'EXTENUATING CIRCUMSTANCES'

IN THE

SOUTH AFRICAN LAW OF MURDER

BY

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E R R A T A

Page 84: Footnote 2) should read "p.54 - 56".

Page 132: Footnote 24) should read "Per Williamson .....".

Page 257: Footnote 86) "Malia" should read "Malai" and "Fabiona" should read "Fabiono".

Page 342: Footnote 94) After "..... participation" insert ", p.352".

Page 439: Burchell and Hunt "Vol III" should read "Vol IV".

Page 441: The second entry under Dugard should be moved to be the second entry under Drever.

Insert as fifth entry: ELLIOTT, D W: "Offence against the Person" 1977 Crim. L R 70.

Page 445: Insert at top of page above first line: LABUSCHAGNE, J M T: "S v De Blom" (1978) 11 De Jure 386.

Page 449: Insert second entry under Strauss: "Bodily Injury and the Defence of Consent" (1964) 81 S A L J 179, 332.

Page 451: Next below Wessels insert: WHITING, R C: "Changing the Face of Mens Rea" (1978) 95 S A L J 1

and above Zink insert: ZIMRING, F E and HAWKINS, G J: Deterrence: The Legal Threat to Crime Control.

Page 455: After fourth entry insert: FABIANO (1941) 8 E A C A 96 (UGANDA)

and next below George insert: GIDEON 1951(2) S A 60 (S R).

Page 457: After Koning insert: KONKOMBA (1952) 14 W A C A 236 (GOLD COAST).

Page 460: Next below Mouton insert: MOYO 1979(4) S A 61 (ZR, AD)

and above Muir insert: MUCHIMBI 1972(2) P H H 83 (HC, R).

Page 461/...

Page 461: Next above Phineas insert: PEVERETT 1940 A D 213.

Page 462: Next above Ramanka insert: RAINERS 1961(1) S A 460 (A D)

and below Shepard insert: SHUPINYANENG 1977(2) P H H189 (O).

Page 463: After Steyn insert: SUDAN GOVERNMENT v ABDULLAH 1959 SLR 1.

CHAPTER V in its reference to "drugs", particularly cannabis, is subject to correction in the light of R E Hemphill and W Fisher "Drugs, Alcohol and Violence in 604 Male Offenders" S. Afr. Med. J. 57, 243 (1980) (16 February 1980).

P R E F A C E

The concept of statutory "extenuating circumstances" was introduced into the South African criminal law of murder in 1935 in the use of those two words alone. It was left to the courts, without any further legislative aid, to provide the definition, structure and development of the concept. Over the period of more than forty years there has been no written attempt to survey or deal at any length with this development. Besides legal textbooks which give some brief outline or rough grouping of certain of the cases (E M Burchell and P M A Hunt, South African Criminal Law and Procedure, Volume II allocates ten pages - the most detailed textbook handling of the matter so far) there have been two articles in law journals (one by the present writer in 1955 and one by M M Loubser in 1977) which have attempted a form of analysis or development of the subject.

This thesis is in the nature of a pilot study along a certain line of approach in an attempt to order the appropriate material. No entry has been made into the discussion of the substantive legal concepts in the law of murder or any areas of contention there, even though these may have been referred to in passing. Rather have the generally accepted statements of the substantive law been accepted. What is sought to be dealt with is the limited area of the relevance and application of certain considerations appropriate only to the sentencing function in cases where an accused is found guilty of murder in South Africa. But even this limited field of study has a dynamic broadness about it which associates with other disciplines such as ethics, anthropology, psychiatry and other psycho-social sciences.

The thesis does not purport to be a comparative study even if there is certain comparative reference on a very limited basis.

It is a pleasure for me to record my grateful thanks to my supervisor, Professor I Leeman, of the Faculty of Law at the University of Cape Town, whose interested and sympathetic approach I have greatly appreciated and whose clear perception has helped me to avoid numerous inadequacies.

I also wish to express my deep gratitude to my wife Ann and my children who have had to live with this work as an extra member of the family for longer than I or they would have wished My wife also undertook the typing of the first drafts of the work.

Miss T B Brophy typed the final scripts with the exception of Chapter VII which, because of her emergency operation shortly before the deadline, was typed by Mrs R du Plooy. I express my appreciation for a job well done.

The case law is noted as at December 1979.

20 February 1980 STANLEY EVANS
NEWLANDS

ABSTRACT OF THESIS IN TERMS OF REGULATION 8

This investigation examines the law on "extenuating circumstances" introduced legislatively into the South African criminal law in 1935 as a "via media" between the extremes of an unqualified application of the mandatory death sentence for guilt in the crime of murder and an open judicial discretion as to sentence for the crime.

Chapter One attempts to provide a very general and limited background to the subject and is derived largely from secondary sources. Punishment and its purpose is briefly examined in order to establish the relationship of extenuating circumstances to the various main purposes or emphases of punishment and in particular to the distributive element The conclusion is reached that none of these emphases necessarily exclude the application of a system of extenuating circumstances. (p.27) Certain historical attempts to meet the rigour and rigidity of the death sentence are referred to (p.36) and this leads to the suggestion that extenuating circumstances relating particularly to the sentencing function of the court rather than to the determination of the crime-category or level of guilt seem an appropriate means to achieve the justice of the case in the crime of murder where the penalty is normally a capital or fixed sentence. (p.49)

Chapter Two commences with reference to various historical forms of mitigation including those mentioned in the Roman-Dutch law and arrives at a broad categorisation of such circumstances as personal, situational and consequential or additional. (p.57) After brief reference to the meaning of the words "mitigation" and "extenuation" the moral and legal

basis of extenuation is examined and it is submitted that where a moral distinction or a form of relevant and justified differentiation is not able to be reflected in the substantive categories of the criminal law then it is important to take account of this as mitigating or extenuating circumstances at the stage of punishment in order to reach the justice of the case. (p.63) After examining the various types of approach to the consideration of extenuation the chapter concludes with an examination of the relationship of extenuation to certain concepts, namely intention, premeditation, motive and mercy: the first three being in different degrees relevant to the proof or determination of guilt but not thereby excluding a relevance of some or all of the factors constituting the concept to extenuation and the last one being a concept not normally relevant to extenuation. Extenuation is seen as being inherent in the principle of justice.

The introduction to Chapter Three touches briefly upon some stepping-stones of the South African approach to punishment from about the beginning of the 19th century to the present and it appears that the South African judiciary accepts and applies the main historical purposes of punishment: retribution, deterrence, prevention and reformation, with the emphasis changing according to the circumstances of the case or the accused or to related public policy as conceived or interpreted by the judicial officer. (p.100) Certain purposes should not be considered entirely at the expense of subjective elements personal to the accused nor should the reverse apply. In this respect certain observations are made as to the recording or announcing by trial judges of the considerations which lead to punishment. (p.99) It is noted that in relation to a mandatory death penalty the law is not able to be consistent with itself in relation to the

balancing of the purposes of punishment but that this would be possible if the death sentence were made permissible, one of the range of possible sentences. (p.101)

The chapter next contains a reasonably detailed description of the circumstances surrounding the historical introduction of "extenuating circumstances" into South African law in 1935 as a "via media" between the extremes of granting judges an absolute discretion in regard to sentence in capital cases and a proposal for degrees of murder. (p.108)

The remainder of the chapter consists of an examination of numerous of the decided cases on "extenuating circumstances" in an endeavour to move towards a broad definition. The discussion centres round the words "circumstances" and "extenuating" - the two statutory words - and the conclusion is suggested in respect of the former that the legislature probably did not wish to limit the factors which might be considered as extenuating - it certainly showed no such intention from the historical base or its own statutory language. (p.118) The categories of circumstance which form a basis for this thesis and which follow those suggested in Chapter Two (p.57) are stated and exemplified (p.122) as personal background, special mental, situational and consequential or additional circumstances. The subjective approach to the circumstances (p.130) and the assessment of such circumstances (p.133) are then analysed and the limited objectivity of the moral judgment made is suggested. A broad definition of extenuating circumstances based on the discussion in this chapter is then proposed. The approach taken in this chapter is broader than a strict reading of the later judicial definitions may seem to allow and in its detail, not before undertaken in this manner, attempts to make a contribution to the knowledge of the subject.

The thesis now proceeds in Chapters four to six to examine three different sets of mental circumstances which may be found to be extenuating circumstances: psychopathic personality (a constitutional mental or moral disability or influence), intoxication (a temporary mental disability or influence) and witchcraft (a cultural mental disability or influence).

In Chapter Four the basis of psychopathic traits or personality components is isolated from medical writings spanning a number of years and is found to centre round a deficiency in moral constitution and sensitivity together with an impulsiveness and probable diminished ability to control aggressive action in stressful situations. (p.155)

It is observed that it is unlikely that an accused with this form of mental impairment would be able successfully to call in aid the defence of irresistible impulse. (p.158)

The case law is examined in relation to the nature of the components of this type of personality but it is urged that, short of it being dealt with under the law of insanity, the relevance to extenuating circumstances lay not so much in the possession of the personality but in the relating of one or more of the relevant components of the personality to the facts of the case and to the diminution in moral blameworthiness. (p.168) A similar approach should be adopted in respect of psychopathic tendencies. (p.172)

The final portion of the chapter attempts critically to relate the psychopath to diminished responsibility as provided for statutorily in the Criminal Procedure Act, 1977 and the Mental Health Act, 1973 and certain anomalies and terminological incongruencies between these two statutes in this respect are referred to. (p.181 - 185)

The chapter concludes with the suggestion of a proviso to section 277(2) of the Criminal Procedure Act, 1977 in respect of the "diminished responsibility". (p.188)

In the introduction to Chapter Five the scientific basis of the effect of alcohol upon the mind and body of a person and the substantive approach of the law to a person who commits a crime in an intoxicated state are briefly indicated. (p.196) Next are considered those cases where intoxication was dealt with in relation to extenuating circumstances and specifically with regard to the "extent of the influence" (p.202 - 204) where certain judicial phraseology is analysed and submissions made in regard to the proper posing of the question, and the erroneous finding that "he knew what he was doing" negatives the possibility of extenuating circumstances. Again, knowledge or awareness of purpose-directed action should not exclude consideration of the effects of influence upon the actor in leading to such action. (p.207) The combination of intoxication with other circumstances, particularly provocation, is referred to (p.208) and a discussion follows as to the validity of regarding intoxication as an aggravation possibly weighing against a finding of extenuation. (p.212) Finally, brief reference is made (p.213) to the problems of accurate proof of intoxication in many murder cases particularly among African and Coloured witnesses.

The introductory portion of Chapter Six on witchcraft is rather longer than that of the previous two chapters. This was done particularly to give a more detailed background picture to this cultural mental influence. The place and effect of superstition and witchcraft in African society, the types of homicide resulting from superstitions or cultural beliefs (p.232) and the possible bases for mitigation are outlined. (p.236) In Africa generally the tendency has been

not to accept a belief in witchcraft as a defence to a charge of homicide in administrations influenced by Western systems. (p.240) It is considered that it is unlikely that the independent African States will shake off the skin of superstitious belief and practice in the short term. (p.252) The case law on witchcraft and other indigenous beliefs in relation to extenuating circumstances is then surveyed particularly in respect to the subjective approach and pluralism, (p.244) the types of act attracting the application of a belief in witchcraft (whether a past causa or a present apprehension) (p.252) and five problem areas illustrated or suggested in Fundakubi's case. (p.260) The difficulty of obtaining suitable evidence in cases of this nature is discussed and compared with the same question in the two previous chapters. (p.278) In the conclusion the plea is again made not to treat a formula of words, i.e. "a belief in witchcraft", as founding extenuation but rather for there to be a careful analysis of the influence and effect of witchcraft or other indigenous beliefs and mental attitudes on the conduct of the accused regarded from the subjective point of view. (p.283) The field of influence exhibited in this chapter appears in general to be a most appropriate area for the application of extenuating circumstances to meet the justice of the case.

Having attempted to set some form of pattern in the analysis of extenuating circumstances in chapters three and six, Chapter Seven broadly categorises the remaining South African case law under the various headings, personal background, special mental, situational and consequential or additional circumstances, to exemplify the approach of the courts and yet to maintain an open-ended basis to allow a dynamic society-related growth pattern in the sentencing function. It is recognised that many cases fall for discussion or

reference under more than one heading or category, depending on approach. Under the first heading Youth is dealt with in detail and the submission made that "inherente boosheid" should not be allowed to continue to be considered in the determination of extenuating circumstances for youthful offenders. (p.301) Numerous special mental circumstances are dealt with including Motive, Absence of the Aim to Kill, various forms of Putative Moral Justification and Emotional Influences. The following section on Situational Circumstances attempts to show that, although it is primarily the influence of the mind of the accused which is regarded for purposes of extenuating circumstances, the circumstances surrounding an act of homicide or in which an accused finds himself do affect his state of mind and his blameworthiness and can be regarded as a factor associated with the commission of the crime and are in fact named by trial courts as extenuating circumstances. These include possibly controversial headings such as "Circumstances of the Act" (p.361) and "Condition of the Victim". (p.365)

The final category consists of certain consequential acts or states of mind of accuseds or other circumstances occurring after the actual commission of the act which have led to findings of extenuating circumstances because they evidence or illustrate the state of mind of the accused at the time of the commission of the crime or because the triers of fact hold such to be "associated" with the commission of the crime or the conduct of the accused in a manner which relates to the extent of his moral blameworthiness. The chapter concludes with a short discussion on sentencing or public policy in relation to extenuating circumstances. (p.378)

In Chapter Eight the question of extenuating circumstances is dealt with from the procedural point of view. Neither in 1935 nor since has the legislature given any indication of how this question is to be dealt with in the adjective law. It was left to the hand of forensic experience to adjust the new procedural step to the existing law of procedure. The chapter pursues this matter in the chronology of a trial from plea to sentence and appeal. There is discussion on a called plea of "guilty with extenuating circumstances" (p.388); on the much-ignored decision in Malopi's case, whether the accused has the right to lead evidence on extenuating circumstances as such and when (p.395); on the question of onus as determined by Lembete's case (p.403); and of the right of counsel to address the court on extenuation evidence. (p.408) In dealing with the function of assessors the unsatisfactory and confusing wording of section 277(2), particularly in its use of the word "court" and the legislative language in relation to "impose" or "pass" sentence, is discussed and an amendment proposed. (p.412) The chapter next briefly sets out the law in respect of the judge's discretion as to sentence when extenuating circumstances are found and the provisions regarding actual sentencing and use of previous convictions. The chapter concludes with a section dealing with leave to appeal; the leading of further evidence; the appeal court's approach to an appeal (p.426); and, briefly, stay of execution and commutation of sentence.

It is submitted that the thesis makes an original contribution to the knowledge of the subject because -

(a) it breaks new ground in dealing with the subject matter as a whole to the extent of the analysis here undertaken;

(b) it attempts to clarify the moral and legal basis of extenuation, locating it in the principle of justice;

(c) it examines the concept from the two statutory words "extenuating circumstances" in order to build up to a more comprehensive definition than the later judicial decisions seem to have allowed;

(d) it attempts to carry out this analysis on a broad flexible basis, avoiding where possible, in contradistinction to Loubser, a direct relationship or derivation from substantive legal categories or a use of verbal formulae because one is dealing with the sociologically related field of sentencing morality; and

(e) from its broad categorisation and analysis of extenuating circumstances, it may enable the courts, not only in regard to the crime of murder, to further develop the law on extenuation or mitigation.

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CHAPTER - I

I N T R O D U C T I O N

"Just as murder itself is one of the most elemental and primitive of crimes, so also the law of murder is, for all the torrent of words written about it, still pretty elemental and primitive in its basic concepts. The human tribe learned early that indiscriminate killing was not only poor for the tribal decorum and well-being but threatened its very survival and was therefore bad in itself. So murder became taboo". Robert Traver, Anatomy of a Murder, p.38.

Probably from the dawn of history, man has been faced with the fact of life that he, for various reasons, takes the life of his fellow man. The primitive genesis of this fact may have a basis similar to that found in the animal kingdom where it is centred in the strength of one against challenge to self-preservation or in innate aggression and retaliation. With the rise of civilisation, social and economic conditions as well as human relationships and emotions have played a large part in the crime of murder.

A prerequisite to the continued existence of man was the basic family unit and very early on there arose the distinction between kindred on the one hand and outsiders or

strangers on the other. It has been suggested by Breasted,[1] among others, that the moral impulses in the life of man have grown up out of the influences that are operative in the family relationship. There is a natural beneficence towards kindred which is not as readily displayed to the outsider and injury or hurt to kindred produces anger and resentment besides being harmful to the maintenance of kindred numbers where death ensues. The anger evoked in this way is said to be the germ of all moral indignation from which a sense of justice and a great part of public law were later to develop.[2]

The early basis of the approach to retaliation and redress for aggressive conduct resulting in homicide might well give rise to the consideration that the family, community or tribe formulated its rules or procedure not on the abstract principle that homicide is right or wrong but that the form of retaliation or redress was expedient for preservation.[3]

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1) J H Breasted, The Dawn of Conscience, p.121 and J L Strachan-Davidson, Problems of the Roman Criminal Law, Vol. I, p.38 et seq.

2) Cf. C L von Bar, A History of Continental Criminal Law, p.498 - 546. See also E B Tylor, Anthropology, Chap. 16 and J C Flugel, Man, Morals and Society, Chap. 11, p.179. But see Anthony Storr, Human Aggression, p.148 regarding aggression as an innate drive and compare Ashley Montagu, The Nature of Human Aggression, p.300.

3) See generally W A Robson, Civilisation and the Growth of Law, Chap. IX, p.88 - 90; von Bar, op. cit., p.57 and 381; H von Hentig, Punishment, Chap. 2, p.20 - 27; P Vinogradoff, Outlines of Historical Jurisprudence, p.53; L Mair, Primitive Government, Chap. 1; and W Moberley, The Ethics of Punishment, p.217.

If a stranger killed one of the kindred the natural and violent reaction was to seek the life of the assailant. The aggressive action was often regarded as an act against the group and group solidarity was basic in the enforcement of redress.[4] The seeking of this redress was in turn regarded by the "stranger" group as an act of aggression and this could give rise to a blood-feud. This amounts to a form of requital in qualitative terms as opposed to the later refinements of an assessment of compensation for the loss of life in quantitative terms. This composition in many societies could take the form of the product of the predominant "economic" activity of the groups concerned, namely of the payment of cattle, land or goods. Among the Northern Sotho and Tsonga tribes of Southern Africa, for example, there was even a requirement that a female be provided to bear a child to replace the deceased.[5] In early Germanic and Anglo-Saxon law there was, of course, the principle of man-money or weregild whereby money payments were made by or on behalf of anyone who had caused the death of another and this varied according to the rank and status of the deceased.[6] When this payment was accepted it had

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4) See, for example, I Schapera, The Bantu Speaking Tribes in South Africa, p.70 - 71 and 199. This is still found in communities in South Africa today and is the cause of many so-called faction fights in tribal areas such as Natal and the Transkei - see, for example, G L Ndabandaba in Crime, Law and the Community, p.236.

5) H A Junod, The Life of a South African Tribe, p.441 and J A Bruwer, Die Bantoe van Suid-Afrika, p.197.

6) Kenny, Outlines of Criminal Law (J C W Turner), p.9. Also L Radzinowicz, Ideology and Crime, p.11 quoting G Tarde, Penal Philosophy (1912).

the effect of eliminating the wasteful results of blood-feud.[7]

In an effort to maintain order a stage was reached where it was the leaders or communities themselves who brought about and sought to achieve this form of composition. It appeared to be more in the nature of a peace-making than a judicial function.[8] A further development in the community's reaction against homicide was the concentration in the leader or the central and accepted public authority of the exercise, on behalf of the people, of the right to redress and to this extent private redress and arrangement were limited until it virtually disappeared. With the growth of the conception of crime as an offence against public authority or welfare, there appeared to be a corresponding decline in the principle of compensation in the economic sense unless this was transferred to the sphere of the civil law. Von Hentig[9], sums up the development as follows:-

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7) Robson, op. cit., p.106; von Bar, op. cit., p.59 - 60. See also H E Barnes and N K Teeters, New Horisons in Criminology, p.228 who remark that "our barbarian ancestors were wiser and more just than we are today, for they adopted the theory of restitution to the injured, whereas we have abandoned this practice, to the detriment of all concerned". Compare H W F Saggs, The Greatness that was Babylon, p.199; J Walter Jones, The Law and Legal Theory of the Greeks, p.257; and J E Hall Williams, The English Penal System in Transition, p.19.

8) Mair, op. cit., p.44 and 94 discusses this process among East African tribes where it existed in pre-Colonial days. R v Hamkoshi 1941 S W A 16 affords an example of a case where the compensation of eight cattle was not accepted and retribution in the form of a life for a life was exacted.

9) Von Hentig, op. cit., p.20. See also B Beinart, "Crime and Punishment in an Historical Setting" in Acta Juridica 1975, p.6 et seq. and L Radzinowicz's A History of English Criminal Law, Vol. I, p.381, note 99 regarding an unpublished manuscript by Jeremy Bentham.

"The development of legal punishment to its present state has been a slow process, arrested at times, at times even retrograde. Indeed, the general idea of punishment in practice has altered only in so far as the persons of the injured party and he who inflicts the punishment (or, in the case of a fine, he who receives it) have been separated; and any progress that has been made towards a systematic treatment of the criminal problem is the result of this differentiation which makes one who has not been wronged decide on the State's reaction".

Before examining the measure of the State's reaction in the fixing of punishment at the present day, with particular reference to meeting the individual circumstances of the case and the offender concerned by means of the recognition of mitigation or extenuation, we shall consider briefly whether the main theories, attitudes or emphases of punishment admit the recognition of a system of extenuating circumstances.

PUNISHMENT AND THE JUSTIFICATION OF PUNISHMENT RELATED TO EXTENUATING CIRCUMSTANCES

"Modern criminal policy is proceeding empirically on the observation of proved facts rather than moving in obedience to theories of a metaphysical character as to the nature of crime and punishment. It may perhaps be said that punishment nowadays is looked on less as an instinctive reaction to crime and more as a conscious action against crime".
L Radzinowicz and J W C Turner, Modern Approach to Criminal Law, p.46.

Ewing, who examines the morality of punishment from the philosophical aspect, says punishment means "pain inflicted by an external agent as a mark of disapproval for wrong done".[10] Von Bar, after a lengthy examination of the theories, expounds the theory of moral disapprobation and regards punishment as the external means of emphasizing moral disapprobation.[11] Jerome Hall, rather than a definition, delineates certain characteristics of punishment, namely that it is a coercive privation inflicted in the name of the State and presupposes rules, their violation and a more or less formal determination of that fact; it is inflicted upon an offender who has committed a harm and this presupposes a set of values which by reference gives ethical significance to both harm and punishment; the extent and type of punishment are said to be proportionately related to the gravity of harm and aggravated or mitigated by reference to the personality of the offender, his motives and temptation.[12]

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10) A C Ewing, The Morality of Punishment, p.219 and J Kleinig, Punishment and Desert, Chap. 2.

11) Von Bar, op. cit., p.546 and H Gross, A Theory of Criminal Justice, p.6. Von Hentig, op. cit., p.1 regards punishment generally as the establishment of artificial danger, as organised hurt which society consciously uses to train humanity to avoid certain possible courses of action potentially injurious or hostile to itself.

12) Jerome Hall, General Principles of Criminal Law, p.310 and H L A Hart, Punishment and Responsibility, p.4. E M Burchell and P M A Hunt, South African Criminal Law and Procedure, Vol. I, p.69. H G Rambonnet, in his study on the nature of punishment, defines it as "een physiek kwaad, toegebracht door het bevoegde gesag tengevolge van een schuldige gedraging, tot herstel van de orde" - Het Wezen van Straf, p.98. In essence this is the same as that offered by P J Fitzgerald, Criminal Law and Punishment, p.219 and T Honderich, Punishment, p.15. By contrast the Dutch writers, J Voet and Grotius, define punishment briefly as "malum passionis quod infligitur ob malum actionis" - Commentarius ad Pandectas, 48.19.1 and De Jure Belli et Pacis, Chap. 20 and De Poenis, Vol. II, p.240 respectively.

It is not intended here to argue the merits of any one definition of punishment as against any other. There are a number of works which have sought to do this from various bases and the purpose of the present investigation is not to add to these. It is not considered that any of the definitions or approaches to punishment mentioned above militate against the acceptance of the idea of extenuation and this will probably appear a little more clearly when the emphases of punishment are examined in this regard presently.

From the history of these emphases it is clear that punishment can be looked at from a number of points of view: it can be looked at from the divine or absolute or theoretically moral point of view or it can be looked at from the empirical or relative point of view; it can be looked at from the point of view of its relationship to past conduct (retributively) or its relationship to future conduct (the reformative or general deterrent theories); it can be looked at objectively or as related only or mainly to the external wrong act or it can be looked at from the point of view of its subjective appropriateness.[13)]

One of the great difficulties in the moral appraisal of punishment lies in the impossible task of attempting to equate the pain of punishment with the wrong occasioned by the external act or the moral blameworthiness of the actor.

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13) G W Paton, A Textbook of Jurisprudence (4th ed.), p.357 points out that the philosophy of punishment affects the standards of liability laid down, for example: "If punishment is based on an ethical desire to make men better, then a subjective theory of liability should be adopted. If punishment is intended to protect society from certain acts, then punishment may be inflicted where there is no moral guilt".

The history of the criminal law indicates the painfully slow development from the objective to a subjective approach to this type of question, of proportion rather than equation, with many periods of relapse occasioned by prevailing social and political conditions and many periods when theoretical discussion of the idea found little or no root in practice, being related, as much of it was, to a mysterious or other-worldly extension of the concept of punishment or to the sheer authority of the past.[14)]

It would seem that the institutional Christian Church did have the very valuable and progressive effect of concentrating attention upon the mental element in crime and the moral basis of responsibility was again emphasized.[15)]

Von Bar details the two main contributions of the Church to criminal law as being:-

(a) that it upheld the idea of absolute objective law and order superior to all individual rights and the equality of all before the law; and

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14) Von Bar, op. cit., p.383 - 385 and 389 - 390; Robson, op. cit., p.31; Kenny, op. cit., p.13; and Radzinowicz, A History of English Criminal Law, Vol. I, p.10 - examples of comparatively disproportionate punishments. See also Hart, op. cit., generally and p.233.

15) See also Modern Approach to Criminal Law, p.201. This does not, of course, detract from the foundations laid by other Western or early Middle-Eastern systems. See also J Stone, Human Law and Human Justice, p.22.

(b) that it signified a better valuation of the subjective side of crime, the emphasis being on individual guilt; the idea of reformation implying that punishment should benefit the offender.

The present age is still trying to work out and bring into practical effect the content of these contributions to human thought and order.[16)]

The recognition of a moral criterion was a "necessary historical preliminary to an ultimate recognition that if crime is to be reduced and prevented criminal policy must direct attention to the personality, mental as well as physical, of the individual delinquent".[17)] This too lays a more reasonable foundation for the appraisal of mitigating or extenuating features in criminal conduct than was the

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16) While it is difficult to see clearly at the moment, the political indications are that in this century there might be an authoritarian trend against the liberalising influence of the nineteenth century. This might have a significant effect on the law and the theory of punishment. See, for instance, M Ancel, Capital Punishment, p.29 - the re-appearance of the death penalty in the last thirty years for political offences and p.63 regarding the indefinite detention of abnormal persons. Also von Hentig, op. cit., p.236.

17) Kenny, op. cit., p.28. Beinart, op. cit., p.36: "..... morality or humanity in punishment should be given greater prominence, and in my view the place of some types of punishment such as capital punishment is determined by moral considerations rather than by the effectiveness or otherwise of a particular type of harsh punishment".

position in earlier times.[18] "The moral element in sentence is the lynch-pin which holds together all the other possible objects of punishment and without which all punishment becomes at best an amoral and at worst an immoral proceeding".[19]

A probable concomitant of the moral emphasis in crime and punishment, even though somewhat tardy in coming to a more adequate practical expression in the last century, was the principle re-emphasized by the French criminalists, following upon Beccaria's writing on moderate penalties, of l' individualisation de la peine.[20]

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18) For example, Digest, 48.19.28 requiring attention to distinctions in rank in the determination of punishment and in the middle ages the right of a "puella" to marry an offender and save him from death or mitigation on account of the offender's special ability in his art, trade or profession. Von Bar, op. cit., p.234, note 3 and J van der Linden, Rechtsgeleerd, Practicaal en Koopmans Handboek, 2.2.7.

19) S G Vesey-Fitzgerald, "The Reform of the Law of Murder", Current Legal Problems (1949), p.28. Also P J Fitzgerald, op. cit., p.116 and 211; Lord Longford, The Idea of Punishment, p.72; Moberley, op. cit., p.73 et seq., 92 and 94; and Kleinig, op. cit., p.25 and 42.

20) Radzinowicz, A History of English Criminal Law, Vol. I, p.280 and 376; Robson, op. cit., p.76 et seq.; and Vinogradoff, op. cit., p.59. The influence of the rise of the doctrine of the law of nature should also not be discounted - von Bar, op. cit., p.245, 319 and 324.

The present century has not yet fully worked out the implications of the individualisation of punishment vis-a-vis the protection of society and the reform of the criminal but, with the development of the social sciences; a greater awareness of the psychological and social causes of crime; greater development in penology and the treatment of the criminal; and a general social refinement of moral outlook, much has been commenced and done to change the face of crime and punishment. Much more remains to be done.[21)]

We now turn briefly to examine the relationship between the main theories or emphases of the purpose of punishment and extenuating circumstances. The question is whether there is a place in the distributive element of punishment for certain factors in the circumstances or surrounding an act of homicide or the actor which contain elements which may be said to lessen the magnitude of the offence or diminish the moral blameworthiness of the accused concerned and which provide extenuation sufficient to justify or permit a variation in or diminution from the maximum or normal level of punishment for the crime.

The purpose or aims of punishment have naturally been discussed and debated over the centuries and in recent years increasingly by philosophers, lawyers and criminologists. While the emphasis might vary according to social milieu and disciplinary approach, there is naturally much common ground in the selection or ranking of such aims or ends of criminal

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21) "The more we understand the complex web of conditions that go into the make-up of a person, the less can we accept the simple equations of sin and expiation, offence and retribution, and the like" - W Friedmann, Law in a Changing Society, p.225 - 226. See also the plea of J H Steyn, "The Role of Punishment in the Maintenance of Law and Order", (1972) 89 S A L J, p.309.

justice.[22] These include retribution and its probable cognates: expiation, atonement, revenge, denunciation, disapprobation or demand for justice; prevention or reductivism; deterrence (individual and general); reformation or rehabilitation. With the pronounced secular trend of the twentieth century and the increasing influence of the sciences and possibly existential thinking, it might be proper to reflect upon the consequence of a diminution in the influence of the expiative or similarly orientated emphases. Certainly the quotation at the head of this section would appear to support such reflection. Whether a stage will be reached in the foreseeable future when the theories of the absolute aims of punishment will recede in importance completely and validly or whether it is a question of one or more of the aims of punishment being emphasized in the prevailing social and political condition at the expense

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22) See, for instance, J Salmond, Jurisprudence, p.94 et seq. (deterrence, prevention, reformation and retribution); Report of the Royal Commission on Capital Punishment, 1949 - 1953, H M S O, Cmd. 8932, para. 51 (retribution, deterrence and reformation); H Silving, "A Plea for a New Philosophy of Criminal Justice", 35 Rev. Jur. U P R 401 (1966), p.416 - 417 referred to in L Radzinowicz and M E Wolfgang, Crime and Justice, Vol. II, The Criminal in the Arms of the Law, p.133 (primary goals - retribution and prevention; secondary goals - rehabilitation and deterrence); P J Fitzgerald, op. cit., p.202 (as related to protection - deterrence, reformation and prevention; others - retribution, expiation and prevention); and Burchell and Hunt, op. cit., Vol. I, p.67 (retribution including expiation, atonement, revenge and denunciation; prevention, individual and general deterrence and reformation). Burchell and Hunt, op. cit., Vol. I, p.68 include as a purpose "fairness and consistency". This is rather a distributive principle than a purpose. See also Ellison Kahn, "Crime and Punishment, 1910 - 1960" in Acta Juridica 1960, p.191 and Friedmann, op. cit., p.224 et seq. The purpose of punishment did not receive much discussion from the Roman and Dutch jurists - Beinart, op. cit., p.30.

of other valid considerations is difficult to estimate.[23] Whether at any time there will only be one aim or purpose of punishment with only one emphasis seems most unlikely.[24] Basically, and possibly logically, there would appear to be at least three different viewpoints upon punishment in a specific case: the injured person's; the accused's; and that of the authority determining the punishment which is normally the attempt to approach the question from a State or public point of view. It would not be logically inconsistent therefore if the aim or purpose of punishment contained at least three emphases or, perhaps more correctly, was the distillate of the interaction of three components.

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23) Though it cannot be argued at this point, I would be prepared to submit that the theories of the absolute aims will continue to recede in significance. See, for instance, H Weihoffen, The Urge to Punish, p.143. Naturally this will take a long time because attitudes, most of which have deep emotional bases and more particularly in the field of punishment, are not easily or quickly changed. But see Hart's "middle way", op. cit., p.233, i.e. restriction of punishment to an offender and general retention of the doctrine of mens rea; Honderich's "compromise", op. cit., p.149, i.e. desert in a special sense and prevention; and Nigel Walker's emphasis on reductivism in Sentencing in a Rational Society, p.38.

24) F E Zimring and G J Hawkins in Deterrence: The Legal Threat in Crime Control, p.34 say: "We are inclined to agree with Prof. Flew (Justification of Punishment in Acton, p.101) that philosophers have been mistaken in seeking 'to find a single unitary and comprehensive justification for all justified punishments'". Hart, op. cit., p.3 says: "What is needed is the realisation that different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment". L Radzinowicz, Ideology and Crime, p.115.

Retribution, Revenge and Denunciation

The word "retribution" is sometimes used in the sense of vengeance and sometimes in that of reprobation or as entailing the act of denunciation. Modern finer feelings reject it in the sense of revenge or vengeance,[25] while the second meaning contains the idea of the State marking its disapproval or the disapproval of society at the breaking of its laws by a punishment in accordance with the gravity of the offence.[26] A punishment based on retribution looks mainly to the past, the act done, for which a deserved recompense is to be meted out. Whereas in earlier times punishment was related mainly to the wrongful act without regard so much to the offender, the modern view of retribution necessarily extends the disapproving judgement to the actor.[27] It has also been argued that the idea of retribution contains principles of limitation in that punishment is applied only to one who has committed an offence and is morally justified if it is just because it is deserved and if there is some proportion between punishment and the degree of blameworthiness.[28]

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25) Walker, op. cit., p.20 and Gross, op. cit., p.393. See for example, R v Karg 1961(1) S A 231 (A D), p.236.

26) Burchell and Hunt, op. cit., Vol. I, p.70; Royal Commission on Capital Punishment, op. cit., para. 52; Moberley, op. cit., p.91 - 92; and R J Gerber and P D Anamy in Radzinowicz and Wolfgang, op. cit., Vol. II, p.131 - 132. But see also Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (Rumpff Commission), R P 69/1967, para. 1.24 - 1.29.

27) See, for example, von Bar, op. cit., p.48 and 501 and Hart, op. cit., p.235.

28) Moberley, op. cit., p.91; Kleinig, op. cit., p.65; P J Fitzgerald, op. cit., p.206; and Hart, op. cit., p.231.

While the idea of retribution seems a basic reaction in the emotional, if not also the rational,[29] life of man, the theory condemns the punishment of the innocent and insists that expediency should not be allowed to outweigh the general rule that the guilty are punished and demands that a lighter offence should not be punished more severely than a much graver one.[30]

The acceptance of a system of extenuating circumstances, such as has been instituted in regard to the South African capital crime of murder, does not necessarily conflict with a retributive or denunciative theory of punishment. If the retributive theory is regarded as implying a moral basis of culpability and is the expression of the disapprobation of a moral society, and if in achieving this requital the moral blameworthiness of the actor is regarded, then this approach is consonant with a theory of extenuating circumstances in the punishment of murder. The court's verdict stamps the crime as murder and, in the use of that word alone, much of society's disapprobation is included and the recompense is justly proportioned according to the moral blameworthiness of the actor at the time or according to other factors which current morality regards as providing extenuation. The retributive view, as we have seen, justifies no severer punishment than the offence deserves and the evidence of logic and history is that the offence or act, in most cases,

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29) Honderich, op. cit., p.151.

30) Ewing, op. cit., p.44 and Honderich, op. cit., p.25 and 42. Moberley, op. cit., p.120 suggests that: "Retribution when fully understood includes the moral amendment of the wrongdoer. Where there is no such amendment, retribution remains incomplete and unsatisfying".

is intimately bound up with the actor. The early objectivity which sought to separate the two is something of a fiction which deserves rejection by a society whose moral sensitivity has apparently been heightened.[31)]

A system of extenuating circumstances which permits the apportionment of a punishment less than death, according to the moral blameworthiness of the accused or other relevant factors, does not, it is submitted, offend against the principles of a retributive or denunciative emphasis of punishment.

Expiation and Atonement

Some jurists regard the emphasis of expiation as depending on moral doctrines which go beyond the limits of the law. According to the ideas of expiation and atonement the wrongdoer by suffering the punishment pays the debt demanded by absolute justice.[32)] The effect of this payment is to wipe out the moral blot - the self-erected barrier between the wrongdoer and society - and, theoretically at any rate, to reconcile him to society and the authority imposing the

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31) This does not necessarily mean that in a particular case other valid considerations, such as deterrence or public policy, should not be held to weigh against the actor in assessment of punishment.

32) Burchell and Hunt, op. cit., Vol. I, p.69. See also Stone, op. cit., p.299 on the "absolute and relativist criteria". Moberley, op. cit., p.120 says: "It follows that retributive punishment can only give full satisfaction if it takes the form of expiation and not of outlawry. Expiation is the true norm of retributive punishment".

punishment.[33]

Religious teaching indicates that reconciliation can be effected by sincere forgiveness which also wipes out (and forgets) the blot of evil. If forgiveness is accepted by the wrongdoer his re-instatement or reconciliation follows. What is being submitted here is that while it clearly seems that deserved punishment has a cleansing potential - Plato also recognised this[34] - so also does the acceptance of the act of forgiveness without the objective necessity of physical punishment. In an enlightened society traditional punishment is not the only prerequisite to reconciling the wrongdoer.[35] This view, while probably a little in advance of an opportunity for its practical implementation on a broad scale, can nevertheless be allied to the reformative theory which seeks the re-instatement in society of the wrongdoer. In this sense I must therefore agree, with respect, with Fitzgerald[36] that the idea of wiping the "slate clean for a fresh start" is an element of substance in the notion of expiation which could have its roots in the psychological depths of man.

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33) The practical effect, however, tends to be a little different. Society very often allows the stigma of its denunciation of the crime to persist in its relationship with the wrongdoer even after the debt has been paid. The slate is in fact not wiped clean: the machinery of the public law retains, and uses where necessary, the fact of a previous conviction.

34) Plato, Gorgias, 472, 477.

35) See also Flugel, op. cit., p.179 on the psychological "need for punishment". Snyman, A J, in sentencing Karg, felt that no sentence was really necessary from a moral standpoint but he felt obliged, because of other considerations, to impose a sentence - R v Karg (supra).

36) P J Fitzgerald, op. cit., p.204.

The practical application of the idea of expiation, however, comes up against the assessment of the nature and degree of punishment considered necessary to pay the debt. If this is to be adjudged with regard to the considerations of moral blameworthiness then the application of extenuating circumstances would not be out of place. The fact that the circumstances of one act of homicide, morally speaking, might require a lesser punishment than those of another case does not offend against a theory of expiation or atonement unless such theory, grounded in deep historical and mystical roots, stands steadfast on the idea of "a life for a life" irrespective of individual circumstances or degrees of moral blameworthiness. Much has been written on the moral illogicality of this kind of approach which it is not possible to discuss here.[37)]

Expiation or the purging of guilt need require no greater punishment than that which the moral sensitivity of society requires in the circumstances of the case and this would normally require a proportion to the accused's moral blameworthiness.[38)] Atonement, in the sense of the reconciliation of the offender, presumably to society or the State, probably goes further in the non-absolutist sense in not requiring the elimination by death of the offender. However that may be argued it does appear that the ideas of expiation and atonement are not inconsistent with the application of a system of extenuating circumstances.

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37) See, for example, Ernest Gowers, A Life for a Life and Weihoffen, op. cit.

38) Burchell and Hunt, op. cit., Vol. I, p.69.

Deterrence

As a substantive and sole theory of punishment the deterrent theory is not entirely satisfying in all its logical extremities and has been much criticised in many quarters and from a number of points of view.[39] That punishment has a deterrent effect, individually and generally, is not to be denied. Indeed, even recent progressive writings recognise deterrence with reformation as the proper objects of punishment though it has been argued that there is an inherent incompatibility between these two which lies at the root of modern penal problems.[40]

The admission of deterrence as a main purpose of criminal justice necessarily entails the view that punishment must follow crime because the force of deterrence will diminish if wrongdoers in any substantial proportion remain undetected or, in the practice of the adjective law, a substantial proportion is not convicted.[41] In an absolute logical

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39) Burchell and Hunt, op. cit., Vol. I, p.75 - 76; Walker, op. cit., Chap. 4; P J Fitzgerald, op. cit., p.210 - 212; Honderich, op. cit., p.93; Hart, op. cit., p.1; Zimring and Hawkins, op. cit., p.4 and 200 - 201; P Brett, An Inquiry into Criminal Guilt, p.54; and Gross, op. cit., p.394 - 400.

40) The Reform of the Law, ed. Glanville Williams, p.193 and 197, much of the argument being taken over in the 2nd edition (1963) and Law Reform Now, ed. G Gardiner and A Martin, p.261 et seq. See also Walker, op. cit., p.96 and Burchell and Hunt, op. cit., Vol. I, p.77. Zimring and Hawkins, op. cit., p.18 (quoting Norval Morris); J Andenaes, Punishment and Deterrence; and Honderich, op. cit., p.93.

41) In the eighteenth century foreign observers of English criminal justice were impressed by the co-existence of a remarkably liberal criminal procedure and exceptionally severe criminal laws - Radzinowicz, A History of English Criminal Law, Vol. I, p.720.

sense it also entails the view that punishment need not be equated with the blameworthiness of the actor.

Punishment may be sufficient to deter a particular individual from again committing a certain wrong act but if it will not, in the circumstances of the time, be sufficient to deter others from wrongdoing then the theory may require a heavier penalty to achieve this purpose.[42] In similar manner crimes of passion and crimes resulting from strong emotional forces will require more severe punishment than normally imposed for the fear of punishment to overcome the powerful drive of the emotions.[43] On this basis what are normally regarded as extenuating circumstances may, on the deterrent view, be a ground to increase punishment rather than to lessen it.

At the lowest level deterrence presupposes a biological society where there is a sort of instinctive retraction from an unpleasant stimulus, while at the highest level deterrence presupposes a moral society and punishment is regarded as supplying or assisting in some measure in supplying a new motive to make persons abstain from wrongdoing. If the law presupposes a moral basis for blameworthiness, as is found in the theory of criminal imputability (with possible limited

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42) "The contemporary approach to the best way of achieving this general objective (i.e. deterrence) has undergone profound transformation. We are no longer certain that the harshest punishment is necessarily the best way of preventing repetition of the offence" - Friedmann, op. cit., p.224 and Beinart, op. cit., p.36. See also Honderich, op. cit., p.93 - 94.

43) Von Hentig, op. cit., p.16 has rightly declared: "Where life is harder than the punishment of man, law and order stands at the limit of its power". Also Walker, op. cit., p.97 and Zimring and Hawkins, op. cit., p.200.

exceptions such as absolute, strict or vicarious liability though even here there might be some indirect moral basis), then it should also logically recognise degrees of blameworthiness. The recognition of these would seem immediately to open the door to the recognition of morally extenuating features associated with the commission of wrongful acts. Again logically there appears to be no reason why such a general principle of extenuation should not be applicable to the crime of murder where experience demonstrates a vast variety in degrees of blameworthiness.

The Royal Commission on Capital Punishment discussed deterrence in relation to the death penalty.[44] The fact was realised that capital punishment is more likely to act as a deterrent to premeditated murder than that impulsively committed and on normal persons more than on the mentally abnormal. In the questioning of Sellin, who had made a thorough study of the subject, statistically and otherwise, the Commission elicited from this "most cautious witness" that on the basis of his studies the death sentence cannot be exercising an over-whelmingly deterrent effect.[45] The Commission concluded that it was unwise to base a penal policy in relation to murder on the "exaggerated estimates of the uniquely deterrent force of the death penalty".[46]

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44) Royal Commission on Capital Punishment, op. cit., para. 60.

45) Royal Commission on Capital Punishment, op. cit., para. 67. See also Capital Punishment, ed. T Sellin, p.138.

46) Royal Commission on Capital Punishment, op. cit., para. 68. See also P W Tappan, Crime, Justice and Correction, p.253 and Weihoffen, op. cit., p.150.

Obviously, where the death penalty is applied, there is no question of individual deterrence.

If an absolute theory of deterrence be adopted then it would seem that there is little place for any reasonable system of extenuating circumstances but this would not appear to be the position today. Rather the law would seem to act on the basis of "mitigated or economical deterrence" or rather to regard deterrence as a factor to be taken into account in assessing punishment but not, except in very special cases, as one exercising an overriding or exclusive influence.[47] Burchell and Hunt[48] indicate quite clearly that "the need to deter others must be tempered by consideration of the offender's moral blameworthiness". If this is so, a system of extenuating circumstances does not necessarily nullify the deterrent effect of punishment as a sentence of ten or fifteen years for murder, imposed as a result of a finding of extenuating circumstances, can, according to the general moral climate, also have a deterrent effect in cases where such effect is likely to have any reasonable operation.

Prevention and Protection

One of the purposes of punishment has been stated to be the prevention of crime. Men use laws to regulate conduct for the welfare of society. Breach of these laws has to be dealt with and the criminal law evolved to stigmatise certain public acts as not conducive to society's well-being and to establish penalties for the breach of the laws. Criminal law and punishment are then protective and preventive insofar

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47) Honderich, op. cit., p.72 and Burchell and Hunt, op. cit., Vol. I, p.77.

48) Burchell and Hunt, op. cit., Vol. I, p.77.

as certain acts are proscribed and insofar as such proscription or the penalty induces to the prevention or suppression of criminal conduct. The preventive aspect has also been found in the fact that the law disables the criminal, albeit in many cases only temporarily, from committing further offences.

Although certain punishments prevent the commission of further crimes by the criminal this is not an effect of the punishment as a punishment. For instance, imprisonment might be regarded as pleasant or as a reward or as "free board and lodging" but it would still prevent a crime. On the other hand, it is possible for an imprisoned murderer still to commit murder in prison as in the case of the well-known "Birdman of Alcatraz".[49]

The preventive emphasis is also no absolute theory of punishment[50] as it would seem to apply only or mainly in respect of punishments taking the form of restraint of liberty or death. The moral difficulties raised against any

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49) Thomas E Gaddis, Birdman of Alcatraz.

50) Burchell and Hunt, op. cit., Vol. I, p.74.

absolute nature of deterrence also apply to prevention.[51] As in the case of deterrence Burchell and Hunt[52] indicate that "preventive measures must be balanced by considerations of 'fairness and consistency' and the moral blameworthiness of the offender". It seems therefore that the preventive emphasis is not inconsistent with the acceptance of a system of extenuating circumstances.

Reformation

As with the retributive purpose this justification for punishment is more consistent with the moral approach to blameworthiness and punishment. It treats the offender as a moral being, capable of change and susceptible to inducement

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51) P J Fitzgerald, op. cit., p.210 - 211 - for example, the complete subordination of the individual's interest to that of the community and the exclusion of other relevant factors in punishment. H L A Hart, The Morality of the Criminal Law, p.51. J Andenaes has indicated that it was never a principle of criminal justice that crime should be prevented at all costs. Ethical and social considerations will always determine which measures are considered proper. He considers that, from a practical point of view, considerations of individual prevention (with reference to mitigation or aggravation) could be taken into account to a considerable degree without noticeably impairing the general preventive effects. See his article, "The General Preventive Effects of Punishment", quoted in Radzinowicz and Wolfgang, op. cit., Vol. II, p.80 and 92 and Andenaes, Punishment and Deterrence, Chap. 2.

52) Burchell and Hunt, op. cit., Vol. I, p.74.

by punishment and reward.[53] Salmond[54] considered the reformative element as a reaction to the earlier tendency to neglect it altogether. Given an efficient penal system, he says, crime is too poor a bargain to commend itself, save in exceptional circumstances, to any except those who "lack the self-control, the intelligence, the prudence or the moral sentiments of the normal man".[55] Just so, but these classes probably form by far the greater proportion of those with whom the criminal law has to deal, particularly in murder cases.

For reformation to succeed, the offender must realise the wrongness of what he has done and society's way of impressing this upon him is by punishment. There are at least two responses to this: acceptance with resultant "purification" and reformation or rebellion with resultant hardening and possible recidivism. If punishment is capable of producing the second of these results it is fitting for society not to accept this as inevitable but to explore every avenue, in the light of social advancement, to ascertain whether there are no other means whereby the evil of recurrent crime in the same person may not be abated. It is possibly in this search that the reformative emphasis takes on some of its significance. While the deterrent emphasis may attempt by

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53) P H Nowell-Smith, Ethics, p.304: "Pleasures and pain, reward and punishment are the rudders by which human conduct is steered, the means by which moral character is moulded".

54) Salmond, op. cit. (10th ed.), p.114; not stated in 12th edition.

55) This statement on its own is almost the complete justification for the necessity for extenuating circumstances in murder cases.

fear to force a person into not committing a crime again, and others from embarking on crime, the reformative emphasis seeks, insofar as the criminal is concerned, to eliminate recurrent crime by changing the criminal so that he will not wish to commit crime again.[56] While punishment might be some spur to moral conduct, it is no real teacher of moral values.

If society comes to regard the essential element of punishment not as the severity of the pain inflicted but as the degree of moral disapprobation implied by the punishment then this could open the way to an increasing importance of the reformative emphasis with the basis of "punishment" being broadened to all reasonable means of correction or re-education. The more enlightened the society, the more, in theory at any rate, should the stigma of the offence assume an importance greater than the physical elements of punishment.[57] This would be consistent with the increasing moral subjectivity of the law and its effects.

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56) We do not only beat children for wrongdoing, we also explain and appeal and teach in an endeavour to lay the ground for a moral constitution. Is it unreasonable for society to adopt a similar policy with its errant children? The force of punishment has not and will not always succeed in establishing a moral appreciation which is lacking. See also Friedmann, op. cit., p.180.

57) It may well be said that when, in any brushes we may have with the law (be it even a speeding contravention), our consciences hurt us more than any penalty we suffer, we are well on the way to developing a more mature approach to law.

In applying the reformative theory to the question of the death penalty, the Royal Commission on Capital Punishment[58] recognised that, while the reformation of the offender is usually regarded as an important function of punishment, it can naturally have no application where the death penalty is exacted. The recognition of this assists in the consequential recognition of the importance of extenuating circumstances in capital cases where, without such recognition, the death penalty must be imposed. The practice of extenuating circumstances is then consistent with a reformative emphasis in punishment.

We see therefore that none of the main emphases or purposes of punishment, if regarded relative to the moral climate of present Western society, need give rise to practical inconsistency in regard to the application of a system of extenuating circumstances.

MURDER AND MURDERERS

In view of the fact that this investigation is dealing only with a particular class of crime and criminal, it might not be out of place to make brief reference to some of the pertinent facts which are relevant to these categories.

Generally it might be stated that an important facet in the crime of murder is that, in common with many other crimes, it can be said to arise from social circumstances and personal relationships. Just as the thoughts and actions of man in society can assume a multitude of combinations and permutations, so also the reasons and circumstances

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58) Royal Commission on Capital Punishment, op. cit., para. 54.

surrounding homicides are many and varied. The Report of the Royal Commission on Capital Punishment[59] states that "there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder". The crime might be brutal and callous to a degree which repulses the normal person or it might be human and understandable, giving rise more to pity than censure. It might be committed in the heat of passion or complete loss of self-control or it might be premeditated and coldly executed. It might be committed in the carrying out of another crime or to escape after committing a crime. There might be a clear desire to kill or the desire might be entirely absent. Among the motives for murder are found the basest as well as the better emotions of man: anger, fear, superstition, jealousy, revenge, greed, lust, love, despair, duty, self-righteousness, political or religious fanaticism and pity. It might be committed in sound and sober senses with full knowledge and deliberation or it might be committed by those who are mentally disordered or abnormal; those who are morally underdeveloped or weak; those whose rational self-control is unable to pit itself against the overpowering drive of their emotions; and those who are not in their sound senses because of the influence of alcohol or drugs. For all the variety of circumstances in homicide, man has, generally speaking, from early times recognised one main and ultimate penalty: death.

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59) Royal Commission on Capital Punishment, op. cit., para. 21. See also M E Wolfgang, Patterns in Criminal Homicide, Chap. 11 and H von Hentig, The Criminal and His Victim, p.397.

Barnes and Teeters,[60] in an attempt to classify the types of murderers generally, distinguish between:-

(a) those who suffer from some serious physical, mental or cultural deficiencies that make it possible for them to contemplate murder as a more or less natural form of conduct. Their point of view is so deficient, judged by normal approved standards, and their sense of fellow feeling or sympathy so underdeveloped that the compunction against taking human life, even if only in certain situations which exist in the normal person, is, with them, absent to a greater or lesser degree;

(b) those who are relatively normal, physically, mentally and culturally and who could in most circumstances get along comfortably well but who, when subject to intensely difficult and overpowering and provocative situations, resort to homicide as a "way out"; and

(c) the professional or hardened criminal whose thought and compunction about the taking of life are similar to a member of the army in time of war.

It will be seen that the first group concerns those with definite deficiency or subnormality whether in the physical, mental or cultural aspect. Constitutionally or environmentally the person in this group has a limitation which is serious enough to distinguish him from the class of

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60) Barnes and Teeters, op. cit., p.317.

persons to whose standards he is unable to conform or has some special difficulty in so doing. The third group is also fairly well defined and, while there might be sociological or criminological reasons for the existence of this type, society has in the past generally felt little sympathy and was inclined here to demand the ultimate sentence. The second group is the one which is providing a testing point for the law. Weihoffen[61] points out that not only lawyers but also philosophers and laymen tend to regard intellection as the core of mental conduct. Not only are intellection, volition and emotion inextricably interwoven but it is probably emotion and not intellection that is the most important of these. He quotes Norwood East as saying: "Perhaps the outstanding feature of modern criminal psychiatry is the recognition of the importance of the emotional rather than the intellectual genesis of crime".[62]

It would seem to be the case that prisoners, other than those found to be insane, who had been convicted of murder and who had received sentences of imprisonment or been reprieved make good prisoners. In 1951 the Philadelphia Bar Association, in a study of 215 persons who had been released after serving substantial sentences for murder, found that only seven were later arrested and only one of these was for a second murder.[63]

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61) Weihoffen, op. cit., p.14. See also Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, op. cit., para. 9.9 - 9.25.

62) Weihoffen, op. cit., p.16.

63) Barnes and Teeters, op. cit., p.319. See also G Gardiner, Capital Punishment as a Deterrent, p.60.

It would appear that it is not claimed against the average "sane" murderer that he is in the class of a criminal recidivist. Weihoffen would state it much more clearly. He says[64] that among the professional criminals we find very few convicted of murder. On this basis the third category indicated by Barnes and Teeters above would be a small one. "Murder is not typically the crime of the so-called criminal classes. Much more often it is an incident in miserable lives, characterised by domestic quarrels, brawls, drinking and fighting".[65] He questions whether a person who at one crisis in his life commits a sudden killing is worse than one who makes it his daily business to peddle drugs to teenagers and is of the opinion that it is merely primitive impulse that causes us to bay for the blood of murderers and rapists but accept with philosophic equanimity the existence of thousands of racketeers, swindlers, fraudulent promotors and clever operators in high places who cost the United States of America billions in losses every year.[66]

While the act of homicide itself can take many forms as to the manner and degree to which violence is used and pain inflicted and may in this sense be compared with certain, but not many, other broad common law crimes such as theft, it certainly seems that, insofar as causative and motivational factors as well as the background and personality of the actor are concerned, there is a great variety of combinations

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64) Weihoffen, op. cit., p.158 - 159.

65) See also Tappan, op. cit., p.253, observation 3. This is confirmed by Ancel, op. cit., p.45. See also J H Steyn, "Crime and its Control" in Acta Juridica 1971, p.194.

66) Weihoffen, op. cit., p.141.

and permutations. To attempt to account for these only by way of one fixed penalty appears clearly to evidence a moral insensitivity commensurate only with an elementary level of development which sees importance only in the outward act of homicide as a physical event and the actors as pawns. To impose a fixed penalty at all where there is such a variety of blameworthiness appears to be a relic of primitivism.

THE PUNISHMENT FOR MURDER

> "No area of penal sanction is either more controversial or more weighted with excessive emotions of hate, horror and grief than is the death penalty". P W Tappan, Crime, Justice and Correction, p.424.

The traditional punishment for murder is death.[67] Generally it has been so for many centuries in the history of man. From early times the taking of life to satisfy personal vengeance and to act as a deterrent to others was probably common. Only in comparatively recent historical times has the punishment of death, generally speaking, been applied only or principally to murder and possibly to one or two other crimes such as treason or kidnapping. Historical and social conditions have, of course, at various periods moved the extension of the application of the death penalty. In the middle ages, for instance, the talion law seemed to predominate and largely preclude compromise or mitigation.

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67) J Laurence, A History of Capital Punishment, p.1 - 2; von Hentig, Punishment, p.163; and The Bible, Book of Genesis, 9 v 6.

Allied to this was the fact that deficiency in the law or circumstances of procedure and proof led to the imposition of capital punishment for acts which were merely dangerous such as the carrying of a knife.[68] During this period not only did the number of capital crimes increase but the various modes of inflicting the penalty became more studied and cruel with no marked effect on the diminution of crime.[69] Laurence[70] says that one of the oldest recorded death sentences as such is to be found in the Amherst papyri containing accounts of Egyptian criminal trials at about 1500 B C and it is not a little surprising to read that possibly the last public execution, in America at any rate, took place in Owensboro, Kentucky about forty years ago on the 14 August 1936.[71]

The humanisation of the sentence of death as a penalty, its execution and mitigation have been slow processes. The recent history of this process in Britain perhaps adequately exemplifies the more conservative approach to the problem but it is doubted whether the United States of America, from a practical point of view, really has any better history. At a time when France, after the period of the revolution, was embodying in its law the ideas of the philosophers of the eighteenth century, among others, equality, individuality and

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68) Von Bar, op. cit., p.105 - 106.

69) Laurence, op. cit., p.5; von Bar, op. cit., 109 and 252; and Radzinowicz, A History of English Criminal Law, Vol. I, p.231.

70) Laurence, op. cit., p.307.

71) Barnes and Teeters, op. cit., p.307.

mitigation of the penal system, England was virtually at the height of its exceptional rise in the number of statutorily created capital offences.[72] The crime of murder apparently formed a small percentage of the total commitals for trial or convictions[73] and, generally speaking, three factors assisted in diminishing the number of persons executed: "pious perjury"; generous exercise of the royal prerogative; and the fact that only a very few of the numerous capital statutes were used in practice.[74]

In 1949 a Royal Commission was appointed to examine the question of capital punishment along lines carefully limited by its terms of reference. After an exhaustive study lasting four years, the Commission, in an excellent report, found that the outstanding defect of the law of murder was that it provided a single punishment for a crime varying so widely in blameworthiness.[75] The rigidity of the punishment for murder was mitigated only by wide use of the royal prerogative of mercy and this was open to criticism.[76]

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72) Radzinowicz, A History of English Criminal Law, Vol. I, p.4 and E O Tuttle, The Crusade against Capital Punishment in Great Britain, p.1.

73) Radzinowicz, A History of English Criminal Law, Vol. I, p.143 and J Michael and H Wechsler, Criminal Law and its Administration, p.236.

74) Radzinowicz, A History of English Criminal Law, Vol. I, p.94 - 95, 137 and 155.

75) Royal Commission on Capital Punishment, op. cit., para. 21 and 790.

76) Royal Commission on Capital Punishment, op. cit., para. 23 and 46.

After considering various aspects of this problem, the Commissioners came to the conclusion that a workable procedure could be devised for the introduction of jury discretion to recommend a penalty other than death. They felt that this was the only practicable way of enabling the courts, instead of the Executive, to take account of extenuating circumstances. "The signal advantage of the jury discretion is that it would solve our main problem. It would make the law of murder more flexible. It would remove the outstanding defect of the existing law and would enable the courts to examine each case individually on its merits and to make the punishment more nearly fit the crime ..... as an American witness expressed it, it would enable the wide differences in moral guilt to be discriminated by the courts as a matter of right not by the Executive as a matter of grace".[77] Although this recommendation was later rejected in Parliament, experts in the field felt that there was a great deal of validity in the suggestion.[78]

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77) Royal Commission on Capital Punishment, op. cit., para. 568. Beinart, op. cit., p.38.

78) Tuttle, op. cit., p.89, note 26. The British Government did not accept the main recommendation of the Royal Commission. In 1957, however, Parliament passed the Homicide Act, 1957 (5 and 6, Eliz. II, C 2) which introduced the doctrine of diminished responsibility, which the Commission had not recommended, and also created two kinds of murder, capital and non-capital. The measure was very much a compromise on the question of capital punishment which in many quarters was not kindly regarded - J E Hall Williams, Developments since the Homicide Act, 1957 in Tuttle, op. cit., p.161 and 164; A L Armitage, The Homicide Act, 1957 in Cambridge Law Journal, 1957, p.183; and J A Joyce, The Right to Life, p.103 et seq. In 1965 the Murder (Abolition of Death Penalty) Act, 1965, Chap. 71 was placed on the statute book. The provisions of this Act repeal most of the Homicide Act including the section distinguishing between capital and non-capital murder. A fixed sentence of imprisonment for life for murder took the place of the death sentence.

Alternative means for avoiding having to impose the death sentence, for those kinds of homicide for which society does not consider it the appropriate or just sentence, have been explored. These attempt to limit the application of that sentence in such a way that it becomes a matter of substantive law and not prerogative. Four of these means will be referred to briefly.

Redefinition of Murder

On a broad view, the question of redefining murder is related particularly to the question of degrees of murder but also to the other proposals for the limitation of the crime for which the death sentence must or may be imposed. On the narrow view, the problem becomes one of the strictly linguistic definition of the crime so as to permit its application, and the resultant death penalty, only to the types of homicide which current morality stigmatises as proper for the death sentence. This would mean defining the crime more narrowly with a corresponding broadening of the crime of culpable homicide or the second degree of murder.

The question of redefinition therefore is fraught with problems of a substantive nature associated with linguistic difficulties and difficulties of interpretation and application besides giving rise to greater rigidity in regard to a crime where circumstances are so variable.

It would seem, from the very nature of things, that as with other important categories of legal standards, such as "the reasonable man", broad, flexible categorisation or definition is preferable to the impossible, or almost impossible, task of narrowly and precisely defining certain pockets of human conduct and circumstance where variety was still extensive

and almost defied delimitation.[79] Indeed, after widespread investigation and comparison, the Royal Commission came to the conclusion that it was impracticable to frame a statutory definition of murder which would effectively limit the scope of capital punishment and would not have overriding disadvantages in other respects.[80]

What is needed, in terms of definition, is some statement to the effect that an intended act committed without lawful reason by one person upon another, which was contemplated and did cause the death of the other person, shall be the crime of murder.[81] It is, with respect, doubted whether existing definitions in these or similar terms can be improved upon as concise and reasonably practicable definitions, bearing in mind that when one has definition there must always follow interpretation. To attempt to delineate or categorise is likely only to lead to greater difficulty of interpretation in drawing the boundaries of the categories with any clarity or, where this may be achieved, may well result in an undesirable rigidity, particularly in a field where there is such a variety of circumstances as has been seen.

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79) Some of the criticisms which followed the British Homicide Act, 1957 illustrate this. See the authorities cited in note 78 and also C Hollis, The Homicide Act.

80) Royal Commission on Capital Punishment, op. cit., para. 483.

81) Burchell and Hunt, op. cit., Vol. II, p.323 define murder as consisting "in the unlawful and intentional killing of another person". See also Proposed Official Draft Model Penal Code, May 1962, of the American Law Institute, clause 210.2.

Degrees of Murder

Within the bounds of modern history, the first American statute to provide for degrees of murder was that enacted in Pennsylvania in 1794. While the statute recognises the benefits of moderate and certain penalties and the "duty to reform rather than exterminate offenders", it is interesting to note that the problem of capital punishment is adequately appreciated in the preamble which states: "Whereas the several offences, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment .....".[82] Certain types of premeditated homicide or homicide committed while attempting or perpetrating certain more serious offences were regarded as murder in the first degree, punishable by death, other homicides being second degree murder.

