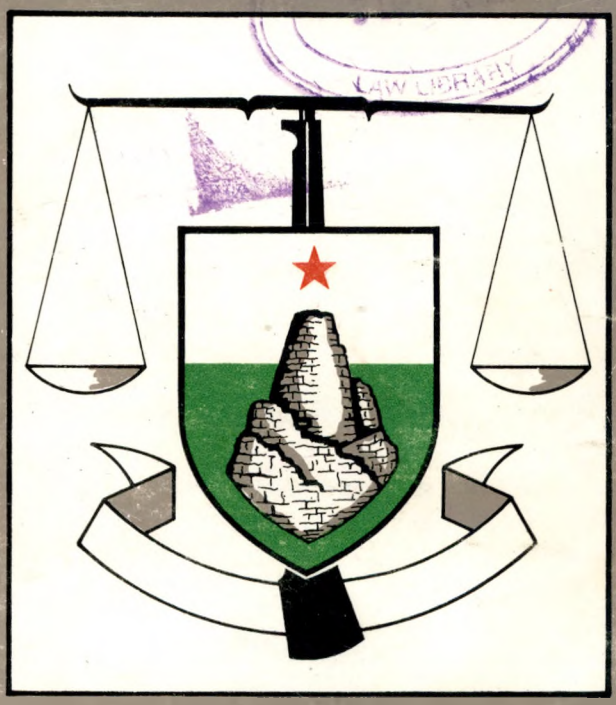

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EXTENUATING CIRCUMSTANCES : A LIFE AND DEATH ISSUE

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1. INTRODUCTION

In Zimbabwe the death penalty is a mandatory sentence for murder where there are no extenuating circumstances.[1] (The only exceptions are that the death penalty may not be imposed upon a pregnant woman or a person under the age of sixteen and the court has a discretion to impose a lesser sentence than death upon a mother who has killed her newly born child.) The trial court is obliged to sentence to death in the absence of extenuating circumstances. On the other hand if it finds that there are extenuating circumstances the court has the discretion to impose a sentence other than death. Thus, even if the court finds that there were extenuating circumstances, it could still proceed to impose the death sentence if, for instance, it concluded that the extenuating circumstances were not strong and were far outweighed by the aggravating features.[2]

The matter of extenuating circumstances is quite literally a life and death issue. Yet the decision as to whether there are sufficient extenuating circumstances to justify the non-imposition of the death penalty is often a very difficult one. Some cases, of course, are quite clear cut, there are some where it is patently obvious that there are absolutely no extenuating circumstances and there are some where the existence of cogent extenuation such as to make the death penalty inappropriate is beyond doubt. Frequently, however, decisions about extenuation are far less clear cut. It may be highly debatable on the evidence as a whole whether the scales are tipped in favour of or against the death penalty. In such cases there is scope for disagreement on the matter of extenuation. That these cases do attract differing opinions about extenuation is clearly evidenced by

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1. See s. 314 (1) of the Criminal Procedure and Evidence Act, Chap. 59.

2. See, for example Phineas v S 1973 (3) SA 877 (RA): S. 314 (1) of Chap. 59 lays down that the court may (not must) impose a sentence other than death if it is of the opinion that there are extenuating circumstances. It follows, therefore, that it can still pass the death penalty even if it finds extenuation. See Hunt (1971) South African Criminal Law and Procedure Vol. 2 (2nd Ed.) p. 388 and 88 SALJ 416. (In the last mentioned article the author argues that the court should be obliged to impose the death penalty where it finds extenuation).

the number of cases in which the Supreme Court has ruled that the trial court was wrong in concluding that there was insufficient extenuation to reduce the sentence from death. This article seeks to explore particularly the decision-making process in these more finely balanced cases and to highlight the dangers involved in making such a vital matter as extenuation depend upon the exercise of subjective moral judgment based on rather nebulous factors. It also attempts to provide a commentary on the leading Zimbabwean cases on extenuation.

2. WHAT ARE EXTENUATING CIRCUMSTANCES?

There have been many attempted definitions of this elusive concept. Perhaps the clearest is that of Holmes J.A in S v Letsolo [3] namely "Extenuating circumstances are facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability". Two aspects of this definition need to be stressed. Firstly, the facts or circumstances must be directly related to or connected with the criminal conduct. The court is only concerned with facts which lessen the seriousness or culpability of that particular criminal conduct. Secondly, extenuation relates to moral blameworthiness. At the stage when extenuation is being considered, the accused has already been found guilty of murder. Any full or partial defence which he may have raised before conviction will thus not have succeeded, otherwise he would have been found not guilty or guilty of the lesser crime of culpable homicide. Facts raised in respect of the failed defence are nonetheless relevant when extenuation is under consideration because they may have a bearing on the moral blameworthiness of the accused. If, for instance, the accused was provoked to some extent, even though he was not so provoked that he lacked the intention to kill, this must be taken into account in deciding upon extenuation. Or if the accused took unreasonable and unnecessary action to ward off an attack and thus the defence of self-defence has failed because it has not met all of the essential requirements for the defence, the fact that the accused was under some form of attack still must be considered at the extenuation stage. Or the accused may have been under some compulsion but not of a sufficient degree to satisfy the requirements of the defence of compulsion: This factor must still be properly considered at the stage of extenuation.

It should also be stressed that the facts vary from case to case and the matter of extenuation has to be considered with reference to the facts of the particular case in question. A factor may be extenuating in the context of one case but may not necessarily be extenuating when considered in the context of the facts of a completely different case. Or a factor which is strongly extenuating on the facts of a particular case may only be very weakly extenuating on the facts of a different case. It should be noted also that it is the cumulative effective of all possible extenuating factors in the particular case which must be considered by the court and the court

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3. See Muchimika v S(2) 1970 (3) SA 476 (A) at 476. Unreported S-93-87 p. 2 of cyclostyled judgment.

"misdirects itself if it considers and dismisses each factor in isolation". [4] The correct approach is thus to isolate all extenuating factors, no matter how weak each individually may be, and to weigh these cumulatively.

3. NEED FOR CAREFUL CONSIDERATION OF EXTENUATION AND THE GIVING OF FULL REASONS FOR DECISION ON EXTENUATION

As has been said previously, the finding on extenuation is of crucial importance. As a person's life is at stake, there can be no room whatsoever for superficial treatment when the courts are dealing with this issue. It is essential that the trial court examines the matter of extenuating circumstances in painstaking detail and that it articulates fully its reasons for its decision for its finding. Unfortunately trial courts have not invariably dealt with extenuation as thoroughly as they should. In a number of recent cases the Supreme Court has drawn attention to the fact that it is imperative that full reasons for its decision on extenuation be given by the trial court so that the Appeal Court is in a position to assess the validity of these reasons. The insistence by the Supreme Court on the giving of full reasons for decisions on extenuation will lead to salutary results. The giving of full reasons necessitates the detailed exploration of all relevant considerations and avoids shallow treatment of this vital matter. Obviously convincing reasons can only be given for a decision if the facts are considered in detail and then a considered decision about these facts is arrived at. A further reason why trial courts should be obliged to deal with the matter of extenuation with great care is that when, as usually happens, the case goes on appeal to the Supreme Court, the Appeal Court has only a limited capacity to interfere with the trial court's discretionary finding on extenuation.

In Mateketa v S [5] for instance the Chief Justice stated at p.9 of the judgment that "the omission to give reasons is an irregularity" which allows the Supreme Court the right to interfere with the trial court's discretionary finding on extenuation. As no reasons were given, said the Chief Justice, the Appeal Court was entitled to examine the record to find out whether there were any extenuating circumstances.

4. TWO METHODS OF DEALING WITH THE DEATH PENALTY ISSUE

In Zimbabwe over the years two different approaches have emerged as to how to deal with the matter of extenuation. [6] In theory the same end result should be arrived at whichever of these two approaches is employed. The first method may be described as the single stage or composite method and the second as the two stage method.

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4. S v Sigwahla 1967 (4) SA 566 (A) at 571.

