PREMENSTRUAL SYNDROME AS A DEFENCE TO CRIMINAL CULPABILITY

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PREMENSTRUAL SYNDROME AS A DEFENCE TO CRIMINAL CULPABILITY

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Directed Research Essays.

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Dr. M. Munalula
DEDICATION

To my sister, Matenta.

The woman who kept the flame going even through the storm.

Thank you.
ACKNOWLEDGEMENTS

I would like to thank my family for their love, encouragement and for their faith in me.

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Bridget, thank you for enduring those long nights with me.

Most importantly, I thank God, for if it were not for him, I would not be.
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Chapter one

1.1 Introduction

This paper looks at pre-menstrual syndrome as a defence to criminal culpability and whether, or to what extent, it has been accepted as such in Zambian or other jurisdictions.

Pre-menstrual syndrome is a condition peculiar to women and is sometimes referred to as their changing nature. Alleged symptoms include, headache, breast swelling, abdominal bloating, weight gain, acne, tension, irritability, aggressiveness, lethargy, anxiety and depression. Some women have claimed that these symptoms have made them conduct themselves in an unusual manner and even to commit a criminal act. In a decided English case, the accused claimed pre-menstrual syndrome turned her into a raging animal each month.

Most jurisdictions the world over, have refused to recognise pre-menstrual syndrome as a defence or even a mitigating factor. Certain groups, such as feminists fear that the acceptance of pre-menstrual syndrome as a defence would revive the sexist misconception of women as a species of endocrinological cripples incapable of holding offices of responsibility. Though most women suffer from premenstrual stress or tension, only a few have symptoms that are so severe as to disturb their day-to-day living. It is these severe symptoms that are referred to as premenstrual syndrome. Sufferers have been known to lose control and, some, even commit criminal offences. Shall these be denied their liberty by the reluctance to bring this peculiarity before a court in defence or mitigation?

This paper will look at pre-menstrual syndrome and whether it qualifies as a defence of its own standing, under the existing defences such as diminished
responsibility and insanity, or as a mitigating factor. It will look further at jurisdictions around the world and whether and how they have accepted pre-menstrual syndrome as a defence or mitigating factor with a particular focus on the Zambian Courts.

1.2 Methodology

Information in this paper was gathered from various sources. These include:

- Existing literature on the topic.
- Reports done by legal and, to the extent permissible, medical researchers.
- The Internet.
- Zambian statutes.
- Case law.
- Law review.
- Interviews

1.3 Chapter outline

As a matter of introduction, chapter two contains an analysis of the concept of responsibility and the concept of pre-menstrual syndrome is made.

Chapter three makes an analysis of traditional defences under which pre-menstrual syndrome has been considered by courts in other jurisdictions and considers how well it could fall under such defences. The chapter closes with a discussion on whether pre-menstrual syndrome can form a legal defence to criminal culpability of its own standing.
Further to this, in chapter four, the paper theorises the possible reaction of Zambian court’s to the condition if it were raised as an excuse to criminal culpability.

By way of conclusion, chapter Five will contain recommendations and concluding remarks on pre-menstrual syndrome as a defence to criminal responsibility or culpability.
Chapter Two

2.1. Introduction

With the recent increased regard to the peculiarities of each sex, it is the intention of this paper to review an area of the criminal law to which little attention, if any, has been given in Zambia and the world at large. It is true that historically, both Law and Medicine, have been male institutions and both are a powerful force in human society. When men turn to crime, the focus tends to be on their economic and social background to explain why they committed the crime. This reflects that the criminal justice system was mainly created to deal with male offenders in a time when little was known about biological basis of behaviour. The criminal justice system in many ways does not cater for women accused of crimes because they make up only a very small percentage of criminals. However, as more is known about the biological basis of behaviour, which is the reason why a small percentage of women commit crimes, the law should take this reality into consideration.

There are arguments for and against the use of pre-menstrual syndrome as a defence. Feminists fear that the use of a defence of pre-menstrual syndrome will not serve to aid the progression of the women's movement. Bad publicity could

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1 MUNA NDULO AND JOHN HATCHARD, READINGS IN CRIMINAL LAW AND CRIMINOLOGY IN ZAMBIA 75 (1994).
lead to public misconception where all women are regarded as unstable during premenstruum. Proponents of the defence argue that the defence would only be used by a few women, as it is not all women, but only a very small fraction of them suffer from pre-menstrual syndrome. It is for these women that it would be unjust to ignore the possibility of pre-menstrual syndrome as a defence to criminal responsibility.

2.2. The Concept of Criminal Responsibility

Legal theory is nowhere more generously endowed with philosophical substance than in those parts that address questions of responsibility. Theorists have come up with different opinions as regards criminal responsibility; some advocating that if the purpose of criminal law is the prevention of 'socially damaging actions' the doctrine of responsibility is misplaced and should only be regarded after a conviction has been got. The alternate argument is supported by virtually all advanced legal systems and holds that liability to conviction for serious crimes should be made dependent not only on the offender having done those outward acts which the law forbids, but on his doing them in a certain frame of mind or with a certain will.

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2 JANE SELWOOD, PREMENSTRUAL SYNDROME: SHOULD IT BE USED AS A DEFENSE TO A CRIMINAL CHARGE? 2 (1997)
3 JOEL FEINBURG AND HYMAN GROSS, PHILOSOPHY OF LAW 467 (1986)
4 BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW 43 (1963)
That the principle of criminal responsibility be done away with until after the conviction stage stems from a misunderstanding of the concept of criminal responsibility. It is therefore essential for the proper understanding of the subject matter of this paper to briefly analyse the concept of criminal responsibility.

