

**EXTENUATING CIRCUMSTANCES IN MURDER**

by REUBEN JOHNSON MBULI B JURIS, LLB (UZ)

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**SUPERVISOR** : PROF C R M DLAMINI B Proc, LLB (UZ)  
LLD (Pret)

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Lastly, I wish to thank my family for encouraging me to proceed with this project.

R.J. MBULI

KWA DLANGEZWA

JANUARY 1989

(ii)

DEDICATION

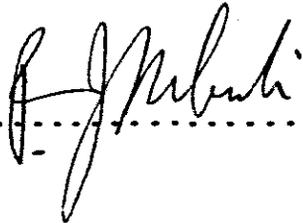
To my mother Alice, wife Beauty, daughter Thabile and sons Ntuthuko, Ntokozo and Sibusiso for their support.

(iii)

DECLARATION

It is hereby declared that this dissertation entitled Extenuating Circumstances in Murder is my own original work, both in conception and execution and that other works or sources have been fully acknowledged.

Signature: .....

A handwritten signature in cursive script, appearing to read "R. J. Mubanti", is written over a dotted line. The signature is fluid and somewhat stylized, with a prominent initial "R" and a long, sweeping tail.

SUMMARY

The concept of extenuating circumstances was introduced in South African law in 1935. If a trier of facts finds extenuating circumstances he is conferred with a discretion to impose either the death sentence or any other sentence. This concept applies only to the crime of murder. The introduction of this concept was a welcome development in our law because for the first time a discretion was conferred on a trier of facts notwithstanding the fact that an accused was neither a woman who had been convicted of murdering her newly born child nor a person under the age of eighteen years.

The purpose of this dissertation is to appraise the concept of extenuating circumstances in the light of the case law and legal literature. The traditional factors which figure more often than not in our courts are intoxication, psychopathy, belief in witchcraft, youthfulness, provocation and many others. They were critically analysed in this dissertation.

The definition of extenuating circumstances excludes all factors which were not present during the commission of murder. The onus of proof is on the accused.

The conclusion reached is that although the concept was a welcome introduction in our law, its fetters have a negative effect. A judge may impose an appropriate sentence if he has a discretion to do so. Where a discretionary power to impose a sentence according to justice is out of question, there exists a need to reform the law. A discretion to impose a sentence is not an end in itself but a means to justice and civilization.

Several traditional conclusions of the courts and legal writers were criticised in this work. The purpose was to point out areas which need reform. On the whole, the concept of extenuating circumstances is regarded as a compromise between the abolition of the death sentence for murder and its retention.

It is recommended that a trier of facts should have a discretion to impose the death penalty on any accused who displayed psychopathic tendencies during the commission of murder. There is no justification for depriving a youthful accused of the benefit of extenuating circumstances even if he killed out of inherent wickedness or inner vice.

The danger of retaining the concept of extenuating circumstances is that it may entrench the death penalty for murder because of the three-part enquiry procedure used to establish it. The legislature may not reform the law

because it may continue to believe that the concept is satisfactory.

In conclusion, a plea is made that death sentences not be carried out until the legislature considers and expresses its views on the argument advanced by the abolitionists.

OPSOMMING

Die konsep van versagende omstandighede is gedurende 1935 in die Suid Afrikaanse regstelsel ingevoer. Indien 'n verhoorhof sou bevind dat versagende omstandighede aanwesig is, word hy met 'n oordeel (diskresie) bekleed om of die doodvonnis of 'n ander vonnis op te lê. Hierdie bepaling geld slegs ten opsigte van die misdaad van moord. Die invoering van hierdie konsep was 'n welkome ontwikkeling in ons reg wat vir die eerste maal 'n diskresie aan 'n verhoorhof verleen ongeag of die beskuldigde 'n vrou was wat skuldig bevind is aan die moord van haar pasgebore kind of andersins 'n persoon was wat benede die ouderdom van agtien jaar was.

Hierdie verhandeling het as doelstelling die beoordeling van die konsep van versagende omstandighede soos beliggaam in gewysde sake en regspublikasies. Die tradisionele faktore wat mees algemeen in ons howe aangetref word is die invloed van bedwelvende middels of dronkenskap, psigopatie, geloof in toornkuns, jeugdigheid en uitlokking (provokasie). Hierdie faktore word in hierdie verhandeling krities ontleed.

Die omskrywing van versagende omstandighede sluit alle faktore uit wat afwesig was tydens die pleeg van die moord. Die bewyslas rus op die beskuldigde.

Die gevolgtrekking word gemaak dat, alhoewel die aanvaarding van die konsep 'n welkome neerslag in ons regstelsel beleef het, die beperkinge wat daaraan gebonde is 'n nadelige gevolg het. 'n Regter mag 'n toepaslike vonnis opleë indien hy oor die nodige oordeel beskik om dit te doen. Indien sodanige diskresionêre vonnisopleggingsbevoegdheid afwesig is (is out of question or non existent) ontstaan daar 'n noodsaaklikheid om regshervorming. 'n Diskresie by vonnisoplegging is nie bloot in sigself 'n doel nie maar 'n middel tot geregtigheid (justisie) en beskawingsontwikkeling.

'n Aantal gevolgtrekkings van ons howe asook juriste is in hierdie werkstuk gekritiseer. Die doel was egter om daardie areas te identifiseer waar hervorming van die reg nodig is. In die geheel gesien word die konsep van versagtende omstandighede geag 'n kompromie daar te stel tussen die algehele afskaffing van die doodvonnis enersyds as die behoud daarvan andersyds by 'n skuldigbevinding aan moord.

Dit word aan die hand gedoen dat 'n verhoorhof 'n diskresie behoort te besit om die doodvonnis op te lê ten opsigte van enige beskuldigde wat psigopatiese neigings tydens die pleeg van moord, toon. Daar is geen aanvaarbare redes om 'n jeugdige beskuldigde die voordeel van versagtende omstandighede te ontnem nie selfs indien 'n dader 'n moord sou pleeg as gevolg van inherente boosheid (kwaadwilligheid of innerlike ondeug).

Die gevaar gebonde aan die behoud van die konsep van versagtende omstandighede is dat dit die doodvonnis vir moord mag verskans as gevolg van die drieledige ondersoekmetode wat gebruik word om die bestaan al dan nie van die versagtende omstandighede vas te stel. Die wetgewer mag nie die reg hervorm nie bloot omrede hy onder die waan mag verkeer dat die konsep as geheel aanvaarbaar is.

Ter afsluiting word 'n beroep gemaak dat doodvonnise intussen nie voltrek word nie tot tyd en wyl dat die wetgewende gesag oorweging skenk en sy standpunt stel in antwoord op die argument wat deur die afskaffers geopper word.

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## GENERAL INTRODUCTION

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## 1.1 INTRODUCTION

The imposition of the death penalty is an awesome responsibility for any judge. It is one thing to take the life of a man unlawfully; it is entirely another to authorise legally the taking of the life of a fellow human being for taking the life of another. It is even painful if the judge is compelled to impose the death sentence.

A critical analysis of extenuating circumstances as a device in our law will be introduced in this chapter. Legal concepts are better understood if approached from a historical perspective. A historical background of the legal position will be set out; the problem under investigation will be stated and a general introductory discussion of extenuating circumstances will be set out in this chapter.

## 1.2 HISTORICAL BACKGROUND

During the nineteenth century the death sentence<sup>1</sup> was competent for murder, rape or treason. The punishment for these crimes was determined in terms of the common law. Triers of fact did not always impose the death sentence for murder, and this was the case where they had a discretion not to impose it. This discretion was invoked "in very special circumstances, on very exceptional occasions and for very cogent reasons"<sup>2</sup> These "special circumstances" were cases where a mother killed her newly-born child and where an accused was a youthful offender. The discretion not to impose the death sentence for murder could be invoked under restrictively defined circumstances. One does not find a similar limitation on the discretionary power to impose the death sentence for rape or high treason.

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- 1 Kahn "Crime and punishment 1910 - 1960" 1960 Acta Juridica 191 at 199; Milton South Africa Criminal Law and Procedure vol II Common Law Crimes 2ed (1982) 376.
- 2 Kahn 199; Milton 377; R v Sinnah 1908 10 HGC 387 at 389.
- 3 Milton 377.

In 1917 the legislative passed the Criminal Procedure and Evidence Act. Section 338 (1) of this Act provided as follows:

"Sentence of death by hanging shall be passed by a superior court upon the offender convicted before or by it of murder, and sentence of death by hanging may be passed by a superior court on an offender convicted before or by it of treason or rape : provided that where a woman is convicted of the murder of her newly born child, or where a person under sixteen years of age is convicted of murder the court may impose any sentence other than the death sentence."

It is clear from the wording of this section that triers of fact were directed to impose the death sentence for murder. However, the proviso clearly sets out that a woman convicted of the murder of her newly-born child or where the accused was under sixteen years, triers of fact might impose any sentence other than the death sentence. It was only in respect of the cases covered by the proviso that the death sentence was not mandatory for murder. The death sentence was mandatory in all cases which were not covered in the proviso. The death sentence

was mandatory no matter what the circumstances were, and no matter what mitigating factors were present during the commission of the murder. The personal circumstances of the accused like intoxication, provocation, belief in witchcraft, psychopathic tendencies were not considered because they fell outside the cases covered by the proviso.

Section 376 of the Act<sup>5</sup> provided that there was nothing in the Criminal Procedure and Evidence Act which could be construed as affecting the sovereign Royal prerogative of mercy. This meant that in all cases not covered in the proviso to section 338 (1) of the Act, an accused could be saved from hanging if his sentence was commuted. It was assumed that the personal circumstances of the accused or other mitigating factors could persuade the Governor -General to exercise the prerogative of mercy.

The mandatory death sentence for murder elicited academic comments. Morice<sup>6</sup> pointed out that while the proviso to section 338 (1) was an excellent provision, it was necessary to give a discretion to the judge or jury to impose the death sentence where

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5 Act 31 of 1971.

6 Morice "The Administration of the criminal law in South Africa" 1920 SA LJ 134.

a recommendation for mercy was forthcoming. The passing of the death sentence was often no more than a farce "the cruelty of which is enhanced by the special solemnities that sometimes accompany it, such as calling silence in the court, and the medieval barbarity of the black cap..."<sup>7</sup>

The second comment was that where mitigating factors were found, triers of fact returned a verdict of culpable homicide in order to avoid the awful consequences of a finding of murder.<sup>8</sup> It is irregular to convict of a lesser offence where the elements of the offence charged have been proved beyond a reasonable doubt.

The last comment was that "a great burden was placed on prosecutors, attorneys - general, law advisers, judges, the Executive and others who had either to report on or consider each capital case."<sup>9</sup>

An accused had to wait for a long period ranging from weeks to months before he was informed whether or not his sentence would be carried out. This was

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7 Morice 134.

8 Hiemstra Suid - Afrikaanse Strafproses 3ed (1981) 595; Kahn 200.

9 Kahn 200, the House of Assembly Debates vol 24 (1935) col 1718 \_ 1719.

indeed harsh punishment before the commencement of the actual sentence.

The judges' Conference of 1933 recommended that a complete discretion on the imposition of the death sentence for murder be left with the judge. Some judges did not favour the idea of absolute discretion, others wanted no discretion at all while the judges of the Natal Provincial Division<sup>10</sup> wanted a complete discretion with one exception.

In 1934 a Bill which sought to confer a discretion on triers of fact to impose the death sentence for murder was referred to a Select Committee and the latter regarded a discretion to impose the death sentence following a conviction of murder as a dangerous procedure. The Select Committee drafted a legal instrument in which it sought to classify murder into two categories: one carrying the death penalty and the other not. This proposal was not accepted.

In 1935 the concept of extenuating circumstances was

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10 see Evans Extenuating Circumstances in the South Africa Law of Murder unpublished PhD thesis UCT (1980) 106.

11 House of Assembly Debates 2879.

introduced into South African law.<sup>12</sup> The purpose was to introduce a via media between the two extremes, namely the mandatory and the discretionary imposition of the death penalty. Whether the fear entertained in 1934 that it was a dangerous procedure to confer a discretion on judges to impose the death sentence for murder is still valid, is an open question.<sup>13</sup> As a result of the amendment of the Criminal Procedure and Evidence Act of 1917 in 1935, section 206 (2) was inserted. This section became section 330 (1) in 1955 when the legislature passed the Criminal Procedure Act<sup>14</sup> of 1955. In 1977 section 330 (1) became section 277<sup>15</sup> (2) when the present Act was passed.

### 1.3 STATEMENT OF THE PROBLEM

Section 277 (2) of the Criminal Procedure Act<sup>16</sup> reads as follows:

"Where a woman is convicted of the murder of her

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12 Section 61 of the General Laws Amendment Act, Act No. 46 of 1935; Hiemstra 595.

13 See S v Diedericks 1981 3 SA 940 (C) 942.

14 Act 56 of 1955.

15 Criminal Procedure Act 51 of 1977.

16 See n15 supra.

newly -born child or where a person under the age of eighteen years is convicted of murder or where the court, on convicting a person of murder, is of the opinion that there are extenuating circumstances, the court may impose any sentence other than the death sentence."

The legislature has not provided a definition of extenuating circumstances. Several observations may be made in this regard: Firstly no indication was given on which factors are to be taken into account in the process of deciding whether or not extenuating circumstances are present. Secondly it is not indicated on what type of factors are to be considered. Should such factors relate to the state of mind of the accused or should they relate to the accused's degree of participation in the commission of the murder? It is also an open question how or on what basis triers of fact should form an opinion whether an accused committed a murder with extenuating circumstances.

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The subsection does not indicate at what stage of the trial triers of fact should decide the existence or otherwise of extenuating circumstances. It is

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17 my underlining.

18 Section 277 (2) of Act 51 of 1977.

also not indicated whether the factors should have originated out of the case itself or whether they should have arisen within the accused.

This dissertation will attempt to analyse the case law where extenuating circumstances were considered. Use will also be made of legal literature. Since the legislature did not place a limit on factors which may be considered, that may be taken as an indication that a large volume of case law must exist. The reason for that is that the vagueness of the concept is susceptible to various interpretations. Be that as it may, an attempt will be made to point out those areas of the law which need reform.

#### 1.4 TOWARDS A DEFINITION OF EXTENUATING CIRCUMSTANCES

It would appear that dictionary definitions are not particularly helpful in establishing the meaning of a legal concept.<sup>19</sup> Triers of fact use rules of interpretation and their main assignment is to establish the intention of the legislature.<sup>20</sup> In R v Hugo Schreiner J (as he then was) remarked as follows:

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19 Milton 377.

20 R v Hugo 1940 WLD 285 at 286; see Milton 377.

"One dictionary definition is "circumstances which lessen the seeming magnitude of an offence, which tend to diminish culpability." This is not very helpful because it is difficult to affirm that any particular circumstances lessen culpability unless one has some idea of a normal or ordinary degree of culpability and that is what it is almost if not quite impossible to arrive at. Certainly the mere fact that one can imagine worse or more diabolical murders than the one that was under consideration would not warrant the conclusion that extenuating circumstances were present."

A dictionary is a guide and is not necessarily conclusive. A definition of extenuating circumstances is useful if it relates to a particular accused and a specific murder. In R v Mfoni<sup>21</sup> the court pointed out that each case must be decided on its own merits. This dictum implies that in one case a factor may constitute an extenuating circumstance whereas the same factor may not have the same effect in other cases. For that reason, the definition of extenuating circumstances is related to the commission of a

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21 1935 OPD 191 at 193.

murder. In an attempt to formulate a definition of  
extenuating circumstance in R v Mfoni,<sup>22</sup> the judge  
took the view that in general terms only such  
circumstances which were connected with or have a  
relation to the conduct of the accused in the  
commission of the crime should have any weight at  
all (that is, should be considered). The judge warned  
that factors which are not directly related to the  
commission of the crime should not be considered.

The R v Mfoni decision clearly indicates that there  
must be a causal nexus between the commission of the  
murder and the personal circumstances of the accused  
as they were during the actual commission of the  
murder. Factors which were not present during the  
commission of the murder may not be considered.

<sup>23</sup>  
In R v Biyana extenuating circumstances are defined  
as facts associated with the crime which serve in  
the minds of reasonable men to diminish, morally the  
degree of the prisoner's guilt. This decision means  
that the accused's conduct in committing the murder  
must be subjected to a moral appraisal and all

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22 see n21 supra.

23 1938 EDL 310 at 311.

factors or circumstances which were present during the commission of the murder must be considered. It appears that reference to the minds of reasonable men is a reference to the conclusion which triers of fact may form after the consideration of the said facts. The use of this expression is, however, misleading as in extenuating circumstances a subjective as opposed to an objective test is used.

In the decision of S v Babada<sup>24</sup> extenuating circumstances were defined as follows: "...Uit die aard van die saak kan dit alleen 'n omstandigheid wees wat die beskuldigde se geenstesvermoens of gemoed beïnvloed het op so 'n wyse dat hy, wat sy wandaad betref, met minder verwyt bejeen kan word." The judge then laid down the three-part inquiry procedure into the presence of extenuating circumstances.<sup>25</sup> In S v Petrus<sup>26</sup> the appellate division stated that extenuating circumstances may perhaps be defined as "'n feit of feite is wat betrekking het op die gemoed of geestesvermoens van die beskuldigde toe die moord gepleeg is en waardeur

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23 1938 EDL 310 at 311.

24 1964 1 SA 26 (A) 27 - 8.

25 See discussion infra.

26 1969 4 SA 85 at 95.

sy sedelike skuld, d.w.s. sy verwytbaarheid, ten op sigte van die dood van die oorledene, volgens die oordeel van 'n redelike persoon verminder word."

The definition of extenuating circumstances set out in S v Babada<sup>27</sup> is supported. Strictly speaking it is not a definition but an indication of the nature of factors that may be considered during the inquiry into the presence of extenuating circumstances. The basis for the support is that this definition does not put a limit on the type or nature of factors that may be considered. Secondly, it has been accepted as correct during the past twenty-five years since 1964. Thirdly, it forms a basis on which an informed decision may be taken because it also sets out procedural steps without which the inquiry into extenuating circumstances would be a farce.

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27 Supra at 26-7; that judicial interpretation of this concept in the Babada decision was followed in S v Ndlovu (1) 1965 4 SA 688 (A) 691. S v Ndlovu (2) 1965 4 SA 92 (A) 695; S v Bradbury 1967 1 SA 387 (A) 394 - 395 and 404; S v Manyathi 1967 1 SA 435 (A); S v Van der Berg 1968 3 SA 250 (A) 252; S v Petrus 1969 4 SA 90 and 94; S v Mngoma 1984 3 SA 666 (A) 673; S v Theron 1984 2 SA (A) 878; S v Smith 1984 1 SA 581 (A) 592 - 3; S v Mongesi 1981 3 SA 204 (A) 207; S v Sauls 1981 3 SA 172 (A) 184; S v Ngubane 1980 2 SA 741 (A) 746; S v Ramatseng 1977 3 SA 510 (A) 512; S v Moorman 1976 3 SA 510 (A); S v Hartmann 1975 3 SA 535; S v J 1975 3 SA 146 (O) 147-8; S v Mulal 1975 3 SA 208 (A) 212 - 213.