5. Unreported S-99-85.

6. In a number of cases the Appeal Court has stated that either of the two approaches are permissible. See, for example, S v Phineas, 1973 (3) SA 897 (RA); 1973 (1) RLR 260, S v Jacob 1981 ZLR 1(A). The two stage approach was adopted in Mudzimu v S. Unreported S-965-82 and Moyo v S unreported S-186-82.

A. THE SINGLE STAGE OR COMPOSITION METHODS

Basically this entails weighing all mitigating factors against all aggravating factors in order to make a finding as to whether on balance extenuating circumstances exist such as to justify the non-imposition of the death penalty. Thus under this approach it is possible for the trial court to conclude that despite the existence of mitigating features there is no extenuation because those mitigating factors are outweighed by the aggravating features. If extenuating circumstances are found to exist presumably the court will impose a sentence less than death as it has already given consideration to the matter of aggravation in deciding whether there were extenuating circumstances.

B. THE TWO STAGE METHOD

STAGE 1

The trial court seeks to identify whether there are any extenuating factors, no matter how weak these may be. At this stage the court disregards all aggravating features.

STAGE 2

The court now seeks to identify any aggravating features. Having done this it weighs the aggravating features against the extenuating factors and decides whether, on balance, the death penalty should be imposed. It could thus conclude, that despite the existence of some extenuating factors the death penalty should nonetheless still be imposed because, for instance, the extenuating factors are weak and the aggravating features are very strong.

Although both of these approaches entail a consideration of the same sorts of material, it is the second approach has these advantages [7] :

(i) In terms of s. 314 of Chap. 59 the court may (not must) impose a sentence other than death if it decides that there are extenuating circumstances. The first approach seems to be at variance with the wording of this section insofar as the court simply decides whether or not extenuating circumstances exist and, presumably, if it decides that there are no such circumstances it will automatically impose the death penalty. On the other hand, the second approach enables the court to decide, as the section specifies, whether, despite the extenuating factors, the death penalty is still nevertheless to be imposed.

(ii) More importantly, the second approach necessitates a careful stage by stage examination of the factors. The first approach can lead to a more superficial treatment of extenuation in that if all the aggravating and mitigating factors are considered together, the trial court may not properly separate out all of these various factors and meticulously decide upon the weight to

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7. It will be suggested later that there is a completely different approach to extenuation which could be adopted which might lead to a fairer and more consistent handling of extenuation.

be attached to them. The second approach, on the other hand, obliges the court to articulate exactly what, if any, extenuating features are present and then subsequently to pin down what aggravating features there are. It must then finally make a decision whether the aggravating features are sufficiently strong to justify the step of imposing the death sentence, even though there were some extenuating circumstances.

There has been no definitive decision in recent years in which the Supreme Court has expressed a direct opinion as to which of these two approaches it favours. However, it is implicit in a number of recent supreme court cases that the Supreme Court now favours the single stage method. [8]

5. PRESENT SAFEGUARDS AFTER THE DEATH PENALTY HAS BEEN IMPOSED BY TRIAL COURT

A. APPEALS TO SUPREME COURT

There is virtually an automatic right of appeal against a death sentence to the Supreme Court. [9] (There is no system of automatic review of all death sentences by the Supreme Court.) However, despite the fact that almost all death penalty verdicts are subjected to scrutiny by the Supreme Court on appeal, the capacity of the Supreme Court to interfere with death sentences is limited. The matter of sentence is a matter within the discretion of the trial court judge. Therefore the Supreme Court can only set aside a death sentence passed by the trial court if:

(i) there was some irregularity or misdirection on the part of the trial judge or,

(ii) the finding that there were no extenuating circumstances was one which no reasonable court could have arrived at or the death sentence was disturbingly inappropriate or manifestly excessive in the light of all the circumstances. [10]

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8. The issue in these cases was whether, if extenuating circumstances were found to exist, the death penalty could still be imposed on the basis that the manner of killing was such in terms of brutality that this factor overrode the extenuation. The Supreme Court emphatically laid down that if extenuating circumstances were found, the factor of the brutality of the killing could not be used in order to justify a decision to impose the death penalty despite the presence of extenuation. These decisions were Mateketa v S, S-99-85, Chaluwa v S S-75-85, Mutsunge & Anor S-36-87 and Muchimika v S (No. 2) S-93-87.

9. See statement by McNally J A to this effect in Muchinika v S. Unreported S-121-85 at p. 1.

10. See Timothy v S. Unreported A-178-71 at p.; X v S. Unreported A-178-77 and Zvikaramba v S A-310-77.

Because the appeal court has such a limited capacity to interfere with the discretionary finding of extenuation, this is a further reason why the trial court should deal with this matter with great care. As Holmes J A said in S v Letsolo "Every relevant consideration should receive the most scrupulous care and reasoned attention; and all the more so because the sentence is unalterable on appeal, save on an improper exercise of judicial discretion, that is to say unless the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate." [11]

Two further points need to be commented upon. Firstly, it is suggested that we should have some sort of provision which makes it mandatory for the Supreme Court to review any cases where the death penalty has been imposed but no appeals have been lodged. In other words the Supreme Court should scrutinise every single capital case and not only those (although these will be the great majority) which come to them by way of appeal. Secondly, it is submitted the capacity of the Supreme Court to interfere with death sentences imposed by trial courts should be expanded. Under the present system there have been a number of cases where the Appeal court judges have made such statements as "Had I been responsible for sentence in this case, I think I would have taken the view that in all the circumstances, a sentence other than death was justified but as there was no misdirections and as it cannot be said that the sentence was disturbingly inappropriate I cannot interfere with the trial judge's exercise of his discretion in this matter." [12] The rationale for non-interference in the absence of a misdirection or disturbing inappropriateness of the sentence, is that it is the trial judge who is vested with the discretion in regard to sentence. The matter of extenuation, however, is different from verdict. With verdict the trial judge is in a far better position to decide this having heard all the witnesses and having formed impressions about their credibility and so on. With extenuation, on the other hand, the appeal judges are in as good a position as the trial court to decide this matter as they have before them the record of the trial proceedings which includes all facts relevant to extenuation together with the trial judge's reasons for his decision on this matter. The decision on extenuation is a matter of value judgment as to how the extenuating and aggravating factors should be weighed up. Surely if these appeal judges decide that in their unanimous judgment they would not have imposed the death penalty in all the circumstances, the accused should be given the benefit of the doubt and the death penalty should be set aside even if the Appeal judges can't go as far as to find that the sentence was disturbingly inappropriate. Admittedly if the Appeal Court had such a power, it would only be in the rare case that it would be applicable, as the Supreme Court has not been very reticent about finding inappropriateness or manifest excessiveness where it has disagreed with the trial court's finding about the death penalty. The point is, however, that the Supreme Court should be relieved of what is an unnecessary constraint to overturning the impositions of the death penalty in appropriate circumstances. Surely no-one should hang if the appeal court is of the opinion that it would not have imposed the death penalty even if the trial court judge has properly exercised his discretion.

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11. 1970 (3) SA 476 (A) at 477.

12. For a statement of this nature see Timothy v S. Unreported A-178-77 for instance.

B. EXECUTIVE CLEMENCY

The President's power to set aside a death sentence imposed by the courts and to substitute some other sentence is contained in section 67 of the Constitution. The relevant portions of this section are "67(1) The President may, subject to such lawful conditions as he may deem fit:

(a) grant a pardon to any person concerned in or convicted of an offence against any law;

(b) substitute a less severe punishment for that imposed by any sentence for such an offence."

6. INDIVIDUAL FACTORS WHICH MAY BE EXTENUATING

The factors dealt with below come up in various permutations in cases of murder. In one case only one factor may be present whereas in another a whole variety of these may have entered into the picture. All the circumstances referred to by Hunt relate either to subjective influences affecting the functioning of the mind and thence conduct or external factors influencing conduct which may serve to reduce the blameworthiness of the behaviour. These individual factors will now be considered before making some more general observations about the common characteristics of cases of murder which have attracted penalties other than death.

