

# THE ROLE OF THE CRIMINAL LAW IN THE PROTECTION OF WOMEN AGAINST GENDER-BASED VIOLENCE

## Case Note on *S v Jeri* HH-516-17

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### GENDER-BASED VIOLENCE

Although men can be targets of gender-based violence, the large majority of persons affected by gender-based violence are women and girls.

The preamble to United Nations Declaration on the Elimination of Violence Against Women recognizes that:

... violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men ...

The preamble affirms that “violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms” and it expresses concern about the long-standing failure to protect and promote those rights and freedoms in the case of violence against women.”

Article 3 of the Istanbul Declaration<sup>2</sup> defines gender violence against women as “gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of

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<sup>2</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence 2011.

such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

This article will first address the constitutional framework generally for the protection of the rights of women and then focus specifically on the Jeri case which involves a gender-based murder.

#### THE CONSTITUTIONAL FRAMEWORK

The Constitution has various important constitutional provisions on gender rights and protection against gender discrimination. Section 80(1) provides that “every women has full and equal dignity of the person with men.” Section 56 stipulates that everyone has the right to equal protection of the law and women have the right not to be discriminated against on the basis of their gender. Section 17 provides as a national objective that “the State must take positive measures to rectify gender discrimination and imbalances resulting from past practices.” Section 80(3) outlaws laws, customs, traditions and cultural practices that infringe upon the rights and personal safety of women. Zimbabwe is also a signatory to the UN Convention on the Elimination of All Forms of Discrimination Against Women which in Article 2 obliges a State Party to take all appropriate measures to abolish customs and practices and repeal penal provisions which constitute discrimination against women, although it CEDAW does not directly address the issue of violence as such.

More generally, section 51 of the Constitution accords every person the inherent right dignity and to have that dignity respected and protected, and section 52(a) provides that every person is entitled to freedom from all forms of violence from both public and private sources. The Declaration on the Elimination of Violence Against Women which was adopted by the United Nations in 1993 defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” In terms of section 327 of the Constitution International conventions do not form part of the law of Zimbabwe until they have been incorporated into the law by an Act of

Parliament. However, section 327(6) provides that when interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention. Section 46(1)(c) provides that in interpreting the provisions of the Declaration of Right the courts must take into account all international conventions to which Zimbabwe is a party. Section 46(2) further provides that when interpreting an enactment and when developing the common law and customary law, the courts must promote and be guided by the spirit and objectives of the provisions in the Declaration of Rights.

Since 1980, apart from entrenching gender rights as constitutional rights, the Government of Zimbabwe and the courts have adopted various criminal law measures to protect and advance the rights of women and protect them against discrimination and gender based violence. The objectionable marital rape exemption has been abolished,<sup>3</sup> domestic violence has been criminalized<sup>4</sup>, the law of rape has been strengthened and the higher courts have stressed that the courts must impose sentences that reflect the seriousness of rape, the physical chastisement by a man of his wife is now penalized as assault, and various cultural practices that violate the rights of woman and girls including child marriage have been prohibited.<sup>5</sup> Under the law of rape, the courts have explained what is required for the defence of consent to apply, underscoring that when a woman says no to sex she means it and not maybe. Consent is absent when a man uses force or

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<sup>3</sup> Section 68 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

<sup>4</sup> Section 4 of the Domestic Violence Act [*Chapter 5:16*]. However, there are problems in prosecuting some harmful cultural practices under the Domestic Violence Act as this legislation deals with abuses within the family and other intimate relationships. It would thus not apply to a situation outside these relationships such as where members of the church or community who are not part of the complainants' family force the complainants to undergo virginity tests on the complainants. However, the accused could be charged with indecent assault in terms of the Criminal Law Code.

<sup>5</sup> Section 4 of the Domestic Violence Act.

coercion or fraud or abuses his power or authority in order to have sexual relations with the complainant. The courts have also ruled that a prostitute can be raped if she has declined to have sexual relations with a man and that the fact that a woman is wearing skimpy clothes does not provide any sort of excuse for rape.

Although there has been some retraining of the police in the proper handling of rape complaints, cases still arise in which the police adopt a dismissive attitude to complaints of rape and decline to take the matters any further. Police at local level may sometimes fail to take seriously and deal properly with complaints of domestic violence. There is a need for further training of the police to change their attitudes to such cases.

In a society which is still deeply patriarchal many men continue to hold unacceptable sexist and chauvinistic attitudes towards women. The constitutional provisions on gender rights must be vigorously applied and gender discrimination must be rooted out at every level of the society. The criminal law should play a key role in upholding and advancing the rights of women in line with the constitutional provisions.

