



**Cultural Defences in an open and democratic South Africa
with specific reference to the custom of *Ukuthwala* and
belief in Witchcraft**

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DECLARATION

I, Wandisiwe Patricia Nzimande, hereby declare that:

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ABSTRACT

The Constitution of the Republic of South Africa guarantees the right to culture for all its citizens and guarantees non-discrimination on account of religion, conscience, belief and culture. Culture shapes our identity; influence our reasoning, perception and behaviour therefore culture should be a crucial consideration when determining a person's criminal liability. This paper is based on a notion that conduct of an individual can be seen as an indigenous belief or custom in terms of African customary law but at the same time be considered a crime in terms of our common law and statutory law. This paper will be dealing with the controversial custom of *ukuthwala*. and the belief in witchcraft.

This paper will seek to demonstrate that conduct of an accused who thalasa a girl with the honest and bona fide intention to secure a wife under the custom of *ukuthwala*, where the accused had a genuine yet mistaken belief that his conduct was justified under the custom of *ukuthwala* his mistaken yet genuine belief may exclude the element of mens rea.

This paper will further seek to demonstrate that in witchcraft related offences where the belief in witchcraft and the belief in the supernatural is the motivation for the commission of the offence such belief have the potential of excluding the perpetrator criminal liability. Therefore this paper seeks to demonstrate the importance of the recognition of a cultural defence in an open and democratic South Africa.

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CHAPTER ONE

1. INTRODUCTION

1.1 Background and problem statement

1.1.1 Introduction

The Republic of South Africa is enriched with many diverse cultures and rich traditions, which are all protected by the Constitution of the Republic of South Africa.¹ The Constitution further emphasises no discrimination against South Africans on the basis of one's religion or cultural orientation.² Non-discrimination based on culture or ethnic group is one of the key national principles enshrined in the preamble of the Constitution: 'South Africa belongs to all who live in it, united in our diversity'.³ The Constitution further urges courts to apply customary law when that law is applicable, subject to limitations set in place by the Constitution and specific legislation dealing with customary law.⁴ The Constitution further allows every person /citizen the right to participate in a culture of his or her own choice.⁵

The Constitution of the Republic of South Africa will be the cornerstone of this study as it has been shown to pride itself on cultural diversity and the protection of culture hence giving the impression that common law and African customary law are now on the same footing. However cases such as *S v Mokonto*⁶ and *S v Jezile*⁷ which will be discussed in the paper will show that there is a substantial overlap between the two systems. Cases dealing with culturally motivated crimes have shown that the courts are reluctant to accept indigenous beliefs and customs as a defence even when raised in the context of existing common-law defences such as private defence. Highlighting these cases, this study will deal with the conflict that customary law has in particular with South African criminal law.

In this study, I will deal with the controversial custom of *ukuthwala* which is a traditional custom mostly practised amongst the Xhosa and Zulu speaking clans. This custom is known to result in various common-law and statutory crimes such as assault, kidnapping, abduction

¹ Section 31 of the Constitution of the Republic of South Africa 1996

² Ibid Section 9 (3).

³ Ibid Preamble.

⁴ Ibid Section 211 (3).

⁵ Ibid Section 31.

⁶ *S v Mokonto* 1971(2) SA 319 (A).

⁷ *S v Jezile* 2015 (2) SACR 452 (WCC).

and rape. The custom further results in the infringement of various fundamental rights of victims such as the right to equality,⁸ dignity,⁹ freedom and security of a person,¹⁰ the right not to be subjected to slavery,¹¹ the right to education¹² and many more.

It is trite law that in order for a person to be said to have criminal liability there are various factors that need to be considered such as legality, conduct, compliance with the definitional elements, unlawfulness and capacity.¹³ The main focus of this study will be the element of fault (*mens rea*), as a possible basis for a defence to culturally motivated crimes. The argument to be considered by this research in relation to the *Ukuthwala* custom is:

If an uneducated man from the deep rural parts of the Eastern Cape *thwalas* a girl with the honest and bona fide intention to secure a wife under the custom of *ukuthwala*, can he be said to have had the necessary criminal intent to commit a crime of abduction or rape? Should his honest but incorrect belief that his act was acceptable under the practice of *ukuthwala* not exclude the element of fault? This study will also be looking at witchcraft related offences such as witch killings and killing as a result of the belief in the supernatural particularly the belief in the *tokoloshe*. This study will consider whether in such cases, where the belief in witchcraft or the supernatural is the motivation for the commission of the offence, can such belief exclude the criminal liability of the perpetrator.

1.1.2 What is a cultural defence?

What is a cultural defence? Van Broeck defines a cultural defence as follows:

A cultural defence maintains that persons socialized in a minority or foreign culture, 'who regularly conduct themselves in accordance with their own cultural norms, should not be held fully accountable for their own culture'.¹⁴ Van Broeck further defines what is meant by the term 'offence' in the cultural concept as being 'an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is

⁸ Section 9 of the Constitution (see note 1 above).

⁹ Ibid section 10.

¹⁰ Ibid section 12.

¹¹ Ibid section 13.

¹² Ibid section 29.

¹³ CR Snyman *Criminal Law* 5th ed (2008) 30-33.

¹⁴J Van Broeck 'Cultural Defence and culturally motivated crimes (cultural offences)' (2001) 9(1) *European Journal of Crime Criminal Law and Criminal Justice* 5.

nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation'.¹⁵

This defence will assist the courts to consider how the cultural defence of an accused person affected his or her behaviour¹⁶ as culture effects the way society acts.

This defence permits affiliates of a minority culture to contend that they ought to be entirely acquitted of criminal charges or their culpability be at least mitigated, on the basis that their cultural beliefs were the motivation for the commission of the act which is considered a crime by the dominant culture.

1.1.3 The concept of *Ukuthwala*

Ukuthwala has been described by many authors as the act of stealing a bride¹⁷ and some have said it to be a mock abduction or irregular proposal.¹⁸ However, it is said what had been known to be the true practice of *ukuthwala* has been developed over the years amongst the different clans. As a result of this development the custom has taken different dimensions and this has opened the custom to abuse¹⁹.

The practice has been described by Koyana and Bekker as follows:

The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her home, quite late in the day, towards sunset or at early dusk, and they will forcibly take her to the young man's home. Sometimes, the girl is caught unaware, but in many instances she is 'caught' according to a plan and agreement. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will when, in fact, it is hardly ever so.²⁰

Once the girl is abducted a message will be sent by the intending bridegroom to the intended bride's parents informing them that he has taken the girl. As peace offering the intending bridegroom will offer the family of the bride a cow (*inkomo yesithwalo*). If both the bride and grooms family desired and consent to the union, 'she'll be watched until she gets used to it'.²¹

¹⁵ Ibid 5.

¹⁶ Renteln & Forbles 'Multicultural Jurisprudence: Comparative perspectives on the cultural defence' (2009) 44 (2) *Law Society Review* 192.

¹⁷ E Curran and E Bonthuys, 'Customary Law and Domestic Violence in Rural South African Communities' (2005) *Centre for the Study of Violence and Reconciliation* 7.

¹⁸ TW Bennett *Customary law in South Africa* (2004) page.

¹⁹ L Mwabene & J Sloth-Nielsen 'Benign accommodated? *Ukuthwala*, 'forced marriage' and South African Children's Act (2011) *African Human Rights Law Journal* 2.

²⁰ DS Koyana & JC Bekker 'The Indomitable *Ukuthwala* Custom' (2007) 40(1) *De Jure* 139.

²¹ K Wood 'Contextualizing group rape in post-apartheid South Africa' (2005) 7(4) *Culture, Health and Sexuality* 313.

In ethnographic research conducted by the author Kate Wood in a township of the former Transkei, the author found that involuntary sex seemed to normally take place as part of the practice of *ukuthwala*. In an interview she conducted with an elderly woman, who herself had been married through *ukuthwala*, explained:

Some guys would hold you down for your husband-to-be. If a girl has strength, the men would turn out the light, holding your legs open for the guy to sleep with you. Whatever you may try to do, they are holding you down. Even if you cry, old people wouldn't care; they knew what was going on.²²

Even in cases where the girl had to be held down by other men for penetration to take place, most elders the author spoke to did not equate this with rape. This was largely on the basis of the man's intentions: the act of penetration—violently enacted or not—was one crucial part of the process of turning a girl into a wife, and thus enabled her attainment of an adult status (assuming her prior virginity), and thus could not be equated with contemporary urban rape, which had no decent intention. The act of sexual union marked the woman as belonging to that man.²³

It clear from this article that communities that practice the custom, strongly believe in the custom and the practices that come with it are generally seen as part of the custom. Looking at the example of the interview conducted by the author above, it is generally believed and accepted by the community of the Transkei where the research was conducted that the male will have to have forceful intercourse with the woman violently enacted or not, so as to turn the girl into a wife. Can it therefore be said that a man who honestly and bona fide believed that his actions were lawful under the custom of *ukuthwala* be said to have had the necessary criminal intent to rape?

Despite such beliefs by the communities of the minority groups courts have been unwilling to accept this belief as an element that affects the intention of an accused's act. As we see in cases such as *R v Mane*²⁴ where the accused on two occasions coerced a girl into having sexual intercourse with him. The court held that:²⁵ 'We wish to make it clear that a man, who forces a woman to have connection with him after a marriage ceremony which has taken place without her consent commits the crime of rape'

²² Ibid 313.

²³ Ibid 314.

²⁴ *R v Mane* (1947) EDL para196.

²⁵ *ibid* para 199.

The Sexual Offences Act (which will be dealt with in Chapter 3) brought about a stricter approach to be employed in cases of rape. The Act brought about a wider definition of rape and criminalising acts where there were perpetrators who assisted in the furtherance of the act. However whether such people practising this culture are aware of such legislation is an issue that needs to be established by the courts.

1.1.4 Witch–killings in South Africa.

Witchcraft is believed to be the cause of misfortune and evil in communities.²⁶ Witchcraft is practiced by employing different methods which include incantations or spell; using witch-familiars such as the *tokoloshe*; poisoning; using *muti*; and the use of lightning.²⁷ Witches are said to be supernatural beings with supernatural powers. These powers are normally used in bad faith, mainly to destroy or harm individuals. Normally such acts are associated with envy or jealousy between the witch and person being bewitched. As a result of this evil, the minority group who believe in witchcraft normally among the native community frown against any form of witchcraft. Due to the evil associated with this practice, people fear witches hence such fear influences the actions of a believer. In cases of witch-killings in South African law, the accused would be charged with the common-law crime of murder. In such cases, can an accused be permitted in terms of South African law, to raise a cultural defence by putting evidence before the court of his cultural background in an attempt to persuade the court that his actions were not unlawful?