Hunt [13] provides the following list of factors which have been considered as extenuating in the various cases:

A. Mental condition, other than mental condition warranting special verdict.
B. Provocation and other emotional disturbance.
C. Intoxication.
D. Legal intention only.
E. Partial exercise.
F. Belief in witchcraft.
G. No premeditation.
H. Compulsion.
I. Youthfulness.
J. Political, social or other motives which are not ignoble.
K. Minor degree of participation.
L. Repentance and endeavours to assist victim before crime completed.
M. Mercy killing (consent of victim). [14]

A. MENTAL CONDITION, OTHER THAN MENTAL CONDITION WARRANTING SPECIAL VERDICT

In the case of Nyathi v S [15] Beadle C J stated " It is true that

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13. op. cit pp. 381-386.

14. At the end of this section there is a compilation of Zimbabwean cases which give guidance on the application of these individual factors.

15. Unreported A-12-74 at p. 5.

judged by the standards of the ordinary decent man, the appellant is an abnormal man, but there are few criminals who commit cold blooded murders, and who are sentenced to death for these murders, who can be said to be normal persons if judged by the standard of normal behaviour which one expects from decent citizens. There is some element of abnormality about all criminals who commit cold blooded brutal crimes of murder. The question here is to decide when that abnormality reaches a stage which justifies a court in imposing a sentence less than death. It would be highly undesirable, in my view, to attempt to lay down any hard and fast rules which would indicate when such abnormality was sufficiently great and when it was not. Each case must be judged on its own merits. The judge must make a value judgment and decide whether the circumstances are such, when all ... the merits of the case are weighed up, as to justify the imposition of a sentence other than death."

In our law the provisions relating to when the special verdict is to be rendered are very broad. It includes cases where the accused is suffering from a temporary disorder or disability of the mind at the time of the crime such as to make him not responsible at law for his actions. [16] Given the breadth of these provisions, all serious permanent or temporary mental conditions which cause mental irresponsibility at the time murders are committed are encompassed. However, as Beadle C J points out in the quotation above, even though a special verdict is not warranted, any mental condition or abnormality which may have influenced the behaviour of the accused at the time is a possible extenuating circumstance. The nature and extent of the abnormality and the effect upon the accused's behaviour must be carefully considered in determining whether this factor is extenuating. From a policy standpoint it would seem that where the accused's conduct was heavily influenced by some mental abnormality or diminished responsibility such as a delusional belief or mental retardation, (but not such an abnormality as to require the special verdict), extenuating circumstances should be found as this type of murder is less reprehensible than a murder committed by a person with a normal mind. [17]

B. PROVOCATION (AND OTHER EMOTIONAL DISTURBANCES)

Glanville Williams in his Textbook of Criminal Law at p.477 cites the statistic that "half of the intentional killings of adult males are in a rage or a quarrel, and another 14 percent in jealousy or rage." A sampling of the Zimbabwean cases on murder similarly indicates that a high proportion of murders takes place in circumstances where the accused lose their tempers after receiving verbal provocation or after witnessing events which provoke them. Very frequently the persons losing their tempers have been drinking and the consumption of alcohol is a contributory factor to the violent behaviour. Alcohol lowers inhibitions so the intoxicated person may more easily lose his temper, over-react to any provocation received and more readily respond with extensive violence. We are all familiar with the drunken brawl

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16. See Feltoe (1971) "Sane Automatism: The Demise of a Defence" (1) Rhodesian Law Journal 19, Feltoe (1979) "Dreaming, day-dreaming and the defence of automatism" (1) Zimbabwe Law Journal 12.

17. For a commentary on the South African cases see Hunt op. cit. 381.

situation where the incident which sparks the violence may be of a trivial nature. Another common situation is the domestic quarrel where again the final sparking incident may be of an insignificant character. Yet another frequent cause of anger is suspicion that a girl friend or a spouse has been unfaithful.

These matters have to be carefully considered when it comes to the stage of extenuation. That they are being considered at that stage pre-supposes that the trial court has already rejected the defence of provocation or the combined defences of intoxication and provocation. This means that the court will already have found that the accused had not so lost his self-control in response to the provocation received that he had not formed the requisite mens rea for murder (or if he had also been drinking, the combined effects upon the accused of the drink and the provocation were not such that he failed to form the intention to kill). It will also have been found under the second rung of our test for provocation that the action of the accused was not partially excusable on the basis that the reasonable person would have reacted similarly in the self-same circumstances by intentionally killing.

Thus by the stage of extenuation the court will already have ruled that the accused was guilty of murder as he had killed his victim with actual or legal intention and the action taken was unreasonable in response to the extent of provocation received. But now on the separate issue of moral blameworthiness "nothing which influenced [the accused's] mind or emotions and thus his conduct can be ruled out of consideration merely because it was unreasonable for him to allow it to influence him..." [18] Therefore the court must carefully consider the effect which the provocation (or the drink and provocation) has had upon the accused's mind and thereby on his conduct. It may be that his mind was very little influenced, if at all, by these factors and that he knew full well what he was doing when he set upon his victim. (The nature of the accused's conduct may be such that it shows that he was little affected by the provocation). On the other hand, although he may just have been able to form legal intent to kill, he may have been seething with rage and may have not been able to stop himself from fatally assaulting his victim. One problem which arises with the latter type of case is that the precipitating factor may have been of a very minor nature. If that is the case, should the courts rule that, despite the extreme anger of the accused, no extenuating circumstances exist because his action in relation to the provocation received was totally disproportionate and unreasonable? It is submitted that to adopt such an objective approach at the extenuation stage is not correct and is unfair to the accused. [19] His moral blameworthiness is surely less

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18. Hunt op. cit. 379.

19. It is arguable that the application of what seemed to be an objective test in one case was unfair. In Ndhlovu v S. Unreported A-33-73 the court accepted that what drove the accused to carry out the murder was his obsessional belief that his father had killed the accused's wife. This belief, said the court was not extenuating because it was "not based upon reasonable grounds and was wholly irrational in the circumstances" (because, for instance, police investigations found that there was no substance in the accused's suspicions).

in a situation when he acted precipitously and impetuously because his passions were inflamed even though the sparking incident may have been of a minor nature. Such a case is of a different character from the case of, say, the accused who deliberately and viciously attacks his enemy intending to cause his death, using the excuse of some slight provocation to launch his attack.

Hunt points out that emotional upset arising out of events spread over a long period of time and not strictly amounting to 'provocation', may sometimes constitute extenuating circumstances. [20]

As regards marital quarrels and quarrels between lovers, in the case of S v Karuze Beadle C J adopted a fairly hard-line approach to these situations. This is what he said:

> "There are very few murders which are committed when emotions are aroused because of marital infidelity or suspected infidelity which are committed when the accused's mind is not, to some extent, unbalanced by what has upset him. If every case where an accused committed a crime because his mind was temporarily unbalanced by something which had disturbed him was regarded as a case where extenuating circumstances existed, there would be relatively few murders when it would not be possible to argue that extenuating circumstances existed. The mere fact that a murder is not committed - if I may use the expression - in cold blood, does not mean that extenuating circumstances exist." [21]

The Karuze case was an unusual one as the accused did not kill his wife whom he suspected of infidelity but instead a completely innocent child. Where, however, the accused believes his wife or lover to have been unfaithful and a full scale quarrel erupts over this and, during this heated argument, the accused kills the woman having only legal intent to kill, it is submitted that a sympathetic approach should be adopted when it comes to extenuation. The sort of approach which, it is submitted, our courts should adopt is the one adopted by the South African Appellate Division in the case of S v Meyer. This is summed up in the headnote as follows:

> "In general, and in the absence of evidence of aggravation, the mental tension which leads to a murder committed in a situation where the act in question is usually the consequence of a

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20. Op. cit. p. 382. See the case of S v Zuze. Unreported A-200-77 where there had been a long history of discord leading up to the situation in which the step-son after verbal provocation killed his step-mother. See also the note on a recent South African case on emotional stress in (1985) 102 SALJ 240. In this note the author argues that this case was incorrect insofar as the case admitted a defence of 'emotional stress'. This was, however, a case of cumulative provocation and is the sort of case where extenuation might apply.