The fact that the division of murder into degrees has not of itself been sufficient to limit the application of the death penalty in American experience is evidenced by the fact that, while degrees of murder were applied in more than three-quarters of the forty-two States where capital punishment was still in force in about 1950, in almost all of these States the jury had a discretion to decide or recommend whether the death sentence should be imposed for first degree murder.[83]

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82) Royal Commission on Capital Punishment, op. cit., para. 486.

83) Royal Commission on Capital Punishment, op. cit., para. 516. See also Kahn, op. cit., p.200 - 201 where he refers also to the rejection of degrees of murder by General J C Smuts in 1935, then Minister of Justice, as a "wise" decision in favour of extenuating circumstances because the definition of first degree murder was not and, in the nature of things, could not be satisfactory. Burchell and Hunt, op. cit., Vol. II, p.358.

This is noteworthy as it would seem to indicate the insufficiency of the definition of degrees of murder in that country to isolate such categories of murder as should require the fixed penalty of death.

The British experience regarding capital and non-capital murder introduced in the Homicide Act of 1957 has been indicated to have been not very successful.

In a number of Western European countries considered by the Royal Commission in 1950 there were in effect two degrees of intentional homicide, one of the principal tests for the higher degree being premeditation.[84] It would appear, however, that even in these countries a more general and subjective test than premeditation is being sought.

It would seem therefore that the attempt, in homicide cases at any rate, to match the penalty to the crime by means of definition is a most difficult matter. A legal definition must normally be expressed in terms of the objective characteristics or bases of the offence and all the gradations normally taken into account in determining an appropriate penalty cannot easily be taken into a definition without making it unwieldly, exclusive or rigid. The problem has certainly been accentuated in the past because of the fixed or mandatory death penalty with all the considerations which surround that subject. Experience would seem to support the Royal Commission in its description of the search for satisfactory degrees of murder as "chimerical" and in suggesting that it should be abandoned.

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84) Royal Commission on Capital Punishment, op. cit., para. 513. Cf. H Schjoldager, The Norwegian Penal Code, section 231, p.95.

Diminished Responsibility

The question of diminished responsibility appears to be one which, as the words suggest, addresses itself primarily to the departure from the normally accepted rational state of mind or control of the accused person. The acceptance of the phrase in law recognises, quite correctly, it is submitted, that there is no sharp line of demarcation between those persons who are regarded as normal in the eyes of the law and those who fall within the legal definitions, satisfactory or otherwise, of the insane or mentally abnormal. It might be said to be recognition of a patch of grey between the bordering colours of white and black. This, indeed, is consistent with medical testimony which finds, sometimes to the frustration of lawyers, that a line cannot always clearly be drawn between the various circumstances of human motivation and its consequent action. Much as the logical human mind seeks to categorise and classify, so does life resist this with its incessant interaction of multiple circumstances.

Continental legal systems usually recognise the doctrine of diminished responsibility as a concept of general application and T B Smith feels that this is also the position in Scottish law where it has been recognised for about the last hundred years.[85] The real purpose of the doctrine is stated to be for the mitigation of punishment, not only in cases of murder, where the accused is not "fully guilty in the moral sense owing to diminished responsibility".[86] To

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85) T B Smith, Scotland: The Development of its Laws and Constitution, p.153. See also G H Gordon, The Criminal Law of Scotland, p.380 et seq. and Nigel Walker, Crime and Insanity in England, p.138 et seq.

86) Smith, op. cit., p.161.

overcome the anomaly of the fixed penalty of death for murder, the doctrine has been so applied as to reduce the quality of the crime. Therefore the application of the doctrine in Scotland has substantive effect besides being consequently related to mitigation of sentence.

The often-quoted statement of the doctrine in Savage's case[87] appears to suggest that what was sought to be dealt with was a similar quality of mental abnormality as was sought by its much later introduction in England in the Homicide Act of 1957:-

> "It is very difficult to put in a phrase, but it has been put this way: that there must be aberration or weakness of mind; there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility - in other words, the prisoner in question must be only partially accountable for his actions".

This statement appears to support the submission that, at any rate, the later development and exposition of the doctrine was aimed at supplementing the infirm and narrow M'Naghten rules.

The use of the doctrine to effect a change in the quality of the crime (which resulted really in a distinction in the crime category, the successful application resulting in conviction for culpable homicide) might well have been one of

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87) R v Savage 1923 J C 49, p.50 - 51.

the reasons for the desire to limit the application of the doctrine after the Second World War.[88] This was regrettable. If the doctrine was not to be progressive in its extension and was not to be taken as extending to the psychopath then this fact, it is submitted, has the immediate effect of dating the doctrine and of limiting its application. But not only that: the result of such conservatism might well place Scottish law in a more anomalous position by showing it to be realistic in certain limited respects but not others currently demanding attention. In 1962 T B Smith pointed out that it was open for the Scottish courts to treat the psychopath as a case of diminished responsibility by judicial development of the law "but such an extension does not seem imminent".[89] With the elimination of the fixed death penalty, however, it will be open for the doctrine, without anomalous consequences, to have general and extended application.

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88) R v Carraher 1946 J C 108. The Court was not prepared to extend the doctrine to cover the case of psychopathic personality and in H M Adv. v Cunningham 1963 J C 80 the High Court restricted diminished responsibility to murder cases.

89) T B Smith, Studies Critical and Comparative, p.247. See also Gordon, op. cit., p.338 and Walker, op. cit., p.156. However, the English law of diminished responsibility, introduced in the Homicide Act, 1957, has found itself in a position to accommodate the psychopath - Reg. v Byrne 1960(3) A E R 1 (C C A) and Reg. v Rose 1961(1) A E R 859, p.683 where Lord Parker's interpretation in Byrne's case of the statutory phrase "abnormality of mind" as including, besides perception, the "ability to exercise will-power to control acts in accordance with ..... rational judgment" was accepted as "authoritative and correct". See also J C Smith and B Hogan, Criminal Law, p.176 et seq.

The English law, however, in accommodating, for instance, the psychopath in section 2 of the Homicide Act, 1957[90] has tended to keep the test on a fairly broad common sense basis[91] but if, as seems likely, the law develops along the lines of coupling "abnormality of mind" with the necessity for proven medical abnormality then this form of statutory diminished responsibility might be said to be distinctly limited in its operation and it would not operate as a general principle of mitigation in homicide cases.

Diminished responsibility has been recognised in South African law[92] primarily in relation to psychopathy and mental deficiency or weakness short of legal insanity. The

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90) 6 Stats. 457

91) Davies, J, in Reg. v Lloyd 1966(1) A E R 107 (C C A), approved a judge's direction to the jury containing phrases such as: "There is no scientific precise test. That cannot be and never can be in human conduct ..... I think you should look at it in a broad common sense way and ask yourselves, having heard what the doctors have said, having made up your minds about it knowing what this man did ..... 'Do we think ..... there was a substantial impairment of his mental responsibility in what he did?'" Glanville Williams, however, was of the opinion that the intention of the section of the Act was "evidently to restrict the defence to cases where it is supported by medical evidence and to exclude killings that are motivated merely by such emotions as jealousy, rage or hate"; Criminal Law (2nd ed.), p.542.

92) R v Lloyd 1941 C P D 162; R v Roberts 1957(4) S A 265 (A D), p.272 per Steyn, J A as he then was; S v Makete 1971(4) S A 214 (T P D); and Burchell and Hunt, op. cit., Vol. I, p.213.

The Rumpff Commission[93] regarded a finding of diminished responsibility, on account of mental disorder, as implicit in the sections of the Criminal Procedure Act, 1955 providing for a finding of extenuating circumstances.[94] The Commission recommended that the principle of diminished responsibility, as accepted in South African law, should be maintained.[95] In the South African law of homicide therefore diminished responsibility as such or as providing an extenuating circumstance does not have the effect of reducing the crime category. It is, however, related to the question of sentence. It seems also as if the application of the principle is limited to the aspect of mental responsibility as evidenced by some mental deficiency short of insanity.[96] This state of affairs has now been

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93) Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, op. cit., para. 8.6.

94) Sections 141(2) and 330(1). The only relevant section in the new Criminal Procedure Act No. 51 of 1977 is 277(2).

95) Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, op. cit., para. 12.34.

96) Would the term be applied, for instance, in a case of provocation, intoxication, private defence, necessity of mercy-killing where the evidence is insufficient to substantiate a defence? It seems unlikely. But see Glanville Williams, op. cit., p.546. The use of the word "responsibility" in "diminished responsibility" has the immediate effect of relating the concept to the legal ideas and tests for responsibility for action as related to verdict but the practice is not so; rather is it related to the general moral blameworthiness of the action in regard to punishment. "Diminished culpability" might be more appropriate. See also Gordon, op. cit., p.381.

statutorily enacted in the Criminal Procedure Act, 1977,[97] section 78(7) of which reads:-

> "If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused".[98]

This sub-section uses the same factors set out in sub-section (1) where it is provided that incapacity to appreciate the wrongfulness of an act or act in accordance with such appreciation renders an accused not criminally responsible. This provision of statutory diminished responsibility therefore seems to be a logical step forward in our law as has developed and no doubt results directly from consideration of the Rumpff Commission Report. It is a

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97) Criminal Procedure Act No. 51 of 1977, section 78(7).

98) The corresponding clause 78(7) in the original Bill, published for general information in Government Gazette R 1540 of 10 December 1971, does not contain "or mental defect" after "mental illness" and had "shall" instead of the permissive "may" after the last reference to "the court". The first change is consistent with the coupling of these two concepts throughout section 78. The second seems to indicate a timidity that is apprehensive of the logical consequences of the decision statutorily to recognise diminished responsibility. Perhaps it was considered that by imperatively taking account of diminished responsibility it would require a lesser sentence. This need not necessarily be so as the judicial officer still has to consider all facts in relation to sentence.

provision which naturally applies to all offences and this is in accord with its recognition in certain Continental countries[99] but its application as a general principle of mitigation in South Africa is likely to be limited to what the courts are prepared to admit as falling within the concepts of "mental illness or mental defect".[100] However, "diminished responsibility" which is found to exist in homicide cases cannot, under that description, empower a judge to pass a lesser sentence than death upon a person convicted of murder.[1] This can only occur when diminished responsibility is found to be an extenuating circumstance in terms of section 277(2) of the Criminal Procedure Act, 1977 and when the court exercises its discretion in favour of a lesser sentence than death. In homicide cases therefore diminished responsibility falls under the umbrella of extenuating circumstances.

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99) See Gordon, op. cit., p.383. Ancel, op. cit., p.16, in examining the reasons why the doctrine of diminished responsibility did not play a greater part in limiting the application of the death penalty, found that the two reasons were:-

(a) the modern law tends to reduce the number of capital crimes; and

(b) in many countries account was taken of extenuating circumstances and this had the effect of giving recognition to diminished responsibility and mitigating the penalty.

100) "Mental illness" is defined in section 1 of the Mental Health Act, 1973 as "any disorder or disability of the mind" including any mental disease, arrested or incomplete development of the mind and any psychopathic disorder.

1) Notwithstanding the last two lines of section 78(7) of the Criminal Procedure Act, 1977. Diminished responsibility does not stand on its own feet in relation to the power to pass a mitigated sentence upon a convicted murderer.

Extenuating Circumstances

Extenuating circumstances, in various forms as mitigation of punishment, has a long legal history and is related to the exercise by the judge or the triers of fact of a discretion as to punishment. It is recognised in many countries in some form or other: by statute or in the common law;[2] in homicide cases or as a general principle of the law of punishment. In all cases it is particularly related to the sentencing function of the court rather than to the determination of guilt as is the case with considerations such as redefinition of murder and diminished responsibility.

The Royal Commission on Capital Punishment found that in a number of European countries a doctrine of extenuating circumstances operates as a general principle of mitigation of punishment even where there is no death penalty. In some cases the discretion is vested in the court or the jury and in others in the court and the jury sitting together.[3]

The desirability of defining extenuating circumstances in any but the broadest of terms is questioned for reasons very similar to those given against the redefinition of the crime of murder:[4] detailed circumscription results in a rigidity in which it is difficult to account for all dynamic and variable factors.

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2) Ancel, op. cit., p.16.

3) Royal Commission on Capital Punishment, op. cit., Appendix 11, para. 71.

4) See, for instance, the Draft Model Penal Code of 1959 quoted in M G Paulsen and S H Kadish, Criminal Law and its Processes, p.557. Compare the Proposed Official Draft Model Penal Code, May 1962, of the American Law Institute, clause 210.6.

After a thorough and comparative study of the problem of punishment in murder cases, the Royal Commission on Capital Punishment, 1949 - 1953, came to the conclusion that as long as capital punishment is retained the acceptance of a discretion as to punishment based on the presence of extenuating circumstances was the "only practicable way of correcting the outstanding defects of the existing law".[5] A discretion vested in the triers of fact would make the law of murder more flexible and "would enable the wide differences in moral guilt to be discriminated by the courts as a matter of right".[6]

It would seem that the mind is drawn into agreement with the main recommendation of the Royal Commission as well as the South African Parliament's decision in 1935[7] that the most suitable and practicable solution to the problem of the punishment for murder, against the background of the acceptance of capital punishment in the hierarchy of penalties, was the introduction of a discretion as to punishment based on the acceptance of extenuating circumstances. The consensus seems to be that the system has worked well in practice and that there has not been any undue abuse of the discretion by means of excessive or

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5) Royal Commission on Capital Punishment, op. cit., para. 595. P J Fitzgerald, op. cit., p.219.

6) Royal Commission on Capital Punishment, op. cit., para. 568.

7) Burchell and Hunt, op. cit., Vol. II, p.358 and see Chap. III, p.102 of this thesis for an outline of the events leading to this decision.

unjustifiable leniency[8] and the system appears to achieve a degree of practical justice commensurate with that in other branches of the law.

CONCLUSION

In this introductory chapter the difficulty of the guilt-punishment equation in the crime of murder has been indicated theoretically and from the historical experience of some leading Western States. There has been brief reference to the murderer as a type of person and murder as a type of crime and into the crucible of interaction have been placed the wide variety of persons and circumstances which go to make the crime, the various theories of punishment together with the application of appropriate punishment against the background generally of a death sentence for murder and various historical attempts to meet the rigour or rigidity of that punishment.

The following conclusions may reasonably be drawn:-

(a) The emotional and psychological basis of retaliation and punishment is very deep-seated in man and his history.

(b) The attempt to balance guilt and punishment in terms acceptable to current morality and "sense of justice" is not, and probably never will be, an easy or exact task involving as it does the interaction of various factors and emphases.

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8) Kahn, op. cit., p.202 and Burchell and Hunt, op. cit., Vol. II, p.358.

(c) Because of the statement in (b) and the search in many jurisdictions for an appropriate punishment, sentencing discretion plays an important part and the narrow circumscription of punishment limits is, as a general feature, not desirable.

(d) As a consequence of (c) and also of the variety in the subjective and objective characteristics and circumstances of offenders and crimes, it appears from the experience of certain Western countries that an appropriate approach to the sentencing function in cases of murder is not easily found in attempts to redefine the crime of murder or in the introduction of degrees of murder.

(e) Diminished responsibility, as it has developed in countries like Scotland and England and even in South Africa, is not by any means the whole answer to the problem of sentencing the murderer - it is too limited in its application.

(f) A system of extenuating circumstances, relating as it does particularly to the sentencing function of the court rather than to the determination of guilt, as is the case with the considerations mentioned in (d) and (e) above, seems to be a suitable avenue to achieve the justice of the case in murder in jurisdictions where the penalty for the crime is normally a capital or fixed sentence.

CHAPTER - II

E X T E N U A T I O N

"A society in which the questionings of justice cease to be a constant prod and perplexity would not be human in any sense that matters". Julius Stone, Human Law and Human Justice, p.355.

INTRODUCTION

It can probably be declared as a general statement that in the history of man's punitive dealings with man, at least from the time when societies became more orderly and commenced up the rungs of reasonable civilisation, he has been aware that circumstances alter cases. Whether this has always received recognition is another matter but this awareness has been almost as evident, to a greater or lesser degree, as the search for norms and standards which aim, on the basis of fairness and justice, at treating offenders in similar categories on a similar basis.[1)]

Extenuation or mitigation as affecting punishment has historically taken various forms which are not necessarily related to the criminal act itself or the offender in the commission of the act. Old Hittite laws indicate that legal penalties were related to the political status of the

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1) See, for example, J Stone, Human Law and Human Justice, p.12 and 20.

offender.[2] Among the Israelites the law of blood revenge was tempered by the establishment of cities of refuge.[3] In France, during the Middle Ages, confession and repentance were often taken into consideration[4] while in Germany, during the seventeenth century, an offender could be saved from the death sentence if a young girl offered to marry him and mitigation of penalty might also be allowed for special ability of an offender in his art, trade or profession.[5] In Switzerland, during the same period, intercession of the family and the circumstances of the case were considered in apportioning punishment.[6]

Although these various forms of mitigation seem to adhere to no pattern of rational order, but were socially (and legally) acceptable in their age, this does not mean that there were no attempts to formulate a reasoned general basis.

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2) J H Breasted, The Dawn of Conscience, p.343. See also C L von Bar, A History of Continental Criminal Law, p.46 and Digest, 48.19 for differentiated punishment according to class difference.

3) The Bible, Book of Joshua, Chap. 20 and E B Tylor, Anthropology, p.142.

4) Von Bar, op. cit., p.147. In some countries this still applied in recent years by legislation - see M Ancel, Capital Punishment, p.17.

5) Von Bar, op. cit., p.234, note 3.

6) Von Bar, op. cit., p.298.

Marcianus[7] writes:-

> "It is the duty of the judge to be careful not to impose a sentence which is either more or less severe than the case demands; for neither a reputation for harshness, nor the glory of clemency should be his aim; but having carefully weighed the circumstances of the case, he should decide whatever the matter requires. It is clear that in cases of minor importance, judges should be inclined to levity; and where heavier penalties are involved, while they must comply with the stern requirements of the laws, they should temper them with some degree of indulgence".

Jerome Hall,[8] perhaps not quite accurately, characterises as "completely modern" a portion of the laws of Aethelred: "But every deed shall be carefully distinguished and judgment meted out in proportion to the offence".[9] In the later Middle ages, Bouteiller, the Frenchman, examined the question of extenuation more fully and advised judges in determining sentence to take account of the character of the victim, the condition of the criminal and the previous habits of the offender. In homicide cases he ranked the heedlessness of the offender as the circumstance offering most extenuation in

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7) Digest, 48.19.11 (trans. S P Scott). The Roman texts are not very clear or specific as to what "good causes" permit the exercise of a discretion to mitigate punishment - B Beinart, "Crime and Punishment in an Historical Setting" in Acta Juridica 1975, p.17.

8) Jerome Hall, General Principles of Criminal Law, p.143.

9) VI Aethelred, cap. 10, No. 1 in Robertson, The Laws of the Kings of England from Edmund to Henry I, p.95.

which case the penalty ought to be more lenient.[10] In England, during the late eighteenth century, the harshness of the penal laws providing for capital punishment was attenuated by the frequent commutation of the death sentence on one or more of the following grounds: youth; no previous convictions; previous good character; absence of violence in the crime; absence of use of weapons; the fact that the accused was driven to the crime by necessity; that restitution of the stolen article was made; that the conviction resulted from the accused's confession; and the fact that strong public compassion would be evoked were the law to take its course.[11]

The Roman-Dutch law of the seventeenth and eighteenth centuries, not unexpectedly, based some of its general principles on the approach to punishment on those found in the Roman law. Matthaeus, in dealing with the function of the judge, summarises in shorter form the type of statement made by Marcianus, quoted above, as follows:-

> "Id omne tribus summis preceptis absolvitur: quorum primum est; Poena suos debent tenere auctores; Secundum, Poenae interpretatione sunt mollienda potius, quam exasperandae; Tertium, Judex pro modo admissi interim durius, interim remissus statuere debet".[12]

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10) Von Bar, op. cit., p.151 and 158.

11) L Radzinowicz, A History of English Criminal Law, Vol. I, p.115.

12) Matthaeus, De Criminibus, 48,18.4.

Voet,[13] after pointing out that where a fixed penalty has been prescribed judges should be required to impose such sentence and cannot take upon themselves the right, through mitigation of punishment, to decide on the fairness or unfairness of the law, goes on to indicate nevertheless that the circumstances and characteristics of crimes generally make a great deal of difference. He states, referring to Matthaeus,[14] that current penalties were almost discretionary. He also resorts to Marcianus in requiring that the penalty must fit the crime and the judge's decision must be in accordance with the demands of each case "according to the measure of their wrongdoing". He goes on to deal briefly with the mitigatory effect of certain features such as drunkenness, anger, sex, minority and old age. Van Leeuwen[15] in one passage complains that in earlier times the judges softened and mitigated sentences too much. In regard to homicide he states that circumstances such as time, place, means of doing, motive for the crime and personal status should be regarded in order to determine whether the crime should be punished ordinarily or extraordinarily. If there were circumstances indicating

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13) J Voet, Commentarius ad Pandectas, 48,19.4 (trans. Gane). Beinart, op. cit., p.8 and footnote 29a.

14) Voet, op. cit. See also S A Groenewegen, De Legibus Abrogatis, Ad. Inst., 4.18.4, 5, 6 and 8 and U Huber, Heedendaagse Rechtsgeleerdheyt, 4.26.1.

15) S van Leeuwen, Commentaries on Roman Dutch Law, 3.6 (trans. J G Kotze), Vol. I, p.25. See also D G van der Keessel, Praelictiones in Libros XLVII et XLVIII Digestorum (trans. B Beinart and P van Warmelo), Vol. III, p.995, footnote 68.

that severity was appropriate, even in cases requiring a death sentence, then a worse form of death penalty would be imposed such as burning or breaking on the wheel instead of the ordinary beheading.[16] Moorman,[17] writing in 1764, touches upon mitigated punishments in respect of certain categories of offender. He considers that, because of the great variety of differing circumstances, the mitigation and aggravation of penalty should be left to the "verlichting, bescheidenheit, en het gemoet van den Rechter". Besides dealing with features like youth and drunkenness he also seems to recognise mitigation in those "whose idea of right and wrong is dimmed (verduistert) but not completely 'uitgedooft'"[18] and in cases where "de billik oorsaek de gramschap" excuses the crime and makes it less punishable.

Nearly fifty years later one of the last writers on the Roman Dutch law, in the form in which it became part of the heritage of South African law, van der Linden, devoted the second book of his Institutes to criminal law and one chapter to punishment generally. He examines the question of extenuating circumstances and finds a basis for them "meestal uit den meerderen of minderen graad van de zedelijke waarde (moraliteit) der daden".[19] He finds the following to have the potential to extenuate culpability: repentance;

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16) Van Leeuwen, op. cit., 34.1 (trans. J G Kotze), Vol. II, p.269 - 270. Also Huber, op. cit., 4.13.31 and 4.26.8 et seq.

17) J Moorman, Over de Misdaden, Inleid, 2.7 et seq. See also van der Keessel, op. cit., Vol. III, p.999 et seq.

18) Moorman, op. cit., 2.15.

19) J van der Linden, Regtsgeleerd, Practicaal en Koopmans Handboek, 2.2.7 and 2.5.8.

weakness of the female sex (sometimes); a bad education; previous good conduct and the bad influence of others; intercession of the person injured; the fact that the accused is a person of great talent and merit or that poverty was the main reason for the crime or that the accused had a large family; and voluntary confession and provocation. To these he adds, in homicide cases, the fact that experts differ as to the deadliness of the wound and where the deceased had lived so long that the mortality of the wound may reasonably be doubted.

It can be seen therefore that extenuating circumstances and mitigation of punishment in Roman Dutch law accorded generally with the ideas prevailing in some other comparable systems such as they were enunciated or listed and that the types of circumstance can be broadly categorised as:-

(a) personal - relating to the accused himself, his character and state of mind;

(b) situational - relating to circumstances surrounding, or part of, the criminal act; and

(c) consequential or additional - for example, confession and repentance and evocation of subsequent compassion.

Coming to more recent times one finds the following circumstances being regarded or suggested for extenuation or mitigation: passions or emotions; lesser mental abnormality;[20] euthanasia; survivors of genuine suicide

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20) In Belgium - Report of the Royal Commission on Capital Punishment, 1949 - 1953, H M S O, Cmd. 8932, Appendix 13.

pacts; absence of premeditation; provocation; cases where only a constructive intent is found; minor degree of participation;[21] circumstances which the accused believed to provide moral justification; domination by another person or duress;[22] putative self-defence; psychopathic condition; influence of beliefs and customs of a less civilised way of life;[23] and compulsion and coercion.

It will be observed from this brief survey that most, if not all, of these more recently characterised circumstances fall within the personal or situational circumstances and the increase in the designation of circumstances which have subjective content is clearly discernible.

EXTENUATION AND MITIGATION

In regard to terminological use it would seem that similar meanings are assigned to the words "extenuate" and "mitigate". The Oxford English Dictionary[24] indicates the meaning of "extenuate" as including "to lessen or seem to lessen the seeming magnitude of (guilt or offence) by partial excuses; also of circumstances: to serve as an extenuation of". For "mitigate" one finds the following: "to abate the rigour of (a law); to reduce the severity of (punishment, etc.); to

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21) Royal Commission on Capital Punishment, op. cit., para. 39. Ancel, op. cit., p.17.

22) M G Paulsen and S H Kadish, Criminal Law and its Processes, p.557.

23) In South Africa and other African countries - discussed below in Chap. VI, p.224.

24) Shorter Oxford English Dictionary.

palliate (an offence)" and "mitigation", "a circumstance that mitigates". Radin's Law Dictionary[25] indicates "mitigate" as "to reduce or lessen punishment or damages" and "mitigation" as "any circumstance in criminal law which, while not constituting a defense may be taken into account in the imposing of punishment". The Dictionary of Legal Words and Phrases and the South African Judicial Dictionary[26] define "extenuating circumstances" in terms of the South African judicial decisions on the subject. The Report of the Royal Commission on Capital Punishment, 1949 - 1953, uses both words, for example, "extenuating circumstances" and "..... the discretion to mitigate the death sentence".[27]

It would seem that these words are largely interchangeable, "mitigation" being a broader term, of course, used also in civil law (as in the law of damages) and "extenuation" being largely limited to the sphere of criminal or moral circumstance. Although in this thesis "mitigation" may be used on occasion in a general sense, "extenuation" or "extenuating circumstances" will be the words predominantly used because the latter are the words used in the relevant South African legislation.[28]

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25) Radin's Law Dictionary (1970).

26) Compiled by C J Claassen and J J L Sisson respectively.

27) Royal Commission on Capital Punishment, op. cit., para. 39 and p.461 respectively. H L A Hart, Punishment and Responsibility, p.14 prefers the word "mitigation" as a general heading in dealing with this aspect of distributive justice relevant to the amount of punishment. The Proposed Official Draft Model Penal Code, May 1962, of the American Law Institute, clause 210.6 uses "mitigating circumstances".

28) Criminal Procedure Act No. 51 of 1977, section 277(2).

MORAL AND LEGAL STANDING OF EXTENUATION

The limiting concept of distribution in regard to punishment embraces, firstly, the principle of liability for punishment in law which deals with the question of what class of persons may be punished. There is a general moral basis in this principle which can be related to the general justification of the right to punish. Generally speaking, only an offender is punished and in respect of a specific offence. Punishment is attracted by the commission of an actus reus accompanied by the mens rea. Secondly, the concept of distribution in punishment embraces the question of amount or degree and the principle of proportionality.[29] It is under this heading that the principle of mitigation or extenuation falls to be discussed.

Initially the severity of punishment is determined by the predominant emphasis in or justification of punishment or the limits set by customary or positive law. This sets, as it were, the ground base to the degree of punishment or the general attitude or socio-moral outlook which punishment seeks to maintain. Within these parameters, however, there are further restrictions on the severity of punishment and these proceed from the limiting effect of the principle of proportionality and by the idea of extenuation or mitigation which involves the special application of punishment in a particular case and to a particular person. This consideration is independent of the general aim of punishment. Certainly, where the institution of criminal punishment has a moral basis, as with the purposes of punishment referred to in Chapter I, "the law should reflect the principle of

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29) Hart, op. cit., p.11 and H Gross, A Theory of Criminal Justice, p.438.

justice that morally disparate cases should not be punished with the same severity unless there is some overriding moral reason for departing from this principle".[30)]

Implicit in the concepts of crime and punishment are the ideas of guilt and blame. Blame and its correlate praise have a distinct moral connotation and basis.[31)] Non-conformity with a rule of conduct or a law when one could have done otherwise is the circumstance which attracts blame. The degree to which one "could have done otherwise" provides a differential which is reflected in the degree of blame or denunciatory condemnation or punishment.[32)] This is generally argued to be justified on moral grounds based on the degree of moral guilt but the same conclusion is reached by the approach of the philosopher, T H Green, as Morris Ginsberg points out,[33)] where the argument is that the admission of extenuating circumstances is not based on the degree of moral guilt because this is not ascertainable. It is rather based on a change in the circumstances which make it unnecessary to visit the crime with the normal degree of severity of punishment thought necessary to defend the right involved.

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30) H L A Hart, The Morality of the Criminal Law, p.51 and Gross, op. cit., p.448.

31) P H Nowell-Smith, Ethics, p.304; S Zink, The Concept of Ethics, p.129; T Honderich, Punishment, p.172; and P Brett, An Inquiry into Criminal Guilt, p.70 and at p.156: "The basic principle of blameworthiness is failure to conform to the community ethic".

32) Zink, op. cit., p.207; Honderich, op. cit., p.171; and W Moberley, The Ethics of Punishment, p.58: "Extenuating circumstances then can have a place in a scale of punishment based on danger as well as in a scale based on wickedness".

33) M Ginsberg, On Justice in Society, p.189.

This investigation into the question of extenuating circumstances in murder is, of course, not concerned with the categories of capacity and circumstance insofar as these afford an absolute defence to criminal liability but it is necessary to recognise that even though liability is imposed there are gradations within the categories mentioned as well as other circumstances to which regard should be had in the apportionment of blameworthiness for the purpose of penalty if punishment is to have any reasonably moral basis or appeal to a sense of justice.[34)]

Logically, as well as morally, it seems that a derogation by degrees from what is regarded as normal culpability, with reference to capacity or variation in relevant circumstances, should be met by a derogation in degrees from the normal or maximum penalty. While, for the ascertainment of legal guilt, the law is required to draw a line of demarcation - conduct on the one side being "not guilty" and conduct on the other side being "guilty" - there is within the class of guilty ones a wide variety of degrees within capacity and circumstance, judged from a moral point of view, which should be considered in regard to punishment.[35)]

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34) The generality of the law implies impartiality between the different parties subject to it and basic to the notion of justice is the absence of arbitrariness. Arbitrary discrimination is sought to be removed by requiring justification in terms of relevant differences in any differential treatment - see Ginsberg, op. cit., p.64; Hart, Punishment and Responsibility, p.15; and Stone, op. cit., p.334.

35) Kenny, Outlines of Criminal Law (J W C Turner), p.13; Stone, op. cit., p.344; P J Fitzgerald, Criminal Law and Punishment, p.211; Hart, Punishment and Responsibility, p.25; D A Thomas, Principles of Sentencing, p.67; and Moberley, op. cit., p.171: "It is the special concern of distributive justice to discriminate".

The moral and legal basis for a system of mitigation or extenuating circumstances is nothing new and we may say that, in this respect, legal man has walked largely hand-in-hand with moral man. Where a moral distinction or a form of relevant and justified differentiation is not able to be reflected in the substantive categories of the criminal law, it is important that it should be possible to take account of it as mitigating or extenuating circumstances at the stage of punishment. Not to do this tends to distort the legal concepts or to bring into disrepute the idea of justice and to evoke reactions in one form or another.[36)]

It should be observed here, however, that "the major principle governing the effect of mitigating factors is that an offender is not considered to be entitled as of right to a reduction in his sentence for mitigating factors; allowance for mitigation is seen as a matter in the discretion of the court which the court may withhold if it sees fit in order to emphasize some other penal object, usually deterrence".[37)] Naturally this principle would normally apply in the absence of any specific statutory requirement to the contrary. Furthermore, the failure to take mitigating factors into account at the stage of sentencing, other than for some relevant overriding consideration, could result in such sentence being subject to the normal tests applied by an

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36) See, for example, Radzinowicz, A History of English Criminal Law, Vol. I, p.94 in regard to "pious perjury" and Ellison Kahn, "Crime and Punishment, 1910 - 1960" in Acta Juridica 1960, p.200 in regard to verdicts of culpable homicide instead of murder.

37) Thomas, op. cit., p.170 and 44. See also R v Owen 1957(1) S A 458 (A D), p.462 and R v Roberts 1957(4) S A 265 (A D), p.270.

appeal court in determining appeals on sentence.[38]

TYPES OF APPROACH TO MITIGATION OR EXTENUATION

Judicial and Statutory

Ancel, the French judge, in his study of capital punishment and its mitigation among the member States of the United Nations, indicates[39] two systems of extenuating circumstances. The first is that of the "judicial" system where the judge has an absolute discretion to take extenuating circumstances into account in determining sentence. The admission of extenuating circumstances would generally operate automatically to avoid the imposition of the death penalty. This was the system introduced in France

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38) R v Ramanka 1949(1) S A 417 (A D); R v Lindsay 1957(2) S A 235 (N P D); S v Fazzie and Ors. 1964(4) S A 673 (A D); and S v de Jager and Ano. 1965(2) S A 629 (A D). In S v Whitehead 1970(4) S A 424 (A D), p.436 the tests, on the basis of which the appeal court could interfere with the sentence of a trial court, were summed up by Ogilvie Thompson, J A as follows: misdirection (or "irregularity" - de Jager's case); striking disparity between the sentence passed and the sentence which the appeal court would have passed; startingly or disturbingly inappropriate. The court was to have regard not only to the main purposes of punishment but also to the individual concerned and the circumstances of his crime. In Fazzie's case, van Winsen, A J A, p.684 said: "One of the factors to which a trial court ought to have regard in assessing punishment is the moral blameworthiness of the accused". See also S v Shepard 1967(4) S A 170 (W L D).

39) Ancel, op. cit., p.16. See also Gross, op. cit., p.450.

in the revision of the Penal Code of 28 April 1832.[40] In the second place the system of extenuating circumstances may be "statutory". In this case the mitigatory or extenuatory factors are set out in legislation.[41]

Formal and Informal

Hart distinguishes between formal and informal mitigation.[42] Formal mitigation occurs where legal rules provide for the removal of the offence into a separate crime category with a lesser penalty where the relevant mitigating factor is present. Informal mitigation occurs where the law fixes a maximum penalty but leaves it in the discretion of the judicial officer in determining punishment to consider mitigating factors among the other relevant considerations in sentencing.

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40) Ancel, op. cit., p.16. See also von Bar, op. cit., p.339 where he points out that "this radical reform gave to the trial tribunal the power to determine, with some discretion, the legal morality of the offence under investigation and thus to cast a more exact balance between the punishment and the gravity of the particular offence".

41) These systems are said to have developed in the second half of the nineteenth century and are found in countries like the U S S R, Latin America and Greece with examples such as spontaneous confession, active repentance and minor participation - Ancel, op. cit., p.16 and 17.

42) Hart, Punishment and Responsibility, p.15.

The South African system of extenuating circumstances introduced in 1935,[43] in regard to the crime of murder, can be said to be a judicial and an informal system. "Extenuating circumstances" are not defined in any statute nor are the types of admissible circumstances or mitigatory factors specified or limited in any law. It is open therefore for the triers of fact, normally a judge and two assessors, to find that any circumstances, within the meaning of these words, are extenuating circumstances. The court then has a discretion to pass a sentence less than the mandatory death sentence prescribed for murder.[44]

Personal and Situational

It is possible further to categorise the approach to extenuating or mitigating circumstances conceptually as an aid to clarity of thought but it is submitted that this should not be done to the extent or in a form which will tend towards a rigidity of categories which will not allow flexibility in what is considered to be a dynamic concept. In the field of ethics it is clear that the ability to act

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43) By section 34(2) of the General Law Amendment Act No. 46 of 1935 which introduced a new section 206(2) into the Criminal Procedure and Evidence Act No. 31 of 1917 with a complementary amendment to section 338(1). Section 206(2) empowered the jury to make a finding of extenuating circumstances. This section was repealed by section 35(1) of the Abolition of Juries Act No. 34 of 1969 when juries were abolished and the only present reference to extenuating circumstances is in section 277(2) of the Criminal Procedure Act No. 51 of 1977, the corresponding section to 338(1), which permits, but not requires, a court to pass a lesser sentence than death on a conviction of murder when in the opinion of the court "there are extenuating circumstances".

44) Section 277(1)(a) of the Criminal Procedure Act No. 51 of 1977.

depends on conditions which are personal to the actor as well as conditions of his external situation.[45] Many factors of excuse, justification or mitigation are related to either of these viewpoints. Hart, from a lawyer's point of view, indicates that "the special features of mitigation are that a good reason for administering a less severe penalty is made out if the situation or the mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or weakened otherwise than by his own action, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed".[46] It is not considered that Hart purported here to be comprehensive or exhaustive in the description of situational or mental features which he mentions. The point is that he recognises that the prime emphasis or origin of certain mitigatory features may arise out of the external or situational elements in or surrounding an accused's act or from his mental state.

Subjective and Objective

The previous paragraph suggests a further, perhaps parallel, categorisation into the subjective and the objective: the former dealing with those matters related to the mental state

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45) Zink, op. cit., p.212.

46) Hart, Punishment and Responsibility, p.15. Also at p.24: "The idea of Mitigation incorporates the conviction that though the amount of severity of punishment is primarily to be determined by reference to the General Aim, yet Justice requires that those who have special difficulties to face in keeping the law which they have broken should be punished less".

or approach of the accused and the latter relating to those matters external to him or situational. Naturally, in examining or analysing the comprehensive act, these two aspects are generally closely related and interactive. For instance, in the case of a person faced with a marital in flagrante delicto situation or a situation requiring an act of self-defence or necessity, it can well be said that the external or objective aspects of the situation, which are generally not every-day occurrences, occasion the resultant mental state in the person giving rise to the act. Where the person's act does not fulfil the prescription of the law to the extent to validate a defence, it may well be said that the situation in which he found himself was such as to provide a differential which could be considered in relation to mitigation of penalty. Generally, of course, the subjective factors are treated as of more importance because these lie within the mind and sentiment of the accused; those factors to which punishment has particular and individual reference. But, in sentencing, judicial officers do not only have regard solely to those purposes of punishment related to the accused's subjective state but also to such matters as general deterrence and public policy which have no direct reference to the accused. It is being submitted therefore that it is neither illogical nor unreasonable, in considering mitigating or extenuating circumstances, to have regard to or to name the situational factor, where such may provide a qualitative differential, in relation also to the subjective factor. "Circumstance" is generally defined in dictionaries in terms such as "that which stands around or surrounds; the adjuncts of an action or fact" or "the logical surroundings of an action; an attendant fact".[47)]

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47) Shorter Oxford English Dictionary and Chambers Twentieth Century Dictionary (1960) respectively.

General and Particular

Circumstances which may be described as affording elements of mitigation may also be categorised as general or particular. Those which could be termed "general" would be such as indicate the general background of an accused and which may be said to indicate the general type of mind which he brings to the crime. Examples of these would be youth, standard of moral appreciation or primitive beliefs and customs. The "particular" factors would be those special mental attitudes or reactions which the accused displays shortly prior to, during and possibly after the commission of the crime but related pertinently to it such as provoked anger, jealousy, intoxication, fear, etc.

Quasi-Defensive and Psycho-Social

A further manner in which to regard or group certain circumstances which have the potential of providing elements of mitigation is related to the originating basis of such circumstances in the psycho-socio-moral aspect of the conduct or in the narrow failure to meet the prescription of the law generally in regard to a defence. The psycho-socio-moral aspect may be regarded from the subjective (accused's) point of view as in a case of putative moral compulsion or justification, or from the objective (external to the accused) point of view as in a case of limitation on freedom to act or in choice of alternatives. The quasi-defensive (for want of a better term) aspect may be said to be found in a case where a defence such as private defence or necessity is raised but not fully substantiated as where an accused misjudged his ability to avert an attack or exceeded the bounds of

reasonable private defence.[48] A further group of examples may be found in the application of the legal test of causation of death where an accused may be found guilty but the facts provide a differential which the triers of fact are prepared to regard as an extenuating circumstance.[49] Quite clearly, in cases such as these, under this heading the accused is found guilty but the degree of blameworthiness, an element relevant to punishment, still remains to be assessed in relation to all qualitative differentials and may provide an extenuating circumstance.

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48) E M Burchell and P M A Hunt, South African Criminal Law and Procedure, Vol. I, p.279 remind that each requirement of the attack and of the defence are judged from the external or objective point of view but that the question of the accused's mens rea is, of course, judged from the subjective point of view - see S v Ntuli 1975(1) S A 429, p.435. If therefore the accused fails to substantiate the defence on the objective test, applied to arrive at verdict, it can still occur that the degree of his failure, espeically if narrowly so, can afford a set of facts which could provide extenuation at the sentencing stage. See also Burchell and Hunt, op. cit., Vol. II, p.364 s.v. (The effect of S v de Blom 1977(3) S A 513 (A D) will be referred to in Chap. VII, p.328 below). Compare M M Loubser, "Versagtende Omstandighede by Moord: die gradering van skuld", 1977 T H R-H R, p.339.

49) Examples may be found among the numerous cases or illustrations dealt with by Burchell and Hunt, op. cit., Vol. II, p.329 - 342. Possible examples are R v Rooi 1952(2) P H H 119 (T); R v Loubser 1953(2) P H H 190(W); R v Mubila 1956(1) S A 31 (S R); and S v Molale 1974(1) P H (O P D) H (S) 6. Compare also van der Linden, op. cit., 2.5.8.

Consequential or Additional

A further group of circumstances which historically has been, and currently in some legal systems still is, regarded as capable of mitigating punishment is that which follows after the actual commission of the crime but in respect of which there is naturally evidence before the court. Such may be, for instance, restitution (hardly applicable in modern homicide cases even if certain so-called primitive systems allowed such) or confession and repentance. Cases giving rise to difficulty in regard to legal causation of death, such as mentioned above, may also be considered as circumstances consequential upon the criminal act.

It is clear that while most of the headings or categories mentioned above may overlap or interact with one another, such as to appear to reduce the virtue of any distinctive grouping, it is considered that each represents a particular approach or emphasis in the examination of the facts of a case relevant to the question of extenuation and also to punishment in attempting to achieve the justice of the case. Reviewing the general trends in South African judicial sentencing policy, Ellison Kahn indicated that account may be taken of the nature of the crime and the degree of guilt and circumstances of the criminal.[50] What has been done above is to elaborate on a statement such as this to determine the various approaches or points of view in the examination of factors or circumstances which are likely to provide mitigation or extenuation.

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50) Kahn, op. cit., p.194.

THE RELATIONSHIP OF EXTENUATION TO CERTAIN CONCEPTS

Intention

Extenuation may be present in the facts of a case of intentional homicide when regarded from the point of view of punishment. Notwithstanding the fact that the accused's conduct fulfilled the substantive requirements of the law in regard to intention, circumstances other than those related to intention as well as those related to intention may be found to extenuate the conduct.[51] The point is that in stating this it must not be taken as requiring the necessity to detract from the substantive category of intention, the fulfilment of which required the accused to be found guilty. In fact, at the stage of considering extenuation, it is preferable to avoid as far as possible the technical terminology like dolus directus, indirectus or eventualis. This terminology has reference to intention and the pre-verdict stage of a trial. The use of this phraseology at the stage of extenuation can give rise possibly to the kind of conceptual confusion which appeared to come to head in S v de Bruyn[52] in regard to the use of the concept dolus eventualis as a condition or circumstance which might found extenuating circumstances. At the stage of extenuation it is rather a factor or circumstance in the set of facts which, prior to verdict, were used to prove intention which is now

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51) This submission was made though not argued in detail in S Evans, "Extenuating Circumstances", (1955) 72 S A L J, p.387 and suggested again in "Extenuating Circumstances: A Recent Essay in Semantics", (1969) 86 S A L J, p.143. Hart, Punishment and Responsibility, p.122 expresses some uncertainty on this question. But see also Loubser, op. cit., p.341.

52) S v de Bruyn 1968(4) S A 498 (A D). See also "Extenuating Circumstances: A Recent Essay in Semantics", op. cit., p.143.

used in the consideration of moral blameworthiness and extenuation if it is capable of providing a qualitative moral differential. From a point of view of legal guilt, in a case of murder there is, of course, no difference between an accused who desires the death of a victim and carries out his actual intention of killing him and the case of an accused who probably foresaw death as a possibility but did not desire it. If it is wilful moral depravity or evil-mindedness, which is generally sought to be visited with society's sternest penalty, then there is probably room for a moral distinction where the accused has no actual desire for the death of the accused;[53] or where the subjective foresight of the consequences or the possibility of their ensuing is proved by inference from all the facts;[54] or where the facts concerning the remoteness of the possibility of death or the degree of recklessness as to the death ensuing provide a differential relative to moral blameworthiness.[55] Burchell and Hunt[56] have indicated, in regard to subjective foresight, that "in the result there may be little difference between the objective and the subjective tests in the majority of cases, for where it is found that the accused 'ought to have foreseen' the consequences it could usually be shown that he 'must have foreseen' and therefore, by inference, 'did foresee' them. But the adoption of the

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53) S v Arnold 1965(2) S A 215 (C P D), p.219.

54) S v Sigwahla 1967(4) S A 566 (A D), p.570.

55) S v de Bruyn (supra), p.511. See also "Extenuating Circumstances: A Recent Essay in Semantics", op. cit., p.415 and Burchell and Hunt, op. cit., Vol. I, p.124.

56) Burchell and Hunt, op. cit., Vol. I, p.121.

subjective test means that in those instances where the prosecution fails to prove that the accused 'did foresee' the consequences he will escape criminal liability".

The acceptance in the 1950's in South Africa of the subjective test for intention has not materially affected the consideration of extenuating circumstances. In consideration of extenuating circumstances the subjective test of the accused's state of mind is a more important one to consider than the objective test of the factual basis for that state of mind.[57] Besides any circumstances of an objective nature which may be found to be extenuating circumstances, this subjective test related to blameworthiness is based on the same facts as are used to infer and prove the intention subjectively or on additional facts proved after verdict. In the case of intention the application of the subjective test has inherent in it an element of objectivity in the use of inferential reasoning where this is required, as seen in the previous paragraph, and due caution has been urged in too lightly making the inference that the accused "did know".[58] In the case of extenuation the application of the subjective test also has inherent in it an element of objectivity in that it is the moral judgment of the triers of fact which will determine the acceptance of factors or circumstances and the moral weight to be attached to them as providing a differential capable of

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57) R v Mkize 1953(2) S A 324 (A D), p.336.

58) Burchell and Hunt, op. cit., Vol. I, p.120, footnote 41 and S v Dlodlo 1966(2) S A 401 (A D), p.405.

being designated as extenuating circumstances.[59]

It is submitted therefore that facts or circumstances which before verdict justify an intention sufficient to find an accused guilty can, in relation to the procedures for sentence, also form the basis for an assessment of moral blameworthiness whether on its own or together with other factors.

Premeditation

Premeditation preceding a criminal act has generally been regarded as evidencing the fullness of criminal intent in indicating deliberation and mental preparation or planning to carry out an evil or criminal deed. Normally this factor might be said to militate against a finding of extenuation for these very reasons in relation to the moral blameworthiness of an accused person. There are, however, exceptions to this approach where, although a crime was clearly premediated, there may well be associated circumstances or states of mind which, taken on all the evidence, are capable of providing extenuation. In a case of euthanasia,[60] premeditation is generally clearly evident but factors associated with motive or other situational circumstances, such as the physical condition of the victim

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59) R v Taylor 1949(4) S A 702 (A D), p.717; Danger v R 1962 R & N 49; S v Ndlovu (1) 1965(4) S A 688 (A D), p.691; S v van der Berg 1968(3) S A 250 (A D), p.252; S v Petrus 1969(4) S A 85 (A D), p.91 and 92; S v Mokonto 1971(2) S A 319 (A D), p.326; and S v Ntanzi 1975(1) P H (A D) H 8.

60) S v Hartmann 1975(3) S A 532 (C P D) and S v de Bellocq 1975(3) S A 538 (T P D) - judgment was actually delivered in May 1968. Compare S v Robinson and Ors. 1968(1) S A 666 (A D).

or the relationship of the parties, may be such as to lead a court to find extenuation. The killing by an African of a supposed witch may be premeditated but extenuating circumstances may be found in the "clouding of the mind" which premeditated; a clouding which originates in a belief in and fear of putative malicious witchcraft.[61] Even an accused who procures and assists an assassin[62] or one who hires assassins[63] may, notwithstanding such premeditation, secure findings of extenuating circumstances on grounds of youth and emotional involvement or the deceased's prior ill treatment of accused. Psychiatrists advise that in the case of certain mentally abnormal states there may be ostensible premeditation and planning in criminal acts even where other factors point to mental disorder or diminished responsibility.[64]

It is clear therefore that premeditation or deliberation and planning in the execution of a murder does not necessarily exclude the presence or a finding of extenuation.[65] Factors such as motive or any mental condition - not necessarily mental abnormality - or situational circumstances, when considered in regard to the moral blameworthiness of the accused, are able to provide the substance of extenuation when considering the degree of punishment.

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61) R v Biyana and Ors. 1938 E D L 310 and S v Ndhlovu and Ano. 1971(1) S A 27 (R, A D).

62) S v Lehnberg and Ano. 1975(4) S A 553 (A D).

63) R v Mayet 1957(1) S A 492 (A D).

64) P Hays, New Horizons in Psychiatry, p.291 and H Weihoffen, The Urge to Punish, p.70 and 77.

65) S v Ntanzi (supra).

Conversely, when there is an absence of premeditation in the circumstances of a homicide, this is often the case where the situational or personal circumstances of the accused person were such that there was little or no time to deliberate upon or premeditate the act of homicide. This can occur when there is a "clouding of the mind" temporarily through the release of inhibitions by the consumption of alcohol or emotional reaction such as in fear, anger or jealousy or where the situational elements require or induce immediate action or reaction or limit freedom of action or choice of means. Where none of these factors is of sufficient degree to excuse from the crime or reduce the crime category, they may nevertheless be considered in relation to extenuation either as evidencing absence of premeditation or action in the heat of the moment or emotional involvement limiting rational choice of action. Each of these indicates a factual disparity from premeditated or deliberate action and if this disparity can be evaluated as relevent to moral blameworthiness then there is a moral reason for weighing such factors in the consideration of mitigation or extenuation.

Motive

The question of motive, being a subjective variable associated with moral purpose, is a relevant consideration in the determination of the existence of extenuation or mitigation. It appears to be generally accepted that the relevance of motive is pertinent to moral blameworthiness and the measure of penalty.[66] Motive is distinguished from

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66) P J Fitzgerald, op. cit., p.120; Burchell and Hunt, op. cit., Vol. I, p.145; and Gross, op. cit., p.103 and 113.

criminal intent as "good" might be distinguished from "right".[67] An act may be "right" while the motive behind the act may be morally "wrong" or questionable and, on the other hand, an act may be "wrong" while the motive behind it may be "good" and reasonable or understandable in the circumstances.

As has been seen[68] the reasons for the commission of an act of homicide are many and varied, ranging from those which are base in the extreme to those many more which demonstrate varying degrees of emotional basis, human frailty or putative moral justification or excuse. The ulterior intention[69] or motive often bears a relation to the moral outlook or depravity or situational predicament of the accused, either generally or in the commission of this one act of homicide. Where it is related to the moral factor in man and also actually or potentially to the purposes of punishment then it would seem to be necessary for penal theory in seeking the justice of the case to take motive into consideration in the determination of penalty. As it is a variable intimately related to the commission of the crime it should in appropriate cases, where it is relevant to moral blameworthiness, be considered in relation to factors of extenuation.[70]

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67) Hall, op. cit., p.141.

68) In Chap. I, p.28.

69) Burchell and Hunt, op. cit., Vol. I, p.144.

70) As moral sensitivity and consequent judgment develop, considerations of motive assume an increasing relevance and importance - see J C Flugel, Man, Morals and Society, p.183.

Mercy

Among the more usual meanings of the word "mercy" are found: compassion or forbearance towards one who is in one's power and has no claim to kindness, a forgiving disposition, compassion for the unfortunate.[71] Whatever part there is for mercy to play in the judicial sentencing function, it must clearly be distinguished from the function of mercy or pardon exercised by the head of state or State President who is empowered to "pardon or reprieve offenders, either conditionally or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures".[72] Judicial mercy may not assume the function to be carried out only by the State President.

In 1973, in S v Kumalo,[73] it was stated in an Appellate Division judgment that "punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances ..... The last of these four elements is sometimes overlooked". During the next two years this word was used with some frequency[74] in appeals on sentence probably as a last resort when argument on mitigation and extenuation had been

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71) Shorter Oxford English Dictionary (3rd ed. 1969). See also J Kleinig, Punishment and Desert, p.87.

72) Republic of South Africa Constitution Act No. 32 of 1961, section 7(f). This function may be exercised on any grounds.

73) 1973(3) S A 697 (A D), p.698 per Holmes, J A.

74) See Rumpff, C J in S v Roux 1975(3) S A 190 (A D), p.197.

exhausted. In S v de Maura,[75] Hofmeyr, A J A considered that the question of mercy may legitimately play an important part in deciding upon the proper sentence to impose and should be seen primarily in contra-distinction to and as a corrective for any tendency towards callous or arbitrary vindictiveness in the sentencing of offenders. This did not, however, justify any suspicion of a desire to condone or minimise serious crime.[76] Mercy tempered one's approach to the factors to be considered in arriving at a proper sentence: "It has particular relevance in letting the punishment fit the crime".[77]

Rumpff, C J, in S v Roux,[78] took the opportunity to try to place this matter in perspective. He considered that it was the duty of a judicial officer to impose an appropriate sentence by considering the personal circumstances of the accused, the nature of the crime and the interests of society.

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75) S v de Maura 1974(4) S A 204 (A D), p.208. Rumpff (then A C J) who later dealt with this matter in S v Roux (supra) was a party to this judgment of Hofmeyr, A J A.

76) In S v Narker and Ano. 1975(1) S A 583 (A D), p.586, a bribery case, Holmes, J A pointed out that this did not mean that the judge determines a proper sentence and then "reduces it somewhat for mercy's sake. Such an approach would be erroneous".

77) Per Holmes, J A in S v Narker (supra). In S v V 1972(3) S A 611 (A D), p.614, Holmes, J A had indicated that "true mercy has nothing in common with soft weakness, or maudlin sympathy with the criminal, or permissive tolerance. It is an element of justice itself". For reference to Roman roots see B Beinart, "Crime and Punishment in an Historical Setting" in Acta Juridica 1975, p.17.

78) Supra, p.197, a case of driving a motor vehicle while under the influence of liquor.

Mercy was not to be added as a fourth basic element. "Die woord ‚mercy' in die sin: ‚punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances' beteken dus niks anders nie as ‚mercy' wat gegrond is in, en uitspruit uit, die drie basiese elemente wat oorweeg moet word".[79)]

Mercy therefore appears to be the tempering or balancing of one's approach to the factors to be considered in determining a proper sentence and this is grounded in the basic considerations of the accused's personal circumstances, the nature of the crime and the interests of society.

Properly speaking, therefore, the question of mercy does not enter into the consideration of extenuation or mitigation. Circumstances of extenuation are to be found in all the factors of the case - personal, situational or consequential - as providing an ascertainable differential and these should be considered and formulated without reference to the consideration of mercy. Mercy, in its function as stated above, may then, in appropriate cases, feature in the final determination of the actual sentence of the court where there is a discretion.

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79) S v Roux (supra), p.198. The learned Chief Justice gives the example of the commission of a serious crime where, because the accused was a young person, a lighter sentence than normal should be imposed. In such a case the personal circumstances of the accused are considered and mercy is applied in this sense. Were the judge to determine sentence after consideration of the basic elements and then "om een of ander rede wat niks met die feite te doen het nie" (p.197) show mercy, this would be wrong and the sentence would not be appropriate. See also S v Rabie 1975(4) S A 855 (A D), p.866.

Extenuation indicates the reduced level or degree of disapprobation or blameworthiness directed or attributable to an accused person judged on the basis of morally recognised factors, while mercy may be regarded as an overlay in tempering the judicial approach to the determination of an actual and appropriate sentence, probably with particular reference to any special circumstances of the accused or the special interests of society in the particular circumstances of the case.

CONCLUSION

In regard to the place which extenuation occupies in the structure of legal ideas, we are able to conclude firstly, that there is adequate historical recognition for the reduction of the penalty of an accused person on grounds personal to him or which arise out of or are related to the circumstances of his criminal conduct. Factors or circumstances which received such recognition were based on the socio-moral outlook of the society of any particular period. Coming to more recent times there appears to be clear evidence of an increase in the range of circumstances considered and an increase in the subjective content of the circumstances or factors capable of giving rise to extenuation.

Secondly, there appears to be a moral as well as a legal warrant for a principle of extenuation. If a moral basis of the right to punish and of the purposes of punishment is accepted then it seems appropriate to reflect the search for the justice of the case in the principle that morally disparate cases should not be punished with the same severity. The determination of this moral disparity occasions the recognition of the principle of extenuation which becomes as much a legal principle as is the recognition of justice.

The theory of extenuation therefore can be said to be inherent in the principle of justice. Extenuation, as inherent in the principle of justice, involves the special application of punishment in a particular case to a particular person.

The South African system of extenuating circumstances is a judicial informal system of extenuation and its relationship to the concepts of intention, premeditation, motive and mercy is examined and the interrelationship indicated.

In the examination of the categories of the types of mitigation or extenuation and types of circumstances or approaches to such circumstances, it was apparent that besides the constitutional element in the judicial, statutory, formal and informal categories the other categories reflected the interplay or overlapping of types of approach or circumstances in a manner which points to the guarded avoidance of any rigid or detailed categorisation. Rather should the question of extenuation be treated as a dynamic concept on the basis of a broad definition together with the necessary emphasis on the various approaches or viewpoints from which such circumstances may and should appropriately be considered. This approach will be adopted in this thesis.

CHAPTER - III

EXTENUATING CIRCUMSTANCES

INTRODUCTION

Before dealing with the statutory introduction of extenuating circumstances in capital cases in this country and analysing the cases leading to a definition of such circumstances, it may be pertinent very briefly to indicate some stepping-stones in the approach to the law of punishment in South Africa. This has been documented in other sources[1] and it is not the purpose of this work to go fully into the historical development generally but rather to find the basis of punishment and extract such principles as may be relevant to the question of extenuating circumstances.

Touch-Stones in the South African Approach to Punishment: Dutch Writers

As has been seen from the brief reference to some of the Roman-Dutch law authorities in Chapter II,[2] there was an awareness that, from the personal circumstances of the accused or his situational or consequential circumstances,

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1) See Burchell and Hunt, South African Criminal Law and Procedure, Vol. I, Chap. 1 and 3; H R Hahlo and E Kahn, The Union of South Africa, Chap. 5 and 7; Ellison Kahn, "Crime and Punishment, 1910 - 1960" in Acta Juridica 1960; and G G Visagie, Regspleging en Reg aan die Kaap van 1952 tot 1806, p.70 - 73 and 96.

2) See above p. 50 - 52.

there were those which invited consideration for the purpose of mitigating the penalty.[3] This recognition of differences in the circumstances of the offender or of the nature of the crime led to some attempt within recognised categories to meet the justice of the case and punish the accused according to the measure of his wrongdoing.[4] This determination was to be left to the trial court[5] and the basis for mitigating the punishment was found, certainly in the later law, in the degree of moral blameworthiness of the accused.[6]

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3) Matthaeus, De Criminibus, 48.18.4; J Moorman, Over de Misdaden, Inleid, 2.7. et seq.; D G van der Keessel, Praelictiones in Libros XLVII et XLVIII Digestorum (trans. B Beinart and P van Warmelo), Vol. III, p.995, footnote 68 and p.999; S van der M Groenewegen, Tractatus De Legibus Abrogatis, Ad. Inst., 4.18.4 - 6; S van Leeuwen, Commentaries on Roman Dutch Law, 3.6 (trans. J G Kotze), Vol. I, p.25; U Huber, Heedendaagse Rechtsgeleerdheyt, 4.26.1; J Voet, Commentarius ad Pandectas, 48.19.4; and J van der Linden, Regtsgeleerd, Practicaal en Koopmans Handboek, 2.2.7 and 2.5.8.

4) Voet, op. cit., D 48.10.31.

5) Moorman, op. cit., Inleid., 1.8.

6) Van der Linden, op. cit., 2.2.7. He actually says "meestal uit den meerderen of minderen graad van de zedelijke waarde (moraliteit) der daden". Burchell and Hunt, op. cit., Vol.I, p.15 say of van der Linden's book: "It is probably true to say that it has had more direct influence on our criminal law than any other Roman-Dutch work on the subject".

A reading of these authorities generally indicates that in the law, as received in South Africa early in the nineteenth century, there appeared to be recognition of the deterrent, reformative and retributive purposes of punishment even if the purposes were not always specifically designated as such.

Some of the factors to be taken into account in mitigation have more universal appeal to the reasonable moral mind as deriving from understandable aspects of common humanity irrespective of social milieu (for example, provocation, bad upbringing, intoxication) while others may appear rather to be the historical incidents of a certain social setting and the common outlook of the time (for example, special ability or merit or status of the accused).

Before 1910

In the early days at the Cape, before the imposition of the death sentence, it was necessary that the accused should confess his crime. To obtain this confession to corroborate the evidence proving his guilt the accused was subjected to torture.[7] However, torture was abolished in 1797 and the substance of a letter dated 14 January 1796 from the members of the Court of Justice to Major-General Craig, the Head of the Cape Government,[8] provides interesting reading regarding the position in South Africa, albeit under a temporary government, shortly before van der Linden's book was published in 1806:-

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7) See C Graham Botha, "Criminal Procedure at the Cape during the 17th and 18th Centuries", (1915) 32 S A L J, p.319.

8) C 1584, p.77, Archives - quoted by Graham Botha, op. cit., p.237. (My underlining).

"The degree of severity with which punishments are inflicted according to our laws is measured by the atrocity of the crime, which in proportion to its magnitude demands a more striking example. But in all cases the following particulars are carefully considered:

(1) the person who commits the crime, and also the person on whom it is committed; as when a subject murders his sovereign or a slave his master;

(2) the place in which the crime is committed, e.g. he who murders a person in his own house, which ever ought to be his safest asylum, is punished more severely than he who commits murder in a place to which both had an equal right;

(3) the quality of the fact; as whether the instrument with which the murder is committed is generally esteemed a deadly weapon or not;

(4) the quantity of guilt; as when the accused has murdered more than one person, or has been guilty of the same crime at any former time;

(5) the design in committing the crimes; as when it is followed by thefts;

(6) the judge also pays attention to the motives from which the crime was committed, for instance, whether murder has been perpetrated in anger or premeditated, in cool blood, and in an invidious manner.

> Particular attention was paid to these and other circumstances which might produce some shades of difference even in crimes essentially of the same nature, whether committed by free people or slaves and incurred different degrees of punishment, according to their atrocity ..... A wilful and insidious murder is more severely punished than murder perpetrated in the heat of passion where provocation has been given - simple murder is deemed less culpable than regicide, parricide, fratricide, etc. ..... These distinctions obtain so universally that they almost amount to a rule of conduct for the Courts Judicature over all Europe; and in this country they are observed equally with free persons and slaves .....".

On this basis therefore in apportioning punishment regard was had to personal and situational factors, the manner in which the crime was perpetrated and the degree of blameworthiness related to intention and motive.

An examination of the numerous early South African law reports reveals a dearth of reported cases where there was any substantial discussion of the principles of punishment and mitigation although where this did occur to a limited extent reliance was placed on some of the Roman-Dutch authorities referred to above such as van Leeuwen or van der Linden[9] or English text books and reports.[10] The courts did consider that they had a general discretion in

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9) See, for instance, Barry, J P in Queen v Kievet 1 B A C (1880 - 1884) 273, p.275.

10) Burchell and Hunt, op. cit., Vol. I, p.24.

relation to punishment[11] but apparently not in cases of murder[12] where only recommendations to mercy could be made but in cases of infanticide[13] and youthful offenders[14] a discretion to impose a lesser sentence was exercised.

The Roman-Dutch law on crime and punishment generally, influenced selectively by the English law and as applied in the Cape, became largely and increasingly with the passage of time the common law of crime and punishment in Natal, the Orange Free State and the Transvaal.[15]

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11) Queen v Kievet (supra), p.275 and D M B, "Judicial Discretion in Capital Cases", (1908) 25 S A L J, p.275 - 276.

12) R v Mans 5 Searle (1864 - 1867) 285, p.288 and Queen v Wildeman 9 Buch. (1879) 111, p.115. But see R v Sinnah 10 H C G 387.

