasoning and condemned her to death.

At the time *Esther* had killed her abusive husband, there is no doubt that she was condemned both by society and the criminal justice system. However, having embarking upon this study, I can safely say that her actions were justified and that the criminal justice system should have shown her mercy and imposed on her a sentence less than death.

1.4 Research Assumptions

The research was guided by the following assumptions that:

1. The defence of provocation favours male over female perpetrators as society does not expect women to react violently. As a result, it condemns women who kill their abusive partners.
2. Case law in Zambia in respect of the defence of provocation has not been well developed by the courts since they very often hold the view that a man is more easily provoked than a woman.

3. Intimate partner violence is overwhelmingly an issue of male violence against a female partner resulting in women developing a 'slow burn' anger that causes them to kill their abusive partners.
4. Officials of the criminal justice system in Zambia do not understand why women kill their abusive partners at a time when the victim may not have done any provocative act.
5. The phrase 'sudden provocation' in section 205 of the Penal Code is too narrow and needs to be redefined to include provocative acts (e.g., of women in abusive relationships) not done 'in the heat of the moment'.

1.5 Research Questions

The research was guided by the following research questions:

1. Does the defence of provocation favour male as opposed to female perpetrators simply because society condemns women who react in a violent way by killing their abusive partners?
2. Does the case law in Zambia show that the courts have not developed the defence of provocation well since the courts very often hold the view that a man is more easily provoked than a woman?
3. Why is it that intimate partner violence is overwhelmingly an issue of male violence against a female partner resulting in women developing a 'slow burn' anger that causes them to kill their abusive partners?
4. Do officials of the criminal justice system in Zambia understand why women kill abusive partners at a time when the victim may not have done any provocative act?

5. Is the phrase 'sudden provocation' in section 205 of the Penal Code too narrow to the extent that it needs to be redefined to include provocative acts done not done 'in the heat of the moment' in order to cater for women killing their abusers?

CHAPTER TWO

2.0 THEORETICAL FRAMEWORK

2.1 Introduction

The theoretical model selected in this study was guided by feminist legal theories and cultural feminist theories. Studies that specifically examine gender bias in the courtroom show that the judicial system continues to minimize the violence of husbands against wives and often places the blame for the abuse on the women victims as some women commit murder after the man has passed out or gone to sleep. The 'appropriate' situation for using deadly force in self-defence or under provocation simply does not fit the lived experiences of women who are beaten and threatened with death by their male partners. The only available means many women have with which to defend themselves is to catch their assailants' off-guard. A woman whose intimate assailant has injured her, terrorized her, and threatened to kill her or her children, knows first-hand what is likely to happen when he awakens (*Scafran*, 1990, *Welling et al.*, 1990).

2.2 The 'Baula' (slow anger) Reaction Theory

I further developed the '*battered woman syndrome*' (BWS) coined by Walker, (1984) to denote slow burn anger in an abused woman due to psychological and behavioural symptoms into the '*baula*' theory to denote the fact that an abused woman develops a slow anger reaction resulting in her killing an abusive partner at a time she is not necessarily provoked. I derived the '*baula*' theory from the heating up (to the colour of red hot) of a charcoal brazier which in my language means '*baula*'. When charcoal is put on a brazier, it does not heat up immediately; it takes time for it to becoming burning, red hot. From the findings, that is how an abused woman reacts to the provocative acts of an abusive partner. Like the BWS, '*baula*' (slow anger reaction) refers to a situation where an abused woman, as a result of being subjected to prolonged physical and psychological abuse, develops cumulative anger, which explodes at a time she is not necessarily provoked by her abusive partner. Her response makes it difficult for her to invoke the defence of provocation, which under sections 205 and 206 of the Penal Code has to be committed in the heat of the moment. Courts do not take into

consideration the '*baula*' (slow anger) reaction in construing the defence of provocation in respect of abused women who have killed their abusive partners; instead, as in the case of Mwimbe, the courts normally state: '*Why didn't she just leave him instead of killing him?*' With reference to the '*baula*' theory, an abused woman does not normally react in the heat of the moment, but this does not mean that she is not in a state of being provoked as alluded to by a psychologist interviewed at the University of Zambia, who stated that:

“Women kill abusive partners at a time they are not necessarily provoked due to triggers which are either internal or external. Suppression of feelings can result into someone reacting at a time he/she is not actually provoked.”

What this means is that an abused woman after being subjected to continuous abuse by her spouse develops a '*baula*' reaction (slow anger reaction), and since she can no longer contain her suppressed feelings of anger against her abuser (husband), she reacts at a time when she is not necessarily provoked by him. As the killing of her abusive partner does not technically/legally fall within the ambit of '*in the heat of the moment*', the abused woman will usually fail to succeed in proving a defence of provocation as her actions do not meet the criteria required in terms of sections 205 and 206 of the Penal Code.

2.3 Cultural Theory

On the basis of my experiential data, in the highly patriarchal Zambian society, wife beating is justified based on the argument that a loving man beats his wife and, therefore, that if a man does not beat his wife, then he does not love her. Therefore, a battered woman who is often beaten up by her abusive husband may not react in the heat of the moment as she is socialised to accept the fact that wife beating is normal in a marriage. Such a woman may react at a time when she is not necessarily provoked by her abusive partner due to a '*baula*' reaction (slow anger reaction). Under these circumstances, she will usually fail to prove a defence of provocation in a court of law. This study relied on 'cultural theory' to explain why women are expected to be passive towards abusive partners. Violence perpetuated against women by men to a large extent stems from cultural practices. The term 'culture' is often used to describe patterns of beliefs and behaviour shared by a social group (Heath, 2001). Cultural theory emphasizes the power of traditional norms within the African culture leading

to widespread incidences of violence against women in general. Cultural theorists see the connection between traditional norms and violence against women as interlinked, arguing that wife battering is normal and culturally accepted (Bowman, 2003). Furthermore, Bowman (2003:4) observed the *'uneven distribution of power within African marriages, the impact of polygamy, the power of the extended family over a married couple, and the universal institution of bride price as underlying the widespread abuse of women.'*

It is important to recognise that violence, like any other social phenomenon, must, if it is to be meaningfully understood, be analysed within its social and cultural setting. That is why studies of female homicide in western industrialised societies may have a limited significance to an understanding of female homicide in the African context (Tibatemwa-Ekirikubinza, 1999:17). As observed by Bohannan, (1960); *'homicide [and violence in general]...is everywhere, set firmly into the social background where they occur ... and must, like all other relationships, take place and therefore be studied and understood in terms of culture'*. As such, homicide [and violence in general] is not only a social relationship but is also *'a human relationship which takes place within a particular social and cultural context.'* (Avison, 1974). Mahfooz, (1989) also agreed that; *'...cultural context and cultural environments are too important to be ignored in studying the murderous or any other violent assaultive behaviour. Cultural context shapes all human behaviour including criminal behaviour...The social processes involved in the development of criminal behaviour are components of the same social structure that produces law-abiding citizens.'*

Tibatemwa-Ekirikubinza, (1999), contends that it may be that wives in traditional society are willing to accept subordination because they are at the receiving end; men provide for the material well being of the family and thus deserve to be regarded as superior to women. Gelsthorpe, (1989) argues that in contemporary society, the wife may shoulder heavier responsibility, but sooner or later realises that her heavier responsibility has given her no extra standing in her husband's eyes. This recognition may partially explain a woman's violent reaction. The cultural theory will run through the entire study, as by socialisation women are not expected to react to the provocative acts of their partners.

2.4 The 'Reasonable Man' Test

The '*reasonable man*' test is an objective requirement taking into account the fact that section 206 (1) of the Penal Code⁴ requires that the provocative act or insult must be such as might cause an '*ordinary person*'⁵ to lose his/ her self control and do as the accused person did. In elucidating the dilemmas faced by lawyers who attempt to educate judges about male battering and female provocation, the emphasis on the unique characteristics of battered women's experiences may penalize women's different experiences and women's departures from a stereotypical norm (*Schneider*, 1992). This test provides a standard by which the act or insult of the victim and the response of the accused person might be judged.⁶ The '*ordinary person*' mentioned in section 206 (1) is none other than the '*reasonable man*' who on occasions loses his/her temper and behaves like a beast. A reasonable man has some characteristics⁷ which courts may take into account in determining the reaction of a person to a provocative act or insult. But courts seem to insist that for a characteristic to be relevant for the purpose of the defence of provocation, it should '*affect the gravity of the provocation*' of the accused person.⁸

Going by the English case of the *Director of Public Prosecutions v Camplin*,⁹ there is evidence that English courts recognise attributes like the age of the offender. Similarly, courts in Zambia should take into account the fact that women are socialised not to react to provocative acts done by their partners in determining the reasonableness of a provocative act (*Kulusika*, 2006). In *Camplin*, a fifteen (15) year-old boy killed a man. His only defence before the House of Lords was provocation. Contrary to the summing up of the defence lawyer, *Lord Diplock* took pains to instruct the jury that they must consider whether:

...the provocation was sufficient to make a 'reasonable man' in the circumstances act as the defendant did. Not a reasonable boy as (counsel for the defendant) would have it;...it is an objective test- a 'reasonable man.'

⁴ Chapter 87 of the Laws of Zambia.

⁵ *R v. Stewart* (1995) 4 ALL ER 999 (CA).

⁶ *R v. Morhall* (1995) 3 ALL ER 659 (HL).

⁷ *DPP v. Camplin* (1978) 2 ALL ER 168 (HL).

⁸ *Ibid.*

⁹ (1978) 2 A.E.R.168.

The jury found *Camplin* guilty of murder. On appeal, however, the Court of Appeal, Criminal Division, allowed the appeal and substituted a conviction for manslaughter on the ground that *Lord Diplock's* instructions were a misdirection. It held that the proper direction to the jury was to invite the jury to consider whether the provocation was sufficient to make a reasonable person of the same age as the appellant in the same circumstances do as he did. The applicable test, therefore, was what a reasonable boy, fifteen (15) years of age, would have done in the circumstances. Similarly, courts, including Zambian courts, should take into account issues of gender, as already mentioned. In other words, a woman by nature of her gender, is not expected to react in the heat of the moment upon being provoked by her male partner; generally, she reacts after being provoked due to a *baula* reaction (slow anger reaction), which I will explain later in much more detail.

From an analysis of some reported cases and perusal of court records, courts' decisions (*ratio decidendi*) were too harsh against female offenders as compared to male offenders in construing provocative acts. If a person kills another '*in the heat of passion*',¹⁰ whilst he/she is not the master of himself/herself due to things done or said or both and subject to certain requirements, then he/she is said to have committed an unlawful homicide having performed the *actus reus* with the necessary *mens rea*.¹¹ However the defendant can raise the defence of provocation. A successful plea will entitle him/her to be convicted of manslaughter only.¹² Provocation is a defence to murder only, reducing it to a lesser charge of manslaughter. But it is not a defence to attempted murder¹³ or to other criminal offences.

The defendant cannot plead provocation, unless he/she can show that he/she killed because he/she was provoked, and that at the time of committing the offence, he/she lost self-control. In considering the defence of provocation, it is important to determine whether the defendant (*D*) was in fact provoked, whether a reasonable person would have been provoked to act as (*D*) did, and whether the response of (*D*) could be said to bear a '*reasonable relationship to the provocation*.'