1.5 THREE-PART INQUIRY PROCEDURE AND MORAL  
BLAMEWORTHINESS

The onus to prove the existence of extenuating circumstances rests on the accused on a balance of probabilities.<sup>28</sup> This does not mean that an accused is required to lead evidence in all cases. The court may draw an inference from the evidence led by the State and the accused during the trial. In S v Babada Rumpff J.A. (as he then was) introduced three steps to be followed by a trial court in an inquiry into whether extenuating circumstances exist in a particular case.<sup>30</sup>

The first step constitutes an inquiry into the question whether there were facts, factors or

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28 R v Lembete 1947 2 SA 603 (A) 609; R v Taylor 1949 4 SA 702; R v Balla 1955 3 SA 274 (A) 275 - 6; R v Padha 1948 PH H87; R v Malopi 1954 1 SA 390 (A) 396; S v Theron 1984 2 SA 850 (A) 874; S v Pedise 1986 PH H12; Ex Parte Minister of Justice: In re R v Boloa 1941 AD45; R v Kubeka 1953 3 SA 691 (A) 695; R v Roberts 1957 4 SA 265(A) 272 - 273; S v Sibeko 1968 1 SA 495 (A) 497; S v Ndlovu 1970 1 SA 430 (A) 433; S v Mdletshe 1978 4 SA 75 (A) 77; S v Mkize 1969 1 SA 462 (A) 463; S v Peterson 1980 1 SA 938 (A) 945; Du Toit 7 40.

29 supra 27-28; see also S v Ngoma 184 3 SA 666 (A) 673; S v Oktober 1986 2 PH H97.

30 see Smit "Judicial discretion and the sentence of death for murder" 1982 SALJ 87 at 88 - 9.

circumstances which could have influenced the mental  
ability or the state of mind of an accused.<sup>31</sup> This  
is a factual question. The court is merely required  
to scrutinize the evidence as a whole and to  
indicate whether there were such factors. If an  
accused is a youthful offender, for example, the  
court is likely to find that this is one of such  
factors. The court is also likely to conclude that  
such factors were present if there is evidence that  
the accused was intoxicated, provoked, defending or  
acting under compulsion. It is not possible to put  
a limit to the nature of factors or circumstances that  
may be present in different cases. If a court  
does not find any fact, factor or circumstances  
which could have influenced the mental ability or  
the state of mind of the accused during the  
commission of the murder, the court will not find  
extenuating circumstances. The imposition of the  
mandatory death sentence will be a logical step  
since the court will not have a discretion to impose  
any other sentence.<sup>32</sup>

The second step consists of an inquiry into the  
question whether the facts, factors or circumstances

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31 S v Babada supra at 27 - 8.

32 Section 277 (2) of Act 51 of 1977.

which were present during the commission of the murder did in fact influence the accused. This is once again a factual question. The court must be satisfied on the balance of probabilities that the said facts, factors or circumstances did influence the accused. If they and did not influence the accused, the court will not proceed to the next step but will announce its decision that it could not find extenuating circumstances. There must be a factual basis for the finding of extenuating circumstances and the trial court should not-speculate.<sup>33</sup>

During the third and last stage of the inquiry into extenuating circumstances, the court is required to judge whether in its opinion, the influence on the mental ability or state of mind of the accused was of such a nature that his conduct could be regarded as less morally reprehensible.<sup>34</sup> The third stage is a controversial one. The trial court consisting of a judge and at least two assessors is required to form an opinion after taking into account

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33 Du Toit Straf - In Suid Afrika (1981); S v Ndhlovu  
1970 1 SA 430 (A) 433.

34 See n29 supra.

the influence of all factors, or a cumulative effect of all factors. No objective standard exists to determine the basis of the said opinion. It is trite that the subjective test is used to determine the presence or absence of extenuating circumstances.<sup>35</sup>

It is during the third step of the inquiry that the question of moral blameworthiness comes into the picture. The concept of moral blameworthiness is the creation of the courts and the legislature did not include it in the legislation in question.<sup>36</sup>

Loubser<sup>36</sup> argues that the factors which the courts regard as extenuating in their bearing on moral culpability or moral guilt are the same factors which are also taken into account in determining legal guilt or fault. While there is substance in this argument, it should be borne in mind that although such factors may be the same in some cases the purpose is to answer two different questions. Before conviction the question which is sought to be

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35 See section 277 (2) of 1977; S v Theron 1984 2 SA 868 (A) 878.

36 Loubser "Versagte omstandighede by moord; die gradering van skuld" 1977 THRHR 333 at 336.

answered is whether an accused is guilty of murder, that is the purpose is to determine legal guilt or legal culpability whereas the second phase of the inquiry is to find out whether the court has a discretion to impose the death sentence.

The three-part inquiry procedure is followed during the inquiry into the question whether or not extenuating circumstances are present. The murder trial on the other hand consists of two phases. When the so - called moral blameworthiness of an accused is determined, several factors which may not be relevant to the question of legal guilt may be taken into account. A belief in witchcraft, for example, is not an element of murder or of fault. Yet it is a factor which may constitute an extenuating circumstance.

Loubser takes the view that moral culpability is assessed with reference to factors which have a bearing on criminal capacity or fault.<sup>37</sup> The author continues to state that for purposes of

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37 Loubser 336.

extenuating circumstances, the accused's moral culpability is judged in regard to the criminal capacity and fault.<sup>38</sup> This is a surprising limitation of the factors which may be extenuating in a murder case. If the courts were to limit inquiries into extenuating circumstances in the manner set out in Loubser's argument that would amount to an irregularity. The so-called "further grading of these elements of legal guilt" appears to be a reference to the three-part enquiry into extenuating circumstances. If the legislature wished to limit the enquiry into extenuating circumstances to a further grading of only those few factors which are relevant to the criminal responsibility / capacity of an accused or fault it would have expressed its intention in clear language. A belief in witchcraft or primitive level of development does not as a general rule indicate a reduced criminal capacity or lack of fault. The view borne out by the reported decisions is that a belief in witchcraft is only relevant to the enquiry into extenuating circumstances.<sup>39</sup> Loubser's view to the contrary cannot be supported.

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38 see n37 supra.

39 R v Biyana 1938 EDL 310; R v Fundakubi supra  
S v Ngubane 1980 2 SA 741 (A) to mention a few.

A factor is capable of diminishing moral guilt of an accused if it lessens the magnitude of an offence by providing an account on moral grounds which led to the commission of the offence. In other words, the moral aspect is a view held by a specified community. The trial court is a representative of the community and its views on the morality of the act of an accused is relevant to the whole question of extenuating circumstances. A decision whether or not a factor diminishes the moral guilt of an accused is arrived at after a careful consideration of the influence which that factor exerted on the mind or mental faculties of an accused. The moral guilt is diminished if the crime is made to appear less serious or morally excusable while it is a crime. This is a question of fact. The facts of each case are weighed carefully in the light of the evidence led by the state and the accused.

The legislature did not express itself on the concept of moral blameworthiness when it introduced the concept of extenuating circumstances. That omission is a cause for concern because there is difficulty in ascertaining the moral judgment of society. The

so-called moral guilt or partial excuse is a vague concept and yet it is the theme of the whole question of extenuating circumstances.

To sum up the exposition of the three-step inquiry procedure, it is deemed necessary to state the following:

The purpose of the first and second steps of the three-part inquiry procedure into extenuating circumstances is to assist the courts to ensure that there is a factual basis for the finding of extenuating circumstances. They serve as a limiting factor in that any factor which was not present during the commission of the murder is effectively excluded. These steps also ensure that all facts or factors which were present should be considered either alone or in their cumulative effect. If the evidence supports the conclusion that there were facts or circumstances which were present and influenced the accused during the commission of the crime, the court is then required to give a moral judgment on the question whether in its opinion extenuating circumstances were present.

The third step of the three part inquiry procedure constitutes the forum where the trial court gives a moral judgment. The checks and balances of the

moral judgment are the effects and influences which they exert on the state of mind or mental faculties of the accused. Loubser is partly correct when he says that the inquiry into extenuating circumstances is a further grading of the factors which are relevant to prove fault or legal guilt. The only reason why his view is not supported is because it limits the scope of the inquiry because the elements of the crime are limited. However, the moral blameworthiness is judged in the light of the facts of each case. It would appear that ~~this is moral blameworthiness~~ in the limited sense. Although it is a vague concept, it is often resorted to in practice. The vagueness of the moral standards which are used in the inquiry into extenuating circumstances demonstrate a serious vagueness embodied in extenuating circumstances at the time when the life of an accused is at stake. When one says that a moral judgment is given it means that a decision is reached after the use of the subjective test to put the legal guilt of the accused in its proper perspective. It is indeed tempting to say that an inquiry into extenuating circumstances constitutes a second trial where a subjective test is used to assess the guilt in order to determine whether

there were factors which reduced the legal guilt of an accused. The moral blameworthiness may be increased if aggravating factors are present; and it may be reduced if extenuating factors were present.

The moral blameworthiness of an accused may be established after conviction and it is related to the circumstances of the case where it is invoked. It presents a moral appraisal of the conduct of the accused during the commission of the crime. It is reduced if there are facts or circumstances which make the crime to appear less serious or less reprehensible. Legal guilt is established by answering the question whether the accused killed the deceased unlawfully and intentionally. The establishment of an extenuating circumstances answers the question why the accused committed the murder. It provides a motive for the murder. If the motive is acceptable according to the moral values of society, extenuating circumstances are present.

#### 1.6 CLASSIFICATION OF CIRCUMSTANCES

It is possible to classify <sup>40</sup> circumstances which may extenuate the criminal conduct of an accused. Factors like intoxication, provocation,

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40 Such a classification is merely an illustration of the different types of factors which may be considered. The list is not exhaustive.

premeditation, and dolus eventualis pertain to the state of mind of an accused. The mental faculties of an accused are influenced by such factors. Whether or not such an influence constitutes an extenuating circumstance is a question of fact. Such factors may also be referred to as mental circumstances.<sup>41</sup>

The second type of circumstances pertains to the background of an accused. Youthfulness, psychopathic tendencies and belief in witchcraft are examples of circumstances which may fall under this category. There is no clear distinction between the background and mental circumstances.

The third type of circumstances pertains to the role which an accused has played during the commission of an offence.<sup>42</sup>

All these circumstances are discussed in detail in the following chapters. For that reason, it suffices to point out that there is much overlapping and triers of fact may consider the cumulative effect of all such circumstances before the inquiry into extenuating circumstances is disposed of.

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41 Evans 122.

42 see paragraph 7.2.7 infra for further details.

1.7 EXTENUATING CIRCUMSTANCES AND MITIGATING FACTORS  
DISTINGUISHED

Extenuating circumstances are applicable only to  
the crime of murder.<sup>43</sup> They do not apply to  
other offences. The presence of extenuating  
circumstances confers a discretion on a court to  
impose either the death sentence or any other  
sentence. In other words, extenuating  
circumstances constitute a jurisdictional fact-  
a fact which enables a court to impose a  
certain type of sentence.<sup>44</sup> For example, the  
death sentence, life sentence, imprisonment or  
whipping.

A mitigating factor is a concept which applies to  
all offences.<sup>45</sup> It does not concern the  
discretion of the court to impose a certain type  
of sentence. It pertains to the quantum of  
punishment or extent of the sentence. Mitigating  
factors serve as criteria used for complying with  
the appellate division's decision in S v Zinn<sup>46</sup>

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43 section 277 (2) of Act 51 of 1977.

44 see Oosthuizen "Dronkenskap en die oplegging van straf" 1985 OBITER 29 31.

45 Du Toit Straf in Suid - Afrika (1981) 49;  
Oosthuizen 31.

46 1969 2 SA 537 (A).

where consideration should be given to the triad consisting of the offence, the offender and the interests of society.<sup>47</sup> In murder, mitigating factors are important in so far as they constitute extenuating circumstances. There are times when mitigating factors constitute extenuating circumstances. It may be concluded that all extenuating circumstances are also mitigating factors.<sup>48</sup> The converse is not true.

The importance of extenuating circumstances in murder is that their presence confers a discretion on the court to impose the death or another sentence. Murder is the only crime in South African criminal law which is approached in three stages: In the first place, the formal trial takes place which is concluded by either a conviction or an acquittal; the second stage commences after conviction with an inquiry into the presence or absence of extenuating circumstances; and the third stage is constituted by the sentencing of the accused. All other

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47 S v Zinn supra 540.

48 Oosthuizen 36.

offences in South African criminal law have two stages: The first stage consists of the formal trial which is concluded by the verdict of the court. If the verdict of guilty has been returned, the second stage commences. During the second stage, the accused is sentenced.

The philosophy behind the concept of extenuating circumstances is that the court should have a discretion, not to do the accused a favour, but to impose the ultimate death penalty only where the facts of each case warrant such a sentence. This philosophy brings murder into line with other serious offences in South African criminal law. A court which has a discretion to impose a sentence is in a better position to see to it that justice is not only done but is seen to be done. A sentence which is imposed must be appropriate and fair if viewed against the circumstances under which the offence has been committed, the personal circumstances of the accused and the interests of the society.

1.8 EXTENUATING CIRCUMSTANCES AND AGGRAVATING CIRCUMSTANCES DISTINGUISHED

The concept of aggravating circumstances

("verswarende omstandighede") is applicable to two offences in South African Criminal law. It applies to the crime of housebreaking with intent to commit an offence or an attempt to commit this crime and to the crime of robbery or attempted robbery.<sup>49</sup>

The court is conditionally empowered to impose the death sentence following a conviction of any of these offences if aggravating circumstances are present. There is no need for such provision in the case of murder because the death sentence is mandatory subject to three exceptions.<sup>50</sup>

The concept of aggravating circumstances would be redundant if it were applicable to murder. However, aggravating factors<sup>51</sup> are applicable to all offences.

Aggravating factors give rise to a heavy sentence<sup>52</sup> because:

- (a) they increase the moral blameworthiness of the accused;

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49 see Section 1 of Act 51 of 1977; Synman Strafreg 2 ed (1986) 541.

50 see n5 above.

51 Du Toit 85.

52 Du Toit 85.

- (b) they increase the moral guilt of the accused in the eyes of the society; and
- (c) they emphasise the rejection of the conduct of the accused.

In a murder trial, it is the presence of aggravating factors that may persuade a judge to impose the death sentence where it is not statutorily compulsory to do so.

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#### 1.9 JUDGE'S DISCRETION TO IMPOSE THE DEATH PENALTY FOLLOWING A FINDING OF EXTENUATING CIRCUMSTANCES

The word "discretion" refers to a concept embracing a number of interrelated components. Discretion involves making a choice according to certain standards or in accordance with determined criteria. The standards or criteria that shape a discretionary decision are called decisional referents. The "decisional referents" include legal rules, guidelines and customs.

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Discretion exists in a situation where it is

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53 see n31 supra.

54 Baxter Administrative Law (1948) 80.

55 Baxter 89.

56 see Baxter 89 n103.

57 The list is not exhaustive.

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limited. A discretionary power entitles the authority so authorised to act within the fetters of that discretion. It is a misnomer to say that a discretion is free or unfettered because that overlooks the non-choice element of discretion which operates as a fetter.<sup>59</sup> The presence of extenuating circumstances confers a discretion on the court to impose any other sentence other than the death sentence.

Once a finding has been reached in a murder case that extenuating circumstances were present, the judge is conferred with a discretion to be exercised judicially on a consideration of all relevant facts and all personal circumstances of the accused.<sup>60</sup> The exercise of this discretion is the responsibility of the judge alone. The assessors do not play a role after the finding of extenuating circumstances. It is advisable for a judge to use the following guidelines:<sup>61</sup>

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58 Dworkin Taking Rights Seriously 1978 31; see Dworkin 69-71 for further information on the concept of "discretion."

59 Baxter 88.

60 S v Letsolo 1970 3 SA 476 (A) 476. Milton 388.

61 see S v Matthee 1971 3 SA 766 (A) 771.

- (a) the factors which were found to be extenuating should be put in their proper perspective.
- (b) the alternative term of imprisonment as opposed to the death penalty should be considered; the judge should consider the imposition of the term of imprisonment for life and convincing reasons should exist before the ultimate death sentence is imposed.
- (c) the judge should consider the question whether the discipline and training which a prisoner receives in prison while serving a long term of imprisonment would rehabilitate the accused to such an extent that he will not be a danger to society.
- (d) finally the judge should satisfy himself whether the seriousness of the crime warrants the imposition of the death sentence.

The death sentence has been imposed in a number of cases notwithstanding the finding of extenuating circumstances.<sup>62</sup> It is not the purpose of this dissertation to discuss the discretionary<sup>63</sup> imposition of the death sentence for murder. The legal position regarding the exercise of the

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62 Milton 388.

63 for more details see Du Toit 208 et seq; Rabie & Strauss Punishment : An Introduction to Principles. 4 ed (1985) 216 - 222.

judicial discretion is that the death sentence should be imposed only in extreme cases.<sup>64</sup> The words "extreme case" should not be interpreted literally; and the judge is required to scrutinize the facts of the particular case and the personal circumstances of the accused before he passes sentence.

1.10 OTHER CONSIDERATIONS OF THE INQUIRY INTO EXTENUATING CIRCUMSTANCES

The inquiry is limited in the sense that only those facts, factors or circumstances which were present during the commission of the murder are scrutinized. For purposes of convenience the onus to prove the presence of extenuating circumstances is on the accused.<sup>65</sup> The procedure is somewhat flexible as the court may resolve this issue on the strength of the evidence led during the trial.

<sup>66</sup> In S v Diedricks it was pointed out that statutory provision governing the concept of extenuating circumstances created difficulties in the administration of sentence. The determination

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64 Rabie and Straus 216.

65 see n28 supra.

66 S v Diedricks 1981 3 SA 940 (C) 942.

of sentence following a conviction of murder is not keeping pace with other developments in our law where triers of fact enjoy a discretion in the determination of sentence.<sup>67</sup>

The crucial question therefore, is to what extent the discretion of the court is fettered by the section relating to the concept of extenuating circumstances.

The facts which may be considered in the inquiry into the presence or absence of extenuating circumstances are themselves a fetter.<sup>68</sup> For

example,<sup>69</sup> Loubser argues that the factors which courts regard as extenuating in their bearing on culpability or moral guilt are the same factors which are also taken into account in determining legal guilt or fault.<sup>70</sup>

In S v Owen<sup>71</sup> the appellate division made it clear that where the matter is still in the hands of the triers of fact, as at the stage when the

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67 Smit "Judicial discretion and the sentence of death for murder" 1982 SALJ 87 at 88.

68 Du Toit 41.

69 Loubser 341 - 2.

70 see para 1.4 supra where this view was discussed.

71 1957 1 SA 458 (A) 462.

issue of extenuating circumstances is under consideration, factors like the character of the accused are left out of consideration. Similarly in S v Witbooi<sup>72</sup> it is pointed out that the interests of society are not relevant during the inquiry into the existence of extenuating circumstances. The evidence relating to the character of the accused is also irrelevant to this inquiry.<sup>73</sup>

One fetter of the discretion of the court is the facts which are considered during the inquiry. The scope of inquiry is limited to the detriment of the accused.<sup>74</sup> Such limitations and exclusions of facts or evidence of the accused's character or interests of the society are undesirable and may even lead to a miscarriage of justice. For example,- if the court, as a result of such exclusions and limitations, does not find extenuating circumstances, the death sentence must be imposed. Generally speaking, there is no miscarriage of justice if the death

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72 1982 1 SA 30 (A) 34.