#### **A CASE OF GENDER VIOLENCE**

The criminal law must deal effectively with gender-based violence. For instance, the criminal law must severely punish a man who responds with violence towards a woman when he misguidedly believes that he is entitled to special privileges from the woman and she refuses to grant him these privileges. Such an attack must be condemned under the criminal law in order to disabuse the accused and like-minded men of these mistaken notions.

The case of *S v Jeri*<sup>6</sup> shows how the criminal courts can play an important role in this regard. In this case a man violently attacked and killed a woman simply because of her rejection of his sexual advances towards her. The woman was working at a bar serving food and drinks. The accused approached her and when she rejected his sexual advances, he slapped her,

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<sup>6</sup> HH-516-17.

pushed her against a fridge and head butted her. To protect herself the woman hit him with a bottle. Efforts were made to try to restrain the accused from further assaulting the woman but the accused was now in a frenzied rage and he took out a knife and stabbed the woman in the stomach which led to her death. At the time of the stabbing the deceased was standing behind a patron who stood as a buffer between the accused and the deceased.

The court convicted the accused of murder, rejecting the defences of self-defence, provocation and voluntary intoxication. As regards self-defence, the court found that at the time that he stabbed the deceased, the accused was the aggressor who was intent on causing harm to the woman. He was not protecting himself as the deceased no longer had a bottle. But even if she was still holding a broken bottle piece as alleged by the defence, it is clear that the accused was not under attack as the woman had sought protection by locating herself behind a patron. As regards the defence of provocation, the court found that this defence did not apply. The accused had at least legal intention to kill and, under the second stage of the provocation was certainly not such that it would have caused a reasonable person to completely lose self-control and cause death and thus to reduce murder to culpable homicide. Finally, voluntary intoxication was not a defence to an intentional killing although it could be a mitigatory factor in appropriate circumstances.

Tsanga J explored in detail the gender-based motivation for the fatal attack, pointing out that the accused acted to avenge the supposed affront to his manhood and to “show her who was master.” His attitude arose from “the dangerous perception that a woman’s ‘no’ does not mean ‘no’ and more significantly that a woman does not have right to make independent decisions about what whom she likes or does not like and whom she wishes to associate with or not to associate with.” The fact that “the accused had at least three girl friends at the same time, lead to the conclusion that the accused was clearly a man not accustomed to women saying no to him. He obviously perceived his manhood to have been challenged due to his own dangerous sense of entitlement in his dealings with and perceptions of women.”

The court observed that the accused and his defence counsel had regrettably unfortunately trivialized the killing by seeking to depict the deceased and her fellow female bar worker as “no more than prostitutes and drunkards.” The accused wrongly believed that the deceased had no right to say no to his advances because she was a sex worker. The court pointed out that even if the deceased was a sex worker, she was still entitled to her dignity and not to be subjected to violence. Further even if she was a sex worker, she was not engaged in sex work on the fatal evening.

The court went on to say:

The suggestion appeared to be that any woman who sets foot in a bar or works in bar must be perceived to be a prostitute and a drunkard. This demonising of women who do not fit society’s framework of the moral woman in society in fact shows the depth of patriarchal perceptions of women to which even counsel are often not immune.

The judge observed that dignity and freedom from violence are integral to the rights of women in all spheres of their lives and women should never be treated as objects without rights. The accused’s conduct was clearly a violation of these rights.

The court summed up the obligation of the court when dealing with cases of gender based violence as follows:

As courts, it is our duty to be alive to the constitutional imperatives and to make the gender connections from the everyday cases that we deal with. The motivations for the assault were clearly gendered and to fail to speak to the gender dimensions of this case would be to legitimise gender based violence within the criminal justice system. Our efficacy as courts in addressing gender based violence rests in ensuring that the criminal justice system speaks to the lived realities and experiences of all its victims. Equally important is showing our appreciation and understanding of the manifestations of gender violence in the cases that we are confronted with. Such open recognition in the cases that we deal with, helps to put into gender violence into the consciousness of the law and society in general from the perspective of the courts thereby aiding the process of change.

Having convicted the accused of murder, the court then turned to the question of sentence. It stated that a factor to be considered was “the need to send a clear message on the lack of tolerance for violence in general and gender based violence.” The sentence should be such that it gives the offender a real chance to be rehabilitated and to change his views about women. In fostering respect for women, much will depend on whether there are any conscious efforts directed at rehabilitating him in this regard whilst he is in prison. The accused was sentenced to imprisonment for fifteen years.

#### CONCLUSION

The judgment in the *Jeri* case shows how the courts should approach cases involving gender-based violence. The courts have an obligation to base their judgments in such matters squarely on the constitutional provisions on the rights of women. They need to make it quite clear that violent behaviour arising from erroneous male misconceptions and prejudices about their right to dominate women will be severely dealt with.