¹⁰ R.v.Duffy (1949) 1 ALL ER 932.

¹¹ Farrar (1992) 1 VR 207.

¹² Section 205 of the Zambian Penal Code, Chapter 87 of the Laws of Zambia.

¹³ Bruzas (1972) 1 Crim.LR 367.

The study in chapter three (3) looks at the influence of my conceptual framework on the methodologies.

CHAPTER THREE

3.0 RESEARCH METHODOLOGIES AND METHODS

3.1 RESEARCH METHODOLOGIES

3.1.1 *The Women's Law Approach*

The study employed the 'Women's Law Approach' which is an inter-disciplinary methodology integrating the law based on women's lived experiences and realities. *Dahl*, (1987) observes that:

'the methodology of women's law is cross disciplinary and pluralist and calls for a rather free use of available material wherever it can be found.'

The aim was to capture women's voices in relation to their lived realities. I therefore examined the circumstances leading to the women's involvement in their homicides against abusive partners and their experience with the criminal justice system from the time they committed their crimes to their current status in prison. I chose this approach as it provided a holistic analysis of the lived realities of the women who had killed their abusive partners. At both *Lusaka* central and *Kabwe* female maximum prisons, by interviewing 11 female inmates, I was able to understand their lived realities and circumstances which ultimately lead to their committing spousal homicide and to analyse whether the defence of provocation was applicable to them or not. One of the female inmates stated:

For well over ten years that I was married to my deceased husband, he always beat up me without reasonable cause. On the fateful day, he came back home drunk and asked me why I had refused to abort the baby I was carrying, as he was not interested in the pregnancy. Thereafter he started to beat me up, and pulling me all over the kitchen with my long hair. Later, after 30 minutes when he was off guard, in order to teach him a lesson, I stabbed him to death. The High Court sentenced me to life imprisonment, as the court did not expect me as a woman to react to provocative acts of my deceased husband.

In sentencing her to life imprisonment, it is quite clear that the court did not take into account her past abuse (lived reality) at the hands of her abusive deceased husband, but invoked the

provisions of sections 205 and 206, to ascertain whether she reacted ‘in the heat of the moment’ upon being provoked by her deceased husband. This position was also the case with other female inmates interviewed, who also did not react ‘in the heat of the moment’ at the time they killed their abusive partners, but as a result of the ‘*baula*’ reaction (slow anger reaction).

Therefore, using the women’s law approach, I was able to conclude that when courts deal with women who had killed their abusive partners they did not take into account their lived realities including the ‘*baula*’ reaction (slow burn anger reaction) under which they laboured. Rather than causing them to react against their abusers ‘in the heat of the moment’, the ‘*baula*’ reaction (slow burn anger reaction) built up in them over a period of time and caused them to kill their abusive partners some time after the final act of provocation. This will be explored in chapter four of this study.

3.1.2 The Grounded Theory Approach

Grounded theory approach may be compared to the activities of a ‘*dung beetle*’ which constantly compiles balls of animal dung for purposes of laying its eggs in the dung. The dung beetle approach as a grounded research process helped me to collect data, sift it and analyze it by considering the implications of the findings and thereafter determining what next to collect in order to meet women’s needs and continue with the collection and analysis cycle (Bentzon et al., 1998).

The defence of provocation favours male over female perpetrators as society does not expect women to react violently. As a result, it condemns women who kill their abusive partners.

Using my assumptions, the grounded theory approach helped me to analyse the lived realities of women on the ground. By way of example, one of my assumptions was that: ‘*The defence of provocation favours male over female perpetrators as society does not expect women to react violently. As a result, it condemns women who kill their abusive partners.*’ Some lawyers and law lecturers interviewed were of the view that since women are not expected to react in a violent way towards abusive partners, ‘the reasonable man test’ employed in criminal law does not have women in mind but men who are expected to react in the heat of

the moment, thereby successfully plead the defence of ‘provocation’. As such, the defence of provocation discriminates against women on the basis of their gender as they often do not react to provocative acts within the ambit of ‘in the heat of the moment.’ With this approach, I was able to further develop the ‘battered woman syndrome’ into the ‘*baula*’ theory, which explains why women do not react in the heat of the moment as required by sections 205 and 206 of the Penal Code. Furthermore, using this approach, I saw the need to have the defence of provocation amended by allowing it to include provocative acts not done ‘in the heat of the moment’ on the basis of the ‘*baula*’ theory.

Using the grounded theory approach, apart from holding in-depth interviews and focus group discussions with respondents and informants in my sample, I also interviewed respondents who initially were not part of the sample. When I went to interview a senior research officer at the Zambia Law Development Commission, she informed me that:

Your study requires you to engage with the Young Women’s Christian Association (YWCA) who are major stakeholders in matters affecting abused women, and that YWCA would take a leading role in the lobbying of government to amend the defence of provocation, as in its current form it is gendered.

Indeed, when I got to YWCA, the organisation became interested in this study to the extent that it suggested that I furnish them a copy of this study for their advocacy programs and indeed for YWCA to lobby government to amend the defence of provocation, as in its current form, it appears to discriminate against abused women who through as a result of strong cultural values do not react in the heat of the moment. Initially YWCA was not in my research design, yet using the grounded theory approach YWCA turned out to be useful respondents in this study.

3.1.3 The Human Rights Approach

The human rights approach focused on whether courts in interpreting the defence of provocation take into account the country’s obligations in complying with regional and international human rights instruments that Zambia has ratified and which advocate for the non-discrimination of women on the basis of their gender and discriminatory cultural values.

It also caused me to analyse Article 23 of the Constitution which prohibits discrimination on the basis of sex. The United Nations, in accordance with Article 2 of CEDAW, urges all state parties to take appropriate measures, including legislation, to do away with customs and practices that constitute discrimination against women. Furthermore, Article 4 of DEVAW also urges states to take measures to eliminate violence against women and also encourages them to:

‘4(f) develop in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimisation of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.

This study established that courts in construing the defence of provocation do not take into account international human rights instruments or constitutional provisions prohibiting the non-discrimination of women on the basis of gender/cultural values. The reason for this appears to be that courts on the basis of cultural values expect women to be motherly towards their abusive partners by not responding to provocative acts. In fact in one court case whose record I perused, the High Court in sentencing a woman convicted of killing an abusive partner had this to say:

As a woman, society does not expect you to be violent towards your husband, therefore the court will not hesitate to show this indignation by passing befitting sentences.

Furthermore, the Constitution of Zambia was critically analysed in relation to Article 23(1) (2) (3), which guarantees protection from discrimination on the basis of sex, yet contradicts itself, as sub Article (4) (d) allows customary law to predominate in areas of family law; including marriage, divorce and property inheritance, to the disadvantage of women, as most Zambian customs expect women to be passive as they are perceived to be subordinate to men. Using this approach, I was able to establish that the defence of provocation is not accessible to abused women, as the courts do not take into account the country’s local and international commitments to prevent discrimination against women on the basis of their gender.

3.1.4 Gender and Sex Analysis

To establish which of the sexes benefit from the defence of provocation in its current form in the Penal Code, I undertook a gender and sex analysis approach to establish why women are not expected to react violently against abusive partners, taking into account the fact that an abusive marital relationship is more prone than any other factor to drive a woman to murder (La Fontaine, 1960). Tibatemwa-Ekririkubinza (1999) explains that the justification of wife-beating or chastisement is a reflection of the gender power imbalances within society, as a woman is perceived to be subordinate to a man whom she must obey and that society expects a woman to sacrifice self interest to the needs of others. The contradiction is the belief that women are socialised not to commit crime; those who do so must have experienced faulty socialization (Richardson, 1969). One cultural gate keeper interviewed pointed out that:

A woman who has had lobola (bride price) paid for her is expected to be extremely submissive to her husband, as in essence he has bought her from her parents.

This indicates that a woman is not expected to react violently against an abusive partner. If she does so, she is often condemned by society including the criminal justice system. In one court case, where a woman had killed an abusive partner, the court, in passing sentence, said:

‘Domestic violence must be frowned upon by the court especially if it is perpetrated by a woman who is expected to be motherly to her husband and children.’

By implication the court was suggesting that a woman is not expected to be provoked by her abusive partner by virtue of her gender and if she does get provoked and kills him, but not ‘in the heat of the moment’, she must be heavily dealt with by the criminal justice system. Using this approach, I was able to analyse society’s expected attitude of a woman towards an abusive husband, that is to say that a woman is socialised to be passive in her marital relationship in order to stay in her marriage. Therefore this approach enabled me to appreciate why men who are very often the instigators of domestic violence ultimately end up (in one sense) being its final (as in dead) victims; in another sense, abused women incarcerated for their killings also find themselves its final but surviving victims.

3.1.5 Legal Pluralism

Legal pluralism refers to a situation where multiple laws such as culture, statutory law, religion and other regulatory norms which control people's lives operate side by side, as statutory law alone does not regulate people's lives, taking into account the fact that women's lived realities are also shaped by religious and cultural practices (Matie, 2010). This is due to the fact that customary or religious laws or both are recognised alongside State laws in many African countries, including Zambia (Allott, 1980). One cultural gate keeper interviewed stressed that:

“We teach young women about to get married that they are expected not to raise a hand against their spouses. We further teach them to pick up small needles from the floor with their mouth whilst in a kneeling position, as a sign of endurance, as marriage is ‘a *shipikisha*’ club (endurance club) for women who enter into it.”

Clergymen interviewed also supported the view that a woman is not supposed to raise a hand against her spouse as the Bible commands her to be a submissive wife. Therefore, this approach enabled me to examine the interplay between culture, religion and legal norms in as far as lived realities of women are concerned. By using this approach, this study was able to ascertain the levels of influence of religion (Christianity) and cultural practices on women generally. As a result of this approach, the study came to the conclusion that the defence of provocation is a defence not generally available to abused women who kill their partners. Whereas men often react ‘in the heat of the moment’ and may therefore enjoy the defence of provocation, women are denied the defence because they often kill their male abusers after a lapse of time as a result of the ‘baula’ reaction (slow burn reaction) they have which is rooted in the cultural and religious values which demand that women should be submissive to their spouses.

3.1.6 Evaluation of Methodologies

The methodologies I employed in this study worked well for me, as I got direction on how to solicit data from my respondents especially from the 11 female inmates whose lived realities were analysed as to what lead them to commit violent crime against abusive partners and

whether the defence of provocation does discriminate against women on the basis of their gender. Indeed all the methodologies employed pointed to the fact that the defence of provocation discriminates against women on the basis of their gender and indeed cultural values in terms of which a woman is expected to be passive towards an abusive partner.

3.2 DATA COLLECTION METHODS

3.2.1 Research Sample

I drew my research sample from the following distinct social groups for the following reasons:

1. **Female inmates incarcerated for killing abusive partners:** These were the key respondents to the study, and they were interviewed in relation to their lived realities to the point of killing their abusive partners and analysed if the defence of provocation does discriminate against women who do not kill 'in the heat of the moment.'
2. **Magistrate, lawyers, law lecturers from two universities, judge (retired), and police officers:** These were interviewed to establish whether they understood the battered woman syndrome (BWS) that propelled women to kill abusive partners but not 'in the heat of the moment'. They also helped to establish if there is a need to amend the defence of provocation.
3. **A psychologist at the University of Zambia** was interviewed to analyse what propels an abused woman to kill an abusive partner but not 'in the heat of the moment'.
4. **Teachers** were interviewed to analyse if some of the reading materials for pupils contribute to gender inequalities in society.
5. **Cultural gate keepers and clergymen** were included in the research to establish what is expected of a woman towards her spouse.