73 S v Diedricks supra 943.

74 Smit 90.

sentence is imposed after an exhaustive consideration of all facts be they extenuating or mitigating as it is the case in other serious offences.<sup>75</sup>

The second fetter is to be found in the procedural form of the inquiry.<sup>76</sup> In most cases the accused is required to testify in order to discharge this onus.<sup>77</sup> Where the accused's evidence has been

rejected by the court, the accused must nevertheless convince the court on a balance of probabilities that his version is now true.<sup>78</sup> Smit expresses a view that the accused starts with a lack of credibility ("'n geloofwaardigheidsagterstand"). This may make it difficult for him to discharge the onus. Consequently, the imposition of the death sentence remains mandatory if the presence of extenuating circumstances is not proved nor inferred by the court. The situation would be different if there was no onus because the court would consider all the evidence before it and impose an appropriate sentence.

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75 e.g. terrorism; sabotage; robbery with aggravating circumstances etc.

76 see para 1.4 supra.

77 Smit 91.

78 Smit 91.

The other fetter is inherent in the nature of the concept of extenuating circumstances. The fact that the "moral blameworthiness" serves as a criterion used for evaluating the "circumstances" means that the court has a wide discretion to impose the death penalty. In S v Dladla<sup>79</sup> the appellate division pointed out that the death sentence should not be reserved for the most extreme type of case. This means that the death sentence may be imposed on both A and B, where A intentionally caused the victim's death by a gruesome deed, and where B exceeded the grounds of self-defence and failed to prove the presence of extenuating circumstances.

1.11 OPPOSING VIEWS ON THE DEATH PENALTY

By the way of an introduction, it is necessary to point out that the death sentence is not a welcome type of sentence to a section of our community.

There are two schools of thought on the death penalty in South Africa.<sup>80</sup> In the first place,

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79 S v Dladla 1980 1 SA 149 (A) 151.

80 see Van Niekerk "Hanged by the neck until you are dead" 1969 SALJ 457; Van Niekerk "Hanged by the neck until you are dead" 1970 SALJ 60; Kahn "The Death penalty in South Africa" 1970 THRHR 108; Van der Westhuizen "Moet die doodtraf in Suid-Afrika afgeskaf word of nie?" (1980) SACC 172; Didcott "Should the death penalty be abolished" (1980) 4 SACC 295. Smith "Judicial discretion and the sentence of death for murder" 1982 SALJ 87.

there is a school of thought which advocates that the death sentence should be abolished.<sup>81</sup> This school of thought supports its standpoint by advancing several reasons. For example, the abolitionists argue that :

- (a) there is no clear evidence that the abolition of the death penalty has ever led to an increase in the rate of homicide;<sup>82</sup>
- (b) the alternative to the death penalty is life imprisonment;<sup>83</sup>
- (c) the concept of justice changes with the times. All countries which have abolished capital punishment at one time had capital punishment;<sup>84</sup>
- (d) no judicial system is infallible; mistakes do occur which may lead to the hanging of an innocent man.<sup>85</sup>

The other school of thought advocates the retention of the death penalty. The retentionists advocate the maintenance of the status quo. The status quo is that the death penalty may be

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81 This school of thought is also known as abolitionists.

82 RSA House of Assembly Debates Vol 25 (31 January - March (1969) 2575 (Hereinafter referred to as Assembly Debates).

83 Assembly Debates 2576.

84 Assembly Debates 2577.

85 Assembly Debates 2578.

imposed following conviction on certain crimes; but is mandatory for murder except in certain cases. The retentionists argue in support of the death penalty that:

(a) if the capital punishment, the most severe penalty were no deterrent, then the conclusion must be reached that all penalties would have even less deterrent value.<sup>86</sup> That means that all punishment would become pointless.

(b) if the death penalty is abolished, the murderer would think of his victim on these terms: "You are going to the cemetery for ever, but I am merely going to prison for a while."<sup>87</sup>

(c) hanging is a grim and ugly business, but so is murder, rape, treason, terrorism and

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86. Assembly Debates 2584.

87. Assembly Debates 2584.

sabotage. All these crimes are a grim and ugly business in the eyes of the victim and for society itself.<sup>88</sup>

The argument between retentionists and abolitionists is interesting. There are merits and demerits on both sides. It may be necessary to give a brief exposition of these schools of thought because the concept of extenuating circumstances may act as a via media between the two opposing views. In the majority of cases a term of imprisonment is imposed if extenuating circumstances were found; whereas the death sentence is a logical sentence if they are not found. Didcott J has recently called for the abolition of the death penalty and emphasized that his call had nothing to do with the sympathy for the criminal.<sup>89</sup> The reasons for his call were that the death penalty degrades and debases the society and reduces it to the level of the criminal.<sup>90</sup> The society is made to behave worse than the average criminal and the hanging of an

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88 Assembly Debates, 2590.

89 Sunday Tribune (April 23, 1989) at p 1.

90 see n89 supra.

accused is a cold-blooded premeditated<sup>91</sup> act. Didcott continued to state that a convicted accused is told that he will be strangled to death on an undetermined date in the future and he is kept for months before he is informed of the hour of his execution. The views expressed by Didcott J must be considered against the reasons why an accused is sentenced to death. A very clear and acceptable alternative to the death penalty must be found before it is abolished. The accused who has committed murder deserves to be punished and the punishment must contain some pain and suffering.<sup>92</sup>

#### 1.12 EXTENUATING CIRCUMSTANCES ON APPEAL

It is the primary function of the trial court to make a finding on the presence or absence of<sup>93</sup> extenuating circumstances. An appeal may be lodged against a finding that there are no extenuating circumstances. There are only three

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91 see n89 supra. The Chief Justice of South Africa declined to comment on the views taken Mr Justice Didcott on the death penalty in general.

92 Rabie and Straus 6 - 13. Seeing that this topic falls outside the scope of this dissertation it will not be discussed in detail.

93 Hiemstra 605; R v Muller 1957 4 SA 642 (A) 645; S v Nell 1968 2 SA 596 (A); S v De Bruyn 1976 1 SA 496 (A).

grounds on which an appeal could be lodged:

- (a) a misdirection on the facts or question of law;
- (b) an irregularity; and
- (c) where no reasonable court could have come to any other conclusion than that extenuating circumstances are present.

This appears to be an unnecessary limitation on which an appeal against the death sentence could be lodged. The trial court is required to consider the cumulative effect of all factors as  
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failure to do so is an irregularity. Reasons should be given for a decision that there are no  
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extenuating circumstances.

The limitation on the grounds of appeal against the death sentence is undesirable. In the first place, a judge sitting without assessors arrives at a conclusion that there are no extenuating circumstances. It is also possible that the assessors may overrule the judge. In all fairness, the court of appeal (consisting of three judges)

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94 Milton 388; Hiemstra 605; R v Balla supra 275.

95 Hiemstra 605; S v Manyathi 1967 1 SA 435 (A) 439; S v Sighwahla 1967 4 SA 566 (A) 570.

96 Hiemstra 597; S v Hlohloane 1980 3 SA 854 (A).

should be entitled to review the decision of the trial court or to confirm or set it aside in the same manner as it does in other cases. The concept of extenuating circumstances should not entrench the death sentence imposed on an accused. For these reasons, it is recommended that an appeal against the finding that there are no extenuating circumstances should be automatic or subject to no limitations.

### 1.13 FACTORS WHICH MAY CONSTITUTE EXTENUATING CIRCUMSTANCES

There are factors in South African law of criminal procedure that have been recognised as extenuating circumstances in some decided cases. Each case turns on its own facts. It does not follow that extenuating circumstances in case C would also be extenuating circumstances in case D.

#### 1.13.1 INTOXICATION

Intoxication may either reduce or aggravate the moral blame for a certain crime.<sup>97</sup> It may be regarded as an extenuating circumstance either alone or together with other factors.

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97 S v Ndhlovu (2) 1986 4 SA 692 (A) 695 - 6; see further discussion in chapter 2 of this dissertation.

1.13.2 PSYCHOPATHY <sup>98</sup>

Psychopathy alone may constitute an extenuating  
circumstance.<sup>99</sup> Psychopathic tendencies and  
youthfulness may also amount to extenuating  
circumstances.<sup>100</sup> In S v Webb (2)<sup>101</sup> it was  
held that the use of drugs as well as the fact that  
the accused experienced an emotional disturbance  
amounts to an extenuating circumstance.

1.13.3 BELIEF IN WITCHCRAFT <sup>102</sup>

A belief in witchcraft may constitute an  
extenuating circumstance if:

- (a) the accused entertains a profound and genuine  
belief in witchcraft and that the deceased has  
been practising it;<sup>103</sup>
- (b) the motive for the murder should be to avert  
some great evil that would either befall the  
accused, his/her family or the community; and

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98 see chapter three infra for further details.

99 S v Sibiya 1984 1 SA 91 (A); S v Phillips 1985 2 SA  
727 (N) R v Hugo 1940 WLD 285.

100 S v J 1975 3 SA 146 (O) 149; S v Lehnberg 1975 4 SA  
553 (A) 559.

101 1971 2 SA 343 (T).

102 See chapter 4 for further details.

103 R v Biyana supra 311; S v Sibanda 1975 1 SA 966  
(RAD) 967; S v Ngoma supra 745.

(c) in the opinion of the court, the belief in witchcraft satisfies the three-part inquiry into the presence or absence of extenuating circumstances.

1.13.4 PROVOCATION  
Provocation may, either on its own or cumulatively with other factors such as intoxication, constitute an extenuating circumstance.

1.13.5 YOUTHFULNESS  
Every teenager is regarded as immature. The immaturity may in itself constitute an extenuating circumstance unless the accused committed the murder out of inherent wickedness or inner vice

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104 see n65 above.

105 see chapter 5 for further details.

106 Synman (1984) 152-3; S v Arnold 1965 2 SA 215 (C) 219.

107 S v Manyathi supra 438.

108 see chapter 6 for further details.

109 S v Lehnberg 1975 4 SA 553.

110 Synman (1984) 381.

1.13.6 MISCELLANEOUS EXAMPLES<sup>111</sup>  
Factors like compulsion,<sup>112</sup> absence of  
premeditation<sup>113</sup> and other factors may constitute  
extenuating circumstances.

#### 1.14 CONCLUSION

The purpose of this chapter has been to introduce a discussion of the concept of extenuating circumstances as a device in our law. The legal position before the introduction of this concept has been outlined.

Before the introduction of the concept of extenuating circumstances in 1935, the courts were obliged to impose the death penalty for murder except where the accused was under sixteen years of age or where a woman had been convicted of murdering her newly-born child. The only remedy which could save the life of many accused who did

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111 see the list compiled by Snyman (1984) paragraphs (e) - (n) inclusive; see chapter 7 for further details.

112 S v Peterson 1980 1 SA 938 (A).

113 S v Molale 1973 4 SA 725 (O) 726.

not fall under the categories was the prerogative power of the head of state to commute the death sentences.

The concept of extenuating circumstances was introduced as a device of conditionally conferring a discretion on the courts regarding the imposition of the death sentence for murder in those instances where it was otherwise mandatory. However, the legislature did not define the concept; nor did it give an indication of the nature of circumstances which were to be considered. The procedure and the onus of proof were also left to the courts to determine. This dissertation, therefore is an attempt to discuss that concept in the light of the case law and other available legal literature.

Extenuating circumstances may be defined as any facts, factors or circumstances which were present during the commission of the murder and which influenced the mind or mental faculties of an accused to such an extent that his moral blameworthiness is diminished. The courts may form an opinion that the moral blameworthiness of

an accused is diminished if it gives a moral judgment during the third stage of the inquiry procedure into the concept of extenuating circumstances. The purpose of the first and second steps of the three-part inquiry procedure into extenuating circumstances is to ensure that there is a factual and logical basis on which the existence or otherwise of this concept is determined. It is also a system devised to identify a misdirection if any, on the part of the trial court. It is a difficult task to state whether there is a misdirection during the third stage of the three-part enquiry procedure because a moral judgment is a loose concept - and it is susceptible to various interpretations.

The fact that the concept of extenuating circumstances is restrictively defined is an indication that the law needs reform where a trial judge would be conferred a wider discretion in sentencing an accused convicted of murder.

It is desirable that there should be no limitation on the grounds of appeal against an adverse finding on the question of extenuating circumstances.

## CHAPTER TWO

INTOXICATION: ITS INFLUENCE ON THE MENTAL FACULTIES OF AN  
ACCUSED

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## 2.1 INTRODUCTION

Liquor and drugs may cause intoxication. There are three ways in which these substances may reach the body of a human being. Liquor and drugs may be inhaled, ingested directly into the bloodstream or taken by mouth. The manner how these substances eventually reach the human body is a matter for medical evidence. The law is interested in the influence of any of these substances on the mental faculties of an offender.

In substantive criminal law, the circumstances which give rise to intoxication may be set out as follows:

- (a) actio libera in causa;
- (b) involuntary intoxication; and
- (c) voluntary intoxication;

2.1.1 ACTIO LIBERA IN CAUSA:<sup>1</sup>

Intentional intoxication cannot be raised as a defence if the liquor or drug was taken in order to build up courage for the commission of a crime. Whether this legal position was changed by the S v Baartman<sup>2</sup> decision is doubtful. It would appear that the S v Baartman decision did not change the legal position regarding the liability of an accused on the basis of the actio libera in causa.<sup>3</sup>

1 see Snyman Dronkenskap as Verweer in die Strafreg unpublished LLM dissertation Unisa (1971) 94 - 99; Snyman "Die Actio libera in causa" 1978 De Jure THRHR 60; Joubert The Law of South Africa vol Criminal Law 62; South Africa Law Commission Project 49; Offences Committed under the Influence of Liquor or Drugs (1986) 31 34; compare R v Davis 1956 3 SA 52 (A) 64; S v Kritzinger 1973 1 SA 596 (K) 602; S v Mnyandu 1973 4 SA 603 (N) 606 - 7; S v Burger 1975 4 SA 877 (A) 879; S v Coetzee 1974 - SA 571 (T) 572; S v Dlodlo 1966 2 SA 401 (A) 405; R v Valachia 1945 AD 826 833; R v Thibane 1949 4 SA 720 (A) 729 30; R v Huebsch 1953 2 SA 561 (A) 567; R v Horn 1958 3 SA 457 (A) 466; R v Ntuli 1975 1 SA 429 (A) 437; S v Melinda 1971 1 SA 796 (A) 802.

2 1938 4 SA 395 (C) which was discussed by Snyman "Die actio libera in causa: n onsekere wending in die Suid Afrikaanse reg" 1984 SACC 227.

3 The decision is not discussed in detail because it falls outside the scope of this dissertation.

## 2.1.2. INVOLUNTARY INTOXICATION

Involuntary intoxication is a complete defence in our law.<sup>4</sup> This view was expressed by the Roman Dutch writers. In S v Hartyani<sup>5</sup> the court decided that the defence of voluntary intoxication amounted to absence of mens rea on the part of the offender.

2.1.3. VOLUNTARY INTOXICATION

In S v Chretien<sup>6</sup> the court held that where a person was drunk in such a way that he could carry out involuntary muscular movements, he could not commit an act or conduct in the legal sense. For that

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4 R v Bourke 1916 T S 303; R v Innes Grant 1949 1 SA 753 (A); R v Kaukakani 1947 2 SA 807 (A); S v Johnson 1969 1 SA 201 (A); R v Ngobese 1936 AD 296; R v Fowlie 1906 T S 505; R v Holliday 1924 AD 250; R v Taylor 4 SA 702 (A); S v Tsotsotso 1976 1 SA 364 (O); S v Gardner 1974 4 SA 304 (R); S v Els 1972 4 SA 696 707 (BT); S v Mathews 1950 3 SA 671 (N) 673 - 674; S v Marx 1962 1 SA 848 (N) 853 - 54; R v Schoor 1948 4 SA 349 (C).

5 1980 3 SA 613 (T) 624.

6 1981 1 SA 1097 (A).

reason, voluntary intoxication could constitute a complete defence under certain circumstances.<sup>7</sup>

The Criminal Law Amendment Act<sup>8</sup> created a new offence to close the gap which was created by the Chretien decision. For that reason, voluntary intoxication is no longer a complete defence.

## 2.2 INFLUENCE OF DRUNKENNESS OR DRUG INTOXICATION ON THE MENTAL FACULTIES OF AN ACCUSED

Intoxicating liquor and drugs may impair the mental faculties of a person. The reason for this is that an alcohol - containing beverage or drug acts as a depressant of the central nervous system. When the normal restraint and inhibitions of a person are adversely affected by

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7 see Rabie "Vrywillige dronkenskap as verweer in die strafreg: Die Chretien - saak" 1981 SACC III; Kok "Skuldmetamorfose: De Blom, Dladla en Chretien" 1982 SACC 27; Skeen "Chretien" A riposte and certain tentative suggestions for reform" 1982 SALJ 547 Du Plessis "Chretien - guest uninvited, geographer extraordinary, witness first class" 1982 SALJ 189 Burchell "Intoxication and the criminal law" 1981 SALJ 177; Middleton "S v Chretien" 1981 SASK 83; Badenhorst "S v Badenhorst" 1981 SALJ 148; Kruger "S v Chretien" 1981 SASK 84

8 section 1 (1) and (2) of Act 1 of 1988. A detailed discussion of this Act is not proposed as it falls outside the scope of this research.

the intake of liquor or use of drugs, his power of normal judgment and outlook in life degenerates. There are several phrases one may use to depict this condition.<sup>9</sup>

An intoxicated person is like a car which has an engine problem. If a car's engine is not functioning well the car would either fail to start or may start and move with or without a noticeable problem. Each problem depends on a variety of factors. This parable applies mutatis mutandis to a person whose mental faculties are impaired. The law does not lay down a certain degree of impairment nor does it prescribe a quantity to be consumed or used before it takes cognizance of that influence. The symptoms of impairment of the mental faculties of a person following the consumption of liquor or use of drugs are many. The following examples are not exhaustive:

Drunkenness or drug intoxication may lessen the ability of an individual to exercise self-control over his actions. Moreover, a person who has

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see S v Van den Berg 1968 3 SA 250 (A) 251; S v Petrus 1969 4 SA 85 (A) 89 and S v Grove - Mitchel 1973 (3) SA 417 (A) 421.

consumed liquor or used drugs may lose his ability to exercise self-discipline and to observe his normal moral values. Once his mental faculties are impaired it also means that his judgments would be less than normal.

Sometimes liquor is consumed at a social gathering just for the fun of it. It would be unfair to condemn the consumption of liquor if it is done responsibly. It would be equally unfair to condemn the driving of a car simply because it may be involved in an accident. There are thousands, if not millions, of persons who consume sufficient quantities of liquor and refrain from committing a crime. It would appear that Holmes J A had this in mind when he said:

"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 the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do..."<sup>10</sup>

An analysis of this dictum and others will be done below.

### 2.3. INTOXICATION AND EXTENUATION

Intoxication may blunt the moral feelings of a person who consumed liquor or used drugs. The overall influence of intoxication on the mental faculties of an offender is a factor which may constitute extenuating circumstances.

Intoxication implies a loss of control of physical and mental ability to a degree which renders a person<sup>11</sup> affected incapable of acting as a normal

person; the phrases such as: "Under the influence of liquor" and "to a considerable extent drunk" indicate an impairment of the physical and mental faculties which in turn diminishes the skill and judgment normally required or expected from an ordinary normal and sober person for the proper performance of some activity.