Carstens has stated ‘that a truly held belief in witchcraft or medicinal power of *muti* can result in the accused lacking the requisite criminal capacity to distinguish between right and wrong and the ability to conduct himself in accordance with the appreciation of what is right and what is wrong’.²⁸ Can the subjective belief that the victim was a witch that had threatened the accused with misfortune be viewed as an imminent threat entitling the accused to plead putative private defence?

1.1.5 Challenges affecting the custom of *ukuthwala*

In the case of *S v Jezile*²⁹ the court obtained from various parties submissions of the practice of *ukuthwala* (of importance were the submissions of Nhlapo) with regard to how the practice is conducted and the procedures that are followed. These submissions assisted the court in

²⁶ C Grobler ‘An Analysis of the Cultural Defence in South African Criminal Law’, unpublished LLM thesis, University of Pretoria (2014) 64.

²⁷ Ibid.

²⁸ PA Carstens ‘The Cultural Defence In Criminal Law: South African Perspective’ (2004) *De Jure* 18.

²⁹ *S v Jezile* 2015 (2) SACR 201 (WCC) (will be discussed in chapter 3).

confirming the conviction of the accused. Nhlapho was of the view that sexual intercourse was never part of the custom and the accused having sexual intercourse with the complainant deviated from the custom.

However on the other hand authors such as Karimakwenda³⁰ in his article titled ‘Today it would be called Rape’ is of the view that violence and sexual abuse associated with the custom is not a recent abuse of the custom but that the custom has always been practiced in this manner. It is also clear in Wood’s³¹ interviews that such practice was seen to be normal in the communities practising the custom. Therefore in looking at the views of these authors, one is not entirely convinced that the court in the Jezile case arrived at the correct conclusion.

Dukada³² on the other hand is of the view that a person charged with the crime of abduction, the existence of which he/she was unaware he committed as he genuinely believed that his act of *thwaling* a girl was perfectly lawful in terms of the custom, should be viewed as a mistake of law. This defence has been clarified in the case of *S v De Blom*³³ as being an excuse in our law and therefore the accused should be found not guilty.

On the other hand authors such as Bennett³⁴ are of the view that attempting to have a cultural defence has no place in a constitutional democracy where the rights of women and children need to be safeguarded. It is clear from the existing literature that consensus has not yet been reached on whether the bona fide and honest practising of this custom should or should not be said to exclude criminal liability of a person practising the custom. Clearly whichever direction is taken one will face a constitutional hurdle. Now the fundamental question is; how we then justify whichever infringement in an open and democratic society where the constitution is supreme.

1.1.6 Challenges affecting witchcraft

All witchcraft related cases have to be referred to the formal courts, to be tried either under the Witchcraft Suppression Act or common law depending on the merits of each case. The

³⁰ N Karimakwenda ‘Today it would be called rape’: a historical and contextual examination of forced marriage and violence in the Eastern Cape’ (2013) 2013(1) *Acta Juridica* 339.

³¹ Wood (note 21 above) 302-317.

³² DZ Dukada ‘some thoughts on the ‘*ukuthwala*’ custom vis-a.-vis the common law crime of abduction The cases of R v Ncedani (1908) 22 EDC 243 and R v Sita 1954 4 SA 20(E) re-visited (1984) *De Rebus* 359,375,390.

³³ *S v De Blom* 1977 (3) SA 513 (A)

³⁴ TW Bennett ‘The cultural defence and the custom of *Thwala* in South Africa law’ (2010) 10 *University of Botswana Law Journal* 21.

Witchcraft Suppression Act³⁵ is regarded by many in South Africa, as a white man's law,³⁶ a way of westernizing African people's way of thinking. One of the main challenges surrounding this Act is that it is perceived that the only way to deal with superstitions is to try and suppress them completely,³⁷ by infiltrating western civilization, education and the Christian³⁸ way of thinking among the group that practice the custom. Many authors have criticised the Act as it is said to violate the constitutional right to culture. Some have criticised it as resulting in more and more people taking the law into their own hands. Despite the existence of the Act we still have culturally-motivated offences such as witch-killings and killings as a result of the belief in a *tokoloshe*. This is mainly as a result of the fear embedded in the supernatural powers to negatively influence any aspects of one's life.³⁹ This is due to the fact that the people believing in witchcraft are terrified of witchcraft more than anything else as it is believed to be the frequent cause of death⁴⁰

1.2 Rationale of study

This study is derived from the notion that the conduct of an individual can be seen as an indigenous belief or custom in terms of African customary Law, but at the same time be viewed as a crime in terms of criminal law⁴¹ in particular reference to the custom of *ukuthwala* and witchcraft.

The question that this study seeks to answer is whether the conduct of an accused that commits a common-law or statutory crime in the name of *ukuthwala* or commits a crime of murder due to suspected witchcraft (witch-killing), can be vindicated by relying on the constitutional right to freedom of culture and cultural practice.

Can the accused's belief that his actions were lawful under the customary law exclude mens rea resulting in a mistake of law on the part of the accused?

³⁵ Witchcraft Suppression Act, No 3 of 1957.

³⁶ Minnaar 'Witch purging and *muti* murders in South Africa: the legislative & legal challenges to combating these practice with specific reference to the witchcraft suppression Act (No 3 of 1957, amended by Act No 50 of 1970)' (2001) *African Legal Studies* 1.

³⁷ Ibid.

³⁸ I Niehaus 'Witchcraft as subtext: deep knowledge and the South African public sphere' (2010) 36 (1) *Social Dynamics: A journal of African Studies* 66.

³⁹ A Yaseen 'Burn the witch: the impact of the fear of witchcraft on social cohesion in South Africa' (2015) 49 *Psychol. Soc. [online]* 29.

⁴⁰ P Morton-Williams 'The Yoruba Ogboni Cult in Oyo' (1960) 30(4) *International African Institute* 362-374.

⁴¹ JPL Matthee One Person's Culture is another Person's Crime: A Cultural Defence in South African law? (unpublished PhD dissertation, North-West University, 2014) 12.

1.3 Aims of the study

This study aims to evaluate the following:

1. Whether the constitutional right to culture outweigh the fundamental rights infringed by practising one's culture;
2. Can culture be used as a justification in criminal law; and
3. Should the subjective belief of an accused be the deciding factor?

The aim of this study is to recommend a new approach to minority cultures and norms within criminal law. This research will be limited to the nature of a cultural defence, its application and its effects on the elements of a common-law crime.

1.4 Research Methodology

This study is based on a qualitative approach as opposed to a quantitative approach. The study will mainly involve desktop review, analysis and critical evaluation of various legal materials such as legislation, case law, legal journals, internet sources on the topic and relevant textbooks in an attempt to expose contradictions and inconsistencies of the South African legal system with reference to the Constitution and the criminal law.

CHAPTER TWO

2.1 Cultural Defence in South Africa

When people of differing customs and values coexist and interact within a uniform set of legal standards, some degree of conflict, disagreement or disputation seems ineluctable.⁴² This is given by the confluence of distinct social assumptions, expectations and behavioural norms of the different groups within society. Upon evaluating the existing literature, it becomes clear that there is not yet a formal recognition of a cultural defence in the South African legal system. Courts have shown their unwillingness to accept or incorporate this defence into our legal system due to various reasons such as; the courts may oppose the cultural defence because they feel that it would weaken the deterrent effect of the law.⁴³

A cultural defence is mostly activated or relied upon when a cultural offence has been committed by an individual relying or believing in a certain culture, hence the individual will put forward arguments of their cultural belief and argue that they should be entirely discharged of criminal charges⁴⁴ or at least be seen as a mitigating factor when it comes to sentence on the grounds that their actions were motivated by their cultural norms. This defence is often invoked to show the absence of the mens rea element of a crime.⁴⁵

A cultural offence is said to be ‘an act by a member of the minority culture which is considered an offence by the legal system of the dominant culture. That same act is nevertheless within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation’.⁴⁶

In order to qualify an act as a cultural offence, one has to establish whether or not the norm or values, on which the accused based his or her actions, springs from another culture and if the defendant is a member of that cultural group.⁴⁷ While a cultural group can be classified as a

⁴² JC Fisher ‘The role of morality in cultural defence cases: Insights from a Dworkian Analysis’ (2013) 1 (2) *Birkbeck Law Review* 282.

⁴³ Anonymous ‘The Cultural Defense in the Criminal Law’ (1986) 19 *Harvard Law Review* 1303.

⁴⁴ Discussion Paper 132 (Project 138 – The Practice of *Ukuthwala* South African Law Reform Commission) 45.

⁴⁵ LI Jisheng ‘The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defence’ (1996) 14 (2) *University of Hawai’I Law* 767.

⁴⁶ Elaborated version of the definition given by the Dutch legal anthropologist F. STRYBOSCH 666.

⁴⁷ Van Broeck ‘Cultural Defence and culturally motivated crimes (cultural offences)’ (2001) 9(1) *European Journal of Crime Criminal Law and Criminal Justice* 8.

group of people who adhere to a common culture, the key element would be to point out the different cultures.⁴⁸

In order to fully understand the cultural defence one needs to fully examine the 6 elements of the cultural offence which are; culture, minority and dominant culture, acculturation/assimilation, an acceptable and condoned act, an act conforming to the requirements of the minority culture and an act must be directly related to the minority culture.

2.2 Elements of a cultural defence

2.2.1 The concept of culture

In evaluating a cultural defence it would at the outset be imperative to understand what is meant by the term culture / cultural offence, which is the foundation for many of the arguments of a cultural defence.

Culture has been defined by many scholars and organisations. Some of the definitions we find in our literature are as follows;

Hofstede defines culture as a ‘collective programming of the mind which distinguishes the members of one category from another’.⁴⁹

Kulchohn defines culture as ‘those historically created designs for living, explicit and implicit, rational, irrational and non-rational, which exist at any given time as potential guides for the behaviour of man’.⁵⁰ Van Broeck affords a broader, more abstract definition to culture by describing it as ‘an inter-subjective system of symbols which offer the human being an orientation towards the others, the material world, him or herself and non-human. This symbolic system has a cognitive as well as an evaluative. It is handed over from one generation to the next generation and subject to constant transformation. Even when it never achieves complete harmony, there is a certain logic and structure that binds the system together’.⁵¹

It is clear from the above definitions that culture shapes the identity of people; influencing their thinking, perception and behaviour. Therefore this in itself should be a crucial

⁴⁸ Ibid.