21. 1971 (1) RLR 169 at 171.

quarrel between people who have a love relationship with each other, a quarrel out of which jealously and provocation often arises and which, because of the circumstances, can lead to sudden physical assault and even death, can be regarded as an extenuating circumstance, and indeed so extenuating that the death sentence ought not to be imposed. Even should there be premeditation in such a situation of conflict, extenuating circumstances could, depending on the facts, be found which would make a sentence other than the death sentence appropriate. Every case should naturally in every instance be treated on its own merits." [22]

C. INTOXICATION

Again if this factor is under consideration at the stage of extenuation, the court will previously have found that the accused was not so drunk that he was unable to form the requisite intent to kill. In other words, he will previously have been found guilty of murder on the basis that when he caused the death he had done so with actual or legal intent to kill. What is in issue therefore at the stage of extenuation is the impact of the alcohol or drugs upon the accused's mind and his behaviour when he perpetrated the murder. The degree of intoxication thus needs to be carefully considered. The quantity of alcohol or drugs consumed needs to be looked at but the important question is how the behaviour of the accused was affected by the quantity of intoxicant consumed. With some people it takes only a very small quantity of alcohol for them to become extremely drunk whereas with others who can hold their drink, even if they consume considerable quantities of alcohol they do not become perceptibly drunk. Finally, therefore, the critical issue is how far was the accused's conduct, the product of the intoxicant? The answer may be not at all, only to a minimal extent, to a significant degree or to a very appreciable extent. Where the influence of the intoxicant in producing the conduct was considerable, this should normally serve to reduce the moral blameworthiness of the accused despite the fact that he got himself into the intoxicated state by voluntarily consuming the intoxicant. But, as to Hunt points out, it has been held to be a misdirection in South Africa for the court to require proof that the accused "was so intoxicated that he would not otherwise have committed the murder." If the liquor has to some extent impaired or affected the mental faculties or judgment then the court must consider whether this constitutes extenuation. It is not a pre-requisite that the accused was drunk to an advanced extent. [23]

The general policy approach in South Africa is summed up in this quotation from Holmes J A in the case of S v Ndhlovu. [24]

"Intoxication is one of humanity's age-old frailties which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through

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22. 1981 (3) SA 11 (A).

23. op. cit. p. 382.

24. 1965 (4) SA 692 at 695.

> the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do things which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness... as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design...[The] basic [is that] the court has a discretion to be exercised judicially upon a consideration of the facts of each case, and in essence one is weighing the frailties of the individual with the evil of his deed...."

D. LEGAL INTENTION ONLY

The fact that the murderer or the accomplice had only legal intention to kill may be an extenuating circumstances. In Mharadzo v S [25] Beadle C J stated:

> "I do not wish it to be inferred from this that, where the Court finds that only a constructive intent to kill is proved, the Court must necessarily find that is a circumstance of extenuation, but I do suggest that, where only a constructive intent to kill is proved, the Court will examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances." (My emphasis)

It is submitted that the fact that there was no actual intent to kill but only legal intention is a factor which should normally extenuate. Granted there are cases where it looks as if there may well have been actual intent to kill but the accused is given the benefit of the doubt and a finding of murder with legal intent is made. However, usually the murderer with actual intent is far more morally blameworthy than the murderer with legal intent. If the aim and object of the accused is to kill, this is a different character of murder than the situation where the court finds as a matter of inference the accused must have and therefore did foresee the real possibility of death and continued to act reckless as to whether the death eventuated. [26]

E. PARTIAL EXCUSE

Partial excuse is a somewhat misleading heading for the category of cases which Hunt has in mind here. The cases which he includes in this category are those where the accused have used excessive force in the course of self-defence, defence of property [27] or the

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25. 1966 (2) SA 702 (RA) at 703 C; 1966 RLR 240 quoted in Jacob v S 1981 ZLR 1(A) pp G-7 See also Leonard v S A-128-70.

26. Whaley (1967) "Criminal in our Courts: Dolus Eventualis" Responsa Meridiana 117 and Feltoe (1985) "States of Mind" Zimbabwe Law Journal.

27. It is by no means certain that in our law we will follow the South African case of S v Bradbury 1967 (1) SA 387 (A) and allow as a defence to murder the defence that the accused killed to protect his property. The policy aspects will need to very carefully considered before a decision is made on this point.

apprehension of a suspected offender. These accused would have been able to raise successfully full defences to charges of murder if they had used a reasonable degree of force. If they have used totally disproportionate force, however, the defences raised will fail and the accused will be convicted of murder. The reason why they used such force may still nevertheless constitute extenuation in Zimbabwe as well as in South Africa. [28]

F. BELIEF IN WITCHCRAFT

If the accused killed in order to obtain parts of the victim's body for medicine, his belief in witchcraft would not be an extenuating circumstance. But in a case where the accused has killed a supposed witch to protect himself, his family or the community from the activities of the witch, the accused's avid belief in the evil power of witchcraft may extenuate. This is particularly so if the accused believes that the witch has caused deaths by witchcraft practices and is threatening to cause further deaths by such practices. To disregard a deeply held belief on the part of the accused on the basis that a such a belief is unreasonable is totally unfair. [29]

G. COMPULSION

Although this has not yet been settled in our law, where an accused kills or assists in the killing of another because he is under an immediate and inescapable threat of being killed unless he so murders the other, it would seem that our courts would allow compulsion as a defence to murder. (Even if this is not so, these would certainly be extenuating circumstances in this case, unless perhaps the accused had voluntarily joined a dangerous gang knowing that the gang engaged in violent activities and would threaten violence to ensure that its members carried out all instructions).

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28. See Hunt op. cit. p. 383. The most important case in our system is that of R v Detsera 1958 (1) SA 762 (FSC) which has been followed in Zimbabwean cases.

29. See L Aremu (1980) "Criminal Responsibility for Homicides in Nigeria and Supernatural Beliefs" 29 ICLQ 112 and Feltoe (1975) "Witch Murder and the Law" (1) Rhodesian Law Journal 40 In the case of Dube v S SC-33-82 Fieldsend C J said at p. 4 that in the unfortunately numerous cases where the accused's belief in witchcraft leads the accused to kill a person whom he believes is making the wicked deeds by witchcraft "is almost always regarded as extenuating circumstance." This case did not involve such a situation. Rather it was a case where the accused killed his father because of his obsessional belief that he was suffering personal misfortune as a direct result of his father's failure to conduct the required ceremonies which should have been conducted after his mother's death to put her spirit to rest. It is arguable that the trial court, despite its finding of actual intent to kill, was incorrect in not treating the strongly held belief that his misfortune stemmed from offence caused to ancestral spirits as a sufficient extenuating circumstance to justify a penalty other than death."

But if the requirements for this defence are not fully satisfied, (as is usually the case, there frequently being ways available to break away from the compelling influence by, say, going to the police) the fact that the accused has not voluntarily carried out the murder but did so because of threats of violence to himself or to members of his family is prima facie extenuating because a murder carried out because of fear is less morally blameworthy than a murder carried out from motives of, say, revenge or greed. The court will, however, have to examine factors such as the nature and extent of the threat, whether or not the accused could easily have freed himself from that threat and whether or not the accused is to blame for placing himself in a position where such threats would be likely to be levelled against him. [30] It is submitted that we should give serious consideration to raising the age below which the courts cannot impose the death sentence to 18. In Simbi & Anor v S [31] Fieldsend CJ stated at p.3 "In South Africa and indeed many other countries, the age [below which a person cannot be sentenced to death] is 18 which could with advantage be adopted in this country.")