13) R v Sinnah (supra), p.389 and 391: "..... special consideration must be given to the circumstances as largely diminishing her moral responsibility for her action". The State v Sanni (1892) 10 C L J 71 where, notwithstanding the provisions of section 20 of the Thirty Three Articles (1849), "al wie schuldig is aan moord, vader-moord, kinder-moord en vergifting, zal met den dood gestraft worden", the accused was sentenced to ten years imprisonment for infanticide. See also Statute Law of the Transvaal (trans. Barber, MacFadyen and Findlay) and Ordinance No. 9 of 1866, Procedure in Criminal Cases, section 5 listing death as a permissible sentence by the High Court.

14) R v Jantjies (1908) E D C 382, p.383, reliance for this being placed on Roman-Dutch law as the "common law of the colony".

15) Burchell and Hunt, op. cit., Vol. I, p.29 - 31.

After Union

In the first half of the twentieth century the developments in the field of punishment demonstrate a reflection of changing social conditions and of changing public opinion and penological thought. "A comparison between the position in 1910 and that in 1960 makes it quite clear that the days of simple rules, which gave courts almost absolute discretionary powers in regard to the infliction of a limited number of punishments, have long since passed. As the Legislature gave expression to the desirability of more individual treatment of offenders the procedural rules became increasingly complicated".[16)]

Ellison Kahn[17)] feels that the history of criminal punishment since Union amply shows the appeal, conscious or unconscious, of the non-rational theories of expiation, retaliation and retribution. This might be an incident of the heterogeneous structure of the community and the fact that the larger proportion of the population over these years began to throw off the shackles of a less developed thought and way of life. Nevertheless, the accent of the law on the reform of the criminal has been increasingly stressed.[18)] There has been a tendency towards rehabilitative measures in addition to, or in place of, punishment in the historically accepted sense with regard to, among others, youthful offenders, the

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16) S A Strauss, "The Development of the Law of Criminal Procedure since Union" in Acta Juridica 1960, p.157.

17) "Crime and Punishment, 1910 - 1960", op. cit., p.192.

18) See, for example, Report of the Penal and Prison Reform Commission, U G 47 of 1947 (hereafter referred to as the Lansdown Report), para. 366 et seq. and Burchell and Hunt, op. cit., Vol. I, p.77 - 78.

inebriate, the first offender and the psychopath.[19] Besides seeking to make punishment fit the crime, to an increasing degree efforts are being made to make the penalty fit the criminal even if this be primarily in the penological field.

The basic factors which are considered by the courts in sentencing are those which are well-established historically: the nature of the crime, the degree of guilt and the circumstances of the criminal.[20] A sentence should not normally be based on grounds unconnected with the commission of the crime in its relation to society or the circumstances of the crime itself or the character of the criminal and his circumstances in its commission. The sentence should not be related to whether the accused pleads guilty or not guilty or the manner in which he conducts his defence but evident contrition might be considered as related to the deterrence or reformation of the offender. Regard should be had to the previous history of the accused, his character, age, mental development and environment, the degree of temptation to which he was exposed and whether the offence followed deliberation or resulted from ignorance or careless, impulsive or other rationally diminished conduct. Consideration must also be given to the intrinsic nature of the offence and the degree of its condemnation by society. The maximum penalty must be reserved for the worst offenders manifesting the greatest degree of evil or blameworthiness.

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19) Kahn, op. cit., p.192 - 193.

20) Kahn, op. cit., p.194. See also S v du Toit 1979(3) S A 846 (A D), p.857H - 858A.

Subjective factors and moral guilt will generally be relevant to the fixing of the penalty.[21]

Certain important stepping-stone cases which have often been quoted and which have grounded the approach of the courts in the purposes of punishment, as applied in South African criminal law since 1935, are chosen to illustrate the general approach to the principles of punishment. In R v Swanepoel,[22] Davis, A J A, after what Kahn[23] calls an "eclectic" reference to certain authorities, insisted that the deterrent effect of punishment should not be disregarded. The magistrate, in sentencing for culpable homicide arising from negligent driving, had looked at punishment exclusively from the point of view of its effect upon the accused personally.[24]

In R v Mzwakala[25] the accused had been sentenced to twenty-five years imprisonment on two counts of assault with intent to murder. Because of some supposed grievance against the railway authorities he had loosened bolts on a railway line causing two trains to be derailed. He appealed to the Appellate Division on the question of severity of sentence.

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21) See also D A Thomas, Principles of Sentencing, p.45 and 67; E Green, Judicial Attitudes in Sentencing, p.102; R Cross, The English Sentencing System, p.118; and Nigel Walker, Sentencing in a Rational Society, p.139 et seq. and 203.

22) 1945 A D 444, p.453.

23) op. cit., p.194.

24) See also R v Barnado 1960(3) S A 552 (A D), p.557 and R v Bredell 1960(3) S A 558 (A D), p.560 and 562.

25) 1957(4) S A 273 (A D).

The appeal court felt that, while in cases where a crime gravely endangers the safety of the public the elements personal to the accused may be entitled to relatively less weight in assessing punishment, it is nevertheless not proper to disregard the history and circumstances of the accused and the subjective aspects of the crime; fairness to the individual accused must be weighed against the need to protect the community. The trial judge had regarded the offence as so dangerous to the community that the personal elements of the accused could have little or no importance in fixing the punishment.[26] Schreiner, A C J could see no reason to doubt that a period substantially less than twenty-five years is "normally sufficient to meet the deterrent, preventive, reformative and retributive ends of justice to which reference is made in R v Swanepoel at 454, 455".[27] The sentence was accordingly reduced to one of fifteen years. There was nothing beyond the derailments themselves to suggest that the appellant wished to bring about the death of anyone in the trains. The intent was of a technical artificial kind and was a factor of importance in assessing the penalty.[28]

In R v Karg[29] the appellant, also a first offender, had been convicted of culpable homicide and sentenced to two years imprisonment. He had killed a child when he had fired three shots into a plantation believing that the persons there were

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26) Supra, p.277.

27) Supra, p.278.

28) Supra, p.277 - 278.

29) 1961(1) S A 231 (A D).

bent on stealing his father's poultry. He appealed against the sentence. The trial judge had felt that as far as the accused was concerned there was no need for further correction - he had learnt his lesson. The accused was a normal decent citizen and, being a first offender, the judge considered that the sentence he was to impose would not benefit but would actually harm the accused. But the judge also appreciated that, while the harm to the individual had to be borne in mind, the interests of the community had also to be taken into account.[30] The appeal court could see no reason to doubt that the appellant's behaviour showed "recklessness or some high degree of negligence".[31] It was argued for the appellant that the trial judge had taken irrelevant considerations into account, namely that the courts should impose such sentences as will not tempt aggrieved persons to seek private vengeance and that the sentence imposed should do justice not only to the community but also to the parents of the deceased.[32] Schreiner, J A[33] could not agree that these considerations were irrelevant and went on:-

> "While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing.

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30) Supra, p.234 - 235.

31) Per Schreiner, J A, p.235.

32) See also S v J 1975(3) S A 146 (O P D).

33) Supra, p.236.

But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences the Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgement. Snyman, A J was bringing home to the appellant and other persons the seriousness of the offence and the need for severe punishment, and I can find nothing in his remarks to show that he gave undue weight to the retributive aspect".

This passage was referred to in S v Whitehead[34] where Ogilvie-Thompson, J A continued:-

"I accordingly do not consider that Munnik, J erred in referring, in the terms set out above ('society demands that the death of one of its members be avenged'), to society's demands; nor can the learned judge's observations regarding reformation be faulted in themselves. This youthful appellant is, however, said to be highly intelligent, and according to the evidence, to have considerable potential. Insofar as is compatible with the requirements of justice, the element of the appellant's reformation should therefore be accorded all possible scope in assessing the total period of

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34) 1970(4) S A 424 (A D), p.439B.

imprisonment appropriate in his case. A sentence of 22 years would, in my opinion, be more likely to break than to reform appellant".

Six years of a seven-year sentence for assault with intent to murder, a second count to a murder charge for which fifteen years had been imposed, was suspended, making a total term of sixteen years.

In S v Matthee[35] the judge and one assessor had found extenuating circumstances but the judge in his discretion had nevertheless imposed the death sentence. This was challenged on appeal, inter alia, on the ground that no proper thought had been given to the objects of punishment which ought to be borne in mind in imposing a sentence. The trial judge had indicated that he had considered the need for society to be protected; that the punishment must be adequate to avoid the administration of justice falling into disrepute; and must be appropriate as a deterrent against murder for gain and gratification of sexual perversion (the act of sodomy on the unconscious body of the victim). He did not consciously consider that the discipline and training of a long-term of imprisonment might reform but felt that on balance the personal factors had to yield to the serious and shocking features. He said that if he had considered imprisonment he would still have imposed the death sentence because the crime was particularly heinous; there was no history, as in Letsolo's case,[36] that the crime was prompted by addiction to drink or dagga (the accused here was under the influence of liquor to a limited degree - "beperkte

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35) 1971(3) S A 769 (A D).

36) 1970(3) S A 476 (A D).

mate"); and the accused appeared to be a dangerous homosexual whose reform was not certain and he could sexually assault or murder a fellow prisoner.

On appeal van Blerk, J A felt that "dit sou 'n sinnelose las op 'n verhoorregter lê om van hom te verwag dat hy al die moontlike uitwerkings op 'n beskuldigde van al die oogmerke van gevangenisstraf moet tabuleer".[37] Holmes, J A[38] said that considerations such as whether heinousness was related to intoxication or provocation or whether the corrective of a lengthy period of imprisonment would act in a reformative as well as a deterrent capacity should "not be applied as rules of thumb, but as aids in the exercise of a judicial discretion in all the circumstances of a particular case". Muller, J A,[39] in the same case, said:-

> "Op 'n enge teoretiese benadering mag hierdie gebeure (not consciously considering the alternative of imprisonment) as 'n mistasting beskou word maar, realisties gesien, is dit in werklikheid nie so nie. By vasstelling van 'n gepaste vonnis in 'n bepaalde saak moet die basiese oogmerke van strafafskrikking, voorkoming, hervorming en vergelding oorweeg word in die lig van die misdadiger en die besonder omstandighede van sy daad. En ek meen dat daar in die onderhawige saak wel genoegsaam aan daardie vereiste voldoen is. Die geleerde regter het nou wel nie in sy uitspraak by vonnisoplegging die verskillende oogmerke van straf genoem of ontleed nie, maar dit word selde in so 'n uitspraak gedoen".

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37) 1971(3) S A 769 (A D), p.770.

38) Supra, p.771.

39) Supra, p.774.

From the point of view of practice it might be too much to expect a judicial officer, each time he sentences an accused, to consider in detail, tabulate and relate all the purposes and types of punishment before imposing such. The judicial experience probably tends on balance to weigh up and sort all this out in the computer of the mind without necessarily analysing each factor consciously.[40] Nevertheless, there may be a strong case to be made out for taking greater care in cases where clearly the accused is in jeopardy of the ultimate sentence and one is mindful here of the quite proper warning of Holmes, J A, in Letsolo's case,[41] in stating that an alternative to the death sentence "should be weighed with the most anxious deliberation ..... every relevant consideration should receive the most scrupulous and reasoned attention and all the more so because the sentence is unalterable on appeal, save on an improper exercise of judicial discretion .....". In this case the appeal court found it to be a misdirection that the trial judge had not appropriately considered the alternative of a lengthy period of imprisonment. In S v Pietersen,[42] however, also in respect of a youthful appellant, this lack of indication that the imprisonment alternative was considered was not held to be a misdirection.

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40) S v J (supra) is an example of where the judgment deals in detail with all these factors. See also Walker, op. cit., p.194 and S v P 1972(3) S A 412 (A D), p.416.

41) Supra, p.477. In this case the accused was twenty-one years of age.

42) 1973(1) S A 148 (A D), p.153. The accused was under eighteen years of age.

It may well be reasonable to suggest that the judicial officers may have some reason for concern whether the discretion they have exercised in fixing punishment is not likely to be assailed on grounds of misdirection, in regard to this alternative of imprisonment alone, based on "all the circumstances of a particular case". And this, whether or not they did in fact consider the alternative even though no mention is made in the judgment of such consideration. Certainly the appeal court seems to have released judicial officers from the need to record in the judgment all the factors or aspects considered in exercising the sentencing discretion. It is also clear that if the traverse of the judicial mind is set out in the judgment it may well be more easily assailable, unless it is exhaustive, than if the judgment were comparatively silent in this respect.

Certain observations deserve to be made:-

(a) the more silent a judgment is on the considerations which led to sentence, whether in regard to the purposes of punishment or type imposed, the more at large the appeal court is likely to be in balancing its own approach with the facts of the case;

(b) there is an element of public importance in announcing in the court and therefore in the judgment, particularly in cases of some public interest as are many murder cases, the judicial considerations which lead to the imposition of sentence;

(c) the provision of a detailed analysis of sentencing considerations is not only time-consuming, and is likely to become largely mechanically repetitive in a busy division, but may also provide more chinks through which counsel or the appeal court could proceed in finding a misdirection should there be any omission or imbalance; and

(d) this sort of problem is inherent in the sentencing procedure and is perhaps highlighted where a death sentence is involved but this probably reinforces the current interest in sentencing and sentencing policy and the need for more research and probably training in this difficult field of achieving the justice of the case.

It can therefore be stated that the South African judiciary accepts and applies the main historically accepted purposes of punishment with the provision that these must be applied in the light of such social change as gives rise to a change in the emphasis or priority ranking of any particular purpose. The elements of retribution, deterrence, prevention, correction and reformation may all play a part in the assessment of sentence with the emphasis changing possibly according to the circumstances of the case or the accused or related public policy as conceived or interpreted by the judicial officer. It is clear from Mzwakala's case and others that the deterrent and preventive elements (particularly in relation to lengthy sentences of imprisonment) should not receive consideration entirely at the expense of the subjective elements personal to the accused and his potential for reformation and from Karg's

case it is clear that, even if the personal elements and the need for correction and reformation are such as to require no real punishment, they are nevertheless not to be allowed to exclude a consideration of the other elements of punishment, namely retribution (to the degree which it might necessarily be required to feature in modern society), deterrence and prevention.

In the application of this approach to capital cases it is clear that where the inflexible death sentence is mandatory the full effect of this balanced approach is virtually defeated. Rather is there the application of the retributive, deterrent and preventive (in an absolute sense) elements of punishment automatically and in the extreme at the expense of degrees of moral blameworthiness and the elements personal to the accused. Where, however, there is a system of degrees in capital cases or diminished responsibility or extenuating circumstances in force, it is possible to avoid what might well be an imbalance and possibly injustice in respect of cases which can be excluded from the imposition of the death sentence. That this does not fully meet the case is shown by the continuing necessity for the substantial exercise of the prerogative of mercy.[43] If, however, the application of the death sentence were made permissive, if the death sentence became one in the range of possible sentences, it is submitted that it would be possible for the law to be entirely consistent with itself in regard to its acceptance of the purposes of punishment. This

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43) See S v Lehnberg 1975(4) S A 553 (A D), p.561 where Rumpff, C J quotes recent figures. In the twelve months, July 1973 - June 1974, out of sixty-eight cases, where the death sentence was imposed, twenty-five were subject to the prerogative of mercy. He says: ..... "Die persentasie van begenadigdes bly opmerklik".

sentence would be reserved for the worst cases of moral blameworthiness only; the judicial officers would justify such sentence by imposing it in the worst cases only and would probably be saved much mental harrowing in evaluating the blameworthiness of cases less than the worst in order to find a justifiable moral basis for a sentence less than death. This could well be accompanied by a diminution in the number of cases requiring the time and detailed consideration of legal officers and the Executive in regard to the prerogative of mercy. Such a change in orientation would, it is submitted, be an improvement in a more sophisticated and sensitive twentieth century culture.

THE INTRODUCTION OF EXTENUATING CIRCUMSTANCES INTO SOUTH AFRICAN LAW

Section 338(1) of Act No. 31 of 1917, the Criminal Procedure and Evidence Act, read 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 upon 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".

In all cases upon conviction for murder therefore the court was obliged to pass sentence of death unless the person convicted fell within the terms of the proviso. In the two cases mentioned there the court had a discretion in regard to sentence and could pass some sentence other than death. In

cases of treason or rape the court likewise had a discretion in regard to sentence. In all convictions for murder therefore, except the very limited number of cases covered by the proviso, no matter what the circumstances were, no matter what variation there was in subjective circumstance, no matter what degree of mitigation, the court was obliged to sentence the accused to death. In the case of all other crimes the court had a discretion in regard to sentence and in statutory offences this discretion was limited only by a maximum or minimum fixed by the Legislature. Within these limits, however, the fixing of punishment was left to the discretion of the judicial officer.

Section 376 of the Act provided that nothing in the Act should affect the Sovereign's Royal prerogative of mercy, so that the only hope of a person sentenced to death was that the circumstances of his case might persuade the Governor-General to exercise the prerogative of mercy. Section 377 provided that in any case in which the Governor-General was authorised to extend the Royal mercy conditionally to an offender who has been sentenced to death he may without the consent of the offender commute the punishment to any other punishment provided by law. Such commutation was conveyed in writing to the Minister of Justice who was required to carry out the terms of the pardon and order the offender to be punished in terms of the Governor-General's direction. The order of the Minister has the effect of a valid sentence passed by the court before which the offender was convicted. It was naturally open for any judge who had sentenced any person to death to convey to the Governor-General-in-Council any recommendation to mercy given by the jury or any recommendation of his own and this would be duly considered with the record of the case.

Criticism of the compulsory death sentence for murder, except in the two cases provided for, especially in its relation to the indigenous population, was voiced as early as 1920 by Morice. In an article, only three years after the adoption of the criminal code, he said:-

> "(The proviso to section 338(1)) is an excellent provision. But we might well go further in the same direction. Why not provide that where the jury, or where there is no jury, the judge, recommends to mercy, it should not be obligatory to pass the sentence of death? At present the passing of the death sentence is 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. One feels inclined to blush for civilisation when one has to pronounce such a sentence upon an unsophisticated native, after explaining to him that it will in all probability not be carried out".[44)]

This was the first of "three major criticisms"[45)] of a state of affairs which resulted shortly after the passing of the Criminal Procedure and Evidence Act in 1917 and persisted until 1935 when the introduction of the system of extenuating circumstances substantially alleviated the position in respect of all three criticisms.

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44) G T Morice, "The Administration of Criminal Law in South Africa", 37 S A L J (1920), p.134.

45) Kahn, op. cit., p.200. See also the Report of the Royal Commission on Capital Punishment, 1949 - 1953, Appendix 13, p.481.

The second major criticism was that where there were mitigating factors "it must frequently have happened, particularly where jury trials were in their hey-day, that a verdict of culpable homicide was returned to avoid the awful consequences of a finding of murder".[46] Mr Justice Pittman, writing after the introduction of the legislation governing extenuating circumstances, indicated that "before the amendment of the law in 1935 cases certainly did occur where this approach would not have been undeserved, and it seems a matter for congratulation that now mercy may have full play without any sacrifice of logic".[47]

The third major criticism 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".[48] The Lansdown Commission said in 1947:-

> "This procedure, necessarily lengthy, usually took some weeks and all this time the prisoner occupying the condemned cell was apprehending, and tasting of the bitterness of, death - an unnecessary cruelty having regard to the moral certainty that reprieve would, by reason of the circumstances, not be withheld".[49]

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46) Kahn, ibid. Jury revolt is nothing new - see L Radzinowicz, A History of English Criminal Law, Vol. I, p.94.

47) W Pittman, Criminal Law in South Africa, p.123.

48) Kahn, ibid; S Evans, "Extenuating Circumstances", (1955) 72 S A L J, p.386; and Debates of the House of Assembly, Vol. 24 (1935), Col. 1718 - 1719.

49) Lansdown Report, op. cit., para. 472.

The Judges' Conference of 1931, which was asked to consider a change in the law in regard to this matter, felt, with one exception, that a complete discretion as to the imposition of the death sentence should be left with the judge. By 1935 the judges of the Orange Free State Provincial Division had mixed feelings in the matter of absolute discretion; the Cape judges, by five to one, wanted no discretion; the Natal judges, except one, wanted an unfettered discretion as did all the Transvaal judges.[50)]

A Bill introduced into the House of Assembly in 1934 contained a provision abolishing the compulsory death sentence and permitting judges a discretion in regard to sentence in murder cases.[51)] The Select Committee to which the matter was referred felt that this was a dangerous procedure. Mr Leslie Blackwell, M P, who was on the Select Committee, later described this as a "horrifying responsibility", putting "an almost intolerable onus on the bench".[52)] The Select Committee drafted a provision which sought to classify murder into two classes, namely murder in the first degree and murder in the second degree. First

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50) Debates, op. cit., Col. 2879.

51) Debates, op. cit., Col. 1719.

52) Debates, op. cit., Col. 1739.

degree murder was to be punishable by death.[53]

The Minister of Justice in 1935, General J C Smuts, felt that he could not accept this proposal. He referred to the experience of England and other countries as evidence of the fact that "you cannot define premeditated murder in such a way as to confine it simply to cases calling for the imposition of the death sentence, and the number of mitigating circumstances which have to be taken into consideration on the other hand, are almost infinite".[54] With one exception the large number of judges whom the Minister had consulted were all against the proposal of the Select Committee. They favoured their former recommendation of a judicial discretion. The proposal to allow the judges a discretion in the determination of extenuating circumstances and the imposition of the death sentence were criticised by Mr C R Swart, Mr Leslie Blackwell and Mr F C Erasmus, and Mr W H Rood felt that it should be left to the Governor-General-in-Council to decide whether the death sentence should be carried out or not.[55]

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53) First degree murder included that which was premeditated or committed in the commission or furtherance of another offence. The following types of murder, even though premeditated, were not to be regarded as first degree murder: by a woman on a newly born child; by a person under sixteen years; by an African person in accordance with indigenous custom or belief and without intent to benefit himself; and of a person suffering from a serious illness or injury and killed at his own insistent request or to relieve the deceased of acute suffering which would have caused death - Select Committee 19/1934. See Kahn, op. cit., p.200.

54) Debates, op. cit., Col. 1719 - 1720.

55) Debates, op. cit., Col. 1938.

At the committee stage Mr E W Douglass, K C, a former Attorney-General whom Mr Leslie Blackwell described as having had "long experience in the administration of criminal law", moved an amendment in a form which had previously been drafted by the law advisers and which was the form finally promulgated in sections 34 and 61 of the General Law Amendment Act of 1935. By this amendment he sought to lighten the burden of the judge in exercising the absolute discretion which clause 61 of the Bill sought to give him in regard to the imposition of the death sentence.[56]

The following day the Minister of Justice announced that, after careful consideration and consultation with his department, he had come to the conclusion that the better course would be to accept the "via media between the two extremes", i.e. the amendment of Mr Douglass. The ultimate discretion would still rest with the judge but he could "fortify himself by the opinion of the jury on the facts".[57] It is interesting to note that when the House dealt with clause 61 of the Bill which sought to amend section 338 of the Criminal Procedure and Evidence Act, 1917 Mr van den Berg, a member of Parliament, introduced an amendment to abolish the death sentence altogether. This was, however, not accepted by the chairman. Although the adoption of Mr Douglass' amendment was the adoption of a compromise, Kahn feels that in retrospect the decision of the government was a wise one.[58]

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56) Debates, op. cit., Col. 2873 - 2874. Notwithstanding the fact that the majority of judges consulted were prepared to accept the responsibility.

57) Debates, op. cit., Col. 2946.

58) op. cit., p.201.

In the debate[59] the Minister of Justice had indicated that only between eleven and twelve per cent of the death sentences imposed were actually carried out. The Report of the Lansdown Commission[60] states that prior to 1935, in cases where the sentence of death had been pronounced, "a proportion (which may fairly be computed at not less than sixty per cent) were the subject of reprieve". In the twelve years prior to the introduction of extenuating circumstances, namely 1923 - 1934, 868 persons were convicted of murder of whom 205 were executed. This represents a percentage of 23,61.[61]

In the twelve years after the introduction of extenuating circumstances, 1935 - 1946, which included the war years, the total number of cases where there were convictions for murder was 1 545, an increase over the first period of seventy-seven per cent.[62] The percentage of executions, however, was only thirteen per cent and commutations accounted for twenty-one per cent. The remaining sixty-four per cent of cases where there were convictions for murder were cases where extenuating circumstances were found to exist.[63]

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59) Debates, op. cit., Col. 1718.

60) op. cit., para. 471.

61) Supra, Appendix N.

62) I am inclined to agree with Kahn, op. cit., p.202 against the conclusion in the Lansdown Report that this increase was related in some measure to the introduction of extenuating circumstances.

63) Lansdown Report, op. cit., Appendix O.

It is probable that prior to 1935 in cases that appeared to be borderline the courts, prosecutors and juries were tempted to look for reasons to reduce indictments or verdicts from murder to culpable homicide where mitigation, albeit not strictly excuse, was present. The purity of the law of murder probably became tainted by "strict logic yielding to the promptings of mercy".[64]

The introduction therefore of the provisions regarding extenuating circumstances were welcomed from at least two broad points of view. Firstly, "they are provisions to mitigate the rigour of the law as it then existed" as well as the accompanying mental anguish[65] and secondly, much administrative work and procedure as well as a somewhat fictitious aspect of the law and accompanying disrespect were eliminated.

TOWARDS A DEFINITION

Section 34(2) of the General Law Amendment Act of 1935, which inserted section 206(2) into the Criminal Procedure and Evidence Act, 1917, reads as follows:-

> "When an accused is tried upon a charge of murder, the judge shall require the jury to state, if they find the accused guilty of murder, whether, in their opinion, there are extenuating circumstances, and if they state that in their opinion there are extenuating circumstances, he may require them to

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64) Pittman, op. cit., p.123 and Kahn, op. cit., p.200.

65) Per Greenberg, J A in *R* v Lembete 1947(2) S A 603 (A D), p.609.

specify those circumstances: provided that any failure to comply with the requirements of this sub-section shall not affect the validity of the verdict or any sentence imposed as a result thereof".

A complementary amendment was made to section 338(1) which adds a further proviso to the compulsory imposition of the death sentence as follows:-

"..... or where the jury, in convicting the accused of murder, expresses in terms of subsection (2) of section two hundred and six, the opinion that there are extenuating circumstances, or in the case of a trial without a jury, where the court is of the opinion that there are extenuating circumstances, the court may impose any sentence other than the death sentence".

The introduction of these sections clearly permitted the recognition of the fact that within the crime of murder the court hearing the case should, in the first instance, be given a discretion in regard to a penalty based on the variety of circumstances which are found to extenuate the conduct of the accused. This discretion to avoid the extreme death penalty is, in many cases, transferred from the administrative sphere to the judicial sphere. There is a sense in which administrative action leading to commutation, while admittedly having the advantage of abstracted extra-forensic deliberation, can never be a substitute for the findings of the trial court in the atmosphere of the actual

trial.[66] On the other hand, courts and judges will within certain limits vary, as they do, in judgments and opinions not only as to the law but also as to the moral or subjective approach or as to aspects of the trial, demeanour or evidence which make a greater impression upon them. As in all other matters appearing before the courts, the atmosphere of the trial is a matter which is inherent in the present system, it is not illogical that this approach be adopted in regard to the crime of murder.[67]

In the Criminal Procedure Act of 1955 section 206(2) became section 141(2) and, when all the provisions regarding jury trials were repealed in 1969,[68] this sub-section disappeared and section 338(1) became section 330(1). In the further consolidation of the law in 1977 section 330 became section 277 which again provides that the sentence of death shall be passed upon a person convicted of murder except where a woman is convicted of the murder of her newly born child or a person under the age of eighteen years is convicted of murder ".... or where the court, in convicting the accused of

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66) It is true that administrative action may well have the effect of bringing about more consistency of policy in the absolute sense. Although Ministers of Justice may come and go, a pattern can be built up in the Law Adviser's office of the Department of Justice where the record of the case is read in order to advise the Minister what action to recommend to the Executive.

67) As the learned judge in R v Jafta 1941(2) P H H212 (C P D) put it: "Die Hof wat die saak verhoor het en na die getuienis geluister het, is met die omstandighede baie beter bekend as wat the Governeur Generaal en sy Ministers later kan wees .....".

68) By section 35(1) of the Abolition of Juries Act No. 34 of 1969.

murder, is of the opinion that there are extenuating circumstances, the court may impose any sentence other than the death sentence".[69]

This reference therefore remains the only statutory reference to extenuating circumstances in homicide cases.

The Legislature has never provided any definition of extenuating circumstances; it has not stated what factors are to be regarded as such nor where they are to be sought. For instance, no indication is given as to whether only such factors or circumstances as arise out of the facts of the case itself may be considered in terms of the section, for example provocation or fear where a circumstance external to the accused produces within him a reaction which leads to the violent conduct. May the triers of fact go further and consider facts which are generated or arise within the accused only, for example a "clouding of the mind", drunkenness, degree of premeditation, motive, etc.? Furthermore, may the triers of fact leave completely the setting of the instant facts and delve into the history of the accused in an endeavour to draw a relationship between his age, mental development and personality and the instant facts? There is also no indication by the Legislature whether in a heterogeneous society differing levels of civilisation or differences in social custom, belief and way of life are to receive consideration in the determination of extenuating circumstances.

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69) Section 277(2) of the Criminal Procedure Act No. 51 of 1977.

Although this thesis will attempt to give a broad and general classification of the circumstances, which have been found to be extenuating circumstances in South African law, no detailed classification of all potential circumstances will be attempted, primarily because the Legislature has placed no limit on the consideration of factors as extenuating - the words remain open-ended. As will be seen the triers of fact, in determining whether circumstances are extenuating, are exercising a moral judgment and where accepted or common morality has a tendency to change, possibly within the limits of one generation, rigid classification would serve no good purpose and would only constrict the exercise of the finding. Is there then any virtue in general classification? It would seem that there is and for the following reasons:-

(a) classification will have the effect of keeping consideration of extenuating circumstances on a logical basis;

(b) it will also assist the triers of fact in approaching the matter from that basis, ensuring that consideration from all points of view is maintained;

(c) it might also assist in the avoidance of loose-thinking and in the ordered presentation of extenuating circumstances to serve as legal authority even though there is a danger of such approach becoming formalised and perhaps rigid; and

(d) it would assist as guidelines for future development.

Definitions or descriptions of the statutory words "extenuating circumstances" have been enunciated by the courts from 1935[70] shortly after the introduction of the concept until more recent years.[71] A traverse of the cases indicates an increasing trend towards the importance of the subjective element and towards the relation of the relevant facts to the mind, emotions or mental faculties of the accused.[72] The early description in Mfoni's case was "generally speaking ..... only such circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime should have any weight at all .....".[73] In Biyana's case an extenuating circumstance was stated to be "a fact associated with a crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt".[74] In Babada's case Rumpff, J A said: "Uit die aard van die saak kan dit alleen 'n omstandigheid wees wat die beskuldigde se geestesvermoëns of gemoed beïnvloed het op so 'n wyse dat hy, wat sy wandaad betref, met minder verwyt

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70) R v Mfoni 1935 O P D 191, p.193 per Krause, J P.

71) S v Petrus 1969(4) S A 85 (A D), p.95 per Rumpff, J A.

72) R v Mfoni (supra), p.193; R v Lloyd 1941 C P D 162, p.164; R v Biyana 1938 E D L 310, p.311; R v Fundakubi 1948(3) S A 810 (A D), p.818; R v Mkize 1953(2) S A 324 (A D), p.335; S v Babada 1964(1) S A 26 (A D), p.27; S v Petrus (supra), p.95; and S v Letsolo 1970(3) S A 476 (A D).

73) Supra, p.193. (My underlining).

74) Supra, p.311 per Lansdown, J P. (My underlining).

bejeën kan word"[75] and in Petrus' case the same judge suggests that extenuating circumstances can perhaps ("miskien") be said to be "'n feit of feite is wat betrekking het op die gemoed of geestesvermoëns van die beskuldigde toe die moord gepleeg is en waardeur sy sedelike skuld, d.w.s. sy verwytbaarheid, ten opsigte van die dood van die oorledene, volgens die oordeel van 'n redelike persoon, verminder word".[76] The first portion of this dictum indicates the narrowing down of the relevant facts to those which have reference to the mind or mental faculties of the accused while the second portion evidences a restatement of the kind of words used by Lansdown, J P in Biyana's case.

Circumstances

Before the description of the type of circumstances is considered there shall first be discussion of the meaning to be given to the word "circumstances". As was seen in Chapter II the word "circumstance" is defined in English dictionaries as "that which stands around or surrounds - the adjuncts - of an action or fact"; and "the logical surroundings of an action, an attendant fact".[77] These definitions appear to be very broad and to include in the word "circumstance" any logical, attendant or accompanying fact or factor which can be said to form a part of or be

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75) Supra, p.27. (My underlining).

76) Supra, p.95.

77) Shorter Oxford English Dictionary (3rd ed. 1969). The Random House Dictionary of the English Language (1967) defines the word as "a condition, detail, part or attribute with respect to time, place, manner, agent, etc., which accompanies, determines or modifies a fact or event".

related in some form, not necessarily causally, to an action, event or fact. From the other comparatively few occasions on which the word "circumstance" is used in the Criminal Procedure Act, 1977[78] it is apparent that the normal wide meaning of the word is intended[79] except where some particular relevance or limitation is mentioned.[80]

Involved in an act, and certainly in a criminal act, are circumstances of an external or physical nature and circumstances of a subjective or mental nature indicating a mental condition.[81] Circumstances and facts as recognised by law would therefore have reference to both the external and internal or mental factors related to a crime.[82] The

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78) No. 51 of 1977.

79) See, for example, section 11: "..... circumstances beyond his control ....."; sections 30 and 39(1): "..... circumstances so require ....."; section 145(2): "..... the circumstances of the case ....."; and section 148(1): "..... the circumstances relating to such charge .....".

80) As in section 40(1)(f): "..... circumstances which afford reasonable grounds for believing ....."; section 169: "..... any circumstance relevant to the proceedings ....."; section 215: "..... in the circumstances referred to in section 214 ....."; and section 221(3): "..... all the circumstances from which an inference may reasonably be drawn .....".

81) Burchell and Hunt, op. cit., Vol. I, p.97 and S v Petrus (supra), p.90E.

82) The Legislature in the Criminal Procedure Act No. 51 of 1977 in section 253 has used both these words, indicating possibly a difference in meaning between the two: "No provision of this Chapter shall be construed as modifying any provision of any other law whereby in any criminal proceedings referred to in such law certain specified facts or circumstances are deemed to be evidence or a particular fact or circumstance may be proved in a manner specified therein". (My underlining).

Legislature has used the word "circumstances" and not "facts" in regard to extenuation. Had the word "facts" been used, and if there is a difference in meaning between the two, it might well have been argued that only legally provable and cognisable facts should be considered in regard to extenuation. The use of the word "circumstances", it would appear, indicates that the Legislature did not wish to limit the factors, other than by the ordinary meaning of that word, which might be considered as being extenuating.[83] The variety of circumstances, other than those obviously and immediately associated with or arising from the mentality of the accused, which have been named as included in extenuating circumstances is evident from a number of cases.[84] Some of

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83) Schreiner, J A in R v Fundakubi (supra), p.817 said: "No provision is made for the judge's summing up to the jury or court on the subject of extenuating circumstances or for his excluding from their consideration any kind of circumstance on the ground that it does not in law amount to an extenuating circumstance as the expression is used in the Act". (My underlining).

84) See R v Andries Cameron 1943(2) P H H191 (N P D) (the fact that one assessor found the verdict to be culpable homicide); R v Roberts 1957(4) S A 265 (A D) (the jury's list of extenuating circumstances included "the apparent lack of supervision and guidance at camp and work" and "the apparent lack of organisation of leisure hours ....."); Fisher v S 1965(1) P H H88 (A D) (circumstances found by the trial court included: there was an argument; there was only one stab wound); S v Dikgale 1965(1) S A 209 (A D) (Appellate Division found inter alia that accused played a lesser role); S v Arnold 1965(2) S A 215 (C P D) (the subsequent conduct of the accused in trying to undo the harm caused although it was questioned whether by itself this was an extenuating circumstance); S v Robinson 1968(1) S A 666 (A D) (the fact that the deceased wanted and arranged to be killed); S v Molale 1974(1) P H H(S)6 (O P D) (three circumstances were named including "6 stab wounds were administered of which only one was dangerous" and "there was a medical possibility that the wound would heal"; and S v Hartman 1975(3) S A 532 (C P D) (circumstances including accused's closeness to his father and the fact that the father was suffering severe pain - a case of euthanasia).

these are of an objective nature, outside the accused's state of mind, while others, seemingly so, can be said to have some relationship to his state of mind.

Circumstances in regard to the Criminal Conduct

In Mfoni's case extenuating circumstances were said to be "such circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime".[85] In Biyana's case the phrase used was "a fact associated with a crime"[86] while in S v Babada[87] the contribution to definition was "'n omstandigheid ..... wat die beskuldigde se geestesvermoëns of gemoed beïnvloed het ....." and the same judge in S v Petrus[88] used the words "'n feit of feite is wat betrekking het op die gemoed of geestesvermoëns .....". In S v Letsolo,[89] Holmes, J A, while setting out the steps to be taken by trial courts in the consideration of extenuating circumstances, uses the phrases: "facts bearing

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85) Supra, p.193. (My underlining). This definition was accepted by Schreiner, J in R v Hugo 1940 W L D 285, p.286; by the same judge in R v Fundakubi (supra), p.818 and again in R v Owen 1957(1) S A 458 (A D), p.462 and incorporated into a rephrased definition by Henochsberg, J in R v Mdhluli 1960(2) P H H267 (D C L D).

86) Supra, p.311. (My underlining). This definition as a whole was accepted or followed in R v Lloyd (supra), p.164; R v Hamkoshi 1941 S W A 16; R v Fundakubi (supra); R v Ndlovu 1951(1) P H H47 (O P D) as well as more recent cases like R v Mdhluli (supra) and S v Petrus (supra).

87) Supra, p.27 per Rumpff, J A. (My underlining).

88) Supra, p.95. (My underlining).

89) Supra, p.476. (My underlining).

on the commission of the crime"; "any facts which might be relevant to extenuation"; and "every relevant consideration should receive the most scrupulous and reasoned attention .....". Each of the words "connected with", "relation" or "relevant" and "association" is generally defined in terms referring to each other and "relevant" is defined as "bearing upon" or "pertinent to".[90] The meanings of each is a broad form of connection or link ideationally and "connect" is not limited to causal connection but has the connotation rather of mental association.

Associated with the broad meaning of "circumstance", besides these terms of definition used above, the courts have been careful to emphasise that the relationship of the circumstances to the commission of the crime is also to be regarded as broadly as such words allow and any limitation placed by the triers of fact in their approach to the consideration of such circumstances is liable to be regarded by the appeal court as a misdirection.[91] The only circumstances which do not require consideration are those which may be said to be too remote or too faintly or

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90) Shorter Oxford English Dictionary (3rd ed. 1969).

91) R v Fundakubi (supra), p.818: "No factor, not too remote or too faintly or directly related to the commission of the crime which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration"; Kgolane v Reg. 1960(1) P H H110 (A D); S v Dikgale (supra), p.214; S v Letsolo (supra), p.477; and S v Ntanzi 1975(1) P H H8 (A D) (too objective an approach by the trial court). In S v Babada (supra), p.28 and S v Mula 1975(3) S A 208 (A D), p.213 the appeal court found misdirection where the trial judges had limited the court's consideration of extenuating circumstances by apparently requiring a certain degree of intoxication, or lack of appreciation of what he was doing, in the accused.

indirectly associated with the crime or related to the commission of the crime.[92]

Furthermore, circumstances which require to be considered in relation to extenuating circumstances must not be approached by triers of fact in the same way as the circumstances or facts which are required to be proved to establish verdict. The consideration of extenuating circumstances is a distinct procedural step;[93] entirely different considerations apply to the proof of extenuating circumstances from those which apply to the proof of guilt itself;[94] the onus and degree of proof differ from that imposed in the trial up to the stage of verdict;[95] and the circumstances, while they may be found in the facts proved to establish the verdict, must be taken from all the circumstances of the case[96] and from such other circumstances as may be relevant to the issue of extenuating circumstances and which are evident or are proved by the accused.[97]

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92) R v Fundakubi (supra), p.818 and R v Biyana (supra), p.311.

93) R v Taylor 1949(4) S A 702 (A D), p.717 and S v Shabalala 1966(2) S A 297 (A D), p.300.

94) S v Mula (supra), p.213.

95) R v Lembete (supra), p.609.

96) Whether the accused gives evidence or not - S v Ndlovu (supra), p.433.

97) S v Shabalala (supra), p.300.

Insofar as the question of extenuating circumstances is a step "in relation to the power to sentence a convicted murderer[98] and that an appropriate sentence must have regard to the personal circumstances of the accused, the nature of the crime and the interests of society,[99] it is reasonable to conclude that extenuating circumstances should have some relevance to or association with these three basic elements.

It is then reasonably to be expected that circumstances related to the following states, conditions, capacities or facts are likely to be appropriate for consideration as extenuating circumstances:-[100]

Personal background circumstances such as youth, mental abnormality or instability, character, diminished standard of moral appreciation, primitive beliefs or customs.

Personal mental circumstances such as absence of premeditation, indirect intention, motive, minor degree of participation, intoxication, provocation; putative private defence or putative moral compulsion, justification or

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98) R v Taylor (supra), p.717.

99) S v Roux 1975(3) S A 190 (A D), p.197.

100) The listing of circumstances here must not be regarded as exhaustive but merely illustrative of the type of circumstance. Where some circumstances are listed under more than one heading this indicates the possibility of a different viewpoint depending upon the predominant circumstance, for example an accused may play a lesser role in a homicide because he refused to be a major participant (subjective unwillingness) or because, in the execution of the crime, the circumstances of the moment prevented his being a major participant.

necessity; emotional excitation such as anger, jealousy, fear, stress or sympathy; external influence by persons, circumstances or beliefs.

Situational circumstances such as quasi necessity or private defence, minor degree of participation, participating or consenting victim, condition of victim, influence of external circumstance.

Consequential or additional circumstances such as confession and repentance, conduct of accused after the commission of the crime, particular circumstances relating to the cause of death of the victim.

Of the words judicially used to indicate the linking of the circumstances to the crime or the conduct of the accused, it is submitted that preference should be given to "associate" or "relation" (or "relevant", Afrikaans "betrekking").[1] These indicate that the association or relevance is a mental or ideational one. Although these words are defined additionally by the use of the word "connect" this word or the word "link" is not preferred if they are likely to give rise to a tendency to limit them to causal connection or link. "Bearing upon" has a sufficiently wide connotation for use and in fact forms part of the definition of "relevant". The triers of fact therefore are required, as a first step, to find circumstances which are relevant to extenuation, namely

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1) The words used in Mfoni's (alternatively to "connected with"), Biyana's and Petrus' cases - see footnotes 85, 86 and 88 above respectively. The use of "beïnvloed" by Rumpff, J A in Babada's case - see footnote 87 - indicates rather a mental effect of a circumstance and, unless used in this special or limited sense according to the evidence, should give way to "betrekking" in the definition in Petrus' case - see footnote 88.

"associated with" or are "related to" or "bear upon" the commission of the crime and the accused who was the actor in it.[2]

The Effect of the Circumstances

The only qualification which the Legislature has placed on the word "circumstances" is the adjective "extenuating". "Extenuate" is generally defined in terms such as "lessen seeming magnitude of (guilt, offence) by partial excuse" or that which "palliates".[3] The suggestion contained here is that which reduces, diminishes or lessens the apparent magnitude or gravity of the crime because of some reason or excuse-factor[4] accepted or appreciated by the person making such a value-judgment generally based on common human experience.

The first judicial definition to suggest what the effect of an extenuating circumstance should be was that by Lansdown, J P in R v Biyana[5] in the following terms:-

> "('A fact .....') which serves ..... to diminish, morally albeit not legally, the degree of the prisoner's guilt".

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2) R v Taylor (supra), p.717; S v Babada (supra), p.27; and S v Letsolo (supra), p.476.

3) Shorter Oxford English Dictionary (3rd ed 1969). The dictionary phrase was used by de Villiers, J in R v Lloyd (supra), p.163.

4) "Excuse" is not used here in the sense of excusing from responsibility. See also Adams v S 1964(1) P H H46 (A D) - the trial judge's definition of extenuating circumstances.

5) Supra, p.311.

The use of the word "guilt" is perhaps unfortunate although the phrase does contrast moral and legal guilt. However, in law generally, guilt is normally contrasted with innocence and relates to a verdict which indicates that all the elements of an offence have been proved to the required degree. In regard to verdict there is no question of degree of guilt. Unless it is clear that in regard to extenuating circumstances the word "guilt" is used in the more popular sense of "culpability" or "blameworthiness", it is preferable to use one of the latter words in this context.[6] Later judicial definition or description of the effect of the circumstances indicates the preference for the word "blameworthiness".[7]

The use of words such as "reduce, diminish or lessen" or "met minder verwyt bejeën kan word"[8] have occasioned some judicial discussion. First raised by Schreiner, J, in R v Hugo,[9] the matter was discussed by de Vos Hugo, J, in

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6) In R v Hugo (supra), p.286 Schreiner, J foresaw some difficulty in affirming "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". This matter was also dealt with in S v Onjani 1967(1) P H H226 (G W) and S v Petrus (supra), p.91.

7) R v Taylor (supra), p.818 and R v Mkize (supra), p.335 since which that word or the Afrikaans "verwytbaarheid" have been generally accepted up to the recent cases of R v Letsolo (supra), p.476 and S v Mnyanda 1976(2) S A 751 (A D), p.766.

8) S v Babada (supra), p.27. (My underlining).

9) Supra, p.286.

S v Onjani,[10] following the use of the phrase in Afrikaans by Rumpff, J A in Babada's case.[11] De Vos Hugo, J felt that it was not clear what was meant by "minder verwytbaarheid" because this posits a comparison and the second part for comparison had not been given by Rumpff, J A. He suggests that the comparison might be that the circumstances under which the accused committed the crime were such that lesser blameworthiness could be ascribed to him than if such circumstances had not been present. The learned judge nevertheless felt that the variety of circumstances under which a crime can be committed is of such a multiple nature that it brings a person no nearer to determining the scope (bestek) of blameworthiness in respect of each criminal act. Babada's case, he felt, supposed a norm of blameworthiness but he found such a norm most difficult to apply.

The logic of this kind of argument may at first sight appear reasonable but the problem probably originates in equating too finely blameworthiness for the purposes of sentence with guilt for the purpose of verdict. While the measure of blameworthiness is broadly gauged by the type or grade of crime committed as expressed in the general level of punishment prescribed or imposed,[12] sentencing policy, the considerations applicable at sentence and actual sentences imposed indicate generally that, in respect of guilt for any one particular offence, sentences do vary in accordance with circumstances and proper considerations in sentencing which

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10) Supra.

11) Supra, p.27.

12) For example, the difference between a traffic offence, a common assault and an assault with intent to murder.

might include "blameworthiness" or excuse-factors relevant to sentence. Naturally sentencing policy includes a number of other considerations as well personal to the accused and his crime or otherwise.

In S v Petrus,[13] Steyn, C J deals at some length with this question of the meaning of "diminished blameworthiness" in that case more particularly in relation to the vicious nature of the crime. He gets involved in a similar type of argument to that set out by de Vos Hugo, J but deals with it at greater length and, with respect, more adequately. He said in regard to what is understood by the nature of the crime:-

> "Die eerste vraag is, wat onder die aard van 'n wandaad verstaan moet word. Dit kan, wat juridiese inhoud betref, slaan op die omskrywing van moord met sy objektiewe elemente en 'n subjektiewe skuldelement. Met betrekking tot 'n besondere moord deur 'n bepaalde dader gepleeg, kan dit slaan op bedoelde inhoud tesame met die wyse waarop die moord gepleeg is, of moontlik, in 'n losser sin, selfs op laasgenoemde alleen. Uit die objektiewe en subjektiewe elemente blyk sonder meer 'n onteenseglik hoë graad van verwytbaarheid van elke skuldige dader. Hierdie verwytbaarheid wat ek die basiese verwytbaarheid sal noem, kan in 'n bepaalde geval verhoog word deur verswarende omstandighede soos wreedheid, onmenslikheid of voorbedagte, planmatige sluheid waarmee die besondere daad voltrek is, of buitengewone verdorwenheid van die

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13) Supra, p.90. Compare M M Loubser, "Versagtende Omstandighede by Moord: die gradering van skuld" 1977 (40) T H R-H R, p.340.

daad en hulle sou uit die aard van die besondere daad af te lei wees".[14]

The learned Chief Justice goes on to state that diminished blameworthiness indicates a comparison with some other blameworthiness. Is this, he asks, to be found in the basic blameworthiness he spoke of or in the personal blameworthiness of the accused as appears from the circumstances without reference to extenuating circumstances? He suggests that the answer is not obvious. Comparison with an abstract or hypothetical "usual murderer in a usual murder" would not provide a workable test he feels. After quoting the proviso to section 330(1) of the Criminal Procedure Act, 1955[15] Steyn, C J said:-

"Dit gaan hier om 'n bepaalde dader, die beskuldigde, en die moord wat hyself gepleeg het, en dit laat verder vermoed dat die Wetgewer hier omstandighede in die oog het wat as versagtend beskou word in die samehang van die feite wat betrekking het op die bepaalde dader en sy wandaad, soos hy dit gepleeg het, en nie in die samehang van ander feite wat op 'n ander denkbeeldige of 'n ander veronderstelde gewonedader en daad betrekking sou hê nie".[16]

This would appear to indicate the lines of a more correct approach.

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14) S v Petrus, ibid.

15) No. 56 of 1955, now section 277(2) of the Criminal Procedure Act No. 51 of 1977.

16) S v Petrus (supra), p.91. It can be seen that this approach is very much accused-situational centred.

On the other hand, instead of the use of words indicating diminution of blameworthiness, preference might be given to words such as "partial excuse" as long as it was realised that the word "excuse" had no reference to substantive or legal excuse.[17] While one may become involved in the kind of argument indicated above, it might be more acceptable and consistent with the idea of extenuating circumstances to concentrate on elements of partial excuse (in the sense stated) to be found in the circumstances of the case. Excuse may be looked for in the reason or explanation for conduct; a factor which did not give the particular accused an opportunity or capacity to conduct himself as a normal or reasonable person whether in cases of diminished responsibility or otherwise; and factors or circumstances of which one is able to say it provides a differential which, morally speaking, is regarded as affording a basis for a difference in disapprobation which inclines to the opposite end of the scale of moral values than would the difference occasioned by aggravation. This kind of approach might be more consistent with general sentencing policy and with the practical approach of the law generally as to excusatory factors whether in assessment of guilt or determination of

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17) In order to avoid the kind of discussion which appeared in Onjani's and Petrus' cases (supra) this preference was shown by the present writer in "Extenuating Circumstances", (1955) 72 S A L J, p.383, 387, 391 and 393 where it was said (p.391): "Although it might be impossible to find to what degree culpability is lessened, it might be possible to find some moral excuse or 'partial excuse' which would afford a basis for the legal concept of extenuating circumstances". In a rephrased description of extenuating circumstances in Adams v S 1964(1) P H H46 (A D) the trial judge used the terminology of partial excuse in putting the matter to the jury.

sentence.[18] This phraseology is therefore suggested as an alternative, though not exclusively so, to indicate the effect of a circumstance which may be said to extenuate. The effect of a circumstance which extenuates may therefore be said to be one which diminishes the moral blameworthiness of the accused or which partially excuses his conduct for the purpose of sentence.

The Subjective Approach to the Circumstances

In regard to the approach of the triers of fact to the circumstances which could be considered as extenuating circumstances, the first of the earlier cases in which this matter was referred to was R v Fundakubi[19] where Schreiner, J A said:-

> "It is unnecessary to go so far as to hold that in considering whether extenuating circumstances are present the jury (or court) should have regard solely to what was referred to in the argument as the subjective aspect of the matter, i.e. the individual blameworthiness of the accused in the light of the circumstances ..... But it is at least clear that the subjective side is of very great importance, and that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration".

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18) See also H L A Hart, Punishment and Responsibility, p.13 - 17 and 24.

19) Supra, p.818.

While at first sight this might appear to admit a wide range of circumstances, some limitation is placed on consideration by the use of the words "not too remote or too faintly or indirectly related ....."[20] and that the circumstances found must be related to the "commission of the crime" and must bear upon the accused's "moral blameworthiness in committing it".

In R v Mkize[21] these remarks of Schreiner, J A in Fundakubi's case were not only approved of by Fagan, J A but extended as he went on to say:-

> "..... and I should be prepared to say that the subjective test of the accused's state of mind is not only a factor to be taken into account, but is indeed a more important one to consider in this regard than the objective test of the factual basis for the state of mind".[22]

It would appear from this that the fact that the mind of an accused was, for instance, influenced or overpowered by the strong emotion of blinding jealousy is more important in considering extenuation of his action than the fact that this

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20) Compare the cautionary remark by Krause, J P in R v Mfoni (supra), p.193: "..... and care should be taken to eliminate any factors which may be either of a purely sentimental character or which are only remotely connected with the crime". See also Holmes, J A in S v de Bruyn 1968(4) S A 498 (A D), p.51 and R v Ncanana 1948(4) S A 399 (A D), p.407.

21) Supra, p.335.

22) See also S v Mokonto 1971(2) S A 319 (A D), p.326 in regard to provocation and S v Ntanzi (supra).

emotion was initiated by facts which might or might not, in the minds of reasonable men, constitute objective reasonable justification for his action.[23]

In attempting to arrive at the subjective state of the accused's mind to test the influence of any factor for the purpose of extenuating circumstances, the triers of fact "should try mentally to project himself into the position of that accused at that time. He must, of course, also be on his guard against the insidious subconscious influence of ex post facto knowledge".[24] Inferential reasoning in regard to extenuating circumstances in murder cases, because of the ultimate sentence in the absence of such a finding, should, probably more than in the case of intention, be guarded against objectivity. This applies to the second step enunciated by Rumpff, J A in Babada's case[25] in the

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23) See Ntanzi's case (supra) and cf. R v Qenele Xutu 1941(1) P H H7 (W L D) - jealousy of males in the practice of "Koshana". See also R v Mdhluli 1960(2) P H H267 (D C L D) - a grudge regarding a putative unjust conviction; S v Mangondo 1963(4) S A 160 (A D), p.163; and S v Mokonto (supra), p.326 regarding provocation.

24) Per Williams, J A in S v Mini 1963(3) S A 188 (A D), p.196. This was said in regard to ascertaining subjective intention but would certainly appear to apply equally to the subjective test for extenuating circumstances. See also S v Dlodlo 1966(2) S A 401 (A D), p.405. In S v de Bruyn (supra), p.507 Holmes, J A said: "What is needed in these cases is down-to-earth reasoning with a view to ascertaining what was going on in the minds of the appellants".

25) Supra, p.28. In R v Taylor (supra), p.717 Schreiner, J A says: "..... after considering ..... the extent of their probable influence on the accused's conduct". (My underlining).

consideration of extenuating circumstances, namely "om te oordeel of sodanige omstandighede die beskuldigde wel beïnvloed het". The particularity of the accused in his situation was made clear by Steyn, C J in Petrus' case in the passage quoted above.[26)]

A measure of objectivity which may be arrived at by comparison or by reliance on general conduct should be avoided in endeavouring to ascertain whether the particular accused in a particular set of facts was influenced by such factors as may be considered to be extenuating circumstances.

The Assessment of the Circumstances as Extenuating

When the triers of fact have found circumstances associated with the crime or bearing upon the accused's mental faculties or state of mind and when they have found that such circumstances probably did influence the accused, the third step in the mental procedure for determining whether there are extenuating circumstances in terms of the statute is to decide whether such influence upon the accused's conduct was of such a nature or such circumstances were such as to render him morally less blameworthy.[27)] This judgment which the

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26) Supra, p.91 - see footnote 16.

27) R v Taylor (supra), p.717; S v Babada (supra) p.28; and S v Letsolo (supra), p.476. All three of these cases list the same three steps in the mental process of considering and evaluating extenuating circumstances. In Babada's case Rumpff, ibid, concluded with the words: "..... sodat die Regter nie verplig hoef te wees om die doodstraf op te lê nie". The meaning of "sodat" was clarified by Steyn, C J in S v Bradbury 1967(1) S A (A D), p.395 as not meaning "to the extent that the judge need not be obliged to pass the death sentence" but rather as bearing its ordinary meaning of "so that". He continued (p.395): "..... once extenuating circumstances have been found, the judge is not bound to impose the death sentence whatever the extent of the influence thereof upon the accused".

triers of fact are called upon to make has no substantial relationship to the question of the legal guilt determined by the verdict[28] even though it follows it procedurally as "a distinct procedural step in relation to the power to sentence a convicted murderer".[29] The triers of fact are "to form what is essentially a moral judgment as to whether the circumstances ought to be characterised as extenuating .....".[30]

The nature and complexity of human conduct, motivation and mental influences are such that, while the expert may be required to give evidence as to the circumstances, their validity, extent and influence in those cases in which this is pertinent, it is the platform of the common man from which the judgment of these circumstances as "extenuating" must proceed.[31] Without delving here into the depths of

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28) R v Biyana (supra), p.311 and S v Letsolo (supra), p.476.

29) Taylor's case (supra), p.717.

30) Taylor's case, ibid. See also R Graser, "Sentencing as a rational Process" in Acta Juridica 1975, p.131: "After an accused has been found guilty the court is faced with the most difficult and morally demanding task - that of formulating a sentence that will benefit both the individual offender and society".

31) In Biyana's case (supra), p.311 Lansdown, J P used the phrase "in the minds of reasonable men" and in Petrus' case (supra), p.95 Rumpff, J A refers to "die oordeel van 'n redelike persoon". See also D D Raphael, Moral Judgment, p.135; E Cahn, The Moral Decision, p.43 and 46; and P Brett, An Inquiry into Criminal Guilt, p.146: "..... if we cannot envisage ourselves in the situation in which the defendant was placed, we are not in a position to assign moral blame to his conduct ..... in making a judgment of moral blameworthiness, we must be able to admit that we might have acted in the same way as defendant and for his reasons".

ethical philosophy it must perhaps be questioned whether absolute ethical principles are easily applicable in the field of extenuation. One is dealing essentially with the criminal act and the cause or reason for it and there are hardly any elements of it which can generally be said to be "good" or moral.[32] One is dealing with the evidence of human weakness; with a diminution from normal moral conduct.[33] Holmes, J A has put it in this way:-

> "An accused must not be judged from a standpoint of Utopian perfection or insensitive righteousness. He is a fellow mortal who has fallen prey to temptation and wrongdoing for which he must be duly punished. But there may nevertheless exist in respect of him some redeeming facet or extenuating circumstance, bearing on his commission of the crime ....."[34]

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32) In the case of a conflict of putative moral duty, as possibly in euthanasia, see S v Hartmann (supra), it might be arguable that while the act of homicide is "bad" the element of motive may have been "good" or "well-intentioned".

33) In regard to the relevance of intoxicating liquor to extenuating circumstances, for instance, Holmes, J A, in S v Sigwahla 1967(4) S A 566 (A D), p.571, said: "The approach of the trial court should be one of perceptive understanding of the accused's human frailties".

34) S v Bradbury (supra), p.406. See also Wessels, J A in S v K 1972(2) S A 898 (A D), p.901: "In 'n beskaafde gemeenskap, waar dit nogtans beskou word dat die doodvonnis in besondere omstandighede 'n gepaste straf is, sou ek aanvaar dat die uiterste straf slegs in uiterste gevalle as toepaslik geag sou word. By wetgewing is bv. bepaal dat die doodvonnis in die geval van moord 'n verpligte vonnis is slegs waar geen versagtende omstandighede aanwesig is nie".

While therefore in exercising this moral judgment the triers of fact as reasonable men will be applying a degree of objectivity common to reasonable men, even though the test of the influence of the circumstance itself may have been subjective, this objectivity is not of the absolute type of the normal reasonable man in law. That is to say, the triers of fact are not to use as a measure of the accused's blameworthiness the blameworthiness of the usual murderer in a usual murder or an imaginary accused in an imaginary murder.[35] One is dealing with a particular accused and the murder which he committed and the circumstances which can be characterised as extenuating are found in the context of the facts associated with that accused and his wrongful act.[36] In general the greater the extent of the influence of the circumstances upon the accused or the more potent the extenuating circumstances, the less blame is attached to the deed and the less blameworthiness accounted to the accused.[37]

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35) S v Petrus (supra), p.91 per Steyn, C J.

36) Petrus' case, ibid.

37) S v Sibiya 1973(2) S A 51 (A D), p.58. In S v Makete 1971(4) S A 214 (T P D), p.215 Viljoen, J considered that extenuating circumstances could be of two kinds: the first, "circumstances under which a mature and responsible person does an act under the stress of certain conditions which excuse his unlawful act to such an extent as to render that act less blameworthy" and the second, "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". He considers the second category could clearly fall within the term "diminished responsibility". See now section 78(7) of the Criminal Procedure Act No. 51 of 1977 in regard to this second category; but it still is necessary to find such as "extenuating circumstances" in murder cases.

In this sense then the operation of the words "..... the minds of reasonable men ....."[38] has a limit to its objectivity and basis of comparison; it is limited to a consideration of the circumstances of the particular accused and the crime as he committed it. The evaluation of moral blameworthiness then centres around the personal background and mental circumstances of the accused, the situational circumstances in which he found himself and any consequential or additional circumstances which are relevant to extenuation or from which in the mental sphere an inference may be drawn as to the accused's mental state or attitude and therefore possibly as to moral blameworthiness.

In the assessment of circumstances as extenuating the triers of fact must be accorded considerable latitude in deciding what matters in their view reduce the moral blameworthiness of the accused or morally excuse his conduct in some measure.[39]

One of the more common circumstances which has been considered as possibly weighing against the diminution of moral blameworthiness is brutality, viciousness or callousness in the carrying out of the deed and this has been discussed in a line of cases arising particularly in relation

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38) In Biyana's and Petrus' cases (supra), footnote 31. The "interests of society" may, in a very limited sense in relation to the accused's conduct, diminish the effect of extenuating circumstances - S v Maarman 1976(3) S A 510 (A D), p.512.

39) Kgolane v R (supra).

to witchcraft, provocation, youth and intoxication.[40] There have been cases where these factors of aggravation have been found or have been said to diminish the effect or weight of factors being considered as extenuating and where no finding of extenuating circumstances was therefore made.[41] In other cases these aggravating features were held not to exclude a finding of extenuating circumstances and this led to sentences less than death.[42] The following guidelines in the treatment of this aspect may be derived from these cases:-

(a) the greatest degree of brutality or cruelty does not exclude the effect of the influence of factors of extenuation;[43]

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40) R v Fundakubi (supra); R v Myeni 1955(4) S A 196 (A D) (witchcraft); Danger v R 1962 R & N 49; S v van den Berg 1968(3) S A 250 (A D) (intoxication); S v Arnold (supra) (provocation); S v de Bruyn (supra) (anger); S v Petrus (supra); S v Letsolo (supra); S v Phineas 1973(3) S A 897 (R, A D) (intoxication); S v de Maura 1974(4) S A 204 (A D) (emotional disturbance); S v J (supra) (psychopathy and intoxication); S v Lehnberg (supra) (emotional disturbance and youth); S v Maimela 1976(2) S A 587 (A D); and S v Maarman (supra) (youth).

41) Fundakubi's case (supra), p.819 as well as the cases of R v Bungweni 1959(3) S A 142 (E C D), Myeni, Petrus and Maarman (supra).

42) The cases of van den Berg, Letsolo, Lehnberg and Maimela (supra).

43) Van den Berg's case (supra), p.252; Petrus' case (supra), p.92; and Maarman's case (supra), p.512 - it is for the judge alone to determine whether the death sentence is still appropriate. Especially where there is the possibility of "youth" being found as extenuation, brutality is not necessarily evidence of "inherente boosheid" - S v Maimela (supra). See also S v Lehnberg (supra) and S v Mapatsi 1976(4) S A 721 (A D).

(b) the mere multiplicity of wounds is not proof of calculated cruelty or brutality;[44]

(c) the very factors which are considered as extenuating could well have been the cause of the senseless brutality which characterises a murder;[45] and

(d) while brutality or cruelty as such are not relevant to the consideration of the presence of extenuating circumstances, nor may such a finding be denied because it is believed that the death sentence should in any event be imposed, the nature of the crime in the sense of the murder and the manner in which it was carried out cannot be left out of account in

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44) Fundakubi's case (supra), p.819. In Bungweni's case (supra), p.146 the trial judge questioned why the accused had not "hacked" the supposed witch "to pieces in your frenzy" instead of burning the hut in which she was thought to be - the traditional mode in certain areas of despatching a "witch".