The influence of intoxication on the mental faculties of an accused is a factor which triers

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11 cf Evans Extenuating circumstances in the South African Law of Murder unpublished PhD thesis UCT (1980) 189.

of fact should consider either before conviction or after conviction but before sentence is passed. For purposes of this chapter, intoxication<sup>12</sup> would be discussed as a factor which may constitute an extenuating circumstance either alone or together with other factors.

During the inquiry into the presence or absence of extenuating circumstances, triers of fact would consider any factor in order to form an opinion whether these circumstances are present.

In S v Babada<sup>13</sup> the appellate division expressed the view that it is an irregularity to require a

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12 cf S v Babada 1964 1 SA 26 (A) 27 which was followed in S v Ndhlovu (1) 1965 4 SA 688 (A) 691; S v Ndhlovu (2) supra 695; S v Manyathi 1967 1 SA 435 (A); S v Bradbury 1967 1 SA 387 (A) 394 - 395; S v Petrus 1969 4 SA 58 (A) 90 - 94; S v J 1975 3 SA 146 (0) 147 - 148; S v Mula 1975 3 SA 208 (A) 212 - 213; S v Maarman 1976 3 SA 510 (A); S v Hartmann 1975 3 SA 532 (C) 535; S v Ramatseng 1977 3 SA 510 (A) 512; S v Ngubane 1980 2 SA 741 (A) 746; S v Sauls 1981 3 SA 172 (A) 184; S v Smith 1984 1 SA 581 (A) 592 - 593; S v Theron 1984 2 SA 868 (A) 878; S v Ngoma 1984 3 SA 666 (A) 673; S v Mongesi 1981 3 SA 204 (A) 207; R v Taylor 1949 4 SA 702 (A); see Milton South African Criminal Law and Procedure: Vol II Common Law Crimes (2ed) (1982) 382.

13 supra 28; Du Toit Straf in Suid-Afrika (1981) 13 and Snyman and Morkel Strafprosesreg (1985) 477; S v Mula supra 212; S v J supra 149; S v Ndhlovu (1) supra 691.

specific degree of intoxication before it could amount to an extenuating circumstance. This view is supported because it takes into account the fact that two persons may react differently to the same quantity of liquor or narcotic drugs. This view is supported in that it does not contain an inherent danger of limiting the scope of inquiry by prescribing quantities of liquor or drugs that must be used or consumed before intoxication is considered as a possible extenuating factor. Triers of fact are expected to form an opinion whether extenuating circumstances exist. To require a specific degree of intoxication would frustrate the inquiry and often lead to wrong conclusions which would constitute an irregularity.

Intoxication alone may constitute an extenuating<sup>14</sup> circumstances. This approach is supported as long as triers of fact are satisfied in each case that the liquor or drugs in some way impaired or

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14 Hiemstra Suid-Afrikaanse Strafproses 3ed (1981) 598; S v J supra 149; S v Ndhlovu (2) supra 695 - 696; Milton 382.

affected the accused's mental faculties or his judgment and thereby influenced him to commit the murder. However, it does not necessarily follow that once an accused has consumed liquor or used drugs then triers of fact will inevitably find extenuating circumstances. Consumption of liquor or use of drugs does not constitute extenuating circumstances. The influence of these circumstances on the mental faculties of the accused may influence triers of fact to find extenuating circumstances.

Triers of fact may consider intoxication together with other factors such as provocation, youthfulness and psychopathy as possible extenuating circumstances.<sup>15</sup> It is not desirable to consider and dismiss each factor in isolation. The motivation for this view is that the cumulative effect of all the factors which were present during the commission of the murder may constitute extenuating circumstances. An accused has one set of mental faculties and factors exerting influence on them affect him. The correct procedure is to have regard to all the factors which may have

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15 see S v J supra; S v Van Rooi 1976 2 SA 580 (A) 584.

influenced him during the commission of the murder.

Triers of fact may consider the influence of drugs or liquor on the mental faculties of an accused even if the accused denies that he was drunk or intoxicated as long as there is a factual basis for so doing. In other words, a ruling on the merits of the case before conviction does not rule out the possibility of finding extenuating<sup>16</sup> circumstances on the basis of intoxication.

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The Criminal Law Amendment Act does not appear to have altered the legal position as regards the the recognition of intoxication as a factor which may constitute an extenuating circumstance. This Act merely creates an offence which would close<sup>18</sup> the gap which was opened by the Chretien decision. It is not clear what effect section 2 of that Act would have on sentencing an offender following a finding of extenuating circumstances on the basis of intoxication. It appears that section 2 of the Criminal Law

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16 see S v J supra; S v Van Rooi 1976 2 SA 580 (A) 584.

17 Act 1 of 1988.

18 see S v Chretien supra.

Amendment Act does not change the present position in the law of sentencing in South Africa.<sup>19</sup> Intoxication may either be a mitigating or aggravating factor depending on the facts of each case. If the legislature wished to alter this position it would have expressed its intention in a clearer language.

#### 2.4 CONCLUSION

~~It is trite that~~ intoxication is one of the factors which may constitute extenuating circumstances either alone or together with other factors. In support of this position, several reasons were advanced on why intoxication ought to be accorded such recognition.

Intoxication following the use of narcotic drugs or consumption of liquor causes loss of control of physical and mental ability to a degree which renders a person affected incapable of acting like a normal person.

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19 S v Ndhlovu (2) supra 696.

The phrases "under the influence of liquor or narcotic drugs"; "considerably befuddled by liquor" or "to a considerable extent drunk" indicate an impairment of the physical and mental faculties which in turn diminishes the skill and judgment normally required or expected from an ordinary normal and sober person for the proper performance of some activity.

It is the influence of intoxication on the mental faculties of an accused during the commission of the murder which may constitute an extenuating circumstance.

It is trite law that no specific degree of intoxication is required for it to constitute an extenuating circumstance, that intoxication alone or together with other factors may constitute extenuation and that triers of fact are not bound by a ruling on the merits of the case.

## CHAPTER THREE

## PSYCHOPATHY AND EXTENUATION

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## 3.1 INTRODUCTION

Our criminal law proceeds from an indeterministic premise. This means that the human will is essentially free; "it is not incontrovertibly<sup>1</sup> predestined to any particular line of conduct." For that reason, wrongdoers are criminally responsible, and their responsibility may be excluded by mental abnormality or diminished by personality disorders<sup>2</sup> or by distressing personal circumstances.<sup>3</sup> According to modern psychology the human personality consists of mainly three series of mental functions, namely, the cognitive, conative and affective faculties.<sup>3</sup>

The cognitive functions of a human mental faculty include perceiving, thinking, reasoning, remembering and insight.<sup>4</sup> A person's power to

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1 Report of the commission of enquiry into the responsibility of mentality deranged persons and related matters. RP 69 / 1967 (hereafter referred to as the "Rumpff Report") par 2.4; S v Lehnberg 1975 4 SA 553 (A) 559 G; S v Williamson 1978 2 SA 233 (T) 238 G - H; Rabie & Strauss Punishment: An introduction to principles 4ed (1985) 264 - 265; Snyman p 112.

2 Rabie & Strauss 265.

3 Rumpff Report para 9.9.

4 Rumpff Report para 9.9A.

understand or to form a conception of something or to have an insight into any matter is controlled by the cognitive process of that person.<sup>5</sup>

The affective functions relate to the feelings and emotions of a human being's mental faculty.<sup>6</sup> Such feelings relate to hopeful anticipation or disappointment. On the other hand the emotions include emotions of hatred, fury and jealousy.

The conative or volitional functions distinguish a human being from an animal. Man is capable of controlling his behaviour by the voluntary exercise of his will.<sup>7</sup>

If the cognitive, affective and conative functions of a human being's mental faculties function properly, his personality is normal because his mental faculties are integrated. It is at the door of this human being, it is submitted, that the law lays full blame for wrongdoing until the contrary is proved.

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5 Rumpff Report para 9.9 A.

6 Rumpff Report para 9.9 B.

7 Rumpff Report para 9.9 C.

The disintegration of the unifying function of the self, the cognitive, affective and conative (volitional), may take place under certain circumstances.<sup>8</sup>

This then brings us to the question of psychopaths.<sup>9</sup> The term "sociopath" may be used in the place of "psychopath."<sup>10</sup>

There are two schools of thought regarding the definition of a psychopath. It is necessary to discuss their view in detail below in order to formulate an acceptable definition. The discussion of these definitions would appear too long, but it would be realised that the extent of the problem merits a wider consideration of all the aspects of psychopathy.

8 see paragraphs 9.11, 9.12 and 9.13

9 The word "psychopath" is used here for want of a better word; see Kisker The Disorganised Personality 3ed (1977) 186.

10 Kisker 186; Cleckley The Mask of Sanity 4ed (1984) 28.

### 3.2 DEFINITION OF A PSYCHOPATH BY PSYCHOLOGISTS

<sup>11</sup>  
 McCord defines a "psychopath" as an asocial, aggressive, highly impulsive person, who feels little or no guilt and is unable to form lasting bonds of affection with other human beings. A psychopath is a dangerously maladjusted personality who displays the following <sup>12</sup> characteristics:

- (a) ~~The~~ psychopath is asocial and his conduct brings him into conflict with society;
- (b) He or she is driven by primitive desires and an exaggerated craving for excitement;
- (c) His or her actions are unplanned and guided by whims;
- (d) A psychopath is highly impulsive because of his or her self-centred search for pleasure;
- (e) A psychopath is aggressive because he or she has learned few socialized ways of coping with frustration;

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11 McCord Psychopathy and Delinquency (1956) 2.

12 McCord 14.

(f) The psychopath feels little guilt and may commit most appalling acts, and yet view them without remorse;

(g) The psychopath differs from other human beings because of his or her guiltlessness and lovelessness. His or her emotional relationships are designed to satisfy his or her own desires.

13.

Kisker defines a psychopath as an antisocial personality who shows five principal traits:

"inability to profit from experience; superficial emotion; irresponsibility; lack of conscience and impulsiveness. A psychopath does not fall under persons who are mentally retarded or who suffer from organic brain damage or disease; and a psychopath is neither a psychotic nor a neurotic.<sup>14</sup> He is incapable of forming friendship based on trust and affection.<sup>15</sup> Kisker points out that when such a person enters into what appears to be friendship, it is a matter of expediency.

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13 Kisker 186.

14 Kisker 186.

15 Kisker 187.

Friendship exists only to the extent that it can  
<sup>16</sup>  
 be useful.

<sup>17</sup>  
 Cleckley, a professor of clinical psychiatry at  
 the Medical College of Georgia, in an attempt to  
 clarify some issues about the so-called  
 psychopathic personality, listed sixteen  
 indicators of a psychopath:

1. Superficial charm and good "intelligence";
2. Absence of delusions and other signs of  
~~irrational~~ irrational thinking;
3. Absence of "nervousness" or psychoneurotic  
 manifestations;
4. Unreliability;
5. Untruthfulness and insincerity;
6. Lack of remorse or shame;
7. Inadequately motivated antisocial behaviour;
8. Poor judgment and failure to learn by  
 experience;
9. Pathological egocentricity and incapacity for  
 love;

16 Kisker 187.

17 Cleckley 362 - 363.

10. General poverty in major affective reaction;
11. Specific loss of insight;
12. Unresponsiveness in general interpersonal relations;
13. Fantastic and uninviting behaviour with drink and sometimes without;
14. Suicide rarely carried out;
15. Sex life impersonal, trivial, and poorly integrated; and
16. Failure to follow any life plan.

It is clear that these characteristics of a psychopath are shared by many other criminals.

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Craft points out that there appears to be some general agreement among experts that psychopaths have a combination of the following salient clinical features:

(a) Primary Features

- (i) A lack of feeling of equality to other human beings, also known as affectionlessness or lovelessness; and
- (ii) A liability to act on impulse and without forethought.

## (b) Secondary Features

- (i) A combination of the primary features resulting in aggression;
- (ii) A lack of remorse or shame for what he or she has done;
- (iii) Inability to learn from experience; and
- (iv) A lack of drive or motivation.

## (c) Additional Feature

In addition to the features enumerated above, a psychopath may entertain a wish to do damage to things or to injure persons.

In all fairness it must be pointed out that Roux<sup>19</sup> inherited from Craft the idea of dividing the characteristics of a psychopath into primary and secondary features. The difference between the views of the two authors is negligible. Be that as it may, Roux's definition of a psychopath is<sup>20</sup> singularly impressive. It reads:

"Psigopatie is 'n afwyking of gebrek wat in die persoonlikheidsamestelling van 'n persoon manifesteer en wat herhalde antisosiale en

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19 Roux Die Psigopaat (1975) 21.

20 Roux 14.

wangedrag vanaf 'n vroeë ouderdom (voor of tydens puberteit) tot gevolg het en waarop straf en die konvensionele metodes van behandeling geen verbeterende of hervormende effek het nie, met die gevolg dat sodanige individu met die norme van die gemeenskap waarbinne hy lewe, in botsing."

### 3.3 DEFINITION OF A PSYCHOPATH IN SOUTH AFRICAN LAW

An attempt has been made to distinguish between a clinical definition of psychopathy and a definition given to the concept by the courts and the legislature. This has been done for various reasons. In the first place many of the psychiatrists who defined this concept did so while doing research overseas.

For that reason, their definition based on the results of their research is clinically acceptable throughout the world. On the other hand, the courts in this country have defined the concept of psychopathy on many occasions. The decisions of the appellate division of the supreme court are binding in the Republic of South Africa and South West Africa / Namibia. Roux is a South African

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21 see n19 supra.

author. He did research in this country and his definition of the concept of psychopathy carries more weight because he referred to the South African legislation, the definitions formulated by overseas psychiatrists and the decisions of our courts. It is therefore reasonable to accept his definition as a point of departure.

A psychopath is "a type of a person in whom there exists an emotional immaturity and instability which manifests itself from an early age in an inability to conform to the accepted moral and social standards demanded by the society in which he lives."<sup>22</sup>

This definition has been accepted by the courts in this country. It is also accepted that "while the psychopath can assess the difference between right and wrong and appreciate that injury may result from violence, he used forethought and is usually heedless of consequences. Generally impulsive, he often reacts to anything which angers him by losing control and becoming dangerous."<sup>23</sup>

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22 R v Kennedy 1951 4 SA 431 (A) 434.

23 S v Nell 1968 2 SA 576 (A) 579; cf R v Von Zell 1953 3 SA 303 (A) 308.

In terms of the Mental Health Act a "psychopathic disorder" means a persistent disorder or disability of the mind (whether or not subnormality of intelligence is present) which has existed in the patient from an age prior to that of eighteen years and which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient ("psychopath" has a corresponding meaning). "Mental illness" means any disorder or disability of the mind, and includes any mental disease, any arrested or incomplete development of the mind and any psychopathic disorder.

The definition of a psychopath in South African law is limited because it does not cover all the aspects of the clinical definition.

#### 3.4 PSYCHOPATHY AND EXTENUATION

Section 78 (7) of the Criminal Procedure Act 51 of 1977 provides that if the court finds that the accused at the time of the commission of the act was criminally responsible for the act, but that his capacity to appreciate its wrongfulness or to

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24 Section 1 (xxii) of Act 18 of 1973.

25 Section 1 (xi) of Act 18 of 1973.

act in accordance with an appreciation of its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such such diminished responsibility into account when sentencing him.<sup>26</sup> Diminished responsibility means that the accused has committed a crime under certain circumstances<sup>27</sup> which make his act morally less reprehensible. Such an accused, despite his criminal responsibility, finds it more difficult than a normal person to act in accordance with his appreciation of right and wrong because certain circumstances -- make it easy for him to commit the offence. In other words his ability to resist the temptation to commit the crime is rendered less effective.

If an accused has been convicted of murder<sup>28</sup> his diminished responsibility will not entitle him to a less severe sentence unless it amounts to an extenuating circumstance. However, if the court has found extenuating circumstances it may take into account the fact that the accused's

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26 Section 78 (7) of the Criminal Procedure Act 51 of 1977.

27 cf Rumpff Report para 8.3.

28 except where he has been convicted of killing a newly born child or where the accused is under 18 years of age.

criminal responsibility was diminished.

In S v Mnyanda<sup>29</sup> the appellate division held that the mere fact that an accused is clinically regarded as a psychopath does not warrant a finding of diminished responsibility.

Following the characteristics of a clinical psychopath<sup>30</sup> it would appear that psychopathy being a psychiatric concept is not of much value to a lawyer. The lawyer wishes to determine criminal responsibility. Moreover, some psychopaths may not qualify to be criminally responsible in terms of section 78<sup>31</sup> (1) while others may be criminally responsible, and fail to qualify for lenient<sup>32</sup> punishment in terms of section 78 (7). Evans states that section 277 (2) of the Criminal Procedure Act<sup>33</sup> should be amended by the addition at the end of the sub-section of the following

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29 S v Mnyanda 1976 2 SA 751 (A) 766.  
see S v Fourie 1976 2 PH H146A.

30 see 3.2 above.

31 Act 51 of 1971; see Snyman Criminal Law (1984) 129

32 Evans Extenuating Circumstances in the South African Law of Murder unpublished PhD thesis (1980) UCT 188.

33 Act 51 of 1977.

proviso:-

"Provided that, where a court finds that the accused in the commission of the crime acted with diminished responsibility, the presiding judge shall impose any sentence other than the death sentence."

This submission is partly supported. This proviso, if inserted, would make it impossible for a trial court to impose the death sentence on an accused convicted of murder committed while his criminal responsibility was diminished. The wording of this proviso suggests that the court must not impose the death sentence. This proviso is not wholly supported because it ignores the fact that the borderline between criminal responsibility and criminal non-responsibility is not an absolute one, but a question of degree.<sup>34</sup> "... Practical experience also teaches however - and psychology and psychiatry confirm this - that there are gradations of normality and that it is difficult in some cases to draw a dividing line between normality and abnormality for purposes of the law."<sup>35</sup>

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34 Snyman 128; R v Hugo 1940 WLD 285 289; Rumpff Report para 8.1.

35 Rumpff Report para 8.1.

The question whether or not an accused's psychopathic personality is to be regarded as an extenuating circumstance falls to be decided by the trier of fact in the light of the facts of the particular case. This view has been criticised as being too easy a way out in dealing with the psychopath and which can so easily fall foul of not having regard to the essential characteristics of this type of person as related to the concept of blameworthiness. This criticism does not appear to be sound. A trier of fact has the benefit of having heard the expert witness, observed his demeanour and of relating all these to the facts of the particular case. There must be a factual basis for the finding of the absence or presence of extenuating circumstances. An informed decision, that is a decision based on proved facts is sought in any enquiry of this kind. Moreover, the characteristics of a psychopath must be viewed against the background of what the accused is alleged to have done and proved to have been so.

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In R v Hugo, it was pointed out that while it is

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36 S v Nell supra 580; Snyman & Morkel Strafprosesreg led (1985) 480.

37 Evans 167.

38 R v Hugo supra.

true that the mentality of an accused may furnish<sup>39</sup> a fact which may constitute extenuation, it is not every warped or prejudiced mind that can be said to be suffering from a delusion, erroneous belief or defect that will do so. There must be a clear<sup>40</sup> element of abnormality. In casu the court found that the facts revealed some abnormality. The court was satisfied that the accused was a psychopathic person to a degree amounting to<sup>41</sup> substantial abnormality. For that reason the accused was subject to abnormal obsessions and was different from a normal person. The accused was unable to show the powers of resistance and the courage in the face of trouble that normal persons could display.<sup>42</sup> The court found that extenuating circumstances were present although the case was classified as "borderline".