H. ABSENCE OF PREMEDITATION

The moral blameworthiness of most persons who commit non-premeditated murders is usually less than those who commit premeditated murders. In some situations this may not be so. Thus, for instance, if a person without planning to do so, on the spur of the moment decided to kill an innocent person who had not provoked him in order to rob him, and he uses very brutal methods to do so, the absence of premeditation obviously in no way reduces his moral blameworthiness. Very frequently, however, the non-premeditated murder is carried out with only legal intention in emotional circumstances. Typical of these types of cases are drunken brawls and various domestic quarrels. One writer has expressed the difference in seriousness between sudden impulsive killings and premeditated killings in these terms:

> "It has been convincingly argued that when a killing is impulsive, concepts which emphasize rational processes - forming an intention or contemplating a risk - have little meaning. The actor lost his self-control for whatever reason and the enquiry as his mens rea will amount more or less to the negation of duress, insanity and fundamental mistake coupled with some minimal notion of foresight of consequences'...
>
> Planned and premeditated killing is different. Here the actor has written the script for the drama that ensues. Having reasoned his way to kill he presents a unique threat to his intended victim's life and, more generally, to the rules necessary for the preservation of social order. This is not to say that in all cases his crime is more serious than that of one who kills impulsively; we can think of very heinous instances of impulsive killing and less heinous examples of planned and

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30. See Hunt op. cit. p. 384.

31. Unreported A-118-82.

premeditated killing. It is however to recognize that it is different and in general more seriously wrong than other killings." 31

From a policy standpoint, it would seem that generally non-premeditated murders should be treated differently from premeditated murders. Deterrence cannot be a justification for a capital punishment in cases of sudden, impulsive, emotional killings. In such cases the accused acts without thinking about the consequences and the threat of the death penalty cannot act as a deterrent. From the standpoint of deterrence the death penalty should be reserved for cases in which the imposition of this sentence may serve to discourage other potential murderers. [32] From the standpoint of retribution the question needs to be asked whether the sudden, impulsive killing by a person who is most unlikely ever to commit another murder should be treated on a par with the dangerous criminal who has used violence on a number of previous occasions against innocent people and has ultimately killed someone.

I. YOUTHFULNESS

In terms of s. 314 of the Criminal Procedure and Evidence Act Cap. 59 our courts cannot sentence to death anyone under the age of sixteen. Any accused who is sixteen or over may be sentenced to death, even though under the Age of Majority Act 15 of 1982 a person does not attain majority until he reaches eighteen. However, with young murderers (particularly those who are close to the age of sixteen) the courts are obliged to give very careful consideration to whether youthfulness constitutes sufficient extenuation to justify the imposition of a sentence other than death. The courts are obviously very loathe to pass the death sentence on young offenders as youthfulness is associated with "immaturity, a lack of experience of life, thoughtlessness and especially a mental condition of susceptibility to external influences, [particularly those emanating from] adult persons." Thus the policy of the courts is to give sympathetic consideration to the fact of youthfulness because to measure the youth's conduct using the yardstick of adult behaviour would be unfair. Considerations of humanity also apply as "no ivilized State is anxious to send teenagers to the gallows" unless there are very exceptional circumstances. [34] In South Africa the courts have adopted the approach that prima facie a youthful murderer is to be regarded as immature and on that ground extenuating circumstances will always exist unless it is found that the youth acted out of "inherent wickedness" in committing the murder. If the youth acted under the influence of an older person or because of his youth and inexperience he is not acting from inherent wickedness, factors to be considered include motive, personality and mentality,

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33. P. MacKinnon (1985) "Two Views of Murder" 63 Canadian Bar Rev. 130.

32. See, for instance, J. Andenaes (1966) "The General Preventive Effects of Punishment" University of Pennsylvania Law Review 949 and Bedau The Death Penalty in America (3rd Ed.) 1982 OUP.Chapter 4. Strong doubts can be raised as to the deterrent impact of capital punishment even in relation to premeditated killings.

34. The quotations in this paragraph are from the judgment of Rumpf C J in S v Lehnberg and Anor 1975 (4) SA 553 (a) at 560.

past history, nature of crime, manner of commission and any other relevant factors.

In Zimbabwe, however, in the case of S v X [35] Lewis J P expressed the opinion that the "inherent wickedness" test was not very helpful, was not easy to apply in every case and should not be applied as a rule of thumb. Later he stated that, in finding that there was no extenuation, despite the youthfulness of the accused, "the trial court had not overlooked the general principle that a person of this age is, generally speaking assumed to be less mature than an adult" and the trial judge had examined to what extent it could be said that what he did was attributable to his immaturity. Subsequent to the reservations expressed by Lewis JP about the "inherent wickedness", the test has been applied by the Supreme Court in a number of cases and in Muchinika v S (No. 2) [36] Korsah JA cited these judgements and said that he saw no reason to depart from it. (In this case the appellant was under 19 at the time he committed the murder. The Appeal Court found (at least impliedly) that the youth had committed the murder not out of inherent wickedness, but because of personality defects which he had acquired as a result of being subjected to traumatic experiences at a tender age.)

It is submitted that this approach of treating youthfulness as Prima facie extenuating should especially be applied not only to youths between 16 and 18. As Rumpff CJ said in the Lehnberg case, speaking about persons of 18 and 19 years of age, "there are of course degrees of maturity where teenagers are concerned, but naturally no teenager has the maturity of an adult". [37]

Only if the court is quite satisfied that the murder was in no way the product of youthful immaturity should it rule that the prima facie assumption falls away and no extenuation exists on the grounds of youthfulness. In most cases, especially where the accused was close to 16, youthfulness is likely to have played some role in the causation of the crime and thus extenuating on this ground will apply at least to some extent. It may be that it was only a weak extenuating circumstance if say the youth was reasonably mature for his age and somewhat worldly wise, but yet still not as experienced as an adult and the commission of the crime was still partially the product of this inexperience. Where such extenuating circumstances on the grounds of youthfulness exist, it is submitted that it should take extremely strong aggravating circumstances to justify any decision that the death penalty should still be imposed. Again from the general policy standpoint we should be extremely reluctant to hang youthful offenders.

J. POLITICAL, SOCIAL OR OTHER MOTIVES WHICH ARE NOT IGNOBLE

As regards social motives, Hunt cites a case where the accused believed that the person he killed was a witchdoctor who was a danger

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35. A - 132 - 74.

36. 40. Unreported S-93-87.

37. op. cit. at 560.

to the community and apparently this factor was taken into account in finding extenuating circumstances.[38]

Regarding political motives, whatever may be the position in the political circumstances of South Africa where the oppressed majority are fighting to overthrow the apartheid regime, it would seem that in Zimbabwe the fact that the murder was done with a political objective will not be extenuating but may indeed be aggravating. Thus in the case of Moyo v S,[39] for instance, it was stated that the killing of political opponents does not render the crime any less blameworthy.

K. MINOR DEGREE OF PARTICIPATION

The accomplice is convicted of murder on the basis that he participated or assisted in a murder knowing that the principal offender would kill or at least foreseeing the possibility that the principal might kill. If the accomplice was only a very minor participant in the enterprise this may be an extenuating circumstance. The nature of the circumstances need, however, to be carefully examined. If, for instance, the accomplice plays a minor role in an armed robbery and he knew full well before the robbery commenced that his fellow criminals were armed with deadly weapons and had every intention of using them to kill, the minor extent of participation might not necessarily be extenuating. Where, however, the accomplice was convicted on the basis of legal intention in that he foresaw death as a possible and not probable outcome of the enterprise, minor participation should normally be extenuating.

In the case of Mbirinyu v S[40] Beadle C J had this to say about the significance of the fact that the appellant was a socius criminis:

> "The fact that an accused is a socius and not a principal offender is always an important factor to be taken into account in assessing his moral blameworthiness, and the principal factor to be taken into account here is the extent to which the socius makes common cause with the principal offender, as there is a very wide range of moral blameworthiness in cases of this sort. The position of the socius might be that he played a very unimportant part in the actual commission of the crime but was nonetheless a socius. In such a case the moral blameworthiness of the socius would be very much less than that of the principal offender. In another case the part he played in the offence might be so great as to identify him completely with the principal offender, in which case his moral blameworthiness could be considered to be as great as that of the principal offender."