Table 1: Table of Respondents

S/N	Respondent (s)	Sex	Method	Location
1.	11 prisoners	F	In- depth interviews	Kabwe & Lusaka Female prisons.
2.	6-police officers	M	In-depth interviews/Focus group discussion.	Zambia Police College and selected police stations in Lusaka urban.
3.	4- magistrates	F	In- depth interview	In chambers at the Magistrates Court complex, Lusaka
4.	1- law lecturer	M	In- depth interview	Cavendish University, Lusaka
5.	2- lawyers	M & F	In- depth interview	In chambers
6.	3- pastors	M	In- depth interviews	In their respective churches
7.	Senior Research officer	F	In- depth interview	In her office, Zambia Law Development Commission.
8.	4-women cultural gate-keepers (<i>alagizi</i>)	F	Focus group discussion	At one of their residences.
9.	2-village headmen	M	In-depth interviews	Villages, south of Lusaka.
10.	2- teachers	F & M	In-depth interviews	Lilayi Basic School
11.	Judge (retired)	M	In- depth interview.	Zambian Open University.
12.	YWCA Executive Director.	F	In- depth interview.	YWCA Head Office.
13.	A psychologist	M	In- depth interview	University of Zambia (UNZA).
TOTAL		Thirty nine (39) Respondents		

3.2.2 In-depth Interviews

Prior to the interviews, I clearly pointed out to the female inmates interviewed that the aim of the study was not to pass judgment on them but rather to examine the circumstances under which they committed their crimes. Allowing women their own voices was fundamental to the nature and purpose of this study. Rather than filtering women's language through the interpretive lens of another, this study used the interviewees' own words, thereby reducing

the potential for distortion and misrepresentation. The conduct of these interviews was inspired by *Heidensohn*, (1985) who stated that:

‘The search for the authentic voices of women and girls involved in crime is difficult. So often those voices have been...more concerned to demonstrate their lack of criminality than to illuminate their actions, although these attitudes are of course enormously revealing about the status of deviant women in our society and societal reactions to them.’

Eleven (11) female inmates were interviewed at *Lusaka* Central and *Kabwe* female maximum prisons, which included those on remand and also those already convicted of either murder or manslaughter in respect of their partners. During the course of the interviews, each offender was given the opportunity to give her own perception of the homicide. The interviews shed light on more personal dynamics of each woman’s violent behaviour. This was quite useful, as in-depth interviews created space for interviewees to express their views in relation to their abusive relationships with the victims. Furthermore, I interviewed police officers, a retired judge, teachers, magistrates, lawyers, and a law lecturer and relevant stakeholders to establish their critical understanding of the defence of provocation. I further interviewed a psychologist at the University of Zambia, in order to find out whether a prolonged abusive relationship affects women resulting in their killing their abusive partners, and, if so, how.

3.2.3 Focus Group Discussions

There were three (4) focus group discussions conducted during the field research with some police officers at the Zambia Police College, some magistrates at the Magistrates complex, some clergymen and some cultural gate keepers at villages south of the Zambian capital, Lusaka. Apart from being an appropriate way of targeting the community such as the village headmen, focus group discussions accorded me an opportunity of unearthing and collecting data on the assumptions and goals informing people’s values, beliefs and actions (*Tsanga*, 2003:44). This method proved to be an effective tool of data collection as respondents in the focus group discussions which comprised of not more than five respondents all actively participated in the discussion.

3.2.4 Perusal of High Court Transcripts

Another useful method that I employed was the perusal of some High Court case records in order to establish what goes on in the trial of either a man/woman accused of killing a partner in order to appreciate whether High Court Judges understand the perspective of women as well as male offenders. What emerged was the fact that, when considering the defence of provocation, courts do not take into account the lived realities of female offenders. Their decisions (*ratio decidendi*) were based on the fact that married women were not expected to react to or defend themselves against the provocative acts of their abusive husbands. However, if such comments were part of the courts' '*obiter dictum*' (i.e., which are comments or observations made in passing and not crucial to the court's ultimate decision or *ratio decidendi*), I was not going to conclude that courts are more sympathetic to men who had killed wives than women who had killed abusive partners.

3.2.5 Triangulating Research Methods

Although all the data collection methods proved very useful, I had to triangulate the data in order to ensure its accuracy for the study. Triangulation of research methods proved necessary in as far as researching real life contexts is concerned because of the multitude of causes that may account for human behaviour. The idea was to establish whether after the introduction of additional variables, the data still pointed towards a dominant inference or towards new explanations for the phenomenon in question (*Tsanga, 2003:45*).

3.3 Limitations of the Study

The inability to access the Lusaka High Court Criminal Registry where most of the criminal transcripts are kept, and the High Court Library (where I expected to find concluded cases involving male and female offenders who had killed their partners and pleaded the defence of provocation) did not in any way greatly affect this study, because, with the help of a research assistant at the High Court, I was able to analyse seven court records to that effect. I could not interview High Court Judges as the Judge in charge did not respond to the written request. Although I made several attempts to meet with her in person at her chambers, this proved

impossible as she was reported to be too busy to meet with me as all the judges were dealing with bulky election petition cases from the 2011 tripartite elections. This also did not greatly affect the study, as I was able to interview one retired judge who gave me much of the information that I could have had obtained from the judges still on the bench. The ethical issue I encountered was that, despite having permission from the Permanent Secretary for Home Affairs to visit Lusaka Central Prison, the Officer-in-Charge required me to seek fresh permission from the Permanent Secretary for Home Affairs to visit the prison with my supervisor as she was coming from a foreign country. My supervisor, however, met with other respondents to the study.

CHAPTER FOUR

4.0 PRESENTATION AND DISCUSSION OF FINDINGS

4.1 Introduction

The study revealed that due to constant physical abuse women endure at the hands of their abusive partners emanating from cultural values, these women, at some point, react by killing their abusers. However, they are condemned by society including the criminal justice system as they are always expected to be nurturing in character by virtue of their gender. Furthermore, because women often react and kill at a time when they are not necessarily provoked, the defence of provocation discriminates against them. It is quite the contrary for men (deemed by the law to 'reasonable' men) who may and often successfully do invoke the defence of provocation because they are expected to react and do react 'in the heat of the moment' to provocation. The study came up with the following findings.

4.1.1 Society does not expect Women to react violently in response to their abusive Partners

Most of my respondents including the 11 female inmates interviewed were of the view that a married woman should try by all means not to react to provocative acts of an abusive partner, as the socialisation of women is quite different from men who are expected to be aggressive. It is in this context that a woman who reacts aggressively to a male partner will be roundly condemned by society. Since this study is confined to spousal homicide, what emerged was the fact that female inmates had killed their abusive partners at a time they were not necessarily provoked and thereby condemned by the criminal justice system. One female inmate interviewed at Lusaka Central prison, killed an abusive partner at a time when she was not provoked and the court, which is part and parcel of society, condemned her actions. In her own story she stated that:

On the fateful day, when my deceased husband came back home, he started to accuse me of giving him a lot of problems. Thereafter he started to beat me up. I shouted for help, but no one came to my rescue. Later in the night in order to teach him a lesson, I stabbed him

to death. I was subsequently charged for his murder. The High Court sentenced me to five (5) years imprisonment indicating that violent crime was not for women, as I was expected to be submissive to my husband.

From the fairly lenient sentence it handed down, the court appears to have upheld her defence of provocation. Generally, however, and based on my perusal of court records involving women who had killed abusive partners, the decisions (*ratio decidendi*) indicated that a woman was not expected to react to the provocative acts of her husband. Therefore, the lived realities of this female inmate clearly confirm that society condemns a woman who reacts in a violent way towards an abusive partner by killing him. In other words, women who kill their husbands receive harsher sentences than men who kill wives. The patriarchal legacy recreates patterns of male domination through socialization and through social institutions that seem to support a man's right to control his wife, as a *man* is perceived to be the head of the household (Andersen, 1997). Feminist theory and practice reflects the following basic tenets: (1) male/female relationships are socially constructed on an unequal distribution of gender-based power, (2) men have differential access to society's valued material and symbolic resources, (3) women are devalued; (4) violence is the most visible form of male control over females, (5) no woman deserves to be abused, and (6) men, not their female partners, are responsible for their actions (Bograd, 1984).

Patriarchal control is seen as being particularly evident in culture, religion and control of women's sexuality. Radical feminists argue that men assert themselves supported by customs and laws denied to women, and that men have physical power which equals power over women. As such, from a radical feminist perspective, the task of feminist analysis is to unravel women's subordination and lack of power (Tsanga, 2011b). During a focus group discussion with two (2) women cultural gatekeepers, popularly known as '*alakizi*', one of them told me that they chastise young girls in order to prepare them for the chastisement they are expected to undergo at the hands of their spouses once they are married and that these young girls are not expected to raise a hand against their spouses. She further explained that girls are taught to pick up small needles from the floor with their mouth whilst they are kneeling, as a sign of endurance, as marriage is a '*shipikisha*' club (an endurance club) for women who enter into it. Culture is defined as '*the customs and beliefs, or a way of life and social organization of a particular group*' (Wehmeier, 2000). Culture in its wider sense has a rich, diverse and fluid meaning (Giles and Middleton, 2008). In relation to women, culture as

a way of life is often narrowly interpreted, particularly by those with power primarily to serve their own interests. It is for this reason that African feminists often argue that culture is one of the arenas that present obstacles for women (Tsanga, 2011a).

Within the family, the traditional head of the household is perceived to be a man (Munalula, 2005). This notion in my view must be revisited, as nowadays we have seen women looking after husbands who are unable to fend for the family. Take for example one female inmate I interviewed who assumed the role of being the head of her household by fending for her children including her husband (whom she had killed) who had completely failed to provide for his family for a period of well over 27 years up until she killed him for misusing some money she had lent him to start a business in order to assume his role as head of the household. According to Tsanga (2003:111-112) women have developed negative attitudes about themselves from being constantly told that they are subordinate to men and worst of all socialized to accept the fact that in marriage they are expected to submit to male authority and to accept the fact that marriage has its ups and downs. Furthermore, women are forced by society to stay in abusive relationships as the act of staying in such a relationship is meant to save one's marriage, and such conduct will invariably earn the approval of society.

Radical feminists claim that not even in the State is there a neutral tool equally available to women and men, and automatically responsive to the dictates of reason and justice. As such, dealing with patriarchy comprehensively necessitates bridging the gap between public/private dichotomy (Bryson, 1992). This study was also of the view that the educational system in Zambia, is also partly to blame for the 'gender power imbalance' in the country, as by way of example, in the English reader five (5) illustrated by Whitear, a text book used as a 'supplementary reader' for grades one to three in primary schools, clearly depicts the gendered roles of men/boys and women/girls, where a woman (a mother) and a girl (Jelita) are depicted as the ones to serve men/boys, in this regard father and Jelita's young brother Mulenga (Whitear, 1989). With this kind of scenario boys who read such supplementary books grow up believing that they are superior to girls by virtue of being male. And therefore in adult life, what can stop boys when they turn into men and abuse their female partners? This view was shared by two (2) primary school teachers interviewed at Lilayi Basic School.