45) Letsolo's case (supra), p.478, for example intoxication and witchcraft. The type of problem which can arise is exemplified in S v Phineas (supra) where Beadle, C J tries to ascertain which of the "two approaches" to the question of extenuating circumstances the trial court had used. In setting out the second approach, i.e. considering circumstances which might extenuate and then weighing these against the aggravating features, it is submitted that the learned judge has used some loose language and in fact erred in saying "on this second approach there is no room to sentence an accused to death once the Court has found that extenuating circumstances exist, because all the aggravating circumstances ..... have already been considered .....". This is not so; the judge still has a discretion and is entitled to consider other factors, for example previous convictions, public policy, etc.

considering extenuating circumstances.[46]

Plurality of Circumstances

A consideration of the statutory phrase "..... there are extenuating circumstances ....."[47] and some of the judicial definitions[48] indicate the implication of a plurality of circumstances as against a singular circumstance. The statutory provision is phrased in the plural and does not limit the consideration of the triers of fact to the finding of a single circumstance. On the other hand, in view of the statutory words, is it possible for a finding of a single extenuating circumstance to qualify as "extenuating circumstances"? It is submitted that it is. While there has been no pertinent judicial discussion on this point, and in most cases a plurality of circumstances is submitted or found to be extenuating circumstances, it is clear that a single circumstance has been found to be "extenuating

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46) Petrus' case (supra), p.92. The manner in which the crime was carried out, which may include the element of brutality or cruelty, is considered where an inference may be made therefrom as to the mental attitude of the accused during the commission of the crime and as to his moral blameworthiness - S v Maarman (supra), p.512. See also S v Arnold (supra) and S v Bradbury (supra).

47) Section 277(2) of the Criminal Procedure Act No. 51 of 1977.

48) Particularly R v Mfoni (supra), p.193 and S v Petrus (supra), p.95.

circumstances".[49] It is also clear that although a single circumstance may not be sufficient to provide extenuating circumstances yet that circumstance together with other circumstances, each possibly in itself not sufficient, might nevertheless cumulatively provide extenuating circumstances.[50] Furthermore, it is a misdirection if the triers of fact consider and dismiss each circumstance separately and fail to take account of the possible cumulative effect of all factors.[51] In Manyathi's case[52] Williamson, J A said:-

> "There is certainly nothing in the manner in which the Court expressed its views as to extenuating circumstances in its abovementioned brief remarks on that subject ..... which indicates that the Court considered the cumulative effect of all the relevant factors. The impression made by a perusal thereof is certainly that the Court considered and discussed

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49) R v Mukeiruib 1938 S W A 4, p.5 where van der Heever, J uses the words "versagtende omstandigheid"; R v Hamkoshi (supra), p.19; R v Ndlovu (supra) (a fit of jealousy causing diminished control); R v Kgau 1958(2) S A 606 (S W A); Vilakzi v Reg. 1959 H C T L R 89, p.90 (domestic provocation); R v Bungweni (supra), p.145 (compulsion); R v Mdhluli (supra) (putative unjust conviction); and S v Whitehead (supra), p.434 (youth). See also S v Ningi 1977(3) S A 59 (E C D), p.60.

50) R v George 1938 C P D 486, p.487; R v Lloyd (supra), p.164; S v Fisher (supra); S v Manyathi 1967(1) S A 435 (A D); and S v Sigwahla (supra).

51) S v Manyathi (supra), p.439; S v Sigwahla (supra), p.57 p.571; S v de Bruyn (supra), p.501; and S v van Rooi, 1976(2) S A 580 (A D), p.585.

52) Supra, p.439.

each factor separately. To decide whether an accused's mental state, at the time he committed the crime, was such that his conduct was less blameworthy than it might normally be, obviously requires consideration of the cumulative effect of all the relevant circumstances. A failure by the Court to address its mind to the possible cumulative effect of all the relevant factors which might constitute extenuating circumstances on a charge of murder would amount to the Court misdirecting itself on the question in issue".

It seems clear then that the triers of fact are not limited in naming factors or circumstances which are relevant to be considered as extenuating circumstances to those whose excuse-content in each case is sufficient to justify a finding of extenuating circumstances. Every relevant factor or circumstance is required to be considered and the total or cumulative effect or influence of these upon the accused or his conduct and his moral blameworthiness in this regard is to receive due and careful consideration.

CONCLUSION

We may now move towards assembling a definition, if such it can be, or a description in broad terms of extenuating circumstances. From what has been examined in this chapter we might list the components of such a definition as:-

(a) any "circumstances" in the broadest sense of that word

(b) which are associated with or are related to or bear upon -

(i) the crime or

(ii) the conduct or mental faculties or state of mind of an accused in the commission of the crime of murder[53)]

(c) which, in the opinion of the triers of fact upon the exercise of a moral judgment,

(d) diminish the moral blameworthiness of the accused or partially excuse his conduct.

"Extenuating circumstances" in terms of the statute regarding the crime of murder may therefore be said to be:-

any circumstance or cumulation of circumstances found by the triers of fact to be associated with the crime or the conduct or mental state of the accused in the commission of the crime which, in the moral judgment of the triers of fact, diminish the accused's moral blameworthiness or partially excuse his conduct.

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53) This wording in (i) and (ii) would be consistent with regard to the broad categorisation of circumstances into personal, situational and consequential. It is submitted that there is no warrant to limit the statutory words to anything less.

CHAPTER - IV

P S Y C H O P A T H O L O G Y

THE PSYCHOPATH

> "Barring accidents and possibly also exceptional circumstances, which may make a relatively normal human being kill another, it is, I believe, the psychopathic personality that is the most likely of all persons to find himself in such a situation".[1)]

While this statement by a psychiatrist purports to be no more than a generalisation, it immediately suggests a perspective for the type of person we are now to consider in relation to the question of extenuating circumstances.

Psychopathology has been called "one of the most baffling of problems in clinical psychology"[2)] and as we shall see, while this problem is to a certain extent concerned with the question of definition, it is also the question of degree or extent of effect and the remedial treatment of such persons

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1) D Perk, "A Psychiatrist's View of 'Irresistible Impulse'", (1960) 77 S A L J, p.184.

2) E Glover, The Roots of Crime, p.118. See also J M MacDonald, Psychiatry and the Criminal, p.120. See also J H van Rooyen, F J Goldberg and Norval Morris, The Psychopath in South African Criminal and Mental Health Law, (1976) 9 C I L S A, p.1.

which is a real problem.[3]

As early as 1835 Pritchard isolated what he called "moral insanity" from the then more generally known and recognised "intellectual insanity" and he described this moral insanity as follows:-

> "..... a form of mental derangement in which the intellectual functions appear to have sustained little or no injury, while the disorder is manifested, principally or alone, in the state of the feelings, temper or habits. In cases of this nature the moral and active principles of the mind are strongly perverted or depraved: the power of self-government is lost or greatly impaired and the individual is found incapable, not of talking or reasoning upon any subject proposed to him, but of conducting himself with decency and propriety in the business of life".[4]

This definition indicates the basic aspect of psychopathic personality as being what Glover calls "moral obliquity" and the following points emerge from this early description. A psychopath exhibits:-

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3) The psychopathic personality has also been called the "convenient psychiatric waste basket" - Report of the Royal Commission on Capital Punishment, 1949 - 1953, H M S O, Cmd. 8932, para. 393 or as a "catch-all" for certain emotional states - see H E Barnes and N K Teeters, New Horizons in Criminology, p.106. See also L C Kolb, Modern Clinical Psychiatry, p.500 and Mayer-Gross, Slater and Roth, Clinical Psychiatry, p.184.

4) Glover, op. cit., p.120. See also Taylor's Principles and Practice of Medical Jurisprudence (K Simpson), p.436.

(a) no necessary intellectual impairment (rational function in isolation is most often hardly deficient);

(b) impairment in emotional maturity and function and associated with this;

(c) impairment in control.

Henderson, the psychiatrist, classifies psychopaths into three groups: those who are predominantly aggressive, including those who attempt to injure themselves or others, together with active sex-variants; those predominantly inadequate, manifesting dishonesty to the point of criminality and following the line of least resistance; and those predominantly creative, including genuises who manifest disordered mental equilibrium.[5)]

While therefore it can be said that a psychopath might never come into active conflict with the law, it can be seen from what has thus been said that given certain circumstances, particularly circumstances of symbolical and emotional significance, the psychopath, outside of a certifiably insane person, is the most likely person to find himself in such conflict.[6)]

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5) D Henderson, "Psychopathic States", Brit. J Delinq. 2 (1951), p.84 - 87. While Henderson is reluctant to regard psychopaths as insane he favours the application to them of the doctrine of partial or diminished responsibility - see M Peskin, Journal of Forensic Medicine (1954), Vol. I, No. 4, p.198.

6) It must not, however, be supposed that all criminals are psychopaths. Many confirmed and dangerous criminals cannot be so regarded nor would psychiatrists depose to their being so. See Royal Commission on Capital Punishment, op. cit., para. 397; J P Roux, Die Psigopaat, p.13; and Kolb, op. cit., p.499.

The Report of the Royal Commission on Capital Punishment, 1949 - 1953, while indicating the lack of agreement among the experts on the question of definition of the psychopath and the nature of the condition, points out[7] that the evidence of many experienced medical witnesses in the international field indicates that the concept of the psychopathic personality is a necessary and legitimate one and that it is much easier to recognise than to define. A simple illustration is given to differentiate this type of personality from the psychotic and the neurotic. In the psychotic it may be said that there is a radical breakdown in the machinery of the personality; in the neurotic it may be said that the machinery is working badly even if this is only a temporary thing. In the psychopath it may be said that the machinery has been built to an unusual or non-conformist pattern or is faulty in its structure.

It may fairly be stated therefore that even though psychiatrists in their various schools, depending to a certain extent on the basic premiss or approach of such schools, have had difficulty in defining the nature and scope of this mental condition it is nevertheless generally recognised and must, it is submitted, be pertinently faced by the law as a fact of human experience.

Peskin,[8] after discussing the difference in the approach of the lawyer and the psychiatrist to the question of proof of mental disorder; the insistence of the former on "sane" or

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7) op. cit., para. 394. See also Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (Rumpff Commission), R P 69/1967, Chapter 8.

8) op. cit., p.194.

"insane", "yes" or "no", "guilty" or "not guilty", etc.; and the reluctance of the latter to accept these definite compartments of category, recognising that there are shades or tints which are not "black" or "white", says:-

> "It is essential for the lawyer to realise that mental disorder does not necessarily imply intellectual impairment. The dysfunction may exist only in the emotional field and leave concrete reasoning ability intact, so that although the intellectual capacities appear normal, they are nevertheless unable to protect the 'will' against the powerful drive of the emotions".

It is here in the field of emotion, as we have seen, that a key to the psychopathic personality is found.[9] But the subject of "emotion" is itself not free from difficulty of definition and delimitation. Hillman in his thesis on emotion quotes, among others, the following statements on the subject: "Our knowledge of the topic of emotion is much less complete than our knowledge of the other topics in the field of psychology" and "Emotion is virtually impossible to define ..... except in terms of conflicting theories".[10]

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9) M Minde described psychopathy briefly as "emotional instability plus anti-social conduct if 'social defect' as defined in the Mental Disorders Act, 1916 is mental abnormality plus anti-social conduct" - Journal of Forensic Medicine, op. cit., p.205. (The definition of "socially defective person" was deleted from the 1916 Act by Act No. 37 of 1957). Simpson in Taylor's Principles and Practice of Medical Jurisprudence, p.436 says the psychopath has not grown beyond emotional infancy.

10) From Encyclopedia Britannica (1955) and the Comprenensive Dictionary of Psychological and Psychoanalytical Terms by English and English (1958) respectively in J Hillman, Emotion, p.5.

Drever[11] distinguishes between what the authorities agree upon and that in regard to which there is no agreement. He says:-

> "Emotion is described and explained by different psychologists, but all agree that it is a complex state of the organism, involving bodily changes of a widespread character - in breathing, pulse, gland secretion, etc., - and, on the mental side, a state of excitement or perturbation, marked by strong feeling, and usually an impulse towards a definite form of behaviour. If the emotion is intense there is some disturbance of the intellectual functions, a measure of dissociation, and a tendency towards action of an ungraded or protopathic character. Beyond this description anything else would mean an entrance into the controversial field".

As Hillman briefly puts it: "There is agreement about the concept of emotion and disagreement about the theory of emotion".[12]

It may well be that this difficulty in the approach to the theory of emotion can be associated with the difficulty in the delimitation of the psychopathic personality. What can be said, however, is that emotion while not accurately defined is recognised as a form of energy in the psyche as a whole having its effect on mental and physiological function and as such plays its important part in the discussion of the psychopath.

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11) Dictionary of Psychology (1952), p.80 - 81.

12) op. cit., p.8.

Perk believes that it is in the ranks of the psychopaths that the perpetrators of crimes under an "irresistible impulse" are to be found and briefly describes the psychopath in the following terms:-

> "The psychopathic personality, as is well known, has little if any feeling for others, is dominated by the imperative need to satisfy his urges and desires, tends to sense frustration as persecution and feels little or no remorse for his anti-social behaviour. Intellectually he knows when he has commited a breach of convention or the law, but emotionally he is incapable of self-criticism or condemnation; so that he knows but does not feel guilt. He knows in other words that what he did was wrong, but he cannot feel the wrongness or guilt".[13)]

If the psychopath is unable to fully appreciate in the emotional and moral sphere the wrongness or guilt of what he has done then this might to a certain extent cut away the basis of any form of punishment based on deterrence or reformation. This suggestion is consistent with what Glover has to say regarding the treatment of psychopaths whom he regards as therapeutic recalcitrants. If, as he puts it in psychoanalytical terms, the problem with the psychopath is a deficiency or defect in the super-ego formation (i.e. moral structure) which it is virtually impossible to repair after about forty years of age and which, because of the hostility and lack of moral appreciation of the subject, is attempted with difficulty and indifferent success before that age then the main aim of treatment for the criminal psychopath "must be to preserve society from his aggressive depravations", a view which he suggests leads ultimately to a policy of

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13) op. cit., p.183. But compare Glanville Williams, Textbook of Criminal Law, p.604.

institutional supervision.[14] While this aspect deals more with the type and suitability of punishment for the psychopath, the main concern of this chapter is to determine the degree of moral blameworthiness of the psychopathic murderer in relation to a finding of extenuating circumstances and in this regard the moral and emotional constitution of the psychopath is of prime importance.

Without going into too detailed an analysis of the specific characteristics of the psychopath it might nevertheless assist to form a broad picture of this type of personality against the background of what has already been said and to detail Roux's somewhat lengthy list of these characteristics:-[15]

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14) op. cit., p.161. Minde tends to agree with this view, op. cit., p.206. See also H von Hentig, Punishment, p.151 and P Hays, New Horizons in Psychiatry, p.187 and 313. Hays says: "The separation of psychopaths from the normal criminal in certain penal systems had led to the crystallization of useful techniques of management" used profitably at Herstedvester in Denmark and the Pantucket Institute in Illinois. The Mental Health Act, 1973 now also makes provision for a hospital prison for psychopaths. See also Roux, op. cit., p.195 and Meyer-Gross, Slater and Roth, op. cit., p.183.

15) op. cit., p.14 - 20. The underlined characteristics he considers to be the prime characteristics. Glover, op. cit., p.128 provides the following summary: "The criminal psychopath is a constitutional 'sensitive' peculiarly intolerant of frustration; inclined to sexual 'excess' or perversion, deeply aggressive and openly negativistic; selfish and egotistical, with an immediately ineffective reality sense, incapable of sustained effort; callous, inconsiderate, unprincipled and lacking in moral sense; incapable of deep attachments; given to periods of anti-social conduct; recidivist and refractory to punishment. His psychopathic outbursts are irregular in incidence, stereotyped and on the whole compulsive but even in quiescent periods his character is disharmonious and often eccentric. At the same time he wears the mask of friendly normality". Barnes and Teeters, op. cit., p. 107: "His behaviour usually leaves a pathetic trail of misery, unhappiness and concern among his closest friends and relatives, but he remains blithely oblivious". See also Psychopathic Disorders and their Assessment, ed. M Craft, p.18 - 21 and Report of the Commission of Inquiry into the Mental Disorders Act, R P 80/72 (referred to as the van Wyk Commission), para. 3.7.7.

Gebrek aan emosionele diepte
Onvermoë tot diepgaande interpersoonlike verhoudings
Gebrek aan berou en skuldgevoelens
Afwesigheid van angs
Onverantwoordelikheid
Impulsiwiteit
Patologiese egosentrisiteit en selfgesentreerheid
Lae frustrasietoleransiedrempel en onbeheerde aggressie
Patologiese leuenagtigheid en onbetroubaarheid
Onvermoë om iets positiefs uit vorige strafervarings te leer
Uitstekende vermoë om te manipuleer
Onvermoë om met doelgerigte aktiwiteit te volhard en 'n lewensplan te volg
Die afwesigheid van uitgesproke psigotiese en neurotiese simptome, asook swaksinnigheid
Gebrek aan insig.

Sufficient has been said to indicate the reasonable acceptance of the prime deficiency or departure of the psychopath from the norm as being moral obliquity or deficiency in moral fibre. It should also be borne in mind that this aspect is weighed and considered primarily in its social considerations as opposed to the purified clinical theory or analysis and it is just in this social consideration that the law must enter the picture realistically.

The psychopath manifests the underlying tendency towards crude gratification of primitive forms of instinct. Because of the deficiency in moral fibre, the origin of which some important schools of psychiatry, if not establishing such on

a congenital basis,[16] would be prepared to trace to the early years of the psychopath in growth and maturation of the super-ego or moral constitution, the psychopath tends to lack what is regarded as the normal moral control or censorship of instinctual expression which appears to take the form of episodic compulsion. Because of a lack of moral standard he tends to become an aggressive rebel against all forms of authority that threaten or constrict or frustrate this gratification of instinctually based action. Flowing from this basis one also observes emotional instability and insensitiveness. Also consistent with this pattern, as Glover points out,[17] the psychopath acts apparently without thought and his compulsive behaviour is notably foolish and senseless - "He has a penchant for causing trouble".

Regarding his sense of reality which is an important aspect of mental disorder generally, while the psychopath may give a superficial impression of shrewdness and even manifest a generally normal or even superior intelligence,[18] his appreciation of consequences and his ability to profit by experience appear to be puerilely limited in their effective scope. This appears to be contradictory against the background of at least normal intelligence but this is only apparently so judging objectively from some of his actions. For the actual explanation one must revert to the instinctual basis of the psychopathic personality, a basis brought about

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16) Barnes and Teeters, op. cit., p.107 and Hays, op. cit., p.184 - 185.

17) op. cit., p.127.

18) See Annual Report of Commissioner for Mental Hygiene 1960, R P 35/1962, p.5.

by lack of moral censorship and associate with that the important question of control. While intellectually the psychopath can, it is felt, foresee consequences, because of emotional instability and the compulsion to instinctual expression his foresight has little or no restrictive effect upon his desire to act.[19] Experience shows that whatever theoretical explanation the schools of psychiatry wish to give, the psychopath, against the accepted basis of his personality as seen above, exhibits this puerile and, perhaps from an objective point of view, illogical lack of capacity in states of emotional build-up to appreciate the consequences of his action sufficiently or effectively to control his desire or need for immediate action. I do not enter upon the discussion whether the psychopath should fall within the law of insanity as presently applied.[20] There might be greater force to the argument that a psychopath whose mental imputability was substantially impaired or diminished should be able to benefit from a verdict of culpable homicide and that legislation should make this possible.[21] If one or other of these arguments has some reasonable or moral force then I submit that there is far greater moral force to regard the proven psychopathic homicide as falling in the ambit of a finding of diminished responsibility or extenuating circumstances and not as an appropriate case for the ultimate sentence of death.

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19) See Glover, op. cit., p.127 and 146; Perk, op. cit., p.184; and Kolb, op. cit., p.500 - "The immediate urges are stronger than any rational considerations". H von Hentig, The Criminal and His Victim, p.169.

20) As T B Delaney and R I Peters have suggested in Responsa Meridiana 1966, p.66 - 67 and 69.

21) S A Strauss in (1960), 23 T H R-H R, p.280.

> "From a deontological standpoint it can be justified by reference to medical evidence that the psychopath suffers from a significant abnormality, albeit a constitutional one, which makes it more difficult than normal for him to control his actions, so that a degree of leniency and sympathy is fitting, while on the other hand, he has committed a crime for which he is at least partially responsible so that it is proper for him to be subjected to treatment and, or, security measures".[22)]

It would seem therefore that among a number of characteristics evidencing a diminution from the norm the factors of deficient moral constitution and instinctive action resulting in diminution of normal self-control when under stress are characteristics of particular emphasis in the observed psychopath and that it would appear that his foresight or appreciation of the consequences of his actions as related to his ability to choose and control is not in accordance with the norm of the reasonable man at whose door the law lays the full normal blame. If this is so then the affliction of a psychopathic condition, if relevant to the commission of the crime of murder, is a factor which is likely to affect the conduct of a person so charged. If the constituents of such a mental condition have manifested themselves in the commission of the crime or are associated or connected with it then it would appear that these circumstances are relevant to the question of moral blameworthiness and that the effect is a diminution from the norm of personal moral blameworthiness sufficient to found extenuating circumstances.

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22) G H Gordon, The Criminal Law of Scotland, (1st ed.), p.352 but see also the second edition, p.397.

IRRESISTIBLE IMPULSE AND THE PSYCHOPATH

A question which might have arisen out of the foregoing discussion is whether, if the psychopath is characterised generally by an inability effectively to control his actions in an "emotional storm"[23] or in seeking release in an emotional build-up, he should not fall within the rules governing irresistible impulse as opposed to a possible finding of extenuating circumstances?

As early as 1899 South African criminal law took a more realistic step in the question of legal insanity than was up to that time recognised under this country's heritage of the M'Naghten Rules.[24] In Hays' case[25] it was recognised that the capacity to distinguish between right and wrong was not the sole test of responsibility where the defence of insanity was raised. The courts felt bound to recognise a form of mental disease which prevented the sufferer from controlling his conduct and choosing between right and wrong although he may have the mental capacity to distinguish between the two.

While the law laid down in this case became firmly rooted,[26] the courts have approached the principle conservatively, wary of any undue extension. As a successful defence on this

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23) R v Kennedy 1951(4) S A 431 (A D).

24) See M'Naghten's case 8 E R 718, p.722 (1843).

25) Reg. v Hay (1899) 16 S C 290, p.298.

26) See R v Smit 1906 T S 783; R v Westrich 1927 C P D 466; R v Smit 1950(4) S A 165 (O P D); and R v Koortz 1953(1) S A 371 (A D).

ground carries with it a discharge from liability for his criminal act the onus is on the accused to show that he acted under this impulse which, because of a diseased mind, was not only uncontrolled but irresistible.[27] A psychiatrist, Perk, says[28] "theoretically speaking an 'irresistible impulse' predicates a defect of reason but not disease of the mind, except in a very temporary sense; and disease of the mind predicates defect of reason but not necessarily of the degree to obliterate reason". He prefers the term "obsessional compulsion" as "conveying the picture of an unreasoning, unrelenting mental process which does not cease its torment of the individual until it is consummated by the act which, though it serves a readily recognised conscious purpose, can only be fully understood in terms of unconscious processes".

From the medico-legal point of view the main difficulty with the term "irresistible impulse" is the problem of assessing the irresistible nature of the impulse. By definition one expects an immediacy and lack of premeditation in this impulse and the courts are chary of inferring irresistibility where there is evidence of an incubation period and preparation towards the final act. But from the psychological point of view irresistibility is not dynamically related to the incubation and preparation but to the degree of compulsion which drives the person to the act. The law, judging from a man's external acts, infers premeditation and deliberate action from incubation and acts of preparation. This is the logical crystallisation of

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27) E M Burchell and P M A Hunt, South African Criminal Law and Procedure, Vol. I, p.207. Perk, op. cit., indicates some of the difficulties in the defence trying to establish irresistible impulse.

28) op. cit., p.179.

human experience but then the mind, subject to the compulsion or irresistible impulse as has also been seen regarding the psychopath, is not necessarily intellectually or rationally inferior except in the compulsion sphere or the aspect of emotional fixation. In this regard therefore it is psychologically unrealistic to expect a chain of illogicality in all forms of mental disorder. If the intellect is not disordered, as insanity commonly implies, and if the law, as does South African law, recognises in the full implications of irresistible impulse factors other than plain intellectual and general rational impairment then the law should also be tempted to recognise that its normal manner of inference requires modification or at least the recognition of exceptions.

Some of the difficulties inherent in the proof of irresistible impulse are therefore apparent: inapt and inadequate terminology from the psychological point of view; the necessity of proving mental disorder to the satisfaction of the court which is very wary of accepting forms of what are commonly called "temporary insanity"; and the necessity of proving that the impulse was wholly irresistible.

In view of these difficulties the psychopath, whom Perk believes is the most likely perpetrator of crimes under an irresistible impulse,[29] while manifesting the theoretical make-up posed by a defence of irresistible impulse will, because of possible incubation and premeditation, have difficulty in satisfying the present requirements of the law in regard to this defence.

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29) op. cit., p.184.

EXTENUATING CIRCUMSTANCES AND THE PSYCHOPATH

The first reported case in which the court had to consider extenuating circumstances in relation to a psychopath was R v Hugo.[30] In this case Schreiner, J found that the accused was a psychopathic person to a degree amounting to substantial abnormality and that he suffered from a mental defect in consequence of which he was subject to abnormal obsessions and was unable to show the power of resistance of a normal person. The court found extenuating circumstances although the case was classified as "borderline".

While this judgment is more general in its terms than specific, it is clear that at this early stage the factors of mental defect or abnormality, though it does not appear to have been specifically located in the moral constitution, and diminished power of resistance or self-control are evident as assisting the court towards its finding of extenuating circumstances.

Psychopathy and Other Factors

A similar basis to that in Hugo's case was established in the cases of Lloyd[31] and Izaks[32] where in the first case these factors cumulatively provided a finding of extenuating circumstances and in the second case where the absence of these factors militated against such a finding.

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30) 1940 W L D 285.

31) 1941 C P D 162.

32) 1947(2) P H H291 (C P D).

In the cases of von Zell[33] and Roberts,[34] in spite of the presence of psychopathic personalities and, indeed, findings of extenuating circumstances, the respective judges exercised their discretion to pass the death sentence and in both cases it was carried out. In the first appeal by von Zell the appeal court upheld the appeal on the ground that the trial judge, in charging the jury in respect of extenuating circumstances, had erred in instructing them that their function was restricted by law in a manner in which it was not, namely that certain passages in the judgment of Schreiner, J in R v Hugo,[35] regarding a sense of injustice and mental abnormality generally, was a statement of the law. It was common cause that the accused had a psychopathic personality and the appeal court remitted the case to the trial judge to pass sentence afresh on the basis that the jury had specified the following factors, in fact stated by the appeal court, as extenuating circumstances:-

(a) "the appellant's mental instability aggravated by malaria, drink and the motor accident in which he was involved";

(b) "the strains and stresses to which the appellant was subjected because of his relations with his wife and her daughter, because of his wife's desertion and because of the legal proceedings which she instituted against him".[36]

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33) 1953(3) S A 303 (A D) and 1953(4) S A 552 (A D).

34) 1957(4) S A 265 (A D).

35) Supra, p.289.

36) R v von Zell (supra), p.314.

Van den Heever, J A at the same time indicated that he did not wish to intimate that the circumstances specified by him were, or were not extenuating but that the judge was to exercise his discretion as if the jury had found and specified extenuating circumstances. It will be noted that the appeal court did not specify the proven psychopathic personality as a circumstance.

Basing his description of the psychopath on medical evidence van den Heever, J A said:-

> "Such persons are emotionally immature. Owing to some mischance which occurred at their conception there is a defect in their emotional development which results also as a rule in a defect of the volitional capacity of such person. Such persons are apt to work up such an emotional tension that it must be released by some act. Certain psychopaths would have control, but the majority of serious cases of psychopaths feel that they 'must go over to some sort of action'".[37)]

No form of disagreement with this description was expressed and, except perhaps for the theoretical aspect as to whether the genesis of this type is congenital or early environmental which might be argued, this accepted description again emphasises the aspects of the discussion earlier in this chapter. Further evidence of the psychiatrist was quoted indicating that, while a psychopath might bring his intelligence to bear and control his action in the stock phrase "with a policeman at his elbow", the question of rational self-control all depends on the immediate

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37) Supra, p.308.

circumstance of the psychopath at the moment of extreme tension. The psychiatrist felt that on the evidence in this case the accused was unable to control his emotional feelings and that he acted as one might have expected from this type in those circumstances.

The trial judge reimposed the death sentence and on the second appeal[38] the appeal court felt that it could not interfere with the sentence.

In Robert's case[39] the accused who was a psychopath was sentenced to death for what was described as a "horrible murder", also after the jury had found and specified extenuating circumstances. The circumstances specified were the following:-

"(a) the accused is a psychopath and patently an abnormal person;

(b) his whole life, upbringing and history;

(c) the amount of alcohol consumed during the day of the crime;

(d) encouragement by the deceased and subsequent frustration, having regard to his abnormal sexual urges;

(e) apparent lack of supervision and guidance at (army) camp and work;

(f) apparent lack of organisation of the leisure hours leading to uncontrolled drinking and depravity".

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38) R v von Zell (supra), p.559.

39) Supra.

In pleading in mitigation the accused's counsel also made the following points:-

1. The accused had no previous convictions other than the one in respect of which he was cautioned and discharged in the children's court.
2. He made a voluntary confession.
3. He tried to see a psychiatrist.
4. His warrant officer described him as a good worker and polite and his friends regarded him as generous and a good friend.

The trial judge, in exercising his discretion to impose the death sentence, felt strongly that his duty was to protect the public against "would-be killers". He said that the accused belonged to a class of person whose conscience was gravely impaired and who are deterred only by the fear of detection and punishment.[40] Feeling that if the accused were later to be set free he might well commit a similar type of offence, and firmly convinced that the death sentence is still the strongest single deterring factor with this type of person, he felt it his duty to impose the death sentence.[41]

The Appellate Division (per Hoexter, J A), after restating the law on the judge's discretion and the factors other than extenuating circumstances which he is entitled to take into account in assessing punishment, found that it would not interfere with the exercise of his discretion.[42]

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40) Roberts and, indeed, others mentioned in this chapter were apparently not deterred by these factors.

41) Supra, p.269.

42) Supra, p.271 - 272.

It is seen from the judgment and the extenuating circumstances specified that, besides the characterisation of the accused as a "psychopath and patently an abnormal person", the deficiency in moral structure and control does not appear to have been pin-pointed as a basis for extenuation in assessment of punishment. Whether a strong presentation of this basis would have influenced the trial judge, van Wyk, J, in the light of his reasons for imposing the death sentence, appears doubtful but it is submitted that this basis can and should be urged with a clarity of thought that will enable a court properly to appreciate and assess the diminution in moral blameworthiness from the norm.

In this case Steyn, J A pointed out[43] that apparently the jury did not accept the evidence of the one psychiatrist that the accused was not in a state to control his actions. The jury apparently preferred the evidence of the other psychiatrist that, although one was here dealing with an acknowledged pathological reaction which arose from an exceptionally strong impulse, it was not irresistible. The learned judge felt that this placed the case between insanity on the one hand and a healthy mentality on the other. This, he considered, immediately posits a condition of ab- or sub-normality which should be taken into account in regard to punishment.

In S v Webb[44] the trial court found that the evidence established beyond a reasonable doubt that the accused was a psychopath but the court felt that in the light of Nell's

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43) Supra, p.272.

44) 1971(2) S A 343 (T P D).

case[45] this alone would not have been sufficient to find extenuating circumstances. There were, however, the additional factors that the accused was a self-confessed drug addict who, on the day in question, was to some extent under the influence of alcohol and dagga and that he was in a state of emotional conflict regarding his wife. The court unanimously found extenuating circumstances and he was sentenced to fifteen years imprisonment.[46]

In each of these cases there were other factors as well as the accused's psychopathy which were found or regarded as extenuating circumstances[47] and, as has been seen, in two cases the death sentence was not imposed while in the other two it was: in von Zell's case apparently because the weight of the cumulative factors was not considered sufficient and in Roberts' case for reasons of general and special deterrence.

Psychopathy Alone

There is on record also the type of case where the psychopathic condition stands alone as a possible extenuating circumstance. S v Nell[48] was such a case. The accused had murdered two Bantu females by "savage assault". The

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45) 1968(2) S A 576 (A D) where the psychopathic personality alone was found not to be an extenuating circumstance.

46) See also R v Kennedy (supra).

47) Except in Hugo's case (supra), p.287 where the presence of aspirin and alcohol was disregarded as its limited effect overlay a general intention to kill.

48) Supra, p.578.

trial court accepted that the medical evidence proved on a balance of probabilities that the accused was a psychopath. There was no known motive, provocation or alcohol involved and the court found that the mental condition alone in the circumstances of this case did not constitute an extenuating circumstance. The trial judge granted leave to appeal because he felt that he might have erred in assessing the significance to be attached to the proved psychopathic personality particularly in the light of what Steyn, J A had said in Roberts' case.[49] The appeal court felt that no such error had been committed. Ogilvie-Thompson, J A said:-[50]

> "Roberts' case is, in my opinion, no authority for the proposition that the mere circumstance that a proved murderer has a psychopathic personality should, by itself and without more, necessarily constitute an extenuating circumstance ..... In my opinion, the remarks in question (of Steyn, J A) were designed to emphasize that there is, in this field, room for divergence of opinion in relation to the question of diminished responsibility and the appropriateness in such cases, of a death sentence ..... whether or not a convicted murderer's psychopathic personality is to be regarded as an extenuating circumstance falls to be decided by the trial court in the light of the facts of the particular case before it".

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49) Supra, p.272.

50) Nell's case (supra), p.580.

I submit that this kind of approach is, with respect, too easy a way out in dealing with the psychopath and can so easily fall foul of not having regard to the essential characteristics of this type of person (where the medical evidence is accepted as in this case) as related to the concept of blameworthiness. It would appear that one of the problems is that counsel may be trying to persuade the courts to accept personality categorisation as evidence, in its own name, of absence of or diminution in imputability and the courts are naturally reluctant to open the door to this sort of thing short of certifiable insanity. I submit that it is imperative to look at the essentials of the category and endeavour to establish them in relation to the legal essentials and not to rely mainly on a shorthand phrase for a condition. For instance, we talk about provocation, depending on degree, as negativing intention to kill or as affording an extenuating circumstance. Normally one is able to point to aspects of the evidence in the form of words or acts of the deceased or other persons which ostensibly inflamed the accused and deprived him of the normal control and judgment. Again we speak generally of "a belief in witchcraft" as affording an extenuating circumstance.

In these cases we do not normally say that this condition, in itself "and without more" as Ogilvie-Thompson, J A indicated above in Nell's case, is not sufficient to supply an extenuating circumstance. The explanatory evidence in its relation to the crime itself, if accepted, is sufficient base for a finding of lesser blameworthiness on normally accepted criteria of fear, compulsion, loss of rational control, lessening of freedom of choice, putative self-defence or whatever else.

In the light of the first part of this chapter it does not seem unreasonable to couple the psychopath with this kind of approach. Either we wish to exclude him on the basis of the substantive issues at stake or we do so on evidential grounds. On the substantive issue the medical evidence accepted by the courts in many cases dealing with the psychopath[51] indicates the characteristics of defective moral constitution and a kind of compulsive instinctually-based action under stress with a diminished ability to control actions at that time. This is apparently the kind of personality weakness or abnormality which any psychopath brings to his crime. It can be argued that this factor in itself is sufficient to supply a moral excuse to the reasonable mind in the abstract sense. This would be to recognise the condition as a definite form of mental weakness or defect short of insanity but not equatable with the normal person in the eyes of the law or ethics. But from a legal point of view and at its most cautious it may well be reasonable to require the link of the psychopath and the essentials of his condition with the crime committed. It is possible that in certain categories of crime, for example housebreaking, tresspass, possession of uncut diamonds or parking offences, the essentials of his condition is not a pertinent factor to the extent which may justify a real degree of mitigation. It would seem, on the other hand, however, that in cases particularly involving violence or aggression, especially in the field of interpersonal relationships where stress, tension or emotion is involved, the essentials of his proved condition are likely to be far more pertinently related to his criminal act. Therefore by relating the essentials of his condition to the evidence before the court, not just his

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51) R v Kennedy (supra); R v Roberts (supra); S v Nell (supra); and S v Webb (supra).

personality category as such, it is submitted that it is reasonable to say that the probabilities justify a finding of extenuating circumstances. The proved moral differentiation is clear, it is submitted.

Psychopathic Tendencies

A psychopathic tendency or rather evidence of certain relevant psychopathic characteristics in conjunction with other circumstances have been found to provide extenuating circumstances. In S v J[52] the accused, sixteen and a half years of age, was found guilty of the murder of a woman whom he had killed by throwing her out of a train window when she had resisted his sexual approaches. Extenuating circumstances were found in the accused's diminished state of responsibility at the time of the commission of the offence resulting from the influence of liquor on his defective personality which in turn was caused by his youthfulness, his immaturity and his mental deficiency or psychopathy.[53]

A clinical psychologist had testified that "vir alle praktiese doeleindes (hy) as 'n jong psigopaat beskou moet word".[54] But the trial judge, with respect, adopted a correct approach when he said:-[55]

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52) 1975(3) S A 146 (O P D).

53) While he was not obliged to impose the death sentence by law, the trial judge, Steyn, J in his judgment nevertheless carefully examined all aspects of the case including the purpose of punishment, public interest, extenuating circumstances, the death penalty and the element of mercy - a satisfying judgment.

54) S v J (Supra), p.150. Rumpff, C J in S v Lehnberg 1975(4) S A 553 (A D) referred to this case as one where no professional evidence on psychopathy had been led.

55) p.150D.

"Dit gaan egter in die beskouing van die Hof, nie om 'n kwessie van die beskuldigde as 'n psigopaat te brandmerk nie, maar eerder daarom dat sy ware persoonlikheid oop gevlek moet word sodat die Hof wanneer dit moet bepaal of daar op daardie betrokke aand bepaalde omstandighede was wat ingewerk het op die persoonlikheid van die beskuldigde, instaat kan wees om vas te stel of sy persoonlikheid sulks was dat dit as versagting beskou kan word".[56]

It is not the classification of a personality or tendency or characteristic which is relevant to extenuating circumstances; it is rather a question of what components of that personality, tendency or characteristic are relevant to appreciation, control, effect of influences, motive and other factors bearing on extenuation and did these components influence the accused in his conduct in committing the crime.

The question of the ability to resist or withstand influences on the personality was taken a step further in S v Lehnberg.[57] The accused, a young woman of twenty-one years, had procured and assisted an assassin to kill her middle-aged lover's wife. After the death sentence had been passed on both accused the trial court was asked to hear fresh evidence as to psycho-social background. Psychiatrists and sociologists were called to give evidence generally as to the mental background

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56) In passing, regarding the psychopath, the learned judge said at p.158: "..... in my estimasie is 'n psigopaat geestelik net so gebreklik soos 'n persoon wat gebore word sonder hande of sonder voete; sy beweeglikheid in die sfeer van die emosies, in die sfeer van self-beheersing, is net so aan bande gelê soos die beweeglikheid van 'n kreupel".

57) Supra.

The learned Chief Justice considered that the trial judge had put the test too high in posing the question "whether she was capable of resolving her problems except in the manner in which she did".[60] He considered that this seemed to presuppose a kind of mental irresistible pressure or compulsion as being required before extenuating circumstances could be found. Rather he considered was the question whether the influence undermined her youthful personality in such a manner that she was prepared to do something she would not otherwise have done.[61]

It is submitted that psychopathic tendencies if relevant and pertinent to the commission of the crime in respect particularly of the facts of influence and control are circumstances which should be considered on their own or in conjunction with other factors regarding extenuating circumstances. They may also be relevant to the question of diminished responsibility as possibly affording evidence of a mental defect in regard to the capacity to "act in accordance with an appreciation of the wrongfulness of the act .....".[62]

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60) Lehnberg's case (supra), p.559.

61) A similar approach was taken in respect of the second accused, the hired assassin - see p.563.

62) Section 78(17) of the Criminal Procedure Act No. 51 of 1977. "Mental defect" is not defined in this Act nor in the Mental Health Act No. 18 of 1973.

of the accused but none of the witnesses would go as far as saying that Lehnberg was a psychopath; at most the evidence showed that she had psychopathic tendencies. On this aspect Rumpff, C J said:-[58]

> "Wel is dit nodig om op te merk dat die vraagstuk van psigopatie as versagtende omstandigheid met groot omsigtigheid behandel behoort te word omdat dit anders maklik sou wees om daar deur die leerstuk van die determinisme by die agterdeur in ons strafreg in te bring. 'n Volwaardige psigopaat mag miskien 'n aangebore en verworwe swakheid hê maar hy sal nie 'n vrou in die publiek probeer verkrag nie ..... Aan die ander kant is dit moontlik dat 'n psigopaat in sekere gevalle nie in staat is om dieselfde weerstand te bied as wat 'n volkome normale persone sou kon bied nie en dan sou in sulke gevalle die swakheid tereg as 'n versagtende omstandigheid in aanmerking geneem kon word".[59]

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58) p.559. I submit that the reference to determinism in this passage need not feature too largely in this question as the learned Chief Justice may seem to imply. Interestingly enough, further in his judgment, p.561F, he says that the death sentence should not be imposed upon a youthful offender "indien dit werklik blyk dat hy uit inherente boosheid gedood het". This may also have undertones of determinism. See the same judge's elaboration of "inherente boosheid" in S v Mapatsi 1976(4) S A 721 (A D).

59) The learned judge then refers back to the conclusion on the facts in R v Hugo (supra), p.285 by Schreiner, J. See also S v Mnyanda 1976(2) S A 751 (A D), p.763F and S v de Bruyn 1976(1) S A 496 (A D).

DIMINISHED RESPONSIBILITY AND THE PSYCHOPATH

Gordon[63] says "any discussion of diminished responsibility is likely to be bedevilled at the outset by the inaccuracy of the term itself which suggests wrongly that diminished responsibility affects responsibility in the sense of guilt and not merely sentence. This fundamental error crept gradually into Scots law between 1867 and 1923 .....".

A brief outline of the part played by this doctrine in other countries, particularly in Scotland and England, was given in Chapter I above where it was seen that the purpose of the doctrine was for the mitigation of punishment, not always or necessarily for the reduction of the crime category. It was suggested that the phrase "diminished culpability" might more aptly describe this approach. Smith and Hogan[64] distinguish this from irresistible impulse as follows:-

> "The test appears to be one of moral responsibility. A man whose impulse is irresistible bears no moral responsibility for his act, for he has no choice; a man whose impulse is much more difficult to resist than that of an ordinary man bears a diminished degree of moral responsibility for his act".

The Rumpff Commission in 1967[65] considered that "if it can be proved by means of recognised scientific psychological

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63) G Gordon, The Criminal Law of Scotland, p.380.

64) J C Smith and B Hogan, Criminal Law, p.180.

65) Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, R P 69/1967, para. 9.34 and 12.5.

testing techniques that, in respect of a particular act, an accused's insight or volitional capacity was seriously impaired, he should not be held fully responsible for his actions. However in such cases the purely clinical classification is not sufficient. Some indication of the degree of mental disorder should be submitted, as this may give an indication of the measure of his sense of responsibility".

The Commission considered that the courts obviously recognise the possibility that the mental condition of the psychopath may be such that he should be deemed to be not criminally responsible as a result of his mental disorder but felt that in the absence of convincing facts the courts are not inclined to return a verdict freeing the psychopath from responsibility.[66] The Commission felt that the possibility in South African law of finding diminished responsibility on account of mental disorder was implicit in the statutory provision in the Criminal Procedure Act for a finding of extenuating circumstances[67] and therefore has reference to the question of sentence only.

In 1973 the Legislature recognised the psychopathic disorder officially and by name in the Mental Health Act.[68] The Act

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66) op. cit., para. 4.73. Compare A Kruger, Kante van Imputasie in die Nederlandse en Suid-Afrikaanse Strafreg, p.281 et seq. and van Rooyen, Goldberg and Morris, op. cit., p.19 and 26.

67) Now section 277(2) of the Criminal Procedure Act No. 51 of 1977, formerly section 330(1) of the Criminal Procedure Act No. 56 of 1955.

68) No. 18 of 1973. The English text of the Act was signed on 26 March 1973 and it came into operation on 27 March 1975.

repeals the whole of the Mental Disorders Act[69] except the procedural sections 27 to 29 bis inclusive. In section 1 of the Mental Health Act there are only two definitions of mental condition:-

> "mental illness" which 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"; and
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> "psychopathic disorder" which means "a persistent disorder or disability of the mind (whether or not subnormality of intelligence is present) which has existed in a 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, and 'psychopath' has a corresponding meaning".

The van Wyk Commission,[70] which had followed the Rumpff Commission and had specifically examined the Mental Disorders Act, 1916, considered the phrase in section 3 of that Act "mentally disordered and defective" as dated and considered that classifications of disorder should not be prescribed by the Legislature as had been done in that Act.[71] It was

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69) No. 38 of 1916.

70) Report of the Commission of Inquiry into the Mental Disorders Act, op. cit.

71) op. cit., para. 3.3.2. The 1916 Act had in section 3 classified six types of mental disorder or defect and a further class, "a socially defective person", was added by the Mental Disorders Amendment Act No. 7 of 1944.

intended to phrase the new definition section in terms wide enough to include "all possible classes of 'mental disorder or defect' and to avoid any possible misunderstanding it was considered advisable specifically to include psychopaths and to indicate what this word meant".[72] In introducing the debate on the second reading the Minister of Health pointed to the criticism that the proposed definition of mental illness could possibly include all children because their mental development was not complete but said that the Commission was convinced that no court would resort to this absurd interpretation. No such interpretation had been attempted in the British Mental Health Act, 1959[73] which used the same words. "Incomplete development of the mind" he said obviously means "abnormal incomplete development".[74] This appears to be clear because it is the words "mental illness" which is in fact being defined and normal immaturity of mind can hardly be regarded as an "illness".

The classification of "socially defective person" in the Mental Disorders Act, 1916 was deleted in 1957[75] but there was doubt whether the psychopath could be included in this classification.[76] The 1973 Act, however, puts the matter

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72) Debates of House of Assembly, 1973, Col. 1854 per the Minister of Health, Dr S W van der Merwe, M P. This was commendable.

73) 25 Stats. 42.

74) op. cit., Col. 1854.

75) By section 1 of Act No. 37 of 1957.

76) See M Minde, "Remarks on Criminal Responsibility in Psychopathology and Pathological Intoxication", Journal of Forensic Medicine (1954), Vol. I, No. 4, p.205.

beyond dispute by specifically including "psychopathic disorder" in the definition of "mental illness" and then defining "psychopathic disorder". The South African definition of "psychopathic disorder" differs from that found in the British Mental Health Act, 1959 only in respect of the clause which has been inserted in the South African definition, namely "..... which has existed in the patient from an age prior to that of 18 years and .....". Otherwise the definitions are identical except for an inconsequential variation of the wording in brackets without change of substance and the fact that the British definition ends with the words "..... and requires or is susceptible to medical treatment". The van Wyk Commission felt that because the progress for treatment is usually felt to be poor these words should not be included. The Commission, without any supporting argument in the Report, preferred the inclusion of words such as "a person who from an early age, before or during puberty, has suffered from a persistent disorder ....."[77] In the legislated instrument, however, the age of eighteen years was chosen in place of "puberty" to avoid any doubt.

One must accept that there were sound medical grounds for this apparent restriction in the definition of psychopathic disorder. There is ample evidence that the causative factors of psychopathy are largely to be found in the early or teenage years of life and that the numbers suffering the disorder in the population decrease from the many in late teens and early twenties to the few, if any, by retirement

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77) op. cit., para. 3.7.8.

age.[78] It seems as though the South African Legislature wished to tie its definition to an etiological base and the British Legislature, on the other hand, to a prognostic base: "and requires or is susceptible to medical treatment". I submit that both these "limitations" in a legislative definition are unnecessary and may in both cases have been introduced ex abundante cautela to keep the feet of psychiatric evidence on the ground. The definition of "mental illness" in the Mental Health Act, 1973 includes no reference to etiology or prognosis. Admittedly this definition is intended to cover all mental illness and is therefore perhaps appropriately wide whereas the definition of "psychopathic disorder" is only intended to deal with this one form of mental illness. The definition indicates that the disorder or disability must be persistent (this indicates the requirement for an adequate history) and that it must result in abnormally aggressive or seriously irresponsible conduct. With our knowledge of the general early genesis of this disability it is surely unnecessary to specify an age in a definition. Are we again to be subject to the harrassment of evidence indicating borderline cases and the possible vagaries of pinning a witness down to illustrating definite examples of the existence of the disorder prior to the age of eighteen years?[79] In the British definition there is at

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78) Psychopathic Disorders and their Assessment, ed. M Craft, p.78. The British Mental Deficiency Act, 1927 in section 1 defined "mental defectiveness" by including this age limit of eighteen years. This still excluded many psychopaths according to Nigel Walker at p.36 of Craft's book (supra). See also Roux, op. cit., p.14. At p. 187 - 189 he compares the position of the psychopath in the law of certain Continental countries.

79) See Rumpff, C J's comments on this in S v Mnyanda (supra), p.763 with which I respectfully agree.

least an alternative: "requires or is susceptible to .....". Presumably it would normally be reasonable to say that such a disorder requires treatment even if it were not possible to say it was susceptible to it. I submit that the South African definition should have excluded this reference to age and that its presence is likely to give rise to difficulties and possibly injustice in certain cases.

Section 1 of the Mental Health Act, 1973 also defines a "hospital prison for psychopaths" as meaning "a building or any portion of a building, whether part of a prison or not, which has been set aside and equipped by the Department of Prisons as an institution for the detention of prisoners who have been certified as psychopaths". This is a most welcome and advanced step forward in our penology comparable with the most modern and recent post-war developments in Britain, the Netherlands and Scandinavia, and the Department of Prisons and the Legislature are to be commended on taking this step which was recommended by the Rumpff Commission.[81] Such a hospital prison has been opened and is functioning since the coming into operation of the Act in 1975 and is incorporated at Zonderwater Prison near Cullinan in the Transvaal. The committal to such a prison can take place in terms of the Mental Health Act, 1973 as read with sections 77 or 78 of the

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81) op. cit., para. 8.46 and 12.24.

Criminal Procedure Act, 1977[82] as State President's patients in terms of sections 77(6) and 78(6) of the Criminal Procedure Act, 1977 or at any other time after certification in terms of section 8 of the Mental Health Act, 1973 by two medical practitioners, usually psychiatrists.

It is clear therefore that the Legislature and consequently South African penological practice have recognised that psychopathy is a certifiable mental illness and that such remedial means as are scientifically available can be applied. How does this affect a defence of psychopathic mental illness in relation to a charge of murder and to a finding of extenuating circumstances?

The van Wyk Commission[83] considered that "generally psychopaths are both responsible and capable of understanding the proceedings against them and of defending themselves and such persons ought to be tried if accused of a crime and sentenced if found guilty. It is apparently because psychopaths could not be tried under the existing Act that the provisions included in Class VI ('socially defective person') were repealed in 1957". The Commission further

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82) The long awaited promulgation of the Criminal Procedure Act No. 51 of 1977 more than a year after the coming into effect of the Mental Health Act No. 18 of 1973 avoids the kind of problem brought to light in S v Mnyanda (supra). This delay created an unsatisfactory situation. The Mental Health Act defined only "mental illness" whereas the procedural sections 27 to 29 bis of the Mental Disorders Act of 1916, not repealed pending the promulgation of the Criminal Procedure Act, 1977, referred only to the "mentally disordered or defective" of the 1916 Act, the definition of which words had been repealed by the Mental Health Act, 1973.

83) op. cit., para. 3.7.6.

said that if effect were given to the recommendations of the Rumpff Commission the Criminal Procedure Act would draw a clear distinction between responsibility, ability to understand forensic proceedings and certifiability. Section 77 of the Criminal Procedure Act, 1977 deals with the procedure in respect of an accused who is not capable of understanding the proceedings so as to make a proper defence by reason of "mental illness or mental defect". If such is found to be the case an accused may be detained pending the signification of the decision of the State President.[84] Section 78(1) provides that an accused who suffers from a mental illness or mental defect which at the time of the commission of the offence makes him incapable of appreciating the wrongfulness of his act or of acting in accordance with an appreciation of the wrongfulness of his act shall not be criminally responsible for such act. In such a case the court shall find him not guilty and direct his detention in a "mental hospital or prison" pending the signification of the State President's decision.[85]

It will be observed that the Criminal Procedure Act, 1977 in sections 77 and 78 adds the words "or mental defect" to "mental illness" in the Mental Health Act. This may be

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84) Section 77(6). S v McBride 1979(4) S A 313 (W L D).

85) Section 78(6). The Criminal Procedure Act, 1977 does not define "mental hospital or prison". The Mental Health Act, 1973 does not use the words "mental hospital"; it defines and refers only to "institution" as a state psychiatric hospital or provincial hospital or halfway house providing for the detention and treatment of mentally ill persons and also defines a "hospital prison for psychopaths". It also defines "prison" in terms of the Prisons Act No. 8 of 1959. There is therefore this terminological incongruance between the Criminal Procedure Act, 1977 and the Mental Health Act, 1973.

considered to extend the words "mental illness" to include any other mental defect not considered to be covered by the definition of the Mental Health Act as any disorder or disability of the mind including mental disease or arrested or incomplete development of the mind including psychopathic disorder. This is strange, unless it is done ex abundante cautela, because the definition of "mental illness" purported to be wide enough to deal with any mental condition. The Criminal Procedure Act, 1977 does not define mental illness or mental defect.

Insofar as the psychopath is concerned, if there is clear evidence of psychopathic disorder, then in terms of the Mental Health Act, 1973 this would be "mental illness" and if "to such a degree that he should be committed to an institution"[86] then such an order may be made. If additionally there is acceptable evidence that the psychopath is incapable of acting in accordance with an appreciation of the wrongfulness of the act then in terms of section 78(1) of the Criminal Procedure Act, 1977 he would not be criminally responsible for his act, would be found not guilty and detained in a mental hospital. However, in the absence of very convincing facts, the courts would not be disposed to return such a finding.[87] Such a finding is, however, possible in law.

The Criminal Procedure Act, 1977 goes on in section 78(7) to provide that if the accused at the time of the commission of the crime was criminally responsible but that his capacity to

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86) See, for example, sections 8(1) and 30(1) of the Mental Health Act, 1973.

87) Rumpff Commission, op. cit., para. 4.73; Roux, op. cit., p.191 and 195; and Mnyanda's case (supra), p.763E.

appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect the court may take the fact of such diminished responsibility into account when sentencing the accused.[88] This now provides statutory recognition of the concept of diminished responsibility and naturally applies to all criminal offences.

The question arises in a case of murder: Will this mean that a lesser sentence than death be imposed? The answer seems to be: Not necessarily so. A lesser sentence than death may only be imposed on a finding of extenuating circumstances.[89] Of course, a court may regard diminished responsibility as being an extenuating circumstance and then it would have a discretion as to sentence. Logically this would seem to be an eminently reasonable approach. However, in a case of murder, this is merely the interposition of another step in arriving at sentence. Whether we say that extenuating circumstances may be found in respect of a psychopath (or

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88) (My underlining). It is interesting to observe that in the Criminal Procedure Bill, published for general information and comment on 10 December 1971 in the Government Gazette No. 3328 R G 1540, this same sub-section said "the court shall take the fact of such diminished responsibility into account when sentencing the accused". The timidity of the Legislature in not being logically and, it is submitted, legally consistent in its thought processes is a little surprising. The fact that the court should be required to take such factor into account does not necessarily mean that the sentence need be diminished, taking into account other relevant sentencing factors. The Bill also referred only to "mental illness", not to "mental illness or mental defect" as now in the Act.

89) Section 277(2) of the Criminal Procedure Act No. 51 of 1977.

rather psychopathic characteristics evident in the commission of the crime) or may be found in respect of statutory diminished responsibility found to exist in a psychopath it will not necessarily affect the sentence or avoid a sentence of death if the past practice of the courts is any guide.[90]

In the reference earlier in this chapter to the mental characteristics of the psychopath the diminution in normal self-control in stressful conditions and impulsiveness were among those isolated as being particularly relevant. If these factors as well as others are evident in the conduct of the accused in the commission of the crime then it is possible for the court now to find that his capacity to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness which includes diagnosed psychopathic disorder. It can even be stated that psychopathic tendencies, when particularly relevant in terms of this paragraph and if found to be a mental defect (which is not defined), could also give rise to a finding of diminished responsibility in terms of section 78(7) of the Criminal Procedure Act, 1977.

It is submitted that the courts should take the lead of the Legislature in making provision for diminished responsibility in this way and reflect this in their consideration of

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90) The cases discussed earlier in this chapter. See also S v Mnyanda (supra), p.766 where Rumpff, C J indicates that the fact that an accused is clinically regarded as a psychopath is not automatically regarded as diminished responsibility. Only when the psychopathic disorder is of such a degree that the "wilsbeheervermoë" is diminished may there be diminished responsibility. Compare Gradwohl's Legal Medicine (ed. F E Camps), p.500 regarding diminished responsibility as applying to the psychopath under section 2 of the British Homicide Act, 1957.

sentence. Regarding homicide cases committed by a person in respect of whom there is acceptable evidence of psychopathy in relation to the offence, i.e. who is mentally ill in terms of the Mental Health Act, 1973 and who is found to have diminished responsibility in terms of the Criminal Procedure Act, 1977 and in respect of whom extenuating circumstances have been found, it would be most unusual, indeed, if he were still to be sentenced to death. And this notwithstanding the fact that there is now a hospital prison for psychopaths. It would be a little difficult to restrain oneself from asking what is society doing when it can apply these three descriptions to a person and still consider him only fit for the gallows?[91]

CONCLUSION

Recognising that the states, conditions or circumstances particularly related to the psychopath in crime are those of personal background, mental and situational circumstances we may summarise broadly the findings in this chapter as follows:-

(a) The theoretical and clinical evidence regarding the psychopathic personality appears to indicate a deficiency in moral constitution as well as a ready resort to instinctive action accompanied by a less than normal capacity to self-control or action in accordance with appreciation in certain stressful situations.

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91) It is submitted that it may be necessary for the Legislature to act consistently with its legal and penological provision in the case of a psychopathic homicide and require that, where the findings referred to above are made, the mandatory death sentence shall be excluded.

(b) It is unlikely, even since the passing of the Mental Health Act, 1973 and the Criminal Procedure Act, 1977, that the psychopath will find himself accommodated in the law of insanity nor, because of the nature of the doctrine of irresistible impulse and that of psychopathic action, will he find such legal doctrine applied to him in homicide cases generally.

(c) As psychopathic disorder is, however, statutorily recognised as a mental illness and is certifiable as such when a persistent disorder of the mind existing in the patient from an age prior to eighteen years results in abnormally aggressive or seriously irresponsible conduct, there is nothing in the Mental Health Act, 1973 or the Criminal Procedure Act, 1977 to prevent a psychopathic accused on suitable evidence from being found to be not criminally responsible in terms of section 78(1)(b) of the Criminal Procedure Act and detained pending the signification of the decision of the State President.

(d) A psychopath will not normally be able to rely on an inability to understand the nature of his trial or to prepare a defence so as to be dealt with in terms of section 77 of the Criminal Procedure Act, 1977.

(e) It is probable that, upon suitable evidence, cases of psychopathic homicide may be dealt with in terms of section 78(7) of the Criminal Procedure Act, 1977 as diminished responsibility and that such finding may be taken into account in regard to sentence.

(f) A finding of diminished responsibility in cases of homicide will have no effect on the mandatory death sentence in terms of section 277(1) of the Criminal Procedure Act, 1977 unless such finding is found to be "extenuating circumstances" in terms of section 277(2).

(g) A finding of extenuating circumstances, whether on the basis of diminished responsibility or not, may still be made in respect of an accused found guilty of murder where the evidence shows that the relevant components of the psychopathic personality, or psychopathic tendencies, even though not certifiable as "mental illness" in terms of the Mental Health Act, 1973, were present either alone or in conjunction with other extenuating factors.

It is further submitted that the Legislature should give proper effect to its apparent intention in recognising diminished responsibility and the relation of this condition to sentence, in respect of homicide in any event, to avoid what appears to be a cumbersome illogicality referred to in (f) above. It is recognised that diminished responsibility applies to all offences where the evidence indicates such but, in respect of homicide cases which carry the ultimate sentence, the provision for diminished responsibility should

be linked with section 277(2) of the Criminal Procedure Act, 1977. To recognise the fact that the Legislature recognises psychopathic disorder as a certifiable mental illness and that hospital prisons for psychopaths are in existence and that normally diminished responsibility should be taken into account regarding sentence, it is submitted that section 277(2) of the Criminal Procedure Act, 1977 should be amended by the addition at the end of the sub-section of the following 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".

CHAPTER - V

INFLUENCE OF ALCOHOL AND DRUGS

INTRODUCTION

The effect of intoxicating liquor and narcotic drugs upon the human body is a question that is related to the facts of each case depending on the external evidence available and the opinion of experts as to such effect in specific cases and the terms "drunk", "intoxicated" and "under the influence of liquor or drugs" are terms which, though used loosely by the layman as descriptions of conditions, cannot be applied without reference to specific facts and cases. The terms "drunkenness" or "intoxication" normally imply a loss of control of physical and mental ability to a degree which renders the person affected incapable of acting as a normal person with safety to himself or with due consideration to the rights of others. The phrase "under the influence of intoxicating liquor or narcotic drugs" indicates a lesser impairment to the physical and mental faculties which diminishes the skill and judgement normally required for the proper performance of some activity. It indicates an influence upon normal healthy conduct which is less than that implied by the first two words used.[1)]

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1) I Gordon, R Turner and T W Price, Medical Jurisprudence, p.764. While the words "intoxication" or "drunkenness" will be used predominantly in this chapter, the legal position is the same where the mental effect is induced by drugs - E M Burchell and P M A Hunt, South African Criminal Law and Procedure, Vol. I, p.226.

The absorption of alcohol from the stomach into the system which gives rise to resultant impairment of faculties depends upon a number of factors which vary from case to case, namely the nature, amount and alcoholic content of the material ingested; the amount and nature of the food present in the stomach at ingestion; the addiction or otherwise of the ingestor to alcoholic beverages; his tolerance to alcohol and his general physical make-up. Alcohol is not evenly distributed in the different tissues of the body, the blood and brain attracting a greater effect than bone and fat. The main tissues affected by alcohol are the ganglionic cells of the central nervous system and the effect is to depress these possibly to the extent of causing a temporary functional paralysis of the cells. The higher centres of the nervous system govern the intellectual processes and the co-ordination of the finer muscular movements and these become depressed with a moderate amount of alcohol. The lower centres which, inter alia, govern emotional tone might not be directly physically affected at this stage but are indirectly affected by being released from the inhibitory control of the depressed higher centres causing a false sense of stimulation and a varying degree of lack of control of emotional responses. The ingestion of further alcohol depresses the lower centres as well, possibly causing stupor.[2)]

As the intellectual functioning of the brain, the government of the body, is early affected by alcohol, perception becomes dull, memory defective and judgement impaired by the

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2) Gordon, Turner and Price, op. cit., p.772; Sydney Smith, Forensic Medicine, p.501; Taylor's Principles and Practice of Medical Jurisprudence (K Simpson), p.494. Gradwohl's Legal Medicine, p.565: "The same dose of alcohol will vary in effect not only in different persons but in the same individual at different times"; and I Gordon and H A Shapiro, Forensic Medicine, p.344.

relaxation of inhibitions and an exaggerated or unnatural sense of stimulation. The condition can degenerate to mental confusion, disorientation and loss of consciousness in extreme stages. Basic character, background and environment interplay against the backdrop of the exaggerated tone and dominant moods may be melancholy, irritability, pugnacity, sentimentality or sensuousness. Reason loses ground to impulse and conduct becomes more reckless and careless with the barriers of natural inhibition and reasonable care removed. Motor activities of the body are also affected, firstly the finer and more skilled movements and later grosser movements affecting walking. The mental process resulting in speech and articulation itself suffers under the influence of alcohol.

Gordon, Price and Turner[3] distinguish five stages of intoxication with their resultant effects:-

(a) Slight: No obvious impairment physically or mentally; face possibly flushed, exaggerated mood but possessing ability to control behaviour. This category is not certifiable as under the influence of liquor.

(b) Moderate: Face flushed and mood exaggerated; otherwise there may be difficulty in detecting mental impairment. Rombergism (swaying when eyes are closed and feet together or standing on one leg) is positively present and the finer movements inco-ordinated. Behaviour may be irregular and the subject may be uninhibited, exuberant and reckless to a degree which justifies him, for instance, being certified as unfit to drive a motor vehicle.

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3) op. cit., p.777.

(c) Drunk: The mind is confused, mood exuberant and uncontrolled and behaviour may be irregular. Speech is noticeably affected and movements inco-ordinated to a degree causing reeling and staggering. There is ineffective control of behaviour.

(d) Very Drunk: The mind is confused and disorientated and motor activity inco-ordinated to a degree which might make walking very difficult, unsafe or impossible - often called the "paralytic" stage.