Responsibility has been defined as the state of a person being, "the cause of something and so, liable to be blamed for it."\(^5\) Criminal responsibility as such refers to the liability or blameworthiness of a person for a crime committed. In order to come to a decision, the courts consider whether this person had the mental element prescribed in the definition of the crime, where the forbidden act has been committed. This mental element is known as the *mens rea* of the offence, which is often referred to as a guilty mind, a term which should not be taken literally. It refers merely to the state of mind of the accused as laid down by the statute creating the offence. Therefore, only he who has the *mens rea* of an offence is liable to be punished for committing acts that constitute the offence. The acts constituting the offence being called the *actus reus*.

The importance of this doctrine cannot be over emphasised. Stephen j, said of it in *R v Swindall and Osbourne*\(^6\), that

\(^5\) OXFORD ADVANCED LEARNERS DICTIONARY (5\(^{th}\) ED., 1995).

\(^6\) (1846) 2 C. & K. 230
The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to be absent in any given case, the crime so defined is not committed; or again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition.

The doctrine of *mens rea* as it is applied may be summarised as that a man will not, as a general rule, be held to be criminally responsible unless:

- He was acting voluntarily;
- He knew what he was doing, and;
- In those offences where particular consequences form part of the *actus reus* of the prohibited acts, he foresaw the likelihood of those consequences.

It is, therefore, a defence to a criminal charge to show that the accused did not have the required *mens rea* at the time of his performance of the acts in question. An illustration of this is where a man kills another while sleepwalking. He, not knowing what he was doing, cannot be guilty of murder.

Different scholars over the years have argued that the concept of criminal responsibility is not in conformity with the purpose of the law. Some purposes of
the criminal law being: to prevent the recurrence of the forbidden acts; to punish the wicked; or to avenge the wrong done. Some theorists, like Lady Wootton, have argued that giving consideration and priority to the doctrine of mens rea before coming to a conviction is misplacing the doctrine. Wootton argues that paramount to the doctrine is the prevention of 'socially damaging actions', not retribution for past wickedness. Mens rea should only be relevant after conviction, as a guide to what measures should be taken to prevent a recurrence of the forbidden act. Wootton considers it, therefore illogical, if the aim of the criminal law is prevention, to make mens rea part of the definition of the crime and a necessary condition of the offender's liability to compulsory or punitive measures. In line with this argument, a person who had committed the actus reus of an offence must be convicted whether or not they could be held criminally responsible or not. Thus the insane, negligent and under age offenders would be convicted on the same footing as they that are truly responsible for the offence.

The importance of the purposes of the criminal law cannot be overemphasised, however, they must coexist with the ever-important need for only they that are truly responsible for the crime to be brought to book, if the aims of the criminal law are to be effected. There is also the ever-real danger that a widespread

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7 MCLEAN AND MORRISH, HARRIS'S CRIMINAL LAW 29 (1973)
8 MUNA NDULO AND JOHN HATCHARD, READINGS IN CRIMINAL LAW AND CRIMINOLOGY IN ZAMBIA 69 (1994)
9 BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW 43 (1963)
practice of imposing liability independent of any moral fault would result in the criminal law being regarded with contempt\textsuperscript{10}.

The oft-quoted passage of Lord Diplock illustrates this:

> It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of the crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind. \textsuperscript{11}

Some of the various forms of defences against a criminal charge serve to show either that the accused could not have had the \textit{mens rea} of the offence at the time it was committed though he was neither insane nor negligent; that he had no mens rea but was negligent; or that he has no mens rea because he was suffering from a disease of the mind. Defences are such as that the accused had a bona fide claim of right, was under a mistake of fact, was \textit{doli incapax} or because of his age could not be considered criminally responsible, was insane, or had diminished responsibility\textsuperscript{12}.

\textsuperscript{10}John Edwards, MENS REA IN STATUTORY OFFENCES 65 (1955)

\textsuperscript{11}Brend v Wood (1946) 62 T.L.R 462
It is in this last area of defences that the condition of pre-menstrual syndrome will be explored and consideration given as to whether it could form a defence to a criminal charge of its own right, under pre-existing defences or as a mitigating factor, if at all.

2.3. Pre-menstrual Syndrome.

Dr Dalton, a leading medical expert on pre-menstrual syndrome defines it as: "the presence of the monthly recurrent symptoms in the premenstruum or early menstruation with a complete absence of symptoms after menstruation."\(^{13}\) It has also been said to be, "the cyclic occurrence of the symptoms that are of sufficient severity to interfere with some aspect of life and which appear with a consistent and predictable relationship to menses".\(^{14}\) Pre-menstrual syndrome is characterised by a group of somatic, behavioural, cognitive, and mood symptoms that appear one to ten days before the menses and usually subside with its onset\(^{15}\). It must be noted that pre-menstrual syndrome is not a disease but a collection of physical, psychological and emotional symptoms that occur in the days leading up to the period.

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\(^{12}\) Penal Code, Cap 87, section 8,10,14, 12 and 12A.

\(^{13}\) KATHERINE DALTON, THE PREMENSTRUAL SYNDROME AND PROGESTERONE THERAPY 3 4 (1984)


\(^{15}\) LOEB S (Ed), DISEASES 1042 (1992)
The British Nursing health services (NHS) Direct Online Health Encyclopaedia lists pre-menstrual syndrome as a disorder whose symptoms can be extremely disabling. The American Psychiatry Association has also added premenstrual Dysphoric Disorder (PMDD), a severe form of premenstrual syndrome, to the diagnostic and statistical Manual (DSM-IV). The manual lists many disorders of mental health and used widely by health professionals in the United States to identify mental illnesses.