⁴⁹ G Hofstede ‘National Culture and corporate culture’ in LA Samovar and RE Porter (eds), *Communication Between Cultures*, 4th ed, (1984).

⁵⁰ C Kulchohn & W.H Kelly ‘The concept of the culture in R .Linton (E.D) The science of man in the world’, (1945) New York P 78-105

⁵¹ Van Broeck (note 47 above) 8.

consideration when determining a person's criminal liability since culture is one element which determines the way people act, think and behave.

The difficulty faced in South Africa with the notion of culture is the vagueness surrounding the authenticity of various cultural practices as with regards to the custom of *ukuthwala*. There is no set practice of how the culture is practised as it has been demonstrated in various studies that people have different opinions of how the practice is practised. Some communities are for the custom and regard sexual intercourse a standard practice of the custom.⁵²

At the same time other communities regard sexual intercourse as never being part of the custom however an abuse of the practice.⁵³ Therefore it becomes difficult to say who is permitted to say if a custom or practice is genuine or not, as it is clear in the above literature that there is a lack of consensus about other practices on the custom.

Similar in cases of witchcraft related offences as will be evident in the cases that will be discussed in chapter 4 courts are unwilling to accept the existence of witchcraft or the cultural belief in the supernatural as having any place in a westernised society.

2.2.2 Distinction between Dominant and Minority Cultures

Distinguishing between dominant and minority cultures has nothing to do with the question of which culture came first, nor is it a matter of numerical superiority or physical power⁵⁴. This is clearly seen in the South African legal system as the indigenous African population consists of an overwhelming 80.5 % of the entire population⁵⁵ and it is said that African indigenous people were the first settlers in South Africa. However the African culture represents the cultural background of the minority group that does not part take in the same cultural norms and values⁵⁶ of our legal system which is considered the dominant culture. Throughout the empire, European or settler culture was said to be the standard to which people should aspire, while African customary law was tolerated. Its application was allowed only with reservation⁵⁷ which is why in South Africa, the ideological basis of the legal culture

⁵² Wood (note above 21)

⁵³ Discussion Paper 132 (44 above); *S v Jezile* 2015 3 SA 201 WCC.

⁵⁴ *Supra* 5 (note 51 above); Bennett 18 (note 34 above); Matthee 71 (note 41 above).

⁵⁵ Statistic South Africa 'Mid-year population estimates' (2015) 302.
<https://www.statssa.gov.za/publications/P0302/P03022015.pdf>

⁵⁶ Van Broeck (note 47 above) 5.

⁵⁷ *Ibid.*

is based on a western framework and is drawn from Roman–Dutch and English law.⁵⁸ The advocacy of the recognition of a cultural defence is as a result of trying to protect minority groups⁵⁹ as they have been seen to be vulnerable and affected by the non-recognition of a cultural defence.

2.2.3 The problem of acculturation (or assimilation)

Culture is forever in a state of development and is continually influenced by the wide variety of factors such as migration and acculturation.⁶⁰

Van Broek defines acculturation as the process that takes place when one is confronted with another culture.⁶¹ When this cultural confrontation takes place sometimes it is even possible for the original culture to be abandoned and replaced, entirely or in part, by the cultural values of the dominant culture.⁶² For courts to take into consideration the cultural defence, the courts need to evaluate whether the person relying on the defence has assimilated or adapted to the norms and culture of the dominant culture. However there is a major hurdle in the recognition of the cultural defence as it is sometimes challenging to determine whether or not a person was acculturated to the dominant culture. Torry is of the view that once an immigrant or member of some other subculture minority passes into the societal mainstream, her eligibility presumably expires.⁶³ Van Broek however argues that it is not possible to set a time limit to the use of a cultural defence since there is no evidence that a person has become acculturated within any specific period of time.⁶⁴ Bennett is also of the view that in determining whether the accused has been acculturated the court needs to take into consideration factors such as the accused's level of education, language proficiency, occupation, place of upbringing and place of residence.⁶⁵ Only when such determination is made can it be said that an accused has or has not been acculturated into that society.

2.2.4 Establishing if the minority culture required, condoned, endorsed, promoted or regards the accused's act as obligatory

When considering a cultural defence courts need to also take into consideration whether the act committed by the accused is acceptable or condoned by that particular minority group, i.e

⁵⁸ Ibid.

⁵⁹ Bennett (note 34 above) 4.

⁶⁰ Van Broeck (note 47 above) 9.

⁶¹ Ibid 11.

⁶² Ibid.

⁶³ WI Torry 'Multicultural Jurisprudence and the Cultural Defence' (1999) 44 *Journal of Legal Pluralism and Unofficial Law* 132.

⁶⁴ Van Broeck (note 47 above) 13.

⁶⁵ Bennet (note 34 above) 17.

the actions of the accused are seen as justifiable by the minority group. The mere fact that the accused adheres to the rule of the minority group does not mean that his action is required or approved by the minority group.⁶⁶ This may be due to various reasons such as the patriarchal system practiced among the minority group. As much as an action would be condoned and acceptable if practised by a man, however, the same act would not be condoned and acceptable if practised by a woman. This is due to the fact that though cultural groups may share the similar set of beliefs they are not expected to act in the same way.⁶⁷

In order for the crime to be a crime falling under the category of a cultural defence the minority culture must condone the accused's actions: although not appreciated as good it is accepted that, taking into account the specific circumstance, it may be acceptable behaviour and there is no, or only a minimal disapproval.⁶⁸ The actions might be described as normal behaviour in the given situation, in which case there is an absence of disapproval, or the behaviour might be qualified as the necessary thing to do.⁶⁹

What best illustrates this requirement would be the custom of *ukuthwala* in relation to the ethnographic research conducted by Wood.⁷⁰ The author conducted interviews in the community of Transkei about the custom. The author found that the community recognised sexual intercourse as part of the custom violently enacted or not, this act was acceptable and condoned by the community.⁷¹ This act was not equated to rape; instead it was seen as a necessity in turning the girl into a woman. Members of the majority group would view this act as socially unacceptable.

Therefore in such cases the minority group will react entirely differently to the accused's behaviour in that the group might not necessarily appreciate the accused's behaviour as being good but may still condone it.⁷²

The courts will have to take into consideration the behavioural patterns associated with the accused's social position within his cultural group.⁷³

⁶⁶ Ibid 25.

⁶⁷ Van Broeck (note 47 above) 10.

⁶⁸ Ibid 15.

⁶⁹ Ibid.

⁷⁰ Wood (note 21 above) 313.

⁷¹ Ibid.

⁷² Van Broeck (note 17 above) 15.

⁷³ Ibid 11 and Mathee, JLP One Person's Culture is another Person's Crime: A Cultural Defence in South African law? (Unpublished PhD dissertation, North-West University, 2014) 87.

2.2.5 The act must conform to the requirements of the minority culture

The act which derives from culture which the accused is alleged to have been practising must comply with the cultural norms or requirements for that particular custom. Culture is not absolutely uniform; therefore the behavioural pattern linked to the social position of the offender has to be taken into account⁷⁴ when considering this requirement. However this requirement may prove to be a very difficult one to prove due to the constant evolving of culture due to acculturation/assimilation. If we had to look at the practice of *ukuthwala* there have been varying opinions in communities to how the custom used to be practiced and how the practice ought to be practised. There may be no uniform rules that the communities use when practicing the custom as it varies from one community to the next.

2.2.6 The act must directly relate to the minority culture

This is where the most essential aspect of the definition comes into play.

In order for an offence to be classified as a cultural offence, it has to be caused directly by the fact that the minority group, of which the offender is a member, uses a different set of moral norms when dealing with the situation in which the offender was placed when he committed the offence. The conflict of diverging legal cultures has to be the direct cause of the offence.⁷⁵ It is stated that the motivation behind the practice of that particular culture should not be due to socio –economic circumstances.⁷⁶ It is only when all of the abovementioned requirements are complied with then can it be said that an offence is culturally motivated hence entitling a person to rely on or raise a cultural defence

2.3 Cultural Defences and the Constitution

The Constitution of the Republic of South Africa is admired and respected around the world for its pioneering approach to human rights. Views have been expressed that the Constitution is a sound basis for the official recognition of the cultural defence albeit in context and balance to the limitation clause.⁷⁷ The Constitution through various provisions guarantees the right to culture for all its citizens and guarantees non-discrimination on account of, religion, conscience, belief and culture.⁷⁸ Section 15 of the Constitution⁷⁹ entrenches the right of everyone to freedom of religion, belief and opinion. The rights to culture are formally recognised in section 30 and 31 of the Constitution which read respectively as follows:

⁷⁴Ibid.

⁷⁵ Van Broeck (note 47 above) 19.

⁷⁶Ibid.

⁷⁷ Carsten (note 28 above) 329.

⁷⁸Section 9 of the Constitution (note 1 above).

⁷⁹ Ibid.

‘Section 30 provides that everyone has the right to use their language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Section 31 provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community;

- a. To enjoy their culture, practise their religion and use their language; and
- b. To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

However no right is absolute as it may be limited if the limitation is, inter alia, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁸⁰ Rentel argues that;

In states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice of their own religion, or to use their own language.⁸¹

He further states that the right to culture in itself should entitle people to a cultural defence because states are obliged to protect the right to culture.⁸² This is evident in our Constitution as section 211 (3)⁸³ which provides that courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with it.⁸⁴ Therefore in the interests of a fair trial⁸⁵ which is also a right conferred to the accused by the constitution of the Republic of South Africa. It would seem that it would be in the interest of justice and constitutionally fair for the cultural beliefs of the accused to be taken into consideration when determining his criminal liability, notwithstanding that various court decisions (which will be discussed in detail at a later stage) have shown their unwillingness to accommodate this defence. In considering the cultural defence Matthee⁸⁶ points out that the right to dignity should not be left out of the equation as Sachs⁸⁷ points out that

⁸⁰ Ibid.

⁸¹D Renteln *The cultural defence* (2004) 213.

⁸²Ibid 63.

⁸³ Section 211(3) of the Constitution (note 1 above).

⁸⁴Ibid.

⁸⁵Section 35 (3) of the Constitution (note 1 above).

⁸⁶Matthee (note 73 above) 244.

⁸⁷*Christian Education South Africa v Minister of education* 2000 (10) BCLR 1051.

Religious beliefs have the capacity to awake concepts of self-worth and human dignity which form the cornerstone of the human right. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful transitions that frequently have an ancient character transcending historical epochs and national boundaries.