(e) Coma

If the body weight and the concentration of alcohol are known it is possible to calculate with reasonable accuracy the total amount of alcohol which was absorbed into the body tissues at the time the sample was taken.[4] For instance, in the case of a person who weighs 77 kgs and has a blood content of 0,15 per cent, it is possible to say that the equivalent of approximately six tots of brandy, at least, had been consumed to indicate such absorption.[5]

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4) Gordon, Turner and Price, op. cit., p.768. Gordon and Shapiro, op. cit., p.347.

5) The limitation of the evidentiary nature of these tests particularly in cases of homicide must be appreciated. In most such cases the accused is not apprehended and examined very shortly after the commission of the crime so that the scientific nature of these tests is not available to the accused or the State.

We may reasonably conclude that the consumption of alcohol impairs human faculties to varying degrees. On the physical side, motor functions and co-ordination suffer impairment while on the mental side, intellectual functions suffer an early impairment more particularly in the aspects of judgement, memory and control of the emotions. This results in impulsive action pitting itself against a failing rational ordering of behaviour.

As early as 1914 Kinberg[6] showed that various abnormalities, entirely controlled and in fact not manifested during a state of sobriety, showed themselves in a state of drunkenness; abnormalities such as homosexuality or pyromania.[7] These manifestations are sometimes followed by complete amnesia as to the conduct during the intoxicated condition. Jerome Hall[8] indicates, for instance, that in a mediate degree of intoxication there is such a blunting of ethical sensitivity as to destroy the understanding of the moral quality of the act, combined with a drastic lapse of inhibition. After a very adequate examination of the general question of the responsibility of the intoxicated person he concludes[9] that the principal facts which must be taken into account in the formulation of the legal rules on the question are:-

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6) "Alcohol and Criminality", (1914) 5 J Crim. L 569 and 573.

7) Quoted by Jerome Hall in "Intoxication and Criminal Responsibility" in Harvard Law Review, Vol. LVII, No. 7, September 1944, p.1072. But see also H Silving, Constituent Elements of Crime, p.350.

8) op. cit., p.1078.

9) op. cit., p.1082.

(a) circumstances during sobriety which signify that drinking of intoxicating liquor by certain types of persons is reckless misconduct;[10] and

(b) the lack of control and the ethical understanding at the time of the commission of the harm.

Hall felt that the legal approach should be to build on the foundation of Meade's case[11] and to express the legal rules not in terms of lack of intent but in terms of "lack of understanding of the ethical quality of the act and of ability to control (it)".

This is also the approach of de Wet and Swanepoel[12] who have urged this question of "toerekeningsvatbaarheid" or imputability for many years[13] with the support of Continental legal systems but against the view generally

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10) Regarding this category he rightly points out that the habitual drunkard might lack full culpability in that he is assailed by greater temptation and his self-control is impaired even though he might be aware of the possible general consequences of his partaking of liquor, p.1080. Also Jerome Hall, General Principles of Criminal Law, p.318 and 557 and Silving, op. cit., p.318 and 341.

11) R v Meade (1909) I K B 895. Limitations were in fact placed on the rules in Meade's case by the judgment in D P P v Beard (1920) A C 479. Compare G H Gordon, The Criminal Law of Scotland, p.407 and Glanville Williams, Textbook of Criminal Law, p.420.

12) Strafreg (3rd ed 1975), p.105 and 115.

13) Strafreg (1st ed. 1949), p.166; (2nd ed. 1960), p.99; and (3rd ed. 1975), p.105.

taken by South African courts.[14]

In the Roman-Dutch law voluntary intoxication was not accepted as a defence to excuse from criminal liability but could be taken to mitigate punishment.[15] The accused would therefore be found guilty of the substantive crime as charged but intoxication might have the effect of reducing the penalty. In Fowlie v R,[16] Wessels, J said:-

> "It would be absurd to say that if a man in his cold, sober senses did the act he should be punished with no greater severity than the man who did it whilst under the influence of liquor. That there should be a difference in the degree of punishment has been recognised in almost every system of jurisprudence ..... Although a man may not be so drunk as to be

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14) See Burchell and Hunt, op. cit., Vol. I, p.184 and 234; S v Johnson 1969(1) S A 201 (A D); cf. J C Smith and B Hogan, Criminal Law, p.186; and Director of Public Prosecutions v Majewski (1976) 2 A E R 142, p.151E, 166 - 170.

15) Burchell and Hunt, op. cit., p.228. The distinction between voluntary and involuntary intoxication has deep roots - J Moorman, Over de Misdaden, Inleid, 2.25 quotes Seneca; Matthaeus, De Criminibus, Proleg., 2.14 quotes Aristotle; and Marcianus is quoted in the Digest, 48.19.11. The Dutch writers regarded voluntary drunkenness itself as an offence - Moorman, op. cit., 2.26 and J van der Linden, Regtsgeleerd, Practicaal en Koopmans Handboek, 2.1.5.9. Involuntary intoxication, however, may afford grounds for excuse - S v Johnson (supra), p.205 and where it fails in this respect it might be proper for consideration as an extenuating circumstance.

16) 1906 T S 505, p.511. The charge was one of malicious injury to property. See also R v Bourke 1916 T P D 303, p.307.

excused the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened".

However, the South African courts departed from the Roman-Dutch basis in the acceptance of the "specific intent" rule of the English law which has been criticised as creating an "arbitrary and artificial" state of affairs[17] and as being "uiters onindrukwekkend" and "'n stuk rasionalisasie".[18] The accpetance of this rule results in mitigation where intoxication negatives specific intent by a diminution in the crime category, for example murder to the less serious crime of culpable homicide. There follows normally a diminution in the severity of sentence. On the other hand, where the crime charged does not require any specific intent, no such reduction of crime category takes place because of intoxication but such may operate to mitigate sentence.

In the South African law concerning homicide therefore the effect of intoxication or drugs may mitigate the seriousness of the offence or the severity of the punishment by:-

(a) diminution of the crime category where the effect of intoxication or drugs on the mind negatives the presence of an intention to kill; and

(b) by a finding of extenuating circumstances on the basis of the influence of intoxication or drugs on the mind of the accused at the commission of

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17) Burchell and Hunt, op. cit., Vol. I, p.229 and 230. See also Glanville Williams, op. cit., p.428.

18) De Wet and Swanepoel, op. cit. (3rd ed. 1975), p.118.

the crime.[19]

EXTENUATING CIRCUMSTANCES AND THE INFLUENCE OF ALCOHOL OR DRUGS

There are dicta in the judgments of South African criminal cases where intoxication is involved which on the one hand tend to indicate a stern moralistic approach and those on the other hand which evidence an appreciation of intoxication as a human weakness which has been with mankind for a very long time and which should be looked at with perceptive understanding. In the first category one has examples such as:-

> "I think, when a man commits a crime under the influence of liquor, he has to take the consequences, even if there were every reason to think that if sober he would have restrained himself".[20]

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19) It is not considered that a person who commits a crime in a state of intoxication will receive the benefit of a finding of diminished responsibility in terms of section 78(7) of the Criminal Procedure Act No. 51 of 1977, unless the courts are prepared to accept the state of intoxication as a "mental defect" (undefined in the Act or in the Mental Health Act No. 18 of 1973), i.e. a "temporary" mental defect, but this seems unlikely. If the courts did adopt this approach, where the capacity of an intoxicated accused to act in accordance with an appreciation of the wrongfulness of the act is diminished and the special finding of diminished responsibility may be made permitting this factor to be taken into account in sentence, this could be a means of easing the effect of the specific intent rule out of South African law. See also de Wet and Swanepoel, op. cit. (3rd ed.), p.202.

20) Gregorowski, J., p.309 in R v Bourke (supra).

> "..... I am not prepared to admit the principle that a man may dull his senses to a certain extent by drinking liquor and may in consequence become enraged all of a sudden and then stab and kill his victim, and ask the Court to hold that there were extenuating circumstances. I disapprove entirely of such an idea .....".[21)]

On the other hand, one has dicta such as:-

> "Personally I think that our law does not take a sufficiently human view of the effect of liquor on the mind of a person ..... a person who is very much under the influence of liquor cannot be said to be in full command of his reason; his mind is bound to be affected by it. And even if he is found by a Court of law to be capable of appreciating what he is doing and of realising the probable consequences of his act, it can be only in a vague, blurred and confused way ..... He cannot be said to be fully capable of appreciating and realising what he is doing. One only has to observe the action and conduct of a drunken man to realise this .....".[22)]

> "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 invoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure

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21) Hathorn, J P in R v Andries Cameron 1943(2) P H H191 (N P D).

22) Curlewis, J A, p.300 in R v Ngcobese 1936 A D 296.

in liquor, may easily over-indulge and thereby do the things which sober he would not do".[23]

In some cases the court's approach seems to be more a matter of principle than an analysis of the circumstances and effects with a willingness to ascertain as nearly as may be whether such influence, in its relation to the accused's capacity to appreciate, judge, foresee, control or direct his actions in the commission of the crime,[24] diminishes his moral blameworthiness.

Extent of Influence

In the early Appellate Division case of R v Ngcobese[25] the accused, while very much under the influence of liquor, stabbed a friend during an argument. On a question referred back from the appeal court regarding the degree of influence the trial judge said:-

"The Court was of the opinion that although the accused was under the influence of liquor when he stabbed deceased, his mind was not so obscured by it that he was incapable of forming an intention to kill ..... It is difficult to say exactly to what lesser effect this influence extended, but it is

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23) Holmes, J A, p.695 in S v Ndhlovu (2) 1965(4) S A 692 (A D).

24) The availability of appropriate evidence to assist the court is in some cases not evident and in others such evidence as there is comes from the mouths of lay witnesses in general language. This intrinsic difficulty is appreciated.

25) Supra, p.298.

> very probable his mind was sufficiently inflamed by it to make him more prone to take offence and to lose his temper more quickly and consequently to act more hastily. The Court took this into consideration as an extenuating circumstance. The evidence - even accused's own evidence - shows that he was capable of appreciating what he was doing at the time of the stabbing and prior to it".[26]

Here there is a pointing to the recognition of an influence which lessens the capacity to keep normal control and a lessening of inhibition on action. In R v Kubeka,[27] Ramsbottom, J indicated that if an accused had not consumed so much liquor as to reduce the crime to culpable homicide, but his "judgement" was nevertheless impaired as a result, this may operate as an extenuating circumstance. In making the court's finding he referred to the impairment of "his faculties or his judgment .....".[28]

In S v Saaiman[29] the trial court found that the accused had consumed a large quantity of liquor but that this in itself was not an extenuating circumstance. The trial judge had said:-

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26) Ibid. See also R v George 1938 C P D 486, p.487.

27) 1953(3) S A 691.

28) Supra, p.696.

29) 1967(4) S A 440 (A D).

"Alleen wat 'n versagting kan wees, is as 'n mens kan sê dat die resultaat van die drank wat 'n persoon gedrink het sodanig is dat dit sy gewone moraliteits gevoel verstomp het; dat dit die dissipline wat hy oor homself het verbreek het; dat dit vir hom moeiliker gemaak het om die drifte van 'n ondier wat daar in hom moet wees te beheer; en dat 'n mens dan, omdat hy voel dat hy minder bevoeg was om homself te beheer as hy sou gewees het as hy nie drank gehad het nie, moreel sy handeling minder erg moet skat as wat jy dit sou gedoen het as hy nugter was".[30]

Because the accused had not given or led any evidence before or after verdict as to any such effect or influence, no extenuating circumstances were found to exist and the appeal court considered there were no grounds for its intervention. The fact of the consumption of liquor does not of itself justify a finding of extenuating circumstances. That fact must be related by evidence to the commission of the crime and more particularly to the mental and physical influence of the intoxicant upon the accused.[31]

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30) Saaiman's case (supra), p.443.

31) See also S v Msila 1966(1) P H H159 (A D) per Smit, A J A: "..... the mere consumption of liquor by an accused does not make it probable that he acted under the influence of liquor when he committed the crime. It is the effect which the liquor had on the accused which is of importance in determining whether he was influenced by it and to what extent, in the commission of the offence. It is when this is proved that the trial court is in a position to determine whether the influence of liquor on the accused was such that, in its opinion, it reduces the moral blameworthiness of the crime". Compare S v Mienies 1978(2) P H H182 (A D).

The sort of phrases used by courts to indicate the nature or extent of the influence naturally varies considerably.[32] Whatever words are used it is clear that they or rather the evidence must indicate an influence or effect on the mental faculties or conduct of the accused in the commission of the crime.[33]

It is also clear that no specific or required degree or extent of influence can be insisted upon as necessary to satisfy the court that such condition may be considered as an extenuating circumstance. To do this amounts to a misdirection.[34] In Babada's case[35] the trial judge had indicated that the onus was on the accused to satisfy the court that his mental faculties or brain were so affected

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32) See, for example, R v Ngcobese (supra), p.300: "..... very much under the influence of liquor ....."; R v George (supra), p.487: "..... to a considerable extent drunk ....."; S v Ndhlovu (supra), p.696: "..... the appellant was intoxicated ..... as a matter of probability, his mental faculties were thereby impaired ....."; S v van der Berg 1968(3) S A 250 (A D), p.251: "..... tot 'n taamlike mate onder die invloed van drank ....."; S v Petrus 1969(4) S A 85 (A D), p.89: "..... deur die drank aangetas tot 'n bespeurbare mate"; and S v Grove-Mitchell 1973(3) S A 417 (A D), p.421: "..... considerably befuddled by liquor ....." and "..... perceptibly under the influence of liquor .....".

33) S v Babada 1964(1) S A 26 (A D), p.28 - the second step in the determination of extenuating circumstances, and S v Letsolo 1970(3) S A 476 (A D). It is clear that the first step is fulfilled in that the presence in an accused of liquor or drugs is a circumstance which could have a bearing upon the mental faculties.

34) Babada's case (supra), p.28.

35) op. cit., p.27.

("aangetas") by the liquor that he would not have committed the act had it not been for the liquor which he had consumed. Rumpff, J A on appeal considered that "wanneer 'n Verhoorhof by die uitoefening van sy funksie sy bevoegdheid beperk deur 'n assumpsie dat regtens 'n bepaalde graad van beskonkenheid vereis word alvorens die beskonkenheid as versagtende omstandigheid kan dien, begaan so 'n hof 'n mistasting omdat regtens geen bepaalde graad vasgestel is nie".[36)]

It is submitted that it is erroneous to suggest that the influence must be such as to convince the court[37)] that the crime would not have been committed but for the influence or its extent concerned. This almost amounts to re-introducing a required degree of intoxication and it is submitted that the words of Rumpff, J A,[38)] possibly indicating this, should not be accepted. The test cannot be in effect if there were no influence there would be no crime.[39)] The fact is that one is dealing with a crime and with human weakness (very

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36) Babada's case (supra), p.28.

37) Even be it on a balance of probability - R v Lembete 1947(2) S A 603 (A D).

38) Babada's case (supra), p.27.

39) The same judge said in S v Lehnberg 1975(4) S A 553 (A D), p.563 that requiring a test that the influence was "so strong that he, with all his weakness, defects and handicaps, was not able to resist it" was not the correct test. It is true that at p.559, in respect of the other accused, he again uses words which suggest that the influence should be to such an extent that the accused does something which he would not otherwise have done. This seems, as it were, to pose the question as if extenuating circumstances were to be regarded as a defence or justification.

often) in the commission of the crime and one is seeking a just punishment for that crime.

To pose the question in terms of the non-commission of the crime is, it is submitted, to pose the question erroneously. The question must remain: In the commission of this crime by the accused are there circumstances which diminish the blameworthiness of the accused or his criminal conduct?[40)]

In summarising the court's approach to the degree or extent of the influence of alcohol or drugs required to find extenuating circumstances we may say that it is clear law that it is a misdirection for the court to require a specified degree or extent of influence before such may be found to be an extenuating circumstance. This may reasonably be taken to mean that no required quantity or type of alcohol or grade or degree of intoxication with any recognised or commonly observable effects may be insisted on by triers of fact before they are prepared to consider extenuating circumstances. The onus on the accused is to require the evidence to show that whatever and how much he consumed, the effect on himself as a person in the commission of the crime can reasonably be described in terms such as the following: a lessening of the ability to control himself; greater difficulty in controlling his emotions; a breaking down of his normal self-discipline; a blunting of his moral feelings; and the impairment of his faculties and judgement.

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40) S v Petrus (supra), p.91.

"The accused knew what he was doing"

It appears from some judgments that trial courts in some cases have tended to conclude that because an accused, who has been found guilty of murder but was to some extent under the influence of alcohol, "knew what he was doing", this weighs against or more seriously excludes such influence being considered as an extenuating circumstance.[41] This does not seem to be a correct approach. Extenuating circumstances can well be found in cases where there is full knowledge of one's action and premeditation.[42] The plain fact of knowledge of what one is doing does not rule out such factors as impairment of control, self-discipline or judgement through the effects of alcohol or drugs. It may be that the triers of fact use the phrase "knew what he was doing" in a loose sense to mean that the accused was in control of himself and that his faculties were not impaired or influenced.[43] If this is so then it is submitted that it should be stated thus and not in loose terms.

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41) S v Ndhlovu (supra), p.691; S v Msila (supra); S v van der Berg (supra), p.251; S v Petrus (supra), p.89; and S v Mula 1975(3) S A 208 (A D), p.211.

42) S v Robinson 1968(1) S A 666 (A D); S v Hartmann 1975(3) S A 532 (C P D); and S v Lehnberg (supra).

43) The use of this sort of phrase may also arise through usage by interpreters in courts and against the background of accused persons or witnesses (particularly indigenous) to deny that an accused was drunk - S v Sigwahla 1967(4) S A 566 (A D), p.571 and, because of his conduct seeming to be purpose-directed, saying that he "knew what he was doing". Forensic practitioners will be aware of this tendency.

In S v Ndhlovu (1)[44] a witness stated that the accused was intoxicated ("besope"); he staggered from intoxication and he himself said: "Ek was gedrink maar nie dronk nie". The appeal court found that the trial court had misdirected itself in considering that because the accused knew what he was doing extenuating circumstances should not be found. The test remained whether the influence was such that the accused's conduct could be regarded as less blameworthy.

Ten years later the question arose in very similar form. In S v Mula[45] there was evidence of intoxication and provocation but as the court, in finding the accused guilty of murder, had found that he knew what he was doing it felt bound by this finding in regard to extenuating circumstances. The trial judge, in questioning defence counsel in argument on extenuation, had asked whether there was any authority for intoxication being regarded as extenuating when the accused knew what he was doing. The appeal court felt that remarks such as these amounted to misdirection of the triers of fact. Van Blerk, J A said different considerations apply in regard to lesser blameworthiness than in regard to proof of guilt. Evidence which was insufficient to prove non-imputability ("ontoerekeningsvatbaarheid") can well be sufficient to diminish the blameworthiness for the crime.[46]

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44) 1965(4) S A 688 (A D), p.691.

45) Supra.

46) Supra, p.213. The Appellate Division found extenuating circumstances in intoxication (two cups of wine on an empty stomach) and a degree of provocation and passed a sentence of imprisonment.

This clarity that it is the fact of the influence rather than the cause of the influence and that knowledge of what one is doing does not exclude the effect of the influence for extenuation purposes opens the way to recognising the components of the effect of intoxication particularly in relation to impairment of faculties, control and judgement.

INFLUENCE OF ALCOHOL OR DRUGS AND OTHER CIRCUMSTANCES

There are naturally numerous cases where intoxication in combination with other circumstances comes up for consideration as or is found to be extenuating circumstances. These other circumstances may be of a personal background such as youth[47] or personal mental circumstances such as provocation.[48]

In Msila's case[49] the fact that the accused behaved in every way like adults and lacked the timidity of youth detracted, in combination with some influence of alcohol, from a finding of extenuating circumstances while in S v Hlongwana,[50] Rumpff, C J found that the trial court had misdirected itself

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47) S v Ndhlovu (2) (supra), p.696; S v Msila (Supra); S v Sigwahla (supra); S v Petrus (supra); S v J 1975(3) S A 146 (O P D); S v Hlongwana 1975(4) S A 567 (A D); and S v Maseko 1978(2) P H H222 (A D).

48) R v Cebekula 1945(2) P H H176 (A D); S v Dena 1962(2) P H H237 (O P D); S v Ndhlovu (2) (supra); S v Fisher 1965(1) P H H88 (A D); S v Manyathi 1967(1) S A 435 (A D); S v Mula (supra); and S v Grove-Mitchell (supra).

49) Supra.

50) Supra, p.571.

when it said of a seventeen year old accused, who at the time of the commission of the offence was under the influence of liquor[51] and the influence of an older person, that he was a person who fully appreciated ("begryp") what he did that night. To consider youth in extenuation did not depend on whether he appreciated what was happening ("knew what he was doing"). The appeal court set aside the sentence of death. The more definite approach taken by the Appellate Division to regard youth in itself as an extenuating circumstance[52] indicates that the addition of the influence of liquor is likely rather to strengthen than derogate from that approach.

Provocation is a particular mental circumstance which may arise out of a situation whether an accused is intoxicated or not but when it is present in the case of an accused who is under the influence of liquor or drugs it must be carefully examined in its cumulative effect with the intoxication or rather on the intoxicated or influenced mind. Each of these circumstances on their own, if sufficiently in evidence, can have the effect of reducing a crime of murder to culpable homicide so that lesser effects, particularly in combination, deserve careful consideration as influences which may tend to diminish blameworthiness and therefore provide extenuating circumstances. Also there may well be psychological warrant for considering that the total effect of such cumulative factors may be somewhat more influential on the mind and conduct of the accused than the sum of the apparently measurable individual factors of intoxication and provocation.

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51) He admitted to two glasses of beer.

52) S v Lehnberg (supra); S v Matabane 1975(4) S A 564 (A D); S v Hlongwana (supra); S v van Rooi 1976(2) S A 560 (A D); and S v Mapatsi 1976(4) S A 721 (A D).

It seems most improbable to assert that from a subjective point of view the effect of provocation upon a person who is free of other apparent influences is the same as the effect of provocation upon a person who is to a certain degree under the influence of liquor or drugs when the medical facts indicate a diminution of inhibition and ethical sensitivity or judgement coupled with some loss of physical or mental control. The evidence in many cases seems to show that there are persons who, in a state of influence not amounting even to drunkenness, appear to take offence at something said or done which would not have occurred if they were in their sober senses.[53]

In S v Ndhlovu (2)[54] the appeal court found that the trial court had given the impression that intoxication cannot be an extenuating circumstance unless there was some element of provocation by the victim. This led to the setting aside of the death sentence for the second time in this case and the Appellate Division went on to find extenuating circumstances in the appellant's intoxication coupled with his youthfulness.

THE INFLUENCE AS AGGRAVATION IN RELATION TO EXTENUATING CIRCUMSTANCES

A question occasioning some difficulty is whether the triers of fact may, in determining the existence of extenuating circumstances, regard intoxication as an aggravating factor negativing any extenuating circumstances which might be present. The statute only requires the opinion of the court

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53) R v George (supra); S v Fisher (supra); S v Manyathi (supra), p.438; and S v Mula (supra), p.211.

54) Supra, p.694, a robbery-murder case.

that "there are extenuating circumstances .....".[55] That is to say, the matter is stated positively. For instance, if there were circumstances present such as youth, provocation, intoxication, etc. it would be for the triers of fact to state whether in their opinion these were extenuating circumstances. Strictly speaking, in such a case, they would not be concerned with aggravating features because that is not the question posed. The matter is complicated, however, by judicial analysis of this determination of the triers of fact. It has been accepted that the triers of fact, in considering the question of extenuating circumstances, are exercising a function of moral assessment of the facts of the case.[56] In Rhodesian cases one finds slightly more expression on the role of aggravation than in South African cases. In Sebereke's case[57] the appeal court reduced the conviction to one of culpable homicide and imposed a sentence of imprisonment instead of death where the accused was drunk at the time of the killing. In considering the question of extenuating circumstances the trial court had expressed the view that the consumption of alcohol had become more prevalent and associated with that view the fact that liquor previously available to White persons only had now been made available to Africans. The appeal court held that it was questionable whether the trial court was justified in taking this view and held that neither a deterioration in the general standards nor the general policy of the law regarding the punishment of certain types

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55) Section 277(2) of the Criminal Procedure Act No. 51 of 1977.

56) R v Taylor (supra), p.717 and Sebereke v R 1959(2) R and N 5.

57) Supra.

of offences seemed proper matters to influence the trial court in considering extenuating circumstances. It stressed that in exercising the moral judgment regarding extenuating circumstances the emphasis was on the subjective side and such general considerations such as the need to protect the public and the prevalence of the type of offence have little if any relevance.[58] In R v Danger,[59] in considering the trial judge's approach when extenuating circumstances have been found, the Federal Supreme Court said the judge may weigh against such matters of mitigation whatever matters may be relevant, including such matters as previous convictions and public policy when considering sentence. In dealing with the approach of the triers of fact to the question of extenuating circumstances it said that they are concerned not only with the primary facts but also with the moral judgment as to whether the circumstances ought to be characterised as extenuating. The court went on to say that this might involve the consideration of circumstances which aggravate the gravity of the offence but it need not do so in all cases.[60]

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58) This is consistent with the approach in R v Roberts 1957(4) 265 (A D), p.271 See also R v Tarusika 1959(1) S A 122 (F S C).

59) 1962 R and N 49. Compare R v Tarusika (2) 1959(1) S A 395 (F S C), p.395.

60) But compare R v Myeni 1955(4) S A 196 (A D) (witchcraft); S v van den Berg (supra); S v de Bruyn 1968(4) S A 498 (A D), p.515; S v Petrus (supra), p.91 - 92 (nature of murder and brutality); S v Maimela 1976(2) S A 587 (A D); S v Maarman 1976(3) S A 510 (A D); and S v Mapatsi (supra) ("inherente boosheid").

It would seem that the triers of fact should not have regard to the fact that the influence of alcohol or drugs is or is not an aggravating circumstance except perhaps in the limited or infrequent case of actio libera in causa.[61] As a matter of policy this is a matter for the consideration of the judicial officer generally when considering the question of sentence. If there are extenuating circumstances but there are also aggravating features in the evidence it may well be that the triers of fact might be occasioned some moral difficulty on the case as a whole as to whether they consider the circumstances as extenuating in view of the other features. Because of the fact that a finding of extenuating circumstances does not finally conclude the question of punishment, there still being the discretion of the judge[62] and in view of the fact that the triers of fact only can give an opinion as to such extenuating circumstances as are evident in the case, it is considered that the triers of fact as a general rule should not consciously weigh extenuation against any aggravating features. The prime statutory requirement of the triers of fact is to form the opinion whether there are extenuating circumstances.[63] The triers

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61) Compare R v Hugo 1940 W L D 285, p.287.

62) R v von Zell (2) 1953(4) S A 552 (A D).

63) When first introduced in 1935 by the insertion of section 206(2) in the Criminal Procedure and Evidence Act No. 31 of 1917 it was stated more strongly as a requirement by the judge of the jury. It does not appear in such form in the Criminal Procedure Act No. 51 of 1977, section 277(2) but it is submitted that the whole development of the law on this matter would not permit the accused to be deprived of this procedural step in assisting the trial judge in the matter of sentence. Although there is no judgment on this matter I would submit that the appeal court would find it to be a misdirection if a trial court did not direct its mind to the question of extenuating circumstances.

of fact cannot usurp the wider field of the judicial officer. Their moral appraisement of the facts of the case in considering extenuating circumstances must be concentrated on their characterisation of circumstances as extenuating. To do this they may have to regard all the circumstances of the case but primarily they have no legislative licence to characterise circumstances as aggravating.[64)]

PROOF OF THE INFLUENCE OF ALCOHOL FOR EXTENUATION

Evidence as to the influence of alcohol or drugs on an accused will normally make its appearance in the evidence led by the State if necessary during cross-examination except in cases where there were no eye-witnesses who saw the accused shortly before or after the commission of the crime. In many cases this will be the evidence of lay witnesses stating what they saw the accused drink and/or stating what his manner of action was. In fewer cases there might be evidence of a policeman and in rare cases of a medical practitioner. The testimony of lay witnesses, if it is not as to the fact of what or how much was imbibed, probably suffers the hazards of lay interpretation and observation and a varying terminology. The courts should naturally be on their guard against too facile a treatment of this question for extenuation for these reasons.

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64) Section 350 of the Criminal Procedure Act No. 56 of 1955 provided that "whenever it is proved that a person convicted of any offence was under the influence of intoxicating liquor or narcotic drugs when he committed that offence the court may, in determining the appropriate sentence to be imposed upon him in respect of that offence, regard as an aggravating circumstance the fact that he was under the influence of intoxicating liquor or narcotic drugs". This section has not been re-enacted in the Criminal Procedure Act No. 51 of 1977.

The other avenue of such evidence, also containing the seeds of imponderables or elements of credibility, is from the accused himself. Particularly among African accuseds it is a known fact in practice that there appears to be a reluctance to admit to being drunk or intoxicated unless the accused was incapable of any motor activity at all; what is commonly called paralytic drunk.[65] It is probably not an exaggeration to say that there may well have been African accuseds who may have suffered detrimentally in the courts because of this tendency. The Coloured accused, possibly together with the White accused, on the other hand, is, it seems in practice, often eager to admit his influence by intoxication as the explanation of everything and in the hope, and possibly the knowledge, that this may ease his penalty.

Where the accused's word is the only evidence of his influence by alcohol or drugs or the amount he consumed he has, indeed, a more difficult burden of proof if only because of the natural mental reserve of the triers of fact to accepting such evidence too readily. Where such evidence clashes with the direct evidence of eye-witnesses as to consumption or condition, this is a normal question of credibility. But where there is no other evidence than the accused's the court has to look to the analysis of other objective facts of the case in the light of the accused's

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65) This fact of denial was referred to by Holmes, J A in S v Sigwahla (supra), p.571. See also S v Hlongwana (supra), p.571 where the court was prepared to make an inference as to probability of influence.

statement.[66] In the case of S v Lamont,[67] Botha, J A considered that one could not expect a person alleging some degree of intoxication to describe the subjective influence the liquor had on him. He felt that greater reliance must be placed on inferences from the circumstances. If this is taken as meaning that, in the absence of other direct evidence as to his condition, what the accused says on his consumption of liquor or his condition or state of mind is to carry little or no weight then it is submitted that this would amount to a misdirection. It remains one of the proved facts of the case - credibility being the main issue. But it is not considered that the judge meant this. Rather he probably meant that the objective and external facts of the case, the manner of the accused's conduct and his commission of the crime must be weighed with his own evidence on his condition whether affirmative or a denial and the consistencies or otherwise of the evidence sought in order to arrive at a finding. Even here the greatest care and perception must be exercised, not through deduction only, unduly to objectify the subjective approach to the influence on the accused's mind for purposes of extenuation.

CONCLUSION

In this chapter we have briefly examined this personal mental circumstance in the physiological effect which intoxicating liquor brings about in the human body. Faculties are impaired in degrees which differ according to type and

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66) S v Grove-Mitchell (supra). See also Hlocka v R 1949(2) P H H182 (A D); R v Muller 1957(4) S A 642 (A D); and R v Matonsi 1958(2) S A 450 (A D).

67) 1974(2) P H H49 (A D).

strength of alcohol or narcotic, the physique or tolerance of the person concerned and a number of other factors. Intellectual functions suffering early impairment are particularly judgement, memory and control of physical, emotional and moral inhibition. It is clear that as a factor influencing the human mind and conduct it must, on suitable proof on probability, supply a circumstance for consideration as extenuating circumstances. This it has done in the South African law of murder since 1935. One finds in the judgments, as is probably to be expected in a matter of this nature, dicta indicating righteous indignation and emotional colouring and one finds dicta attempting to face a degree of objective reality in recognising that the justice of the case requires a perceptive appreciation of the human frailty evident (which has a very long history, as is the case with provocation) but nevertheless guarding against being unnecessarily sentimental on the one hand or righteous on the other.

Insofar as the moral reaction of the triers of fact differs regarding the question of the influences of alcohol or drugs, so will the assessment of the subjectivity of the influence of that factor as an extenuating circumstance. The cases indicate that the assessment of the Appellate Division can also differ from that of the triers of fact or the trial judge. Indeed, in some of the judgments of the Appellate Division, one may gain the impression that the judges have finely combed the trial court's judgment in order to find something which may be called a misdirection in order to enable them to pass what is considered to be a more appropriate sentence than that of death.

We conclude that:-

(a) Our law historically recognises the fact that the influence of liquor or drugs may mitigate penalty either through a reduction to a lesser crime category or by reduced punishment for the offence charged.

(b) While in some judgments evidence of a stern or righteous reaction to intoxication is found, there are other cornerstone cases where one finds dicta indicating an appreciation of intoxication as "one of humanity's age-old frailties", the effect of which on the accused should be evaluated with great care in murder cases, and where there is an absence of emotional preconception or unnecessarily indignant reaction.

(c) The problem of arriving at the subjective nature of the influence of alcohol or drug usage is not easily resolved because of evidential factors and normal inferential reasoning which is largely objectively based and for this reason a more careful and empathetic appraisal may be called for in considering the question of extenuating circumstances in relation to the mandatory death sentence.

(d) Our case law indicates that -

it is the fact rather than the cause of the influence of the faculties and diminution of control and judgement which must receive consideration (Msila);

no required degree or extent of influence is required to find extenuating circumstances (Babada);

the fact that the accused knew what he was doing must not be taken to rule out the influence of alcohol or drugs as an extenuating circumstance (Ndhlovu (1), Mula);

provocation by the victim is not a required accompaniment to finding the influence of alcohol or drugs to be an extenuating circumstance (Ndhlovu (2));

intoxication, together with one or more other mitigatory factors such as youth or provocation, must be looked at in the cumulative and interactive effect and each circumstance must not be dealt with separately (Ndhlovu (2)); and

it must be borne in mind that the influence of alcohol or drugs may cause senseless brutality as, indeed, in the cases of provocation or fear and such brutality must not be given undue weight as an aggravating feature or one which necessarily negatives extenuating circumstances (Letsolo).

(e) It is submitted that as a general rule the triers of fact must not consciously weigh aggravating features against extenuation; all the facts of the case, however, must be considered in characterising circumstances as extenuating.

(f) In relation to evidence, reference is made to the imprecision of lay witnesses in describing the influence of alcohol or drugs as well as to a certain proneness to admit to or deny such influence, particularly among African or Coloured witnesses, and the point is made that the accused's evidence as to his condition, notwithstanding a possible construction of Lamont's case, remains a fact of evidence, credibility and probability being the test of its weight in conjunction with the other facts.

CHAPTER - VI

SUPERSTITIOUS AFRICAN BELIEFS AND WAY OF LIFE

INTRODUCTION

African law on the whole, which is derived from the authority of tradition and precedent in social behaviour, has reached a high stage of development.[1] It protects the individual and, what is more important, the family unit and its possessions from intentional and sometimes negligent aggression and damage. The aim of tribal judicial procedure seems to be to restore the communal sense of well-being by as far as possible achieving a status quo ante. The juristic nature of the difference between civil and criminal proceedings is appreciated by the African but not to such a degree that, as in the practice of the Western world, the procedure in respect of the one category is divorced from procedure in respect of the other. As the civil and criminal aspects of injury or damage are dealt with in one procedure or at one hearing, earlier African law provides many examples of cases issuing in civil as well as criminal judgments or sanctions.

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1) The Bantu Speaking Tribes of South Africa, ed. I Schapera, p.197; J P Bruwer, Die Bantoe van Suid-Afrika, p.192 and 200; H A Junod, The Life of a South African Tribe, p.436; and J Lewin, Studies in African Native Law, p.98. "African" is used in this chapter to indicate indigenous Black population groups in Africa and South Africa.

Schapera indicates[2] that the manner in which the case is brought to trial and conducted is generally sufficient to show whether it is regarded primarily as a civil or a criminal action. Self-help is limited, generally speaking, to exceptional cases such as the killing or assaulting of an adulterer, murderer or thief who is caught red-handed.[3]

Death as a punishment was widely recognised among the African tribes of South Africa. Murder was punished by death, banishment or a heavy fine. In many cases confiscation of goods followed upon death or banishment and in some tribes, namely the Northern-Sotho and the Tsonga, compensation was paid to the victim's family by the accused's family and this took the form of cattle or the giving of a female who was required to give birth to a child to replace the deceased.

For the purpose of sentence, African law normally distinguishes between intentional or deliberate homicide and negligent or accidental homicide. Intentional homicide or murder was dealt with as indicated above while death caused accidentally went either unpunished or the offender was leniently dealt with. Self-defence, defence of others or severe provocation was sufficient to justify homicide and incurred no punishment.[4]

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2) op. cit., ed. Schapera, p.199 and I Schapera, Handbook of Tswana Law and Custom, p.46.

3) The Bantu Speaking Tribes of South Africa, ed. Schapera, p.200.

4) Schapera, Handbook of Tswana Law and Custom, p.261; The Bantu Speaking Tribes of South Africa, ed. Schapera, p.217; and cf. M Gluckman, The Ideas of Barotse Jurisprudence, p.205 and 208.

There appears to be a fairly general acceptance of provocation as either excusing the crime altogether or as leading to diminished penalty. This indicates a recognition of the power of the emotions in human behaviour or else it is a recognition of the right to retaliate in respect of provocative conduct and is thus merely a direct form of self-help.

In some of the tribes, upon judgment being pronounced, a prescribed sentence was imposed.[5] One finds, however, among some tribes or in certain cases that there is an awareness of the relation of punishment to the degree of culpability or the status of the person. In assessing punishment, generally speaking, the amount of damage caused and the conduct of the wrongdoer subsequent to the commission of the offence are considered. Ready admission of the crime and an attitude of contrition result in more lenient sentences.[6]

Negligence as opposed to accident carries with it liability for resultant damage. The admission of negligence as a basis for liability immediately posits in African society some form of communally accepted "reasonable man". Every adult in the African community is presumed to know the law[7] and is given the opportunity of attending the sittings of the tribal court which is a means, in addition to festive occasions, initiation ceremonies, etc., by which an African

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5) H P Junod, Bantu Heritage, p.95 and Bruwer, op. cit., p.197.

6) Schapera, Handbook of Tswana Law and Custom, p.48.

7) Lewin, op. cit., p.89 and M Gluckman, Judicial Process among the Barotse, p.155.

learns about the more specialised forms of behaviour patterns accepted by the tribe and to which he is to conform. Gluckman points out that the standard is "the reasonable and customary man and what he would have done".[8] From his experience among the Northern Rhodesian (Zambian) Lozi it appeared that the tribal courts did not use a general phrase for the reasonable man; the phrases which appeared in judgments were akin to the Roman law bonus paterfamilias, namely "a good husband", "a sensible induna", etc. That is, the reasonable man appeared from the specific situation or the instant relationship of status. He goes as far as to say "the reasonable man of Lozi law might more accurately be described as the reasonable and customary occupier of a specific position".[9]

We are in a position to conclude that the African way of life gives recognition to certain factors associated with the crime or delict which serve to influence the gradation of the penalty. That is to say, while Bantu communities may have certain stipulated penalties for certain types of wrongdoing, their conception of justice nevertheless permits the apportionment of penalty according to accepted factors which in their view affect or diminish culpability in its relation to punishment or penalty however limited the ambit of this recognition may have been.

How much an approach to mitigation of sentence has been influenced by the arrival of the missionary and the extension of civilization in Southern Africa is not known but there definitely appears to have been a mellowing of the previous

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8) op. cit., p.83.

9) op. cit., p.125 and 155.

harsh and uncompromising ways of dealing with offenders.[10]

It would appear therefore that the African is capable in some degree of appreciating the nature of mitigation or extenuation of penalty regarding wrongful conduct. This statement does not postulate, however, that their views on this subject are the same as those of the Western European. Nor in this regard must the wide divergence between the standards of civilization found among the Africans of Southern Africa, where the South African criminal law is applicable, be lost sight of.[11]

Superstition

Consideration should now be given to witchcraft, sorcery and superstitious beliefs in their influence on the African way of life which, as will be seen, form a substantial factor in the determination of extenuating circumstances in South African law. The African mind is to a great extent dominated or influenced by superstitious beliefs and to some extent by the practice of sorcery and witchcraft[12] and in

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10) See, for instance, the examples given by Schapera, Handbook of Tswana Law and Custom, p.264 and Junod, Bantu Heritage, p.98.

11) See Lewin, op. cit., p.94; The Bantu Speaking Tribes of South Africa, ed. Schapera, p.270; and Junod, The Life of a South African Tribe, p.437.

12) C L Harries, Laws and Customs of the Bapedi, p.119; Schapera, Handbook of Tswana Law and Custom, p.275; Junod, Bantu Heritage, p.116 et seq.; Bruwer, op. cit., p.151; H Kuper, The Swazi, p.48; W D Hammond-Tooke, Bhaca Society, p.263 and 291 - 292; M Hunter, Reaction to Conquest, p.317 - 318; and M G Marwick, Sorcery and Witchcraft in their Tribal Setting (Ph.D. Thesis, U C T) 1961, p.384 - 385.

studying the African beliefs of magic and medicine one is inevitably and naturally impressed by the wealth of superstition which is dismissed by persons of the Western heritage as "unscientific" and under certain circumstances "immoral" or "illegal". The desire in man, however, in time of uncertainty or need to turn to sources of strength, whether imagined or real, outside of himself is very deeply and universally rooted. The degree to which this desire or impulse is given rein and the manner in which it is exercised in relation to superstitious beliefs is dependent apparently on a degree of civilization as the Western world knows it. In the dynamic of cultural progress and bearing in mind the virtual infancy of the mental sciences of the modern age it is difficult to know where to draw the line as to what is superstition and what is not, especially in a world the geographical span of which has been contracted by the rapidity and ease of modern communications and in which those bearing the stamp of an upbringing under the most advanced civilization of the day, morally and materially, virtually rub shoulders with those whose standard of civilization staggers down to almost the most primitive form of human life and existence.[13] Even among the civilized stratas of twentieth century living one finds far too many seriously minded manifestations of a desire not to tempt, or on the other hand to appease, the forces outside of the subject to be able to judge less civilized races or tribes with any form of confident disclaimer in superstition. While the offspring of White civilization today might not necessarily burn witches or believe in them (even the latter is in some

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13) Within the borders of the Republic of South Africa alone are found those who live according to the highest standards of Western civilization and those, on the other hand, in the Kalahari who live at really primitive existence levels.

quarters doubtful) as has been done within painfully recent memory, they nevertheless manifest in degrees diminishing to laughable trivialities the deeply rooted desire referred to above.[14]

In common with many less civilized peoples throughout the world at various stages of history, the Africans tend to a greater or lesser degree to personalise the forces of nature or the natural causes of certain effects in all or most occurrences to the individual, the family or the tribe.[15] Ignorance fosters awe and being perhaps averse to having a deep reverence for inanimate matter, personalisation which feeds the imaginative faculty of man takes place. If only, psychologically speaking, an adverse cause can at least be addressed and perhaps appeased, if personalised, whereas inanimate nature remains impassively severe.

While superstition is fairly generally knit with much of the African custom and way of life, it is certainly not only the facets of sorcery and witchcraft which are frequently found in the courts of law regarding capital cases. The tendency has grown up in the courts to regard "witchcraft" or a belief in witchcraft as a circumstance which might on the facts favourably be regarded as an extenuating circumstance. In relation to the African way of life and custom this is clearly not an exhaustive category and for this reason this

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14) Whether it be the superstition fairly widely found attaching to the number thirteen or to the spilling of salt or whether it be the discarding or ignoring of medical advice in favour of that of some reputed "unscientific" "doctor" or "quack", the tendency remains to stigmatise (or hallow) man as having a faith-capacity and as believing in unseen things and influences.

15) See, for example, Hammond-Tooke, op. cit., p.264.

chapter was headed in the more comprehensive way. One has, for example, the following beliefs and superstitions which are not necessarily directly related to witchcraft or sorcery: the practice of killing twins; the Bushman custom in certain regions that either the adulterer or the husband must meet his death at the hands of the other;[16] the tribal custom which entitles an uncle to complete control over his nephews and which requires from the latter obedience to instructions;[17] the practice of "Koshana" which permitted illicit relationships between males and which might also give rise to an "eternal triangle";[18] and the fact that murder is not seriously regarded and that murderers go unpunished.[19]

Nor has the urban African who comes into much closer contact with civilized society been able as a whole to shed completely the skin of his superstitious way of life and divest himself of his unscientific customs and belief in magic. "Thikoloshe and others rampage the towns as well as through the countryside, and we have still a long way to travel before we can build up, in the minds of the Bantu, the dispassionate, objective attitude of science, which in time will free them from many of these beliefs, the terrors they inspire, and the magical practices in which the believers

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16) R v Mukeiruib 1938 S W A 4.

17) R v Hamkoshi 1941 S W A 16.

18) R v Qenele Xutu 1941(1) P H H7 (W L D).

19) R v Kgau 1958(2) S A 606 S W A.

seek protection".[20] Schapera's opinion[21] that the urban African has not as yet found a completely satisfying substitute for magic appears to be well-founded and is, indeed, supported by the recent writers Hammond-Tooke and de Ridder[22] in relation to tribal and urban Bantu respectively. Against this background of expert opinion it can be stated with reasonable certainty that the policy of separate development and territorial administration by the Africans themselves will not necessarily hasten the eradication of magical practices from African life. It can fairly safely be asserted that the practice of magic may change its form and its compulsive and primitive nature but it will certainly continue for some years to come. It might have been thought that Christianity should have filled the gap but it does not so far appear to have completely and effectually done this.[23]

Medicinal Aids

In his state of disruption from tribal living and under the impact of a Western way of life the urban African has many fears, uncertainties and perplexities. In this state he clings to the basis of the magic he has known rather than

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20) A W Hoernle in The Bantu Speaking Tribes of South Africa, ed. Schapera, p.245. See also J C de Ridder, The Personality of the Urban African in South Africa, p.66 and 68.

21) The Bantu Speaking Tribes of South Africa, ed. Schapera, p.372.

22) Hammond-Tooke, op. cit., p.292 and de Ridder, op. cit., p.160 - 161.

23) Hammond-Tooke, op. cit., p.280 and de Ridder, op. cit., p.162.

those beliefs to which he finds himself a stranger. What is more, he has found that his magic is adaptable to civilized living. He finds he can purchase "medicines" which help him to find work, which deflect the police from his trail, which move the magistrate to be lenient in sentence, etc.[24] As a stranger therefore in a strange world he adapts his belief and faith in the power of magic to his new surroundings to give him a measure of the relief sought.

The African has a crude knowledge of human anatomy and believes that most diseases, especially if the onset is sudden or if the disease lingers with the sufferer, are caused by sorcerers or witches.[25] According to popular belief these evil familiars take various forms or act in various ways. Some, mostly old women, are said to go about at night to kill or endanger. Others use sorcery in an act of vengeance against a particular enemy while some spur on people to the commission of gruesome deeds. Some witch-doctors hire themselves as diviners of maladies or ill-fortune. They are believed to be able to diagnose or divine the real cause of the trouble and to indicate the cure whether such be treatment by a medicine man, a sacrifice to the ancestors or the elimination of the evil influence by the destruction of the sorcerer.

The Africans draw a clear ethical distinction between good or protective magic and evil or injurious magic. It was thus

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24) De Ridder, op. cit., p.138 and The Bantu Speaking Tribes of South Africa, ed. Schapera, p.426.

25) Harries, op. cit., p.121; Hammond-Tooke, op. cit., p.264; Kuper, op. cit., p.50; and Hunter, op. cit., p.274.

considered ethical to use protective or retaliative medicines to destroy a person who has deliberately caused a death or to protect from the forces of nature or the intrigues of rivals. The protective activity of the witchdoctors is regarded as being beneficial to the community as setting itself in opposition to anti-social and prejudicial conduct or conduct suspected to be such. The social use of medicines is in many cases believed to be more powerful than its anti-social use.[26] Among the Africans in the town and the African areas there is a very strong and deep-rooted belief in the effectiveness of medicines prepared by witchdoctors from all kinds of ingredients and whose effects are as much psychological as physiological. Certain special magical properties are believed to inhere in certain ingredients and witchdoctors or persons instigated by them will go to extraordinary lengths to procure such ingredients. In some areas of the country parts of the bodies of victims, very often specially chosen or indicated, are required for "medicine". Murders for procuring medicine take place to a certain extent in various areas of Southern Africa but possibly to a greater degree among the Basuto where the belief in the efficacy of human blood or parts of the human body was still, certainly until fairly recently, disconcertingly widespread.[27]

The purposes for which medicines, having extra "strength" or efficacy by virtue of the presence of any portion of the human body obtained through killing the victim, are required are:-

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26) Hammond-Tooke, op. cit., p.273.

27) G I Jones, Basutoland Medicine Murder.

(a) to promote agricultural fertility;

(b) for personal aggrandisement; and

(c) for protective purposes, for example against lightning or hail or the wiles of rivals.[28]

The parts acquired by the killing and called "liretlo" are used by the Basuto in protective medicines which are regarded as promoting the public good. The evil done in killing a person to obtain medicine is regarded as being outweighed by the benefits it will bring to the individual and his community.[29]

The malicious use of magic or witchcraft to harm other people or destroy their property is something which gives rise to a great dread and fear in the mind of the African and in customary life was drastically and very often cruelly punished. Divination was employed to detect or indicate the witch or sorcerer who upon acceptance of the result of the divination was immediately brought before the chief and punished. The most lenient punishment was to be banished

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28) Kuper, op. cit., p.50 mentions the first two in speaking about the Swazi but from experience in conducting prosecutions in "medicine" or ritual murder trials in Lesotho, prior to independence, I consider that the third category should be included. The first two categories are believed to activate in a positive sense while the third category is for defensive purpose - it is a shield. Lightning, for instance, is greatly feared and Hammond-Tooke, in reference to the Bhaca, op. cit., p.273, mentions that "it is said that if someone sends lightning to a protected hut it will revert to its sender and kill the witch".

29) Bruwer, op. cit., p.160 and Jones, op. cit., Chap. 2.

with consequent confiscation of property but more often the person indicated was killed in a ferocious manner.[30] The arrival in the country of the Western way of life with its legal system which treats the killings of witches and sorcerers as a crime has not over the years yet managed to eradicate the beliefs or superstitions or the practices resulting therefrom. People are still brutally killed as a result of the fear of a belief in witchcraft and sorcery even though this is known to be contrary to the law of the land.

Distinctive Types of Homicide

It will have been observed that in dealing with capital crimes against the background of the African way of life and beliefs the following distinctions suggest themselves in those cases which are not the result of normal passions and desires (i.e. killings resulting from arguments, drunkenness, provocation, etc.):-

(a) Medicine or Ritual

Killing for the purpose of obtaining parts of human body for medicine.

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30) Junod, The Life of a South African Tribe, p.443; Schapera, Handbook of Tswana Law and Custom, p.275; The Bantu Speaking Tribes of South Africa, ed. Schapera, p.211; Bruwer, op. cit., p.151 and 197; and R B Seidman, "Witch Murder and Mens Rea" in 1965(28) Modern Law Review, p.47. Among the Bhaca, for instance, witches are burnt. "Old people describe how, if a person was 'smelt out' by a diviner, the door of his hut was barricaded and the thatch set alight so that he was burnt to death" - Hammond-Tooke, op. cit., p.279. Despite Hammond-Tooke's disclaimer (p.274 and 291) that witches are not burnt today, the quotation above seems to bear a remarkable affinity to the facts proved by the State in R v Bungweni 1959(3) S A 142 (E C D). See also Myeni v R 1955(4) S A 196 (A D).

(b) Witchcraft

Killing a suspected or indicated wizard or sorcerer so as to eliminate the evil of his doings.

(c) African Belief or Custom

Killing under the pressure or influence or against the background of African belief and custom, for example killing of twins.

Regarding these three categories of murder it would appear that killing for the purpose of obtaining ingredients for medicine or portents is morally less justifiable than killing as a result of the fear for oneself induced by superstitious belief. In the first case, as has been seen, the acquisition of medicinal ingredients is for the purpose of promoting agricultural fertility or for personal aggrandisement or for general protective purposes. It appears that this use of medicine has an underlying basis of generality. There is no specific or immediate threat to the individual or his lands. The medicine is acquired as a general weapon against nature or some other contingency.[31] It would seem reasonable to argue that this general state of apprehension of evil or damage is morally less extenuating of wrongful conduct than a belief in a threat to life induced by sorcery, witchcraft or other belief which immediately plays upon the instinct of self-preservation and which gives rise

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31) Although even here bitter experience has probably led to the expectation of certain contingencies with a fair degree of certainty or regularity, for example hail or lightning resulting in destruction of life or crops with resultant sparsity of food resources. But see S v Muchimbi 1972(2) P H H83 (H C, R) and S v Nyongano and Edson 1975(1) P H H42 (H C, R).

to instinctive or emotional drives of a severe degree.[32] It is clear that the expected results of sorcery and witchcraft and other superstitious beliefs give rise to a great fear in the African.

Because of this, virtually unquestioning obedience is given to the divinations of the witchdoctor or the superstitious belief and in cases where there is a hesitancy, possibly from a knowledge of the illegality of the act involved, the fear of the possible consequences of the law is overcome by the deeply rooted fear of non-use of protective resources or non-obedience of the dictates of divination. In this state of superstitious fear the resultant emotionally-governed action is deprived of the rationality which forms the basis or prerequisite for full moral assessment or imputability. It reaches past any capacity to reason and touches off the strong springs of emotional behaviour in much the same way as the stimulus for provocation or irresistible impulse or certain kinds of insanity such as paranoid states where, but for the basic premiss, action is fairly rationally ordered.

The various levels of civilization found among the indigenous tribes in South Africa from the most primitive inhabitants of the Kalahari to the more educated and

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32) A Milner, African Penal Systems, p.340 - 341 and C O Okonkwo and M E Naish, Criminal Law in Nigeria, p.209. Even here it is difficult to superimpose logical rational thought upon a substructure of superstitious belief found in less civilized persons. A man in the African areas who believes that his ability to feed his family from the products of his plot of land is dependent upon protection from hail might believe that the killing of one person (sometimes elderly) to supply enough medicine to protect the whole village is as justified as the killing of a sorcerer who is by his magical art detrimentally endangering the life of one member of the family.

westernised urban dwellers who, as we have seen, in varying degrees still cling to some of their superstitious customary beliefs show the application of a uniform system of Western law to be a little strange.[33] The level of civilization of the African and the beliefs which form the background to his conduct are factors which should be carefully weighed on the occasions when his conduct conflicts with the ordinary criminal law of the land.[34] The existence of this strong undercurrent of superstitious belief and custom which swirls irrationally around the pillars of the African social structure is a factor which, generally speaking, should be taken to mitigate conduct.[35]

Bases for Mitigation

The factors therefore which arise from this discussion as laying a basis for possible mitigation of criminal conduct are:-

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33) Junod, Bantu Heritage, p.95 et seq. The position appears even more incongruous where a reasonable civilized legal formula is imposed upon an uncivilized primitive Bantu accused, for example R v Mbombela 1933 A D 269, p.273. On this, see also Lewin, op. cit., p.93 - 94 and Okonkwo and Naish, op. cit., p.110.

34) In this regard it might fairly be stated that most judges and magistrates may not be sufficiently aware of the background of African thought and custom to be able to appreciate, where it is relevant, the superimposition of the civilized law upon the less westernised offender.

35) Harries, op. cit., p.119; Junod, Bantu Heritage, p.95; R v Xulu 1933 A D 197, p.199; R v Fundakubi 1948(3) S A 810 (A D), p.819; and R v Kgau (supra), p.608. See also Seidman, op. cit., p.59 and p.107 above, footnote 53.

(a) The comparatively recent history of tribally recognised witchcraft killings together with the continued though illegal practice of witchcraft and divination.

(b) The impact and imposition of a civilized legal system with its attendant conceptions and formulae upon the wide cross-section of uncivilized or less developed African societies.

(c) The strong emotionally normative basis (which includes naturally superstitious, magical and customary beliefs) of the African way of life and thought and more particularly the fear engendered by the supposed evil actions of the wizard or witchcraft.

As a generalisation the position might fairly be stated thus: The African knows the requirements of the law but when his surrounding circumstances or his conduct enter certain highly charged emotional and tribally based areas of his life he may be deprived in varying degrees from conducting himself within the limits of the law or believing that he should so do.

It seems reasonably clear that, as far as is known, killings consequent upon beliefs in witchcraft and African or indigenous custom are not many in number and on this ground it might be argued that the application of the civilized law has had its effect upon the conduct and beliefs of the African. It may well have had an effect upon the conduct of the African in general but, as has been seen, it is questionable whether such effect has extended to his beliefs. But it is submitted that this argument does not detract from the principle that any individual offender should receive the benefit in mitigation of the factors discussed if such

factors are valid considerations regarding extenuation of criminal conduct. Inasmuch as certain civilized persons know the law and yet offend under certain conditions of temptation and stress, so certain Africans or the Africans in certain family or tribal units or areas might, depending on a variety of circumstances, be more prone to brave certain legal consequences in the face of alternative supposedly evil consequences.

WITCHCRAFT AS A DEFENCE

In R v Radebe[36] the accused on a charge of murder admitted having killed the deceased but pleaded that he had done this in the belief that she had killed two of his children by means of witchcraft or sorcery. A defence of insanity was not raised but it was argued that the accused suffered from a delusion which should be taken as absolving him from liability for his act of homicide. Innes, C J felt that this proposition was too far-reaching to receive the approval of the Appellate Division. He could not equate a deliberate belief in witchcraft with insanity.[37] It should be observed from the report that the factor which led the accused to kill the deceased was a past causa: he believed that the deceased had killed two of his children. There is no suggestion in the report that he feared what the deceased might do in the future although apparently he believed her to

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36) 1915 A D 96.

37) Applied in R v Molehane 1942 G W L 64. J C de Wet and H L Swanepoel, Strafreg (1st ed. 1949), p.170 likewise felt themselves unable to agree with a proposition of this nature. There was no reference to this case in the second or third editions. See also Seidman, op. cit., p.50 where similar findings have been made by East African courts.

be a witch. It was believed in the court of first instance that he had resorted to a witchdoctor to indicate the cause of the death of his children. The killing would appear to have been in the nature of an act of revenge although for the African, as has been seen, a witch is regarded as a potential danger to the community or a family which the witch may, if such be the belief, have chosen to exterminate.

This question becomes more difficult when the reason for the killing is a present fear or dread in the African mind that the wizard is or will be exercising his art to the detriment of body or life. This very real fear gives rise to a compelling force which has been compared with delusional insanity.[38)]

As indicated by Schreiner, J[39)] a belief in witchcraft has something of the compelling force and the same manifest error that one associates with mental disorders but the courts have declined to regard such belief, however strongly motivated and proved, as a defence on a charge of murder and, indeed, with the increase of the standard of civilization among the African it would now probably be out of place to take any steps in this direction. The courts have rather, depending on the facts, tended to regard an uncivilized state of mind as affording a basis for mitigation regarding acts in conflict with the law of the land.

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38) R v Biyana 1938 E D L, p.311 and R v Hugo 1940 W L D 285, p.289. Seidman, op. cit., p.51.

39) In R v Hugo (supra), p.289.

In R v Kumalo and Nkosi[40] it was held that evidence of certain African beliefs was admissible to prove motive. The two accused (witchdoctors) were charged with the murder of a child who was found in the veld with a cut throat and the body cut open in front. The heart had been taken out and the left ventricle containing the fatty portion removed. Regarding the evidence of a detective who knew the Zulu people well Innes, C J said:-[41]

> "According to his statement the members of those tribes believed firmly in the potency of human fat not only as a charm against misfortune already sustained, but as ensuring good luck in the future and for love philtres. Generally the circumstance relied upon as showing motive stands in direct connection with the person charged, and is clearly within his personal knowledge. Here it is merely a tribal custom. But the customs of native tribes upon vital matters are universal and binding in a very high degree".

If the learned judge's viewpoint is correct as a general statement, and it seems from the introductory discussion above that it is, then it would seem that in order to prove motive in a case the law is prepared to recognise the probability of the binding or compelling force of African custom or belief and to deduce certain probabilities from this in respect of a crime which fits the pattern. On the other hand, it could well be, as will be seen, that in certain circumstances the same evidence which goes to prove

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40) 1918 A D 500.

41) Supra, p.505.

motive may from another point of view provide a basis for extenuating circumstances.

The remarks of Wessels, C J in R v Zulu[42] are worthy of note:-

> "..... in punishing them we must remember that they are not civilized persons but kaffirs living more or less in a state of nature and when they act according to their natural and inherited impulses they do not deserve to be punished too severely. On the other hand they must learn to restrain their natural impulses and not treat life too cheaply".[43]

Seidman,[44] who examined the approach of the courts to witchcraft homicide in East and West African jurisdictions, has found that a defence of witchcraft has not been accepted as negativing mens rea to justify a finding of self-defence, necessity, mistake, insanity, partial delusion and, with one

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42) 1933 A D 197, p.199.

43) See, however, R v Zanhibe 1954(3) S A 697 (T P D) where Bresler, A J, p.700 indicates that, particularly where one is endeavouring to protect a somewhat primitive community, almost paramount consideration must be given to the possible deterrent effect on others of the punishment. In this case the accused, a native doctor, was found guilty of culpable homicide after the death of a patient for whom he had prescribed some "rough" treatment. See also, in regard to witchcraft, the remarks of Schreiner, J A in R v Fundakubi (supra), p.819.

44) op. cit., p.48 - 52. Also J J R Collingwood, Criminal Law of East and Central Africa, p.31.

exception, provocation.[45]

WITCHCRAFT AND INDIGENOUS BELIEFS AS EXTENUATING CIRCUMSTANCES

Soon after the statutory introduction of extenuating circumstances in 1935 Lansdown, J P had occasion to deal with the question of witchcraft in R v Biyana[46] where it was proved that the accused had killed the deceased in the belief that the latter had practised witchcraft to the detriment of accused 1 and 2 and, in the case of accused 3 and 4, to the general public evil. The judge said:-

> "A mind which though not diseased so as to provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous belief or some defect, in the 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".[47]

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45) The exception is Fabiano's case (1941) 8 E A C A 96 (Uganda) where the deceased, whom the accused believed to be a witch who had killed members of their families, was discovered naked and crawling about their compound at night. A defence of provocation was allowed on the basis of loss of self-control. Collingwood, op. cit., p.170 and Okonkwo and Naish, op. cit., p.112 and 239. See also R v Molehane (supra) (insanity defence rejected) and S v Mokonto 1971(2) S A 319 (A D) (self-defence rejected).

46) Supra.

47) Supra, p.311.

The learned judge while deploring this state of affairs felt that European civilization, having regard to its own history, was not in a position unqualifiedly to condemn the African for clinging to such a belief. He continued:-

> "Their position is analogous to that of a man who genuinely but erroneously believes he has been the victim of a grievous wrong and, while suffering under a sense of this grievance, deliberately endeavours to avenge himself upon the supposed wrongdoer by killing him. His crime is not reduced in law by such a belief, but such a belief, genuinely and not unreasonably entertained, might provide a measure of mitigation and therefore become an extenuating circumstance".[48)]

In a much later Rhodesian case MacDonald, J P, after pointing out that that country's witchcraft suppression legislation does not condemn the practice of witchcraft, only the more evil or harmful aspects of its practice, said:-

> "It is clear therefore that the law permits witchcraft to flourish without fear of punishment under the criminal law in a wide field of human affairs, and persons who become steeped in witchcraft under its almost benevolent attitude are not likely to be impressed when at a later stage, the law steps in to

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48) Supra, p.312. Presumably the words "not unreasonably entertained" should be interpreted in the light of R v Mkize 1953(2) S A 324 (A D), p.335 where Fagan, J A said "the subjective test of the accused's state of mind is not only a factor to be taken into account, but is indeed a more important one to consider in this regard than the objective test of the factual basis for the state of mind".

> punish them for taking their beliefs to a logical conclusion. Any punishment imposed in these circumstances is likely to be regarded as an extension of the evil wrought by supernatural means rather than as just retribution".[49]

He felt that a prison sentence was unlikely to reform such an accused person but that sentences imposed should be such as to deter others from committing the excesses to which an indulgence in witchcraft frequently led.

In S v Nxele,[50] Ogilvie-Thompson, C J uttered similar remarks concerning severe punishment being regarded supposedly as an extension of the witch's evil influence. He pointed out that, notwithstanding the provisions of the South African witchcraft suppression legislation,[51] it was questionable whether in the last quarter of a century preceding 1973 any very substantial improvement had occurred by way of discrediting witchcraft particularly among the African peoples. The learned judge considered that a belief in witchcraft, if genuinely held by an accused and directly associated with the crime which he committed, is a factor to be taken into account in assessing an appropriate sentence. It should not be supposed, however, that such a belief must necessarily and in all cases be treated as an effective extenuating circumstance. The courts must be careful not to

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49) S v Ndhlovu 1971(1) S A 27 (R, A D), p.30. The judge felt that the Rhodesian legislation should be brought into line with the South African witchcraft legislation.

50) 1973(3) S A 753 (A D), p.757. This was a case of attempted murder on the grounds of supposed witchcraft.