Pre-menstrual syndrome should be distinguished from pre-menstrual tension. The former refers to the severe manifestations of symptoms and the latter is milder and does not significantly affect the everyday life of the sufferer.

Pre-menstrual syndrome occurs during the female cycle when the progesterone and oestrogen levels drop. The physical symptoms can include swelling, weight gain, fluid retention, sore breasts, acne, allergic symptoms, headaches, clumsiness, difficulties with concentration and memory. These symptoms are exacerbated by alcohol and stress. Other symptoms are: depression leading to feelings of hopelessness and uselessness with ideas of right and wrong becoming confused; irritability leading to mood swings with a complete loss of control as

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the irrepressible impulse takes over; and psychosis induced by premenstrual syndrome which usually lasts only for a day or two and can involve hallucinations, paranoia and total amnesia of behaviours\textsuperscript{19}.

This cyclic occurrence of the symptoms assists in diagnosing and distinguishing pre-menstrual syndrome from other conditions.

Although the actual cause of pre-menstrual syndrome is unknown, it is generally thought to arise from many factors and has been linked to physiological, psychological and socio-cultural factors. Some conditions thought to contribute to pre-menstrual syndrome are such as progesterone deficiency, deficiency of salt or other nutrients, mental and emotional disorders. Women affected with pre-menstrual syndrome may experience psychological complications, such as lowered self-esteem, depression and the inability to function in home, work, or school settings.\textsuperscript{20}

\textbf{2.3.1 Treatment}

Treatments include administration of natural progesterone, diuretics, vitamins, diet alterations, exercise, and lithium carbonate. A more extreme treatment that

\textsuperscript{20} S LOEB (Ed), DISEASES 1042 (1992).
has been used is hysterectomy or ovariectomy. The treatments have had varying success. Dr Dalton has had the most positive results, though, with progesterone treatment for severe sufferers\textsuperscript{21}.

\textsuperscript{21} Scutt J, Premenstrual \textit{Tension as an extenuating Factor in Female Crime}, PSYCHOSIS MENTRALIS 99 (1982)
3.1. Introduction

Pre-menstrual syndrome has been raised in cases ranging from shoplifting to murder. Yet, pre-menstrual syndrome has as yet not been accepted as a defence to criminal responsibility of its own standing. That pre-menstrual syndrome is cyclical, recurrent and predictable makes it difficult to place under the already existing defences. Another peculiarity of the condition, making such inclusion further complicated, is the fact that pre-menstrual syndrome is not a disease but a mere collection of symptoms that vary from woman to woman and from month to month\(^1\). Further, there has been a hesitation to frame a legal defence where there had been broad disagreement on the aetiology of the disorder. There has however been increased acceptance and agreement on the disorder in the medical field that had not previously existed.

Courts have over time accepted premenstrual syndrome under traditional defences such as insanity, diminished responsibility, and even, in one case, under the defence of automatism.

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3.2. Insanity

A person may be acquitted because he was insane at the time the offence was committed. The legal meaning of insanity as distinct from the medical meaning can be expressed in two ways. Firstly, that the person was suffering from a disease of mind so that he could not have had the required mens rea for that offence at the time of its commission. Secondly, that the person though having the mens rea of the offence is suffering from a disease of the mind making him unaware that he is doing wrong\(^2\). An apt illustration of this is where the appellant stabbed his wife to death with a knife believing that he was stabbing an animal\(^3\).

The insanity defence as contained in the Zambian Penal Code is similar to that of most common law jurisdictions and is as a result of the judgment in \textit{M'Naughten} case\(^4\). The rule laid down in that case was that:

\begin{quote}
Every man is to be presumed sane until the contrary is proved ....to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was labouring under such defect of reason from disease of mind as
\end{quote}

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\(^2\) Penal Code, Cap 87, section 12  
\(^3\) \textit{Edward Sankalimba v The People} (1981) ZR 258  
\(^4\) (1843) 10 Cl & F. 200
not to know the nature and quality of the act he was doing or if he did know it that he did not know he was doing wrong.

For the defence to stand it must be proved, firstly, that the accused was suffering from a disease of the mind. There is yet no hard and fast rule as to what constitutes a disease of the mind. In one case the courts ruled that the accused was suffering from a disease of the mind where he had attacked a person while suffering from a loss of consciousness as result of congestion of the blood in the brain itself caused by arteriosclerosis\textsuperscript{5}. The actual disease in that case cannot ordinarily be thought to be a disease of the mind. In the case of \textit{R v Clarke}\textsuperscript{6}, it was said that depression causing absentmindedness and confusion, although a minor mental illness, fell short of being a disease of the mind causing a defect of reason such as envisaged in \textit{M'Naughten's case}. In \textit{Bratty v the Attorney General}, Lord Denning classified epilepsy or cerebral tumours as well as major mental diseases as diseases of the mind, but excluded sleepwalking and concussion.

It must further be proved the accused did not know the nature and quality of the act he was committing. This requirement brings into play the need for \textit{mens rea} if a criminal conviction is to stand. An illustration of this is where a man killed

\begin{flushleft}
\textsuperscript{5} \textit{R v Kemp} (1957) 1QB 399
\textsuperscript{6} (1972) 1 All ER 219
\end{flushleft}
his grandmother suddenly and with great brutality but did not know what he was
doing nor that he was doing wrong.\textsuperscript{7}

However, if he did have the required \textit{mens rea} for the offence, and knew the
offence to be wrong and he subsequently voluntarily places himself in such state
or position that he was likely to, and did in fact, produce the \textit{actus reus} of the
offence, then he can be convicted\textsuperscript{8}

The defence must lastly prove that even though the accused may have known
the nature and quality of his actions, he should not have known that he was
doing wrong. Wrong here being contrary to the law.\textsuperscript{9} Therefore, where a
person, understanding the nature and the quality of their act and knowing it to
be wrong, will not be successful if he attempts to use this defence.