Cultural or religious beliefs, as well as family and friends often work against a victimized woman's departure from her matrimonial home. Due to the nature of the nuclear family and

the man's efforts to isolate the woman from outside social support, she has few alternatives but to stay in a violent relationship (Archer, 1989). The creation of customary law in Zambia to a large extent was centred on the control of women, who are generally considered to be subordinate to men (Chanock, 1985). One headman in Shatumbu area, south of Lusaka, a cultural gatekeeper exclaimed that:

“A woman who has *lobola* paid to her parents, is expected to be submissive to her husband.”

Apart from the issue of *lobola*, women are socialized to view marriage as an important status symbol and they are expected culturally to persevere their marriage at all costs (Watts C. et. al., 1995). *Lobola* is one of the strategies used by men to justify their exertion of power through violence if need be, as men believe that there should be a partner who is like a tortoise in the house but forbid the tortoise to be the man (Tsanga, 2003).

The Preamble of the current Constitution of Zambia provides that the country be a Christian nation while upholding the right of every person to enjoy the freedom of conscience or religion. This is a very noble sentiment, as the country is expected to have upright morals. However, to some, the teachings of the Holy Bible are misinterpreted to mean that women are subordinate to men as they were made from a man's (Adam's) rib. Nkiwane, (2011) describes one of his previous students on the *MWL* program (Masculinity class), at SEARCWL as being so patriarchal in outlook to the extent of quoting extensively from the Bible supporting the view that men were superior to women. That student is not the only one with such perspectives of the superiority of men over women, as most Christians, including some clergymen, by and large have such perceptions. During a focus group discussion with two clergymen, they shared the view that a man is superior to a woman as a woman was created by God from a man. However contrary to the assertions of the clergymen above, a man and a woman should be on equal terms (Adeyemo, 2006). Though this study is not in support of women's violent crime against abusive partners, the study has however revealed that, as women are not expected to react in a violent way towards abusive partners in line with cultural values, they do, however, react at a time when their abusive partners have not necessarily provoked them. This is as a result of a '*baula*' reaction (slow burn anger reaction), which implies that the defence of provocation does discriminate against them as

they do not react ‘in the heat of the moment’ as required by sections 205 and 206 of the Penal Code.

4.1.2 Judges interpret ‘provocative acts’ using Double Standards based on Gender Ideologies

Feminist jurisprudence brings to light the ways in which the law is structured on patriarchal premises. It questions the neutrality of such law and warns against an oversimplification of the value of legal rights for women. It points out that women’s oppression cannot be resolved by a simple declaration of equality under the law. In any case, Smart (2002) has argued that the law’s male approach stems from the empirical observation that most lawmakers and practitioners of law are in fact male.

Taking the case of *Mwiimbe*¹⁴ as a first point of reference, as seen in Chapter One, despite evidence being adduced to the effect that she had suffered an abusive relationship with her deceased husband over a long period of time, till she killed him in self preservation, the High Court condemned her to death as ‘*she had every opportunity to run away and that her action was not instinctive but deliberate and unreasonable.*’ In disagreeing with the assertions of the learned High Court Judge that Esther had every opportunity to run away, empirical research has actually indicated that, in the case of ‘battered women’, it is important to remember that... ‘*even where options of escape exist, the woman may be unable to act or even perceive the existence of such options*’ (Cipparone, 1987). This then explains why Mwiimbe did not leave the abusive relationship. In the case of Mwiimbe, the court should have had taken the position of the American case of *State v Kelly*,¹⁵ where the New Jersey Supreme Court recognized the fact that a battered woman did not have the choice to leave her husband due ‘*to her feelings that if she tried to leave, she would be subjected to even more merciless treatment.*’

With reference to perused court records, in the case of *Jennifer Chipasha*,¹⁶ the Ndola High Court condemned her to death for killing her husband after allegedly misusing some money

¹⁴ Supra note 2.

¹⁵ (1984) 478 A.2d 364.

¹⁶ (2009:unreported).

she had lent him to start a business, as over a number of years he had failed to fend for the family. In condemning her to death the court *held* that; ‘*though no one saw her kill her husband, she was however linked to the offence by circumstantial evidence which suggested that as a woman she was not happy with the way her husband handled the money.*’ One does not need to be lawyer to analyze that the decision (*ratio decidendi*) amounted to discrimination against the female offender, who was ultimately condemned to death. Why did the court attribute her not being happy to her gender? This was a serious form of gender discrimination on the part of the court. In the case of *Mary Nalwimba*,¹⁷ the Ndola High Court sentenced her to 3 years imprisonment for killing her husband using a brazier after they picked up a quarrel instigated by her deceased husband. She was charged with his murder. In passing sentence, the court *held* that as there was no justification for what she had done and since, as a woman, she was expected to be passive towards her deceased husband, she, therefore, had to pay for her actions. In the case of *Phillia Chisokonono*,¹⁸ the court sentenced her to 6 years imprisonment for causing the death of her husband whom she hit on the head with a piece of firewood after a domestic quarrel initiated by him. The finding of the court was to the effect that:

‘Society does not expect a woman to be violent towards her husband; as such courts should not hesitate to show this indignation by passing befitting sentences.’

Unlike Chipasha who was condemned to death, Nalwimba and Chisokonono seem to have received more lenient treatment from the courts. These cases were very similar to those of men who had killed wives under provocative circumstances. It appears that the courts’ decisions (*ratio decidendi*) in the above 4 cases, including that of Mwiimbe, is a clear representation of the hypocrisy of Zambia’s wider patriarchal society and its attendant laws which condemn women on the basis of their gender and the cultural values imposed on them forbidding them from ever retaliating violently against their spouses. The evidence shows that this is a form of discrimination on the part of the courts. Although a convicted prisoner has to be punished for the crime he/she has committed court judgments should not in any way refer to a convicted prisoner’s gender or sex. What Jones (1980) said about homicides in American society is also true of the Zambian situation that ‘*standards of justifiable homicide have been based on male models and expectations, as the man’s conduct, while not always*

¹⁷ (2007:unreported).

¹⁸ (2009:unreported).

legally condoned, is viewed sympathetically by courts and society at large.' Despite the gender discrimination that women who have killed abusive partners undergo in courts in terms of discriminatory decisions, Article 7 of the Universal Declaration of Human Rights clearly provides that:

'all are equal before the law and are entitled without any discrimination to equal protection of the law.....'

Since courts already acknowledge the significance of age¹⁹, gender should also be considered in determining the reasonableness of an action. The acceptance of gender will not be tantamount to a call for a separate defence for women but a basis for incorporating women's experiences and perspectives into existing concepts of criminal law which so far represents fundamentally the male point of view. As a demonstration of the fact that courts in interpreting the defence of 'provocation' discriminate against women on the basis of their gender, in terms of decisions (*ratio decidendi*), the study also analysed some High Court transcripts where courts were sympathetic to men who had killed their female partners under perceived provocative circumstances. As a starting point, in the case of *Paulo Katolo*,²⁰ the accused had killed his wife whom he had suspected of infidelity, and the court in sentencing the accused to 3 years imprisonment *held* that:

The provocation offered by his wife was such that any self-respecting person would lose control and this called for maximum leniency.

In the case of *Enock Mafuta*,²¹ the accused killed his wife for alleged infidelity by shoving her violently to the ground and sentenced him to 18 months imprisonment, effective from the time he was arrested by the police, a period which had already elapsed whilst he was in custody pending the court proceedings. Similarly the court *held* that; '*any reasonable man would have been provoked the way the accused did upon hearing stories of his wife's infidelity*'. In the case of *Paul Katemo*,²² the accused killed his wife by striking her to death with a hose-pipe fitted with an iron bar on mere suspicion of infidelity, and got away with a lenient sentence of 2 years with hard labour, a sentence hardly justifying the killing of

¹⁹ Supra note 7.

²⁰ (1987: unreported).

²¹ (1986: unreported).

²² (1994: unreported).

another human being. The following *obiter dictum* of the court in *Katemo*'s case serves to legitimize men's violent outbursts and attacks on their partners:

"You should have had exercised restraint because you had 8 children with the deceased."

Stanko, (1994) argues that the sanctioning of even minor amounts of violence opens the door to more brutal and possibly fatal levels. He further observes that while justices are not reported to condone directly violence in the home, there appeared to be an assumption that the perpetrators (men) could not control their anger. The above unreported cases where men had killed their partners confirms *Tibatemwa-Ekirikubinza*, (2007) analysis that '*courts have established that a wife's adultery (in patriarchal society) is a wrong of such gravity to the husband that it is likely to lead an ordinary normal man to lose self control and in the heat of passion kill the wrong doer (either a woman or her lover) and that courts have enabled such men to pass the objective test required in provocation.*'

Similarly, an analysis of East African cases further shows the bias of courts in as far as the defence of provocation is concerned. In *Rex v. Hussein S/o Mohamed*,²³ the accused alleged that his father-in-law was planning to move to Nairobi and to take his daughter, the accused's wife, with him. When the accused forbade her to go, the wife replied; '*Go away, sala, budmash, harami.*' (these are terms of abuse which literally mean brother in law, vagabond, scoundrel). The accused stabbed her to death and the East African Court of Appeal returned a verdict of manslaughter on the basis of provocation. The court agreed with the two assessors' opinion that if a wife utters those particular words to her husband, '*words which are so bad with deep hidden meaning*' the man would naturally lose the power of self control. In the Kenyan case of *David Munga Maina v. Republic*,²⁴ the accused was facing a charge of murder in the High Court.²⁵ The accused beat up his wife to death for coming home drunk and when he asked her how she could take care of the children in that state, she responded that it was not her duty as a woman to educate children at home. The trial judge upon considering the evidence adduced in court, held *inter alia*: "*it was not such a wrongful act or insult to the accused as could amount to provocation as is defined in the law to justify the reaction from the accused into assaulting the deceased in the manner that he did.*" This was good

²³ 9 East African Court of Appeal 52.

²⁴ (2006) eKLR.

²⁵ Contrary to sections 203 and 204 of the Penal Code, Chapter 63 of the Laws of Kenya.

reasoning on the part of the learned trial judge; the same reasoning would have been appropriate in the unreported *Zambian* cases cited above involving men who had killed their wives. However, on appeal, a full bench of three (3) judges (all males) in allowing the appeal and setting aside the conviction *held* that; *‘the learned judge did not consider such a remark with the background of the rural folk still intent on maintaining men’s supremacy over their wives.’*

A law lecturer interviewed at Cavendish University (*Zambia*) stated that the ‘reasonable man test’ is quite defective as it only favours men, in that it certainly refers to a man and not a woman and that it should be given a different interpretation so that it may cater for women as well. The lecturer insisted on the need to reform the defence of provocation. These sentiments were echoed by two other lawyers interviewed a few days later. In the *Ugandan* case of *Yovan v Uganda*²⁶, in relation to the ‘reasonable man test,’ the East African Court of Appeal *held* that:

“Provocation must be judged by the standard of an ordinary person of the community to which the accused belongs and that what might be a deadly insult to a member of one community might be a mere triviality to members of another community”.