51) Witchcraft Suppression Act No. 3 of 1957.

create the impression that such a belief affords an excuse for criminal conduct and undue leniency must be guarded against. However, "that it should be taken into account is inherent in the subjective approach. The degree of mitigation, if any, flowing from this factor naturally vitally depends upon the particular circumstances of the case".[52]

These dicta indicate the continuing nature of the problem and the continuing judicial concern over the most appropriate and just way of dealing with offenders guilty of crimes committed under the blight of a belief in witchcraft.

The Subjective Approach and Pluralism

It is interesting to note that it was in an earlier case concerning witchcraft, R v Fundakubi,[53] that in those terms the importance of the subjective approach to the consideration of extenuating circumstances was first emphasised. It was in the further witchcraft case of R v Mkize[54] that the emphasis of Schreiner, J A in Fundakubi's case was reinforced and extended by Fagan, J A.[55] Against the background of a personal dispute between the accused and the deceased the accused's child had died. There was evidence of the general belief in the area that the deceased had by witchcraft been the cause of the death of the

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52) Nxele's case (supra), p.757. See also S v Mohlala 1978(2) P H H126 (A D).

53) Supra, p.818. This was dealt with in more detail in Chapter III.

54) Supra, p.335.

55) See footnote 48.

child. There was also evidence that the accused had expressed pleasure in the death of the deceased "because his child had come back; had returned".[56] Extenuating circumstances were not found by the trial court as it was felt that the accused's belief was without foundation and the trial judge had said: "Unjust cause without foundation cannot, I think, ever extenuate a crime".[57] Fagan, J A on appeal[58] felt that he would certainly not subscribe to the view that unjust cause cannot extenuate a crime. However, since the trial judge had indicated in a subsequent communication to the appeal court (without having had the opportunity of consulting his assessors) that even if the court had held the appellant's belief that the deceased had killed his child to be fully established it would nevertheless not have found extenuating circumstances; the appeal court could not interfere with the sentence of death but it did bring its comments to the notice of the Governor-General-in-Council.

This emphasis of the subjective approach by Fagan, J A following upon a set of facts which pertinently raised the question of objective justification of an erroneous belief is most important and, with respect, properly sets in perspective the subjective test in evaluating blameworthiness. It appears reasonably clear that had the trial judge not made that statement in the subsequent communication the appeal court might well have found extenuating circumstances.

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56) Mkize's case (supra), p.329: "Interpreter: Now as the witness puts it, as I understand him, it was a death for a death. The accused then said to me: 'I will now beget my children in a nice way because he is dead'".

57) Supra, p.332.

58) Supra, 335.

It is submitted therefore that it is clear that Mkize's case read with Fundakubi's case is substantial authority for the proposition, certainly in cases involving witchcraft beliefs, that the subjective test of the accused's state of mind is more important in the consideration of extenuating circumstances than the objective test of the factual basis for such a state of mind. If therefore it is shown on the evidence on probability that an accused entertained the belief, albeit erroneous, that the deceased by malpratice in the nature of witchcraft or sorcery had caused or would cause him harm then such belief or rather such subjective state of mind, if active in the commission of the crime, must come up for serious consideration as an extenuating circumstance.

De Wet and Swanepoel in the first edition of their book[59] put the matter thus:-

> "..... dit is nie die geloof in the toorkuns wat strafversagting meebring nie, maar die vrees en wanhoop wat hierdie mense aangryp". And "Die vraag bly dan, of mens met 'n gebillikte, verstaanbare heftige gemoedsbeweging te doen het, wat hierdie dader onder hierdie omstandighede van die volle verwyt, en bygevolg die volle straf, vir sy daad bevry".[60]

Eleven years later while reiterating this approach the authors added:-

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59) Strafreg (1949), p.171. See also 2nd ed. (1960), p.185.

60) op. cit., 2nd ed. (1960), p.170. See also p.167.

"Van die onbeskaafde of half beskaafde kan mens nie verwag dat hy dieselfde insigte huldig in wat reg en verkeerd is as wat mens van die beskaafde verwag nie, en miskien ook nie dat hy sy drifte en hartstogte tot dieselfde mate beheers en beteuel as die ontwikkelde en opgevoede mens nie".[61]

In the light of this approach, which is submitted to be a proper one and the emphasis noted on the importance of the subjective approach, caution must be exercised regarding the dictum of Lansdown, J P in Biyana's case:[62] "such a belief, genuinely and not unreasonably entertained .....". This would not appear to contribute to the laying of a correct foundation in this matter. As indicated by Fagan, J A[63] it is a question not so much whether it was reasonable for the accused to entertain such a belief but whether it has been proved that the mind or motive of the accused was directly influenced by the belief even if such be regarded as irrational. Bona fides or genuineness of belief is, of course, a relevant factor but this is clearly a matter of evidence and credibility and should not cloud the analysis of the legal basis for extenuation.

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61) Strafreg, 2nd ed. (1960), p.185.

62) Supra, p.312. (My underlining).

63) In Mkize's case (supra), p.335.

The approach of de Wet and Swanepoel possibly raises in the mind the consideration of pluralism.[64] This has not been a substantive consideration in South African law notwithstanding the fact that the standard of civilization in the country has graduated from very primitive groups[65] through a less developed group which has been influenced by Western ways, but only in certain respects and with whom the customary way of life and beliefs are still deeply rooted in the primitive past, to the African who is wrestling with the adjustment to the developed Western culture.

However this may be, in 1959, twenty-four years after its introduction in South Africa, a provision regarding extenuating circumstances was introduced into the law of murder in the then adjacent British High Commission Territories.[66] The Proclamations introduced into the Criminal Procedure and Evidence Proclamation a section in similar terms to section 206(2) of the South African Criminal Procedure and Evidence Act, 1917[67] but with reference to the court and not the jury and added the following sub-section (2):-

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64) See also J J Brinkhof, "Enige Opmerkingen over Pluralisme", in 1972(35) T H R-H R, p.367 regarding the case of S v Mokonto (supra) and N J van der Merwe's note on the case in 1972(35) T H R-H R, p.193. See also Okonkwo and Naish, op. cit., p.110.

65) See R v Kgau (supra). Here the sentence did take into account the primitive background of the accused.

66) The Official Gazette of the High Commissioner No. 3121 of 14 August 1959, respectively Proclamations 45 for Basutoland, 46 for Bechuanaland Protectorate and 47 for Swaziland.

67) No. 31 of 1917.

"In deciding whether or not there are any extenuating circumstances the Court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs".[68]

It is strange that in territories where most of the murder cases involve Africans and where there was probably a need for a provision such as this in the application of Western legal standards the High Commissioner delayed so long in introducing the concept of extenuation or its extension. On the other hand, it can be said that the High Commissioner was able to study the effect of the section and the development of the law in this regard in South Africa. However, sub-section (2) contained an important new legislative provision that was not found in the South African legislation nor does yet appear there. It is noted that it is imperative for the court in reaching its finding to comply with the terms of sub-section (2). In South African law it is naturally open to the triers of fact to have regard to the consideration here set out if they are of the opinion that such is a fact associated with the crime or may found extenuating circumstances but there is no requirement of them to do so.

In Botswana, for instance, this sub-section (2) now appears in identical terms as section 203(2) of the Botswana Penal Code.[69] The application of this sub-section was dealt with

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68) In the High Commission Territories the trials were heard before a judge who may have assessors, African leaders and/or European District Officers in an advisory capacity on the facts only.

69) Law 2 of 1964.

in S v Mothibamela.[70] Here the accused, aged between twenty and twenty-five years, stabbed a four year old child to death. There was no explanation for the killing or mutilation and no evidence of mental disease in the accused. It appeared that the accused's explanation that he was under the influence of witchcraft was likely. Young, C J with assessors at the trial said:-

> "While it can be accepted that witchcraft is a powerful factor in the lives of many people of this class, yet the killing of an innocent child in pursuance of influences derived from witchcraft cannot be accepted as conduct in accordance with the standards of behaviour of that class. What the section has in mind is that the accused shall have acted reasonably according to the lights of the class to which he belongs. There may possibly be circumstances where under the influence of witch-craft a member of a class may be said to have acted reasonably in taking human life, but here there was no reason whatsoever in taking the life of this child".

On appeal, however, the death sentence was altered to one of ten years imprisonment. Schreiner, J A said:-[71]

> "The main difficulty in accepting this reasoning is that the learned Chief Justice seems to have imported into section 203(3) a limiting factor of reasonableness that does not appear in the section.

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70) 1969(2) P H H163 (H C Botswana).

71) Mothibamela v The State 1969(2) P H H226 (C A Botswana).

> The section in effect directs the triers of fact not to deal with the question of extenuating circumstances abstractly, which might operate to the accused's disadvantage, but should look at the matter concretely, in relation to the standards of his class, which would ordinarily operate in his favour. The section seems to have been designed in favour of convicted murderers and not with the idea of limiting the power to find extenuating circumstances. The learned Chief Justice was not entitled to restrict the powers of the court to find extenuating circumstances to cases where the accused had, in the court's view, acted reasonably according to the standards of his class. Such limitation seems to follow the lines which were held to be improper in Fundakubi's case, 1948(3) S.A. 810 at pages 817 et seq".

It is clear therefore that the objective criterion of reasonableness is not to be applied as a limiting factor to the subjective assessment of extenuating circumstances in cases falling under this statutory provision. There is a degree of objectivity in the statutory words: "..... the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs" but the additional objective test of reasonableness must not be introduced. This is consistent with the trend established by Mkize's case[72] and the submissions of de Wet and Swanepoel referred to above.[73]

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72) Supra.

73) See footnotes 60 and 61. Also Okonkwo and Naish, op. cit., p.112 and 239.

The question then arises whether the South African Legislature, in the knowledge that its laws were to be applied to a heterogeneous population including many communities holding beliefs alien to current Western thought, should not before now have given a positive lead in this matter. The introduction of extenuating circumstances was certainly such a lead and the South African courts have within the confines of the legal principles applicable tried to take cognisance of the varying standards of civilization of the offenders before them. The courts may, however, not have gone as far as they might have done with some legislative guidance. With the partition of South Africa into independent African States it might be argued that it is not necessary now to pursue this matter. It would certainly appear to be necessary for such African States to enact statutory provisions in the form of the Botswana law in this respect for it will be years still before the African as a whole will finally be able to shake off the skin of superstitious belief and practice and the law should be placed in a position positively to recognise this.

The Acts attracting the Application of the Belief

Most of the reported cases on the belief in witchcraft as the operative reason for the homicide indicate that the murder was ostensibly committed because of a supposed act of the witch in the past which had caused unexplained illness of the accused or death of a near relation. Acts of homicide in these cases may appear at first sight to be more in the nature of a reprisal or an act of vengeance. However, it must be realised that a supposed wizard at large remains a continuing menance and if he has supposedly turned his attentions to one member of the family the fear remains that he will extend the ambit of his attention to others. The uncertainty of the situation becomes a major preoccupation

rooted in fear. Some cases indicate a belief resulting from a fear of present or future activity of the wizard. In some cases there is evidence of consultation with witchdoctors who identify the evil one while in other cases no such evidence is disclosed.

In R v Molehane[74] the accused believed that an internal ailment suffered by him had been caused by the sorcery of his mother. The court found that this belief caused ill-feeling between the accused and his mother and to some extent motivated his killing of her when one evening she locked him out of her hut. This factor, together with the finding that the accused was below the average standard of intelligence, was accepted by the jury as an extenuating circumstance.

In Bungweni's case[75] the accused believed a woman to be a witch and suspected her of working with the umpundula, the lightning bird, and with the tikalosh to undermine their health and cause illness and death to the accused and their families. The witch was to be despatched in a traditional way by firing her hut when she was inside it. The witch escaped, however, and a child was killed. In the case of the second accused, who was said to have participated to some degree under compulsion from the first accused,[76] extenuating circumstances were found. But no such circumstances were found in respect of the first accused, said to be the prime mover because he acted under no

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74) Supra. See also R v Padhla 1948(1) P H H87 (A D).

75) R v Bungweni (supra). See also R v Myeni (supra).

76) He was told by the headman that if he did not participate he would be falsely accused of the crime.

compulsion. This is questionable. It is clear there was no physical compulsion in the case of either accused. In the case of the second accused there was the psycho-moral compulsion of being falsely accused of the crime. In the case of the first accused, in spite of the accused's denial of a belief in witchcraft, the court considered that he wanted the witch destroyed "because you believed that she was a witch causing sickness and death to you and your family".[77] The court appreciated that a firm belief in witchcraft could provide extenuating circumstances but held against the accused the fact that instead of waiting to waylay the suspected witch and "hacking her to pieces in your frenzy, you, by calculation and persistence, obtained volunteers to assist you, and reckless of what the result was you fired the hut over her head and that of her innocent children".[78] This kind of objective reasoning may be a little out of touch with some African beliefs and customs. Firstly, calculation and persistence does not necessarily derogate from a degree of moral compulsion.[79] Secondly, as Harries wrote regarding the killing of twins: "Unless a wise judge appreciates the fact that no mere capricious whim but a compelling and irresistible superstition actuated the dastardly crime, it is likely that through his representation the supreme penalty will be enforced ..... it should be realised that not punishment but evolution, is going to stop

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77) Bungweni's case (supra), p.145.

78) Bungweni's case (supra), p.146.

79) S v Bradbury 1967(1) S A 387 (A D), p.407 - 407 and S v Hartmann 1975(3) S A 532 (C P D). See also E M Burchell and P M A Hunt, South African Criminal Law and Procedure, Vol. I, p.292.

it".[80] Furthermore, if the phrase "reckless of what the result was" was not loosely used by the judge but was pertinently derived from the evidence in the context of this type of murder then this might tend to weigh against the diminished moral blameworthiness occasioned by the belief and its resultant fear in the mind of the accused. If, however, the phrase was used as reflecting the apparent "recklessness" of the accused in pursuing his plans knowing that other persons were or might be in the hut but without the knowledge that there was some other opportunity to perpetrate the same deed without involving innocent victims then the question is a more difficult one. It is not a question of such recklessness as might be considered from an objective approach. All the relevant circumstances, customs, traditional beliefs and practices must be examined before such an imputation can be made. It will also be observed that the introduction of the element of "recklessness" with its normal objective basis derogates in some measure from the subjective approach and this must be entertained with caution in this type of setting.

In S v Dikgale[81] the appellant and another accused, the policeman of the headman, brutally beat and stabbed the deceased to death when he ran away from them when they were taking him to the headman on the latter's instructions. The deceased used to throw the "dolos"[82] and the accused believed him to be a witchdoctor who could invoke lightning. The trial court found that there were no extenuating

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80) op. cit., p.120.

81) 1965(1) S A 209 (A D).

82) Divining bones.

circumstances, the judge indicating that there was a great difference between cases where a person is believed to cause personal harm as a result of witchcraft and cases where superstitious persons believed the deceased could invoke lightning but where this has not hit them or any other persons related to them. The judge expressed surprise that people of normal intelligence could entertain such a belief.

In the appeal court, however, Holmes, J A[83] considered that the trial court had misdirected itself in saying that a belief in witchcraft could not be an extenuating circumstance unless the witchcraft caused harm to the accused or their relatives. The defence of the accused had been an absolute denial of any participation and, although they had not themselves said that they believed the deceased to be a dangerous sorcerer, there must have been evidence to this effect as even the trial court accepted that this was their belief. The appeal judge held that their belief that the deceased was a social evil and a danger to the community must be an extenuating circumstance.

It would appear as if this is the kind of case where the appeal court tends to use the equation, belief in witchcraft equals extenuating circumstances, which makes it a kind of automatic special finding. If this is to be so as a matter of policy then it were better that it be legislatively stated to be so. Short of this, however, which is unlikely to occur, but consistent with the approach in this thesis the evidence at the trial must show that the effect of such belief is to induce a fear or other substantial emotional or moral (according to their lights) influence or response which subjectively constrained the accused into feeling that the

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83) Dikgale's case (supra), p.214.

only way to rid themselves or society of this "evil" was to exterminate it.

The importance of this case, however, is reflected in the finding that extenuating circumstances can be found where the accused himself has not putatively suffered directly at the hands of the witch nor any of his family nor does he immediately fear such. The fact that the belief is to the effect that the witch is a general public evil is sufficient to found extenuating circumstances.[84]

In a number of cases[85] the evidence showed that the belief with its consequent fear was relative to past actions of the witch in respect of the accused, near relations or the general community but possibly with a continuing fear as to the present or future actions of the witch. Other cases indicate that the putative evil of the witch was feared as a present or future event.[86]

A case where possibly a degree of objectivity was applied in analysing the influence of the belief was that of R v Ncanana[87] although this is not a clear example as the factors

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84) See also R v Biyana (supra).

85) Such as Biyana (supra); Fundakubi (supra); Meyni (supra); Ncanana 1948(4) S A 399 (A D); Ndlovu 1970(1) S A 430 (A D); Mokonto (supra); and Nxele (supra).

86) Ndhlovu (supra); Malia 1972(4) S A 402 (T P D); Konkomba (1952) 14 W A C A 236 (Gold Coast); and Fabiona (1941) 8 E A C A 96 (Uganda). For these last two cases see Seidman, op. cit., Vol. 28 (1965), p.49 and 52. See also Collingwood, op. cit., p.170.

87) Supra.

motivating the murder were possibly twofold. The accused had procured the killing of the deceased because he had supposedly caused the death of the accused's parents by witchcraft and because he was sleeping with their wives. Schreiner, J A said:-

> "It is, I think, to be assumed that the trial court would have found extenuating circumstances if it had held that the applicant had procured the killing of the deceased because he was convinced that the deceased had caused the death of his parents and of his uncle by witchcraft. But the last-dying of these, the father, had died seven years previously and the court did not believe that this was the sole motivating factor or even that, after so many years, it operated at all to induce the applicant to instigate Ntsimini to commit the murder. It is not possible for this court to hold that the trial court was wrong in this view which seems to be in accordance with the evidence".[88)]

This delay does tend to weigh against the subjective bona fides of the relevant belief as being the sole motivating factor in the killing and against the urgency or compulsive nature of the fear engendered by the belief.

It seems in our practice, under this heading of witchcraft, that while the courts have in many if not most cases been prepared to accept the formula of "a belief in witchcraft" as an extenuating circumstance there does not seem in a number of cases to have been sufficient analysis of the resultant effects or components of such beliefs nor its play on the

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88) p.407.

mind of a person subject to African customs, way of life and standard of civilization.[89]

For instance, where there is a proven and credited belief in the present or future ability of a person by means of sorcery to harm gravely or to kill the person believing this or those near to him, is there not a degree of dread fear and uncertainty as to one's future good health and well-being akin to the fear of a man seeking to avert a physical evil with which he is faced? There is certainly not the same degree of immediate physical danger required to justify a defence of compulsion or necessity but there is in a sense a far more insidious and corroding fear easily likely to give rise to intense preoccupation and brooding such as is capable of being translated into the need or "compulsion" to eliminate this source of evil. All measures short of death will not achieve this. The authorities and the law of the land, both of which frown on this kind of superstitious belief, offer no assistance to the believer who is therefore thrown back on a form of self-help or "self-defence" in accordance with his beliefs and customs.[90]

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89) See, for instance, S v Malai (supra) - admittedly a circuit court case - where the defence counsel made no representations on extenuation for accused No. 2. He subsequently wrote to the Secretary for Justice urging certain aspects of extenuation and at the same time acknowledged that accused No. 1 was the real instigator of the crime. He did not recall at the time of the trial that accused No. 2 had consumed some liquor. Counsel explained that he was sick with influenza on the day of the trial and very hoarse. Is one permitted perhaps to doubt the adequacy of the canvassing of all relevant matters in a case which was based on African belief and custom and which certainly had the potential of a death sentence?

90) See, for instance, S v Ndlovu (supra), p.431.

While therefore it is difficult in the application of a civilized system of law to admit a putative belief of a superstitious nature as a basis for a defence of compulsion,[91] it seems clear that the fear of the evil resulting from such a belief can and should be recognised in a system of extenuating circumstances whether this be regarded as a form of delusion, erroneous belief or defect[92] or a strong influence on the mind affecting conduct or a form of quasi-compulsion or necessity.

Fundakubi' Case

The appeal court judgment in R v Fundakubi[93] raises a number of problems associated with extenuating circumstances and witchcraft and these will be discussed here. It appeared that for the ten years 1938 to 1948, in the Eastern Districts Local Division at any rate, the practice of treating a belief in witchcraft as an extenuating circumstance was apparently never departed from.[94] The jurisdiction of that court then covered the Transkei African area. It was probably that tendency of the courts which moved Pittman, J P in 1948, at the hearing of five cases at the Kokstad Circuit Court, to rule that a belief in and the practice of witchcraft should be excluded from those matters which a jury or court may take

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91) S v Goliath 1972(3) S A 1 (A D).

92) Biyana's case (supra). In Sudan Government v Abdullah 1959 S L R 1 the conclusion was drawn that an honest and reasonable mistake, namely that in striking the supposed witch one is not striking a human being, should be a defence - see Okonkwo and Naish, op. cit., p.112.

93) Supra.

94) Fundakubi's case (supra), p.815.

into account in considering whether there are extenuating circumstances. In none of the five cases were there any circumstances other than the belief in witchcraft which could have been regarded as extenuating circumstances and in each case there was expressly or impliedly a finding that the accused were actuated by a genuine belief that the deceased persons had brought about the death of members of the accused's families by witchcraft. The trial judge had indicated that were he able to regard a belief in witchcraft as an extenuating circumstance he would have imposed a comparatively light sentence of seven years imprisonment.[95]

Schreiner, J A, after indicating that the trial judge did not have the right in advance to exclude the consideration by the triers of fact of any circumstances as extenuating, went on to examine various circumstances which might one way or another influence the finding of a belief in witchcraft to be an extenuating circumstance.[96] This examination indicates that no hard and fast rule can be laid down and each set of circumstances must be left for decision by the triers of fact. If a rule were laid down it might be open to abuse and, even within circumstances which showed that a belief in witchcraft motivated the murder, there might be facts or considerations weighing against the finding of extenuating circumstances.

The learned judge categorised three classes of case where he felt it might not be unreasonable to hold that extenuating circumstances should not be found. These should now be examined.

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95) Supra, p.821.

96) Supra, p.817.

(a) The Witchdoctor

The first class of case is that in which a witchdoctor is involved in the homicide by incitement or participation because he is a "firm believer in the dark craft practised by him".[97] This appears in essence as a "pure" type of belief in witchcraft. It is probably unassociated with any threat of harm or death to the person of the witchdoctor acting as he does in an advisory or consultative capacity. It can well be argued, of course, that he may verily believe that he is acting in the best interests of the community which he serves or in which he practises. Against the general background of African belief and custom this is a fact which cannot be summarily dismissed or necessarily excluded but it would seem to be more difficult to justify extenuating circumstances in such a case than in the case where the accused suffered, is suffering or apprehends harm as a result supposedly of sorcery.

However, the door of extenuating circumstances must not necessarily be closed to the witchdoctor. If the courts are prepared to find extenuating circumstances regarding those who involve themselves in witchcraft homicide when their extenuation-interest is their belief that the deceased practised witchcraft to the general public evil,[98] taking into account the nature of African society and its close-knit bonds, then it is possible to find such to apply to a witch-doctor. It would depend on the facts which, it must be said, are not easily obtainable to place on record as evidence.

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97) Supra, p.819.

98) R v Biyana (supra) and S v Dikgale (supra).

(b) Unnecessary Cruelty

The second category illustrates circumstances which show that the accused used unnecessary cruelty in bringing about the death of the victim. Caution must be used here not facilely to accept this reasoning. The learned judge fully realised this as he hastens to point out[99] that mere multiplicity of wounds caused to the deceased is not of necessity proof of calculated cruelty.[100] A person who lives under the delusion of a belief in witchcraft might very well be seized with a fit of elemental self-preserving and vengeful fury in despatching his victim as might be compared in some measure with a person who is so severely provoked as completely to lose all self-control. The judge questioned further whether in one of the five cases with which he was dealing the jury were right in treating the killing, horrifying as it was, as a ground for rejecting the suggestion that extenuating circumstances were present.

It should also be borne in mind that according to African custom there are accepted ways of dealing death to a witch or sorcerer and in African society, as we have observed, there is a deep reverence for established customary procedures which are not easily departed from or questioned. For instance, it is accepted custom in certain areas to burn a sorcerer in his or her hut together with his medicines.[1]

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99) Fundakubi's case (supra), p.819.

100) In Bungweni's case (supra), p.146 the trial judge queried why the accused had not hacked the deceased to pieces in his frenzy instead of firing her hut.

1) See Hammond-Tooke, op. cit., p.279; R v Myeni (supra); and R v Bungweni (supra).

Junod[2] refers to the punishment for witchcraft among the Thonga in former times as being either by hanging or impaling or by drowning in the river if the wizard was in the habit of perpetrating his "murders" by sending crocodiles to kill his victims.

It is submitted that particularly in the witchcraft area no significance should be attached to the fact of the manner of death where such generally accords with accepted African belief and custom as far as is ascertainable. In cases where there is a departure from the accepted mode or no customary practice is ascertainable it is nevertheless submitted that no significant feature should be made of mere multiplicity of wounds or brutality or savageness where there is evidence of the underlying belief in witchcraft.[3] In cases of this kind, even where the action has the appearance of being coldly deliberate, it must of necessity be examined against the very pertinent background of the superstitious emotional fear of witchcraft and the outwitting of the witch as the driving force of the action. Where self-control or judgement suffers as a result of the strong emotional undercurrent to a killing, savagery and brutality in the killing tend more to favour diminished moral blameworthiness than otherwise.

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2) H A Junod, The Life of a South African Tribe, p.443.

3) While the results in the frenzied or fear-compulsive action in witchcraft and the anger-retaliation in severe provocation may be similar, the distinction may be in the fact that in witchcraft cases the actor desires death whereas in provocation, although the desire to retaliate and hurt is evident, death is not necessarily the desired end.

(c) The Effect on Conduct of finding Extenuation

The third category indicated by the judge where it might not be unreasonable to find no extenuating circumstances was stated by him as follows:-

> "It may be, I need say no more than this, that the jury (or court) would not be misusing its functions if it considered also the effect on conduct of holding that a particular circumstance was extenuating".[4)]

It is submitted that this is not a proper consideration for the court at the stage of considering whether there are extenuating circumstances. The requirement of the triers of fact is limited to the finding of facts associated with the act and relevant to the moral blameworthiness of the accused in the commission of the offence[5)] and other factors not falling within these limits should not be entertained when consideration is being given to extenuating circumstances.[6)]

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4) Fundakubi's case (supra), p.818.

5) Schreiner, J A in R v Taylor 1949(4) S A 702 (A D), p.717.

6) Compare R v Owen 1957(1) S A 458 (A D), p.462 and R v Roberts 1957(4) S A 265 (A D), p.270 - 271 where the court felt that general matters of sentencing policy such as the accused's good or bad character, his apparent reformability, his probable reaction to clemency, etc. should not be the concern of the triers of fact at the stage of extenuating circumstances but were rather matters for the judge in finally determining sentence. This would apply also to general deterrence.

(d) Involvement of Innocent Third Parties

The cases with which the learned judge was dealing in Fundakubi's case all resulted from a belief that the victims were causing the death of near relations of the accused. The judge left open two questions which arose from the facts of these cases. The first of these was that the facts tended to show a disposition to extend the range of destructive vengeance beyond the suspect to the spouse as well. It was indicated that there was insufficient material before the court for an expression of opinion on this matter.

While normally speaking the killing of the suspected victim might, from the point of view of extenuating circumstances, tend to lessen moral blameworthiness, the additional unnecessary killing of a believed innocent victim would be more difficult to justify in extenuation if it could be avoided in keeping with the African approach to such matters. Against the background of the present discussion this is a more difficult matter to determine or in which to lay down a definite approach.[7] It is admitted that the initial approach must be that the unnecessary or avoidable killing of innocent victims in the purging of supposed evil can with difficulty be taken as lessening moral guilt. But this must

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7) The affinity of these facts to those in R v Myeni (supra) and R v Bungweni (supra) where children were the innocent victims in the burning to death of the supposed witch in her hut is apparent. See also The King v Vilakazi 1969(2) P H H217 - a poison case. Compare Koza v R 1949(2) P H H172 (A D) where extenuating circumstances were found and Kuzwayo v R 1949(2) P H H109 (A D) where they were not found in respect of unintentioned victims in cases not concerning witchcraft. In S v Ndlovu (supra) extenuating circumstances were found in respect of the one victim but not in respect of his son who was accompanying him and was also killed even though Holmes J A may have found otherwise - p.435.

be examined in accordance with the African mind and the constraints of its belief and custom.[8] To the African mind a departure from the accepted way of dealing with witches might well have the effect of the whole endeavour aborting with possible disastrous results to the actor. In the case of the burning of witches' huts, for example, African females, particularly older ones, are often pointed out as witches and more often than not the older women sleep in their huts in the company of younger children. The actor is therefore placed in this dilemma: he must take the witch by surprise but she may well be in the company of others. To induce the others to leave the hut on the night selected for the burning will be regarded as something unusual enough to arouse the suspicions of the witch. And yet the fear of the activities of the witch and the need to eliminate her and her evil presses upon the actor. The result is likely to be that he acts believing that he does so for his own safety as well as the greater good.[9]

It seems therefore that in these cases the courts should avail themselves of the opportunity to be appraised of all the relevant facts and beliefs and customs; that the involvement of innocents should not be an absolute barrier to extenuating circumstances; and that caution be exercised in applying too fixedly the normal Western rationality to the

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8) For instance, the validity of the argument in Bungweni's case, see footnote 100, cannot be accepted.

9) In S v Nxele 1973(3) S A 753 (A D) Ogilvie-Thompson, C J, in a case of attempted murder on the basis of witchcraft, considered that the involvement of the innocent spouse of the supposed wizard, mainly motivated by the mere circumstance that she was the wife of the male complainant, might constitute something of an aggravating feature.

subjective aspect in these cases of apparent irrationality and custom.

(e) The Non-Intervention of the Witchdoctor

The other question left open by Schreiner, J A was stated in the following terms:-

> "In one of the present cases, R v Gqatini Mqobmeni, an overheard remark of a threatening character made by the victim's wife was enough to bring about his death, without the intervention on the part of a witchdoctor; it may be that in such a case there is less reason, than where it is shown that one or more witchdoctors were consulted, to hold that a genuine belief in witchcraft was the cause of the murder. One hesitates, however, to suggest a point of view that might inure to the benefit of so dangerous and evil a section of the community as the witchdoctors".[10]

With respect, the last sentence quite rightly gives a lead to the approach in this matter. In trying to stamp out witchcraft one can hardly make the finding of extenuating circumstances dependent upon the accused having consulted a witchdoctor in order that a valid basis may be supposed for a belief in witchcraft. But the answer is, I believe, to be found in the fact that, although the witchdoctor is the supposed repository of the power of divining or indicating witches and the causes of evil, he is not the sole possessor of the superstitious beliefs in witchcraft or the supposed knowledge as a result of which witchcraft may be imputed.'

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10) Fundakubi's case (supra), p.820.

To a varying degree such superstitious knowledge, fear and beliefs are the common property of all members of the community. African society is so structured that unusual actions, not conforming to customary norms, or remarks made particularly by an elder, which under the particular circumstances of these beliefs can be regarded as possessing implications of witchcraft and were understood so to be made, can give rise to action against the suspect. Particularly is this likely to be so when apparently inexplicable events like certain illness or death or bad harvests, etc. have smitten the community or the individuals involved. It would not appear to be morally unreasonable in this sort of situation to regard the subsequent conduct as less reprehensible than a deliberate killing unassociated with the belief in question.[11] It must be borne in mind that where superstition reigns the innocent or provocative word or act is so easily given a malevolent connotation.

DIFFERENTIAL TREATMENT OF ACCUSED IN EXTENUATION

It appears from judgments in witchcraft cases that findings on extenuating circumstances can differ in the same case in respect of different accused or in respect of the same accused regarding a different deceased. This arises primarily from differing personal mental circumstances of the accused as adjudged by the triers of fact.

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11) See also R v Mkize 1953(2) S A 324 (A D), p.328 - 329 and 330G and S v Mokonto 1971(2) S A 319 (A D).

In Bungweni's case,[12] in respect of the second accused, extenuating circumstances were found because he to a certain extent acted under the compulsion of a non-physical threat from the headman. In the case of the first accused, the prime mover, however, no extenuating circumstances were found notwithstanding the belief in witchcraft because innocent deaths were involved. In Malai's case[13] extenuating circumstances were found in respect of the first accused because he feared the evil influence of the deceased, a supposed witchdoctor, but were not found in respect of the second accused because the evidence did not reveal that he personally had a similar motive but rather that the first accused had enlisted his aid and he gave it. The judgment which deals primarily with a stay of execution does not reveal whether at the trial the motive of the second accused was adequately canvassed. For instance, was the affinity of African brotherhood and helpfulness one to another in difficulty enquired into? What was the reason for his being persuaded to help the first accused? Did the second accused believe he was assisting to eliminate a general public evil?[14]

In Ndlovu's case[15] the accused and two others, one a witch-doctor, killed the suspected wizard and his young son who happened to be accompanying him. The other two accused were sentenced to death but in respect of the appellant, the

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12) 1959(3) S A 142 (E C D).

13) 1972(4) S A 402 (T P D). See footnote 89 as to certain unsatisfactory features in this Circuit Court trial.

14) See R v Biyana 1938 E D L 310.

15) 1970(1) S A 430 (A D).

instigator, extenuating circumstances were found regarding the death of the father but not of the son because he had known that the son was with the father when the trap was set and there was time for reflection. When one reads of the lengths to which the appellant had gone to move the induna, the police and the Bantu Affairs Commissioner to redress the supposed wrong done to him, one can suppose him to be a little beyond rational reflection when he was so close to achieving his own justice. Indeed, Holmes, J A in the appeal court said:-

> "Had I been a member of the trial court I might have been pursuaded that there was a foundation of probability in all the foregoing, and that it could warrant a finding of extenuating circumstances".[16]

The reasonable mind quite rightly tends to feel that time for reflection on the involvement of an innocent provides opportunity for withdrawal from a morally unjustifiable act. On the other hand, it is not an easy matter morally to appraise the mind of an accused in a situation of cumulative frustration, grief and compulsive belief from the rationality of the armchair. It is clear from a number of cases discussed that the African mind placed in this type of situation is not easily repulsed by the moral contemplation of an extension of the deed to include possible innocents.

In regard to differing findings as to extenuating circumstances in cases of multiple accuseds, a factor to be borne in mind is the close-knit relationship of these communities. A tribe, kraal or family maintains a close pattern of communal living. The men of the tribe or

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16) Ndlovu's case (supra), p.435.

community, whether related by consanguinity or affinity or not, regard themselves as brothers of one another who are bound by kinship to assist one another in cases of general calamity or danger. Social solidarity or cohesion is a matter of no mean importance. A further feature which may exercise a potent influence is the authoritative hierarchy found in these communities. Though it might never appear in evidence that a headman or chief has given any instructions in any witchcraft murder it is a factor in the nature of these communities which cannot be discounted.[17] The difficulties of particular proof of matters of this nature are evident and many courts have felt that only half the story is before them on the evidence.[18]

It is submitted that if these factors are borne in mind or every attempt is made to solicit evidence on them as far as such is available and is given then where it appears that any particular accused, although not directly affected or threatened by the witch, joined in the killing of the witch supposedly for the general good of the community or where in the situation innocents were involved, this should receive serious consideration against the African background in

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17) R v Hamkoshi 1941 S W A 16, p.17 and R v Bungweni 1959(3) S A 142 (E C D), p.144.

18) See, for instance, the conjecture by the court in R v Radebe 1915 A D 96, p.97 and R v Bungweni (supra), p.145.

relation to extenuating circumstances[19] though it is admitted that this can with difficulty be justified by any Western mode of thought.

EXTENUATING CIRCUMSTANCES AND OTHER INDIGENOUS BELIEFS

As has been indicated in the first part of this chapter there arises for consideration as extenuating circumstances not only the beliefs of the African which are found in their superstitious beliefs in witchcraft and sorcery but also beliefs and resultant action thereunder which have their genesis in their general customary and less developed way of life. Here again, as a general rule, the courts have tended in the exercises of the discretion to impose punishment to regard such cases favourably from the point of view of mitigation, basing their approach on the lack of civilized development of the parties concerned and of their necessarily rigid adherence to their customary way of life. For instance, in cases such as the killing of one or both of twins or children born feet first or presenting some other abnormality or of an adulterer or homicide caught in the act or a nocturnal wizard found in one's homestead, the act of homicide was treated in tribes other than the Nguni as justifiable and no penalty attached to it. Among the Nguni a fine was to be paid to the chief.[20] The influence of

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19) There is no civilized legal logic in this submission but, on the other hand, it is doubted whether the appellant in S v Ndlovu 1970(1) S A 430 (A D) really appreciated the logic of differential extenuating circumstances in his case when the innocent killed was the flesh and blood of the wizard who was killed; in the same way as the appellant's innocent son, who had supposedly been killed by the witch, was his flesh and blood.

20) The Bantu Speaking Tribes of South Africa, ed. Schapera, p.210.

these deep-seated cultural circumstances should be regarded favourably as extenuating circumstances when a conflict of cultures gives rise to the potential of a death sentence. Again, not as a matter of a formula but by the isolation of the relevant factor underlying the need to act: fear, a form of cultural conformity, the breaking of which might putatively bring dire consequences.

The Eternal Triangle

In R v Mukeiruib[21] the accused, who was a Bushman living in a remote area not controlled by the authorities and under conditions of primitive development, was found guilty of murdering another Bushman who had taken the accused's wife and lived with her. There was a custom in certain of these remote regions that, in circumstances like this, one of the two men must meet his death at the hands of the other. The evidence showed that the accused was the aggressor in the killing and that the circumstances did not establish anything in the nature of self-defence but the triers of fact, taking the custom into account and the fact that as a result of it the accused's life was in danger unless he was the first to strike, found these circumstances constituted an extenuating circumstance which should seriously be considered in mitigation of sentence. Van der Heever, J[22] drew the comparison between these primitive Bushmen and our forefathers in Holland a couple of centuries ago who had a legally recognised custom of self-help in cases of suspected adultery. The learned judge pointed out that these Bushmen were much more primitive than the forefathers of whom he

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21) 1938 S W A 4.

22) Supra, p.5.

spoke and considered that a sentence of three years imprisonment would meet the justice of the case.

Absence of Crime-Consciousness

The facts in the case of R v Kgau[23] also took place in South West Africa and again Bushmen were involved. The accused who belonged to a very primitive group of Bushmen had, in an argument of a petty nature with the deceased, lost his temper and stabbed him to death. The group, among whom there was no custom of punishment of murderers, covered the body with branches and left the area and it was apparently by chance that the matter was reported to the authorities. The accused himself at the trial behaved in childlike and childish fashion and the learned judge remarked that apparently the accused did not appreciate the seriousness of his wrongful act. The court found on all these facts that the blameworthiness of the accused in this case of murder was very much less than is usually the case and therefore extenuating circumstances were found and the accused sentenced to three years imprisonment.

These two cases draw attention to what is virtually the one extreme of the standard of civilization in Southern Africa. Certain nomadic Bushman groups of South West Africa and the Kalahari have very infrequently or never been in contact with civilization or civilized people. They live a life almost as close to nature as has ever been lived by man. Kgau's case particularly, as indicated by the learned judge,[24] reduces almost to farcical level the application of civilized

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23) 1958(2) S A 606 (S W A).

24) Supra, p.607.

standards of law to primitive peoples. For Kgau and his group the visit to Windhoek was the novelty and the court case apparently an unnecessary incident.

The question arises whether in the light of de Blom's case[25] the accused would today have been found not guilty. In this case which dealt with a statutory offence under the Exchange Control Regulations Rumpff, C J indicated that at this stage of our legal development it must be accepted that the cliché "every person is presumed to know the law" and the statement "ignorance of the law is no excuse" cannot co-exist with or be legally applicable in the current concept of intention.[26]

If, in regard to the two cases of Mukeiruib and Kgau referred to above, Blom's case were to have been applied, Kgau's case is the one most likely to have given rise to a finding of the absence of a knowledge of the wrongfulness of the act and therefore of the required dolus. It is submitted, however, that it is likely that Blom's case would be distinguished were a similar set of facts to those in Kgau's case to arise today. In Kgau's cultural group homicide was left unpunished and was therefore presumably not regarded as wrongful. However, the taking of a life is probably notoriously regarded as a wrong. If this were found not to be so then substantively an accused might escape conviction and the question of extenuating circumstances would not arise. If Blom's case were to be distinguished then the question of extenuating circumstances becomes relevant and, it is submitted, proper for application.

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25) 1977(3) S A 513 (A D).

26) p.529.

Tribal Authority

In R v Hamkoshi[27] a native accused, nineteen years of age, was found guilty of murder. The evidence indicated that he had acted under the influence of his uncle who according to the customs of the tribe was entitled to exercise complete control over the actions of nephews. In the tribe to which the accused belonged succession was matrilineal and the most important person in the family group or etapa was the maternal uncle. An order given by the maternal uncle to his maternal nephew had to be obeyed and the father's authority was subservient to that of the maternal uncle. In this case the maternal uncle, Netope, refused to accept eight cattle in payment of compensation for the accidental killing of one of his family - he wanted retribution in the form of a life for a life and instructed the accused to shoot the deceased with a bow and arrow. The accused carried out the instruction against his will as he had tried to remain on friendly terms with the opposing faction. Hoexter, J in his judgment[28] said that, taking into account the motivation of the killing and the customs and morality of the accused against the background of his social circumstances, his dependence and subservience to his uncle was a fact associated with the crime which served in the minds of reasonable men to diminish the moral guilt of the accused in sufficient measure to be regarded as an extenuating circumstance and he sentenced the accused to imprisonment for seven years. It may also have been possible to base extenuation in this case on a degree of compulsion inherent in the customary belief. This was probably implicit in the judgment.

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27) 1941 S W A 16.

28) Supra, p.19. Compare S v Ngidi 1975(1) P H H20 (A D).

EVIDENCE

Before closing this chapter on witchcraft and African beliefs in relation to extenuation mention must be made of the difficulty facing the accused, his counsel, the triers of fact and the judge in cases where this provides the backdrop for homicide among the African people. The difficulty has already been hinted at and it is the problem of obtaining evidence generally either to form the background to the case or to provide specific evidence on which the defence would be able to make substantial submissions regarding extenuating circumstances.

With the advent of European civilization and control in Southern Africa the chiefs and the people have been deprived of their right to kill or punish sorcerers and furthermore, in an endeavour to stamp out the practice of witchcraft and its attendant malevolent consequences, measures have been introduced under which the imputation of sorcery against any person is made a punishable offence.[29] The Witchcraft Suppression Act, 1957[30] provides for the suppression of the practice of witchcraft and similar practices. Offences are created for imputing supernatural power to naming or indicating any other person as a wizard; professing or pretending to use any supernatural power; employing or

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29) Schapera, Handbook of Tswana Law and Custom, p.276 and Hammond-Tooke, op. cit., p.291.

30) No. 3 of 1957. The list of laws repealed by this Act include portions of the Bantu Territories Penal Code No. 24 of 1886 (Cape) and Proclamation No. 11 of 1887 (Zululand) which contained similar provisions to those mentioned here, Law 19 of 1891 (Natal), the Witchcraft Suppression Act 2 of 1895 (Cape) and the Crimes Ordinance No. 26 of 1904 (Transvaal).

soliciting any witchdoctor to name or indicate any person as a wizard; professing a knowledge of or advising any person on witchcraft or the use of charms; using or causing to be put into operation any means or process which, in accordance with advice or his own belief, is calculated to injure or damage any person or thing; and for gain exercising or using any kind of supernatural power, witchcraft or divination. The penalties which may be imposed range from twenty years imprisonment, where death has resulted from certain activities, to a fine of two hundred rands or two years imprisonment for the lesser offence of acting for gain.

Hammond-Tooke has indicated quite rightly that this type of measure has not eliminated the practice and "the society has now to deal with a deadly, and to it, very real fifth column without the controls and sanctions which it formerly had at its disposal".[31] He indicates that the conflicts in African society which he ~~had~~ and Marwick maintain give rise to the practice of witchcraft and sorcery are still present in society and, indeed, are on the increase the more their society is drawn within the influence of Western civilization.

The difficulty then in obtaining adequate and satisfactory evidence which might be vital in mitigating the conduct of a particular accused, certainly from the participants themselves, is evident. The accused in witchcraft cases often tend to record either a plain denial or an alibi and more often than not it is only in the case for the State that one comes across the suggestion of the background of witch-craft in the case. This evidence is often led to suggest or prove a motive and is in many cases of an unsatisfactory or inconclusive nature, certainly from an extenuation point of

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31) op. cit., p.291.

view. Certainly it is only on rare occasions that an accused gives or leads this kind of evidence.

It seems therefore that in this type of case the accused and the court are at a disadvantage in comparison with many cases such as those involving psychopathic or intoxicated accused. These latter have the opportunity, of which they certainly avail themselves, to lead specialised medical evidence as to their mental condition and make-up or the probabilities of the case and are more favourably placed for the consideration of extenuating circumstances than is the African accused of a witchcraft murder. It is not illegal to plead psychopathology or intoxication but it is to plead witchcraft and this, possibly with a feeling that such evidence will not be adequately appreciated by the court, might well condition the approach of the African to a trial for witchcraft homicide.

It is surely not out of place for evidence to be given by an anthropologist, acquainted with the African beliefs and customs of the particular community, in the absence of other suitable evidence as to the nature and effect of these beliefs. It does not appear from the reported cases that this has been done. It would certainly assist the court in an appreciation of the issues facing it.

CONCLUSION

(a) This chapter permits of the following conclusions: It is shown that the putative malicious use of witchcraft gives rise to a great dread and fear in the minds of superstitious people brought up in a milieu fostering or permitting such beliefs. These beliefs show no substantial signs of attenuation

because of Western cultural contact. Although it appears that most witchcraft or similarly motivated homicides occur in predominantly African territories, there have been cases where these do concern Africans living in an urban environment. Constitutional independence is not seen as easily solving or eliminating this blight in African or urban areas. It cannot be said that the deterrent effect of the death penalty has succeeded in eliminating these superstitious practices.

(b) Witchcraft has not been accepted as a defence to murder.

(c) We have observed the factors indicating a basis for mitigation of conduct generally in these cases as:-

(i) the recent history of tribally recognised ritual and witchcraft homicides and homicides consequent upon superstitious beliefs and customs;

(ii) the lack of the civilized insight, beliefs and self-control normally appreciated by Western peoples and criminal justice systems; and

(iii) the fact that action is taken in a state of superstitious fear or compulsive belief or with "heftige gemoedsbewegings" against the background of social beliefs and customs less developed according to Western criteria.

These factors fall within the general background and personal mental categories of extenuating circumstances.

(d) In these cases particularly the subjective test of the accused's state of mind is more important than the objective test of the factual basis for such state of mind.

(e) In a number of cases the beliefs, customs and morality of the accused in his social setting have been taken into account as a factor associated with the commission of the crime and as providing evidence for a finding of extenuating circumstances. An attempt by the trial court in Fundakubi's case to adopt a stricter approach did not succeed and the appeal court concluded that a belief in witchcraft does materially bear upon the accused's blameworthiness.

(f) Certain dicta in Fundakubi's case have been examined and, in regard to the questions of "unnecessary" cruelty and the effect on conduct of finding extenuation, a different view has been expressed, namely that these should not (the last absolutely and the former relatively) be taken into account in the consideration of extenuating circumstances. Other problems such as the involvement of witchdoctors or the concurrent killing of innocents are more difficult moral issues which should be carefully examined against the total background of African beliefs, customs and manner of acting but extenuating circumstances should not necessarily be excluded.

(g) The former High Commission Territories legislative provision requiring the court to consider the standards of behaviour of an ordinary person of the class of the community to which the convicted accused belongs, in considering the question of extenuating circumstances, was a welcome legislative step forward. This deserves consideration by the newly formed independent African States if they seek to apply a system of law based on those of the Western world.

(h) The need has been illustrated for far more care to be taken than seems apparent from the reports, both by counsel and trial courts to seek evidence and appropriate understanding of the background beliefs, superstitions and customs where it is apparent that the death sentence is in issue. If necessary, suitable anthropological evidence should be canvassed to establish the influence of these beliefs upon the persons concerned.

(i) It must be clearly appreciated that it is not so much the "belief in witchcraft" as a formula which founds extenuating circumstances because any other strange belief short of a delusion might be said to do the same. It is the influence of all the effects of that belief on the mind and action of the accused against the complete background of his customary way of life and mental attitudes which provides the subjective factors which must be considered for extenuating circumstances and which should generally result in a favourable finding and a sentence less than death.

CHAPTER - VII

OTHER EXTENUATING CIRCUMSTANCES

INTRODUCTION

We have examined in some detail two sets of circumstances which have provided testing points for the practice of extenuating circumstances, namely psychopathology and witchcraft or primitive beliefs and customs. Both of these are relevant to the broad categories of personal background and mental circumstances. We have also examined the more common mental circumstance of intoxication. The method in this procedure of extenuation, which is related only to the sentencing function, has been to attempt to integrate more closely the assistance to be given by the medical, psychiatrical and social science with the categories of circumstances which may come up for consideration as extenuating circumstances. The substantive legal concepts of wrongfulness, intention, responsibility and onus of proof, for example, are relevant and must naturally have full sway up to the point of verdict. The question of sentence, however, particularly when this involves the potential of the ultimate sentence, if not also at other times, while governed by general legal rules, should, it is submitted, admit of wider considerations related to available knowledge and understanding and not be tested only against the frame of reference of the legal concepts used prior to verdict; this, if it is sought to meet most of the objects of punishment which in the main are philosophical or social rather than legal concepts per se.

Burchell and Hunt[1] list thirteen headings of factors by nominal description as being some of the factors which have been considered as possible extenuating circumstances. In this list there is no logical grouping or relating of the factors.

Loubser[2] has sought to relate extenuating circumstances insofar as they indicate -

(a) reduced criminal imputability (e.g. youth, mental condition, intoxication, provocation, compulsion, belief in witchcraft or primitive level of development);

(b) a lesser degree of intent related to foreseeability of death (e.g. lack of premeditation, dolus eventualis); and

(c) a lesser degree of intent related to appreciation of unlawfulness (e.g. superior orders, exceeding bounds of self-defence, consent and euthanasia).

While this type of categorisation, i.e. further grading of criminal imputability or intent, does have a certain merit as deriving from the known substantive legal concepts applicable in determining guilt and may be of assistance in dealing with certain factors in relation to extenuation, it does lead to

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1) E M Burchell and P M A Hunt, South African Criminal Law and Procedure, Vol. II, p.362 - 366.

2) M M Loubser, "Versagtende Omstandighede by Moord: Die gradering van skuld", (1977) 40 T H R - H R, p.333.

the very type of problem which that writer poses,[3] namely, what sort of yardstick determines whether guilt is diminished so as to afford the trial judge a discretion as to sentence in murder cases. This was discussed above.[4]

In this thesis, however, an attempt will be made rather to classify factors in as broad groupings as possible under the categories suggested in Chapter III,[5] namely, personal background, mental, situational and consequential circumstances. These, and the factors discussed in their groupings, are, it is submitted, as a whole orientated more pertinently -

(a) to dealing with the accused in the sentencing function;

(b) to the accused person in the commission of the offence; and

(c) to the factors of mental influence, reason for or excuse - content of conduct rather than any diminution from substantive legal categories.

One must, however, be mindful of the caution against detailed inflexible categorisation which may tend to lead to an undesirable rigidity of approach. It must also be borne in mind that a number of circumstances may quite suitably be dealt with under more than one category, depending on the point of view or the emphasis of the evidence. For instance,

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3) Loubser, op. cit., p.340.

4) Chapter III, p.125 et seq.

5) p.122.

evidence indicating something described by the words "provocation", "jealousy", "revenge" or "sense of injustice" may fall under a general heading of "motive" or "emotional reaction" or "putative moral justification". Again, some of the discussion which proceeds under the heading of "situational circumstances", might well be brought under the various headings under "mental circumstances". In this chapter South African case law will therefore be discussed under the various broad and subsidiary headings to exemplify the approach of the courts and the purpose of this thesis remains to keep the consideration of extenuating circumstances on an open-ended basis to allow a dynamic society-related growth pattern in the sentencing function rather than to crystallise in formal legal categories.

I PERSONAL BACKGROUND CIRCUMSTANCES

YOUTH

According to our law, a child under the age of seven years is irrebuttably presumed to be doli incapax and cannot therefore be charged with the crime of murder.[6] Between the ages of seven and fourteen years a child is also presumed to be doli incapax but the presumption may be rebutted by evidence which shows that he knew his act was wrongful in the circumstances of its commission and probably that it was morally wrong.[7] From the age of fourteen years a person is regarded in criminal law as having the status of an adult but his youth may act

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6) Burchell and Hunt, op. cit., Vol. I, p.185.

7) Burchell and Hunt, op. cit., Vol. I, p.188 - 189.

in mitigation of his sentence.[8] These age limitations have come down to the present day from early legal history and appear to be accepted in most Western legal systems.[9] The emphasis for the determination of imoutability appears to have been primarily on the intellectual ability to distinguish between right and wrong[10] and such factors as maturity of judgement or control or reformability appear to be related to mitigation of sentence particularly in respect of offenders in the fifteen to eighteen year old group regarded perhaps as a transitional stage.[11]

There has been a trend, however, in modern systems of criminal justice to differentiate between juvenile and adult offenders in court proceedings and manner of treatment.[12] In regard to the dealing with juvenile offenders, section 290 of the Criminal Procedure Act, 1977[13] recognises other forms of treatment than punishment for offenders under the age of

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8) Burchell and Hunt, op. cit., Vol. I, p.191. Roman-Dutch law appeared generally to recognise a judicial discretion in respect of minors who had committed crimes, in some cases only less serious crimes, to mitigate punishment where normal maturity or understanding had not been reached by the accused: Voet, Commentarius ad Pandectas, 48.19.7; Moorman, Over de Misdaden, Inleid., 2.7.11; van der Linden, Rechtsgeleerd, Practicaal en Koopmans Handboek, 2.6.13. This was recognised in certain early cases such as R. v. Sinnah, 10 H.C.G. 387; R.v. Jantjies, 1908, E.D.C. 382.

9) O Nyquist, Juvenile Justice, p.113 et seq.

10) Nyquist, op. cit., p.120.

11) Nyquist, op. cit., p.122.

12) Nyquist, op. cit., p.158; S Rubin, Crime and Juvenile Delinquency, p.83.

13) No. 51 of 1977.

eighteen years upon conviction for an offence. Sub-section (3) furthermore provides that, other than in a conviction for murder where no extenuating circumstances are found, the court may, instead of imposing punishment, order that an accused be placed under the supervision of a probation officer or sent to a reform school. There is clear recognition here of the rationale for differentiating between youthful and adult offenders, namely, the elimination of the stigma or detrimental effects of criminal procedures, the need for special treatment measures and the greater likelihood of reformability.[14]

In the case of murder and the involvement of the death penalty where the accused was, at the time of the commission of the offence,[15] under the age of eighteen years, the trial court has an absolute discretion to impose any sentence other than death.[16] This discretion can be exercised whether or not the triers of fact have found extenuating circumstances. It would nevertheless be desirable, for the purpose of fully informing itself prior to sentence, for the court to allow the triers of fact to give their opinion as to extenuating circumstances. In respect of an accused over the age of eighteen but under twenty-one years, where extenuating circumstances are found, the court has a discretion, instead of imposing punishment for the offence, to order that the accused be placed under the supervision of a probation

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14) Nyquist, op. cit., p.160.

15) R v Gideon, 1951(2) S A 60 (S R), p.61;
R v Rainers, 1961(1) S A 460 (A D), p.462 and 465.

16) Section 277(2), Criminal Procedure Act, No. 51 of 1977.
On the Appeal Court's power to interfere, see
S v Pietersen, 1973(1) S A 148 (A D) and
S v Maimela, 1976(2) S A 587 (A D).

officer or be sent to a reform school.[17] This may not be done, however, where no extenuating circumstances are found.

(i) Early Extenuation Cases

In R. v. Hugo,[18] Schreiner, J. in examining some general factors had said:

> "In fixing the age of sixteen as the age below which an accused may be sentenced to other than the death sentence the legislature has I think settled the limit of extenuation based on youth and nothing else. But youth and extreme old age may be material in conjunction with other factors. Once, however, you are dealing with an adult of normal faculty the fact that he is rather young or rather old can hardly be an extenuating circumstance".

The age at which the court was not legally required to impose the sentence of death was raised in 1959 from sixteen to eighteen years.[19] This would appear to be legislative concession to youth as a factor of mitigation.

On a logical basis it can hardly be argued that the attainment of eighteen years of age immediately and without more eliminates the reasons for the legislative exclusion of those under eighteen years of age from the mandatory death sentence. But the law must draw the line somewhere even though it cannot attribute to persons an overnight maturation

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17) Section 290(3), Criminal Procedure Act, No. 51 of 1977.

18) 1940 W L D 285, p.286.

19) Section 25 of the Criminal Law Amendment Act, No. 16 of 1959.

in moral responsibility. On this ground alone it might well be argued that youth, proximity to the age of eighteen years though past it, might properly, and indeed on its own, require consideration as an extenuating circumstance. Earlier cases since 1935 hesitated to go as far as this. In Padhla v. R.[20] the Appellate Division was not prepared to say the Native High Court had erred in not finding extenuating circumstances in the appellant's age and the fact that he had no previous convictions, and in Nobanda v. R.[21] Hall, J., in a brief note of the case, is reported to have found that youth is not an extenuating circumstance but a matter for the Executive. In R. v. Samson,[22] the trial judge felt that the youth of the accused alone was not an extenuating circumstance but, taken with his background and his account of what had happened, the triers of fact found the presence of extenuating circumstances.

In the years following Mohlobane's case[23] in 1969 there have been a number of Appellate Division judgments on the question of youthful immaturity as an extenuating circumstance and these clearly show that the appeal court is attempting to place this factor in proper perspective and to lead trial courts away from too narrow a view. In the course of this traverse, however, the appeal court has become involved in a concept of "inherente boosheid". Both of these aspects will now be discussed.

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20) 1948(1) P H H87 (A D). No age was given in the report.

21) 1950(1) P H H72 (G W L D). No age was given in the report.

22) 1959(1) S A 893 (C P D), p.894.

23) S v Mohlobane, 1969(1) S A 561 (A D). See also S v Whitehead, 1970(4) S A 424 (A D).

(ii) Immaturity of Youth

Besides the legal age limits indicated above and besides any general psychological evidence of the aspects of immeturity evident in youth, there are numerous dicta indicating judicially evident elements of immaturity in youth up to about the age of majority. Among these are:

> "... a youth of 20 years is no child, yet he cannot reasonably be expected to show the same stability of character, responsibility and self-restraint as a fully mature man".[24)]

> "Jeugdigheid is inderdaad 'n faktor wet 'n hof in aanmerking moet neem wanneer 'n vonnis gevel moet word. Of jeugdigheid 'n versagtende omstandigheid is, sal in elke geval van die feite en ook die aard van die misdaad afhang, maer, in die algemeen gesproke, sel 'n Hof 'n onrype jeugdige nie met dieselfde meat meet nie as 'n volwassene".[25)]

> (In regard to the discretion in respect of accuseds under 18 years of age) "Klaarblyklik is die rede daarvoor die algemene menslike ervaring en kennis dat jeugdigheid onvoltooidheid beteken, 'n persoonlikheid beteken wat nog nie ryp geword het nie, 'n persoonlikheid waarven al die espekte wet kenmerkend van die volwasse is, nog 'of afwesig is' of slegs gedeeltelik aanwesig is soos bv. insig, oordeel, selfbeteueling en ook verantwoordelikheid

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24) Per Colman, J in S v Khumalo, 1968(4) S A 284 (T P D), p.285.

25) Per Rumpff, J A in S v Mohlobane, 1969(1) S A 561 (A D), p.565.

teenoor die medemens".[26]

"In die eerste plek is jeugdigheid in sigself 'n versagtende omstandigheid. Dit is deel van ons gemene reg. Die Wetgewer het weliswaar bepaal dat die doodvonnis verpligtend is wanneer iemand van 18 jeer of ouer 'n moord pleeg, behalwe wanneer daar versegtende omstandighede bestean, meer die diskressie om jeugdigheid as versagting te beskou is nie weggeneem nie".[27]

"Wet die probleem van versagting betref, behoort na my mening tienderjariges in die algemeen as onvolwasse beskou te word en derhalwe geregtig op versagting, tensy die omstandighede van die seak van so 'n eard is dat 'n Hof homself genoop voel om die doodvonnis op te lê. Vanselfsprekend is daar grade van volwassenheid by tienderjariges, maar uiteraard het geen tienderjarige die rypheid van 'n volwassene nie. Jeugdigheid is onvolwassenheid, gebrek aan lewenservaring, onbesonnenheid en veral 'n geestestoestand van vatbaarheid vir beïnvloeding, verel deur volwessenes. En 'n persoon van 18 of 19 jear is, volgens my mening, onvolwasse ..... Om jeugdiges, sonder meer, met die dood te straf, is om die jeugdige met die meat te meet wearmee 'n rype

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26) Per M T Steyn, J in S v J, 1975(3) S A 146 (O P D), p.158.

27) Per Rumpff, C J in S v Lehnberg, 1975(4) S A 553 (A D), p.560. He then quotes from Voet, Commentarius ad Pandectes, 48.19.7.

volwassene gemeet word".[28]

These dicta in recent years have made abundantly clear the judicial recognition of youthful or teenager (tienderjarige) immaturity in contrast to normal adult maturity as involving the following components:

> not the same stability of character, responsibility and self-restraint;
>
> absence or only partial presence of aspects of adult personality such as insight, judgement, self-control and sense of responsibility vis-a-vis fellowmen; and
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> deficiency in life-experience, thoughtlessness and a potential for being influenced by others.

These characteristics certainly evidence a wide base for differentiating youthful offenders from adult offenders where one or more of such characteristics can be shown to be present in an accused in the commission of a crime. There are general background aspects such as character instability and lack of insightful responsibility and judgement as well as particular aspects flowing from these such as thoughtlessness, immature self-control and potential for influence by others.

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28) Per Rumpff, C J in S v Lehnberg, (supra), p.561. See also S v Matabane, 1975(4) S A 564 (A D).
S v van Rooi, 1976(2) S A 580 (A D), p.584 - 585;
and S v Maimela, 1976(2) S A 587 (A D).

In cases of youthful offenders charged with murder it is necessary for the court to be informed of the personal and domestic background, educational level, work history, degree of intelligence and other evidence relevant to mental faculties of the accused to enable it to be in a position to adjudicate on "so 'n lewensbelengrike vreegstuk" as extenuating circumstances in the punishment for murder.[29] The brutality or gruesome nature of the murder must not necessarily be allowed to outweigh other proper consideretions.[30] Account must be taken of gang influence where this is the case[31] but, on the other hand, in testing the maturity of a youthful accused or the influence which another may have over him, the question must not be put in the form "whether he was incapable of resolving his position except in the manner in which he did" or "it has not been proved that the accused was so immature that he could not exercise the normal judgement or control his conduct".[32] This is to set the test too high. The question is rether whether the influence of others has disturbed judgement or emotion and resultant control.[33] But this is an overlay to youthfulness which itself is an extenuating circumstance.[34]

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29) S v Mohlobane, (supra), p.567 and S v van Rooi, (supra), p.585.

30) S v Petrus, 1969(4) S A 85 (A D), p.92; S v Lehnberg, (supra), p.561; S v Matabane, (supra), S v Maimela, (supra), p.592; S v Maarman, 1976(3) S A 510 (A D); and S v Mapatsi, 1976(4) S A 721, p.724.

31) S v van Rooi, (supra), p.584; S v Jansen 1975(1) PH H14 (AD).

32) S v Lehnberg, (supra), p.558 and 560.

33) Lehnberg's case, (supra), p.562.

34) Lehnberg's case, (supra), p.560 and S v van Rooi, (supra), p.584.

Furthermore, in a case involving liquor and youth as possible extenuating factors, or gang influence and youth, the question is not to be posed in the form that "he well knew what he was doing"[35] or "he was old enough to know well enough what was going on".[36]

In the eight years after Mohlobane's case[37] in 1969, of the Appellate Division's reported cases dealing with youthful offenders for murder, one was remitted for age and extenuation determination,[38] five death sentences were confirmed[39] and in seven there was a reduction of sentence, six having involved the death sentence.[40] A reading of these cases may well lead to a conclusion that, beyond the statement of the broad basic principles indicated above, the determination of extenuating circumstances in cases of youthful offenders is occasioning trial courts some difficulty. Some of this was caused probably because the strength of the Appellate Division's emphasis on youth as an extenuating circumstance in Mohlobane's case was not

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35) S v Hlongwana, 1975(4) S A 567 (A D), p.571.

36) S v van Rooi, (supra), p.585. S v Maseko, 1978(2) PH H222 (A D).

37) 1969(1) S A 561 (A D). In a sample of SALR cases only.