Where a person is found guilty by reason of insanity, he is to be detained
indefinitely at the president's pleasure (in Zambia) or until his release is ordered
by the home secretary (in England).

A person suffering from pre-menstrual syndrome cannot be said to be legally
insane. This is because a pre-menstrual syndrome sufferer is most likely to
know that their act is wrong and also, to know the nature and quality of their

\textsuperscript{7} \textit{R v Wolomosi Phiri} 115 NLR 184
\textsuperscript{8} \textit{Attorney General for Northern Ireland v Gallagher} (1963) A.C. 349
acts. Premenstrual syndrome does not affect cognition and the sufferer knows her act to be wrong.\textsuperscript{10}

Further, considering that the pre-menstrual syndrome sufferer only exhibits the symptoms of the disorder for a short duration of the month, it would be grossly unfair to have them committed indefinitely if found guilty by way of insanity.

It can be argued, therefore, that this is not an apt defence for a person who is suffering from pre-menstrual syndrome to use in a common law jurisdiction.

The defence was successful, however, in the Canadian case of \textit{R v McDonald}\textsuperscript{11}. The accused pleaded insanity based on premenstrual syndrome as a defence to the murder charge. Lisa McDonald was found guilty of manslaughter and sentenced to five years in prison.

An advantage of such a defence is that as the accused is not permitted to go scot free but is committed in an institution until they are considered cured or no longer a danger to society, they will get help for their disorder and will be taught how to take better care of themselves.

\textsuperscript{9} \textit{R v Windle} (1952) 2 Q.B. 826
\textsuperscript{10} B McSheery, \textit{The return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and criminal Responsibility} 15 SYDNEY LAW REVIEW 292 at 299 (1993)
\textsuperscript{11} Op. cit.
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\textsuperscript{11} Op. cit.
Only in France has premenstrual syndrome been recognised as a valid ground for a plea of temporary insanity.\textsuperscript{12} This defence, aside of the stigma of the insane judgment, would appear well suited for a condition with the peculiarities of premenstrual syndrome.

It must herein be mentioned that the law as regards insanity is significantly different in the United States and is not represented here.

3.3. Diminished Responsibility

Where a person had the requisite \textit{mens rea} of the offence of murder, it is a valid defence if that person can show that they suffered from diminished responsibility at the time of the commission of the offence. The defence of diminished responsibility can be found under section 12A of the Penal Code and section 2 of the Homicide Act 1957. The defence will succeed where the accused can show that he, was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury), as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing. Included in the definition of “an abnormality of the mind” are personality disorders\textsuperscript{13} and

\textsuperscript{12} Gonzalez, “PMS: An Ancient Woe deserving of Modern Scrutiny” 245 JAMZ 1393 (1981)
\textsuperscript{13} \textit{R v Bryne} (1960) 2 QB 396
severe depression\textsuperscript{14}. Included under diseases of the mind are such as Othello syndrome and battered woman's syndrome.\textsuperscript{15}

A question that has arisen in relation to this is; is premenstrual syndrome an abnormality of the mind? In the case of \textit{R v Bryne}\textsuperscript{16}, abnormality of the mind was said to mean a state of mind so different from that of the ordinary human being that the reasonable man would find it abnormal. Although, there has been quite a lot of controversy on the issue of the reasonable man and who he is, it would seem only logical that we use the standard of the ordinary woman. It is clear from the authorities on the incidence of premenstrual syndrome that only a very small fraction of the population of women suffers from premenstrual syndrome and even then an even smaller proportion have symptoms so bad as to lead them to commit criminal acts\textsuperscript{17}. For this reasonable person, therefore, premenstrual syndrome of such severe symptoms is abnormal indeed.

This defence has been used successfully in a number of English cases, in association with premenstrual syndrome. In \textit{R v Craddock}\textsuperscript{18}, the accused was tried for stabbing a barmaid with whom she worked. Premenstrual syndrome was raised as part of the defence of diminished responsibility. A Dr Dalton, who was considered an expert on premenstrual syndrome, gave evidence for the

\textsuperscript{14} \textit{R v Seers} (1984) 79 Crim App R 291  
\textsuperscript{15} \textit{Ahlawalia} [1992] 4 All ER 889; \textit{Hobson} [1998] 1 Cr App R 31  
\textsuperscript{16} Op. cit
defence certifying that the accused suffered from premenstrual syndrome. It was held that Craddock stabbed the woman in a fit of rage and her murder charge was reduced to manslaughter because of diminished responsibility. Sentencing was delayed for three months to see if the accused responded well to progesterone treatment. She apparently calmed down dramatically. The court recognising her condition of premenstrual syndrome as a mitigating factor, sentenced her to probation with the condition that she continue to receive progesterone as treatment.

In the \textit{R v English}\textsuperscript{19} case, Christine English deliberately ran down her lover with her car, pinning him to a utility pole. Prior to the event, they had argued about him threatening to end the affair and he had then punched and slapped her. She pleaded guilty to manslaughter because of diminished responsibility and the court accepted premenstrual syndrome as a mitigating factor in the sentencing. The court in that case considered provocation as incidental to the issue of premenstrual syndrome.