However, I am of the view that the standard expressed in the case of *Yovan* is by all means a ‘male standard’. As such, I am satisfied that, based on the findings of this study, all the female inmates interviewed in this study would fail the ‘reasonable man test’ because society does not expect women to react in a violent way towards an abusive partner. In this particular case, they are expected not to get annoyed upon being insulted by their partners. Professor *Munalula* to this effect propounds that ‘provocation’ appears to be a male defence because the requirement for the reaction to be immediate, eludes most women (*Munalula, 2005:148*).

CEDAW, widely regarded as the human rights charter for women, to which Zambia is a signatory, adopts a substantive model of equality. This is not simply concerned with equal treatment in law, but rather with equality in terms of the actual impact of the law. *CEDAW* requires States to ensure the delivery of outcomes that guarantee equality of opportunity (law, policy, programmes), equality of access and equality of benefit. *CEDAW* is also founded

²⁶ [1970] E. A. 405.

upon the principle of non-discrimination on the basis of sex. Article 1 defines the term discrimination against women thus:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

Clearly, this lack of judicial gender neutrality in spousal homicide cases not only affects the administration of justice but also erodes the confidence of women in courts of law due to the double standards expressed by courts based on gender ideologies and yet Zambia is a signatory to human rights instruments enhancing the rights of women. In construing the defence of ‘provocation,’ Zambian courts do not generally take into account the gender equality provisions which are espoused in international human rights instruments to which Zambia is a signatory. The United Nations, in terms of Article 2 of CEDAW, urges all state parties to take appropriate measures, including legislation, to do away with customs and practices that constitute discrimination against women. Furthermore, Article 4 (f) of DEVAW in addition to urging states to take measures to eliminate violence against women goes on to urge states to develop in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence.

The African Charter recognizes the importance of women’s rights through three (3) main provisions: [1] Article 18 (3), which concerns the protection of the family, promises to ensure the elimination of every form of discrimination against women and also ensures the protection of the rights of women; [2] Article 2 of the Charter - the non-discrimination clause - provides for rights and freedoms to be enjoyed by all, irrespective of race, ethnic group, colour, sex, language, religion, political or any other opinion; and [3] Article 3, the equal protection clause provides that *‘every individual shall be equal before the law and shall be entitled to the equal protection of the law.’* The definition section of ‘The Protocol to the African Charter on the Rights of Women in Africa,’ defines discrimination against women to mean; *‘any distinction, exclusion or differential treatment based on sex and whose objectives or effects compromises or destroys the recognition, enjoyment or exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of*

life.’²⁷ The proper position that should be taken by courts in Zambia, when dealing with women either as victims or perpetrators of crime, including civil matters, is to invoke international instruments which advocate for the equality of men and women to which Zambia is a signatory. This is the position taken by a Botswana court in *Dow v. Attorney General*,²⁸ where the court held that:

...there is a clear obligation on this country like on all other African States signatories to the Charter to ensure the elimination of every discrimination against their womenfolk. In my view it is the clear duty of this court when faced with the difficult task of the construction of the provisions of the Constitution to keep in mind the international obligation...in the light of the foregoing, therefore the Constitution must be held not to permit discrimination on the grounds of sex which would be a breach of international law..

What the court was basically saying was that there is a need to domesticate international instruments such as CEDAW in order to eliminate discrimination against women, and that in the event of non-domestication, courts can invoke international instruments for as long as the country is a signatory to such instruments. Unfortunately, Zambian courts do not seem to take this path as seen in cases analysed above, where the defence of provocation heavily discriminates against women on the basis of their gender. This study is of the view that courts, on the basis of cultural theory, tend to assume that a man is more easily provoked than a woman.

Looking through a feminist lens, the Zambian courts interpret and apply the defence of provocation in such a way that it discriminates against women who kill their abusive partners. This is in spite of the fact that Article 23 of the Constitution of Zambia clearly prohibits discrimination on the basis of sex. A critical evaluation of the *ratio decidendi* of the above court cases involving women who were given sentences similar to those of men shows clearly that the courts were unduly hard in their attitude toward women as they held that ‘*women are not expected to react to provocative acts of their spouses*’. In contrast, a similar analysis of decisions involving men who had killed wives reveal that their *ratio decidendi* seemed to be based on nothing short of an expression of sympathy for men. I, therefore, strongly submit that the defence of provocation discriminates against women offenders on the basis of their gender and sex as compared to male offenders.

²⁷ Article 1.

²⁸ 1994 (6) BCLR 1.

4.1.3 Men are the Instigators of intimate Partner Violence resulting in their being killed by their abused Wives

Nine (9) out of the eleven (11) female inmates interviewed indicated how they suffered at the hands of their abusive partners, who often beat them up for no reason at all. None of the women instigated the violence resulting in their killing their abusive partners. This instigation of violence by men towards their partners signifies cultural values in which a man is perceived as being superior to a woman and therefore entitled to physically or psychologically abuse her. Culture to a large extent is to blame for the tendency by men to instigate violence against their partners, as four (4) cultural gatekeepers interviewed were in full support of wife beating as proof of love. Wife beating in this context cannot be said to be a show of love by a man towards his wife, as from the findings in this study, the women themselves at some point reacted by killing their spouses. If it were a show of love, as suggested by the cultural gate-keepers, these abused women would not have reacted by killing their abusive partners.

The pragmatic experiences of most community advocates and professionals dealing with violence between intimates on a regular basis and the research findings of most social scientists studying this phenomenon agree that *'intimate partner violence is overwhelmingly an issue of male violence against a female partner'* (Dobash and Dobash, 2008). As Chimbos, (1978) has discussed *'inter-spousal homicide...is rarely a sudden explosion in a blissful marriage, but is rather an end point of an ongoing series of bitter quarrels between parties.'* From the findings of the study, I can safely submit that in subjecting his wife to violence, the husband risks retaliation by his wife and he, the original assailant, ends up as the victim of the homicide. One female inmate interviewed explained how her deceased husband subjected her to physical abuse causing her to kill him in self preservation. Her story was as follows:

On the fateful day, my deceased husband came back from the bar where he had been drinking demanding extra money from me to enable him continue drinking. When I refused, despite being four (4) months pregnant, he started to kick me in the abdomen, as a result of which I became unconscious. When I regained conscious, I felt anger in me that I had never felt before over the years despite his physical abuse. As a way of teaching him a lesson, I also pushed him off the bed and he fell on the floor, his head hitting on a sharp object causing

him to sustain a deep cut on his head. I rushed him to a nearby clinic, and later referred to the University Teaching Hospital (U.T.H) where he died after five (5) days. I was arrested for murder. The High Court sentenced me to six years imprisonment.

From the story of the abused woman, she had suffered an abusive relationship at the hands of her deceased husband. However, on the fateful day, she could not withstand the continuous abuse and in a bid to preserve her own life and as a result of the '*baula*' (slow anger) reaction she killed her deceased husband. Although the sentence of 6 years' imprisonment imposed on her could be seen as the court having upheld her defence of provocation, abused women generally have great difficulty putting forward this defence as their actions do not usually take place within the ambit of 'in the heat of the moment' as required by sections 205 and 206 of the Penal Code. *Avison* (1974:236) observed that homicide and violence in general is not only a social relationship but also '*a human relationship which takes place within a particular social and cultural context.*' *Mahfooz*, (1989) agrees that '*...cultural context and cultural environments are too important to be ignored in studying the murderous or any other violent assaultive behaviour. Cultural context shapes all human behaviour including criminal behaviour... and therefore social processes involved in the development of criminal behaviour are components of the same social structure that produces law-abiding citizens.*' In his work, '*Crime and Deviance*', *Mushanga*, (1976) commenting on the acceptance of the use of violence by a man against his wife in western Uganda, states that; '*violence is very often used as a means of obtaining conformity as when parents beat up their children or when a man beats up his wife for minor infractions of marital or sexual obligation.*'

Women are more likely to be attacked, injured, raped, or killed by a current or former male partner than by all other types of assailants combined (*Browne*, 1992). Male intimates inflict more injuries on women than road traffic accidents (*Mcleer and Anwar*, 1989). A study by *Schneider and Jordan*, (1978), found that 40 % of the women who had been incarcerated in Chicago's Cook County jail for homicide had killed their husbands or lovers as a result of physical abuse. Although society's permission for a man to chastise his wife does not extend to homicide (it falls short of 'extreme abuse'), a husband's violent action may in fact produce fatal consequences. This is because '*the outcome of an aggressive interaction...is not predetermined*' (*Sommers and Baskin*, 1993). Just as the outcome is not predetermined, neither is the eventual victim. *Block*, (1993) is of the view that; '*in reality, most violence ending in a homicide involves a confrontation in which either person could become the victim*

or the offender as at the outset of the confrontation it may be difficult to distinguish between the person who will later become the victim, and the person who will become the offender.' Writing of Sierra Leone, *Thompson and Erez*, (1994), also reports that; *'apart from homicide, the physical handling of wives in tribal communities was viewed as the prerogative of the husband due to the fact that under customary law in that country a husband has the right to administer 'reasonable chastisement' to his wife for her misconduct.'*

In most Zambian tribes, wife-beating is a norm accepted by women themselves as one of the women cultural gate-keepers popularly known as *alakizi*, asserted that in order to preserve a marriage, a husband is supposed to beat up his wife as a show of love. Furthermore, *Geoffrey Bwalya Mwamba*, a then opposition Member of Parliament and now the country's Minister of Defence, severely beat up his wife and justified his actions on the local radio by stating that wife beating is normal and that those condemning him have no manners as most people fight with their wives (*Saluseki*, 13th September, 2010). These statements of the cultural gate-keeper and current government Minister serve to confirm that Zambian culture justifies wife beating. According to Zambia Police Service-VSU Coordinator, *Tresphord Kasale*, gender based violence which is taken lightly by many, has a many negative effects which include death (*Mwaata*, 2010). As a result of my interviews with the 11 female inmates, the study revealed that they all developed the '*baula*' (slow anger) reaction caused by domestic violence instigated by their abusive partners who finally ended up as its deceased victims.

According to the 'Beijing +10 Shadow Report' produced by the Zambia Association for Research and Development and the Non-Governmental Organization Coordinating Council, violence against women and girls is rampant in Zambia, and includes battery [domestic violence], murder, sexual abuse and exploitation, rape, defilement, incest, forced prostitution, sexual harassment, sexual cleansing, assault, and other forms of violence. To this end, the Zambian government has signed and ratified all relevant major international instruments, including CEDAW, and is a signatory to ACPHR, SADC Declaration on Gender and Development and its addendum on the Prevention and Eradication of Gender-Based Violence (GBV). In order to fulfil the obligations outlined in these instruments, treaties, and agreements, Zambia established several key institutions, including GIDD, the ZWPC, the HRC and the Zambia Police-VSU and also adopted in March 2000, a National Gender Policy, which identifies Gender-Based Violence (GBV) as a major priority area of concern (*Zambia.GRZ*, April, 2008).