It is therefore my submission that religion similarly with culture is a belief system that members of a minority culture believe and employ in their way of life.

Therefore in recognising the cultural defence it will infringe the right to dignity of victims however at the same time not recognizing it will deprive the accused of his right to dignity in not being able to practise his culture. The hurdle that we will be faced with in consideration of the cultural defence is: whose right is more important than the other, which right of the Constitution should be protected and which one should not be protected considering that the Constitution provides that we are all equal and should be treated equally.

2.4 Mens rea and a cultural defence

The accused criminal liability not only rests on the outward conduct, however the accused when committing the act must have a guilty mind, he must have intended to commit the act that is defined as a crime. This is referred to as the fault element. Our law recognises two forms of fault that is intention and negligence.⁸⁸ The test for intention is purely subjective hence the court must assess what went on in the mind of the accused, in doing so the court will have assess the cognitive and conative function of the accused.⁸⁹

In order for the person to be said to have the necessary intention, the act committed by the accused must be an act that the accused commits while his will is directed towards the commission of the act or the causing of a particular result, further the accused must have the knowledge of the existence of such act.⁹⁰ If the accused is unaware that he is committing a crime or whether that particular crime exists the accused cannot be said to have acted with the necessary intention to commit a crime.

Intention does not mean that the accused must actually have meant, wanted or aimed at a particular result his conscious acceptance of such risk of unlawfulness, him foreseeing the result while pursuing another aim is sufficient. consequently the law recognizes three forms of intention that is Dolus directus(actual intention), Dolus indirectus(foresight of a certainty)

⁸⁸ S Walker *Criminal Law* (2012) 125.

⁸⁹ Snyman (note 13 above) 136.

⁹⁰ *ibid*

and Dolus eventualis(foresight of a possibility)⁹¹. Any one of these 3 forms of dolus will suffice when assessing criminal liability.

There are various defences that exclude fault, of importance in this discussion is the defence of mistake / ignorance of law or fact. Mistake means a misapprehension, an erroneous impression or state of mind leading to an inappropriate action being taken.⁹² Before the landmark case of *S v De Blom*⁹³ mistake of law was never recognised as a defence until the court found that

“At this stage of our legal development it must be accepted that the cliché that every person is presumed to know the law has no ground for its existence and that the view that ignorance of the law is no excuses not legally applicable in the of the present day concept of mens-rea in our law”⁹⁴

In order for the mistake to be a mistake that excludes fault that mistake must be genuine i.e the mistake must be a bona fide mistake. Further the mistake must concern essential elements of the crime. The mistaken belief need not be reasonable as the test when assessing the mistaken belief is subjective hence the court need to evaluate the individual characteristic of the accused.

If an accused has a genuine yet mistaken belief that his conduct is justified under a particular defence the element of intention is lacking.⁹⁵ This paper will seek to demonstrate that this is very well the case where culture or religious convictions result in a genuine, yet mistaken belief⁹⁶

A clear example would be the custom of Ukuthwala this custom for the members of the minority group is a traditional and acceptable way of securing a bride. This cultural normative background is the motivation for the commission of the offence hence it cannot be said that the accused will have the necessary mens rea.

⁹¹ ibid

⁹² S Walker (note 88 above) 163.

⁹³ 1977 3 SA 513 (A)

⁹⁴ ibid

⁹⁵ Phelps ‘superstition and religious belief: A cultural defense in south African criminal law ?’ 149

⁹⁶ ibid

CHAPTER THREE

3.1 Common-law crimes and customary beliefs

The South African legal system comprises of two components, the western component and the African component.⁹⁷ The western component was formed as a result of South Africa being colonised by the Europeans. The western component consist of Roman-Dutch law influenced by English law and developed through judicial decisions and legislation.⁹⁸ The African component is our customary law which is developed by legislation and the Constitution of the Republic of South Africa. Over the years there has been an overlap between the two systems that is common law and customary law. Controversy arose when the motivation for an accused's conduct which may be seen as a criminal act is said to be the result of a cultural belief. This is due to the fact that an accused's actions might be seen as lawful according to customary law, however, at the same time be viewed unlawful in terms of common law.

In order for the accused to be said to have committed a criminal act there are various requirements that he needs to comply with. These are legality, conduct, fulfilment of the definitional elements, unlawfulness and culpability. The mere fact that an accused complies with the definitional elements of a crime does not necessarily mean that the accused is liable for the particular offence.⁹⁹

The state also needs to prove that the accused had the necessary criminal capacity to commit that particular crime. The accused needs to be aware that his actions are not justified and that his actions amount to a crime in terms of the law.¹⁰⁰ There are various cultural practices that are said to be seen as lawful in terms of the customary law yet are considered as crimes in terms of common law. I will specifically refer and discuss the custom of *ukuthwala* and witch killing in relation to a cultural defence.

3.2 *Ukuthwala* in General

Ukuthwala has various meanings in the indigenous isiZulu language. To name a few: *ukuthwala* can mean the act of carrying items such as wood, water or luggage on your head as opposed to your hand with the aim of transporting the items from one place to another. It can also mean wearing a *duku* (head scarf) around your head which is mostly done by married

⁹⁷ C Rautenbach, and J Matthee 'Common Law Crimes and Indigenous Customs: Dealing with the Issues in South African Law' (2013) *The Journal of Legal Pluralism and Unofficial Law* 111.

⁹⁸ Ibid.

⁹⁹ Snyman (note 13 above) 95.

¹⁰⁰ Ibid.

women as a sign of respect to her in-laws. It can also mean the act of acquiring supernatural powers with the aim of enabling a person to become rich or powerful.

However, the *ukuthwala* that forms the basis of this discussion is the form of *ukuthwala* that leads to the commission of various common-law crimes. This is the form that has been referred to by Nkosi and Wasserman¹⁰¹ as the custom which helps with forcing the opening up of the marriage negotiation process when it is proving difficult to do so under normal circumstances.¹⁰² In a crude sense, this is done by the physical carrying away of a young woman by a group of young men to the house of the young man who aims to marry her.¹⁰³ Therefore the aim of this custom is to compel the girl's family to enter into negotiations for the conclusion of a customary marriage.¹⁰⁴ It is therefore a means of achieving a customary marriage and is not in its self a customary marriage or engagement.¹⁰⁵

Nhlapo¹⁰⁶ alludes to the fact that there are numerous situations under which *ukuthwala* could be resorted to by a couple that wished to marry, the foremost being:

- a) 'When a woman objected to an arranged marriage and would rather marry a lover of her choice';
- b) 'When the woman's family objected to her marrying the man of her choice';
- c) 'Where the man was unable to afford and secure marriage through the payment of lobola in full'; and
- d) 'Where time was off the essence and it was necessary to conclude marriage especially in instances where the woman was pregnant'¹⁰⁷

According to Van Tromp¹⁰⁸ amongst the Xhosa nation there are three types of *ukuthwala*. The first is *ukuthwala Onkungenamvumelano* whereby the man and the girl come to an arrangement that the man will *thwala* her off to his father's or guardian's homestead. This is seen as a form of elopement.

The opposition of the girl is a sham so that people would not see that she has gone with the male willingly. The second form of *ukuthwala* is *ukuthwala Kobulawu*. In this form of

¹⁰¹ M Nkosi & J Wasserman 'A history of practice of *ukuthwala* in the Natal/KwaZulu-Natal region up to 1994' (2014) 70 *New Contree, Special Edition* 132.

¹⁰²Ibid.

¹⁰³ Ibid.

¹⁰⁴ Bennet (note 34 above) 7; Rautenbach and Matthee (note 88 above) 119.

¹⁰⁵ Mwambane & Sloth – Nielsen (note 19 above) 119

¹⁰⁶ R T NHLAPHO Amicus curia in *S V Jezile* 2015 2 SACR WCC explanation of the custom of *ukuthwala* p42

¹⁰⁷Ibid

¹⁰⁸ J Van Tromp Xhosa law of persons: Rape in South Africa's Eastern Cape, 1987-1902 (unpublished PhD dissertation, Stanford University, 2011) 17.

Ukuthwala the girl is caught unaware as she is forcibly carried away without her permission but with the permission of her parents and the parents of the groom. Under this form of *Ukuthwala* the man has tacit consent from the father of the girl to seduce the girl to have sexual intercourse with her and thereafter the common law crime of rape has not been committed. In the event that she is not married and the sexual intercourse has taken place the man will have to pay damages in the form of a *nquthu* beast. The last form of *ukuthwala* is where the girl is taken against her will and without the permission of the guardian. Permission is obtained only after the act has been committed. The second and last forms of *ukuthwala* are forms that usually result in crimes such as rape, abduction, kidnapping and assault being committed. In such cases a criminal court is faced with the hurdle of deciding whether the accused should escape criminal liability due to the custom of *Ukuthwala*.

3.3 *Ukuthwala* and common-law crimes

This custom has since become very controversial after numerous complaints in the media of the violation of human rights especially the rights of women and children. Regardless of which form the custom takes it will inevitably lead to various common law crimes being committed. The first form of crime that will be discussed will be the crime of abduction: Snyman defines the common law crime of abduction as follows:

A person, either male or female, commits abduction if he or she unlawfully and intentionally removes an unmarried minor, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor.¹⁰⁹

Courts have held that abduction by way of *ukuthwala* is unlawful¹¹⁰ and should be punishable by law. However, Dukada comes with a different view as he is of the opinion in line with principle and logic, knowledge on the part of the accused of the unlawfulness of his actions is now always a requirement of mens rea, particularly in the form of intention, from which it follows that ignorance or mistake of law invariably negates mens rea in respect of the element of unlawfulness and hence excludes liability.¹¹¹ Looking at the new approach to ignorance of the law taken by the case of *S v De Blom*¹¹² in terms of which mistake of law is now said to be an excuse, Dukada is of the view that due to the adoption of this principle the accused should be found not guilty. The majority of people that are to date practising this

¹⁰⁹ Snyman (note 13 above) 403.

¹¹⁰ *R v Swartbooi* 1916 EDL 170; *R v Sita* 1954 4 SA 20 (E) 9.

¹¹¹ DZ Dukada 'Some thoughts on the '*ukuthwala*' custom vis-a.-vis the common law crime of abduction The cases of *R v Ncedani* (1908) 22 EDC 243 and *R v Sita* 1954 4 SA 20(E) re-visited (1984) *De Rebus* 387.