British courts appear to have accepted premenstrual syndrome under this defence. In \textit{Vinagre}\textsuperscript{20} the court said, \textit{inter alia}, that post-natal depression and

\footnotesize
\textsuperscript{17} Solomon L, \textit{Premenstrual Syndrome: the Debate surrounding the criminal defence} 54 MARYLAND LAW REVIEW 571 (1995)
\textsuperscript{18} (1981) 1 C.L. 49
\textsuperscript{19} (1981) Norwich Crown Court (unreported).
premenstrual tension can constitute a disease for these purposes and so give rise to diminished responsibility as can battered woman's syndrome.

More recently, in the case of *R v Reynolds*\(^{21}\), the court of appeal substituted a manslaughter conviction for murder on the grounds of diminished responsibility. Reynolds had killed her mother by beating her to death with a hammer. Dr. Dalton gave evidence in that case attesting that Reynolds suffered from premenstrual syndrome and postnatal depression. The court made a probation order on condition of psychiatric treatment.

However, the stigma attached to the "abnormality of the mind" categorisation has been claimed to be well worth avoiding the defence for. Some writers have even claimed that because of the stigma involved, premenstrual syndrome should not be associated with diminished responsibility\(^{22}\). This may however be considered the unfortunate circumstance necessary for justice to prevail where the accused was genuinely afflicted and thus, should not be considered fully responsible for her actions.

An advantage of this defence vis-à-vis the premenstrual syndrome sufferer is that it takes into account the fact that they might not be fully responsible for their actions.

\(^{20}\) (1979) 69 Cr App R 104
\(^{21}\) (1988) C.L.R. 679
3.4. Automatism

This occurs where a person suffers loss of, or clouded consciousness and performs an involuntary act. The accused is in a disassociated state such that his or her mind or will does not accompany his or her bodily actions.\(^{23}\) Examples of automatism accepted by courts are sleepwalking, hypoglycaemia,\(^ {24}\) and concussion from a blow to the head, amongst others. As the accused in such case would have committed the act involuntarily, he cannot be said to have had the requisite *mens rea* for the offence. And it is therefore only right that if such defence succeeds, it would result in a complete acquittal.

There is very little involuntary action in the case of premenstrual syndrome sufferers of the nature sufficient to qualify for this defence. Therefore automatism would seem an inappropriate defence. The person with premenstrual syndrome may suffer depression leading to feelings of hopelessness and uselessness; irritability; mood swings; loss of control; and temporal psychosis involving hallucinations, paranoia and total amnesia of behaviours.\(^ {25}\) These however do not qualify as the required disassociated state

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\(^{23}\) BRETT, WALLER AND WILLIAMS, CRIMINAL LAW: TEXT AND CASES 789 (1993)

\(^{24}\) *R v Bailey* (1983) 1WLR 5

for automatism. There must be a disassociation between the persons' mind and will and there bodily actions.

The defence attempted to use this in the case of _R v Smith_\(^{26}\), where the accused was held for threatening to kill a police officer. Smith, it was found, had been suffering from premenstrual syndrome at the time of the offence. It was argued that in certain women with premenstrual syndrome who go without eating, an excess amount of adrenalin is produced that causes a hypoglycaemic state of impaired consciousness and a plea of impaired consciousness and a plea of automatism would therefore be appropriate. The court held that the premenstrual syndrome sufferer knowing of the nature of their condition could not use it as a defence. The judge considered premenstrual syndrome not to fall under the named defence and therefore, he directed the jury not to consider the defence.

**Premenstrual Syndrome As A Defence.**

Attempts have been made to use premenstrual syndrome as a defence in its own right. This can be seen in the American cases of _Lovato v Irvin_,\(^{27}\) and _the people v Santos_.\(^{28}\) Both attempts having been unsuccessful, the questions arising are, why did it fail and what can be done to correct the situation? The shortcomings

\(^{26}\) No. 1/A/82 (1982) Crim. App

\(^{27}\) 31 (1983) BR (BC Colo) 251
of this defence being such as its novelty to the legal system\textsuperscript{29}, the disagreement among the medical persons as to the disorder generally, the subjectivity of the symptoms, and the reluctance of various influential groups for a defence of its nature to be drafted for fear of negative attitudes towards women.

Some of these shortcomings have already been addressed earlier in this chapter. Others are to be addressed in the proposition of a strict burden of proof to be applied in cases where this defence is used.

3.5.1. Burden of proof

Though there are many symptoms of premenstrual syndrome, the burden of proof should rely on those particular symptoms that have been found to contribute to deviance. Dr. Katherine Dalton, an expert on this subject, describes the three most common premenstrual syndrome symptoms she has found in women who have committed illegal acts:

- Depression leading to feelings of hopelessness and uselessness with ideas of right and wrong becoming confused. This can lead some into shoplifting, suicide, smashing windows and arson;

\textsuperscript{28} (1982) No.1 K0 462 (unreported).
\textsuperscript{29} As was claimed by the judge in \textit{R v Smith}, No. 1/A/82 (1982) Crim. App
• Irritability leading to mood swings with a complete loss of control as the irrepressible impulse takes over;
• And psychosis induced by premenstrual syndrome, which usually lasts only for a day or two and can involve hallucinations, paranoia and total amnesia of behaviours\(^{30}\).

The burden of proof must involve rigid evidence requirements to avoid any misuse of the defence. It has been recommended that medical evidence must indicate that the woman has a clinically demonstrable physical disorder with the preceding symptoms plus a causal link must be made between the premenstrual syndrome and the Criminal act\(^{31}\).

Sceptics may claim that proof may be problematic in that the symptoms are subjective. The woman may for months on end fake the symptoms and then claim to a court that she suffered from premenstrual syndrome.