<sup>43</sup>  
The facts in S v Sibiya were briefly as follows: Appellant had committed within the space of little more than a fortnight a series of senseless crimes of violence including various assaults,

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39 R v Biyana 1938 EDL 310 311.

40 R v Hugo supra 288.

41 R v Hugo supra 289.

42 R v Hugo supra 289.

43 S v Sibiya 1984 1 SA 91 (A)

murder and rape. Dr Ramsundhar stated in his evidence that appellant was a person who suffered from a persistent disorder or disability of the mind which induced in him abnormally aggressive or seriously irresponsible conduct. Dr Lind, also a psychiatrist, stated in his evidence that although the appellant might be suffering from a personality disorder, he could not be regarded as mentally ill in terms of the Mental Health Act and the Criminal Procedure Act <sup>45</sup> unless he was <sup>46</sup> classified as a psychopath. The trial court, in assessing the mental condition of the appellant in regard to possible extenuation, addressed its mind only to the question whether the accused had <sup>47</sup> been shown to be a psychopath. The court said:

"It is so that the accused is a person who is given to violence without much provocation. However, after considering all the evidence in the case, we find that he is probably not a psychopath. The accused did not behave like a normal person but the same must be said of so many murderers and persons convicted of violent crimes. In our view all the features

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44 Act 18 of 1973 .

45 Act 51 of 1977.

46 my underlining.

47 S v Sibiya supra 95.

mentioned by Dr Ramsundhar, taken cumulatively, point to him not being a psychopath. Dr Lind felt that there was no sufficient evidence to classify the accused<sup>48</sup> as such and we agree with his assessment."

This approach was improper. In the first place the enquiry was limited to the question whether or not the appellant was classified as a<sup>49</sup> psychopath. In the second place, it creates the impression that the appellant could be considered mentally ill only if he was classifiable as a psychopath. Following an application for leave to appeal against the finding of no extenuating circumstances, the trial judge realised a reasonable prospect of success of the appeal because the appellant had an abnormal or defective personality. In granting leave to appeal the trial judge held that the accused did act in a grossly irrational and anti-social manner; and it was quite possible that another

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48 S v Sibiya supra 95.

49 S v Sibiya supra 95 B.

50 S v Sibiya supra 95 A.

51 S v Sibiya supra 95 H.

court might find that there existed some form of diminished responsibility on the part of the accused which necessitates a finding of extenuating circumstances.<sup>52</sup> On appeal a sentence of life imprisonment was substituted for the death sentence because the appellant suffered from a substantial defect, and such mental defect had diminished his moral culpability.

The decision in S v Sibiya is supported because it enables a trial court to consider the effect of all types of mental illness and the effect thereof on an accused during the commission of the murder. It also makes clear that a psychopathic condition of an accused may or may not have a bearing on the criminal responsibility of the accused. If an accused suffers from a substantial mental illness or defect this fact may diminish his moral as opposed to his legal culpability. On the other hand, where the mental illness or defect is not substantial then it would not diminish the moral culpability of the accused. The court must have regard to the cumulative effect of all the possible facts which may have a bearing on the mind of the accused before the question of

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52 S v Sibiya supra 95 H.

53 S v Sibiya supra 86 A.

extenuating circumstances is disposed of.

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The question was asked in S v Phillips whether the classification of a person as a psychopath or as a person with an anti-social personality disorder serves any useful purpose in our criminal law. The judge president warned that it does not necessarily seem to follow that a person who is certifiable as suffering from a mental defect or

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mental illness because he is a psychopath must be taken to be suffering from a mental illness or

defective in terms of section 78 of the Criminal Procedure Act. The judge president stated

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further that it does not necessarily seem to follow that such a person should not be criminally responsible or that such a person should have diminished responsibility. The court was

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justified in making these remarks because the characteristics of a psychopath "seem simply to be a basket of characteristics that exist in a number of criminals who have had criminal and aggressive tendencies from a comparatively young

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54 S v Phillips 1985 2 SA 720 (N) 29.

55 as defined in the mental Health Act 18 of 1973.

56 Act 51 of 1977.

57 within the meaning of section 78 (7) of the Criminal Procedure Act 51 of 1977.

58 age. " Dr Simonsza, a witness in S v Phillips 59 regarded the term as being useful only for purposes of showing the fact that the person concerned did not have a psychosis or mental defect of any kind.

Generally speaking, the remarks by the judge president are justified. After all it is not a classification of an accused as a psychopath or his clinical characteristics that are of interest to the law. The picture changes when an expert witness testifies under oath and informs the court that the accused being a psychopath suffered from mental illness or defect which was substantial during the commission of the murder. Once again the court must be satisfied on the evidence as a whole that the accused's psychopathic condition diminished his moral culpability. A mere classification as a psychopath does not have any legal consequences when the question of extenuating circumstances is considered. However, the court may not summarily dismiss the classification of an accused as a psychopath because that amounts to an irregularity. The statement that the

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58 S v Phillips supra 739.

59 S v Phillips supra 739.

characteristics of a psychopath "seem simply to be a basket of characteristics that exist in a number of criminals who have had criminal and aggressive tendencies from a comparatively young age" seems to undermine the fact that those characteristics were formulated by researchers of repute. This statement is also not entirely correct because a trial court must listen to expert evidence. In S v Pieterse <sup>60</sup> Rumpff C J said:

"Ek dink dit moet beklemtoon word dat 'n psigopatiese toestand in 'n saak soos die onderhawige alleen dan tot mindere verwytbaarheid in die strafreg kan geld indien daar inderdaad 'n abnormale obsessie is wat beheerbaarheid van die wil tot so 'n mate verminder het dat die psigopatiese toestand beskryf kan word as grensende aan 'n g estessiekte."

The appellate division held that there is no formula which could be used to determine the stage at which a psychopathic condition of an accused results in diminished responsibility <sup>61</sup> because a finding in this respect would depend on the facts of each case.

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60 S v Pieterse 1982 3 SA 678 (A) 688.

61 S v Pieterse supra 684.

In S v J<sup>62</sup> the court stated that a psychopath compares well with a motor vehicle with defective brakes. When a psychopath is in motion, he does not stop before he collides with something.<sup>63</sup> A psychopath stands "outside life" and he regards other human beings as objects in his surrounding. Although the court seems to have exaggerated the characteristics of a psychopath its definition corresponds to the clinical definition of this type of person. The parable of a motor vehicle with defective brakes was simply thought out by the trial judge. Although no professional evidence on psychopathy was led in S v J, the trial court correctly stated the legal position when it said that it is not the classification of a personality or characteristic which is relevant to extenuating circumstances, but the fact that his psychopathic tendency<sup>64</sup> may diminish his moral culpability.

### 3.5 CONCLUSION

Our criminal law proceeds from an indeterministic premise that the human will is essentially free and that it is not predestined to any particular line

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62 S v J 1975 3 SA 146 (O).

63 S v J supra 151.

64 S v J supra 150 D.

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of conduct. A normal human personality consists mainly of three mental functions, namely, the cognitive, conative and affective faculties. It is submitted that the mental faculties of a psychopath also consist of these three mental functions. For that reason, a psychopath is criminally responsible. A psychopath is a person who has a slight problem with his mental faculties. He behaves the way he does simply because of a slight disintegration of his mental faculties, which may differ from one psychopath to another. A trial court has the benefit of professional evidence regarding the psychopathic condition of an accused as well as the body of the whole evidence led during the trial.

The findings in this chapter may be summarised as follows:

- (a) The definition of psychopathy as formulated by Roux and supplemented by the decisions of our courts is recommended.<sup>66</sup>
- (b) The emotional immaturity and instability of a psychopath which manifests itself from an

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65 see n1 above.

66 see paragraph 3.2 and n22 above.

early age in an inability to conform to the accepted moral and social standards demanded by the society in which he lives serves as a basis for measuring the acts of a psychopath with a different yardstick. In the normal course of events, however, such emotional immaturity and instability may diminish the criminal responsibility of the accused.<sup>67</sup> If, this is the case, then the court may take this fact into account when passing an appropriate sentence on an accused.

(c) An accused who has been convicted of murder may not benefit from his diminished criminal responsibility unless this also leads to the finding of extenuating circumstances.<sup>68</sup>

(d) A psychopathic tendency on the part of the accused does not necessarily amount to an extenuating circumstances.<sup>69</sup>

(e) Psychopathic tendencies in the required degree may amount to extenuating circumstances.<sup>70</sup>

67 in terms of section 78 (7) of the criminal Procedure Act 51 of 1977.

68 except, of course, where the accused has killed a newly born child or is under 18 years of age.

69 S v Mnyanda 1976 2 SA 751 (A) 7664.

70 S v Mnyanda supra 766 G.

(f) When considering an accused's mental condition in connection with the issue of extenuating circumstances the inquiry is directed to mental disorder or disability of whatever kind and not merely to psychopathic <sup>71</sup> aberration.

(g) It is recommended that the following proviso be inserted to subsection 78 (7) of the Criminal Procedure Act:

"Provided that where the accused is convicted of murder, the court may impose any sentence other than the death sentence."

This proviso would enable the trial court to impose the death sentence only in exceptional cases; and the position of accused persons who are convicted of murder while suffering from mental illness or disorder of whatever kind will be improved considerably.

## CHAPTER FOUR

## BELIEF IN WITCHCRAFT AND EXTENUATION

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## 4.1 INTRODUCTION

A belief in witchcraft is one of the factors that may constitute an extenuating circumstance.

A "witch" is a female person who practices witchcraft.<sup>1</sup> A witch is supposed to have dealings with the devil or evil spirit and by their co-operation to perform supernatural acts.<sup>2</sup> A "wizard" is a male person who practices witchcraft; he may also be referred to as sorcerer or black magician.<sup>3</sup>

"Witchcraft" or "ubuthakathi" is black magic.<sup>4</sup> Practitioners of witchcraft are believed to be capable of harming or injuring others through mystical ways, for instance, by directing lightning to a particular person or by causing the death of certain persons.

In R v Biyana<sup>5</sup> the accused entertained a profound belief in witchcraft as well as a conviction that the deceased was a practitioner of witchcraft.

1 Morris The Heritage Illustrated Dictionary of the English Language (1973) 1470.

2 S v Mafunisa 1986 3 SA 495 (VSC) 497.

3 Morris 1470.

4 see Motshekga "The ideology behind witchcraft and the principle of fault in criminal law" 1984 vol 2 Codicillus 4 7; Dlamini "African medicine and the law" 1985 Obiter 80.

The court acknowledged that there is a universal belief in witchcraft by the vast majority of black people. In S v Mokonto Holmes J A said that the decision illustrated "the dreadful influence of witchcraft which still holds in thrall the minds of some blacks, notwithstanding the coming of Western civilization to Natal some 150 years ago." It is well known that some blacks do believe in magic and witchcraft.

The general belief that Christianity and education would eradicate the belief in witchcraft among Africans seems to have failed.

The purpose of this chapter is to give an exposition of the effect of the belief by an accused in witchcraft during the commission of the crime of murder. The motive behind the killing of a human being will also be considered.

#### 4.2 BELIEF IN WITCHCRAFT PER SE

Most accused usually deny that they believe in

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- 5 1938 EDL 310 311.  
 6 R v Biyana supra 311.  
 7 1971 2 SA 319 (A) 320.  
 8 The word "black" is substituted for "Bantu".  
 9 R v Mkize 1951 3 SA 28 (A) 33.  
 10 Motshekga 7.

witchcraft. This means that no evidence may be led that the deceased practices witchcraft which creates a potential danger to the accused the accused's family or the community in general.<sup>11</sup> Nevertheless, the trial court has a positive duty to determine whether an accused's belief in witchcraft could constitute an extenuating circumstance. It is undesirable to dispose of the question of extenuating circumstances without giving reasons for that decision.<sup>12</sup>

<sup>13</sup>  
A three-part enquiry is used to determine whether an accused's belief in witchcraft constitutes an extenuating circumstance in any given set of facts. The belief in witchcraft must meet certain requirements in order to constitute an extenuating circumstance. Counsel for the state

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11 S v Sibanda 1975 1 SA 966 (RAD) 967.

12 Van den Heever "Geloof in toornkuns as versagtende omstandigheid in die Suid-Afrikaanse reg" 1985 De Jure 105 107; S v Hlolloane 1980 3 SA 824 (A) 825.

13 see S v Ngoma 1984 3 SA 666 (A) 673; S v Babada 1964 1 SA 26 (A) 27 - 28.

14  
 in R v Biyana pointed out in the heads of argument that honest belief by blacks in witchcraft may constitute an extenuating circumstance, and that should be so only where such witchcraft creates potential danger for the black in question. Counsel for the appellant, on the other hand, submitted that witchcraft has always been regarded as an extenuating circumstance whenever a murder has been shown to be the result thereof. This argument is incorrect. Witchcraft as opposed to a belief in witchcraft has never been regarded as an extenuating circumstance. Many people know something about witchcraft but they do not believe in it. The crux of the matter therefore is belief in witchcraft. In casu, the court held that an extenuating circumstance is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally not  
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 legally, the accused's guilt. The mentality of an accused may furnish such a fact. Lansdown J P  
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 said:

"A mind, which though not diseased so as to

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14 R v Biyana supra 310.

15 R v Biyana supra 311.

16 R v Biyana supra 311.

provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous belief or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical than it would be in the case of a mind of normal condition. Such a delusion, erroneous belief or defect would appear to us to be a fact which may in proper cases be held to provide an extenuating circumstance."<sup>17</sup>

~~As belief in witchcraft must be entertained under certain circumstances before it is recognised as an extenuating circumstance. The argument by counsel for the state in R v Biyana forms the basis of the present development of the law in this regard.~~<sup>18</sup>

Belief in witchcraft may constitute an extenuating circumstance if -

(a) the accused entertained a profound and genuine

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17 my emphasis.

18 see discussion infra.

belief in witchcraft that the deceased was<sup>19</sup>  
practicising witchcraft;

- (b) the motive for the killing was to avert some great evil that would either befall the accused, his family or his community;<sup>20</sup> and
- (c) in the opinion of the court, the belief in witchcraft satisfied the three - part enquiry into the presence or absence of extenuating circumstances as formulated by the<sup>21</sup>  
appellate division in S v Ngoma.

It is clear from the aforesaid that a mere belief in witchcraft does not constitute an extenuating circumstance. For that reason, it may be assumed that a man in the street is not in a position to say whether a certain fact or circumstance constitutes an extenuating<sup>22</sup>  
circumstance. The application of the three -<sup>23</sup>  
part enquiry to determine the presence of extenuating circumstances makes it impossible

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19 R v Biyana supra 311; S v Sibanda supra 967; S v Ngubane 1980 2 SA 741 (A) 745.

20 S v Sibanda supra 967.

21 S v Ngoma supra 673.

22 cf Dhlodhlo "Some views on belief in witchcraft as a mitigating factor" 1984 De Rebus 407.

23 S v Ngoma supra 673.

for the man in the street to make a correct guess. Moreover, it is trite that there must be a factual basis on which the finding of the existence of extenuating circumstances is based. This implies that one must have heard all the evidence led during the trial in order to decide properly. An attitude of the man in the street may be tested by means of a questionnaire in order to formulate certain conclusions and predictions, but that would not be of any help on the concept of extenuating circumstances.

#### 4.3 BELIEF IN WITCHCRAFT AND EXTENUATION

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In R v Biyana the court had occasion to deal with the question of witchcraft. It was proved that the accused had a profound belief in witchcraft and a conviction in them that the deceased was practising this to the detriment of accused one and two and in the case of accused three and four to the general public evil. Lansdown J P held that the position of the four accused was analogous to that of a man who genuinely but erroneously believed he had been a

victim of a grievous wrong, and, while suffering under a sense of this grievance, deliberately endeavoured to avenge himself upon the supposed wrongdoer by killing him.<sup>25</sup> The judge president also held that the crime is not reduced in law to a lesser offence by such a belief. However, if such a belief is genuinely and not unreasonably entertained, it may constitute an extenuating circumstance.<sup>26</sup> The judge was wrong here. He introduced an objective element in an area that is subjective. It is immaterial whether the belief was reasonable as long as it was genuine. In casu the court was satisfied that the erroneous belief or the delusion which induced the accused to murder the deceased amounted to an extenuating circumstance.

The Biyana decision is the first reported decision on belief in witchcraft since the introduction of the concept of extenuating circumstances<sup>27</sup> in 1935. The court regarded the belief which could render a crime committed under its influence less reprehensible than it would be in the case of a mind of normal condition.

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In S v Ngubane, accused one and three, each armed

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25 R v Biyana supra 312.

26 see n25 above.

27 section 206 of Act 46 of 1935.

28 S v Ngubane supra.

with a pistol, awaited the expected arrival of the deceased near his home. Their common purpose was to shoot him. In due course the deceased arrived, driving a motor car up to the front gate of his home where he stopped. The two men, upon reaching the car from which the deceased had not yet alighted, fired several shots at him. The deceased was hit three times, two of the bullets caused relatively minor injuries but the third bullet which penetrated the heart fatally injured the deceased. After conviction accused one, an appellant in this case, told the trial court that he "got involved" in the matter because he:

"Knew that a witch... is not wanted in the community because a witch... kills children and grown-up people and also at some stage there were children killed at my home by witches... and I consented to this because accused number 3 had told me that this person - this wizard was going to arrive at his... home to do his bewitching there and that we should sit near his home and look after the premises. That a person was a witch he should be killed. Even in the old

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Zulu custom the wizards used to be killed."

The trial court found that the appellant grossly exaggerated the element of witchcraft in the course of his evidence, and that what he said in the passage cited above did not square with or account for his conduct at the scene.<sup>31</sup> The trial court regarded the appellant as "a paid assassin" whose purpose was to kill in order to earn money.<sup>32</sup> The appellate division held that a belief in witchcraft has long been recognized as a relevant consideration and sometimes a decisive one when deciding whether extenuating circumstances exist.<sup>33</sup> Miller J A said the following:

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(a) In R v Biyana it was the accused's belief in witchcraft which served to palliate the horror of the crime and thus provide an extenuating circumstance.<sup>35</sup>

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30 S v Ngubane supra 745.

31 S v Ngubane supra 746.

32 S v Ngubane supra 745; R v Biyana supra 311; R v Fundakubi supra 815 and 818.

33 R v Biyana supra.

34 S v Ngubane supra 745.

35 S v Ngubane supra 745.

(b) The judge president's remarks in R v Biyana do not mean that where a belief in witchcraft is less than "profound" but nevertheless genuine, it is necessarily to be excluded from the benefit of a finding of extenuating circumstances.<sup>36</sup>

(c) The degree of intensity of the belief is a highly important factor, for the more intense such belief is, the greater the sense of fear or apprehension it induces.<sup>37</sup>

(d) It is always helpful to consider whether the killer acted under the influence of genuine fear, whether in regard to his own future safety or of those to whom he stood in a protective relationship, or even of the community in general.<sup>38</sup>

If the element of genuine fear or apprehension is lacking, it might be appreciably more difficult for the accused to persuade the court that his moral guilt was reduced merely because in some

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36 S v Ngubane supra 745.

37 S v Ngubane supra 745.

38 1984 2 PH H113.

vague way he believed in the existence of witchcraft and generally regarded those who practiced it as undesirable members of society who should be eliminated.