¹¹² *S v De Blom* 1977 (3) SA 513.

custom are mostly primitive uneducated people living in deep rural areas; they have been accustomed to that way of living all their lives. In cases where the issue of abduction was raised as a result of the practice of *ukuthwala*, the courts have been unwilling to look at the unlawfulness of the accused act. An example would be in cases of *R v Njova*¹¹³ and *R v Ncendana*,¹¹⁴ in both cases there was no evidence that the accused were in any way aware of the existence of a crime of abduction. When this act was committed the accused had the genuine and honest intention of practicing their culture of which they believed was perfectly lawful in terms of the African custom of *ukuthwala*. Therefore to punish a person who engages in proscribed conduct neither intentionally nor negligently is unjust¹¹⁵ and further to label someone who is without moral fault as criminal would weaken respect for the law.¹¹⁶ Therefore I do believe that when looking at the crime of abduction in relation to the custom of *ukuthwala* the courts should look at the knowledge of unlawfulness factor so as to assess the criminal liability of the accused.

Another common-law crime that is committed as a result of the custom of *ukuthwala* is the crime of assault which is the ‘unlawful and intentional act or omission which results in another person’s bodily integrity being directly or indirectly impaired or which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place’.¹¹⁷

Further to this we have the crime of kidnapping which is the unlawful and intentionally depriving a person of his or her freedom of movement and or if such person is a child.¹¹⁸ What all the above offences have in common is that the accused must have the necessary intention to commit a crime in order for the accused actions to be said to constitute a crime

If we have to look at some of the practices of this custom as mentioned by Bekker that the girl to appear unwilling and preserve her maidenly dignity, will usually put up strenuous and pretended resistance, for, more often than not, she is a willing party.¹¹⁹

In such cases it is my submission that it would be greatly difficult to prove the elements of kidnapping and assault because under the circumstances the accused could not have known

¹¹³ *R v Njova* 1906 20 EDC 72.

¹¹⁴ *R v Ncendana* 1908 22 EDC 243.

¹¹⁵ EM Burchell & PM Hunt, *PMA South African Criminal Law and Procedure, Vol 1* 2nd ed (1983) 64.

¹¹⁶ *S v O’Neil* 1910 126 NW 454 at 456.

¹¹⁷ Snyman (note 13 above) 403.

¹¹⁸ Snyman (note 13 above) 479.

¹¹⁹ JC Bekker Seymour’s *customary law in Southern Africa*, (5th ed. 1989) 98.

whether the girl is genuinely protesting her unwillingness to go with the accused or whether the girl is putting up a show of resistance as is required by the custom. Therefore it would not be easy to determine whether she was a willing partner when convention dictates that she should feign reluctance.¹²⁰

3.4 Ukuthwala and statutory crimes

The practice of *ukuthwala* is also known for giving rise to various statutory offences mostly protected by the Sexual Offences Act. Having sexual intercourse with a woman without her consent followed by the act of *ukuthwala* according to our law constitutes the crime of rape in violation of the Sexual Offences Act.¹²¹ According to the Sexual Offences Act, a child can only consent to sexual intercourse at the age of 16 which therefore stands to reason that sexual intercourse with a child under the age of 16 is an offence. According to the Sexual Offences Act, a child who is below the age of 12 is incapable of consenting to any form of sexual intercourse¹²².

Section 17 of the Act further prohibits sexual exploitation of the child by their parents and others. Therefore the custom of *ukuthwala* where the parents of the child are involved in negotiation of the child can be seen as furthering the act of sexual exploitation of the child, resulting in the prosecution of those involved in giving away the child.¹²³ However in cases of *ukuthwala* when the man has sexual intercourse with the woman it is mostly believed amongst the people practicing the custom that it is not rape. However, it is viewed as a process which forms part of the custom of turning the girl into a woman. Further in most cases, the people who practice the custom are uneducated people from the rural areas who have absolutely no knowledge about the existence of such Acts. Therefore not taking the above into consideration would negate the mens rea of the accused.

3.5 Differing view on the practice

Various communities, organizations and authors are still in support of the custom and its recognition in our legal system. Backing for the custom came from various traditional leaders such as Mandla Mandela, Inkosi of the Mvezo traditional council and grandson of the late Nelson Mandela. He defended *ukuthwala* and cautioned that ‘when you are going to discuss culture do not even try to bring in white notion as such an approach will turn things upside

¹²⁰M Hunter *Reactions to Conquest; Effects of Contact with Europeans on the Pondo of South Africa* 2nd ed (1969) 8.

¹²¹ Section 15 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹²² Ibid section 57(a)

¹²³ Ibid Section 71.

down'.¹²⁴ These were the same sentiments shared by Thatcher that 'contemporary societies often explain African cultures from a European perspective, and portray them as barbaric, primitive and oppressive to women, hence they need to be identified, scrutinized and regulated or stopped by the law'.¹²⁵ Some authors are of the view that traditionally the custom of *ukuthwala* did not involve culturally offensive behaviour such as rape, violence, or criminal abduction'.¹²⁶

Others are however of the view that amongst other segments of the Xhosa-speaking groups, violence has long been used as part of the custom of *Ukuthwala* abductions.¹²⁷ This difference is due to the fact that it is often difficult to pin down the exact requirements for a valid *ukuthwala* as different communities set different requirements for and attach different consequences to the custom.¹²⁸ As much as we have supporters of the custom, there is widespread criticism from various organisations, including the government of the country. Police Minister, Mr Nathi Mthethwa condemned the African custom of *ukuthwala* as 'just simply human trafficking and furthermore labelled those who sleep with young girls as rapist- urging police to do their job'.¹²⁹ The custom also received criticism from a number of authors such as M Van der watt and M Ovens,¹³⁰ they are of the view that the current form of *ukuthwala* has been distorted and used by people as a means of trafficking and exploiting young girls. Clearly there are differing views about the practice; there are people in support of the custom whereas others are of the view that the current practice of *ukuthwala* is treated as an aberration and distortion of tradition.¹³¹

¹²⁴ Staff Reporter 'When 'culture' clashes with gender right' Mail and Guardian Online, 2 December 2011, available at <http://mg.co.za/article/2011-12-02-when-culture-clashes-with-gender-rights> (accessed on the 7th of February 2017).

¹²⁵ A Thatcher 'Some issues with 'Some Issues in Human Sexuality'' (2005) 11(3) *Theology and Sexuality* 9-29.

¹²⁶ Discussion Paper 132 (44 above).

¹²⁷ Karimakwenda (note 30 above).

¹²⁸ Rautenbach and Mathee (note 97 above) 119.

¹²⁹ *Ibid*

¹³⁰ M Van der watt and M Ovens 'Contextualizing the practice of *Ukuthwala* within South Africa' (2012) 13(1) *Child Abuse Research in South Africa* 17.

¹³¹ Discussion Paper 132 (44 above).

3.6 Discussion on *S v Jezile*

This case dealt with the question of to what extent customary law can be relied upon as a defence to negate criminal liability. This was a landmark case decided in the Western Cape High Court by a full bench. The appellant in this case was found guilty of the offences of human trafficking, rape, common assault and assault with intent to cause grievous bodily harm. He was sentenced to a period of 22 years imprisonment. As he was already serving the sentence the appellant appealed against the conviction and sentence. The appellant, who was a 24 year old male, left his residence in the Philippi in the Western Cape for his home village in the Eastern Cape with the specific intent to find a woman to marry, in accordance with his custom. He identified a 14-year-old girl (the complainant), who was still in school.

His family and the family of the complainant initiated and concluded marriage negotiations within one day. The family of the complainant then forcibly took her to the house where the appellant resided, where she was informed that he was to become her husband. While there, she was made to undergo traditional ceremonies despite her protest. At the conclusion of which she became the appellant's wife according to customary law. A bride price of 8000 Rand was paid to the complainant's maternal grandmother with whom the complainant had been living. The complainant was forced to accompany the appellant to his place of residence, where the appellant had forcible intercourse with her several times. On one occasion when she refused, the appellant's brother held her down while they removed her panties. She struggled and the appellant proceeded to have sexual intercourse with her. The complainant eventually ran away and reported the matter to the police. The appellant was charged and convicted on one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm and one count of common assault.

The main issue to be decided by the appeal court was whether the trial court's determination of the issues should have taken into account the practice of customary marriage or *ukuthwala*, which allows the 'bride' to be coerced. Based on the submission of the amici curiae regarding the traditional and aberrant forms of *ukuthwala*, the court evaluated the appellant's defence that his actions were justifiable under the customary practice. The Court took judicial notice of a public debate on the practice of *ukuthwala* that its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape of not only women but children. The Court was persuaded largely by the views of the expert witness Professor Nhlapo and Inkosi Mahlangu on the distinction between the traditional and the aberrant forms of *ukuthwala*. The Court found that the

appellant had relied on an aberrant form of *ukuthwala*. The court therefore held that the appellant could not rely on the misapplied form of *ukuthwala* to justify commission of the offences of trafficking and rape. The appeal against the convictions for trafficking and rape was therefore dismissed.

When evaluating the abovementioned case I am of the view that the court failed to take into consideration the submissions made by the appellant particularly the writings and submissions by the two authors namely Karimakwenda in her article titled ‘today it would be called rape’¹³², and Wood in the article titled ‘Group rape in the post-apartheid South Africa’¹³³. The court in dismissing the accused reliance on the article by Karimakwenda indicated that ‘the applicants reliance on this research is misplaced’¹³⁴ however the court did not indicate why it is of that view i.e. the court did not elaborate as to on what basis it is making such averments. The court heavily relied on the submissions made by Nhlapo when reaching its conclusion, who was of the view that the current form of *ukuthwala* is an aberrant form and is nothing but an abuse of the custom as sexual intercourse, violence and the abduction of young girls was never a part of the practice of *Ukuthwala*.

On the other hand however, Karimakwenda¹³⁵ is of the view that ‘many of the coercive aspects of *ukuthwala* and forced marriage that are denounced newly deviant are in fact not recent phenomena but are deeply rooted in cultural practices that have been rooted for centuries’. Many other authors like Van Tromp¹³⁶ are also of a similar view as he differentiates between the different types of *ukuthwala*. He states that in cases where the girl’s parents have given the man consent, in most cases the girl is caught unaware. In such cases the man may have tacit consent from the father of the prospective bride to seduce her to sexual intercourse and thereafter the customary crime of rape has not been committed. Taking the views of Karimakwenda into consideration and also the fact that cultural practices differ from one community to the next, I do not believe that it would be proper to state that the accused reliance on such practice was misplaced in light of the proven research that there are people or community that still practice the custom in this way. Further where women were

¹³²Karimakwenda (note 30 above)

¹³³ Wood (note 21 above).