4.1.4 The 'baula' (slow anger) reaction causes Women to kill their abusive Partners at a time when they are not provoked

During my interviews with the 11 female inmates, I came to understand that abusive male partners cause their spouses to develop a '*baula*' reaction (slow anger reaction) which drives them to kill their partners at a time they are not necessarily provoked. According to a psychologist interviewed at the University of Zambia the '*baula*' (slow anger) reaction comes about when an abused woman suppresses her feelings; as a result her feelings move from her conscious being to her unconscious or sub-conscious being. Unknowingly she pushes all her unresolved problems into this invisible bag in her mind and this continues every time she has an unresolved issue with her abusive partner. Eventually this bag becomes too full of unresolved issues between the abused woman and her abusive partner. It just lies there waiting to blow up as the result of the smallest of sparks which may or may not directly originate from her abuser. And then suddenly that small spark comes along and the invisible bag just blows up resulting in the accused (woman) snapping and killing her abusive partner at a time when she may not have been provoked by him. Eight (8) female inmates interviewed indicated that physical abuse by their spouses was a common feature in their respective marriages, a trend in my view that caused them to develop a '*baula*' (slow anger) reaction resulting in their killing their abusive partners.

Furthermore; the psychologist indicated that the tendency for a woman to kill an abusive partner when not actually provoked is referred to in psychology as an '*over-reaction*' emanating from differences with her abusive partner that may have not been resolved but rather piled into the invisible bag or her sub-conscious being. Therefore, if one ignores something that has been hurting him/her for some time, this does not necessarily mean the difference with another person has been resolved. An abused woman develops a '*baula*' (slow anger) reaction which at some point bursts, in the case of an abused woman by killing her abusive partner at a time she is not provoked by him. The '*baula*' (slow anger reaction) as already alluded to was further developed from the battered woman syndrome (BWS) defined by Walker, (1979) as:

'A woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights.'

From my findings, the loss of self control in a battered woman may develop after a lengthy period of abuse, and thereafter the abused woman will heat up like a *'baula'* (charcoal brazier) to the point that she is left with no option but to resort to killing her abusive partner in or to preserve herself. From in-depth interviews with female inmates, nine (9) out of the eleven (11) went through this process of the *'baula'* (slow anger) reaction, and killed their abusive partners at a time they were not necessarily provoked by them, having reached a point of no return or *'the end of their tether'*. One female inmate shared her lived experience:

For well over 10 years, my deceased husband a well known drunkard, whenever he came back from drinking, he would beat me up if I delayed in opening the door for him. On the fateful day, my deceased husband came back home drunk as usual and asked me why I had delayed in opening the door. Thereafter he started to beat me up. After 30 minutes when he was off guard, in order to teach him a lesson, I stabbed him to death. The High Court sentenced me to life imprisonment, as the court did not expect me as a woman to react to provocative acts of my deceased husband.

The lived reality of this female inmate clearly demonstrates the fact that an abused woman develops a *'baula'* (slow anger) reaction which causes her to kill an abusive partner at a time she is not necessarily provoked. In relation to the lived reality of the above female inmate, *Mushanga*, (1978) points out that *'...in general...violent homicide involving people who are related to each other tends to be the culmination of a series of episodes over a period of time rather than an abrupt eruption of violence, as is common among friends during a drinking session.'* Similarly in the English case of *Regina v Ahluwalia*,²⁹ the court recognized the concept of a *'baula'* (slow anger reaction) with reference to battered women by holding that:

'According to research battered women tend not to react with instant violence as men do. For one thing, they learn that this is likely to lead to a bigger beating. Instead they typically respond by suffering a 'slow burn' of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed.'

²⁹ (1993) 96 Cr App R 133.

However, the study revealed that officials of the criminal justice do not understand the concept of the '*baula*' (slow anger) reaction. During my in-depth interviews and focus group discussions held with police officers, some magistrates and a retired judge, they all said that I was the first to inform them of the battered woman syndrome (BWS). *Ptacek*, (1990) was of the view that since officials of the criminal justice system do not understand the 'BWS,' they simply blame the victims (women) as confirmed by the findings of this study.

A study of the police response to spousal assault found that police officers, like the public at large, held stereotypical views about battered women and family fights that undermine their effectiveness in dealing with the batterer and the victim (*Ferraro*, 1989). In general, the tendency persists for police officers to view women claiming to have been abused as non-credible and unworthy of police time (*Belknap*, 1995). *Abel and Suh*, (1987) report that while 60 % of the 300 battered women in their study asked to have their spouses arrested, the police arrested the abusers only 28 % of the time. Victims' requests for arrests were ignored in 75 % of the cases examined by *Buzawa, Austin, and Buzawa* (*Buzawa. E et al.*, 1995). *Saunders*, (1995) vignette study of police officers' tendency to arrest domestic violence victims found that patriarchal norms and general attitudes about victims were not related to arrest options; however, the likelihood that officers would choose the arrest option was associated with their justification of domestic violence. An American study noted that in 80% of domestic homicides the police were called to the home at least once before the incident, and in more than half the cases, they had been called five times or more but failed to adequately deal with the issues perceiving the reports as domestic affairs until finally a killing occurred (*Holmes and Holmes*, 1994). *Anyangwe* (2005) articulates the view that police failure to deal with domestic violence which ultimately leads to spousal homicide is as a result of the fact that police officers, as established by the study, perceive domestic violence as a private matter where the state may intervene only minimally. *Crites* (1987) suggests that there is a judicial pattern that shows an unwillingness to see wife abuse as a crime and a tendency to side with the husband in domestic violence cases; she cites as further evidence the resistance of judges in issuing protection orders that temporarily exclude men from their homes. *Schafraan*, (1991) argues that while it may appear easier for women to obtain restraining orders, violations of such orders by men are not punished seriously.

At every level, the judiciary has the opportunity to intervene on behalf of women who live in pain and fear of their intimate partners (*NCDBW*, 1994). However, as seen in this study, very

often women receive very harsh decisions from the courts who blame them for reacting to the provocative acts of their abusive partners, as society expects women to be passive towards them. Accordingly, Zorza, (1997) observes the following glaring irony:

‘The same prosecutors who have refused to go forward without the victim’s cooperation when she is alive have no problem prosecuting her abuser without her assistance after the abuser has killed her.’

As a result of the influence of the cultural values already alluded to, officials of the criminal justice system do not seem to understand the concept of the ‘*baula*’ reaction (slow anger reaction) which causes women to kill their abusive partners at a time they are not provoked as cultural values do not expect a woman to react to acts of abusive partners but rather to endure them ‘as a show of strength in obedience’. In fact, all the officials of the criminal justice system interviewed in this study roundly condemn women who had not reacted ‘in the heat of the moment’. In the face of such condemnation, women such as these (who are really themselves victims) cannot honestly expect compassion and justice from the criminal justice system as long as the provisions of sections 205 and 206 of the Penal Code which require an accused person to react ‘in the heat of the moment’ is not amended. These sections must urgently be amended to include reactions which are not done ‘in the heat of the moment’ but rather are driven the ‘*baula*’ (slow anger) reaction.

4.1.5 Section 205 of the Penal Code is too narrow and needs to be amended to include ‘provocative acts’ not done ‘in the heat of the moment’

Looking at the lived realities of the female inmates interviewed, none of them reacted ‘in the heat of the moment’ but later due to the ‘*baula*’ reaction (or the slow anger reaction). Therefore, this study was of the view that section 205 of the Penal Code is too narrow as it does not include provocative acts which are not done ‘in the heat of the moment’. In my view, this particular section at the time of its formulation, the legislators did not have women in mind as the study has clearly established that abused women generally do not react ‘in the heat of the moment’ as required under the provision of section 205 due to cultural socialisation. One female inmate interviewed, who had suffered an abusive relationship for well over ten (10) years killed her husband on a day she was not necessarily provoked and the High Court in invoking the provisions of section 205 did not accept her plea of

provocation and sentenced her to life imprisonment. If I may ask, is there justice when an abused woman reacts to provocative acts done over the years against her by her abusive husband whom she ultimately kills as a result of the '*baula*' reaction (slow anger reaction) only to be sentenced to life imprisonment, simply because her actions were not within the ambit of the 'in the heat of the moment' requirement of section 205? Obviously this clearly indicates that the defence of provocation discriminates against women, as abused women due to the '*baula*' reaction (slow anger reaction), do not react 'in the heat of the moment.'

A senior research officer at the Zambia Law Development Commission interviewed was of the view that there was need to amend the defence of provocation as it appeared to discriminate against women in its gendered form and that the Commission could propose that government spearhead such an amendment if stake holders, such as YWCA, advocates for the same. In other words what she was saying was that section 205 is narrow and needs to be amended to include provocative acts not done in the heat of the moment.

When sections 205 and 206 of the Penal Code in relation to the defence of 'provocation' are considered together and, for the ease of analysis, one can identify four (4) basic requirements that must be satisfied in order to entitle an accused person to invoke the defence of provocation. These requirements are: (i) sudden provocative conduct causing (ii) actual loss of self-control by the accused person (iii) where an ordinary person would induce him/her to assault that person and (iv) that the act which causes death bears a reasonable relationship to the provocative act which was done or offered to the defendant (Kulusika, 2006). In other words, a person is expected upon being provoked to react 'in the heat of the moment', failure of which he/she may not be entitled to invoke the defence of provocation. It is clear from the provisions of sections 205 and 206 and the decision in *Liyumbi*³⁰ that the act or insult must be wrongful and must arise from a human agency having legal capacity. Unfortunately this may not favour abused women, as the provocative act or insult referred to here requires the accused person to immediately react to the provocative words of the victim. From the study, as already alluded to, women store all the provocative acts in their sub-conscious being over a period of time, and react at a time they are not necessarily provoked due to the '*baula*' reaction (slow anger reaction).

³⁰ Supra note 16; *Liyumbi v The People* (1978) ZR 25 (SC).

Legal provocation which courts apply is narrower than the sociological definition of provocation, in that the legal meaning refers to the commission of the offence ‘in the heat of passion’ arising from loss of self-control, whereby the defendant must have had lost control as a direct result of an unlawful act committed by the victim (*Tibatemwa-Ekirikubinza*, 1999). In agreement with *Tibatemwa-Ekirikubinza*, (1999), I submit that the definition of legal provocation must include the sociological one which is broad, and may include reaction to a long term abusive relationship between a wife and husband. Apparently, to successfully plead legal provocation, section 205 of the Penal Code provides that *‘the offender must have reacted immediately after the provocation, without having had time to cool from the passion caused by that provocation’*. The phrase *‘sudden provocation’* in section 205 is too narrow and needs to be redefined as the defence of provocation should actually cater for an abused woman who kills an abusive partner at a time she is not necessarily provoked by him. In reflecting women’s lived realities accused of killing abusive partners, there is a need for the prosecution (whose primary duty is to assist the court to discover the truth of the events under investigation in criminal proceedings) to adduce before court evidence of an abusive background if any and indeed seek the opinion of psychologists as suggested by the psychologist interviewed at the University of Zambia, as to what could or might have caused an abused woman to kill her abusive partner. This position was established in the case of *Ahluwalia*³¹ where the court held that:

“Abusive background is relevant in gender based violence cases as it may form an important background to whatever triggered the Actus Reus.”