#### 4.4 WHERE BELIEF IN WITCHCRAFT CANNOT CONSTITUTE EXTENUATION

##### 4.4.1. "RITUAL" MURDER

Where A kills B in order to obtain parts of B's body for purposes of medicine, a so-called<sup>39</sup> "ritual" murder is committed. In S v Makhwanya the appellant, who was also a witchdoctor, with the help of his co-accused killed N and sought to remove some parts of the deceased's body. The appellant wanted to use those parts of the body as "medicine" in his practice of witchcraft. It is not clear from the report whether those parts were eventually removed. In casu the appellate division refused to accept appellant's belief in witchcraft as constituting extenuating circumstances.

<sup>40</sup>  
In S v Modisadife the appellant, an uneducated

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39 1980 3 SA 860 (A).

40 S v Modisadife supra 862.

black man, had, at the request of his brother, murdered the brother's stepchild, a black girl aged about 11. Thereafter he cut out certain parts of her body in order that medicine as directed by a witchdoctor could be made therewith. In an appeal against the death sentence, it appeared from the evidence that the appellant believed in witchcraft, but that he did not have<sup>41</sup> an intense and urgent belief in such witchcraft.

In rejecting the appellant's belief in witchcraft as an extenuating circumstance, Rumpff C J held that in times in which we leave a belief in witchcraft the accused apparently had, a fear which had nothing to do with the deceased and also was not immediate and which he could obviate by removing himself from the neighbourhood, did not make his deed any less reprehensible or reproachable.<sup>42</sup> The chief justice pointed out that it is trite that a genuine belief in witchcraft may be considered in determining whether extenuating circumstances are present.<sup>43</sup> At the same time it must be borne in mind that for a belief in witchcraft to

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41 S v Modisadife supra 863.

42 S v Modisadife supra 863.

43 S v Modisadife supra 863.

constitute an extenuating circumstance, the facts of the particular case must permit of such inference.<sup>44</sup> The chief justice was satisfied in the particular facts of S v Modisadife that the appellant's belief in witchcraft did not constitute an extenuating circumstance. However, he did not say that the belief in witchcraft cannot constitute an extenuating circumstance in cases which are called "ritual" murder.<sup>45</sup> Du Toit takes the view that "ritual" or "muti" murder excludes a belief in witchcraft as an extenuating circumstance in all cases because -

"Gewoonlik gaan sulke moorde met koue berekendheid gepaard en het niks te make met 'n subjektiewe geloof in, of vrees vir die bonatuurlike nie"<sup>46</sup>

In the case of "ritual" or "muti" murder a belief in witchcraft should be excluded as a ground on which extenuating circumstances may be found.<sup>47</sup> The view expressed by Du Toit is completely acceptable. A "ritual" murderer commits the crime because he wants to further his practice of

44 Du Toit Straf in Suid-Afrika (1981) 32.

45 Du Toit 32.

46 Du Toit 32.

47 S v Modisadife supra 863.

witchcraft. The motive behind this type of murder is personal gain, greed and barbarism. The legal conviction of the black community condemn a "ritual" murder. Moreover, a victim of a "ritual" murder is usually an innocent person.<sup>48</sup> While recognising the continued existence of a belief in witchcraft, the courts must guard against undue leniency when such belief has manifested itself in conduct which is criminally punishable.<sup>49</sup> There may well be cases where it would be proper to decline to bring in a finding of extenuating circumstances even where the belief in witchcraft is certainly present.<sup>50</sup> A "ritual" murder is one of such cases.

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Van den Heever and Wildenboer take the view that a belief in witchcraft, even in the case of "ritual" murder, and depending on the facts of the case, may constitute an extenuating circumstance. The authors point out that it is wrong to say that a belief in witchcraft cannot constitute an extenuating circumstance in the

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48 S v Nxele 1973 3 SA 753 (A) 757 - 758.

49 R v Fundakubi 1948 3 SA 810 (A) 819.

50 "S v Modisadife 1980 3 SA 860 (A)" 1983 TSAR 82 84.

51 Van den Heever and Wildenboer 84.

case of "ritual" murder . This view is not to be supported . A "ritual" murderer plans his actions long before he commits the crime. A "ritual" murderer picks a particular target. He is like a hunter who searches for a particular game. To say that a "ritual" murderer should be given the benefit of extenuating circumstances would create disrespect for the law. It is doubtful that a belief in witchcraft is a social phenomenon which forms part of the culture of the black man.<sup>52</sup> It is better to say that a belief in witchcraft is an evil which gradually pollutes the culture of the black man. For that reason, few black persons may openly admit in court that they believe in it.

<sup>53</sup>  
In S v Sibanda Beadle C J pointed out that cases came before that court where a human being is murdered with the object of taking some portion of that human being's body for making "muti" to be used for witchcraft purposes and that in every one of those cases the accused, who was found guilty of such murder, was found

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52 S v Sibanda supra 967.

53 S v Sibanda supra.

guilty of committing the offence without any extenuating circumstances. In all such cases the killing was prompted by the belief in witchcraft.

4.4.2. PERSONAL GAIN OR FINANCIAL REWARD

The facts of S v Sibanda<sup>54</sup> were briefly as follows: The appellant had been unfortunate in gambling. He consulted a witchdoctor. The latter told him that if he raped his grandmother, then killed her, then cut off a portion of her ear and her chin for "muti" and used that he would be more successful. Following that advice, appellant raped his grandmother and killed her. He was convicted and sentenced to death. The murder had been deliberate, brutal, cold-blooded and there were no extenuating circumstances. Counsel for the appellant argued that witchcraft played some part in the commission of the murder, and therefore the crime should be found to have been committed in circumstances of  
<sup>55</sup>extenuation. The court disagreed with that

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54 S v Sibanda supra 967.

55 S v Sibanda supra 967.

argument. The only reason why the accused killed his grandmother was because he believed that he would be more successful in gambling.<sup>56</sup> The killing was done entirely for his own personal gain, purely to facilitate his gambling activities.

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In S v Ngubane the trial court concluded that money was the appellant's dominant motive for the deliberate killing of the deceased and that the appellant grossly exaggerated the element of witchcraft in the course of his evidence. The trial judge stated, in his report, that he regarded the appellant as a "paid assassin" whose purpose was to kill in order to earn money.<sup>58</sup>

It is clear from these cases that killing for personal gain does not constitute extenuation. The killing induced by a promise of financial reward or personal gain unaccompanied by fear for oneself or one's family or fear for the safety of the community in general does not constitute an extenuating circumstance.<sup>59</sup>

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- 56 S v Ngubane supra 745.  
 57 S v Ngubane supra 746.  
 58 S v Sibanda supra 967.  
 59 S v Sibanda supra 967.

## 4.5 CONCLUSION

It is clear that a belief in witchcraft per se does not constitute an extenuating circumstance. The courts must apply the three-part enquiry procedure into the existence or absence of extenuating circumstances as set out in S v Babada<sup>60</sup> and re-affirmed in S v Ngoma.<sup>61</sup> There must be a factual basis on which the finding of the presence or absence of extenuating circumstances is based, and it is undesirable to dispose of that matter without giving reasons for so doing.

The present attitude of the courts is to regard a belief in witchcraft as a delusion a defect or erroneous belief which, if genuinely entertained, may make the accused's moral guilt less reprehensible or diabolical.<sup>62</sup> This serves to extenuate a murder committed while entertaining a belief in witchcraft subject to certain exceptions.

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60 S v Ngoma supra 673.

61 cf R v Biyana supra 311.

62 S v Sibanda supra 967; S v Ngubane supra 745.

The court may accept the accused's belief in witchcraft as an extenuating circumstance where the accused kills the deceased in the genuine belief that by killing the deceased he is averting some great evil that would either befall himself or befall his family or his community.<sup>63</sup>

The court may not accept the accused's belief in witchcraft where he commits a "ritual" or "muti" murder.<sup>64</sup> This type of murder is committed with the object of taking some portions of that human being's body for making "muti" to be used for witchcraft purposes.<sup>65</sup> The attitude of the court in refusing to regard a belief in witchcraft as an extenuating circumstance is fully supported because -

- (a) a "ritual" or "muti" murderer plans his actions long before the crime is committed;
- (b) a "ritual" or "muti" murderer selects a victim who, in most cases, is an elderly

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63 Du Toit 32.

64 S v Sibanda supra 967.

65 see the facts of S v Sibanda supra and those of S v Sibanda supra.

person or innocent child;

(c) greed and personal gain are the motive for committing the murder;

(d) financial reward may also be a motive for the crime; and

(e) the murder is brutal, cold-blooded and premeditated.

For these reasons, it is strongly recommended that an accused person who commits "ritual" murder should be deprived of the benefit of extenuating circumstances.

## CHAPTER FIVE

## YOUTHFULNESS AND EXTENUATION

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## 5.1 INTRODUCTION

The Criminal Procedure Act provides that <sup>1</sup> "where a woman is convicted of the murder of her newly born child or where a person under the age of eighteen years is convicted of murder or where the court, on convicting a person of murder, is of the opinion that there are extenuating circumstances, the court may impose any sentence other than the <sup>2</sup> death sentence."

This subsection may be interpreted as follows: There are three instances where trial courts enjoy a discretion to impose the death penalty. The first instance is where a woman is convicted of the murder of her newly born child. This is a statutory discretion and its existence does not depend on the presence of <sup>3</sup> extenuating circumstances.

The second instance is where a person under the age of eighteen years is convicted of murder.

1 section 277 (2) of Act 51 of 1977.

2 my own underlining.

3 Milton South African Criminal Law and Procedure  
Vol II Common - Law Crimes 2ed (1982) 375.

Again this is a statutory discretion, and in my view it is not to be confused with the discretion which is conferred on a trier of facts by the presence of extenuating circumstances.<sup>4</sup> Hiemstra<sup>5</sup> takes the view that the legislature has declared that extenuating circumstances automatically exist where a youth under eighteen years of age has been convicted of murder.<sup>6</sup> Snyman also expresses a view that if an accused is under eighteen years of age there is always extenuation since the imposition of the death sentence is then optional. The views taken by these two authors are not supported.

There is nothing in the wording of the relevant section which indicates that if the age of an accused is below eighteen years extenuating circumstances automatically exist. There is authority that where the age is below eighteen years there is no need to enquire into the presence of extenuating circumstances because the imposition of the death penalty is optional.<sup>8</sup> This view is supported because it represents a correct

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4 Milton 375

5 Suid-Afrikaanse Strafproses 3ed (1981) 600.

6 Criminal Law (1984) 381.

7 section 277 (2) of Act 51 of 1977.

8 Du Toit Straf in Suid-Afrika (1981) 215; Milton 376.

interpretation<sup>9</sup> of the relevant section of the Act and it makes it clear that the enquiry into the presence of extenuating circumstances is necessary where there is no discretion to impose the death<sup>10</sup> penalty.

Snyman's view<sup>11</sup> that the effect of the Lehnberg<sup>12</sup> decision is that the limit of eighteen years is virtually raised by the court to twenty years and that the court has thereby assumed powers vested in the legislature is not supported. A trier of facts is justified in considering the youthfulness of an accused in order to make a finding about extenuating circumstances. This approach is desirable because the concept of extenuating circumstances is not limited to the age of a certain class of accused. If the legislature wanted to limit the enquiry of extenuating circumstances to the age of eighteen years it would have done so in a clear language. Moreover, the language used in the relevant section does not make an enquiry into this concept<sup>13</sup> redundant.

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9 see n7 supra.

10 Du Toit 215; Milton 376.

11 Snyman 381.

12 1975 4 SA 553 (A).

13 see n10 supra.

The determination of the age of an accused is important especially where it is very close to eighteen years. The date of birth is the best method of establishing the age of any person.<sup>14</sup> Evidence of parents or close relatives is also acceptable. Medical evidence may be resorted to. A trier of fact is discouraged from estimating the age if only scanty information is available.

## 5.2 IMMATURITY AND INEXPERIENCE OF A YOUTH

The word "youth" means<sup>15</sup> being in the early or undeveloped period of life or growth; lacking experience; immature; the time between childhood and maturity. On the other hand the word "immaturity" means:<sup>16</sup> unripe; not fully grown or developed; behaving with less than normal maturity.<sup>17</sup> The word "experience" means: the

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14 S v Ngoma 1984 3 SA 666 (A) 672.

15 Morris The Heritage Illustrated Dictionary of the English Language (1973) 1485 & 1486.

16 Morris 658.

17 Morris 682.

active participation in events or activities leading to the accumulation of knowledge or skill; the knowledge or expertise derived from participation in an event or activity; actual observation of or practical acquaintance with facts or events.

A young person does not have experience in life and his judgments may lack the insight which an adult would display under the same circumstances. This conveys a message that a youth should not be measured with the same yardstick as a mature adult.

### 5.3 YOUTHFULNESS AND EXTENUATION

A youth of twenty years is no child, but he cannot be reasonably expected to show the same stability of character, responsibility and self-restraint as an adult.<sup>18</sup> The reason for this view is that maturity is a gradual process which allows for individual variation.<sup>19</sup> In S v Khumalo the judge pointed out that youthfulness, even where the accused is over eighteen years of age, must be considered with other factors in order

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18 S v Khumalo 1968 4 SA 284 (T) 285.

19 S v Khumalo supra 285.

to establish whether extenuating circumstances  
<sup>20</sup> are present. In casu, the court took into  
 account the fact that the accused was twenty  
 years of age and that his intellect was dull.  
 Extenuating circumstances were found and a  
 sentence of twelve years' imprisonment was  
 imposed.

Youthfulness may also be considered together  
 with intoxication for possible extenuation. If  
 an accused denies that he had taken liquor  
 during the commission of the murder, it is not  
 necessary for the trial court to go out of its  
 way and search for evidence that the accused was  
<sup>21</sup> intoxicated.

Youthfulness in itself prima facie amounts to an  
<sup>22</sup> extenuating circumstance. The common law states  
 that the youthfulness of an accused should be  
 regarded as extenuation irrespective of the age  
<sup>23</sup> of the youthful offender. The common law

20 R v Hugo 1940 WLD 285; R v Ndhlovu 1954 SA455 (A)  
 459; S v Mohlobane 1969 1 SA 561 (A) 565.

21 S v Mohlobane supra 565.

22 S v Lehnberg supra 560.

23 S v Lehnberg supra 560 and S v Mohlobane supra 565  
 - 66 where the common law sources are quoted (they  
 were not available to me).

position was not changed by section 277<sup>24</sup> (2) of the Criminal Procedure Act.<sup>25</sup> The age limit of under eighteen years is not superfluous.

Youthful offenders are regarded as immature<sup>26</sup> and therefore prima facie entitled to extenuation, unless the circumstances of the case are such that the trial judge feels compelled to impose the death penalty.<sup>27</sup> The Lehnberg decision makes it clear that youthfulness means immaturity, lack of experience of life, thoughtlessness and especially a mental condition prone to being<sup>28</sup> influenced, especially by adults. A youth of eighteen or nineteen years is immature and to impose the death sentence on such a youth without further ado, is to measure the youth with the same yardstick as a mature adult. The approach that youthfulness in itself amounts to an extenuating circumstance has been applied to youths of eighteen years and older.<sup>29</sup>

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24 see n1 supra.

25 Act 51 of 1977.

26 see n15 supra.

27 S v Lehnberg supra 561.

28 see n27 supra.

29 S v Khumalo supra; R v Ndhlovu supra; S v Manyathi 1967 1 SA 435 (A) and S v Letsolo 1970 3 SA 476 (A).

30

In S v Rooi six accused were convicted of murder. They were ranging from the age of eighteen to twenty one. Their age was fixed by the trial court after hearing medical evidence. The trial court held that the first accused was fully matured because it saw him in the witness box and concluded that he was old enough to know what was happening. On appeal, the procedure followed by the trial court was found to be unsatisfactory. Firstly, the question is not whether the accused was old enough to know what happening; the court must determine whether the immaturity of an accused does not render his conduct less morally reprehensible.<sup>31</sup> The appeal court was not convinced that the degree of the accused's maturity could be assessed in the light of his demeanour in the witness box. The court should consider all factors and not one factor in isolation. In casu the trial court neglected to consider the fact that the murder was committed with the intention known as *dolus eventualis*. The absence of direct intention does not per se constitute extenuating circumstances.<sup>32</sup> The

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30 1976 2 SA 580 (A).

31 S v Rooi supra 585.

32 S v Rooi supra 584.

presence of *dolus eventualis* may constitute extenuating circumstances if it is considered cumulatively with other factors. The appeal court found that the accused acted in a gang; the fact that there were some of them who most probably had been incited by the lead of certain members of the gang into doing deeds which they would never commit or dare to commit under normal circumstances; the fact that their conduct appeared to have occurred suddenly and without premeditation. All these factors considered in their cumulative effect enabled the appeal court to find extenuating circumstances.

The S v Van Rooi decision indicates that an inquiry into the accused of maturity should be determined in the light facts of each case. This approach is welcomed because a youthful accused is likely to commit a murder because of various influences.

The approach of the trial court that the age of an accused could be inferred from his/her demeanour<sup>33</sup> in the witness box was rejected.

In S v Hlongwana<sup>34</sup> it was held that the youthfulness of accused, the influence of liquor and the influence of the older person constitute an extenuating circumstance. It was pointed out that the question whether youthfulness amounts to extenuating does not depend on whether the youth<sup>35</sup> in question fully appreciates what he does.

33 S v Hlongwana 1975 4 SA 567 (A) 571.

34 S v Hlongwana supra 571; see S v Hlohloane 1980 3 SA 834 (A) 825.

35 S v Maimela 1976 2 SA 587 (A) 588 where the death sentence imposed on a 16 year old youth was substituted with a 20 year term of imprisonment; see also S v Mapatsi 1976 4 SA 721 (A) 724; S v Makete 1971 4 SA 214 (T) 215; S v Maarman 1976 3 SA 510 (A); S v Caesar 1977 2 SA 348 (A) 351; S v Lekaota 1978 4 SA 684 (A) 692 and S v J 1975 3 SA 146 (O) where the court had an occasion to consider youthfulness as an extenuating circumstance.

## 5.4 INHERENT WICKEDNESS ("INHERENTE BOOSHEID)

A youthful offender may be sentenced to death if his prima facie immaturity is ruled out by the wickedness of his deed.<sup>36</sup> In other words the accused must have acted out of inner-vice. It is not necessary that the accused should display vicious or wicked propensities throughout his life.<sup>37</sup> The past history of the accused need not be dominated by events of wickedness.<sup>38</sup>

The test is whether the murder has been committed as a result of the inherent wickedness ("inherente boosheid") of the accused irrespective of whether he / she be a first offender or with many previous convictions.<sup>39</sup> As indicia of the inner vice of the accused, a trier of facts may take into account the accused's motives, his / her personality and mentality, his / her past history and any other relevant factor including the nature of the crime, the manner of its commission and the form of intention with which the murder has been committed.

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36 S v Lehnberg supra 561.

37 S v Caesar supra 353.

38 see n37 supra.

39 S v Caesar supra 353.

The concept of inner vice distinguishes two murders committed by youths, and persuades triers of fact to impose the death sentence on one accused and a term of imprisonment on the other. The role of each accused must be carefully assessed if the crime was committed in a gang or group.

## 5.5 CONCLUSION

A youth is a human being who is in the early period of his life or growth. Inherent in his personality is a lack of experience in life generally, immaturity which allows for individual variations and vulnerability to influence by older persons. Triers of fact have rightly decided that a youth should not be measured with the same yardstick as a mature adult.

The findings in this chapter could be briefly summarised as follows:

Triers of fact have a discretion to impose the death sentence on teenagers below 18 years of age. This means that the imposition of the death penalty is left in the discretion of the trial court.