¹³⁴ *S v Jezile* 2015 JDR 0566 (WCC) para 53.

¹³⁵Karimakwenda (note 30 above) 339.

¹³⁶ Van Tromp (note 108 above) 17.

reluctantly coerced into marriage, with or without *ukuthwala*, and once in those marriages, violence was employed to subdue unwilling wives, and to discipline wives¹³⁷ .

In the past girls were regularly beaten and raped into submission, ever so often with the permission or at the instigation of their families.¹³⁸ As we have observed in *Jezile's* case, the complainant would sometimes defy her so-called husband (Jezile) by refusing to be submissive to him as is required of a wife in the Xhosa community. Consequently she would be disciplined accordingly which was seen as acceptable and part of the custom as husbands were permitted to use violence to discipline their wives as long as they did not draw excessive blood or inflict permanent injury.¹³⁹ In the Xhosa custom girls are marriageable once they have reached puberty and breasts start to show, as a result very young girls were chosen to be wives.¹⁴⁰ This goes to show that people practicing the custom of *ukuthwala* did not believe that there was a set age that the girl being *thwalaed* had to be as long as the child is of puberty and breasts are showing she was deemed to be of marriageable age; hence this is in keeping with the actions of Jezile. As much as we do have the Recognition of Customary Marriages Act which regulates at what age a woman should be allowed to enter into a customary marriage¹⁴¹ and the Children's Act which later requires not only the consent of parents or guardian in the case of a minor, but also requires the consent of the minor.¹⁴² However, courts should also take into consideration the personal circumstances of the accused, such as education and the issue of acculturation whether the accused was aware of the existence of such an act. In such cases if the evidence shows that the accused was not aware of the existence of such an act should not be found to have committed an offence as mistake of law according to our law is a defence.¹⁴³

Furthermore, sexual intercourse that takes place as a result of *ukuthwala* is seen as acceptable by the Xhosa community violently enacted or not, it is not seen or equated to rape.¹⁴⁴ The sexual intercourse violently enacted or not was seen as a crucial part of turning a girl into a wife and thus enabling her to attain her adulthood status.¹⁴⁵ This therefore means that sexual intercourse was a step which had to be taken in the process of the *ukuthwala* custom. What

¹³⁷Karimakwenda (note 30 above) 339.

¹³⁸ Ibid 342.

¹³⁹ Van Tromp (note 108 above) 258.

¹⁴⁰ Van Tromp (note 108 above) 342

¹⁴¹ Section 3 (a)(i) Recognition of customary marriages Act 120 of 1998.

¹⁴² Section 12(2) Children Act 38 of 2005.

¹⁴³ *S v De Blom* 1977(3) SA 513.

¹⁴⁴Wood (note 21 above) 313.

¹⁴⁵Ibid.

further emphasised the acceptance of the violence that comes with the sexual intercourse after the girl has been *thwalaed* are the accretions made by the elders of the Eastern Cape community in the interview conducted by Kate Wood where the elderly woman stated:

Some guys would hold you down for your husband to be. If a girl has strength the men would turn out the light, holding your legs open for the guy to sleep with you. Whatever you may try to do, they are holding you down even if you cry, old people wouldn't care, and they knew what was going on.¹⁴⁶

It is my submission that the court failed to look at the rights afforded to the applicant by the Constitution of the Republic of South Africa and the Criminal Procedure Act. By acknowledging this I am in no way condoning the actions of the applicant or the custom which results in the violation of fundamental rights protected by the Constitution. I am simply saying that the court should have also evaluated whether the appellant appreciated the wrongfulness of his conduct¹⁴⁷ i.e the mens rea element of the applicant's actions in the interest of a fair trial and the right to culture guaranteed by the Constitution of the Republic of South Africa. As research has shown that among some parts of the Xhosa-speaking group, brutality has long been employed as a part of *ukuthwala*. Families and communities that generations after generations, continue practicing the custom, condone the raping and compelling of young girls into marriage. This is all due to the fact that it is part of their custom, a custom that they were raised to follow. I believe it is important therefore, for the intention of the accused to be looked at as it is an important element of the offence. The question to be evaluated is whether the accused intended to commit a crime or was the intention to secure a wife and comply with all the requisites and formality of the custom.

An accused is at fault where he intentionally commits unlawful conduct knowing it to be unlawful.¹⁴⁸ When establishing intent the court will have to place itself in the shoes of the accused and look at what was the mind-set of the accused at the time of the commission of the offence. This test is said to be a subjective test. The accused must therefore be aware that his conduct constitutes a crime and is not justified according to our law¹⁴⁹. It is clear from the above case that the accused had a mistaken yet genuine belief that his conduct of *thwalaing* the child was justified under customary law.

¹⁴⁶ Ibid.

¹⁴⁷ J Burchell *Principles of Criminal Law* 3rd ed (2006) 458.

¹⁴⁸ Ibid 459.

¹⁴⁹ Snyman (note 13 above) 182-202.

Even though Jezile's actions on the face of it complied with the definitional elements of the crimes convicted that being: human trafficking, rape, common assault, and assault with intent to cause grievous bodily harm, the court however needed to evaluate whether the accused had the required fault element when committing the offence as only people who are deserving of blame ought to be punished. When committing the crime, the appellant was complying with his custom, a custom that is rooted in the Xhosa community. In all probability the appellant believed this custom was perfectly legal under customary law. If we look at the two articles mentioned above both writers are in agreement that young girls have always been *thwalaed* because according to their culture a girl is of marriageable age when she reaches puberty. Both writers agree that violence seemed to be in line with how the practice had always been practiced therefore Jezile's actions are not an abuse of the custom however, is in line with how the custom is being practiced and has been practised in his community and by his forefathers.

I am of the view that the court mistakenly concluded that the appellant did have knowledge of unlawfulness as the appellant's actions were committed in conditions that justify the performance of the conduct as the accused subjectively believed that he was practising the custom of *ukuthwala* and not that he was committing a crime. What is unfortunate is that in cases involving culturally motivated crimes, it is often a learned judge who adheres to a different value system than that of the accused, who has to decide what the reasonable person in the same circumstance as the accused would or should have done.¹⁵⁰ It is the very same judge that has to decide on the intention of the accused at the time of the commission of the offence, which is why we have an overlap between the two systems.

As a general point it is my submission that it is high time that the courts stop looking at African customs and traditions as barbaric however find means and ways of developing the custom in a manner that complies with the Constitution and the changing needs of society without entirely banning the custom and stigmatizing it as barbaric.

¹⁵⁰ Rautenbach and Matthee (note 97 above) 117.

CHAPTER FOUR

4.1 Witchcraft in South Africa

Witchcraft is said to be the practice of, and belief in, magical skills and abilities that are able to be exercised by individuals and certain social groups.¹⁵¹

In South Africa, the belief in African witchcraft is held by cultural groups who belong to the indigenous African heritage and form part of a numerical majority.¹⁵² Within the South African communities witchcraft is regarded by most, if not all as a reality¹⁵³ and a practice that is still being practiced today. Witchcraft is mostly practiced by experienced old women who are referred to as witches; although in some cases you do get cases of males practicing witchcraft who are referred to as wizards. They are the mediators between the humans and the mysterious super powers such as spirits. Witches are largely found in the rural communities of Limpopo, Mpumalanga and Kwazulu-Natal. These communities reportedly have a prevalence of witchcraft.¹⁵⁴ The witches are commonly referred to as Mthakathi amongst the Zulu speaking people and Moloji amongst the Sotho speaking people. People fear any action associated with witchcraft because it contains supernatural powers that could potentially negatively influence a person's life.

Yaseen Ally¹⁵⁵ distinguishes between 3 forms of witchcraft. The first form of witchcraft refers to the capacity of some individuals to manipulate objects in the nature as well as through incantations, charms and spells to harm others. These powers are said to be activated by hatred and mostly caused by envy and jealousy. The second form of witchcraft is steeped in a religious tradition where a pact is taken with the devil or Satan, a Christian fallen angel associated with evil. In this form of witchcraft, witches are believed to engage in sexual relations with the devil in exchange for supernatural powers which they use to harm enemies.¹⁵⁶ The last form of witches are witches that share a common goal, assist each other in harming enemies or even combine forces to harm one another.¹⁵⁷ What all of these forms of witchcraft have in common is the causing of harm to other individuals by way of

¹⁵¹ H Baldung *Paranormal*. available at <https://en.wikipedia.org/wiki/Witchcraft> (accessed on the 11/02/2017)

¹⁵² Bennet (note 34 above) 14.

¹⁵³ TS Petrus & DL Bogopa 'Natural and supernatural: intersections between the spiritual and natural; worlds in African Witchcraft with Reference to South Africa' (2007) 7(1) *Indo-Pacific Journal of Phenomenology* 2.

¹⁵⁴ A Yaseen 'Witch hunts in modern South Africa: An under-represented facet of gender – Based violence' (2009) *Fact Sheet, Medical Research Council-UNISA. Crime Violence and Injury Lead Programme*.

¹⁵⁵ Yaseen (note 39 above).

¹⁵⁶ E Heinemann *Witches: A Psychoanalytic Exploration of the Killing of Women* 3rd ed (2000).

¹⁵⁷ BP Levack *The Witch-Hunt in Early Modern Europe* 3rd ed (2006).

supernatural power. These powers that the witches are said to possess are believed to cause death, disease, psychological disturbance, divorce, business misfortune etc, hence people fear witches and such fear leads to witchcraft accusation which subsequently leads to violent consequences and sometimes death as the fear permeates the culture of the believers and influences the way they think and act.¹⁵⁸ With the aim of combatting witchcraft-related violence, the government of South Africa passed the Witchcraft Suppression Act.¹⁵⁹ This Act brought about the criminalisation of witchcraft practices in south Africa. This has however proven to being a futile exercise as many authors have argued that it has worsened the situation.¹⁶⁰

As prior to the act individuals seldom took the law into their own hands.¹⁶¹ It has also been argued that South African courts are not equipped to convict people of an offence whose material elements cannot be presented as hard evidence in a court of law. Anyone brought before the court for practicing witchcraft is set free for lack of concrete evidence.¹⁶² This is what has subsequently lead to mob justice and people taking the law into their own hands as the Act has failed to deter people that practice witchcraft, therefore failing to protect the community.