Unfortunately in the case of *Mwiimbe*, the possibility that a woman who kills her partner may have been suffering from the ‘BWS’ was not investigated. Defence lawyers did not argue that she could have had killed as a result of the battered woman syndrome. There is no doubt that officials of the criminal justice system in this case had no idea about what constitutes the ‘BWS’ as is the case with other officials of the criminal justice system as revealed by the study. *Kulusika* (2006) argues that evidence of past abuse of a woman by her intimate partner is usually not pursued during the hearing of evidence at the trial stage of court proceedings (i.e., evidence on which state’s the charge/s and the accused’s defence/s are based and at the end of which the court delivers its verdict, e.g., of guilty or not guilty) but only after the court

³¹ R.v.Ahluwalia 1992 (4) ALL ER 889.

has convicted the accused and when it calls for evidence concerning the sentence it is about to pass. In the Zimbabwean case of *S v Maria Kanzoto*,³² as in the case of *Mwiimbe*, the accused (a woman) had axed the deceased (her husband who had subjected her to physical and psychological abuse) while he slept. She was found guilty of murder with actual intent. At her trial she pleaded provocation and self defence. The main reason why the accused's defence of provocation failed was that she had attacked the deceased when he was asleep and not during his attack on her and that there were no words or acts which provoked her at the time. The judge found as a fact that her reactions were not proportionate to the attack as she had not reacted 'in the heat of the moment' and was deemed to have had the time to cool down her temper. One female inmate interviewed shared her lived realities on how the defence of provocation did not work for her as she had killed her abusive partner at a time she was not necessarily provoked, but due to past cumulative provocative acts. Since she had not killed in the heat of the moment, the High Court condemned her to death and she is awaiting execution.

On the basis of my experiential data as a law enforcement officer, a woman who reacts 'in the heat of the moment' upon being provoked by her partner will not be said to be a 'reasonable' person. Rather she will be deemed to be an 'unreasonable' person in the sense that a woman in Zambia's highly patriarchal society is not expected to react 'in the heat of the moment' to the provocative acts of her abusive partner. Society to a large extent will not look at the woman's suffering at the hands of her abusive partner as this will be deemed normal, as marriage is said to be a *shipikisha* club (endurance club). This is an abused woman's inescapable dilemma imposed upon her by what might be called a dysfunctional male-dominated society: To satisfy the cultural demands of society, a woman is deemed to be 'reasonable' in the eyes of society for not reacting 'in the heat of the moment' to her abusive partner; however, when she does finally react to her partner, she is, at the same time, deemed 'unreasonable' by the criminal law if she does not react 'in the heat of the moment' to his provocation! Since an abused woman does not normally react 'in the heat of the moment', then she is not the 'reasonable man' as defined by section 206 of the Penal Code. In the United States, the Massachusetts Supreme Court in the matter of *Commonwealth v. Conagham*,³³ embraced a more flexible approach, which could be utilised by Zambian

³² HCH4/2000.

³³ 433 Mass 105,110 (2000).

courts, that is to say, leaving the initial evaluation of the ‘BWS’ to experts like psychologists. Professor *Allen*, a specialist in criminal law, sentencing and public law argues that:

‘Provocation should not be confined to the last act before the killing occurred, as there may have been previous acts or words which when added together, caused the accused to lose his/her self control, although the last act on its own may not be sufficient to constitute provocation.’

(*Allen*, 1997).

In the English case of *Ahluwalia*,³⁴ where the defendant (D) killed her husband after a long history of domestic violence by him, it was argued that in domestic violence ‘slow burn’ anger where the accused only loses self control after a prolonged period of provocation from the deceased, the *Duffy* test³⁵ (where the court *held* that for provocation to be sustained, there must be ‘a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him/her for the moment not master of his/her mind’) was inappropriate, as a delay or ‘cooling-off period’ between the last act of provocation and the killing might in fact cause the accused to react more strongly. The English Court of Appeal restated that only Parliament could change the law on provocation but did state with regard to the alleged ‘slow-burn’ reaction that:

‘We accept that the subjective element in the defence of provocation would not as a matter of law be negative simply because of the delayed reaction in such cases, provided that there was at the time of the killing a ‘sudden and temporary loss of self-control’ caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation.’

For as long as the provisions of section 205 are not amended, the defence of provocation will continue to discriminate against women, as they are socialised in terms of culture not to react ‘in the heat of the moment.’ Taking into consideration the characteristics exhibited by a battered woman, as expounded in the cases of *Ahluwalia*³⁶ and in *Mwiimbe*,³⁷ there is a need to remove the requirements that the killing must occur suddenly and immediately after the provocation, a position adopted in the New South Wales Crimes Act.³⁸ As suggested by the

³⁴ Supra note 31.

³⁵ 1949 1 ALL ER 932.

³⁶ Supra note 35.

³⁷ Supra note 2.

³⁸ Crimes Act 1990 (NSW), Section 23(3)(b).

English court in *Ahluwalia*, the study was of the view that there is an urgent need by the Zambian Parliament to amend the law on provocation as in its current form it is gendered and not a defence *per se* for the majority of women who kill their abusive partners.

From the statutory provisions and case law, provocation refers to the killing of another in the heat of passion arising from loss of self-control and that the offended person must have lost control as a direct result of an unlawful act committed by the victim (Tibatemwa-Ekirikubinza, 2007:36). It seems that for a female offender to successfully plead provocation, it must be proved that any other 'ordinary person' in the position of the accused would have lost self control and reacted as the accused did. This unfortunately discriminates against women offenders, as women in Zambia are socialised not to express any opposition to their spouses but to suffer in silence. However, there are occasions when women react to abuse by killing their partners. In Zambia, when an abused woman kills her abuser, the law looks at the circumstances under which the killing occurred. Was it 'in the heat of the moment' or not? If not, past abuse may be considered in mitigation of sentence only (Kulusika, 2006). The 'reasonable man test' causes women's actions to be judged by an inappropriate masculine yardstick, as the problem of 'reasonableness' must be understood in the broader context of abused women who often do not react 'in the heat of the moment'.

4.2 Anti Gender Based Violence Act of 2011: Analysis of its salient Provisions

In a bid to curb gender based violence, which ultimately leads to spousal homicide, the government enacted the Anti Gender Based Violence Act of 2011. The Act was assented to by the President on 12th April, 2011. In part, the Preamble to the Act provides for the protection of victims of gender based violence.

Section 3 of the Act defines 'a place of safety' as 'premises where the welfare of a victim of gender-based violence is assured', and **Section 5(b)** of the Act imposes a duty on police officers, labour inspectors, social workers, medical and legal practitioners, nurses, religious leaders, traditional leaders, teachers etc to inform victims of gender based violence of their rights on how to obtain 'a place of safety' (shelter).

From the interview with the Executive Director of the YWCA, it is only the YWCA, a non-governmental organisation that has such shelters, and I tend to wonder why the government

came up with an Act appearing to care for such victims, without in the first place or immediately after the enactment of the Act, build 'places of safety' for abused women throughout the country? In any case, the government has a greater duty than the YWCA to care for its citizens, in this case, abused women.

*Under the provisions of **Section 7**, police officers are mandated to respond promptly to complaints of gender based violence.*

In a Papua New Guinea study, *Toft*, (1985) observed that there was reluctance by men to have their problems with their spouses externalised as men became more violent when their partners reported their abusive behaviour to the appropriate authority. The men instead continued to beat their women into submission. Furthermore Tsanga (2003) in a similar study undertaken in Zimbabwe reported that women generally expressed little confidence in taking their cases to the police due to their perceived tendency to dismiss such problems as domestic.

***Section 9** of the Act empowers police officers to arrest without a warrant any anyone suspected of committing an offence under the Act.*

In an interview, the acting officer in Charge of Law and Police Duties at the Zambia Police College revealed that the last intake of police recruits began initial training in April, 2011, (the same month the Act was assented to by the President) and graduated in September of the same year without having been taught about the Act or indeed any Human Rights law alongside the other statutes they study (such as the Penal Code, Firearms Act, Control of Dogs Act, Police Act, Forest Act, Criminal Procedure Code etc) and which are considered relevant to police operations. If the Act and indeed Human Rights law is not taught to police recruits and in-service course participants passing through police training institutions how can police officers endeavour to arrest anyone alleged to have committed an offence under the Act? In the first place, police officers may not even be aware of offences under the said Act, and worst of all they will lack an understanding of Human Rights law, in this context, fail to comprehend or work within the all-embracing ambit of women human rights instruments to which Zambia is a signatory.

Interestingly, Part (III) of the Act deals with the application for and enforcement of protection orders:

Section 10 provides for the victim (very often a woman) to apply before court, a 'protection order' restraining a respondent (very often a man) from carrying out a threat of gender based violence on the victim.

Empirical research conducted in Zimbabwe by Dr.Tsanga proved that legal remedies, such as making a criminal complaint or getting a judicial separation or protection order and divorce, were generally criticised as being inappropriate by both men and women, albeit for different reasons. For women, legal solutions were seen as too drastic and likely to hasten divorce. Men, on the other hand, favoured traditional processes, emphasizing reconciliation which they regarded as more appropriate than general law solutions (Tsanga, 2003:104). The study therefore tends to wonder if the situation in Zambia will be completely different from the perceptions of the respondents in the Zimbabwean study, by witnessing a good number of women in Zambia going flat out to seek protection orders against abusive partners as provided for under section 10 of the Act.

The study further wondered how the Zambia Police Service will actively enforce the 'Anti Gender Based Violence Act' which NGOs like YWCA are optimistic will reduce domestic violence in the country, when most police officers perceive domestic violence as a private matter between couples and the greatest challenge being that the Act does not even specify what punishments are to be meted out against offenders. No wonder, during the 2011 sixteen (16) days of activism NGOCC indicated that the 'Anti Gender-Based Violence Act' requires a lot of political will for successful implementation. On the other hand, Home Affairs Minister *Kennedy Sakeni* indicated that the PF government would enact specific legislation to eliminate all forms of discrimination against women and children (*Changala*, 28 Nov. 2011). From the Minister's statement, one tends to wonder whether the Anti Gender Based Violence Act enacted by the then MMD government is inadequate to eliminate violence against women, hence the intention by the PF government to enact another Act. What must be appreciated by any government is the fact that for any Act to be enforced there must always be political will. For, as indicated by NGOCC, without political will, even when specific actions are defined as illegal, there is no guarantee that law enforcement agencies will diligently enforce any given Act.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This study established that prolonged physical/psychological abuse of women by their partners causes them to develop the '*baula*' (a slow anger) reaction in terms of which they kill abusive partners at a time when they are not provoked, a condition which falls short of the provisions of sections 205 and 206 of the Penal Code; in other words, they do not kill 'in the heat of the moment'. From the findings, it is evident that culture plays a significant role in men abusing their wives as women are perceived as being subordinate to men. Court records perused indicated that High Court Judges have little insight into what a woman considers to be a serious threat to her life and the extent to which a woman may be provoked by an abusive partner. Although sections 205 and 206 of the Penal Code establish that the defence of provocation is applicable to both male and female offenders, the criminal justice system does not take into account the fact that the defence may be applied to them in different ways based on their different lived realities. In this respect, discrimination on the basis of gender reveals itself in different forms including biased court decisions, procedures, content and effect of the law, and the manner in which these laws are interpreted.