Every teenager is prima facie regarded as immature<sup>41</sup> and therefore entitled to extenuation. This is part of the common law.<sup>42</sup> A teenager may be sentenced to death if the trial court is satisfied that the murder has been committed out of inherent wickedness ("inherente boosheid"). It is the inner vice in the personality of an accused which distinguishes two or more murders committed by two youths or a gang of youths.

The onus of proof for extenuating circumstances is not affected by the rebuttable presumption that every teenager is prima facie entitled to extenuation due to his / her immaturity.

The Lehnberg decision was correctly decided and it represents a welcome development which is necessary for the sentencing of youths convicted of murder.

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41 s v Lehnberg supra 561.

42 see n23 supra.

## CHAPTER SIX

## PROVOCATION AND EXTENUATION

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## 6.1 INTRODUCTION

The word "provoke" means to incite to anger or <sup>1</sup> resentment; to set in violent motion or to stir.

"Provocation" means a cause of irritation or something that provokes or incites in violent <sup>2</sup> motion. Other words which depict an emotional influence are anger, rage, fury, wrath; resentment and indignation. All these words denote varying degrees of marked displeasure.

The word "anger" denotes strong usually temporary displeasure without specifying the manner of <sup>3</sup> expression. It is common knowledge that anger denotes a strong displeasure. <sup>4</sup> The words "rage" and "fury" denote an intense and uncontained explosive emotion. "Resentment" refers to ill will and suppressed anger generated by a sense of grievance. "Wrath" means a fervid anger that seeks vengeance or punishment.

- 1 Morris The Heritage Illustrated Dictionary of the English Language (1969) 1056.
- 2 Morris 1056.
- 3 Morris 50.
- 4 Fowler The Concise Oxford Dictionary of Current English (1978) 36.

Provocation<sup>5</sup> will be examined in this chapter with the clear understanding the what applies to provocation as an extenuating circumstance applies mutatis mutandis to anger. Provocation as affecting criminal responsibility will not be examined in this chapter as it falls outside the

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- 5 for general information on provocation as affecting criminal responsibility see Bergenthuin "Provokasie in die Suid-Afrikaanse strafreg" 1986 De Jure 98 and 263; Bergenthuin Provokasie as verweer in die Suid-Afrikaanse Strafreg unpublished LLD thesis UP (1985); Snyman Strafreg 2ed (1986) 197 - 213; Du Toit Straf in Suid-Afrika (1981) 603; Evans Extenuating Circumstances in the South African Law of Murder unpublished PhD thesis UCT (1980) 335 - 341; Feltoe "Criminal law policy in relation to the defence of provocation" 1986 Zimbabwe L Rev vol 1 and 2 140 - 157; Strauss "Opmerking oor toorn as faktor by die vasstelling van strafregtelike aanspreeklikheid" 1959 THRHR 14; Burchell "Provocation and intoxication" 1959 SALJ 385; Burchell "Provocation" subjective or objective" 1958 SALJ 246; Burchell "Provocation" subjective or objective" 1964 SALJ 27; Dugard "Provocation: no more rides on the Sea Point bus" 1966 SALJ 261; Snyman "Is there such a defence in our law as 'Emotional Stress'?" 1985 SALJ 240; Van Niekerk "A witch's brew from Natal - some thoughts on provocation" 1972 SALJ 169; Van der Merwe "S. v Mokonto" 1972 THRHR 193; Steyn "The basis of provocation re-examined" 1958 SALJ 383; Van der Walt "Provokasie as regsverdedigingsgrond" 1986 TSAR 99; Snyman and Morkel Strafprosesreg led (1985) 481 - 2; Snyman Criminal Law (1984) 145 - 154; De Wet and Swanepoel Strafreg 4ed (1985) 130 - 6; Joubert (ed) LAWSA vol 6: Criminal Law 85;
- Burchell and Hunt South African Criminal Law and Procedure vol 1 General Principles 2ed (1983) 306 - 318;
- Du Plessis 1987 SALJ 539.

scope of this dissertation. Provocation as a factor which may constitute extenuating circumstances will be examined in this chapter.

## 6.2 PROVOCATION AND EXTENUATION

Provocation is an emotional reaction to words or insulting conduct which leads to aggressive conduct.<sup>6</sup> The conduct of the provoked person is performed on the spur of the moment while there is still little or no power of self-control.<sup>7</sup> The provocative behaviour or insulting words create a conflict in the mind of the accused. The commission of a crime under these circumstances is partly<sup>8</sup> or wholly<sup>9</sup> hastened by the provocative conduct on the part of the other person.

6 Snyman Criminal Law (1984) 145; Evans 335; Hiemstra 603; Du Toit 67.

7 Snyman 150.

8 This is applicable where provocation is relevant to extenuation or mitigation of sentence.

9 where provocation is affecting criminal responsibility.

Provocation is one of the factors which could influence the mind of an accused during the commission of a crime. If the crime of murder has been committed any provocation on the part of an accused is a factor which is to be assessed by triers of fact in determining whether<sup>10</sup> extenuating circumstances are present. In R v Hugo<sup>11</sup> the court held that a degree of provocation may enable the court to find extenuating circumstances.

The reason why provocation is a factor worthy of consideration in extenuation is that a crime committed impulsively without premeditation is likely to be morally less blameworthy than one committed without such an influence.<sup>12</sup> This does not guarantee that where there is evidence of provocation a trier of facts will always find extenuating circumstances for that is a conclusion which may be reached in the light of the evidence as a whole. One may state that it is more evil<sup>13</sup> to kill in cold blood than in hot. This is a

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10 R v Hugo WLD 285 287.

11 R v Hugo supra 287.

12 Snyman 146; R v Krull 1949 4 SA 720 (A) 721.

13 R v Krull supra 397.

general statement which does not have an effect of a rule of law and the law expects people to exercise control over their emotions.

<sup>14</sup>  
Snyman argues that provocation ought to operate as a ground for mitigation if there are reasonable grounds for the accused's anger, which there would be if the reasonable man would also have become enraged under the circumstances. It is very difficult to agree with this view. In

<sup>15</sup>  
S v Mokonto the court held that where provocation is relevant to extenuation there seems all the more reason for the exclusion of the objective test since the moral blameworthiness of an accused is considered and not his legal guilt. In casu the objective test for provocation was expressly rejected.

It is trite that extenuating circumstances may be found only after a moral appraisal of the evidence of the case. To apply an objective test would be irregular. <sup>16</sup> Snyman contends that if a

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14 Snyman 152.

15 S v Mokonto supra 327.

16 Snyman 152.

subjective standard is applied, it would lead to unfair results as quick-tempered people would, in his view, be entitled to hide their impatience and on that ground receive more lenient sentences. This view has merits in spite of the fact that it is not borne out by the available judicial dicta.

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In R v Muyana the court expressed the view that provocation is no defence to legal guilt but merely an incident which is likely to enable a trier of facts to take a lenient view of sentence. In S v Van Vuuren it was emphasized

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that although provocation is no defence to a crime, it warrants serious consideration in mitigation.

Provocation may cloud the accused's sense of appreciation and judgment to such an extent that while he knows what he is doing, he may not fully appreciate the consequences of his acts.

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Provocation as an extenuating circumstance has received little attention from legal

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17 1928 GWLD 42.

18 1961 3 SA 305 (E) 307.

19 see S v Turk 1979 4 SA 621 (ZR) 623.

20  
 writers. Much attention was devoted to  
 21  
 provocation as affecting legal guilt. Be that  
 as it may, provocation has been accepted as  
 constituting an extenuating circumstance in a  
 22  
 number of reported decisions. It appears from  
 all cases where provocation constituted an  
 extenuating circumstance that the provocative  
 conduct must have originated from the victim  
 or, in the case of a gang, from a member of that  
 23  
 group. This is not conclusive, in my view,

- 20 Du Toit 25 (devoted one page); Hiemstra 603 (one half of a page); Snyman Criminal Law (1984) 377 (one page); Snyman and Morkel 481 (one half of a page); Evans 335 - 341 (six pages); Bergenthuin thesis 366 - 367 (one page) and Bergenthuin "Provokasie in die Suid-Afrikaanse strafreg" 1986 De Jure 277 (Almost two pages) and this list is not exhaustive.
- 21 see n5<sup>7</sup> supra.
- 22 S v Mokonto supra; S v Ntanzi 1975 1 PH H8 (A); S v Arnold 1965 2 SA215 (C); S v Grove - Mitchell 1975 3 SA 417 (A); S v Karuzi 1971 4 SA 246 (RAD).
- 23 Evans 336; S v Dena 1962 2 PH H237 (O).

because if A insults B and runs into a crowd of people, B kills C under the mistaken belief that C is A, the effect of provocation would not be ruled out of consideration. The point which one may make here is that it is the influence of provocation on the accused which is relevant to extenuation. The source of the provocative conduct is only relevant to show that there was a causal nexus between the provocation and the commission of the crime.

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In S v Bureke it was stated that "loss of self-control is a pre-requisite for the operation of provocation as an extenuating circumstance." This view is not supported. It is irregular to prescribe that there should be loss of self-control because extenuating circumstances are determined after conviction. Secondly, it is difficult to accept that where there was no loss of self-control provocation would not operate as an extenuating circumstance. The test used to determine the presence of extenuating  
25  
circumstances was set out in S v Babada.

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24 1960 1 SA 49 (FSC) 51 - 52; see Evans 337.

25 1964 1 SA 26 (A) 27.

Strong reasons should be furnished if an additional test is proposed. One may state that the "loss of self-control" is only an additional aspect which may facilitate the examination of provocation as an extenuating circumstance in the light of the evidence as a whole.

### 6.3 CONCLUSION

The effect of provocation on the accused during the commission of a crime of murder was examined in this chapter. The word "provocation" has been defined as an emotional reaction to words or insulting conduct which lead to aggressive conduct.

The examination of provocation as a factor relevant to extenuation re-affirmed the trite position in our -law that provocation may constitute an extenuating circumstance either alone or together with other factors and that the test for  
26  
provocation is subjective.

The reason why provocation is one of the factors to be considered in extenuation is that it influences the mind of an accused and hastens the commission of the murder. The crime is committed on the spur of the moment.

The view that there should be loss of self-control before provocation is acceptable as an extenuating circumstance is not supported because there is no acceptable reason why the test for extenuating circumstance set out in S v Babada should be amended.

## CHAPTER SEVEN

## OTHER FACTORS RELEVANT TO EXTENUATION

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## 7.1 INTRODUCTION

Triers of fact have a wide range of factors to consider in order to form an opinion whether extenuating circumstances exist. Intoxication, psychopathy, belief in witchcraft, provocation and youthfulness are some of these factors which were examined in the previous chapters. The reason for examining them in separate chapters was merely to ensure a special consideration of each factor in the light of the case law. However, in this chapter a consideration of a group of factors will be made because an enquiry into extenuating circumstances should admit a wider consideration of issues.<sup>1</sup> Snyman<sup>2</sup> mentions fourteen factors which may constitute extenuating circumstances. This list, it is submitted,<sup>3</sup> is not exhaustive and those mentioned merely serve as examples of factors which figure more often in practice. The only fetter which limits the factors that may be considered in extenuation is that they must exist during the commission of the murder.

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1 Evans Extenuating Circumstances in the South African Law of Murder unpublished PhD thesis UCT (1980) 294.

2 Snyman Criminal Law (1984) 379 - 80.

3 Snyman 379.

<sup>4</sup>  
 Loubser submits that the factors which triers of fact regard as extenuating are the same factors which are also taken into account in determining legal guilt or fault, and that a further grading of the elements of legal guilt or fault is made after conviction in order to establish extenuating circumstances. There is merit in this view. It is supported if the words "... further grading of these elements of legal guilt or fault" refer to the three-part enquiry used by triers of fact to form an opinion about extenuating circumstances.

## 7.2 EXAMINATION OF OTHER FACTORS RELEVANT TO EXTENUATION

### 7.2.1. GENERAL MENTAL CONDITION OF AN ACCUSED

<sup>6</sup>  
 In S v Makete the court expressed a view that extenuating circumstances can be of two kinds -

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4 Loubser "Versagende omstandighede by moord: Die Gradering van skuld" 1977 THRHR 333.

5 see discussion in chapter 1 supra.

6 1971 4 SA 214 (T) 215.

circumstances under which a mature and responsible person does an act under stress of certain conditions which excuses his unlawful act to such an extent as to render that act less blameworthy. The second type is where a person of immature mind and of lesser responsibility than the proverbial normal person, does an act, not necessarily induced by the stress of circumstances.<sup>7</sup> In casu, Viljoen J pointed out that he was dealing with an accused who had an immature mind. The accused in question did not have a mind which was sick or temporarily sick or affected which rendered him not to be criminally responsible. An accused whose mind is only partly affected or immature may be criminally responsible to a diminished extent.<sup>8</sup> The court found that the accused acted rashly, inexplicably and irrationally. Extenuating circumstances were found.

It is clear therefore that triers of fact are likely to find extenuating circumstances where the accused's mind is partly affected or immature during the commission of the murder.

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7 S v Makete supra 215.

8 S v Makete supra 215.

9

In R v Smook, the court found S guilty of murdering her husband. The facts of the case revealed that S was having an unhappy married life with the deceased. S was a woman with a violent temper. It was also established that before the murder, S was involved in a quarrel with the deceased immediately before the murder was committed. Extenuating circumstances were found and S was sentenced to twelve years imprisonment. This case does not grant a licence to women with violent tempers to murder their husbands and hope that extenuating circumstances will be found. The "violent temper" of the accused refers to her mental condition. A person in a temper and who is subjected to a feeling of frustration over a long period should be given the benefit of extenuating circumstances.

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In S v De Maura, the court of first instance had convicted the accused of murdering his wife and imposed the death penalty although extenuating circumstances had been found. The factual basis of the extenuating circumstances was the fact that the accused was more emotional than normal, and that at the time of the murder the accused

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9 1961 PH 1 H44.

10 1974 4 SA 204 (A).

11

was emotionally disturbed, depressed and suicidal. The trial court held that the crime was a premeditated murder and was a brutal one. The accused was sentenced to death notwithstanding the finding of extenuating circumstances.<sup>12</sup> The appeal against sentence was dismissed because the appellate division held that there was no reason to interfere with the sentence because sufficient weight was given to the subjective matters affecting the accused and that the trial court exercised its discretion properly.

#### 7.2.2 CONSTRUCTIVE INTENTION (DOLUS EVENTUALIS)

Holmes J<sup>13</sup> expressed a view in the case of S v Mini that triers of fact should consider, in the exercise of their function, whether, depending on the factual background of the case, the moral blameworthiness of the accused is reduced if the murder<sup>14</sup> is committed with constructive intention, as distinct from intention plus positive desire (dolus directus or dolus indirectus). This

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- 11     S v Maura supra 206.
- 12     See R v Karg 1961 1 SA 231 (A) 236 for a policy view on sentencing in general.
- 13     1963 3 SA 188 (A) 192; see also Van Niekerk "Dolus eventualus, a mitigating factor? 1968 SALJ 122 - 7; and "Dolus eventualis revisited?" 1969 SALJ 136 - 42.
- 14     "constructive intention is also known as dolus eventualis or legal intention.

15

suggestion was welcomed by Burchell as one worthy of serious consideration. The basis of Holmes J A's view is that where a person has intention to kill, it does not mean that the accused should have applied his will to encompassing the death of the deceased. Dolus eventualis means that an accused subjectively foresees the possibility of his act causing death and is reckless of such result.

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17

In R v Mharadzo, Beadle C J suggested that it is desirable for triers of fact to make a positive finding on the precise state of mind of the accused before determining the question whether or not extenuating circumstances exist. The chief justice sounded a warning that the mere proof of dolus eventualis does not mean that triers of fact should conclude that extenuating circumstances are present.

18

Triers of fact should in addition consider other features of a case very carefully before disposing

15 "Murder: intention to kill: extenuating circumstance" 1963 SALJ 467 468; see Evans "S v Mini 1963 (3) SA 188 (A)" 1964 THRHR 71 72 -3.

16 see S v Sigwahla 1967 4 SA 566 (A) 570.

17 1966 2 SA 702 (RAD) 703.

18 R v Mharadzo supra 703.

of the question of extenuating circumstances. In  
<sup>19</sup>  
S v Manyathi the appellate division warned that  
 triers of fact should consider the cumulative  
 effect of possible extenuating circumstances as  
 it is a misdirection to consider and dismiss each  
 factor in isolation. In <sup>20</sup>S v Mmusi it was made  
 clear that the fact that an accused had no  
 deliberate intent to murder the deceased but  
 only had constructive intent (dolus eventualis)  
 is not in itself an extenuating circumstance.  
 The crux of the matter is whether, regard being  
 had to the fact that the murder was committed  
 with constructive intent, there are  
 circumstances which could be taken into account  
 as extenuating circumstances.

The moral blameworthiness of an accused is likely  
 to be reduced if the murder was committed with a  
 constructive intention (dolus eventualis). It is  
 trite that constructive intention alone does not  
 constitute extenuating circumstances - it may be  
 of assistance to the accused if it is considered

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19 1967 1 SA 435 (A) 439.

20 1968 1 SA 545 (A) 550.

cumulatively with other factors. The constructive intention is a factor which indicates that the primary purpose of the accused was not to take life although his legal guilt is not affected. The moral blameworthiness of the accused may be reduced where the conduct is rendered less serious by the cumulative effect of some factors on the mind or state of mind of the accused during the commission of the crime. The fact that an accused had no wish to kill is not decisive.

### 7.2.3 AGREEMENT BY DECEASED THAT HE BE KILLED

In S v Robinson<sup>22</sup> the deceased arranged his own murder with the accused, the appellant in this case. The deceased was having financial problems and he wanted to avoid to serve a term of imprisonment for fraud. The motive of the deceased was therefore an insurance gain for his widow and his avoidance of imprisonment. The trial court convicted the appellant of murder and the death penalty was imposed. The question for determination on appeal<sup>23</sup> was whether an intentional and unlawful taking of a man's life,

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21 see S v Bruyn 1968 4 SA 498 (A).

22 1968 1 SA 666 (A).

23 except, of course, the appeal against conviction.

at his own request, renders his killers less blameworthy and so to constitute extenuating circumstances. Holmes J A stated that murder<sup>24</sup> is a crime most foul because of two reasons: In the first place, murder infringes the interest of the State in the lives of all those within his right to live, and this is done against his will. In casu, the court held that the fact that the deceased wants and arranges to be killed reduces the moral blameworthiness of the killer and is also relevant to the question of extenuating circumstances.

The appeal succeeded in so far as extenuating circumstances were concerned. A sentence of fifteen years was substituted for the death sentence.

#### 7.2.4. ABSENCE OF PREMEDITATION

In R v Mlambo<sup>25</sup> the court found extenuating circumstances on the basis that the accused had probably not intended to kill the deceased but on

24 S v Robinson supra 678.

25 1960 2 SA 55 (W) 59.

the spur of the moment had recklessly stabbed the deceased in a vital part of the body. There was no evidence of premeditation and the murder was committed with *dolus eventualis*. This case was followed in S v Molale<sup>26</sup> where Hofmeyer J said that in a proper case absence of premeditation could constitute an extenuating circumstance. In the Molale decision the murder was committed with *dolus eventualis*.

The absence of premeditation is indeed a relevant consideration. It must, however, be considered with other factors to arrive at a conclusion whether extenuating factors are present.