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38. Op. cit. p. 386..

39. Unreported A-71-81.

40. Unreported A-149-73.

L. **REPENTANCE AND ENDEAVOURS TO ASSIST VICTIM BEFORE CRIME COMPLETED**

This may be extenuating but probably only if combined with other factors. [41]

M. **MERCY KILLING (CONSENT OF VICTIM)**

If an accused kills a person who is terminally ill or is suffering from an incurable disease, and who has pleaded for the accused to end his pain by terminating his life, this has always been treated by our courts as extenuating.

To the category listed by Hunt, I would like to add some further categories.

N. **KILLING BY A MOTHER OF HER NEWLY BORN CHILD**

Where a mother has killed her child soon after it has been born, even though there may not have been a post-natal mental disturbance such as to attract a special verdict, nonetheless any lesser mental perturbation influencing the conduct will be extenuating. So too other factors in this situation will also extenuate, such as the fact that the accused was a young unwed mother who has been abandoned by the man who made her pregnant or the accused is married with a large family and is living in circumstances of destitution and the support of an additional child will be an unbearable extra burden.

O. **WITHDRAWAL FROM ENTERPRISE BEFORE MURDER CARRIED OUT, BUT NOT DISSOCIATION SUCH AS TO EXEMPT FROM LEGAL LIABILITY**

This situation is dealt with in a recent Supreme Court case Ndebu and Anor v S. [42] In that case the accomplice had gone with another to rob a house. To the knowledge of the accomplice his fellow criminal was carrying a gun. The accomplice had fled from the house when a female inhabitant had screamed and the accomplice was not physically present when the principal offender fired the fatal shot. On all the facts, the Appeal Court found that the accomplice was nonetheless guilty of murder, but it ruled that, as he had played a subsidiary role and as he had abandoned the common purpose just before the fatal shot was fired, there were extenuating circumstances.

P. **ABSENCE OF PREVIOUS CONVICTIONS**

This seems to have been treated as a factor to be considered in respect of extenuation. [43]

7. **EVIDENCE RELATING TO THE MANNER OF THE KILLING**

Evidence relating to the manner of the killing (e.g. things like the extent of planning, degree of brutality of the killing, the number of blows struck and so on) may be relevant to the matter of extenuation

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41. See Hunt op. cit. p. 386.

42. Unreported SC-72-85.

43. See, for instance, Zuze v S A-200-77.

in so far as this evidence may provide either evidence tending to substantiate or to contradict the alleged extenuating circumstances.[44] A few examples will serve to illustrate this point. If the accused alleged that he was extremely drunk at the time of the killing, this may be disapproved by evidence of careful and methodical planning and execution. Or if the accused alleged that he completely lost his self-control as a result of provocation, again evidence of a seemingly rational and methodical course of conduct before and during the murder would tend to disprove the allegation of loss of self control. On the other hand, a murderous attack of a wild and random nature may be consistent with and tend to verify alleged loss of self control, however, the court has already found that there were extenuating circumstances, the court cannot then proceed to find that because of the brutal and callous nature of the killing these extenuating circumstances were somehow neutralised or overriden and, on this basis, then proceed to impose the death penalty. That this is an entirely wrong approach was made quite clear by the Supreme Court in Mateketa v S.[45] Chaluwa v S[46] Mutsunge & Anor vs S[47] and Muchimika v S.[48] Following the approach adopted by the South African Appellate Division,[49] the Supreme Court ruled that the fact that the killing was of a callous and brutal nature cannot be used in order to justify a conclusion that the death penalty was still to be imposed despite the presence of extenuating circumstances.

AGGRAVATING FEATURES

A. **PRE-MEDITATION**

Generally pre-meditated murders are more heinous than unplanned, spur of the moment killings. If the accused decides in advance that he will kill his victim, plans how he will do this and then executes this plan, in the absence of strong extenuation, this may well tip the scales in favour of the death penalty.

B. **MURDERS BY ARMED GANGS ENGAGED IN TREASONABLE OR "DISSIDENT" ACTIVITIES**

Clearly persons who kill whilst implementing a plan to overthrow the lawful government will almost certainly attract the death penalty. So too with an individual who kills in furtherance of political objectives by, say, planting a bomb in a public place.

Various armed gangs are presently operating in Zimbabwe, the members of which are seeking to de-stabilise the country and to cause

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44. See Mutsunge & Anor. Unreported S-36-87 at p. 9 of cyclostyled judgement.

45. Unreported S-99-85.

46. Unreported S-75-55.

47. Unreported S-36-87.

48. Unreported S-93-87.

49. S v Ndwalane 1985 (3) SA 222(A) which followed earlier decisions such as Supetrus 1969 (4) SA 85 (A).

unrest. The lawful forces are carrying out operations to eliminate these elements. From time to time members of the Security Forces are killed during battles with these armed dissidents. These dissidents also kill civilians in order to induce the civilian population not to support the forces of the lawful government of Zimbabwe. The actual perpetrators of these murders are almost certain to receive the death penalty as it is highly unlikely that any extenuating circumstances will be present. Accomplices of such murders are also likely to attract the death penalty unless the degree of participation was very minor or other extenuating circumstances were present, such as a high degree of compulsion.

C. MURDERS DURING ROBBERIES AND HOUSEBREAKINGS

Murders during the course of robberies and housebreakings have often in the past attracted the death penalty, the courts stressing the need to protect the public against these sorts of fatal crimes. The particular factors surrounding the death must, however, be carefully considered in order to decide whether the death penalty is justified. In detailing some of the factors which are relevant, a distinction can be drawn between the principal offender and the accomplice.

i. THE ACTUAL PERPETRATOR OF THE MURDER

In the absence of extremely strong extenuating circumstances the person who kills someone during the course of the robbery or a housebreaking will almost certainly receive the death penalty. This is particularly so where this person has carried firearms or other dangerous weapons to the scene of the crime to use in the event of resistance or disturbance by the victim or guards. If, however, the killer was not armed and, for instance, he killed a victim who had disturbed him during the course of what was planned to be a non-violent theft by using, say, his fists and feet and he was found to have had only legal intent to kill, it is possible that the death penalty might not be imposed. [50]

ii. THE ACCOMPLICE

If the accomplice accompanies a person whom he knows to be armed and whom he knows is likely to use this weapon with fatal effect during the housebreaking or robbery, the blameworthiness of the accomplice is of a high order. As McNally J A said in the case of Ndebu and Anor v S

> "The mere fact that one of a number of wrongdoers carries a weapon does not necessarily mean, when the wrongdoing leads to murder, that he alone will face the death penalty... [It is] a valid point ... that, although the unarmed man's moral blameworthiness may be lower than that of his armed colleague, it may still be so high that the death penalty is appropriate."

If, however, the killer killed not with a weapon but with blows from fists and feet and the accomplice, who had played only a minor role in the criminal enterprise such as standing look-out, was found to have only legal intent, then the death penalty would not usually be appropriate.

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50. But in the case of Muchenje v S S-81-85 an appeal against the death penalty was dismissed where a housebreaker had brutally assaulted an elderly inhabitant after disarming him, the accused had legal and not actual intent to kill.

D. MURDERS DURING RAPES

Such murders are very likely to attract the death penalty, the courts being concerned to protect women from sexual attacks. The worst species of such murders is clearly where the rapist decides either in advance of or after the rape to kill the victim so that she cannot identify him to the police. Far more frequently the killing occurs as a result of violence used by the rapist to overcome resistance from the victim. Here the killing may be done only with legal intent, but the fact that the killing occurred consequent upon a rape attack may still move the court to impose the death sentence.

E. DEGREE OF BRUTALITY OF MURDER

Where the accused deliberately tortures his victim for some time before finally killing him this is an aggravating feature. However, as stated previously, where there are extenuating circumstances the court cannot use the brutality of the murder as a ground to justify imposing the death penalty despite the presence of extenuating circumstances.