In this chapter I will be dealing with witchcraft in the context of witchcraft being a partial excuse or a motivation for the commission of an offence .This will be discussed in the context of witch-killing and killings due to supernatural belief which is coursed as a result of the belief in witchcraft and the belief in supernatural beings such as the *tokoloshe*.

4.2 Witchcraft related killings

4.2.1 Witch-killings

In cases where there are witchcraft accusations society has resorted to taking the law into their own hands as in most cases the suspected witches end up going free due to difficulty in prosecution hence these cases result in witch-killing. Witch-killing is usually done publicly and more often than not in groups. This is because it is believed that the evil or misfortune caused by the witchcraft disturbs the harmony of the group as a whole, but because whatever

¹⁵⁸ Grobler (note 26 above) 57.

¹⁵⁹ Witchcraft Suppression Act 3 of 1957

¹⁶⁰ Grobler (note 26 above) 61.

¹⁶¹ J Hund 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial And The Suspension And The Suppression Of African Justice' (2000) 33 *Comparative and International Law Journal of Southern Africa* 367.

¹⁶²Ibid 368.

happens to the individual happens to the whole group.¹⁶³ Misfortune and losses that occur in the community are attributed to witchcraft which is why in most cases such killings are done by groups or the whole community. Cases of witchcraft accusations are often as a result of smelling out by a witch doctor. In some cases, people caught in neighbour's yards late at night or in other cases it's simply out of jealousy or envy of one's success. In order for the court to assess whether the killing was witchcraft motivated it is important to assess the manner in which the witch or suspected witch is killed. Witches are killed in various ways. The most common is the burning of victims as it is believed that fire destroys their souls and subsequently breaks any if not all ties they might have had with their ancestors.¹⁶⁴ In some cases, witches are killed by other means other than burning like stoning, stabbing or shooting. The witch is later burned hence this is an important consideration when considering whether a crime was committed as a result of witchcraft accusations.

A case worth noting which I believe the cultural defence should have succeeded is the case of *S v Mokonto*¹⁶⁵ where an appellant killed the deceased, an elderly woman who allegedly was practicing witchcraft. Upon the appellant going to confront the accused about her killing his brothers with *muti* the deceased threatened the appellant by telling him that he would not see the setting of the sun that day. He was convicted of murder with extenuating circumstances. On appeal it was argued:

Firstly that the deceased before being struck by the appellant threatened him with the dire pronouncement 'you will not see the setting of the sun'.¹⁶⁶ Secondly the appellant, knowing that the deceased had threatened him with death and believed that she had posed effective supernatural powers as a witch, slew her in self-defence and therefore should have been acquitted.¹⁶⁷ Thirdly the deceased's threat provoked the appellant, and the verdict should have been that of culpable homicide. The appeal court rejected the arguments of the appellant. Consequently the conviction and sentence was upheld by the court.¹⁶⁸

¹⁶³ Grobler (note 26 above).

¹⁶⁴ A Minnaar, M Wentzel and C Payze, 'Witch Killing with Specific Reference to the Northern Province of South Africa' in Bornman, F., Van Eedden R and Wentzel, M (eds) *Violence in South Africa: A variety of Perspectives* Pretoria: Human Sciences Research Council, 175-199.104.

¹⁶⁵ *S v Mokonto* 1971 2 ALL SA 530 (A).

¹⁶⁶ Ibid 533.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

It is my submission that the appellant when killing the deceased did so due to the appellant's belief in witchcraft and his belief that the deceased was a witch who had been weaving her evil spells upon his two brothers who had died as victims thereto.

Therefore it was due to the belief in witchcraft and the belief in supernatural beings that the appellant ended up killing the deceased. The appellant honestly and *bona fide* believed in his head that the deceased was the one that killed his brothers using supernatural powers. As soon as he heard the deceased threatening him that he will not see the setting of the sun, he immediately thought that his life was in danger considering that she had also threatened his brothers '*don't you want to leave this girl alone? You are all going to die*'¹⁶⁹ and they later died.

Therefore the appellant subjectively believed that if he did not kill the deceased, he too would suffer the same fate his brothers suffered. The appellant tried to rely on an existing defence of private defence, however the court found that the appellant's benighted belief in the blight of witchcraft could not be regarded as reasonable to exclude unlawfulness.¹⁷⁰

This case is a typical example showing that courts have been unwilling to accept a cultural defence even if it is used in conjunction with existing defences.

4.2.2 Killings as a result of beliefs in *tokoloshe*

Another form of indigenous beliefs which results in the commission of murders is the indigenous belief in supernatural beings such as the *tokoloshe*. This supernatural being is usually associated with witchcraft as it is said to be sent to people's homes to perform the evil intentions of the witch. Due to the evil associated with such *tokoloshe* and witchcraft, this creature is feared amongst the indigenous population. This creature is categorized as a dwarf, a gremlin, or a hairy creature resembling a monkey and is invisible to adults and can only be seen by children.¹⁷¹

There are various cases in our law where the court had to deal with the issue whether the belief in *tokoloshe* would result in the exclusion of criminal liability, like in the case of *R v Ngema*¹⁷² where the accused dreamt that he was being attacked by a *tokoloshe*, and as a result stabbed the person next to him, thinking that he is killing a *tokoloshe*. The court held that the

¹⁶⁹ Ibid.

¹⁷⁰ Ibid

¹⁷¹ S Lillejord & N Mkabela 'Indigenous and popular narratives: the educational use of myths in a comparative perspective: research in higher education' (2004) 18 (3) *South African Journal of Higher Education* 259.

¹⁷² *R v Ngema* 1992 (2) SACR 651 (D).

accused acted in the state of automatism and therefore did not perform a voluntary act. In this case even though it was an indigenous belief that resulted in the commission of the offence, no separate cultural defence was required as the actions of the accused were catered for in the existing defences we have in our law.

Another case of importance was the case *R v Mbombela*.¹⁷³ In this case the accused was found guilty of the murder of a nine-year-old child. The accused in this matter lived in a rural area and was described by the court as of questionable intelligence. On the day of the incident there were children playing outside in a hut which they believed to be empty. The children then saw two small feet that resembled that of a human being, upon seeing this they ran to inform the accused who was between 18 to 21 years of age. Upon his arrival he believed that this object was a *tokoloshe*, which is said to take a form of a little old man with small feet. According to the belief of the accused it would be fatal to look this spirit in the face. The accused fetched a hatchet then went to the room which was half-lit and struck several blows with the hatchet. When he dragged the object out of the hut, he found that he had killed his younger nephew.

His defence was that he had genuinely believed that he was killing an evil spirit (a *tokoloshe*) and not a human being. The trial court dismissed his defence. The matter was then taken on appeal where the murder conviction was reduced to that of culpable homicide as the court found that the accused did not act as a reasonable person. In arriving at this decision the court applied the strict objective approach whereby an objective reasonable person is based on the personification of the majority culture.¹⁷⁴ In a heterogeneous society the insistence on a purely objective approach to testing liability for crimes of negligence may lead to instances of injustice¹⁷⁵ which is my submission is the case in the *Mbombela* case. No subjective factors were taken into account such the background, educational level, culture, sex and race. The accused when committing the offence was motivated by his cultural belief in the supernatural. It was due to this belief that he subjectively believed that he was killing a *tokoloshe* and not a human being. It is my submission that what would be fairer and in the interest of justice is having a subjective reasonable person test which will measure the accused as an individual. It is my submission that it would not be fair to evaluate the accused

¹⁷³ *R v Mbombela* 1933 AD 269.

¹⁷⁴ Rentteln and foblets in foblets et al (eds.).

¹⁷⁵ EM Burchell and PM Hunt (note 115 above) 384.

against anybody but himself. The court in *S v Van As*¹⁷⁶ supports this view as the court stated that:

In the application of the law he is viewed objectively, but in essence he is viewed both objectively as well as subjectively because he represents a particular group or type of persons who are in the same circumstances as he is, with the same ability and knowledge.

It is clear that if the courts continue to apply the strict objective approach when testing for negligence, certain people will not be protected by our law because of their background and cultural beliefs. It is my submission that this approach will result in unfair discrimination of the accused as by adopting this approach society is being penalised for the way they think and what they believe in.

As correctly stated by Burchell¹⁷⁷ the strict objective test is legal imperialism at worse political domination as it is up to the dominate culture which is the western culture to determine what reasonable values are¹⁷⁸. which I believe will be an unfair practice as what is reasonable for one group will not necessarily be reasonable for the other group

Therefore it is my submission that the objective reasonableness test has no place in an open and democratic South Africa were the constitution is supreme as this test criminalises people for who they are.

This case in my view is a classical case where the accused would have succeeded with relying on a cultural defence as it is clear that due to the strong belief the accused had in witchcraft and the supernatural which formed part of ritual practice for centuries in his community,¹⁷⁹ there was no knowledge on the part of the accused that his action was unlawful hence he did not have the required intention to commit a crime. Clearly from the facts of the case the accused was mistaken about the fact, in that when the accused hit the object he was under the impression that he is hitting a *tokoloshe* and not a human being which would be punishable under our law. As correctly stated by Burchell that in cases where the killer believes he is acting lawfully or does not know or foresee that what he is killing is a human being there can be no fault hence excluding criminal liability.¹⁸⁰

However the problem that one would have when using mistake as a defence as opposed to a formally recognised cultural defence to exclude unlawfulness is that mistake of law is

¹⁷⁶ *S v Van As* 1976 (2) SA 921 (A).

¹⁷⁷ Burchell (note 115 above).

¹⁷⁸ Ibid

¹⁷⁹ Ibid (note 167 above).

¹⁸⁰ Burchell (note 115 above) 458.

evaluated in the context of the dominant culture which is the majority culture. Therefore, to assess if the accused had knowledge of unlawfulness, the judge will have to place himself in the shoes of the accused which would be a difficult task taking into consideration that it would be a westernized judge who does not believe in witchcraft or *tokoloshe* that will be assessing the mind-set of the accused. Whereas in the case of formally recognised cultural defence, cultural evidence and surrounding circumstances need to be placed before a court if a person wants to rely on a cultural defence. This will make it easier for the court to decide the case of the accused in relation to his belief in the supernatural.¹⁸¹

It follows then therefore, that certain cultural practices may affect the subjective mind of an accused to the degree that there is no knowledge of unlawfulness and consequently no intent.¹⁸²

4.3 Witchcraft and mens rea

In most cases where witchcraft or supernatural belief is the motivation for killing, the accused is often charged with the common law crime of murder. To be convicted of this crime the state will need to prove beyond reasonable doubt that the perpetrator unlawfully and intentionally killed another human being. The state in proving its case will need to prove the fault requirement which takes the form of negligence or intention. In proving intention, the state will need to look at the conative and cognitive function of the accused. The test for intention is subjective hence the court needs to evaluate what went on in the mind of the accused. This must be done by assessing the accused's; individual characteristics, his level of superstition, degree of intelligence, background and psychological disposition. All these factors may be taken into account in determining if he had the required intent.¹⁸³ Such determination is done by the court putting itself in the shoes of the accused during the commission of the offence and taking into account all relevant factors.¹⁸⁴

In most cases of this nature where the belief in witchcraft is the motivation for the commission of the offence, an argument often advanced by perpetrators charged with witchcraft killing is that their belief in, witchcraft and supernatural powers which has formed part of their ritual practice for centuries was the motivation for the commission of the offence. Therefore the accused will argue that he lacked the knowledge of unlawfulness at the

¹⁸¹ Grobler (note 26 above) 137.