Dalton, however, states that through careful collection of evidence, including employment records, school, hospital, police and medical records, one can show a cyclical pattern of behaviour change. She believes that there are also other means of proving a premenstrual crime including:

Looking at these requirements, it is more easily understood why courts would be hesitant to accept a defence without such stringent safeguards. With further advances in science, it is hoped that in the interests of justice, legal systems around the world will soon accept premenstrual syndrome as a defence to criminal culpability.

**Mitigation of sentence**

It may have been noticed in the cases involving premenstrual syndrome earlier outlined that premenstrual syndrome was considered in most cases at the sentencing stage of the matter. This is in line with the arguments of Lady Wootton, that issues of responsibility should not be considered until the sentencing stage.\(^\text{34}\)

If this approach is taken the stigma attached to a mental disorder may be avoided because the main concern of the courts will not be the mental health of the accused but more with whether they committed the offence. However, the convicted premenstrual syndrome sufferer will be seen as a criminal and not as the victim that they really are. In other words, they will be seen as requiring punishment and not the help they need more.

\(^{34}\) B WOOTTON, CRIME AND THE CRIMINAL LAW 43 (1963)
An advantage is that, premenstrual syndrome sufferer will be viewed as an individual and the court will sentence according to the severity of their symptoms. Further, the court would, at this present level of acceptance of premenstrual syndrome, be more likely to accept the defence in mitigation than anything else. In the Zambian case of *Silva v Freitas*,\(^{35}\) it was held that any mitigatory factor which the prosecution does not dispute and which is consistent with the facts presented should be taken into account.

This chapter has looked at premenstrual syndrome, firstly in association with other defences and then as a defence in its own right and lastly as it is and could be used in mitigation of sentences. In whichever form it is accepted by the courts, it is a step forward as a form of recognition of the women who suffer from the condition and every journey must begin with a step. However, the use of premenstrual syndrome by the courts should be applied with caution, to avoid its abuse, both by the perpetrators of the crime and by the media, as a backlash against women.

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\(^{35}\) (1969) ZR 121
Chapter four

This chapter will examine the reaction of Zambian courts to the defence of premenstrual syndrome.

Without further ado, it must be pointed out that premenstrual syndrome has never been raised in any Zambian courts as of the date of this paper, whether as a defence or under traditional defences or even in mitigation of sentence. Therefore, in order to gauge the response of the court in the event of such a defence being raised, we shall examine the traditional defences of diminished responsibility, and insanity and the courts’ response to them in terms of flexibility and readiness to accept new concepts.

The oft-used defences in homicide cases involving women are provocation\(^1\); self defence\(^2\) and post natal depression. The reason put forward for premenstrual syndrome not having been used as a defence in Zambia is the lack of knowledge on the subject. It is argued however that in a case where it would be with merit to raise the issue before a Zambian court; it would be willing to listen to it. The courts have expressed willingness and openness to listen to any defence the accused may raise. This is evident in how in the case of *The Director Of Public Prosecutions v Ngoma*, it was held to be tantamount to preventing an accused

\(^1\) The People v Lewis (1975) ZR43
person from putting forward a defence of his choice, when a trial judge refused to grant an adjournment at the request of the defence to lead medical evidence, when the defence was quite clearly seeking to raise the defence of insanity. It was held in that case that particularly in a capital case, an accused that wishes to lead evidence for the purposes of a particular line of defence should be given every facility to pursue that line. The Supreme Court allowed the appeal \(^3\)

The courts have reacted differently to the defences of insanity and diminished responsibility that have in the past come before them. They have only after careful deliberation thrown out cases seeking to use such defences where the facts did not merit the use. An illustration of this is the case of Joseph Mutaba Tobo v The People\(^4\), where the accused attempted to use the defence of diminished responsibility merely because he suffered from a disease of the mind though the disease did not affect his behaviour or cognitive abilities at the time of the commission of the act in question. To this effect, Kabamba, Commissioner, commented in this case:

\begin{quote}
It does not follow that just because an accused suffers from a disease of the mind, his actions should be dismissed as those of a lunatic. The kind of disease of mind, which is relevant to this
\end{quote}

\(^2\) Christor Alyson Denn V The People (2001) Supreme Court Appeal No. 5/2000
\(^3\) (1976) ZR 189
\(^4\) (1990 - 1992) ZR 140
defence, is that which produced that kind of act or omission complained against.

This was illustrated further in the case of *Mvula v The People* where it was held that although the appellant was under severe mental stress at the time that he committed the homicides, he was not suffering from any abnormality and that he knew what he was doing. He therefore could not avail himself of the defence of diminished responsibility.

The above two cases are important in gauging the courts response to a new defence as they arose at the time the defence of diminished responsibility had first introduced in Zambia. The law, which came into force on 11 May 1990, was introduced by s 12A of the Penal Code, Act 3 of 1990.

The courts have also been equally vigilant in ensuring that the procedure as laid down in the criminal procedure code of Zambia regarding the trial and sentencing of persons who are legally insane is followed. The accused is to prove that he was legally insane or suffering from diminished responsibility at the time of the offence. The standard of proof

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5 (1990 - 1992) ZR 54
being, on a balance of probabilities and not beyond reasonable doubt. It
is then up to the prosecution to prove that this is not so.

The courts have in numerous cases upheld the right of the accused to raise any
defence they feel competent to. Therefore in the case of *Chabala v The People*\(^6\)
where the magistrate court attempted to raise an insanity motion of its own
volition, the Supreme Court ruled that unless an accused person is mentally in a
condition that enables him to make a proper defence he would not have a fair
trial. And it is in order to protect him that sections 160 et seq. of the Criminal
Procedure Code exist. But where he is able to make a proper defence and the
only issue is what was his mental condition at the time of the offence it is for him
to decide what defence he wishes to put forward and generally how he wishes to
run his case. If he wishes to defend the matter entirely on the merits, without
raising the question of insanity, that is his privilege.