In S v Mafela<sup>27</sup> the appeal court accepted that the crime was committed with *dolus eventualis* but confirmed the decision of the trial court that there were no extenuating circumstances. The murder was carefully planned and executed.

#### 7.2.5. COMPULSION AND FEAR OF REPRISAL

In S v Masuku<sup>28</sup> five accused were convicted of murder.

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26 1973 4 SA 725 (O) 726; see R v Mharadzo supra 704 where Beadle C J stated that there was no degree of premeditation before the accused struck blows on the deceased on the spur of the moment.

27 1980 3 SA 825 (A).

28 1985 3 SA 908 (A).

They were members of the prison gang. The trial court did not find extenuating circumstances and they were all sentenced to death. They appealed against the death sentence. The evidence of the State revealed that in South African prisons there exist prison gangs. In casu all the five accused belonged to the "Big 5" prison gang. A member of the "28" prison gang was admitted in the cell occupied by the appellants. The leader of the "Big 5" gang gave an instruction that the new arrival be assaulted. That instruction was carried out. Ultimately the new arrival died.

The question on appeal was whether the trial court was correct in deciding that there were no extenuating circumstances. The facts which could constitute extenuating circumstances were as follows:

- (a) the constructive intention which accompanied the conduct when the murder was committed;
- (b) the rules of the prison gangs and the procedure for their enforcement; and
- (c) participation in the commission of the murder.

The appellate division found that the accused killed the deceased with the intent to kill in the form of *dolus eventualis*. Whilst the leader of the gang could not establish that he was compelled to give the instruction to kill a member of the

rival gang as he did, the court found that the other members of the gang carried out the instructions out of fear for their own safety. Any failure to carry out such an instruction was subject to severe punishment which could lead to death. Extenuating circumstances were found in respect of the four appellants. They all held junior ranks in the "Big 5" gang, none of them took part in the decision to murder the deceased and they only carried out an instruction by their leader (that is accused no 1 in the case). It was established on a balance of probabilities that the code of conduct of the prison gang and the implications of failure to obey instructions did influence the junior members of the "Big 5" gang. Consequently, extenuating circumstances were found. The death sentence was set aside and they were sentenced to fifteen years' imprisonment. The appeal by accused no 1 (that is the leader of the "Big 5" prison gang) was dismissed.

The S v Masuku decision is a clear indication that compulsion or fear for reprisal is one of the factors which may reduce the moral blameworthiness of an accused; and thus enabling triers of fact to find extenuating circumstances. It would appear that the remark by Holmes J A in S v Bradbury

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which reads:

"As a general proposition a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on compulsion as a defence or fear as extenuation."

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does not apply to a prison gang. It does apply to free man living in a free society. The reason for that is the fact that a prisoner is locked in a cell without free access to prison officers and may be assaulted or even killed before such officers could intervene. The purpose of joining a prison gang is seen as a measure of self-protection.

31

In S v Magubane the six appellants were convicted of murder without extenuating circumstances and they were sentenced to death. Once again the appellants were members of "26" prison gang. The first accused was murdered after he had given his evidence but before he was cross - examined. The same facts as in S v Masuku<sup>32</sup> were more or less set out in evidence. Accused no 2 was the judge who ordered that the deceased be killed. Accused

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30 see S v Masuku supra 914.

31 1987 2 SA 663 (A).

32 see n28 supra.

no 5 was a secretary of the prison gang and accused 3,4,6 and 8 were merely soldiers. The appellate division pointed out that since accused no 2 was the judge there was no question of fear or compulsion on his part.<sup>33</sup> The remaining accused alleged that they acted out of fear for their lives; and that their fear originated from the prison sub-culture.

Smalberger J A<sup>34</sup> pointed out that there must be a factual basis for the existence of extenuating circumstances;<sup>35</sup> and that the existence of a sub-culture does not per se mean that extenuating circumstances exist.<sup>36</sup> Where a prisoner wishes to rely on the presence of a prison sub-culture as an extenuating circumstance, he must prove on a balance of probabilities in order to convince the court that his state of mind or mental faculties were subjectively influenced during the commission of the murder.<sup>37</sup>

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33 S v Magubane supra 666.

34 S v Magubane supra 667.

35 see S v Mongesi 1981 3 SA 204 (A) 207.

36 S v Mongesi supra 212; see S v Peterson 1980 1 SA 938 (A) 945.

37 S v Mongesi supra 212.

38

In S v Magubane there was a possibility that the accused (that is excluding accused no 2) acted out of fear when they took part in the killing of the deceased. It was also possible that the accused were willing and enthusiastic members of the "26" gang in which case the question extenuating did not arise. In casu the court found that the accused did not discharge their onus to prove extenuating circumstances. It was a mere speculation if the court were to find extenuating circumstances. The appeals were dismissed.

These decisions indicate that the prison sub-culture may exist and that extenuating circumstances must be proved on the balance of probabilities. The question of fear or compulsion must be answered in the light of the proven facts in each case. The court should not be left with several possibilities which create room for speculation.

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## 7.2.6. MERCY-KILLING

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Strauss discusses the unreported case of R v Davidow. The accused's mother was suffering

38 see n31 supra.

39 for general information on mercy-killing or euthanasia see Strauss and Strydom Die Suid-Afrikaanse Geneeskundige Reg (1967) 257 - 8 and 346; Strauss Doctor, Patient and the Law: A Selection of Practical Issue 2ed (1984) 371 - 385.

40 Strauss 381.

from an incurable disease. The accused loved her dearly. He finally decided to relieve her from pain and suffering. The accused was acquitted on the ground of irresistible impulse.

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The facts of the case of S v De Bellocq were briefly as follows: B gave birth to a child that suffered from a disease. It was clear to B that the child would be an idiot as a result of the disease. B drowned the child during the time of bathing it. B had studied medicine for four years. B was charged with murder and was convicted. The murder was committed when the accused was in a highly emotional state. The facts which constituted extenuating circumstances in their cumulating effect were the knowledge on the part of the accused that the child was an idiot and that the child was not going to live for any length of time. The accused was in a stage where a woman is inclined to be more emotional than normal. The court did not specify the facts which constituted extenuating circumstances because they were obvious.

42

In S v Hartmann the accused, a medical doctor,

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41 1975 3 SA 538 (T).

42 1975 3 SA 532 (C).

killed his father. The deceased had been suffering from a disease for many years. The accused visited the deceased in hospital and he found that he was bedridden and suffering great pain. The accused was very close to the deceased. There was no possibility of any cure. The death of the deceased was hastened by means of a drug. It appeared that the deceased would have lived a few hours longer if the murder had not been committed. The facts which influenced the accused during the commission of the murder were as follows: the deceased was admitted to hospital when all hope of a cure had vanished;<sup>43</sup> the stage of the deceased was associated with severe and continuous pain requiring frequent administration of pain-killing drugs. The quality of the life of the deceased shortly before his death had become meaningless to himself through the misery of pain and physical debility.<sup>44</sup> The condition of the deceased presented a problem to the accused; this problem brought about a conflict between the ethics of the medical profession namely to save life and to relieve pain and suffering.

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43 S v Hartmann supra 534.

44 S v Hartmann supra 534.

The conflict in the mind of the accused was brought about by his very close relationship and affection for the deceased as his father on the one hand and the role of being a medical attendant on the other hand. The magnitude of this conflict was sufficient to temporarily cloud the judgment of a medical practitioner and to allow emotional factors to override orthodox medical behaviour;<sup>45</sup> All these factors constituted extenuating circumstances.

It is not the so-called mercy killing per se which may constitute an extenuating circumstances. It is the impact or influence of all the factors which led to the killing which may indicate whether the moral blameworthiness of an accused is rendered less reprehensible or less serious in the light of the facts of each case. Again there must be a factual basis for the finding of extenuating circumstances; and the so-called mercy-killing is no exception.

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45 see n43 supra.

## 7.2.7 PARTICIPATION

The role played by an accused in the actual commission of a crime is one of the factors which may be considered in the determination of the presence or otherwise of extenuating circumstances. In S v Sauls<sup>46</sup> a prison gang committed the crime of murder. One of the accused acted as a doorwatchman during the commission of the crime. The accused were convicted on the basis of the common purpose doctrine. However, the doorwatchman played a lesser role except that he identified himself with the members of the gang. The court found extenuating circumstances on the basis of his lesser role of participation in the crime. The trial court has a responsibility to consider the degree of participation of all the accused whether the crime is committed by a gang or individual accused. The question of participation became a thorny issue in S v Sefatsa<sup>47</sup>. The facts of this case were briefly as follows: The deceased was a deputy mayor of the town council of Lekoa. He was murdered by a mob outside his house. The appellants formed part

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46 1981 3 SA 172 (A).

47 1988 1 SA 868 (A).

of the mob and they were convicted of murder and of subversion.<sup>48</sup> The conviction was based on the doctrine of common purpose. The trial court did not find extenuating circumstances and the accused were sentenced to death. The death sentence imposed on the accused caused an international uproar. The case created a favourable climate for abolitionists to air their views.

In the S v Sefatsa decision the appellate division was unable to interfere with the finding of the trial court in so far as the issue of extenuating circumstances was concerned. The trial court did not misdirect itself, the appellate division held. This was an erroneous conclusion. Firstly, the accused were convicted on the basis of common purpose. While the mere fact that the conviction was based on that doctrine does not per se mean that extenuating circumstances exists, it is a cause for concern that this aspect received inept attention by the trial court and the appellate division. Apart from that, the mob was angered by the imminent increase in service charges. The deceased was seen as a supporter of the increase

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48 The facts of the case may be studied from the report.

in charges and this caused a conflict in the minds of the persons who were in the mob. The grievance of the mob had political undertones. If one studies the facts of the S v Sefatsa decision carefully it becomes very clear that there were factors which, in their cumulative effect, constituted extenuating circumstances. Consequently, the decision of the trial court and the appellate division cannot be supported. The appellate division misdirected itself when it failed to realise that the cumulative effect of the factors which activated the mob to commit the murder temporarily clouded the minds of the accused. It is not in issue that the murder was indeed a gruesome one. But that cannot on its own exclude the existence of extenuating  
49  
circumstance.

7.2.8 ENVIRONMENTAL FACTORS NOT FORMING PART OF ACCUSED'S STATE OF MIND

In S v McBride<sup>50</sup> the accused was convicted on three counts of murder. The accused planted a car bomb outside a hotel in Durban. It was that bomb

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49 See Lund "Extenuating circumstances, mob violence and common purpose" 1988 SACJ 260 for more details of S v Sefatsa supra.

50 1988 4 SA 10 (A).

which exploded and killed three people. The trial court did not find extenuating circumstances and the accused was sentenced to death. On appeal it was argued that the manner of the commission of the crime and the identity of the victims of the crime were relevant to the inquiry as to the extenuating circumstances. These factors were important in this case because the accused simply planted the bomb and was reckless whether a person was killed. The accused was having a political grievance against white section of the South African population.

The reasons for the majority decision for not finding extenuating circumstances were as follows: The accused, who was classified as a Coloured, planted a bomb in an area where many white persons were likely to be present. Those whites, according to the accused, represented the government which created a state of emergency on 12 June 1986. The dilemma of the trial court was that according to any morally acceptable code in any civilised country you do not punish persons presumed to be innocent for the sins of those who offend you. The trial court did not find extenuating circumstances in its majority

decision. The dissentient assessor was of the opinion that the age of the accused, the fact that he was in an emotional state on the day in question; the fact that he initially intended to destroy property and not to commit murder, the fact that the decision to place the bomb near a hotel was made on a spur of the moment and the accused's hatred for whites did constitute extenuating circumstances in their cumulative effect.

Much can be said against the majority decision of the court on extenuating circumstances. The political grievance of the accused did blur his judgment at the time when he placed the bomb near the hotel. His frustration, emotional state and motive to revenge against the declaration of the state of emergency were factors which in their cumulative effect constituted extenuating circumstances.  
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In conclusion, it is clear that environmental factors which do not form part of the accused's mental state of mind may constitute extenuating circumstances. The S v McBride decision is authority for that view. The decision of the trial court was not interfered with on appeal because of the limited grounds on which the appellate division had a discretion to interfere.

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51 The judge was free to impose the death penalty in the exercise of his judicial discretion.

## 7.3 CONCLUSION

A number of factors which often receive consideration by triers of fact have been examined in this chapter. It is trite that the list of factors that may constitute extenuating circumstances is not closed. The lists furnished<sup>46</sup> in some legal text books are merely examples of factors which are deemed important by legal writers following their scrutiny in reported decisions.

Our finding in this chapter is that the list of factors will grow and the number of reported decisions will increase. The reason for that is that the facts of cases warrant such a development. The three-part inquiry procedure assists considerably in determining whether each factor is an extenuating circumstance. It is not the existence of the factor alone, however, convincing, but whether or not that factor has affected the mind of the accused in the commission of the crime to such an extent that he is less morally blameworthy.

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46 Snyman Criminal Law (1984) 380.

## CHAPTER EIGHT

## CONCLUSIONS AND RECOMMENDATIONS

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## 8.1 INTRODUCTION

The purpose of this chapter is to state the major conclusions and recommendations resulting from the analysis of the case law and legal literature on extenuating circumstances.

## 8.2 CONCLUSIONS

The style adopted in writing the previous chapters has been to include a brief summary of the findings in each chapter. That has been done notwithstanding this concluding chapter for purposes of easy reference.

The introduction of the concept of extenuating circumstances into our law was a welcome development because a discretion was conferred on triers<sup>1</sup> of fact to impose the death penalty for murder. The definition of this concept is now trite. The concept of extenuating circumstances has been defined as any factors or which influences the mind or mental faculties of the accused during the commission of the murder to such an extent that the accused's moral guilt is less

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1 see section 277 (2) of the Criminal Procedure Act 51 of 1977 where two other instances for the discretionary imposition of the death penalty are set out.

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blameworthy. The moral guilt of an accused may be determined after the appraisal of the evidence led during the trial.

The discretion conferred on triers of fact involves making a choice according to certain standards or in accordance with determined criteria - and those criteria are called decisional referents. These serve as fetters of the discretion. The point made here is that although a discretion is imposed on triers of fact following a conviction of murder and the finding of extenuating circumstances, the matter is not simplified thereby because the discretion is also limited by many factors. In the law of sentencing, this makes the task of imposing sentence difficult, because the concept of extenuating circumstances has many problems peculiar to it.

Intoxication following the use of drugs or consumption of an alcohol-containing beverage is a factor which triers of fact would consider in an inquiry into the presence or otherwise of extenuating circumstances. Liquor or drugs act as depressants of the central nervous system. The

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2 see chapter 1 paragraph 1.5 and n37.

conclusion reached in this dissertation is that the law regarding intoxication whether as a mitigating or aggravating factor is trite. It is doubtful<sup>3</sup> whether the new Criminal law Amendment Act of 1988 would change this position. It is the influence of intoxication on the mental faculties of an accused which may cause a person affected to lose his physical and mental ability to a degree which renders him incapable of acting like a normal person. This would be the case where his moral feelings have been blunted by the liquor or drugs. Intoxication may diminish the skill and foresight of a person by causing impairment of his mental faculties.

Psychopathic tendencies on the part of an accused convicted of murder are also one of the factors which may be examined in order to make a finding about extenuating circumstances. A psychopath is a person who suffers from emotional immaturity and instability which manifests itself from an early age in an inability to conform to the accepted moral and social standards demanded by the society in which he lives. It has been shown during the research that psychopathic tendencies

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3 see chapter 2 paragraph 2.3.

may be of assistance to the accused if they amount to extenuating circumstances. The conclusion has been reached that to approach the problem of psychopathy in our law from the same angle as intoxication, provocation or a belief in witchcraft is not adequate. The proper thing to do is to give a statutory discretion to triers of fact to impose the death penalty on an accused convicted of murder if he is proven by expert evidence to be a psychopath. The emotional immaturity and instability of a psychopath warrants such an approach.

The acceptance of a belief in witchcraft as a factor which may constitute an extenuating circumstance is now trite. However, its validity would wither away because more and more Blacks ignore its existence. Education and Christianity have failed to change the attitude of some Blacks towards witchcraft. But the life style of many Blacks is no longer affected by this belief. The legal position regarding belief in witchcraft as a factor is trite. Reported decisions appear in the law reports where this factor has been considered in extenuation not because it is popular but because

the community begins to review the whole question of the imposition of the death penalty. The abolitionist school of thought is getting support day by day.

Youthfulness and provocation are also important factors to be considered in extenuation. The legal position on the approach of triers of fact to these factors is trite. The large volume of reported decisions on these factors serves as a pointer to a need for a review of the mandatory imposition of the death penalty following a conviction of murder. The utterances of retired judges of the supreme court support this view.

The research has proved that the number of factors which may be considered during the inquiry into the presence of extenuating circumstances is not limited. It is open ended. In chapter seven of this dissertation seven factors were examined and the finding is that although many writers discuss the concept of extenuating circumstances, that does not exhaust the type and nature of factors which may be examined.

## 8.3 RECOMMENDATIONS

The concept of extenuating circumstances is a compromise between the mandatory imposition of the death penalty and its abolition. Its existence confers a discretion. The purpose of this research has not been to justify the views of the abolitionists. For that reason, no recommendation would be made to support the abolitionists. If any recommendation happens to support their views it will be a coincidence.

It is recommended that triers of fact be given a statutory discretion to impose the death penalty on a psychopath or any person who displays psychopathic tendencies. The prerequisite of this discretion should be expert evidence of a psychologist. This recommendation may be introduced by amending section 78(7) of the Criminal Procedure Act by inserting the following proviso:

"Provided that where the accused is convicted of murder, the court may impose any sentence other than the death sentence."

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This amendment would effectively exclude the necessity for a positive finding of extenuating circumstances in respect of a psychopath. The motivation for this recommendation is clearly set out in chapter three.<sup>5</sup>

The theme of extenuating circumstances is the "influence on the mental faculties" of an accused.

In order to appreciate the impact of this influence, it is necessary to hear a psychologist and relate his opinion to the evidence led during the trial. That may enable triers of fact to find extenuating circumstances where they would not in the absence of such an opinion. An opinion of an expert witness is not binding but it has persuasive value.

The imposition of the death sentence following a conviction of murder should be optional. It is not clear why it is mandatory for murder when it is optional for high treason, sabotage, rape, terrorism or child stealing. There is no clear motivation for this position in our law. Seemingly, it would be appreciated if it is

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5 see paragraph 3.4.

approached from a historical perspective because legal rules may be better understood from that angles.

Lastly, it is recommended that the concept of extenuating circumstances be retained because it is one of three instances that make the imposition of the death penalty discretionary. Although the three-part inquiry procedure has been used by the courts it may manifest certain shortcomings, especially in the third stage, it is a useful tool for determining the existence or otherwise of ~~extenuating~~ extenuating circumstances. Although the law follows an indeterministic approach to legal guilt, extenuating circumstances provide a device which demonstrates that accused persons may be influenced by certain factors which, as frail mortal beings, may render their conduct less morally reprehensible. It is only proper if justice has to be done in meting out punishment that those factors be considered. In the light of the awesome responsibility inherent in the imposition of the death penalty for murder, it is appropriate to consider the effects of those factors.

Because of the present controversy surrounding the death penalty it may be necessary to suspend the carrying out of the death sentence until the argument by the abolitionists is approved or rejected by the legislature. The accused should be given benefit of the doubt under these circumstances.

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