A critical analysis of circumstances within which women killed their abusive partners supported Gelles' (1983) recommendations to the American society that there is a need to change the existing power structure which is based on inequality between members of the family. As noted in the study, a man who subjects his partner (a woman) to physical/psychological abuse or fails to fend for his family, risked becoming a victim of his wife's retaliation. As a matter of serious concern, the study revealed that the defence of provocation discriminates against women as they are socialised in such a manner that they do not often react '*in the heat of the moment*' as contemplated by sections 205 and 206 of the Penal Code.

5.2 Conclusions

This study revealed that abused women do in fact react to the provocative acts of their abusive partners at a time when they are not necessarily provoked and helps to fill the research gap identified by Meena (1992:26) who notes that:

...most of the studies which have been focusing on women have tended to emphasise their being victims of oppressive patriarchal ideologies. Little has been done to unveil the degree and nature of women's resistance against oppressive relations.

The findings of this study have provided that the following conclusions be made:-

5.2.1 There is a strong gender power imbalance in the patriarchal structure of Zambian society in which cultural and religious values play a pivotal role in the perception that women are subordinate to men. As such, a woman is not expected to react against the provocative acts of her abusive partner. From the findings, what was clearly evident was the fact that a woman is perceived as being subordinate to a man and that a woman who does react to the provocative acts of her abusive partner was condemned both by society as well as the criminal justice system. The latter's condemnation is reflected in the failure of the defence of provocation (retaliation '*in the heat of the moment*' in terms of sections 205 and 206 of the Penal Code) to protect abused women suffering from the *baula* (slow anger) reaction.

5.2.2 In their decisions some High Court Judges in some spousal homicide cases appear to be more sympathetic to men who had killed their wives than to women who had killed their abusive partners. This is apparently because when the 'reasonable man' test of criminal law is applied it causes women's actions to be judged by an inappropriate masculine yardstick emanating from judges' double standards imbedded in gender ideologies. Furthermore, gendered comments made by judges during the course of proceedings reaffirm the boundaries of culturally acceptable feminine and masculine conduct resulting in the defence of 'provocation' discriminating against female, as opposed to male, offenders. From the findings, the defence of provocation discriminates against women as they are not expected to raise a finger in their own defence against their abusive partners. Based on the cultural theory that cuts through this study, a man by virtue of his gender, is expected to be aggressive. This means,

upon being provoked, a man is expected to react ‘in the heat of the moment’, unlike a woman who is always expected to be passive towards and subordinate to her spouse.

5.2.3 Men kill female partners in response to their desire to control them, while women kill abusive partners in response to a history of their violence towards them. By listening to the women’s voices, it was clear that ten (10) out of the eleven (11) female inmates interviewed could easily have been the final dead victims of the imminent killing that took place as the men whom they had finally killed out of desperate self-preservation were the perpetual instigators of the on-going violence against them. In other words, the study answered the research question: Why is it that intimate partner violence is overwhelmingly an issue of male violence against a female partner? Out of the need for self preservation women react to provocative acts as a result of the ‘*baula*’ (slow anger reaction) which causes them to kill their abusive partners at a time when they are not necessarily provoked. Consequently, the defence of provocation discriminates against them as their reactions to provocative acts are not considered as being done ‘in the heat of the moment’ as required by sections 205 and 206 of the Penal Code.

5.2.4 Eight (8) female inmates interviewed indicated that physical abuse by their spouses was a common feature in their respective marriages. Unknown to them, they developed a ‘*baula*’ (slow anger) reaction, resulting in their killing their abusive partners at a time when they had not necessarily been provoked. From the findings, the ‘*baula*’ (slow anger) reaction comes about when an abused woman suppresses her unresolved problems with her abusive partner and does not react to them or him ‘*in the heat of the moment.*’ Therefore, in most cases, an abused woman cannot successfully plead the defence of provocation.

5.2.5 Legal provocation under sections 205 and 206 of the Penal Code is defined too narrowly as it is based on a sudden loss of self control, which typically reflects the male response to the emotional trauma of aggressive behaviour. This is seldom the case with abused women; since their reaction is often not immediate, it makes it extremely difficult for them to successfully argue the defence of provocation. Since the requirement for the defence of provocation requires an immediate response to the

provocative words or conduct, this poses an almost insurmountable challenge for most abused women as they usually choose their moment to act when their abuser is off his guard, as seen in the case of *Esther Mwiimbe* and from the interviews with the other female inmates.

- 5.2.6 Without political will, the recently enacted ‘Anti Gender Based Violence Act of 2011’ will not reduce gender based violence in the country which ultimately leads to spousal homicide. In addition, unless the Zambia Police Service is seriously mandated by the executive wing of government to curb gender based violence throughout the country, nothing tangible will be achieved. Although donor funding is welcome, dependence on initiatives from developed countries to curb gender based domestic violence in Zambia is inappropriate due to different cultural and socio-economic conditions.

5.3 Recommendations based on an Action Plan

From the conclusions of the current study, it is recommended that there must be an amendment to the defence of ‘provocation’ by:

1. **Identification of stakeholders to lobby for the amendment of sections 205 and 206 of the Penal Code:** Since women are socialised by cultural and religious values not to react in the heat of the moment, there is an urgent need to amend the defence of provocation, on the basis of the ‘*baula*’ theory to include killings not done ‘*in the heat of the moment.*’ Stakeholders who could lobby government to amend the defence of provocation are: psychologists (as they fully understand that an abused woman may react at a time when she is not necessarily provoked by her abusive partner); the Zambia Law Development Commission (who are involved in amending provisions of the law); the Zambia Association for Research and Development (an association involved in research areas such as this); Zambian mother church bodies (whose voice on important national issues the government very often respects); the Human Rights Commission and the Law Association of Zambia (which normally advise the government on critical issues) and NGOs, such as the YWCA and the Non-Governmental Organisation Coordinating Council (both of which are involved in the advocacy of human rights for abused women).

2. **Strategy for lobbying for the amendment:** Stakeholders must target outspoken Ministers and Members of Parliament to lobby for the amendment to the defence of provocation in the august house. Furthermore, stakeholders have to lobby co-operating partners to put pressure on the government to amend the defence of provocation in such a way that it is gender neutral. From the findings, stakeholders such as the YWCA were of the view that there is a need to amend sections 205 and 206 of the Penal Code which may not be an easy task. Hence stakeholders must put up a spirited fight as delays are expected on the part of government. If there are delays, there is a need to determine whether there should be a new lobby and what, if anything, needs to be adjusted. At this stage, there is a need to ascertain the barriers or resistance to the proposed amendment. If it is a case of a lack of political will on the part of government, which is often the case, then co-operating partners (western donors) must be approached from time to time to put pressure on the government to amend the defence of provocation. Co-operating partners are indispensable as much of the government budget is donor funded, therefore, government will have no option but to listen to the donor community on the need to amend the defence of provocation.
3. **Strategy for implementing the amendment:** In the event that lobbying is successful and there is an amendment to sections 205 and 206 to include provocative acts not done 'in the heat of the moment', there is a need to organise workshops for High Court and Supreme Court judges, where they will be sensitized on the need to take judicial notice of the fact that women are socialised in such a way that they often do not react in the heat of the moment when they are provoked by their spouses. There is need for the Zambia Association for Research and Development to conduct research into appropriate methodologies for making the amended Act successful in terms of its implementation. Stakeholders, like YWCA, should then assess whether abused women who have killed their abusive partners as a result of '*baula*' (slow anger reaction) are now able to successfully plead the new improved defence of provocation.
4. **Incorporating the Anti-Gender Based Violence Act of 2011 into the police training curriculum:** Police High Command should direct that the Act be incorporated into the curricula of all the three (3) police training institutions in the

country; the strategy being to ‘unlearn’ officers that gender based violence belongs in the public and not the private domain. And since it belongs in the public domain, the Zambia Police Service must be seen to be vigorously curbing domestic violence which ultimately leads to spousal homicide as established by this study. In this context, all provincial police commissioners, divisional police commanders, divisional police criminal investigations officers, officers commanding districts, district police criminal investigations officers and recruits should undergo training on the successful implementation of the Anti-Gender Based Violence Act. As a result, there will be a proper enforcement of the Act by the Zambia Police Service, throughout the country. This Act, which is intended to curb domestic violence (which this study shows leads to spousal homicide), must be incorporated into the police training curricula without delay. Since it may be costly to bring all the serving officers to the three police training institutions (namely, Zambia Police College, Lilayi, Sondela and the Mobile Unit Training School), Police High Command should first consider conducting a course ‘to train the trainers’ among the Zambia Police Victim Support Unit officers on the successful implementation of the Anti domestic Violence Act. The trained officers, can then conduct training sessions at their respective stations throughout the country. In this way all serving police officers will eventually be trained in this critical area of law and enforcement with the ultimate intent of reducing the rate of spousal homicide in the country.

5.3.1 Suggested Legislative Amendment to the Defence of ‘Provocation’

Sections 205 and 206 of the Penal Code should be amended as follows:

- (i) When a person kills another person under circumstances which would constitute murder, in the heat of the moment upon being provoked or by loss of self-control in response to cumulative provocation, the court should take into account the accused’s sex and age, bearing in mind that abused women react due to the ‘baula’ (slow anger) reaction. Therefore such a person should be convicted of manslaughter and not murder, on account of the fact that the reaction was due to the ‘baula’ (slow anger)

reaction emanating from past provocative acts (which is typically the situation in the case of an abused woman).

- (ii) The term ‘sudden provocation’ must include: (a) psychological or violent conduct by the victim towards the accused and, in the case of an intimate relationship, this must refer to cumulative provocation due to a prolonged abusive relationship resulting in the ‘baula’ (slow anger) reaction of the accused; and/or (b) must also include things said or done over a period of time which amounted to an exceptional happening and caused the accused to have a justifiable sense of being seriously provoked.
- (iii) The accused must not be charged with murder upon being examined by three (3) well qualified psychologists who attest to the fact that the accused killed the victim as a result of cumulative provocation emanating from a prolonged abusive relationship, which resulted in the accused developing the ‘baula’ (slow anger) reaction. However, if the accused killed the victim not as a result of the ‘baula’ (slow anger) reaction to a prolonged abusive relationship, the court may sentence the accused to life imprisonment or to a sentence that the court deems fit.

5.3.2 *Justification for the Ingredients of the new proposed Defence of Provocation*

- (a) **Loss of self control:** Under the current law, the loss of self control is narrowly interpreted to mean that the loss of self control must be sudden and in response to an immediate provocation; in the new proposed amendment, the loss of self control is broad, as it extends to past provocations resulting from the ‘baula’ (slow anger) reaction.
- (b) **Response to cumulative provocation:** This is conduct or circumstances sufficient to deprive a reasonable person of the accused’s sex and age of self control. This takes into account the phenomenon of battered women finally ‘snapping’ as a result of their being incapable of continuing to sustain long term abuse due to their having the ‘baula’ (slow anger) reaction. As a consequence they kill their abusive partners (out of a desire to preserve themselves from further inevitable and often worse abuse) at a time when they are not necessarily provoked.

- (c) **Defendant's sex taken into account:** Under the current law, as seen in the study, the 'ordinary person' is gendered as it refers to a 'man' as the yardstick or benchmark; however, under the proposed amendment, the sex of the defendant is taken into account.

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