¹⁸² Carstens (note 28 above) 329.

¹⁸³ Snyman (note 13 above) 192.

¹⁸⁴ *S v Ngubane* 1985 3 SA 677 A 685F-685G.

time of the commission of the offence, hence having a material effect on the blameworthiness of the perpetrator. Knowledge of unlawfulness affects the element of intention that is *mens rea*. This test when assessed is assessed subjectively as the accused in his or her subjective mind must thus be aware of his or her wrongdoing at the time of the commission of the offence.¹⁸⁵ The believers in witchcraft seldom, if ever question the existence of witchcraft and believe that witches have the ability to destroy not only his physical existence but his earthly success as well.¹⁸⁶

4.4 Diminished responsibility as a mitigating factor for sentence

In South Africa courts have been more than willing to accept cultural beliefs as a mitigating factor rather than as a defence excluding liability. The courts have accepted that although a reasonable person does not believe in the existence of witches, wizards or witchcraft, a subjective belief therein may be a factor which depending on the circumstances, can have a material bearing on the fault of the accused,¹⁸⁷ hence diminishing the moral blameworthiness of the accused as his belief has a direct bearing on his state of mind. As the court stated in the case of *S v Jezile*,¹⁸⁸ when considering sentence the court accepted the appellants moral blameworthiness was mitigated by the belief which he held concerning traditional practices, and accepted that in his own mind the appellant had not foreseen the catastrophic consequence to the complainant when he set in motion the course of event. Also in the case of *R v Fundakabi*¹⁸⁹ the court held that

‘in considering whether extenuating circumstances are present ... no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration. That a belief in witchcraft is a factor which does materially bear upon the accused's blameworthiness’.

Similarly in the case of *S v Mkhonto*¹⁹⁰ the court held that:

In considering the moral blameworthiness of the conduct of an accused's conduct, as distinct from his legal culpability, his subjective belief in witchcraft may, depending on the circumstances, be regarded as an extenuating circumstance.

¹⁸⁵ Carstens (note 28 above) 319.

¹⁸⁶ Mutungi OK ‘witchcraft and criminal law in East Africa’ (1971) 5 (3) *Valparaiso University Law Review* 531.

¹⁸⁷ Carstens (note 28 above) 318.

¹⁸⁸ *S v Jezile* 2015 JDR 0566 (WCC).

¹⁸⁹ *R v Fundakabi* 1948 3 SA 810 (A) 818 .

¹⁹⁰ *S v Mkhonto* 1971 2 SA 319 (A) 324D-32E.

As much as the courts have in many instances accepted the belief in witchcraft as a mitigating factor. However, it is not all cases where the belief in witchcraft will be considered as a mitigating factor. Cases such as *muti* murder where the victim is killed for pure greed and personal gain cannot be equated to witch-killings which is motivated by fear and the desire to restore harmony in the community.¹⁹¹

Therefore, it is not all killings associated with witchcraft that could be regarded as less blameworthy.¹⁹²

¹⁹¹ Grobler (note 26 above) 64.

¹⁹² *S v Nxele* 1973 (3) SA 757.

CHAPTER FIVE

5.1 Conclusion

From the perusal of South African case law it is evident that a cultural defence can only be raised in situations where the accused is charged with a culturally motivated crime.¹⁹³ It has been established in the previous chapters that culture shapes the way we think and act. Chapter 2 illustrates that before the accused conduct can be said to be a culturally motivated crime, such conduct should comply with the 6 requirements discussed in the chapter. Only then only can the offence be said to be culturally motivated.

From the number of cases that have dealt with the issue of a cultural defence courts have shown their unwillingness to accept that indigenous beliefs and customs can serve as a ground of justification excluding criminal liability. This is primarily due to the courts upholding the rights of victims entrenched in the Constitution. The courts have only shown favour of a cultural defence in cases where the perpetrator has been found guilty of a culturally motivated crime. The courts consider cultural beliefs when imposing sentence which is usually considered as a mitigating factor. This is due to the subjective determination of what constitutes a factor that can reduce the moral blameworthiness of the accused.¹⁹⁴ Seemingly this is how far South African courts are willing to take the issue of culture into consideration.

The custom of *ukuthwala* has resulted in devastating results especially amongst young girls who have fallen victims of the practice. Upon perusal of various literatures it is evident that it is still not certain whether the current form of *ukuthwala* is an aberrant practice or one that has been practiced for centuries, as various authors have different views on the topic. What is certain however, is that there are people still practicing the custom to the detriment of young girls. As much as I submit that the court was incorrect in finding that the appellant in *S v Jezile* relied on an aberrant form of *ukuthwala*, the manner in which he practised the custom in my view is how the custom has been practised for centuries. One must however bear in mind that in the past there had not been a standard to which the custom had been tested.¹⁹⁵ However, currently our country has the Constitution of the Republic of South Africa which is the supreme law of the land and every act or custom should be consistent with the

¹⁹³ *S v Swartbooi* 1916 EDL 170.

¹⁹⁴ Grobler (note 26 above) 64.

¹⁹⁵ See Matthee 2012 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cat=1586&limit=10&page=0&sort=D&cause_id=2137&cmd=cause_dir_news where the author puts forth a similar argument, albeit within the context of proceedings before traditional courts (accessed on 12/12/16)

constitution. Laws or customs found to be inconsistent with the constitution are found to be unconstitutional and invalid.

The conflict between the South African criminal law and the indigenous beliefs and customs in African customary law can be resolved by bringing the indigenous beliefs and customs in line with the values underpinning the Constitution as it is the supreme law of the land.¹⁹⁶it is my submission therefore that the custom of *ukuthwala* should not be abolished as it is a custom which the minority culture or people practicing the custom identify with, hence abolishing the custom would mean them losing their identity and sense of belonging. It is further my submission that the custom should be developed in such a way that it is consistent with the Constitution and does not violate the rights of individuals.

Though the Constitution of the Republic of South Africa does guarantee individuals the right to practice ones culture however, such cultural practice cannot be practiced at the expense of or in violation of the bill of rights¹⁹⁷ as indigenous customs can never override individual human rights.¹⁹⁸

Therefore forming a cultural defence in relation to the custom of *ukuthwala* in its current form would not further the spirit of the Constitution in an open and democratic South Africa.

In developing this custom, I am of the firm view that government should engage traditional leaders, community members and respected academics in aligning traditional customs and practices with the principal's entrenched in the Constitution. This would serve to create a common understanding of the custom and create the missing link between traditional African customs and western law. Traditional leaders should then provide training and guidance to their respective communities in order for an ordinary person to understand what is and what is not acceptable in a democratic South Africa which recognises traditional practices. I further believe that the government should look at introducing a cultural curriculum in school especially in areas affected by these customs, where children can be educated from a young age about the acceptable forms of *ukuthwala*. I do believe that such should be done before the courts can convict individuals for the crimes emanating from practicing this custom.

¹⁹⁶ Matthee (note 73 above).

¹⁹⁷ Momoti NK 'Law and Culture in the new constitutional dispensation with specific reference to the Custom of Circumcision as practised in the Eastern Cape' (unpublished LLM dissertation, Rhodes University 2002) 89.

¹⁹⁸ Ibid

It is my submission that the communities practicing this custom are being placed in a very difficult position. From the literature in chapter 3, you find that communities have been practicing this custom all their lives. It is a custom that is rooted deep within their beliefs.

Therefore in light of this I believe that it would be difficult for the courts to overcome the issue of knowledge of unlawfulness when considering the elements of the crime because in most cases as mentioned in the previous chapters the perpetrator believes that his actions are perfectly justified under the custom of *ukuthwala*. However, if such training and awareness is done, the accused cannot turn around and say that he did not know that his actions were unlawful. As much as I do acknowledge that the practice of *ukuthwala* in its current form violates the rights of individual however, at the same time the courts cannot convict a person of a crime he/she did not know that he/she had committing.

On the other hand the belief in witchcraft, although a component of the Africa traditional religion, falls within the preview of African culture. It is in this context that member of a minority culture relies in the belief in witchcraft as a motivation for the commission of the offence.¹⁹⁹ In cases of this nature the accused kills a person in the genuine belief that by killing the deceased he is averting some great evil that would either befall him or befall his family or his community. As covered in chapter 4, the courts have not yet recognised a cultural defence in the context of the belief in witchcraft or supernatural beliefs. The courts have also not recognised such belief in the context of existing defences such as in the case of *s v Mokonto* where the court found that the belief in the supernatural did not amount to an imminent threat. It is my submission that the accused in the above mentioned case on reasonable grounds believed that he was protecting himself from the deceased who had been waving evil spells to his brothers. Taking in to account the accused background and cultural beliefs, when the deceased made the threat to him he subjectively and honestly believed that his life was in danger therefore I submit that due to the subjective belief of the accused, the accused could have successfully raised a cultural defence in conjunction with an existing putative private defence.

Similarly in the case of *S v Mbombela* the accused due to his belief in supernatural powers believed that what he was seeing was a *tokoloshe* which according to his belief is created by witches and is believed to have the capacity to cause illness and death on the command of the

¹⁹⁹ Grobler (note 26 above) 64.

witch.²⁰⁰ Due to this belief people fear these creatures and naturally want to protect themselves against it .The accused was mistaken about the fact as he believing that the object was a *tokoloshe* and not a human being. It is my submission that due to the accused cultural belief in witchcraft the element of mens rea on the part of the accused is lacking.

Therefore I am of the view that a cultural defence should be recognised as it will compel the courts to listen to evidence of the accused cultural background hence allowing the courts to come to a just decision that is in line with the Constitution.

²⁰⁰ Ibid (note 39 above) 29.

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