F. OTHER AGGRAVATING FACTORS

There may be aggravating factors other than those mentioned. It may be an aggravating factor that the accused killed his mother, or his father [51] or that the person killed was a policeman who was carrying out his duties at the time he was killed. [52]

Apparently the fact that the accused had previous convictions is not to be treated as having much weight as an aggravating factor unless perhaps the criminal record is especially bad. [53]

8. FACTS WHICH COURTS MAY TAKE INTO ACCOUNT WHEN CONSIDERING EXTENUATION

Facts to be taken into account include proven facts upon which the conviction is based and such other facts as may be proven when the enquiry into extenuation is undertaken provided that the latter facts "may only amplify or temper the findings on the merits but may not alter them." As regards the findings on the merits, these will include the accused's own version of the events even if that version was improbable but the court relied upon it when convicting him because the court decided it might reasonably and possibly be true. [54]

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51. See S v Petrus 1969 (4) SA 85 (A) at 90.

52. See Muhlaba v S A-76-73.

53. There seems to be no Zimbabwean case on this matter. This, however, is the approach adopted in the South African case of S v Felix and Anor 1980 (4) SA 604 (A) at 612.

54. See Chaluwa v S. Unreported S-75-85 at p. 7-8 and the South African cases cited in this portion of the judgment.

9. DISTINGUISHING MURDERS WHICH SHOULD ATTRACT THE DEATH PENALTY FROM THOSE WHICH SHOULD NOT

As we have seen in cases of murder the Legislature has afforded the courts a discretion when and when not to impose the death penalty. It has done this by stipulating that where the court finds that extenuating circumstances exist it can impose a sentence other than death. Underlying this provision must be the idea that, although murder is by its very nature a heinous crime, some murders are worse than others and it is the worst types of murder which should attract the death penalty, whereas in other cases a sentence other than death may be appropriate.[55] The problem comes in trying to identify the characteristics of those murders which make some murders so bad as to justify the imposition of the ultimate penalty and to mark these off from other types of murder which are less serious and which do not demand the passing of the death sentence.

The circumstances leading to and surrounding the commission of different murders are widely varied. For this reason it has not been possible to draw a clear dividing line between those murders which merit death and those that do not. Recognition is impliedly given to this reality by the Legislature; the underlying reason why the courts have been afforded broad discretionary powers to decide whether extenuating circumstances exist (which circumstances are not defined in the legislative provision) is that, presumably, the Legislature appreciated that each case had to be considered on its own individual facts and no hard and fast rules could be established. Although hard and fast rules governing the imposition of the death penalty cannot be formulated, this does not mean that we should refrain from trying to identify the sorts of characteristics which lead the courts either to impose or not to impose the ultimate sentence. Far from it, we should be seeking to develop a rational and consistent policy as to when the death penalty is warranted and when it is not and that policy can only be decided upon if we seek to isolate the sorts of features which the courts see as critical in determining in this matter. The questions which need to be asked are:

1. In general terms, in what sorts of situations of murder is the death penalty the appropriate penalty and in what sorts of situations of murder is a lesser penalty warranted?

2. In cases where the death penalty is imposed is there a compelling social justification and rationale for imposing this ultimate penalty?

3. How consistently is the decision to impose the death penalty applied by the different judges?

The third question is one which has received much attention in other countries. In America the Supreme Court in a number of constitutional cases on capital punishment highlighted the erratic, inconsistent and discriminatory nature of the administration of the death penalty when the power decide on its imposition are broad, vague, and discretionary powers to decide whether or not the death penalty should be imposed. States which have re- introduced the death penalty after these

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55. Thus, for instance, in the case of Lovemore v S. Unreported A-110-71 Beadle C J remarked "It was a bad killing but not anything like as bad as many cases of murder that come before this court."

decisions have sought to compose statutes which structure th discretion so as to avoid the charge of arbitrariness by for instance specifying a limited number of aggravating circumstances at least one of which must be present before the death sentence can be imposed and itemising mitigating circumstances which, if present, can permit the court to impose lesser sentences than death even if there are aggravating circumstances. [56]

In Zimbabwe the discretionary power to impose or not to impose the death penalty is very wide and vague. As a result of different judges having differing views on the death senetence, some strongly favouring it, others actively disliking it, being dubious about its moral justifiability and deterrent effectiveness, and feeling that in exercising this broad discretionary power almost inevitably there must be inconsistencies in the way in which the decision to impose the death penalty is applied. Indirect evidence of possible inconsistency derives from the fact that not infrequently trial judges decide to impose the death sentence and the Supreme Court decides otherwise on appeal.

There is the additional factor that moral blameworthiness is usually assessed on a case by case basis rather than on a comparative basis, although the courts refer to previous cases dealing with the weight to be attached to individual factors which may extenuate. Comparisons between different cases are, of course, exceedingly difficult in that the mix of factors vary from case to case and it is a matter of value judgment whether one case where death was imposed was "worse" or "better" than one where it was not.

Despite these difficulties of comparison, again in general terms, we need to be satisfied that we are applying the death penalty to the sorts of cases where there is no doubt that it is the appropriate penalty. The premiss should be that it is the worst types of murder which merit the imposition of the death penalty and that less heinous murders can be dealt with properly with lesser penalties than death. The task of the judges is to apply this approach to the individual cases which come before them. It is submitted that it is more likely that this policy would be consistently applied if the decision-making process in all capital murder cases was more carefully structured. One way to structure it would be to adopt the American approach of seeking to identify all the aggravating factors, one or more of which must be present before the death penalty can be imposed, and then to list the mitigating features which if present will allow the courts a discretion to impose a sentence other than death. This approach is strongly advocated by Professor Seidman but it did not find favour with the Chief Justice's Advisory Committee when they were considering the issue of capital punishment.

This writer is of the opinion that we should strongly consider the devising of a scheme along the American lines. Although it may be a difficult task to draw a comprehensive list of aggravating factors

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56. See Bedau op. cit and Seidman's submissions to the Chief Justice's Advisory Committee when they were considering the matter of capital punishment.

and mitigating factors, it is by no means an impossible task. In America it seems to have been achieved on a reasonably satisfactory basis in States which have recently sought to re-introduce the death penalty. In Zimbabwe over a number of years various mitigatory and aggravating factors have been recognised by the courts. These could serve as a basis for a comprehensive list and the American provision could also be looked at as a possible source. The great advantage of the American approach is that it carefully structures the death penalty decision and it substantially guards again inconsistencies and arbitrariness in this initial field. It could also be argued that it is more logical to consider first aggravating features and then to look at mitigatory factors. The aggravating factors are the ones which place the murder in a special category of seriousness; if one or more of these are present then the murder is no longer an "ordinary murder" but is rather an especially grave murder. These aggravating factors thus provide the courts with a device for identifying "grave murders". Once the case falls into this category, the death penalty is appropriate unless certain mitigatory features are present which are assessed as being sufficiently strong to outweigh the gravity of the murder which was committed in these circumstances of aggravation.

It seems, however, that this proposal, having already been rejected, will not now be accepted. It is suggested, therefore, that in the interests of the most thorough treatment of the issue of extenuation (given the fact that the present handling of this issue by trial courts is not always as painstaking as it might be), the courts should at least have some sort of check list of recognised extenuating and aggravating factors which they should be obliged to use to ensure that they cover all possible relevant factors when the death penalty decision is being taken.

10. CONCLUSION

It is earnestly hoped that in the near future we will move to abolish completely the death penalty regime. If, however, we are going to hang some of our murderers we should hang only the very worst ones. In the exercise of their discretionary capacity to impose the death penalty, the courts should seek to identify the most heinous forms of murder and restrict the application of the death penalty to these cases. They should not duck this responsibility of trying to formulate coherent, rational and consistent policies on the administration of the death penalty by asserting that each case of murder hinges on its own facts and the facts may vary widely from case to case.

APPENDIX: USEFUL ZIMBABWEAN CASES ON INDIVIDUAL FACTORS

(This is a list of cases where the courts have commented upon the application of the particular factor under which the case is listed).