The courts have further not hesitated to reduce a sentence from one of
murder to that of manslaughter on the basis of diminished responsibility
or to have a person detained during the president’s pleasure where they
see so fit. In *Wolomosi Phiri v R*\(^7\), the accused suddenly killed his
grandmother with great brutality. There was no evidence of any prior
vicious tendencies. The only evidence was to the effect that the accused

\(^6\) (1975) ZR 128
\(^7\) 5 N.R.L.R. 184
had been sane shortly after the attack but might have been temporarily insane at the time of the attack. The defence pleaded insanity and the courts found the accused guilty of the murder of the woman but insane when he did the act.

One of the arguments against the use of premenstrual syndrome as a defence under the head of insanity is its cyclic and transient nature. The courts of France have overcome this by accepting the syndrome under the defence of temporary insanity. The courts of Zambia appear to be in favour of a defence similar to France’s temporary insanity defence. The High court of Zambia indicated this in *the People v Kufekisa*, where it was laid down that, “it matters not how the disease comes in to being or for how long it lasts, what is important is that at the material time the person is legally insane”. In agreement with Stephen J and Birkenhead J in *Beard’s case*, the court referred to the judgment in that case

“But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he

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8 (1975) ZR 188
9 (1920) AC 479 at 499 and 500
would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary."

If the accused can prove on a balance of probabilities that she, at the time of doing the act or making the omission was, through any disease affecting her mind incapable of understanding what she was doing, or of knowing that she ought not to do the act or make the omission, she could successfully use this defence.

It would appear likely that our courts would be inclined to accept the defence of premenstrual syndrome under the traditional defence of diminished responsibility because of the persuasive influence of British cases on decisions of our court.

However, the issue that has led to the slow acceptance of premenstrual syndrome in other jurisdictions would probably have a bearing on its acceptance here as well. The reasons being the lack of extensive research on the subject, and the alleged few, if any, cases of its severe occurrence of it at Zambia’s largest mental health hospital\(^{10}\) In the case of *Lupupa v The People*, \(^{11}\) it was held, *inter alia*, that medical evidence, while weighty, is only one of the factors a

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\(^{10}\) This was learnt in an informal interview with a psychologist from Chainama Hills Hospital, a Mrs. Mayeya. However as they are not permitted to give out any detailed information, this was all the writer could obtain on the subject from them.

\(^{11}\) (1977) ZR 38
court should take into account when deciding whether or not an accused person has acted of his own free will.

In closing it would appear that in the event that the courts find premenstrual syndrome to be a condition short of or not applicable under the heads of insanity or diminished responsibility, they would not accept it until a corresponding amendment is made to the Penal Code of the Republic by the Legislature to include it. In *Chileshe v The People*,¹² a murder case where the learned judge may have been influenced by the fact that the appellant was lame and married to a girl much younger than himself in considering diminished responsibility for purposes of conviction, the appellant court ruled that:

“Once again we point out that these are considerations for the legislature and not for us, if the legislature wishes the courts to have regard to possible mental weakness or other forms of diminished responsibility falling short of insanity as at present defined, then it will say so.”

¹² (1975) ZR 236
Chapter Five

5.1. Conclusion

This paper has attempted to show that premenstrual syndrome is a real condition that could form a valid defence to criminal culpability. However, for premenstrual syndrome to be accepted as a defence to criminal culpability of its own right or under traditional defences, there are a lot of hurdles that would have to be overcome.

Historically, both Law and Medicine have been male institutions and both are a powerful force in human society. When men turn to crime, the focus tends to be on their economic and social background to explain why they committed the crime.¹ This reflects that the criminal justice system was mainly created to deal with male offenders in a time when little was known about the biological basis of behaviour. The criminal justice system in many ways does not cater for women accused of crimes because they make up only a very small percentage of criminals. It cannot be overemphasised therefore, how important an increased understanding of premenstrual syndrome, the condition and the complexities, to the legal and medical fields. For as long as legal and medical personnel view persons attempting to use premenstrual syndrome with unfounded suspicion and

¹ MUNA NDULO AND JOHN HATCHARD, READINGS IN CRIMINAL LAW AND CRIMINOLOGY IN ZAMBIA 75 (1994)
disbelief, they will refuse to recognise premenstrual syndrome as a valid defence and unjustly hold responsible for criminal acts, persons who are not fully responsible for them.

Some sceptics have argued, "If women became violent each month our jails would be filled with women." This is the sort of argument to be expected initially before a fuller understanding of the condition and the rarity of it are appreciated.

There is further, the need for members of society to fully understand the condition and see it not as an attempt to abuse the condition by women, nor as a set back for women in their attempt to be viewed as equals in society.

There was an outcry in England and Australia among women's movements in response to the earlier cases that raised the defence. The main fear appears to be that of stereotyping women as uncontrollable unpredictable, and undependable. It is feared that if pre-menstrual syndrome is accepted as a defence to criminal culpability, it will set back progress made in recent decades in overcoming sexist and unjustified views of women.

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These views are such as those expressed by Dr Edgar Berman, a former member of the Democratic Party Committee on National Priorities, who is quoted by DiLiberto as asserting 14 years ago that women were unfit for executive office because of "raging hormonal influences". "Imagine a female bank president making loans at that period, or worse, a menopausal woman in the White House faced with the "Bay Pigs", the "Button" and hot flushes, Berman said. These views can probably account for why the defence has never been raised in Zambia as well. A further reason is that Zambian women are traditionally taught to be very secretive about their menstruation. The secrecy that surrounds menstruation probably breeds shame and reluctance to discuss it in public. This could explain why there has been no real record of pre-menstrual syndrome or even tension at the main mental health institution in the country.