38) S v Mohlobane, 1969(1) S A 561 (A D).

39) S v Petrus, 1969(4) S A 85 (A D); S v Melinda, 1971(1) S A 798 (A D); S v Pietersen, 1973(1) S A 148 (A D); S v Maarman, 1976(3) S A 510 (A D); and S v Ceaser, 1977(2) S A 348 (A D).

40) S v Lehnberg, 1975(4) S A 533 (A D); S v Matabane, 1975(4) S A 564 (A D); S v Hlongwana, 1975(4) S A 567 (A D); S v van Rooi, 1976(2) S A 580 (A D); S v Maimela, 1976(2) S A 587 (A D); and S v Mapatsi, 1976(4) S A 721 (A D). The seventh case was S v Whitehead, 1970(4) S A 424 (A D) where a sentence of twenty-two years was reduced.

adequately appreciated but also, probably, because of the introduction of the idea of "inherente boosheid" which might weigh against the finding of such circumstances.

(iii) "Inherente Boosheid

This concept made its appearance in our law on extenuating circumstances in the reconsideration of youth as such in Mohlobane's case[41] when Rumpff, J.A. was examining some of the Dutch authorities.[42] In S v Lehnberg[43] the same judge, then Chief Justice, said:

> "Weens hierdie oorwegings is ek van mening dat die doodstraf alleen dan op 'n tienderjarige, wat 'n moord gepleeg het, opgelê behoort te word, indien dit werklik blyk dat hy uit inherente boosheid gedood het ..... Dit beteken alleen dat 'n tienderjarige prima facie as onvolwasse beskou word en op daardie grondslag versagtende omstandighede

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41) 1969(1) S A 561 (A D), p.566. The decision turned on the proper determination of age.

42) The words "boos opzet" and "opzettelijke boosheid" were used by van der Linden in Rechtsgeleerd, Practicaal en Koopman's Handboek, 11.1.13 quoted by the learned judge but similar phraseology does not appear in Moorman, Over de Misdaden, Inleid. II or Voet, Commentarius ad Pandectas, 48.19.7 where different kinds of expression are used to indicate the approach to more leniency in sentencing youthful offenders such as "hazards of youth" (Voet, op. cit., trans. Gane) and "aen des Rechters bescheidentheid staet" and "dat de sachtheit met de rechtvaerdigheit niet strydigh is" (Moorman, op. cit.).

43) 1975(4) S A 553 (A D), p.561, my underlining. The term was referred to again by Jansen, J A in S v Maimela, 1976(2) S A 587 (A D), p.592.

bevind kan word tansy dit blyk dat die boosheid van sy daad sy onvolwassenheid uitskakel. Veral sou jeugdigheid van 'n tienderjarige as versagting geld, indien ander faktore weens sy jeugdigheid sy persoonlikheid beïnvloed het".

In S. v. Mapatsi,[44] Rumpff, C.J. explains the words underlined above as follows:

"Die uitdrukking in die uitspraak van die Lehnberg-saak 'tensy dit blyk dat die boosheid van sy daad sy onvolwassenheid uitskakel' is nie 'n korrekte weergawe van wat die bedoeling was nie, indien na die samehang van die uitspraak in sy geheel en na vorige beslissings van hierdie Hof gekyk word, en die uitdrukking kan klaarblyklik tot misverstand lei. Moord is altyd 'n bose daad en wanneer oorweeg word of die jeugdigheid van 'n beskuldigde nie as versagting kan dien nie, moet nie alleen die aard van die daad oorweeg word nie, maar ook die motief waarmee die daad gepleeg word, die persoonlikheid van die beskuldigde en ander relevante faktore wat in 'n besondere geval mag te voorskyn tree, om vas te stel of die dood gepleeg is uit inherente boosheid van die beskuldigde".

Miller, J.A. in S v Ceasar[45] further tries to throw some light on the question of "inherente boosheid" when he says:

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44) 1976(4) S A 721 (A D), p.724.

45) 1977(2) S A 348 (A D), p.353, my underlining.

> "A finding that a person acted from inner vice in the commission of a crime does not imply that he has manifested vicious and wicked propensities throughout his life; nor is a long history of wickedness necessary to such a finding. Primarily the question in any given case (i.e. with reference to youth as an extenuating circumstance) is whether the crime in question stemmed from the inner vice of the wrongdoer, whether he be a first offender or one with many previous convictions. It is in order to answer that question that the Court will examine, and take into account as indiciae, the wrongdoer's motive, personality and mentality, past history and whatever else is relevant to the inquiry. And, of course, it will take into account the nature of the crime and the manner of its commission ..... The concept of inner vice as the genesis of a grave crime committed by a youth throws into proper contrast the case of a crime (perhaps equally dastardly) committed by another youth who has, largely because of his youth and its attendant degree of inexperience, acted in response to outer influence; e.g. under the pressure or stress of intense emotions induced by another (cf. Lehnberg's case) or under the direct or indirect influence of one older than himself, or under circumstances which to him, because of his youth and inexperience, were provocative or emotive".

This certainly does attempt to explain the application of the concept as being an assessment of the vice of the accused manifested in the crime itself and not particularly to "inherent vice" as demonstrated in a past course of conduct. Rumpff, C J. in Lehnberg's case indicated as much in the

phrase underlined above: "die boosheid van sy daad" but in explaining this phrase in Mapatsi's case he refers to all the considerations "om vas te stel of die dood gepleeg is uit inherente boosheid van die beskuldigde".[46] If the "inherent vice" is that of the accused himself then this approach smacks of, or is capable of proceeding along the lines of, a form of determinism which Rumpff, C.J. was naturally reluctant to allow into consideration of the case of the psychopath.[47] And this notwithstanding the elaboration of Miller, J.A.[48]

Where does this concept lead us then? One has first of all the statements of principle that youth is in itself en extenuating feature and such accused are not to be assessed as one would an adult. Various factors have been isolated as indicating immaturity over a broad field.[49] However, in assessing whether the immaturity of youth is to be ruled out of consideration as an extenuating circumstance, the historic Dutch concept of "inherente boosheid" is introduced and this is determined by consideration of the same sources which are to be considered in initially determining the existence of extenuating circumstances in cases generally,

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46) 1976(4) S A 721 (A D), p.724, my underlining.

47) See S v Lehnberg, 1975(4) S A 553 (A D), p.559.

48) The underlined portions quoted from his judgement indicate factors of influence, provocation or emotion which have been held to apply to extenuating circumstances in the cases of adult offenders. Is this not just saying that in addition to youth a youthful offender's case must demonstrate some other extenuating circumstances for such to operate in contradistinction to "inherente boosheid"?

49) These factors do not include youthful "boosheid" or the reasons for it.

namely, the nature of the deed, motive, personality and other relevant factors; these factors now being used to find, possibly, that there are no extenuating circumstances. The cases mentioned indicate that there has been some difficulty in coming to grips with this concept and giving it realistic and practical expression. One can well imagine a case such as: youth being present as prima facie extenuation; "inherente boosheid" being considered to be present and in the assessment of this the court has to weigh factors including "motive, personality (youthful immaturity) and other relevant factors" - factors which are normally considered in determining extenuating circumstances for adult offenders.

It is submitted that the use of this additional step of determining "inherente boosheid" in the case of youthful offenders, thereby creating a sort of mental see-saw, should be allowed to disappear from this branch of the law for reasons including:

(a) this kind of label is not found, as a matter of law, in cases dealing with adult offenders;

(b) it is not necessarily or intrinsically by definition a concept only for youthful offenders but appears only to have been applied in the cases of such accused;

(c) it has the potential of causing, and has in fact caused, confusion in the minds of trial courts;[50]

(d) to stamp an offender as inherently evil, if this is what the words mean,[51] has a moral connotation normally reserved only for use by the divinity and shows an insensitivity to the psychological and background causes of youthful delinquency and an ultimate despair of the potential for reformation;

(e) to stamp an offender's solitary act as inherently evil may be a more reasonable approach but this too, in relation to the death sentence, demonstrates an insensitivity to the reality of the numerous factors upon which the immaturity of youth is based related also to the psychological and background causes of youthful delinquency and to the potential for reform of a youthful personality; and

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50) S v Maimela, 1976(2) S A 587 (A D), p.592 and S v Mapatsi, 1976(4) S A 721 (A D), p.724. Compare the facts of S v Melinda, 1971(1) S A 798 (A D); S v Matebane, 1975(4) S A 564 (A D); and S v Rooi, 1976(2) S A 580 (A D), which makes an attempt to come to grips with gang-conduct of youthful accused. See also M E Wolfgang, L Savitz and N Johnson, The Sociology of Crime and Delinquency, p.364 and 377.

51) See footnote 46.

(f) it has the potential in law of becoming a terminological formula, sight being lost of the components which are to be considered in arriving at the evaluation which are in fact the normal components for evaluating extenuating circumstances.

It is submitted that the formulation of the manner in which extenuating circumstances are evaluated in the case of a youthful offender should rather be:

(a) a youthful offender's acts should not be measured by the same measure as that used for an adult offender;

(b) youthful immaturity, in its various components, must be considered as a background to, as well as assisting to establish the basis for, extenuating circumstances;

(c) the cumulative effects of the components of immaturity must be weighed with the nature of the murder, the motive and the personality of the accused and other relevant factors in order to determine whether extenuating circumstances may be found;[52] and

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52) S v Mapatsi, 1976(4) S A 721 (A D), p.724.

(d) other than any special aspect mentioned above, extenuating circumstances are to be determined as is done in every other case.[53]

GENERAL MENTAL CONDITION

Besides special mental circumstances evident in the accused's commission of a homicide such as motive, premeditation and other categories discussed below[54] there is probably e place for the consideration of general mental condition in regard to extenuation insofar es this reflects the self which the accused brings to the crime insofar es this is not able to be taken account of substantively as a defence or legal excuse. If this is to be relevent to punishment it is on the basis of moral blameworthiness in relation to capacity.[55]

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53) The statement of Rumpff, C.J. in S v Lehnberg, 1975(4) S A 553 (A D), p.561 "Wat die probleem van versagting betref, behoort na my mening tienderjariges in die algemeen as onvolwasse beskou te word, en derhalwe geregtig op versagting, tensy die omstandighede van die saak van so 'n aard is dat 'n Hof homself genoop voel om die doodvonnis op te lê", followed in S v van Rooi, 1976(2) S A 580 (A D), p.584 is, with respect, misleading if the underlined words are to be taken as forming part of the consideration of the triers of fact. That consideration is one for the judge in his discretion at the sentencing stage only and should not be considered, es such, at the stage of extenuation - determination which is a distinct procedural step - R v Taylor, 1949(4) S A 702 (A D), p.717 and R v Koortz, 1953(1) S A 371 (A D), p.381.

54) p.310 et. seq.

55) See H L A Hart, Punishment and Responsibility, p. 31 - 40, 225 - 228 and J C de Wet and H L Swanepoel, Strafreg, p.105 et seq and 202.

Early cases on extenuating circumstances show that a general sub- or abnormality of mind or mental faculties short of insanity is appropriate material for consideration as extenuating circumstances. This may be described as a "clouding of the mind" as in Hugo's case[56] or "the background of the accused person and all the factors that go to make up his mental outlook at the time"[57] or "subnormal mentality or mental instability"[58] or "dullness of intellect or low intelligence".[59]

These descriptions clearly indicate the general nature of the background mental condition. It is the type of mental condition which a person is likely to bring to most or all of his actions and not only an act of homicide. They are descriptions of conditions forming a ground base to action rather than a specific mental condition of a more temporary nature whose genesis may be found in certain situational circumstances such as provoked anger, fear or other fairly

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56) 1940 W L D 285, p.286 where this description is categorised as temporary as, for example, in provocation or intoxication or of more general duration as in the case of a more lasting defect of mind which Schreiner, J exemplified by witchcraft or African custom cases.

57) R v Molikwa, 1940(2) P H H 207 (T P D).

58) R v Lloyd, 1941 C P D 162; R v Koortz, 1953(1) S A 371 (A D), p.376; R v von Zell, 1953(3) S A 303 (A D), p.314; and R v Anderson, 1956(4) S A 756 (A D), p.761. Compare R v Izaks, 1947(2) P H H 291 (C P D).

59) S v Khumalo, 1968(4) S A 284 (T P D). Compare R v Sandi, 1950(2) P H H 132 (A D) which is perhaps not entirely satisfactory on extenuation but the decision centred around the question of leading of additional evidence before the Appellate Division.

immediate emotional reaction. They are descriptions of conditions which indicate a derogation from the norm and are capable of providing a differential for consideration as extenuating circumstances.

In S v Mtshali,[60] however, Friedman, J. and assessors found that even if the accused, who murdered three young women within a short space of time, suffered from some form of mental deviation, which was indicative of a character defect rather than a defect of reason, this did not amount to an extenuating circumstance. In this case the medical evidence may not have been adequate. On the other hand, in R v Smook,[61] extenuating circumstances were found in the case of an accused who was shown to be a woman with a violent temper (as a personality trait rather than as an isolated incident) who, after frustration over a long period, had shot her husband in a quarrel.[62] In S v Makete,[63] Viljoen, J. considered that where the mind was only partly affected or immature, although criminally responsible, such responsibility was diminished and this should be considered in regard to extenuation.

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60) 1966(2) P H H294 (N P D). Some of the argument in the judgment tends to suggest that the normal tests for insanity possibly conditioned the approach to extenuation. If this is so it would not be a valid approach. Neither is "heinousness" an overriding consideration for or against extenuation.

61) 1961(1) P H H44 (W L D).

62) While this case may also fall under other categories of extenuating circumstances, the point here is that the judgment appears to refer to the violent temper as a personality defect of general nature. See also S v De Maura, 1974(4) S A 204 (A D) where the fact that the accused was "more emotional" than normal was considered among other factors to indicate slight extenuation but where, because of premeditation and brutality, the death sentence was imposed.

63) 1971(4) S A 214 (T P D).

These cases, as well as those discussed in Chapters IV and VI on the psychopath and African beliefs and way of life, indicate that the courts have found that the general mental background, personality defect or deviation do provide circumstances for extenuation whether this is regarded as diminishing responsibility on any general basis of imputability or, perhaps preferably, as providing a differential for the assessment of moral blameworthiness for the purpose of extenuating circumstances.

GENERAL CHARACTER

The question has arisen whether the general character of the accused is relevant material for consideration in the question of extenuating circumstances. The general good character or otherwise of an accused person can be regarded as a relevant consideration in the question of punishment generally.[64]

In regard to the proof of previous convictions as general character evidence at a stage prior to extenuation determination, the Appellate Division has had the opportunity to clarify the position. In R v Ndhlovu[65] at the stage of considering extenuating circumstances, when it appeared that there were none, the trial judge called for the accused's previous record hoping that it might assist the triers of fact to find extenuating circumstances. As it happened

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64) D A Thomas, Principles of Sentencing, p.39 and 174; R Graser, Sentencing as a Rational Process, in Acta Juridica, 1975, p.131; J Hogarth, Sentencing as a Human Process, p.371; and J van der Linden, Rechtsgeleerd, Practicaal en Koopmans Handboek, 2.2.7. See also S v Baptie, 1963(1) P H H96 (N P D) for example.

65) 1954(1) S A 455 (A D).

the record was not whet was hoped. Centlivres, C J[66] considered that if courts correctly took youthful inexperience into consideration for extenuation then it may follow that the character of a person convicted of murder is also a relevant factor. However, in Owen's case,[67] where the prosecution had produced the previous convictions after verdict but before the determination of extenuating circumstances, this was held to be an irregularity and Schreiner, J A said:[68]

> "But where the matter is still in the hands of the triers of fact, as it is at the stage when the issue of extenuating circumstances is under consideration, I do not think that such vague and elusive factors as the character of the accused should be regarded as sufficiently closely related to the commission of the crime to be taken into account".

The learned judge, thinking particularly of juries, goes on to point out that the triers of fact may not appreciate that extenuating circumstances may exist even when there is a previous conviction for murder. It seems that character has here been regarded largely in terms of the presence or absence of previous convictions. In S v Shebalala,[69] where there was a similar occurrence to that in Owen's case,

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66) p.459.

67) R v Owen, 1957(1) S A 458 (A D).

68) p.462. Hoexter, J A in R v Roberts, 1957(4) S A 265 (A D), p.271 said similerly "In considering the question of extenuating circumstances the jury is, generally speaking, not concerned with the accused's character ...".

69) 1966(2) S A 297 (A D), p.300

Rumpff, J A made it clear that et the stage of extenuation previous convictions are generally not relevant and the State must not produce or prove them unless certain factors are advanced for the accused in extenuation evidence which gives to the State the right to prove previous convictions, or certain of them, in rebuttal of the accused's evidence. Even then, considered the judge, application should be made to the trial judge to do this.

It is clear therefore that in exceptional cases character evidence in the form of previous convictions may be proved by the State where the accused attempts, at the extenuation stage, to prove good character **or other extenuating** circumstances related to state of mind. This therefore presupposes that evidence of good character can be led at the stage of extenuation. It is part of the general personal background of the accused; it is taken into account generally in the question of sentence and therefore should be taken into eccount in the extenuation procedure which is the stage which determines whether the sentence for the murder is to be fixed or discretionary.

The accused's dilemma is this: if "such vague and elusive factors as the character of the accused"[70] may not be proved as part of the extenuation investigation before the treirs of fact and are only regarded as appropriate to be placed before the judge before sentence, then this would only apply when extenuating circumstances had already been found. If no extenuating circumstances are found, the judge has no discretion as to sentence and evidence of good character at that stage is of no avail.

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70) See footnote 68, i.e. character generally, not in the form of previous convictions except in the limited sense permitted in Shabalala's case.

It is submitted that evidence of good character may be led at the extenuation stage of a murder trial and is a factor associated with the conduct or mental state of the accused in the act of homicide.[71] To that act of homicide he brings his own character and background. There may well be cases where the triers of fact consider that these factors are not directly or sufficiently associated with the commission of the crime to warrant them standing alone as extenuating circumstances, but it is submitted that their consideration should not be excluded.

II SPECIAL MENTAL CIRCUMSTANCES

In contradistinction to general background circumstances there are the special mental circumstances evident in the accused or apparent in his conduct in the commission of the crime and the courts have come to regard these as the prime source factors for extenuating circumstances as being more intimately or directly associated with the accused in the commission of the crime.[72]

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71) See R v Molikwa, 1940(2) P H H207 (T P D); R v Lloyd, 1941 C P D 162; Padhla v R, 1948(1) P H H87 (A D); R v Kgau, 1958(2) S A 606 (S W A); R v Samson, 1959(1) S A 893 (C P D), p.894; S v Bowers, 1971(4) S A 646 (A D), p.650; S v Maimela, 1976(2) S A 587 (A D), p.592; S v Ceaser, 1977(2) S A 348 (A D), p.353; cf. R v Tarusika 1959(1) S A 122 (F S C); and contra R v Roberts, 1957(4) S A 265 (A D), p.271.

72) R v Biyana, 1938 E D L 310, p.311; S v Rabada, 1964(1) S A 26 (A D), p.27; S v Petrus, 1969(4) S A 85 (A D), p.95; and S v Letsolo, 1970(3) S A 476 (A D), p.476. These references are to the descriptions of extenuating circumstances with Badada's and Petrus' cases referring primarily to "gemoed of geestesvermoëns".

Various of these will be referred to briefly, indicating the range and the manner in which the courts have treated these.

MOTIVE

Motive forms no part of the intention required for mens rea and is irrelevant to the question of legal guilt.[73] It is rather the reason for the commission of the crime and may relate to a consequence ulterior to the mens rea and the actus reus.[74] Evidence of motive is, however, often led to prove mens rea. But motive is also relevant to sentence[75] and it is possible here to adjust the punishment in accordence with a moral assessment of the motive of the accused.

In some cases of homicide the motive will either be unknown or difficult to establish with certainty. In other cases there may be no real motive for the actual killing as where it results from a drunken argument about something which would never have resulted in homicide if the actor were sober. In other cases motives may be found resulting from the basest as well as the better emotions or sentiments of man from revenge, greed and lust, through anger, fear, jealousy or

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73) Burchell and Hunt, South African Criminal Law and Procedure, Vol. I, p.144 - 145. The authors refer at page 65 to the "elusiveness of motive" making the achievement of an equation of mens rea and moral guilt most difficult. S v Moyo, 1979(4) S A 61 (ZR, AD).

74) Burchell and Hunt, op. cit., Vol. I, p.144; Glanville Williams, Textbook of Criminal Law, p.56 and J C Smith and B Hogan, Criminal Law, p.63. See, for example, S v Robinson, 1968(1) S A 666 (A D), p.678 and S v Hartmann, 1975(3) S A 532 (A D).

75) Williams, ibid; P J Fitzgerald, Criminal Law and Punishment, p.120; Gerald H Gordon, The Criminal Law of Scotland, p.204; and Smith and Hogan, op. cit., p.64.

despair to duty, putative moral justification, pity or political or religious fanaticism. Morally we are able to distinguish between some, if not all, of these. Insofar as we are able to distinguish and insofar as punishment has a basis in moral blameworthiness, then motive and such distinctions as can be made are relevant to the question of extenuating circumstances, the finding of which in turn is relevant to whether or not the ultimate sentence for homicide should be imposed.

In R v Hugo,[76] Schreiner, J in his hypothetical examination of possible extenuating circumstances also dealt with motive as follows:

> "Here again it is difficult to fix a standard from which to judge - when can you say that the motive was less bad than normal? The motives of murderers are many and diverse and sometimes they are mixed ..... Some ..... motives may seem more ignoble or despicable than others, but the less ignoble may be the more dangerous. Individual opinions will differ as to the relative demerits of particular motives. Occasionally one may get what seems to be a clear case of a motive that constitutes an extenuating circumstance. ..... But it will not often be easy to say that the motive for a murder mitigates the seeming magnitude of the offence."[77]

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76) 1940 W L D 285.

77) p.287.

The learned judge's approach may have been limited by his chosen dictionary definition of "extenuate", the words of which appear in the last phrase of this quotation. Even on this basis, however, it was conceded that certain motives may provide extenuation material. It may also be that if the approach is that of ascertaining partial moral excuse for conduct it may add a further dimension to the enquiry, i.e. it may be preferable to regard a circumstance as affording partial moral excuse for conduct than to regard it as diminishing or lessening the seeming magnitude of the offence.

However that may be, the fact is that the courts have been able to assess certain motives as having a potential to provide, or as providing, extenuating circumstances.[78] It is possible therefore to categorise, even if only broadly, certain motives as morally depraved or "bad" and others as not so depraved or "bad". It must, of course, be borne in mind that one is dealing with conduct which the law and society has stigmatised as unlawful and bad or evil. Against this general canvas of wrongful conduct one is seeking to distinguish the motive which is base and for which there is little or no morally acceptable excuse, unless one delves deeply into psychological motivation and conditioning, from the motive which is not utterly base and for which there may be a degree of moral or social empathy. Motives which indicate sadistic viciousness, direct personal gain or advantage or lucrative enrichment are reasonably clearly distinguishable from motives indicating a putative need to

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78) See, for example, S v Mkaba, 1965(1) S A 215 (A D) p.217 (political motive); S v Robinson, 1968(1) S A 666 (A D), p.678 (murder by consent); S v Hartmann, 1975(3) S A 532 (C P D) (euthanasia) as well as the example given by Schreiner, J in R v Hugo, (supra), p.286 - four different types of motive.

release or extricate oneself from a physical (for example pseudo private defence, necessity or witchcraft) or mental (for example provocation, sense of injustice) situation or indicating a pseudo altruistic motive (for example euthanasia or consent).

The law has not been inclined favourably to regard the murderer who uses poison as the instrument of death.[79] Its insidious nature has been abhorrent from early times. Yet even here there are cases where extenuating circumstances have been found on consideration of relevant factors which may include motive.[80]

Supposed or actual grievance or grudge or sense of injustice may provide a basis for extenuation.[81] So does a motive of jealousy, normally in conjunction with other circumstances.[82] R v Robinson[83] is an example of a case where the prime motive

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79) R v Xulu, 1943 A D 616; R v Lee, 1949(1) S A 1134 (A D); R v Mkize, 1951(3) S A 28 (A D); and S v Sophi, 1961(1) P H H82 (F S C).

80) R v Koza, 1949(4) S A 555 (A D) and Sophi v R, 1962(1) P H H82 (F S C). Compare The King v Vilakazi, 1969(2) P H H217 (S).

81) Vilakazi v Reg., 1959 H C T L R 89; R v Mdhluli, 1960(2) P H H267 (D C L D); and S v Ndlovu (1970) 1 S A 430 (A D). Compare the early case of R v Izaks, 1947(2) P H H291 (C P D) and S v Karuzi, 1971(4) S A 246 (R, A D) (vengeance).

82) R v Ndlovu, 1951(1) P H H47 (O P D) and S v Ntanzi, 1975(1) P H H8 (A D). Compare R v Qenele Xutu, 1941(1) P H H7 (W L D) (jealousy in respect of the practice of "koshana" - homosexuality among Africans) and R v Hlatswayo, 1955(2) P H H255 (A D) (regarding the effect of reliance on gossip).

83) 1968(1) S A 666 (A D).

in carrying out the killing was financial gain.[84] This was the case where the deceased, because of dire financial distress and to place his widow in funds from the insurance of his life, conspired with two persons to procure the appellant for reward to kill him. The trial court found no extenuating circumstances but on appeal extenuating circumstances were found primarily because the deceased wanted and arranged to be killed and that the act of homicide did not deprive him, against his will, of his right to live. The appeal court considered that this reduced the blameworthiness of the killer.

Another type of case where there is clear intention to kill and where the motive was one of compassion and the desire of the accused to relieve his father of further pain and the continuation of a pitiable condition was S v Hartmann.[85] The accused, a medical practitioner, had administered an injection of penthathol to his 87 year old father who was close to death from cancer. Although there was evidence that the deceased had consented to the administration of the drug, this factor does not seem to have featured in the agreed "mitigating factors" which rendered the "crime less reprehensible",[86] namely, the accused's closeness to his father, his witnessing his father's suffering heightened by the stress of the relationship and the fact that the patient was suffering severe pain.[87] On the strength of Robinson's case,[88] consent is also a factor which may be considered for extenuation in cases of euthanasia.

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84) p.678G.

85) 1975(3) S A 532 (C P D).

86) p.535.

87) Compare the extenuating circumstances found in S v Pepenene, 1974(1) S A 216 (O P D) even though in this case the accused was also found to be 17 years of age and therefore the judge was seized with a discretion as to punishment.

88) Supra.

ABSENCE OF PREMEDITATION OR ACTION IN THE HEAT OF THE MOMENT

Premeditation followed by the criminal act which was premeditated is generally regarded as evidencing the fullness of criminal intent. It is indicative of deliberation and mental preparation or planning to carry out an evil or criminal deed. It seems to be inherent in premeditation that there is a period of time during which it might have been possible to reconsider the consequences of the proposed act and possibly to withdraw from the criminal act. The fact that the criminal act follows tends to suggest that the accused was bent on carrying out his criminal purpose and that sounder or maturer moral or legal judgement did not prevail. Generally speaking, a premeditated act might be regarded as morally more blameworthy than an unpremeditated act but this is not invariably the case and depends on other relevant factors.[89] Conversely, where there is an absence of premeditation, this often occurs when the situational or personal circumstances of the accused were such that there was little or no time to deliberate upon or premeditate the act of homicide. This can occur where the situational circumstances require or induce immediate action or reaction or seemingly limit freedom of action or choice of means and to that extent hamper judgement or where there is a "clouding of the mind" or emotional reaction. This kind of case indicates a factual disparity from premeditated or deliberate action giving rise to a possible moral differential which is relevant for the consideration of extenuation.

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89) See S v Mkaba, 1965(1) S A 215 (A D), p.217 and S v De Maura, 1974(4) S A 204 (A D) and compare S v Robinson, 1968(1) S A 666 (A D); S v Ntanzi, 1975(1) P H H8; S v Hartmann, 1975(3) S A 532 (C P D); and S v Lehnberg, 1975(4) S A 553 (A D).

The South African courts have tended to find extenuating circumstances on the basis of an absence of premeditation or action in the heat or on the spur of the moment, whether as a sole extenuating circumstance or in company with other mental or situational factors.[90]

ABSENCE OF THE AIM TO KILL AND THE DOLUS EVENTUALIS QUESTION

In the early case of R v Valachia,[91] in setting aside a death sentence on a matter of admissibility of evidence and remitting the case, Greenberg, J A indicated that, but for the question of evidence, "the court would have found extenuating circumstances in the fact that the accused, although their state of mind was such as to make them guilty of murder, had not in the words of the judge, 'actually' or 'deliberately' intended the death of the deceased".[92] The appeal court did not comment adversely on this approach to extenuation and it was this case which led to the suggestion in my article on "Extenuating Circumstances"[93] that "it would appear that where the intention is more in the nature of a legal presumption than an actual fact this gives rise to extenuating

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90) R v Thompson, 1936(2) P H H158 (C P D); R v Jafta, 1941(2) P H H212 (C P D); R v Sonti, 1954(2) P H H196 (A D); R v Mlambo, 1960(2) S A 55 (W L D); R v Smook, 1961(1) P H H44 (W L D); R v Mharadzo, 1966(2) S A 702 (R, A D); and S v Molale, 1974(1) P H H(S)6 (O P D). Compare R v Valachia, 1945 A D 826, p.833.

91) 1945 A D 826. This was a case of homicide in the execution of a robbery.

92) p.833 - 834. It appears that the judge in his report to the Executive had recommended that the death sentence be commuted to imprisonment for twelve years.

93) S Evans, "Extenuating Circumstances", (1955) 72 S A L J 385, p.387, footnote 12. The footnote is incorrect, however, where it indicates that extenuating circumstances were found in the case as reported.

circumstances". The words "gives rise to" should rather be read as "could reasonebly give rise to consideration as .....". This suggestion was made in reference to the statement of De Wet and Swanepoel[94] that the elements of "wrongfulness" or "intention" in murder, being absolute, cannot be regarded as and therefore cannot form a basis for a finding of extenuating circumstances. In the article this wes questioned on the basis that the "wrongfulness which determines the guilt of a person might be absolute and of general application but the wrongfulness of a particular accused's act, when the question of sentence is being considered - and it is only here that the law on extenuating circumstances is applicable - can be looked to for a finding of extenuating circumstances".[95] It was also suggested that the same would appear to be the position in regard to the element of "intention".[96]

Eight years later in S v Mini,[97] Holmes, J A[98] ventured the suggestion "that trial courts might consider, in exercising their function whether, depending on the circumstances, the moral blameworthiness of a murder is reduced if it is committed with constructive intention to kill, as distinct

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94) J C de Wet and H L Swanepoel, Strafreg, (1949), p.166; (1975), p.202.

95) S Evans, op. cit., p.387; M M Loubser, "Versagtende Omstandighede by Moord: Die gradering van skuld" in (1977) 40 T H R-H R, p.333 and p.339 - 340. See also J M van Bemmelen, Ons Strafrecht, p.95.

96) See the comment on this article by Rumpff, J A in S v De Bruyn, 1968(4) S A 298 (A D), p.503 where he deals with the suggestion in juxtaposition to the statements in the second edition of De Wet and Swanepoel, Strafreg, (1960).

97) 1963(3) S A 188 (A D).

98) p.192.

from intention plus positive desire".[99] There followed a series of cases where constructive intention was not regarded as as extenuating circumstance on its own[100] or where alone, or with other circumstances, extenuating circumstances were found.[1] In Mharadzo's case, Beedle, C J[2] had suggested that "where on a charge of murder only a constructive intent to kill is proved, the Court will examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances". However, in Sebeko's case, van Blerk, J A[3] tried to clarify this question by indicating that murder with constructive intent (as with a bomb placed in a railway station) may be morally more blameworthy than murder by direct intent (for example, euthanasia) and in the same case Wessels, J A[4] said that previous cases should not be understood as requiring the court's approach to the determination of extenuating circumstances to be conditioned by the juristic nature of the intent established by the evidence. The court is bound to consider all relevant circumstances. A few months later this question of terminological use came to a head in the

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99) This suggestion was described by E M Burchell, (1963) 80 S A L J, p.468 as "novel" and as "worthy of serious consideration". See also Annual Survey of South African Law, 1960, p.335 and 27 T H R-H R (1964).

100) S v Nkombani, 1963(4) S A 877 (A D); S v Sebeko, 1968(1) S A 495 (A D); and S v Mmusi, 1968(1) S A 545 (A D).

1) S v Arnold, 1965(2) S A 215 (C P D); R v Mharadzo, 1966(2) S A 702 (R, A D); S v Sigwahla, 1967(4) S A 566 (A D); S v Melinda, 1971(1) S A 798 (A D) and S v Molale, 1974(1) P H H(S)6 (O P D).

2) Supra, p.703.

3) Supra, p.496.

4) p.497.

Appellate Division in S v De Bruyn.[5] It was considered that the suggestion in Mini's case[6] had created some confusion[7] if it was taken to mean that dolus eventualis in itself was necessarily less blameworthy than dolus directus and therefore, on its own, could provide extenuating circumstances. Dolus eventualis is, of course, not a lesser kind of intention as such. It is an intention sufficient to convict of the crime of murder. Rumpff, J A felt that the legal concept of dolus eventualis as such has nothing to do with extenuating circumstances.[8] He considered that it was not the presence of a certain kind of intention which could be considered for extenuation but rather the absence of the aim to kill and he indicated that since 1935 there were those cases where this had so been found even if not in those identical terms.[9]

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5) 1968(4) S A 498 (A D). See also B v D van Niekerk in (1968) 85 S A L J 122 and (1969) 86 S A L J 136; S Evans in (1969) 86 S A L J 142; and M M Loubser, op. cit., p.338 and footnote 30 of that article.

6) Supra, p.192.

7) De Bruyn's case, (supra), per van Blerk, J A, p.500. There was still confusion after this case - see Hawanga v S, 1975(1) P H H30 (A D) where Bothe, J A is reported as having said "die opsetvorm by moord nooit op sigself en sonder meer as 'n versagtende omstandigheid aangemerk kan word nie". De Bruyn's case says "opsetvorm" is not the sort of language to use in extenuating circumstances. See also S v Mienies, 1978(4) S A 560 (A D).

8) Supra, p.505. De Wet and Swanepoel, op. cit., (1975), p.137.

9) Burchell and Hunt, op. cit., Vol.II, p.363 refer to it as "Absence of factors justifying a finding of dolus directus" but it is submitted that that does not correctly reflect Rumpff, J A's point which is that the various legal descriptions of intention should not be used in reference to extenuating circumstances.

In De Bruyn's case, Holmes J A found himself at some variance with Rumpff, J A though not in the end result nor in the fact that dolus eventualis can never of itself be an extenuating circumstance.[10] The term dolus eventualis should not be used as e shorthand wey of saying that there are extenuating circumstances. The point is that the same set of proved facts may for one purpose (i.e. guilt) be termed dolus eventualis and for another purpose (with or without other facts) as evidencing an absence of the aim or desire to kill and therefore eligible for consideration as extenuating circumstances where it indicates a morally less blameworthy condition. It is submitted that there is e moral distinction between a purposed end result and one which was probably contemplated but not desired and in a proper case this should be able to be reflected in punishment as relevant to blameworthiness. The suggestion of Holmes, J A in Mini's case[11] can be read as trying to indicate no more than this. He points to this probable moral distinction and adds "depending on the circumstances of the case". His suggestion, however, in the use of the intention terminology and its use in subsequent cases led to the reaction found in De Bruyn's case. The moral question is not strictly whether there was one or other description of intention to prove guilt; it is rather the degree of evil or depravity of mind which positively desires death or does not, as the case may be. Furthermore, the blameworthiness may also vary according to the remoteness or proximity of the possibility of resultant

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10) De Bruyn's case, (supra), p.509 - 510 and 511. See "Extenuating Circumstances: A Recent Essay in Semantics" (1969) 86 S A L J 142 - 145 where the present writer respectfully sided with Rumpff, J A at the risk of falling within Holmes, J A's description as being "purist" (De Bruyn's case, p.512).

11) Supra, p.192.

death.[12] This is a differential which may well be taken into account.

The courts, then, have supported the view that the absence of the aim to kill can provide a basis for a finding of extenuating circumstances.

PUTATIVE MORAL JUSTIFICATION

Under this heading may be grouped those types of cases in which the aspect of the subjective approach to the question of wrongfulness is an element in the mental attitude or conduct of the accused. In order, however, to avoid using the word "wrongfulness", which is an element in the substantive proof of guilt, the heading as stated above has been chosen. It is intended to indicate the particular subjective approach of the accused as arising from the reason for his act or from the particular situation in which he found himself when these can be assessed as providing a moral differential to be considered for extenuating circumstances.

Such circumstances may arise in the form of a mental and emotional state as in the case of a sense of injustice, grievance or grudge at supposed unjust treatment or out of a particular situation in which an accused finds himself such as putative private defence, necessity, suoerior orders or euthanasia in which a physical or moral dilemma is posed to the particular accused. At the extreme end of the scale one has what has been called "absence of 'wederregtelikheids-bewussyn'"[13] which should perhaps more appropriately be dealt with as a substantive question of imputability but which in

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12) Holmes, J A in De Bruyn's case, (supra), p.511. See also M M Loubser, op. cit., p.338 - 339.

13) Burchell and Hunt, op. cit., Vol. II, p.364.

homicide cases our courts have tended to deal with in the question of penalty.[14)]

(1) Sense of Injustice or Grievance

In R v Hugo,[15)] Schreiner, J suggested that a sense of injustice, even though well-founded, cannot by itself constitute an extenuating circumstance. This statement appears to be too restrictive as subsequent cases demonstrate. In R v Mdhluli,[16)] Henochsberg, J and assessors found extenuating circumstances on the grounds that the accused had killed the deceased whom he believed had given evidence against him in a trumped up charge and secured his conviction. The learned judge said, "..... it seems to us to be clear on the evidence that from the moment of the accused's trial and conviction he was in such a state of mind that it adversely affected his actions. ..... we have accordingly taken it into account as being an important factor to consider and one that has weighed the scale heavily in favour of an affirmative answer to the question" (whether there are extenuating circumstances). In S v Ndhlovu[17)] the accused had killed a father and son. Extenuating circumstances were found in respect of the father's death on the grounds that the accused believed the father had killed the accused's

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14) M M Loubser, op. cit., p.337. Compare J C de Wet and H L Swanepoel, Strafreg, (1975), p.202 and now also the effect of S v De Blom, 1977(3) S A 513 (A D) discussed below, p.328.

15) 1940 W L D 285, p.288.

16) 1960(2) P H H267 (D C L D).

17) 1970(1) S A 430 (A D), p.433. In Vilakazi v Reg., 1959 H C T L R 89, p.91 although the word "grievance" is used, the facts indicate a possible mental grievence but also something in the nature of provocation. See also S v Bradbury, 1967(1) S A 387 (A D), p.406.

child for ritual purposes; the accused had made unsuccessful attempts to move the authorities (the induna, the police and the Bantu Affairs Commissioner as then known) to take action; his desire to kill the deceesed emanated from his grief at the death of his son. The court found that these facts reduced his moral blameworthiness.

In these cases there was nothing to suggest that the accuseds were not reasonably normal people of the class of community to which they belonged and it is clear that their minds were strongly affected by what they believed to be unjust treatment or a denial of justice and this strongly affected their conduct.

(2) Putative Private Defence or Necessity

In R v Ndara[18] extenuating circumstances were found in the fact that the accused probably thought his pursuers intended to injure him severely and he proceeded to defend himself with his knife, killing the deceased. He did not know that they intended handing him over to the police. The fact that the accused is the original aggressor would not debar a finding of extenuating circumstances.[19]

In two recent witchcraft cases the evidence indicates a form of putative self-defence. In S v Ndhlovu[20] the accused, in answer to the charge, pleaded "I intended to kill the deceased because he wanted to kill me". Four witchdoctors had indicated the deceased as the cause of various family harassments and in front of the chief the deceased was said to have threatened to cause the accused to be struck by

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18) 1955(4) S A 182 (A D), p.185.
19) S v Marert, 1967(1) P H H167 (A D).
20) 1971(1) S A 27 (R, A D), p.28.

lightning. In S v Mokonto[21] the accused had pleaded guilty, adding that he had killed the deceased because she was a witch and had said on that day that he would not see the setting of the sun. In both cases extenuating circumstances were found.

Where a defence of private defence or necessity is substantiated then the question of extenuating circumstances would not arise. Where the bounds of reasonable private defence or necessity have been exceeded and the accused is found guilty of murder a finding of extenuating circumstances is not excluded, indeed it may be proper. Where the accused subjectively realised that he was applying more force than was necessary he acts unlawfully and with dolus and is guilty of murder if he foresaw the possibility of death and persists regardless of whether it ensues or not.[22] Where, however, he ought to have foreseen the possibility of death resulting he is guilty of culpable homicide.[23]

On this basis Ndara's case[24] would in present times probably have resulted in a verdict of culpable homicide. In the two witchcraft cases, Ndhlovu and Mokonto[25] there seems little

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21) 1971(2) S A 319 (A D).

22) **S v Ntuli, 1975(1) S A 429** (A D), **p.**437. De Wet and **Swanepoel**, op. cit., (1975), p.71.

23) Ibid. See also Burchell and Hunt, op. cit. Vol.I, p.278. The "hybrid or middle situation" of R v Hercules 1954(3) S A 826 (A D), p.832, per van den Heever, J A would not require recognition if such a case was treated as murder because of the wrongful intention to kill but of partially excusable blameworthiness justifying a finding of extenuating circumstances.

24) Supra.

25) Both supra.

chance of a court accepting that they so feared for their lives that it was necessary for them to kill, so that the findings of extenuating circumstances seem appropriate and proper. The subjective point of view of the putative moral justification must be carefully weighed where a verdict of guilty has been returned.

Cases dealing with the influence of others (including compulsion and duress), consent of the deceased and possibly provocation may also be regarded from the subjective point as falling under putative moral justification but will rather be dealt with under those special headings.

(3) Euthanasia

Cases of mercy killing, while also falling for consideration under the heading of "motive", may also be dealt with as cases of putative moral justification. In these cases it seems there may be said to be a form of moral compulsion or necessity arising from the strong emotions of love or compassion and most commonly because of a special relationship between the parties. There is often a conflict between one or more putative duties or strong emotional feelings where the person concerned feels constrained to act in respect of one of the duties or feelings in an attempt to resolve the conflict. These putative duties are of the kind which generally tend to evoke an immediate sympathetic if not empathetic attitude in other perons. Such cases arise not from the more base or evil of the motives for homicide but rather from the more sensitive and probably altruistic motives. In the early case of R v Hugo,[26] Schreiner, J

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26) 1940 W L D 285, p.287.

considered that extenuating circumstances could be found in the case where "a man killed his child whom he dearly loved because the parents had decided to kill themselves and the accused could not bear to think of the child being left to face the world alone". Other relevant cases here are S v Hartmann[27] and S v de Bellocq.[28] In the latter case although it occurred earlier than Hartmann's case the sentence was the requirement to enter recognizances to come up for sentence within 6 months if called upon - probably an illegal sentence - while in Hartmann's case the sentence was one of 1 year imprisonment, the accused to be detained until the rising of the court and the balance of his sentence suspended for a period of one year on certain conditions. These sentences appear, no doubt, to reflect the moral assessment of the evil content of the act, its danger to society and the need for deterrence or reformation.

(4) Diminished Consciousness of Wrong

Burchell and Hunt[29] deal with this under the separate heading of "absence of 'wederregtelikheidsbewussyn'". The cases normally quoted here deal with persons normally living according to primitive or less developed customs and way of life.

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27) 1975(3) S A 532 (C P D). For a detailed recent discussion of euthanasia see W P le Roux, "Aspekte van Eutanasie in die Strafreg" in 1979(12) De Jure 73; 252. See also Glanville Williams, Textbook of Criminal Law, p.532 and the authorities cited there in footnote 1 and see above p.107 footnote 53.

28) 1975(3) S A 538 (T P D). Judgement in this case was actually given in May 1968.

29) Op. cit., Vol. II, p.364.

These cases are R v Mutkeiruib,[30] R v Hamkoshi[31] and R v Kgau.[32] Customary beliefs or way of life appear to provide a basis for putative moral justification of the act concerned even though it be not, as in Kgau's case, an apparent total absence of the consciousness of wrongdoing in committing an act of homicide. It has been suggested in chapter VI[33] that because the taking of life without substantial cause is probably notoriously regarded as wrong that the case of S v De Blom[34] would be distinguished in its application to murder absolutely or in its application to facts such as those in the three cases referred to in the previous paragraph. If, however, in a case like Kgau's[35] the evidence as a whole demonstrates that there is a reasonable possibility that the accused did not know that his act was unlawful[36] then it seems that he should not be found guilty of the crime. Such cases are obviously likely to be most rare. It will naturally be most difficult for those persons brought up in more developed communities to show absence of consciousness of wrong or putative moral justification under this heading. This section is headed "diminished consciousness of wrong" rather than the "absence of 'wederregtelikheidsbewussyn'" of Burchell and Hunt to

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30) 1938 S W A 4.

31) 1941 S W A 16.

32) 1958(2) S A 606 (S W A).

33) P.276 above.

34) 1977(3) S A 513 (A D), a case concerning Exchange Control Regulations. See also comments by R C Whiting "Changing the Face of Mens Rea" (1978) 95 S A L J 1 and J M T Labuschagne "S v De Blom" (1978) 11 De Jure 386.

35) Supra.

36) De Blom's case, (supra), p.532F.

indicate perhaps more accurately a difference which may have been brought about by a heightened sensitivity to the proof of wrongfulness as an element of dolus.

The question arises under this heading of putative moral justification as to the reasonableness of the putative view of the accused. On the one hand there is the dictum of Fagan, J A in R v Mkize[37] that the subjective state of the accused's mind is a more important factor to consider than the objective test of the factual basis for the state of mind. On the other hand, there is a case such as R v Hlatswayo[38] where objective factors such as the accused acting after a substantial interval upon the acceptance of gossip about his wife weighed against a finding of extenuating circumstances. In Ndara's case[39] it does not appear that the accused's belief in his right of self-defence was tested as to reasonableness and in Mokonto's case,[40] in relation to witchcraft provocation, the Appellate Division made it clear that with the settled trend towards the subjective approach to the matter of intention there seemed all the more reason for the exclusion of objectivism in regard to extenuation.

It seems that, rather than a test of reasonableness of the putative view of the accused, the approach should be to assess the bona fides of his belief and its consistency with his way of life and conduct. As has been indicated,[41]

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37) 1953(2) S A 324 (A D), p.335.

38) 1955(2) P H H255 (A D).

39) 1955(4) S A 182 (A D), p.185.

40) 1971(2) S A 319 (A D), p.326.

41) In Chapter III, p.134.

"..... if we cannot envisage ourselves in the situation in which the defendant was placed, we are not in a position to assign moral blame to his conduct ..... in making a judgement of moral blameworthiness, we must be able to admit that we might have acted in the same way as defendant and for his reasons".[42]

EMOTIONAL INFLUENCES

It is abundantly clear from the school of life that emotions play an important part in the conduct of men and in their action or reaction in interpersonal or other situations. Emotions are aroused by conscious or unconscious representations (for example, ideas, sensations, perceptions) or conflicts within the subject himself or conflict between the subject and other individuals or his environment.[43] Emotion can be conducive to well-being as in the case of love, appreciation of art or beauty or music or it may take the form of a release of energy aimed at survival or improvement or change of or resistance to a situation (as in fear, anger, despair).[44]

James Hillman sums up the psychologically agreed aspects of emotion as being:

> "..... it is a complex state of the organism, involving bodily changes of a widespread character ..... and on the mental side, a state of excitement or perturbation, marked by strong feeling and usually an impulse towards a definite form of behaviour.

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42) Peter Brett, An Inquiry into Criminal Guilt, p.146.

43) James Hillman, Emotion, p.250.

44) James Hillman, op. cit., p.252 and 277. De Wet and Swanepoel, op. cit., (1975), p.127 and 202, 'heftige gemoedsbeweging'.

> If the emotion is intense there is some disturbance of the intellectual functions, a measure of dissociation and a tendency towards action of an ungraded or protopathic character".[45]

Kolb, the psychiatrist says:

> "Emotional behaviour, then, is a complex organismal response to a perception of threat or of satiety. Such behaviour represents a response to signals or cues sensed from either the internal or the external environment".[46]

Various headings of emotional involvement will be indicated which, however, should not be regarded as an exhaustive list in relation to extenuating circumstances. It is natural to expect that a basis of emotional action or reaction is involved in many homicide cases.

(1) Emotional Disturbance or "Stress"

In R v Von Zell,[47] the Appellate Division remitted a case for the trial judge to pass sentence as if the jury had found extenuating circumstances and specified them as including mental instability, strains and stresses because of a marital relationship. This procedure was followed in R v Anderson[48] where the circumstances were specified as mental imbalance and hysteria and a disturbed state of mind because of marital

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45) Op. cit., p.8.

46) L C Kolb, Modern Clinical Psychiatry, p.34.

47) 1953(3) S A 303 (A D), p.314. Von Zell was subsequently sentenced to death a second time.

48) 1956(4) S A 756 (A D), p.761.

relations. In R v Smook,[49] extenuating circumstances were found in an emotional disturbance which took the form of a violent temper resulting from a quarrel in a marriage which had created a feeling of frustration over a long period of time. On the other hand, in S v De Maura,[50] there was evidence of emotional disturbance, depression and marital stresses and strains with a diminished state of responsibility. The death sentence was passed, however, apparently because of the brutality of the killing with a revolver. As in the case of alleged brutality in witchcraft or severe provocation cases, it seems that it could well be argued that the manner of the shooting in this case provided evidence of the emotional loss of control of the accused. He had also immediately turned the revolver on himself without fatal effect however.

(2) Jealousy

The emotion of jealousy which diminishes an accused's power of resistance to a form of aggressive emotional reaction has been accepted by the courts as an extenuating circumstance. In some cases it may not necessarily be described as jealousy which may be defined as the apprehensiveness of being displaced in the love or goodwill of a loved one or envy of a rival but the evidence discloses a love triangle, putative or real. In R v Ndlovu,[51] Horwitz, J said:

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49) 1961(1) P H H44 (W L D).

50) 1974(4) S A 204 (A D).

51) 1951(1) P H H47 (O P D). See also R v Koza, 1949(4) S A 555 (A D), a poisoning case resulting in the death of an innocent where extenuating circumstances were found and compare R v Kuzwayo, 1949(2) P H H109 (A D).

> "..... vir die beslissing of daar wel versagtende omstandighede bestaan al dan nie, moet ons eerder in aanmerking neem die bui waaronder die beskuldigde opgetree het dan die rede wat hom daartoe gebring het om sy humeur te verloor; ten minste nie om ondersoek in te stel of daardie rede regtelik gegrond is nie".

This seems, with respect, to pose the question correctly. The court found that "'n Bui van jaloesie, wat 'n skielike verduistering van die beskuldigde se verstand meebring en wat op verminderde weerstandsvermoë teen 'n pasgebore dwang om kwaad of onreg te doen uitloop, val onder die benaming van versagtende omstandighede". An unduly objective approach should not be taken to what are essentially subjective considerations in the context of the enquiry.[52] In R v Hlatswayo,[53] however, the accused had killed the third party to a putative love triangle but the court held that his conduct in acting, after a substantial interval, upon what was obviously hearsay evidence detracted in the assessment of his moral blameworthiness from the effect of his belief.[54]

In an early case, R v Qenele Xutu,[55] the triers of fact found that jealousy arising out of the practice of "Koshana" - an illicit relationship between males - could not on the facts of the case constitute extenuating circumstances.

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52) S v Ntanzi, 1975(1) P H H8 (A D).

53) 1955(2) P H H255 (A D).

54) But see also S v Lehnberg, 1975(4) S A 553 (A D), the case of a youthful offender, particularly p.559A, 560D and 562.

55) 1941(1) P H H7 (W L D).

Perhaps this finding was made because the deceased was trapped into being found in flagrante delicto. Although homosexuality is an offence, it may well be that today, in the light of the development of the law on extenuation and the subjective nature of the influence, another finding could be made if there were no factors detracting from the subjective influence.

S v Lehnberg[56] is another case with a jealousy-type emotional content with the addition of the factor of youth as extenuating circumstances. No clear identification of jealousy as a factor is made in this case, reference rather being made to the emotional motive of the accused.[57] But the facts support the influence of jealous desperation.

In Anderson's case,[58] the Appellate Division set aside a death sentence and referred the matter back to the trial judge for sentence afresh as if the jury had found extenuating circumstances and specified them as, inter alia, "his suspicion that the deceased had been unfaithful to him".

It is clear that the courts are prepared to recognise, for extenuation purposes in appropriate cases, the strong emotions involved in jealousy or kindred mental attitudes.

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56) 1975(4) S A 553 (A D).

57) Supra, p.562.

58) 1956(4) S A 756 (A D).

(3) Provocation and Anger

Provocation generally arises from an emotional reaction to words or acts of other persons and results in varying degrees of aggressiveness and varying degrees of diminution of self-control. The emotion, often anger, moves to redress, in the form of spontaneous retaliation, an invasion of personal esteem, safety or rights.

Provocation in murder cases is now to be treated as one of the factors to be assessed in determining whether the accused subjectively has the intention to kill.[59] The test of that provocation is a subjective one though the matter may still be an open question.[60] It is submitted, however, with Burchell and Hunt[61] that the test for provocation as an extenuating circumstance must be subjective.

As early as Hugo's case[62] the court recognised that a degree of provocation, which might not affect verdict, might nevertheless justify a finding of extenuating circumstances.

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59) R v Thibani, 1949(4) S A 720 (A D), p.731; R v Krull, 1959(3) S A 392 (A D), p.399; and Burchell and Hunt, op. cit., Vol. I, p.240 - 248; De Wet and Swanepoel, op. cit., (1975), p.134.

60) Burchell and Hunt, op. cit., Vol. I, p.247.

61) Op. cit., Vol. I, p.248. R v Bureke, 1960(1) S A 49 (F S C), p.51; S v Delport, 1968(1) P H H172 (A D); and S v Mokonto, 1971(2) S A 319 (A D), p.326.

62) 1940 W L D 285, p.287. See also R v Jafta, 1941(2) P H H212 (C P D) where there had even been time for "cooling off".

Cases such as Hlatswayo,[63] Vilakazi,[64] Bureke,[65] Ntanzi[66] and Grove-Mitchell[67] deal with provocation in relation to extenuation in marital or similar cases of male-female emotional involvement. In some cases the provocation, such as habitual drunkenness[68] or slights and evasions,[69] proceeded over a protracted period while in other cases the provocation might be of a shorter duration. It is not necessary that the deceased be the lawful spouse of the accused.[70]

The provocative influence on the accused's conduct must normally originate from the deceased or, in the case of group action, from those identifying with the deceased and making common purpose with him.[71]

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63) 1955(2) P H H255 (A D); no extenuating circumstances found on objective factors such as delay and reliance on gossip. See also the earlier cases of R v George, 1938 C P D 486 and R v Lloyd, 1941 C P D 162.

64) 1959 H C T L R 89; extenuating circumstances found.

65) 1960(1) S A 49 (F S C); no extenuating circumstances found.

66) 1975(1) P H H8 (A D); extenuating circumstances found. See also S v Arnold, 1965(2) S A 215 (C P D); extenuating circumstances found.

67) 1975(3) S A 417 (A D); extenuating circumstances found. See also the remarks of Beadle, C J at p.246H in S v Karuzi, 1971(4) S A 246 (R, A D).

68) S v Arnold, (supra), p.218.

69) S v Ntanzi, (supra).

70) S v Ntanzi, (supra).

71) S v Dena, 1962(2) P H H237 (O P D).

To assist the accused insofar as provocation is concerned, during the trial up to verdict, there must be evidence indicating loss of self-control. Proof of such demonstrates an absence of mens rea. In regard to extenuation, Burchell and Hunt[72] make the statement, on the strength of Bureke's case,[73] that "loss of self-control is a prerequisite for the operation of provocation as an extenuating circumstance". The correctness of this statement is doubted. This would mean applying the same test to extenuation as is applied to the substantive question of provocation in relation to verdict. It is submitted that this is not the test. In cases already referred to in this section,[74] there was no evidence of, or particular requirement of, loss of self-control. In fact in Mule's case,[75] van Blerk, J A said:

> "Gans ander oorwegings geld by die bewyslas van mindere verwytbaarheid van die skuld den by die bewys van die skuld self. Getuienis wat onvoldoende is as bewys van ontoerekeningsvatbaarheid, soos hier die geval is, kan wel deeglik die laakbaarheid van die misdaad temper".

To warrant a finding of extenuating circumstances what is required is an influence on the mind and the appeal court has been at pains to indicate that too high a test or a test equatable with that required in substantive law to prove

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72) Op. cit., Vol. I, p.244, footnote 47.

73) 1960(1) S A 49 (F S C), p.51 - 52.

74) See, for example, S v Arnold, (supra) and S v Ntanzi, (supra). See also S v Mula, 1975(3) S A 208 (A D) and S v Karuzi, 1971(4) S A 246 (R, A D), p.246.

75) Supra, p.213.

guilt must not be sought.[76] What has to be evaluated is the nature of the influence subjectively on the mind of the accused, the emotional reaction and its effect on his conduct. If in substantive law this is to be done, whether or not "it is accompanied by intoxication, mental abnormality or idiosyncrasy",[77] then this would certainly be the approach at the very least, in regard to extenuating circumstances.

In regard to the subjectivity of the approach, cases such as S v Mangondo,[78] S v Mokonto[79] and S v Ntanzi[80] point to the care which trial courts must exercise to avoid slipping into too objective an approach, particularly in dealing with the question of extenuating circumstances. In the first case it was found that the accused, as a result of provocation, did not lose control of himself to the extent that he did not appreciate what he was doing. On the facts, however, the death sentence was set aside and the case remitted for sentence on the basis of a finding of extenuating circumstances.

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76) See S v Babada, 1964(1) S A 26 (A D), p.28; S v Mula, (supra), p.212 - 213; and S v Lehnberg, 1975(4) S A 553 (A D), p.560, 562 - 563. "Where provocation is relevant to extenuation there seems all the more reason for the exclusion of objectivism since one is then considering the moral blameworthiness of the accused, and not his legal culpability under a system of law" - per Holmes, J A in S v Mokonto, 1971(2) S A 319 (A D), p.326. See also S v Mangondo, 1963(4) S A 160 (A D).

77) Burchell and Hunt, op. cit., Vol. I, p.247 and S v Mokonto, (supra), p.326. Also S v Saaiman, 1976(1) P H H85 (A D).

78) 1963(4) S A 160 (A D).

79) 1971(2) S A 319 (A D).

80) 1975(1) P H H8 (A D).

In Mokonto's case,[81] the provocation was in the nature of a witchcraft threat to kill the accused. On this basis extenuating circumstances were found by the trial court. Provocation, insofar as it was relevant, only contributed to establish clearly the intention and the appeal court rejected arguments for verdicts of self-defence or culpable homicide. In obiter dicta, Holmes, J A[82] makes it clear that, in considering extenuation in relation to provocation, objectivism must be excluded. In this case too it is pointed out[83] that, while provocation and anger (an emotional reaction) are different concepts, the term provocation seems to be used in criminal law as including both concepts.

In Ntanzi's case,[84] the trial court was held on appeal to have adopted an objective approach to what were essentially subjective considerations including the effect upon the appellant of an accusation of paternity. It was not clear whether the trial court's objective approach related to the influence on the mind of the accused or the trial court's evaluation of that effect as extenuation and the appeal court imposed a sentence other than death.

The distinction in the approach to the facts for substantive guilt and extenuation is again illustrated in S v Mula.[85]

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81) Supra.

82) Supra, p.326. See footnote 76 above.

83) Supra, p.324.

84) Supra.

85) 1975(3) S A 208 (A D). See also R v Ndara, 1955(4) S A 182 (A D), p.185.

Liquor and provocation were involved and, as the trial court had found that the accused well knew what he had done in respect of both these factors, it felt bound by these findings of the trial not to find extenuating circumstances. The appeal court found that the trial judge in his remerks and the triers of fact had closed their minds to considerations proper at the extenuation stage. The fact that the accused was found to have known what he was doing does not necessarily exclude the consideration of factors like the influence on his conduct of alcohol[86] or provocation. The appeal court found that there was a degree of influence of alcohol and of provocation and on these grounds found extenuating circumstances and reduced the sentence from death to imprisonment for ten years.

In S v Makhetha,[87] the accused's defence was a denial of any involvement. The aopeal court found that the court may nevertheless take into account such provocation or anger as appears from the evidence of the State witnesses and that the conclusion in cases such as S v Saaiman,[88] that the court cannot speculate on the effect of provocation on the appellant, was not a rule of law but its applicability was dependent upon the facts of the case.

In cases of anger or provocation as emotional reactions to certain acts or words of others, whether cumulative over a period or almost instantaneous, it appears that the courts should, in respect of extenuating circumstances, have regard

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86) See also p.205 above.

87) 1974(1) P H H36 (A D).

88) 1967(4) S A 440 (A D).

to the fact of the subjective effect of the influence on the accused, of the emotional reaction rather than the objective validity or reasonableness of the reasons for the reaction. Because of the nature of this emotional reaction, the accused normally wishes to harm or to kill and the reasons for this or the actual influence of the anger or provocation on his conduct are prime considerations in the question of extenuation.

(4) Fear

The emotion of fear can play an important part as an influence on the conduct of a person when he is faced by other persons or found in certain situations. This emotion often arises from the natural instinct for self-preservation, whether in respect of life or limb, and can lead a person to conduct which is aggressive or not normally part of his behaviour pattern in ordered circumstances.

This emotion of fear or something similar may arise in the case of putative self-defence[89] or necessity[90] or fear of hidden or superstitious forces ranged against one[91] or fear of disobedience to superior orders[92] or tribal hierarchy[93]

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89) R v Ndara, 1955(4) S A 182 (A D); S v Marert, 1967(1) P H H167 (A D); and S v Mokonto, 1971(2) S A 319 (A D).

90) R v Hercules, 1954(3) S A (A D); R v Kgau, 1958(2) S A 606 (S W A); R v Bungweni, 1959(3) S A 142 (E C D) and S v Goliath, 1972(3) S A 1 (A D).

91) R v Biyana, 1938 E D L 310; S v Ndlovu, 1970(1) S A 430 (A D); and S v Mokonto, (supra). See also the discussion in Chapter VI generally and p.231.

92) R v Werner, 1947(2) S A 828 (A D).

93) R v Hamkoshi, 1941 S W A 16 and R v Bungweni, (supra).

or non-conformity to group or gang requirements[94] or of false accusation[95] or being exposed in certain of one's dealings or conduct.[96]

In each of these types of examples there is a degree of fear present in the subject, in most cases arising out of a particular situation in which the subject finds himself. In some types of case the situation might have arisen with a degree of suddenness, which may not have been foreseeable, requiring almost immediate action of some sort to avoid or overcome the threat which gives rise to the fear as in putative self-defence. In such cases the time or opportunity for reflection on choice of action or possible consequences is limited. In other cases the fear arising from the situation or persons or putative forces ranged against one may have been generated and persist over a period of time until a stage is reached when some sort of avoiding action is deliberated and carried out as in fear of witchcraft. In still other cases the subject or accused may have been in some form or degree, party to his being in the situation in which he finds himself, whether he appreciated or assented to the degree of complicity or not, as in conformity to group or gang requirements.

The factor to be investigated for extenuation purposes remains whether the influence of the person or situation and its concomitant fear or emotional disturbance influenced his

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94) S v Bradbury, 1967(1) S A 387 (A D). See also below s.v. "Lesser degree of participation". S v X, 1974(1) S.A. 344 (R, A D) (a terrorist group).

95) R v Bungweni, (supra).

96) S v Ramatsheng, 1977(3) S A 510 (A D).

actions so that it can be said to afford a moral excuse or diminished moral blameworthiness. The moral judgement must proceed from the capacity of the triers of fact to place themselves in, and appreciate, the position in which the accused found himself and to assess whether they might have acted in the same way and for the same reasons.[97] The degree to which he was free to control the pre-conditions which give rise to the situation of fear in which an accused finds himself is probably a consideration in evaluating circumstances for extenuation[98] but its effect should not be exaggerated in a manner which diminishes the effect of the subjective approach to the influence.

(5) Vengeance

The question of vengeance as, or arising out of, an emotionel reaction was considered in S v Karuzi.[99] The accused, as a result of provocation by his wife, which he took to refer to infidelity, wished to catch and kill her. She put off a child from her back and escaped. The accused returned and killed the child as he wished to punish his wife. While the court recognised that in cases of suspected infidelity the accused's mind might to some extent be unbalanced, it regarded the accused's motive as one of vengeance, carried out against an innocent third party. It found that, although extenuating circumstances might have existed if the accused had killed his wife, such extenuation could not be transferred to the killing of a third party es an act of vengeance.

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97) See above, Chapter III, p.134, footnote 31.

98) See S v Bradbury, (supra), p.398.

99) 1971(4) S A 246 (R, A D). Compare R v Jafta, 1941(2) P H H212 (C P D).