MENTAL CONDITION

1. Nyati A-12-74 (General observations).
2. Johannes A-100-75 (No motive but psychiatrist convinced accused simulating mental abnormality).
3. Bontanquoi and Anor S-171-82 (1st appellant mentally backward and emotionally unstable but this did not affect his actions in premeditated robbery and murder).
4. Joseph S-82-85 (Court ordered examination of accused to ascertain whether some diminished sense of responsibility or other mental condition reducing blameworthiness).
5. Taanorwa S-43-87 (need to distinguish between mental disorder justifying special verdict and mental or emotional state amounting to extenuating circumstance).
6. Muchimika S-93-87 (youth brutalised and personality adversely affected by war experiences and imprisonment at tender age- extenuation despite cold-blooded killing).

PROVOCATION AND OTHER EMOTIONAL DISTURBANCE

1. Sam A-232-69 (Provocation and intoxication but killing wrong man).
2. Leonard A-128-70 (Insufficient provocation).
3. Karuzi 1971 (1) RLR 169 (Killing innocent child - belief that wife unfaithful - death penalty appropriate).
4. Ndhlovu A-33-73 (Obsessional belief not based on reasonable grounds).
5. Zuze A-200-77 (Cumulative provocation).
6. Chiadzwa A-225-77 (Quarrel - intoxication and provocation).
7. Tarisayi S-107-83 (Provocation mild - reaction totally out of proportion).
8. Nyoni S-61-87 (grievance at having been jilted by girlfriend-not necessarily extenuating).

INTOXICATION

1. Timothy A-178-71 (Accused consumed considerable quantities of beer - probably would not have raped and killed if sober but death penalty still imposed).
2. Masaraure A-189-75 (Drunkeness feature that cannot be carried too far - very drunk if sober would not have killed - but death sentence still appropriate).
3. Chiadzwa A-225-77 (Quarrel - intoxication and provocation)
4. Chundu S-14-84 (Smoking of dagga not mitigatory as nothing to suggest senses affected).
5. Chamunorwa S-137-86 (Accused must prove on balance of probabilities that was affected by alcohol).

LEGAL INTENTION ONLY

1. Leonard A-128-70 (Court must examine very carefully facts if only legal intent).
2. Jacob 1981 ZLR 1 (A) (Legal intent factor on credit side but to be weighed with the other factors - where extenuating).
3. Chundu S-14-84 (Legal intent but far outweighed by aggravating factors).

4. Dube SC-39-85 (Killing of woman by soldier - legal intent but no extenuation).

PARTIAL EXCUSE

1. Detsera 1958 (1) SA 762 (FSC) (Excessive self-defence).
2. Mateketa S-99-85 (Thought husband about to kill her - good grounds for belief - but gruesome and callous murder).

BELIEF IN WITCHCRAFT

1. Mhlanga A-27-81 (Circumstances in which mitigatory).
2. Chiradza A-44-81 (To obtain human tissue for good luck charm).
3. Goredema A-63-81.
4. Ngubane 1980 (2) SA 741 (A).

NO PREMEDITATION

1. Lovemore A-110-71 (Drunken brawl between young men).
2. Zuze A-200-70 (Acting on spur of moment without pausing to consider).

COMPULSION

1. Mucherechedzo S-176-81.
2. Mapfumo S-65-83.

YOUTHFULNESS

1. Lovemore A-110-71 (17 year old - Drunken brawl between young men).
2. Zvikaramba A-310-77 (19 year old - but no extenuation as cold-blooded murder of helpless elderly man).
3. Simbi and Anor S-118-82 (Age important factor).
4. Nzima and Anor S-55-84 (Youthful dissidents - gun battle with police).
5. Sigareta and Anor S-65-84 (Young men but planned and cold-blooded plot to murder and rob elderly defenceless persons - aggravation outweighed mitigation).
6. Muchimika (1) S-121-85 (Commentary on age factor as extenuation).
7. Muchimika (2) S-93-87 (Under 19- brutalised at tender age by war and imprisonment - extenuation despite cold blooded killong).

x) **POLITICAL MOTIVE**

1. Moyo A-71-81 (Killing of political opponents does not make killing less blameworthy).

xi) **MINOR DEGREE OF PARTICIPATION**

1. Mbirinyu A-149-73 (Fact socius important factor to be taken into account).

xii) **REPENTANCE AND ENDEAVOUR TO ASSIST AFTER CRIME**

1. Mbirinyu A-149-73 (Co-operation after murder - not hard and fast rule that not extenuating).

xiii) **MERCY KILLILNG**

1. Hartmann 1975 (3) SA 532 (A) (Doctor killing dying father).
2. De Bellocqu (reported in 1975 (3) SA 538) (Woman killing her baby suffering from grave disease).
3. Mayer 1985 (4) SA 332 (HC) (Suicide pact between elderly couple who believed that wouldn't be able to cope financially - accused killing wife but only blinded himself when tried to to take own life).

xiv) **BABY KILLING**

1. Rufaro 1975 (1) RLR 97 (A).
2. Msindo A-172-75.
3. Paterson A-109-79 (Fractured skull with four blows).
4. Phiri S-77-84 (Unsophisticated 20 year-old girl in difficult family circumstances and responsibilities-killing new-born illegitimate child-effective 18 months imprisonment appropriate-seriousness of offence-need for deterrence).
5. Ndawana S-115-84 (Long premeditated decision to murder infant and dispose secretly of its body-6 years imprisonment not exessive).
6. Jokasi S-102-86 (Factors to be considered in assessing sentence-appropriate range of sentence for this crime).
7. Tawanda S-104-86 (27 year-old widow with 5 children killing new-born baby because unable to support it and afraid of her father's reaction to birth - 4 years imprisonment of which 1 suspended appropriate).
8. Chawasema S-19-87 (Deliberate killing of newly born child by prostitute living in desperately poor circumstances-4 years imprisonment).
9. Shonhiwa S-78-87 (21year old-raped by father of child-premeditated killing of child - 4 years imprisonment appropriate).

xv) **WITHDRAWAL ACCOMPLICE BEFORE MURDER**

1. Ndebu and Anor S-72-85 (Accomplice running away before killing).

AGGRAVATING FACTORS

i) **PRE-MEDITATION**

1. Simon A-69-73 (Element of deliberation in killing outweighed intoxication and belief that deceased had beaten mother).
2. Ambirayi A-121-76 (Brutal deliberate and premeditated murder even though insensed as thought that deceased had assisted in elopment of daughter).
3. Sigareta and Anor S-GS-84 (Deliberately planned and cold-blooded plot to murder and rob two elderly defenceless people for gain).

ii) **ARMED GANGS ENGAGED IN TREASON OR DISSIDENT ACTIVITY**

1. Nzima and Anor S-55-84 (Youthful dissidents).

iii) **MURDERS DURING ROBBERIES AND HOUSEBREAKINGS**

1. Baiton A-198-70 (Robbery).
2. Moyo A-16-81.
3. Mudzimu S-95-82 (Robbery - killing taxi driver legal intent but aggravating circumstances outweighed).
4. Sibanda S-32-82 (Killing during robbery - no extenuating).
5. Charamba S-146-82 (Brutal murder for gain in courses of housebreaking).
6. Moyo S-186-82 (Payroll robbery - accused socius but planner of crime - murder with legal intent - no extenuation).
7. Ndhlovu S-34-85 (In absence of weighty extenuating circumstances murders committed in course of robberies will attract death penalty).
8. Muchenje S-81-85 (Robbery - murder of old man in house - legal intent but aggravating features outweighed).

iv) **MURDERS DURING RAPES**

1. Mapiro A-106-71 (Raping and brutal murdering - somewhat under influence of drink and possibly some provocation but no extenuation).

v) **MANNER OF KILLING**

Irrelevant as regards extenuation except to extent that may throw doubt on facts alleged in support of extenuating circumstances:-

1. Mateketa S-99-85.
2. Chaluwa S-75-85.
3. Mutsunge and Anor S-36-87.
4. Muchimika S-93-87.