A major problem that would face the use of this defence in a third world country like Zambia is the mass illiteracy of our women. With such high illiteracy rates, it would not be reasonable to expect these women keep diaries of their behaviour or feelings. Or even sufficiently understand what was happening to them and connect it to their behaviour.

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5 This was learnt in an interview with Ms Mayeya, a Psychologist at the institution.
Further, the high cost of psychiatric treatment and hiring doctors to testify for the defence would be a hindering factor to the raising of such a defence. Even if they could afford a doctor to testify on their behalf, the scarcity of qualified medical personnel with trained knowledge to recognise, diagnose and treat the syndrome would be a further hindrance.

The question that sceptics should answer is should the few women who suffer from the condition lose their defence out of fear of the risk to their entire gender? There is a great need for these fears not to outweigh the interests of the accused who faces a loss of her freedom and in jurisdictions like Zambia where capital punishment still exists, death.

Scutt, in the article, *Premenstrual Tension as an extenuating factor in female Crime*, argues that the needs of the few women who suffer from the condition must not be ignored. She says further:

This.. will allow women with severe symptoms to receive understanding, treatment and the equal benefit of the law without enabling theories of biological determinism to subvert the position of women as a group⁶.

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5.2. **Recommendations**

For premenstrual syndrome to be accepted as a defence, it is important that the medical personnel at our leading mental health centres be willing and able, not only to analyse persons to find out if they truly have the condition in its severity, but also to testify before the courts to this effect and to treat persons with the condition.

Assuming the condition is accepted as a defence, it will not be a universal defence for all women. A doctor trained to recognise, diagnose and treat the syndrome should give medical evidence to a court. This coupled with a heavy burden of proof and evidence showing that a sufferer has a tendency to become violent once a month must be adduced and could include charts, diaries, police files and evidence of family and friends.\(^7\) These methods together will help ensure that only they that really suffer from the condition will succeed if they raise the defence.

Decisions of English courts and other common law jurisdictions have a persuasive effect on our Zambian courts. That pre-menstrual syndrome has been used successfully in other jurisdictions like Britain and Canada under the traditional defence of diminished responsibility would make it more acceptable to

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\(^7\) LOMBROSO AND FERRERO, THE FEMALE OFFENDER (1899)
our courts in the event that it was raised there under. With time it is hoped that it will be accepted as a defence in its own right and codified in the Penal Code. Due to the long process involved in making pre-menstrual syndrome a defence in its own right, it would appear only just, for it to be used under pre-existing defences or at least in mitigation of sentence were it is raised on merit.

A sensitisation of judges to the peculiarities and rights of women should be embarked on. Not only to prepare them to accept pre-menstrual syndrome of its own right or under other defences but also so they can generally be more inclined to upheld women’s rights and treat them with respect. This view has been echoed by Non-Governmental Organisations dealing with women. Emily Sikazwe, then Women in Law and Development in Africa, (WILDAF) chairperson, underscored the importance of it when she said it was important for advocates of women’s rights to work hand in hand with local courts as they are the back bone of justice for so many less privileged people.

It would appear also that, as there exists a conflict among legal theorists as to whether this condition involving a woman’s menses entitling them to a defence should be referred to as premenstrual tension or premenstrual

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8 WOMEN IN TOUCH NEWSLETTER Uphold women’s rights-Lewanika 5 (2/2000)
syndrome. Some like Selwood have argued strongly to the effect that premenstrual tension is a minor condition and cannot be equated to premenstrual syndrome, which has more severe manifestation of symptoms\textsuperscript{9}. On the other hand, British courts refer to the condition warranting an excuse from criminal responsibility as premenstrual tension\textsuperscript{10}. It is therefore imperative that some consistency is arrived at in regard to the subject matter of the defence before any such defence is formed and recognised.

Further, if one of the purposes of law were to prevent the occurrence and recurrence of the forbidden act, more research into a more definite cure or treatment of the condition needs to be found before a defence is framed and accepted. The need for this can be seen from the cases of \textit{R v Smith}\textsuperscript{11} and \textit{R v Craddock}\textsuperscript{12}, which involved the same person. The accused was initially sentenced to probation with the condition that she received progesterone treatment. However when this treatment was slightly varied, she attempted to injure another person. This goes to show that if the defence is accepted devoid of proper advances in the field of medicine, it will not serve the purposes of the criminal law.

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\textsuperscript{9} JANE SELWOOD, PREMENSTRUAL SYNDROME: SHOULD IT BE USED AS A DEFENSE TO A CRIMINAL CHARGE? 2 (1997)

\textsuperscript{10} Reynolds [1988] Crim LR 679
It would, therefore, greatly aid courts and the women sufferers, if there was increased research on premenstrual syndrome in Zambia and the world over.

In conclusion, the words of one Jocelyn Scutt aptly summarise the needs and the reality of the situation in which we find ourselves:

“Until menstruation ceases to be viewed by the populace as a debilitating factor, reasons for ostracism, or to be shamefacedly ignored, and until women criminals are viewed in their political and social context rather than being regarded as aberrations, the truth of whether or not pre-menstrual tension has a part to play in the commission of some criminal acts by some women will remain evasive.\textsuperscript{13}”

\textsuperscript{11} No. 1/A/82 (1982) Crim. App
\textsuperscript{12} (1981) 1 C. L. 49
\textsuperscript{13}Scutt, \textit{Premenstrual Tension as an extenuating Factor in Female Crime}, PSYCHOSIS MENTRALIS (1982) 99
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