Beadle, C J said:[100]

> "The circumstances of the killing of B must be looked at on their own merits and not on what the merits would have been if A instead of B had been killed".

While this logical, theoretical approach has an appeal to the mind, a note of caution must be sounded in that care must be taken not to split up either the nature of an action or the mentality of the accused into its components as to time or place to the extent that the unitary nature of the action or mind and its effect are lost. It was said in this case that some little time must have passed after the accused lost the chase after his wife and in his return to the child to kill it. It could also be argued, as a possibility however, that he might have been more beside himself in the fact of his wife escaping his clutches. While the action can be divided as to time and place, it does not necessarily follow that the mental attitude of the accused can be so compartmentalised. It cannot be said that the state of a provoked, stressed or partially unbalanced mind will in every case change as rapidly as movement in space or time. On the contrary, depending on the circumstances, there might well be aggravation of the condition. There might also, on the other hand, be a lessening of the imbalance. But the consequential acts, as in this case, do point in some measure to the state of mind. The court in this case used the word "vengeance" but the homicide might also have been a continuation of the provoked state to the point of exasperation, the mind having gone over to some form of action.

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100) Supra, p.247H.

Earlier in this theses there was some consideration of the involvement of innocents in witchcraft murders and the view was expressed that this should not necesserily, as if it were a rule, be an absolute barrier to extenueting circumstances.[1] For example, in R v Koza,[2] although the report does not indicate the basis of the finding, extenuating circumstances were found by the trial court in a case where the accused had given a mandate to K, an eight year old girl, to place a poison in a receptacle used by P whom he wanted to kill but where K placed the substance in a different receptacle and a child was killed. The reason for the accused doing this was that he believed P was alienating his wife's affections in favour of P's brother and that he believed his wife had been unfaithful to him.

In S v Namane,[3] where several weeks after the accused hed lost in a fight with the deceased, the accused came up to the deceased and said, "Remember you and I have fought before ..... all the time I said I would get you", before stabbing him in the heart with a knife. The accused's defence was an absolute denial; he said he was intoxicated but gave no evidence. There was a conflict in the evidence as to whether he was intoxicated. Because of the accused's adherence to his denial, the trial court, with reluctance, came to the conclusion that there were no extenuating circumstances in the case. On appeal, Rumpff, C J[4] appeared to accept that a degree of intoxication could have

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1) Chapter VI, p.266.

2) 1949(4) S A 555 (A D).

3) 1977(4) S A 240 (A D).

4) Supra, p.243.

quickened the desire for revenge and that this could have been considered as an extenuating circumstance.

It would appear therefore that in cases such as these, although the objective facts may appear to indicate a desire for or motive of vengeance, which in a pure form may not easily admit of extenuation, caution is to be exercised in examining all the influences at play on the mind of the accused and the effect of these influences on his conduct and its coherence. If there are other emotional or mental influences, such as provocation, intoxication, etc., then the effect of these, in generating what is objectively regarded as vengeance, should be considered in relation to extenuation.

III SITUATIONAL CIRCUMSTANCES

It is obvious that homicide cannot be committed in a vacuum and that at least two persons are required to be involved at a time and in a place. In many cases the actions or words of a person give rise to the offence; in other cases a certain relationship seems a predominating feature in the situation in which the accused finds himself; in other cases the accused from his own motives or desires brings about the situation which generates the homicide; in further cases, such as group action, the accused might find himself, after initial or partial commitment, being drawn along with the group and all the consequences of its actions; in yet other cases, compulsion, duress or coercion, whether of hierarchical authority or not, may influence the accused in the situation in which he is placed.

While in law, in respect of intention and of extenuating circumstances, it is the state of mind of the accused in the commission of the act which is looked to in respect of the

attribution of guilt and largely, but not solely, of punishment, it is also clear that in some cases this mental attitude is brought about by circumstances outside of the accused and his state of mind, i.e. persons, in words or actions, or a set of situational circumstances involving, at the least, the deceased.[5] The general law of mitigation recognises the effect of situational circumstances upon the conduct of the accused and in certain cases considers these as the whole or part of the "reason" for the crime.[6]

While, therefore numerous of the cases already discussed under other headings such as action in the heat of the moment, putative moral justification or emotional influences could equally well be discussed here insofar as the situational element was of some importance, if not predominance, in regard to the mental attitude or reaction of the accused, these will not be repeated. The purpose of this section is to recognise the part played by situational circumstances in the generation of homicide.

Situational circumstances are facts or circumstances associated with the crime or conduct or mental state of the accused in the commission of the crime which are capable of being assessed as diminishing moral blameworthiness or

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5) For example, S v Hartmann, 1975(3) S A 532 (C P D) where a family relationship and the pathological condition of his father, situational circumstances not of his own making, "moved" the accused into ending his father's suffering. Extenuating circumstances were found.

6) Perhaps a stock example is the person who steals to feed his starving children at home. But see also D A Thomas, Principles of Sentencing, Chap. 4, particularly "Factors relating to the circumstances immediately prior to the commission of the offence".

partially excusing conduct morally albeit not legally.[7] It is submitted, though this is not frequently done, that it would not be inappropriate to name a situational circumstance as an extenuating circumstance or one of a number of such circumstances. "Situational circumstances" in the context of this section, and in its application where possible to cases referred to in other sections, would mean not only the obvious physical situations surrounding an accused and the act of homicide but also mental situations such as in cases of necessity or coercion by hierarchy or authority where the circumstances are such as not to provide a defence to the charge.[8]

(a) Influence of others

In the early case of R v Hugo,[9] Schreiner, J indicated that, save in extreme cases approximating to compulsion where the accused acts in fear of death or grave injury, the fact that he was under the influence of others cannot, he thought, be recognised as an extenuating circumstance. The subsequent development of the law shows this to be too restrictive an approach.[10] In the following cases extenuating circumstances were found by the triers of fact in cases where the accused was influenced by another or others:

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7) See the definitions above at pages 115 and 143.

8) See, for example, R v Mukeiruib, 1938 S W A 4; R v Hamkoshi, 1941 S W A 16; R v Werner, 1947(2) S A 828 (A D); S v Bradbury, 1967(1) S A 387 (A D); S v Goliath, 1972(3) S A 1 (A D); and S v X, 1974(1) S A 344 (R, A D). See also Burchell and Hunt, op. cit., Vol. I, p.283 et seq.

9) 1940 W L D 285, p.286.

10) R v Bungweni, 1959(3) S A 142 (E C D), p.145; R v Mneke, 1961(2) S A 240 (N P D); S v Lehnberg, 1975(4) S A 553 (A D), p.562 - 563.

R v Hamkoshi,[11] obedience to the hierarchy of tribal custom; R v Werner,[12] putative superior orders; R v Bungweni,[13] threat of false accusation by a headman; R v Mneke,[14] African acting on instructions of White man; S v Bradbury,[15] fear of gang reprisal against accused's wife and family; and S v X,[16] abducted and compelled to make common cause with a terrorist gang. In S v Khan[17] the influence of another was found to be insufficient for extenuation and in R v Kgolane[18] the appeal court felt it could not interfere with the finding of no extenuating circumstances by the trial court in the case of group action with differing degrees of participation.

In R v Hercules[19] the jury found extenuating circumstances in the fact that accused No. 1 "might have exercised a certain amount of coercion on accused No. 2" and that No. 2 "was to some extent under the influence of accused No. 1". This was after the judge had instructed them to return a verdict of murder on the grounds of common purpose instead of the jury's first finding of culpable homicide. The appeal

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11) Supra.

12) Supra.

13) Supra.

14) Supra.

15) Supra. The two assessors found extenuating circumstances but the judge in his discretion imposed the death sentence.

16) Supra.

17) 1954(2) S A 340 (A D).

18) 1960(1) P H H110 (A D).

19) 1954(3) S A 826 (A D), p.828.

court found that culpable homicide was a competent verdict and van den Heever, J A enunciated the "hybrid or middle situation" position in law. This case was referred to in S v Goliath[20] where it was held that compulsion can constitute a complete defence to a charge of murder and Rumpff, J A considered that the "middle situation" might be more accepted in future instead of convicting of murder or acquitting altogether.[21] This would bring about that such cases would not fall for consideration under extenuating circumstances. However, Wessels, J A said in that case[22] "Dat noodtoestand (wat uit dwanguitoefening kan ontstaan) in gepaste omstandighede strafversagtende werking het, behoef geen betoog nie. In gepaste omstandighede sou 'n noodgedwonge handeling minder verwytbaar wees as 'n soortgelyke handeling waer die dader se keuse van optrede nie deur dwang beïnvloed is nie". The circumstances surrounding an act of homicide can affect the degree of blameworthiness.

The question of the test to be applied in the case of influence by others has been dealt with by the Appellate Division in S v Lehnberg.[23] Accused No. 1, a White female minor of twenty years of age, procured a semi-crippled non-White, accused No. 2, to accompany her to kill her lover's wife. Accused No. 2 committed the murder in the presence of accused No. 1. The appeal court set aside the death sentences imposed and found extenuating circumstances in respect of accused No. 1 in her youth together with the influence which her lover, nearly thirty years her senior,

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20) 1972(3) S A 1 (A D), p.24.

21) Supra, p.24.

22) Supra, p.30.

23) 1975(4) S A 553 (A D).

had over her through her emotional attachment to him. Rumpff, C J[24] found that the trial court had set the test too high in saying "The critical question still remains whether she was incapable of resolving her problems except in the manner in which she did" if this was in essence a requirement of a mentally irresistable compulsion (dwang). The question was not whether she was mentally capable of solving her problem-situation in another way but rather whether the influence of her lover on her youthful personality undermined it in such a way that she was prepared to do something she would not otherwise have done. In the case of accused No. 2 the Chief Justice felt that the defence set too high a test for extenuating circumstances and the trial court apparently accepted this. The test was whether the influence which was exerted upon the accused was so great that he was not able to resist it: "so strong that he, with all his weakness, defects and handicaps, was not able to resist it".[25] The Chief Justice[26] considered that this was not the proper test. If he could not resist the influence he would clearly be mentally sick. The question rather was whether his blameworthiness was sufficiently ("voldoende") diminished by the degree of influence which was exerted upon him.

It seems reasonably clear from this judgement that the appeal court does not consider the type of objective test which might be applicable in the substantive law of guilt-determination to feature in the approach to extenuating

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24) Supra, p.559.

25) Supra, p.562.

26) Supra, p.563.

circumstances.[27] To do such would amount to a misdirection as in this case. Rather, and it is submitted that this is more in keeping with a procedure or consideration apposite to the sentencing function, does the appeal court look at the matter positively in the sense of considering whether the circumstance, in this case the influence of others, has an excuse-content relative to lessened blameworthiness. Not, could he resist or extricate himself, but rather, was there such influence as to affect his own blameworthiness and to form, in some degree, a partial moral excuse for his conduct and it is submitted that this is the proper approach to extenuation.

(b) Lesser Degree of Participation

Where there is more than one accused who takes part in the commission of a crime, whether in the form of aiding, abetting, counselling or assisting in a crime before or during its commission, each such accused is in our law as guilty and liable to the same punishment as the actual perpetrator.[28] Association with others in a common illegal purpose constitutes the necessary participation for a conviction and it is not necessary to prove that any one accused committed any specific act.[29] The criminal intention of each accused, however, must be judged

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27) See, for example, S v Babeda, 1964(1) S A 26 (A D), p.27F and p.28; S v Bradbury, 1967(1) S A 387 (A D), p.406; S v Mokonto, 1971(2) S A 319 (A D), p.326; S v Ntanzi, 1975(1) P H H8 (A D); S v Hlongwana, 1975(4) S A 567 (A D), p.571; and S v van Rooi, 1976(2) S A 580 (A D), p.585.

28) Burchell and Hunt, op. cit., Vol. I, p.349; De Wet and Swanepoel, op. cit. (1975), p.180.

29) Burchell and Hunt, op. cit., Vol. I, p.346. But joining in after the fatal wound has been inflicted would now be governed by the decision in S v Thomo, 1969(1) S A 385 (A D).

subjectively.[30] It is, however, established that where the degree of guilt of the socius criminis is less than that of the actual perpetrator a more lenient punishment is usually imposed.[31] This approach has led to the fact of a lesser or minor degree of participation being regarded as an extenuating circumstance.[32] This would appear to be consistent with seeking to establish the individual blameworthiness of accuseds acting together and the question of the influence of others or even a measure of compulsion or duress, discussed in the preceeding section, is also relevant in cases of multiple accused.[33]

In S v X[34] the court of three appeal judges considered that the fact that an accused is a socius criminis and not a principal offender is always an important factor to be taken into account in assessing his moral blameworthiness. The court considered that, as there was in cases of group action (in this case terrorist activity) a very wide range of moral blameworthiness, the prime factor to be taken into account was the extent to which the socius makes common cause with the principal offender. This question of extent would naturally include the degree of physical participation and, or, mental attitude. The lesser degree of participation may well be in respect of either of these factors. Physical

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30) Burchell and Hunt, op. cit., Vol. I, p.365.

31) Burchell and Hunt, op. cit., Vol. I, p.367 and 405.

32) See, for example, S v Dikgale, 1965(1) S A 209 (A D), p.214E.

33) See R v Bungweni, 1959(3) S A 142 (E C D), p.145; S v Bradbury, 1967(1) S A 387 (A D) (assessors' finding); and S v Goliath, 1972(3) S A 1 (A D).

34) 1974(1) S A 344 (R, A D).

participation may be equal to that of other participants but mental participation or attitude may have been conditioned by other factors indicating a diminution from full mental participation or participation under some influence.[35]

In cases of group or gang action, where it has been possible to identify leaders or persons of influence or persons who take a leading role, the courts have been prepared, depending on the circumstances, to regard the blameworthiness of others as less than that of the leaders.[36] In S v van Rooi,[37] besides the factor of youth, the appeal court regarded as an additional factor that there were some in the group who were probably incited by the lead of certain others into doing deeds which they would never under other circumstances have committed or dared and in S v Mapatsi,[38] Rumpff, C J considered that a youth as one of a gang which committed murder may be entitled to a finding of extenuation while the leader or leaders, who were as old or even younger than the other members, may not be so entitled.[39] In van Rooi's case there was also an absence of the purpose to kill and in Mapatsi's case there was also a probability of an absence of any premedition. In both cases extenuating circumstances were found.

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35) See, for example, S v van der Berg, 1968(3) S A 250 (A D), p.251 and 252.

36) Kgolane v R, 1960(1) P H H110 (A D), per Schreiner, J A.

37) 1976(2) S A 580 (A D).

38) 1976(4) S A 721 (A D). See also S v Maarman, 1976(3) S A 510 (A D).

39) p.724.

In S v Melinda[40] the trial court found extenuating circumstances in regard to the appellant, one of a gang in a robbery in which a night watchman was strangled, in the factors of age, no direct purpose to kill and the fact that another accused played the chief role. Sentence of death was, however, passed by the trial judge on the basis of the appellant's previous convictions which also involved violence. The appeal court, by a majority, felt it could not interfere with the sentence.

S v Bradbury[41] was another case where the trial judge imposed the sentence of death notwithstanding a finding of extenuating circumstances by the majority of the court, i.e. the assessors. In this case a criminal gang, by threatening the accused with his life and threatening the safety of his wife and children, coerced the accused into driving the motor vehicle which carried the killer to the crime and permitted his escape after it. The trial judge exercised his discretion on the basis of deterrence in this type of gang killing and also on the fact that the accused had more than one opportunity to escape the immediate clutches of the gang or to call for police protection. Steyn, C J said[42]

> "A murderer who shrinks from inflicting death on a benefactor by his own hand and performs a lesser part, leaving the act of killing to a fellow murderer, would not on that account be less blameworthy for the part he does perform, even if

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40) 1971(1) S A 798 (A D). Compare S v Nkombani, 1963(4) S A 877 (A D).

41) 1967(1) S A 387 (A D). The sentence of death was not carried out.

42) P.394.

also that part is performed with distaste. It must be accepted, I think, that when the appellant did ultimately participate in the murder in a lesser role, he did so with reluctance. It is not merely that he did not want to be the killer. What he did do was done under the pressure of threats. But in so far as this reluctance may be a mitigating factor, allowance for it is, I consider, inherent in the finding as an extenuating circumstance, that he was influenced by his fear for his own safety and the safety of his wife and children".

The learned Chief Justice and Judge van Blerk dismissed the appeal in finding that the judge's exercise of his discretion was not unreasonable in the circumstances. The third member of the court, Holmes, J A,[43] accepted as a general proposition that a person, 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 an extenuation. But he considered that each case should be judged on its merits and considered that the present case had some unusual features. The learned judge placed more importance on the accused's moral stand in not carrying out the first attempts to kill the deceased. He concluded:[44]

"In the final balancing, on the one hand, this was a dark and evil deed of a nature rare in this country. It requires robust deterrence, to inhibit its further importation. On the other hand, the

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43) P.404.

44) P.407.

> appellant's moral blameworthiness, as distinct from his legal culpebility, is reduced by the extenuating feature that, twisting in the coils of fell circumstance, he resisted his instructions for some time; and also by the extenuating fact, as found by the majority of the trial court, that in the end he did what he did through fear".

The learned judge would therefore have imposed a sentence of twenty years' imprisonment. This case illustrates again the complexity in assessing moral blameworthiness for the purpose of sentence. Situationally, the accused carried out a lesser role in the homicide but this was coupled with a prior commitment to the discipline of a criminal gang, a moral stand against its dictates and a silence and participation under fear of reprisal against himself or his family. Two assessors and one appeal judge found extenuation such as would have avoided the death sentence; the trial judge and two appeal judges did not consider the imposition of the death sentence was a step which should be avoided.

It would appear that a lesser degree of participation, if supported by some subjective mental circumstance or some situational circumstance related either to the accused's mental state or the degree of participation in the resultant harm, can afford a basis for a finding of extenuating circumstances.

(c) Consent

Consent is only to a limited extent a defence in criminal law and where it does apply it operates in respect of the

unlawful nature of the crime.[45] Consent cannot, however, exclude the unlawfulness of a crime which harms the interests of the State rather than primarily that of the individual. It is nevertheless not easy to draw the line of distinction here as a crime is normally constituted such because the State has an interest in preventing the conduct concerned. In the crime of murder, killing at the request of or with the consent of the victim does not avoid conviction for the crime[46] whether this be an act of euthanasia[47] or otherwise.[48]

On the question of extenuation, however, other considerations may well arise. While such a crime might normally be planned and premeditated and while there is no doubt that the accused intends the death of the victim, his subjective state of mind or motive probably does not necessarily demonstrate the evil content (if this is the real punishable element) of another person seeking the death of a victim for the actor's own reasons or purposes. While such an actor offends against the State and its purposes for its citizens, he does not really offend against the victim himself where consent

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45) Burchell and Hunt, op. cit., Vol. I, p.309 et seq.; De Wet and Swanepoel, op. cit. (1975), p.91; S A Strauss, "Bodily Injury and the Defence of Consent" (1964) 81 S A L J, p.179 and 332; and Glanville Williams, Textbook of Criminal Law, p.531.

46) Burchell and Hunt, op. cit., Vol. II, p.323 and 351.

47) S v Hartmann 1975(3) S A 532 (C P D) and S v de Bellocq 1975(3) S A 538 (T P D). The judgment in the second case was actually delivered in May 1968 and reported initially in (1969) 32 T H R-H R 392.

48) Moorman, Over de Misdaden, 2.11.4; R v Peverett 1940 A D 213; and R v Robinson 1968(1) S A 666 (A D), p.678.

is given as an intelligent act. The actor in such a case may be subject to various influences, moral or mercenary, for carrying out a normally repulsive deed and these influences must be weighed in considering his blameworthiness for an act instigated situationally, as where consent may be involved in euthanasia, or volitionally by a victim for other reasons.

The only case of direct and rather stark bearing on this factor is that of S v Robinson.[49] In regard to this "grim and sombre drama of despair and mercenary death", Holmes, J A said:

> "One of the issues in this case, novel in the history of this country, is whether the intentional and unlawful taking of a man's life, at his own request, renders the killers less blameworthy and so constitutes extenuating circumstances".[50]

Because of the deceased's financial distress and to provide an insurance benefit for his widow and avoid the prospect of imprisonment for fraud, he conspired with accused No.'s 2 and 3 that he be shot and that accused No. 3 would procure accused No. 1 to do this for reward. The deceased undertook to go through with the plan no matter what happened. Just prior to the shooting the deceased told accused No. 1 that he could not go through with the plan but the accused nevertheless carried out the original request to do so "no matter what happened". All three accused were convicted of murder

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49) 1968(1) S A 666 (A D).

50) p.674.

and, no extenuating circumstances having been found, were sentenced to death. The majority of the appeal court (Steyn, C J and Potgieter, J A; Holmes, J A dissenting) found that, by shooting the deceased after he retracted his consent at the last, accused No. 1 had acted outside the common purpose and that therefore the other two accused were guilty only of attempted murder.

In regard to extenuation the court found that the tenor of the trial court's finding was that the uppermost motive of each accused was financial gain and that a fraud on the insurance companies was involved. Holmes, J A (with whom the other learned judges concurred on this point) said:

> "No doubt this is a material factor, and it must be weighed in the scale against them. But there are other material factors which the trial court did not mention. First, this was a most extraordinary murder, in that it had its origin in the deceased himself. He wanted to be killed and he arranged the killing. The reason why murder is usually a crime most foul is two-fold: (a) as indicated earlier it infringes the State's interest in the lives of all those within its jurisdiction and (b) it deprives the victim of his right to live, in practically every case against his will. The fact that he wants and arranges to be killed is irrelevant to (a), but it is clearly relevant to (b) in regard to extenuating circumstances. It reduces the blameworthiness (as distinct from the legal culpability) of the killer, for the deceased is not deprived against his will of his right to live. Indeed, in my view the fact that the deceased in the present case wanted and arranged to be killed as a

> solution to his hopeless predicament is a cogent consideration, as far as extenuating circumstances are concerned".[51)]

Extenuating circumstances were found in these facts by the Appellate Division and accused No. 1's sentence altered to fifteen years' imprisonment.

The fact that the appellants' motives were financial gain, the court considered was tempered by the fact that it was the deceased himself, who tempted them.

Greed or need for financial gain does not necessarily evidence the evil of a murderous mind. The fact that other types of crime or low morality might be shown in the evidence also should not normally add to the blameworthiness of an act of homicide.

(d) Circumstances of the Act

These circumstances may be regarded as falling under the broad heading of situational circumstances. The condition of the victim at the time of the assault and after it until death certainly appears to be a circumstance outside of the accused and over which he has no control. While generally the circumstances of the act are primarily within the control and intention of the accused, it can occur that situational circumstances affect the carrying out of the act or manner and extent of the assault. These circumstances may be such as arise in cases involving provocative conduct, influence of others, group involvement or even some incident which comes upon the accused just prior to or during the act of homicide

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51) p.678 - 679.

which may have some relevance to it or its execution. It is clear that surrounding circumstances may well initiate or affect the carrying out of the act. Also, surrounding circumstances may have their relevant effect on the mind of the accused and for this reason the extenuating circumstances may be found in the subjective mental state, for example provoked conduct, influence of others, etc. or in specified situational circumstances together with such factors.

Is it possible to say that the objective factors of the crime may afford material for consideration of extenuating circumstances; that the fact that a men uses a revolver or a drastic poison extenuates his conduct as against a man who uses a knife or knobkierie; that the fact that a victim dies immediately and seemingly without pain is extenuating as against the case where a victim was hacked to pieces and died a slow, painful death? The normal legal and possibly even moral reaction would be to answer these questions in the negative.[52] On the other side of the coin, it has been stated that circumstances of the act such as brutality or callousness of the deed cannot exclude the possibility of the presence of extenuating circumstances.[53]

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52) J C de Wet and H L Swanepoel, Strafreg, (3rd ed.), p.202: "Die objektiewe elemente van die misdaad is nou eenmal nie vir gradering vatbaar nie ..... die wyse van veroorsaking is nie 'n omstandigheid wet as versegtende omstandigheid beskou kan word nie". See also S Evans, "Extenuating Circumstances", (1955) 4 S A L J, p.386 - 387 and S v de Bruyn, 1968(4) S A 498 (A D), p.503 - 504.

53) S v Petrus, 1969(4) S A 86 (A D), p.92 and 95 and S v de Bruyn, (supra), p.515.

It is interesting to note that, in regard to the relevance of the death sentence to the crime of murder, attempts have been made in grading capital or non-capital murders to classify these by reference broadly to the circumstances of the act. For instance, the British Homicide Act, 1957[54] retained the death penalty for murder in the course or furtherance of a theft; by shooting or by causing an explosion; committed in resisting arrest or escaping from legal custody; of a policeman acting in the execution of his duty; and of a prison officer by a prisoner. These are types of murder or murder committed in certain situational circumstances or indicating certain circumstances of the act. The latter three types may have been included as a result of deterrent policy but the first two types are of a more general nature and, although it has been suggested that they are aimed at the professional criminal,[55] they do hit other offenders as well. These provisions of the Act were much criticised[56] but it has been suggested that distinction of capital end non-capital murder is not without reason.[57] The point being made here is that within recent memory a government administration and a parliament considered that, to some extent, differentiation in the punishment for murder could be based on types of or circumstances of the act of murder.

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54) 5 and 6 Eliz. 2 c 11. The distinction between capital and non-capital murder was repealed by the Murder (Abolition of Death Penalty) Act, 1965.

55) P J Fitzgerald, Criminal Law and Punishment, p.34 and J C Smith and B Hogan, Criminal Law, (1965), p.199.

56) Glanville Williams, op. cit., p.205; P J Fitzgerald, ibid.

57) P J Fitzgerald, op. cit., p.34. See also The Royal Commission on Capital Punishment, 1949 - 1953, para. 513 for other examples, and D W Elliott, "Offence against the Person" 1977 Crim. L R 70, p.73.

Although this venture was subject to criticism and although, as indicated above, it is not easy in many cases to make such distinctions, nevertheless it is submitted that this is a matter that must remain open for the triers of fact in each case.

Cases have occurred in our courts where, among other circumstances in the consideration of extenuation to be regarded cumulatively, circumstances of the act have been taken into account. In S v Fisher[58] the trial court found extenuating circumstances in a number of factors which included: the incident occurred over a short period and there was only one stabwound. In S v Molale[59] extenuating circumstances were found in a number of factors including the fact that, although six stabwounds were inflicted, only one was dangerous in entering the lung and there was a medical probability that the wound would heal; death occurred nine days later. On the other hand, it is clear that the circumstances of the act, particularly as reflecting the state of mind of the accused, has been held to weigh against a finding of extenuating circumstances.[60]

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58) 1965(1) P H H88 (A D).

59) 1974(1) P H H(S)6 (O P D). In R v Cebekulu, 1945(2) P H H176 (A D) the trial court found extenuating circumstances including provocation, the use of alcohol and the fact that a uboko, a sharpened stick, not primarily a murderous weapon, was used. On these facts, however, the appeal court found culpable homicide. S v P, 1972(3) S A 412 (A D), a case of strangling, was similarly dealt with. See also J van der Linden, Rechtsgeleerd, Practicaal en Koopman's Handboek, 2.5.8.

60) See, for example, S v De Maura, 1974(4) S A 204 (A D) and S v Maerman, 1976(3) S A 510 (A D).

Among the circumstances of the act are those which are relevant to the remoteness of the possibility of death ensuing as a consequence. This can be related to the question of intention and the accused's subjective foresight of the possibility of a consequence[61] in a case of dolus eventualis or related to the factual circumstances of the act which may give rise to an inference as to subjective foresight.[62] In S v de Bruyn,[63] Holmes, J A considered that "the more such possibility was foreseen to be remote, the less blameworthy his recklessness and conscious taking of the risk of its occurrence". If this is so then such facts are clearly relevant to extenuation where the accused is in fact found guilty of murder.

The circumstances of the act are naturally also integral to the consideration of a number of other circumstances which may be considered extenuating such as provocation and other emotional influences, lesser degree of participation, absence of aim to kill, etc.

(e) Condition of the Victim

In the substantive law concerning the requirements for a finding of guilt, the condition of the victim just prior to or after the act of homicide is not relevant as long as the victim was a person and the actus reus caused his death. The accused takes his victim as he finds him and his act must

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61) S v de Bruyn, 1968(4) S A 498 A D, p.511; Burchell and Hunt, op. cit., Vol. I, p.124; and S. Evans in (1969) 86 S A L J 145.

62) Burchell and Hunt, op. cit., Vol. I, p.122 and S v Sigwahla, 1967(4) S A 566 (A D), p.570.

63) Supra.

have hastened the victim's death[64] even though the facts of certain cases may give rise to problems of causation.[65]

In regard to the question of extenuation, however, is it possible to say that the condition of the victim, as an objective circumstance, may be considered as extenuatory? Normally speaking, it would appear that this is not the case. Morally, this can be looked at from at least two or three view points.

Firstly, the condition of the victim may be such a pertinent factor influencing the mind of the accused that it provides the reason or motivation for the homicide. Cases illustrating this are S v Pepenene,[66] S v de Bellocq,[67] both cases of infanticide, and S v Hartmann,[68] a case of adult euthanasia. In the first two cases the babies were deformed or diseased, having little life expectancy, and these facts were among the facts found to be extenuatory. In de Bellocq's case it was also found that the mother was at the time in a highly emotional state but not so in Pepenene's case. In Hartmann's case one of the factors mentioned among the extenuating circumstances was the fact that the accused was witnessing his father's suffering, a lingering death from cancer.

Secondly, it is possible for the triers of fact to consider the real nature of the degree of harmful result brought about

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64) Burchell and Hunt, op. cit., Vol. II, p.325.
S v Hartmann, 1975(3) S A 532 (C P D).

65) Burchell and Hunt, op. cit., Vol. II, p.332 et seq.

66) 1974(1) S A 216 (O P D).

67) 1975(3) S A 538 (T P D).

68) 1975(3) S A 532 (C P D).

by the accused. While there is no doubt that death is an ultimate result, it is possible for triers of fact to find, on a moral basis, in certain circumstances that there are extenuating circumstances where, for instance, the deceased would have died shortly after the homicide without its intervention. It is submitted that such a finding may have been possible in a case like Hartmann's.[69] The basis for such a finding may be that the harmful effect of the accused's act, while admittedly causing death, was not the same as depriving someone of life who still had much to live for.[70]

Thirdly, in certain cases the facts might show that there was a reasonable expectation that the deceased would not die but that at some time later, whether because of physical or mental condition, death ensued.[71] Account may also be

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69) Supra.

70) It is admitted that this submission may appear radical but it purports to be based on the test of the harmful public effect of the act under special circumstances in seeking a possible moral differential. See also John Hogarth, Sentencing as a Human Process, p.371 where it is stated, admittedly not in homicide cases, that, concerning the offence, most courts in Canada considered the "moral quality" of the criminal act to be more important than the actual harm incurred by the victim. See also Burchell and Hunt, op. cit., Vol. II, p.329.

71) See S v Molale, 1974(1) P H H(S)6 (O P D) where six stabwounds were inflicted, only one of which was dangerous. There was a medical possibility that the wound would heal and death ensued nine days after entering the hospital only the day after the assault. These facts, together with the fact that there was an absence of the aim to kill and the assault was committed on the spur of the moment, resulted in a finding of extenuating circumstances. See also S v Fisher, 1965(1) P H H88 (A D) where the fact that there was only one stab wound was mentioned among those found by the trial court to provide extenuating circumstances and S v Mashele 1972(2) PH H136 (A D).

taken of the facts in certain cases with problems of novus actus interveniens.[72] Borderline cases here might well receive consideration as providing situational extenuating circumstances. This may also occur where the victim refuses or does not continue with treatment or applies treatment without due care.[73] In such cases, where a verdict of murder is returned in terms of the substantive legal principles, it is submitted that the facts of certain cases might be such as to provide extenuating circumstances on a situational basis in terms of the definition of such circumstances adopted in this thesis.

Circumstances may also be surmised, for instance, such as where a victim, who should normally have recovered, gives up the will to live, possibly even for a reason not connected with the assault. A trial court may well be prepared to find, depending on the facts, that the accused's moral blameworthiness is diminished or his conduct partially excused.

Some of the matters referred to in this section might also appropriately be considered under the next heading of consequential circumstances, especially where they are matters which arise after the actual commission of the crime.

IV CONSEQUENTIAL OR ADDITIONAL CIRCUMSTANCES

Under this heading are considered those circumstances which, while in some cases flowing out of the act of homicide,

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72) Burchell and Hunt, op. cit., Vol. II, p.329 et seq.

73) Burchell and Hunt, op. cit., Vol. II, p.332 et seq. for problems occasioned by causation and novus actus interveniens.

arise after the actual assault, either immediately or some time afterwards. As a finding of extenuating circumstances is related to the function of sentencing, the question of whether policy may be considered as such a circumstance is also referred to thereafter.

(a) Consequential Acts of the Accused

Cases have occurred under this heading where the accused, after having committed the assault, comes immediately to the realisation of what he has done and he immediately calls upon others to assist in remedying the situation[74] or himself tries to undo the damage he has caused.[75] In Lloyd's case[76] the accused immediately fetched a doctor and in Sonti's case[77] he went immediately himself to call his employer. The court found in both these cases that this conduct supported the fact that the assault was committed in a sudden outburst or fit of rage showing absence of premeditation. In the former case cumulative extenuating circumstances were found while in the second case the appeal court felt unable to interfere but drew the attention of the Executive to these "mitigating features of the appellant's evidence".[78]

In Arnold's case[79] the accused poured paraffin over and set alight to his common law wife. When he saw the flames he attempted to pull off her burning clothes and wrap her in a blanket to smother the flames during which he suffered first

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74) R v Lloyd, 1941 CPD 162 and R v Sonti, 1954(2) PH H196 (AD).
75) S v Arnold, 1965(2) S A 215 (C P D).
76) Supra.
77) Supra.
78) Sonti's case, (supra).
79) Supra.

and second degree burns. Steyn, J[80] said:

> "I have some doubt as to whether the subsequent conduct of the accused in the circumstances of the present case should be regarded as an extenuating circumstance by itself. The Court is, however, unanimously of the view that taking into account the provocation to which the accused was subjected, and having regard to the fact that, at least very soon after appreciating the gravity of his acts, he attempted to undo the harm he had perpetrated, it is probable that he did not truly desire to kill the deceased".

The court found that these circumstances do in a material degree palliate the horror of the offence and found extenuating circumstances to exist.

In S v X[81] the Rhodesian court of appeal considered that the extent to which acts performed by an accused after the murder had been committed could be considered in relation to extenuating circumstances depended upon the circumstances of the case. Where, however, such acts indicate what the state of mind of the accused was at the time of the murder, these can clearly be taken into account in assessing his moral blameworthiness at the time of the murder. The accused was convicted of murder as being part of a terrorist gang which committed the act. The accused told a story of being abducted and forced to make common cause with the gang after rudimentary training. At an engagement a member of the security forces was killed but it was common cause that the accused never fired a shot but ran away almost immediately.

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80) Arnold's cese, (supra), p.219. My underlining.

81) 1974(1) S A 344 (R, A D).

He later disclosed all to the police and co-operated in recovering arms and pursuing terrorists. These subsequent acts were relevant to the extent to which the accused as a socius made common cause with the terrorists, the courts considering that there was a wide range of moral blameworthiness in cases of this sort.

While these cases indicate that subsequent acts of the accused are not to be ruled out of consideration in relation to extenuating circumstances and that such acts may in appropriate cases be regarded as, or part of cumulative, extenuating circumstances, such acts are especially to be considered in their relevancy to moral blameworthiness as indicating the state of mind of the accused. It is possible therefore that the extenuating circumstances named may be mental circumstances but the courts have also indicated such consequential acts separately, or with others, as extenuating circumstances.

(b) Consequential State of Mind of the Accused

A state of mind giving rise to or evidencing confession, penitence, remorse or conscience arises, by definition, after the commission of the wrongful act, whether or not, in homicide cases, it arises before or after the resultant death. Historically, confession and repentance or remorse have been recognised as affording mitigation or a basis for commutation of the death penalty.[82] Certainly one or more of the

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82) C L von Bar, History of Continental Criminal Law, p.147; L Radzinowicz, History of English Criminal Law, Vol. I, p.115; J van der Linden, Rechtsgeleerd, Practicaal en Koopman's Handboek, 2.2.7; M Ancel, Capital Punishment (U.N.), p.17; E Kahn, "Crime and Punishment, 1910 - 1960" in Acta Juridica, 1960, p.196; and D A Thomas, Principles of Sentencing, p.195 (regarding remorse).

purposes of punishment, such as reformation, may not be inconsistent with an approach which recognises bona fide penitence or confession indicating a contrition which will reasonably result in an avoidance of a similar criminal act or the conscious choice of a different way of life. Where it is clear that such an attitude of mind is genuinely evident, then it can be argued that punishment is not required to achieve certain purposes of punishment relevant to the individual, although it may still be required to satisfy other or public purposes of punishment.[83] This consideration may validly have the effect of diminishing the punishment because we do not punish just for the sake of punishing but for the achievement of certain purposes or ends.

It is true that it may well be asked whether a large proportion of offenders are not penitent. This may appear to be so and the important question remains one of evidence and bona fides in order to avoid the so-called "gallows-repentance" which van der Linden suggested arose more from fear of punishment than from any desire for virtue.[84] In the cases quoted in the immediately preceeding section the consequential acts of the accused, seeking to remedy or undo what he had done, were illustrated. In this section the state of mind, which might give rise to such consequential acts or give rise to some diminution of the punishment, is pointed to. But it remains essentially a state of mind arising after the commission or completion of the criminal act. For this reason it might be said generally to have more limited relevance to extenuating circumstances. In

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83) R v Karg, 1961(1) S A 231 (A D), p.234 - 235.

84) op. cit., 2.2.7. But see S v Shupinyaneng 1977(2) P H H189 (O).

terms of the definition accepted in this thesis, such circumstances are those which are "associated with the crime or the conduct or mental state of the accused in the commission of the crime".[85] Normally an act or a state of mind occurring or arising after the commission of a crime might be said not to be relevant to the conduct or mental stete of the accused which is pertinent to his blameworthy condition. In a general sense only it may be said to be "associated" with a crime, not in the chain of causative events of the crime but in the chain of related events or circumstances in the same way as guilt, blame, punishment or reformation are associated with a crime. There may well be room on this sort of basis for e finding that penitence can provide a circumstance which might be described es extenuating. Confession or conscience simply in themselves could not be so regarded unless they evidenced a contrition related to the crime and to the purposes of punishment for that crime.

In R v Lloyd[86] the subsequent act of the accused (in fetching the doctor) together with the corroboration of his remorse were considered by de Villiers, J to be circumstances relevant to determining an absence of premeditation. On the other hand, pangs of conscience after the commission of a murder together with a fearful state of mind, even where dolus directus is absent, were not found to constitute extenuating circumstances in S v Zondo.[87]

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85) Chap. III, p.139.

86) 1941 C P D 162. See also S v Arnold, 1965(2) S A 215 (C P D).

87) 1969(2) P H H187 (A D).

It would seem that states of mind arising after the act of homicide are not causally associated with the crime or the conduct or mental state of the accused in the commission of the crime. Rather, do they normally arise after and because of the commission of the crime. While they may well be a relevant consideration at the sentencing stage, as historically they seem to have been treated, they would not normally be treated as an extenuating circumstance in our law as it is at present. Such states would rather be a consideration for the judge in determining sentence when extenuating circumstances have been found. If no extenuating circumstances are found then it is not possible for the trial judge to take this factor into account. He can only report his findings in this respect to the Executive for recommendation to the State President for clemency should that be warranted. This is not entirely satisfactory. Where, however, it is possible to relate such a consequential state of mind more directly to the conduct or state of mind of the accused in the commission of the crime, then such circumstance in its related nature or es evidencing the former state of mind or conduct may clearly be named as an extenuating circumstance.

(c) Consequential Circumstances

There are certain other circumstances which follow upon an act of homicide which may form a basis for a finding of extenuating circumstances or which have, rightly or wrongly, been held so to do. These are not necessarily directly related to the state of mind or particular acts of the accused.

The type of consideration which arises here is, for example, whether it is an extenuating circumstance, such as should be relevant to the question of the imposition of the death sentence, if the triers of fact disagree on the substantive

finding of guilt; or if the deceased dies some substantial period of time after the accused's criminal act; or where the triers of fact may differ as to any novus actus interveniens in the question of cause of death.

The question of extenuating circumstances is related to the power to sentence in murder cases and specifically to the discretion of the judge to impose the sentence of death. If there is no finding of extenuating circumstances, the judge must impose the death sentence. If there are factors in the case which the triers of fact feel palliate the horror of the crime or diminish the personal or public blameworthiness[88] of the accused or reduce the degree of potential public denunciation, this would in regard to most other crimes be reflected in the punishment imposed. In murder, however, this cannot be done by the court as a matter of law unless extenuating circumstances are found. If a circumstance relatable to the sentencing function generally is not able to be categorised as an extenuating circumstance because of the terms of judicial definitions of such, then any reasoned consideration of the triers of fact or the judge not to impose the death sentence for the crime cannot be given

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88) In distinguishing between public and personal blameworthiness I am thinking rather of the distinction between the blameworthiness which is judged attributeble subjectively to the accused for the personal evil state of mind giving rise to the crime in contrast to the blameworthiness attributable to the deed and its consequences as a whole taking into account objectively the nature of the whole act and its resultant harm or reactive effect on society generally, such as gives rise to the form and strength of denunciation. This perhaps in some way reflects the difference in the definitions on the one hand in Babada's (1964(1) S A 26 (AD), p.27) or Petrus' (1969(4) S A 85 (A D), p.95 cases and, on the other hand, those of Mfoni (1935 O P C 191, p.193) and Biyana (1938 E D L 310, p.311)

effect to except through the agency of executive clemency. It could well be argued that executive clemency should not be called in aid for cases which could be dealt with in terms of normal sentencing principles or policy but for the mandatory nature of the sentence to be imposed or the narrowing of statutory language by judicial definition.

The trend of judicial definitions of extenuating circumstances has been referred to in Chapter III[89] as being only such circumstances as have relevance to the mind or mental faculties of the accused, i.e. the personal blameworthiness of the accused. That there may well not be legislative warrant for such a limiting definition has been submitted in the conclusion to that chapter and in the formulation of the definition for the purposes of this thesis. The matter should remain open to permit such growth or change as may be required in the process of sentencing for murder.

A case illustrating a finding of extenuating circumstances because of a variance between the triers of fact as to verdict is R v Andries Cameron.[90] The accused was found to have been to some extent under the influence of liquor and counsel had argued that the affair was a drunken brawl and the murder was unpremeditated. Hathorn, J P indicated that he would not have found extenuating circumstances on the ground of the influence of alcohol but for the fact that one of the members of the court expressed the view that the verdict should have been culpable homicide.

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89) p.115 above.

90) 1943(2) P H H191 (N P D) and R v Ndera, 1955(4) S A 182 (A D), p.185. Cf. R v Mcunu, 1960(4) S A 624 (A D).

"That fact weighs with me with great force in considering whether we should find extenuating circumstances in this case, and it is that consideration which weighs the scale in favour of our finding extenuating circumstances, and I am prepared to take part in that finding, feeling at the same time that it is a decision which may well be described as illogical".[91]

In S v Molale[92] the fact that death resulted nine days after the assault after the victim had only entered hospital the day after the assault was one of the factors upon which a finding of extenuating circumstances was based.

Although the year and a day rule in relation to the death of a victim is not applicable in South African law,[93] it is submitted that it is possible, where death ensues some substantial period after an assault and notwithstanding adequate medical attention which should have been effective, for the triers of fact to find that this is a factor associated with the crime of murder which in their view palliates the horror of the crime or diminishes the blameworthiness, public if not personal, of the accused.

Cases where the victim's conduct after the assault did not assist his physical recovery, or even detrimentally affected

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91) Hathorn, J P,(supra). The converse has also occurred in S v Matthee, 1971(3) S A 769 (A D) where a judge, who was part of a majority decision finding extenuating circumstances, imposed the death sentence and was not upset by the appeal court.

92) 1974(1) P H H(S)6 (O P D).

93) Burchell and Hunt, op. cit., Vol. II, p.343.

it,[94] might well provide circumstances which triers of fact regard as extenuating, bearing in mind that the crime of murder only originates when death has occurred and such circumstances can well be regarded as associated with the crime.

Although the crime of murder is never prescribed,[95] it might well be that, where an accused is only brought to book, say, some years after the commission of the offence and his way of life subsequent to the crime has been exemplary, the triers of fact might regard such circumstances as associated with the crime or the mental state of the accused in the commission of the crime and, depending on the facts, find extenuating circumstances.

V SENTENCING OR PUBLIC POLICY

The question has arisen whether sentencing policy or public policy is a matter of relevance to extenuating circumstances. Extenuating circumstances as defined would not appear to be able to incorporate the wider type of consideration such as may validly be taken into consideration by a judicial officer in the sentencing process and related to one or other purpose or emphasis of punishment.

In R v Roberts,[96] Hoexter, J A indicated that "in considering the question of extenuating circumstances the jury is, generally speaking, not concerned with the accused's character or with his probable reaction to clemency, or with matters of

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94) See Burchell and Hunt, op. cit. Vol. II, p.330 - 333.

95) Section 18(2), Criminal Procedure Act, No. 51 of 1977.

96) 1957(4) S A 265 (A D).

policy such as deterrence".[97] He said "it is necessary to bear in mind that in passing sentence the judge is entitled to take into consideration matters which the jury would not be entitled to take into consideration in deciding whether there are extenuating circumstances".[98]

This kind of approach is based upon the consideration that, while the determination of extenuating circumstances is a "distinct procedural step"[99] in the sentencing process, it is not the total process. While a finding of such circumstances empowers the judge to pass a sentence other than death and while it may provide him with a number of considerations upon which to base his determination of sentence, it does not necessarily provide him with the full range of matters which may validly be considered before determining the sentence. In S v Meyer[100] the majority of the triers of fact found extenuating circumstances but the judge felt constrained nevertheless to impose the death sentence because the deceased was a policeman who was carrying out his duties. If the fact, that the deceased was a policeman at the time carrying out his duty, was known to the accused, this might well be said to be a factor which is associated with the crime and perhaps even with the accused's blameworthiness depending on the facts. Any other extenuating circumstances might validly have been found, as in this case, but the

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97) p.271. See also R v Sebereke, 1959(2) R & N 5 (F C) where it was held that "neither deterioretion in general standards of behaviour nor the general policy of the law regarding punishment of certain types of offences seemed proper matters to influence a trial court in considering extenuating circumstances"; R v Tarusika, 1959(1) S A 122 (F S C); and Danger v R, 1962 R & N 49.

98) p.270.

99) R v Taylor, 1949(4) S A 702 (A D), p.717.

100) 1968(1) P H H171 (A D).

judge's consideration of this one factor as outweighing such circumstances is a matter of what he deemed to be sentencing policy[1] which formed no part of the procedure for extenuating circumstances.[2]

Normally, some of the community-related aspects of a crime would be regarded as policy in the sentencing process, for example, the fact that, for reasons of general deterrence or protection, a crime should be more severely punished because its frequency is increasing.[3] In S v Maermen,[4] however, a community-related aspect of the crime, such as "the interests of society" in a certain sense, was deemed to be related to the consideration of extenuating circumstances. A group of youths entered a house, took a woman outside and raped and killed her. No extenuating circumstances were found, the trial judge indicating that the duty of the court lay not only to the accused person but to society as well. It was argued on appeal that this was a misdirection in relation to the extenuating circumstances procedure. Rumpff, C J said:[5]

> "Maer selfs al word aanvaer det hierdie faktor wel in aenmerking geneem was, toe versagting oorweeg is, was dit, myns insiens, geen mistasting in die besondere omstandighede van hierdie geval nie. Dit

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1) "..... police work is dangerous work and a policeman is entitled to look to the court for protection" - Meyer's case, (supra).

2) See also R v von Zell (2), 1953(4) S A 552 (A D) and R v Roberts, 1957(4) S A 265 (A D).

3) R v Joseph, 1953(3) S A 589 (O P D), p.594; R v Samson, 1962(4) S A 64 (S R), p. 65 - 66.

4) 1976(3) S A 510 (A D).

5) p.512E.

is waar dat in die Babada-saak die belange van die gemeenskap nie genoem word nie. Dit was daar nie ter sake nie. Dit is ook waar dat by die oplegging van vonnis die belange van die gemeenskap wel oorweeg moet word ..... Uiteraard is moord 'n misdaad wat die belange van die gemeenskap aantas, en sou dit verkeerd wees om by oorweging van versagtende omstandighede die belange van die gemeenskap in hierdie sin in oorweging te neem. Nietemin, is ek van mening dat, in die samehang van die feite van die onderhawige saak, die Hof geregtig was om die belange van die gemeenskap as 'n faktor te beskou wat saam met al die ander relevante faktore oorweeg kon word om die subjektiewe geestestoestand van die appellant te beoordeel".

The judge then compared the question of brutality[6] which, while it should not exclude extenuation, was a factor from which the mental attitude of the accused, during the commission of the crime, could be assessed as also his moral blameworthiness. He continued:[7]

"Die omstandighede waaronder 'n moord gepleeg word kan ook, myns insiens, sodanig wees dat daarvan afgelei kan word dat die beskuldigde 'n gees geopenbaar het waarin hy nie alleen 'n persoon vermoor het nie, maar ook die gemeenskap self wou uitdaag en aantas ..... Die gees van sulke mense is dié van geweldadigheid, en van minagting vir die

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6) See Chap. III, p.137 - 139.

7) Supra, p.512 - 513, my underlining.

vreedsame gemeenskap waarin mense andersins kan verwag om in onderlinge beskerming te leef. Ek is van mening dat, in hierdie lig gesien, die belange van die gemeenskap in 'n beperkte sin wel as 'n faktor kan geld, saam met al die ander relevante faktore wanneer versagting oorweeg word, en dat in so 'n geval die gewig wat byvoorbeeld aan jeugdigheid van 'n beskuldigde geheg kan word, ook deur hierdie faktor verminder kan word".

Caution must be expressed as to the limited application of this approach. The case involved a gang of youths who were out to terrorise the neighbourhood. Furthermore, this factor must be so integrated with the total conduct and state of mind which is being considered at the extenuation stage that it is difficult or impossible to evaluate blameworthiness without considering the interests of society. Generally, however, it is submitted that the triers of fact should concentrate on the ascertainment of any circumstances which extenuate and, if these are there, to state them. This then permits the judge to take other factors such as previous convictions, policy or other valid considerations into account. If the triers of fact relate their function at the extenuation stage too closely with the actual appropriate sentence, then they would be assuming more aspects of the sentencing function than practice allows them.

CHAPTER - VIII

PROCEDURAL ASPECTS

INTRODUCTION

Either accidentally or with astute purpose the draftsman in preparing sub-section (2) of section 34 of the General Law Amendment Act No. 46 of 1935,[1] which introduced statutory extenuating circumstances into South African law, and the Legislature in enacting the section failed to indicate the exact nature or order of the procedural steps to be taken in carrying out the provisions of the sub-section. In the same way as the determination of the meaning of "extenuating circumstances" was left open and flexible for application and interpretation by the courts, so it was left to the hand of forensic experience to adjust this new procedural step to the existing law of procedure. The sub-section read as follows:-

> "When the accused is tried upon a charge of murder the judge shall require the jury to state, if they find the accused guilty of murder, whether in their opinion there are extenuating circumstances and, if they state that in their opinion there are extenuating circumstances, he may require them to specify those circumstances: provided that any

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1) This sub-section became section 206(2) of the Criminal Procedure and Evidence Act No. 31 of 1917 and later section 141(2) of the Criminal Procedure Act No. 56 of 1955. This was deleted by the Abolition of Juries Act No. 34 of 1969.

failure to comply with the requirements of this subsection shall not affect the validity of the verdict or any sentence imposed as a result thereof".

Among other considerations we observe the following:-

(a) While it was suggested or implied that the enquiry was made after verdict, this is not clear. No indication was given as to whether the judge was to state his requirement to the jury during the summing up, so that they should consider the question of extenuating circumstances together with or immediately after reaching a verdict of guilty or whether it was to be made after the jury had returned the formal verdict and should then only consider the question of extenuating circumstances.

(b) No indication was given in the sub-section as to whether the judge was required to or may have pointed out to the triers of fact what circumstances may or were likely to give rise to a finding of extenuating circumstances or what circumstances should not be so regarded.

(c) May separate evidence be led purely on the question of extenuating circumstances and should such be led before or after verdict or both where necessary?

(d) Were counsel for the defence or the State allowed to address the triers of fact on the question of extenuation?

(e) Though the judge may have required the jury to specify circumstances said to exist, could he enquire behind the jury's plain statement of the circumstances?

(f) No lead was given as to how the Appellate Division was to approach the question of extenuating circumstances at the stage of an appeal.

As the frequency of jury trials for murder diminished substantially over the years until the abolition of juries in 1969[2] reference to jury cases remains only of historical significance and therefore will not be dealt with in detail in this chapter. All trials for murder are now conducted by a judge and normally two assessors, usually persons with legal training and experience. These three together become the triers of fact to determine verdict and to express the opinion whether there are extenuating circumstances.

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2) Section 35(1) of Act No. 34 of 1969. Reported cases dealing with questions of jury trial procedure are: R v Mfoni 1935 O P D 191 (what to put to jury and when); R v Molikwa 1940(2) P H H207 (T P D); R v Qenele Xutu 1941(1) P H H7 (W L D) (form of direction to jury); R v Fundakubi 1948(3) S A 801 (A D) (summing up on and characterisation of extenuating circumstances by jury); R v Mcunu 1950(4) S A 624 (A D) (finding on extenuating circumstances indicating a variance with the substantive verdict); R v Malunga 1952(1) P H H8 (A D) (obligation to put question to jury); R v Koortz 1953(1) S A 371 (A D) (jury not to be influenced by penal consequences to considering extenuating circumstances); R v von Zell 1953(3) S A 303 (A D) (erroneous instruction to jury); and Adams v S 1964(1) P H H46 (A D) (inadequate summing up).

As indicated in Chapter III, since the abolition of juries in 1969 the only statutory reference to extenuating circumstances now is found in section 277(2) of the Criminal Procedure Act, 1977[3] where one of the privisos to the mandatory imposition of the sentence of death for murder reads:-

> "..... 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".

We proceed in this chapter to deal with the subject matter in the chronology of the stages of a trial from arraignment to appeal on the question of sentence or irregularity in the proceedings of the trial court. Before commencing this, however, there is one case which deals, at a stage before arraignment, with the possible effect of a finding of extenuating circumstances at the stage of a bail application.

BAIL APPLICATION

In R v Grigoriou,[4] Ramsbottom, J heard an application for bail from an accused charged with murder. The Attorney-General opposed the application. For the accused it was contended that on the State case, according to the dispositions at the preparatory examination, there was a

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3) No. 51 of 1977. In what follows, reference to any section shall, unless otherwise stated, be a reference to a section of this Act. See also section 290(3)(b) in respect of accuseds over the age of eighteen years but under twenty-one years.

4) 1953(1) S A 479 (T P D).

likelihood that extenuating circumstances would be found and the death sentence not passed. Ramsbottom, J considered that the court should have regard to what temptation there would be to the applicant to abscond if he were admitted to bail. He was of the opinion that the likelihood of a conviction for murder was not negatived and that it was not clear from the preparatory examination that extenuating circumstances would be found to exist in the case. In the circumstances the learned judge felt that the court would not be justified in granting the application.

A primary consideration regarding any application for bail, the grant of which is in the discretion of the court, is whether the grant of bail is likely to prejudice the ends of justice.[5] In the determination of this question the circumstances of the case, the nature of the charge and the severity of any possible sentence resulting from a conviction are factors which must be considered in deciding whether the accused is likely to prejudice the ends of justice in absconding and forfeiting his bail. In a charge of murder therefore an important consideration is whether the accused stands in peril of having the sentence of death imposed and whether the threat of such sentence is likely to induce him to abscond. It would therefore appear that consideration must, on a prima facie basis, be given to the possibility or likelihood of the trial court finding extenuating circumstances in the case. While the judge determining a bail application is not required to and should not comment on the weight or credibility of the evidence or make any statement which might appear to prejudge the issues to be investigated at the trial, he must reach a prima facie appraisal of the issues to assist himself in determining the

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5) See section 61(1).

prima facie consideration. It is clear, however, that the less he says about the respective merits of the State or defence case as disclosed or about the moral assessment of blameworthiness, the less likelihood there will be of possible embarrassment to the triers of fact at the later stage. The judge can reach his conclusions and state them as far as possible without precise commitment and pertinently in respect only of the application for bail. It is clear, of course, that no statement or finding of a judge hearing a bail application can bind the triers of fact at the trial or the judge in the determination of sentence for or against the accused.

PLEA

Section 105 of the Criminal Procedure Act, 1977 states that the charge shall be put to the accused by the prosecutor before the trial is commenced and, subject to the accused's capacity to understand the proceedings or to object to the charge under section 85, he shall be required forthwith to plead thereto in accordance with section 106 which lays down the pleas which may be tendered by the accused. The section, inter alia, states that the accused may plead guilty to the offence as charged or to any other offence of which he might be convicted on the charge or he may plead not guilty. The question which arises regarding a charge for murder is whether an accused may tender a plea of "guilty, with extenuating circumstances". The direct answer to this question might seem to be in the negative. Firstly, section 106 makes no provision for such a plea. A plea of guilty to an indictment for murder is a statement by the accused that he unlawfully and intentionally killed the deceased[6] and

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6) Section 98.

renders him liable in terms of section 277 to the sentence of death. The sentence of death for a conviction of murder may be avoided only where the triers of fact have found the existence of extenuating circumstances or where a woman is convicted of murdering her newly born child or where the accused is under eighteen years of age. Secondly, "murder, with extenuating circumstances" is not a separate crime as such, distinct from murder or culpable homicide, nor does it appear in section 258 as a possible verdict upon a charge of murder.

On a plea of guilty to the offence charged, if the presiding judge is of the opinion that the offence does not merit the sentence of death he may impose any competent sentence.[7] Where, however, the judge is of opinion that the offence merits the sentence of death he must question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty.[8] The proviso to section 112(1)(b) nevertheless prevents the sentence of death being imposed unless the guilt of the accused has been proved as if he had pleaded not guilty. Were the accused therefore to plead guilty to "murder, with extenuating circumstances" it would be necessary for evidence to be led to prove guilt and

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7) Section 112(1)(a)(i). Compare section 140(2).

8) Section 112(1)(b). Section 112(2) provides that if the accused or his legal adviser hands into court a written statement setting out the facts on which he has pleaded guilty the court may, in lieu of questioning the accused, convict him on the strength of his statement if satisfied that he is guilty of the offence. The court may always question an accused to determine an appropriate sentence - section 112(3). Section 112 appears to be more happily worded than its predecessor section 258 of the Criminal Procedure Act No. 56 of 1955.

also extenuating circumstances. If extenuating circumstances are not evident in the State evidence which is led for this purpose then the defence will also be required to lead evidence to justify a finding of extenuating circumstances. If evidence is to be led, assessors will have to be sworn in.[9)]

It seems therefore that if an accused pleads guilty, with extenuating circumstances and, either from a preparatory examination record or from a statement lodged by the accused in terms of section 112(2) and accepted by the prosecutor, it appears that the sentence of death shall not be imposed, the court may convict the accused and, in terms of section 277(2), express the opinion that there are extenuating circumstances and impose a sentence other than death. In such a case it would apparently not be necessary to summon assessors and a presiding judge could deal with the matter on his own.

The plea of "guilty, with extenuating circumstances" is and, it is submitted, can be taken as a plea of guilty to the crime of murder. The qualification pertains only to the question of sentence. If the presiding judge is of opinion that the offence does not merit the death sentence and he is of the opinion, in terms of section 277, that there are extenuating circumstances, whether from the preparatory examination record[10)] or from questioning the accused[11)] or from the receipt of a statement from the accused in terms of section 112(2), he may find the accused guilty and proceed to

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9) Section 145(3).

10) Section 141(3).

11) Section 112(1)(b).

sentence. Where, however, the prosecutor indicates that he contests the qualification "with extenuating circumstances" then the sentence of death becomes a possible sentence and evidence will have to be led and assessors summoned to determine on this evidence.

OPENING ADDRESSES

The prosecutor, prior to adducing evidence for the State, and the defence counsel, prior to adducing evidence for the accused, may address the court or jury for the purpose of explaining the charge or the defence and opening the evidence intended to be adduced but no comment thereon is permitted.[12] The question arises: May reference at these stages be made to extenuating circumstances? It might be suggested that as the finding of extenuating circumstances is a special finding by the triers of fact on all the facts as proved, bearing in mind the onus of proof in this matter, reference should not be made to extenuating circumstances. There would appear to be no objection to a prosecutor or defence counsel drawing the attention of the triers of fact to the fact that a determination as to the existence of extenuating circumstances will have to be made on the proved facts. There might also be no objection to defence counsel stating that the defence will try to establish certain facts, which he might name, which it will be submitted should receive favourable consideration as extenuating circumstances.

The mere statements, as indicated above, will apprise the triers of fact at any rate that at a certain stage they will have to determine the existence of extenuating circumstances and the indication by the defence counsel will enable them in

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12) Sections 150(1) and 151(1)(a) respectively.

advance to appreciate the trend of the defence case. This may have been more necessary in the days of jury trials but where in practice most assessors are legally trained they will be aware of the procedure on extenuating circumstances. Normally the prosecutor will not be concerned with indicating facts which specifically negative the existence of extenuating circumstances. He will state in his opening address the positive facts which, he will later submit, support the allegations in the indictment and justify a conviction for murder. It will be left for the defence counsel, if such be his instructions, to indicate the factors of moral excuse or defence to the charge.

EVIDENCE

It is possible to say that since 1935 there have in fact been three distinct stages in the criminal trial for murder instead of two. Prior to the introduction of section 34(2) of the General Law Amendment Act[13] a trial for murder in which the accused was found guilty consisted of two stages, namely the establishment of the facts in the indictment, i.e. the unlawful and intentional killing of a person and, upon the verdict of guilty of murder, the passing of the sentence. The second stage was little more than a formality except in the case of a woman who was convicted of the murder of her newly born child and persons under sixteen (now eighteen) years of age as the judge was obliged to pass the sentence of death and had no discretion. With the introduction of this section, however, the first stage remained virtually the same. In regard to the finding of extenuating circumstances,

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13) No. 46 of 1935.

however, Schreiner, J A in R v Taylor[14] said:-

> "It is not part of the sentence or part of the judge's reasons for the sentence; it is a distinct procedural step in relation to the power to sentence a convicted murderer".

It was a special finding on the facts related to the issue of sentence where guilt has been previously determined or may be determined contemporaneously with the finding on extenuation. It is not a final step in relation to sentence, firstly because it does not bind the judge[15] and secondly because it is possible for further evidence to be placed before the court after extenuating circumstances have been found in order to assist the judge in determining sentence.[16] The third and final step, the determination of sentence by the judge, is, in the case of a finding of no extenuating circumstances as indicated, a formality but, in the case where extenuating circumstances have been found, assumes a more definite character as the judge is at large in regard to

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14) 1949(4) S A 702 (A D), p.717.

15) R v von Zell 1953(3) S A 303 (A D).

16) Section 274(1). See, for instance, R v Owen 1957(1) S A 458 (A D), p.462 regarding previous convictions. If no extenuating circumstances are found the judge is precluded from further investigating the question of sentence as he has no sentencing discretion other than in respect of a woman regarding the murder of a newly born child or an accused under the age of eighteen years.

the sentence to be passed.[17]

The question of evidence relating to the second stage must now be discussed. By definition, extenuating circumstances are factors associated with the commission of the crime and, regarding objective facts at any rate and perhaps certain subjective factors, one might expect that these factors will manifest themselves during the course of the evidence and cross-examination in the State and defence cases. An accused is entitled to make submissions as to the existence of extenuating circumstances which are found only in the State case as where, for instance, the accused gives or leads no evidence.[18] Again, he is entitled to give such evidence himself or to lead witnesses to the same effect. Even if the accused pleads an alibi which is rejected and he is convicted he can submit the existence of any extenuating circumstances which have manifested themselves in the State case.

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17) In Southern Rhodesia the judge is permitted at this stage also to consult the assessors if he so wishes - R v Tarusika 1959(1) S A 122 (F S C). The use of the word "court" in section 277(2) of the South African Criminal Procedure Act, 1977 in two senses, i.e. in relation to the finding of extenuating circumstances as well as in relation to the imposition of sentence, suggests that this may also be done in South Africa. Compare section 145(4).

18) S v Ndlovu 1970(1) S A 430 (A D), p.433H: "This does not necessarily mean that the accused must give evidence: in a proper case the trial court may be able to find the required degree of probability from the evidence as a whole or from so much thereof as it has accepted. But there must always be a foundation of probability before the court can exercise what is in effect a moral judgment in a matter of extenuating circumstances". Also S v Mdletshe 1978(4) S A 75 (A D), p.77.

The question, however, whether an accused is required to submit extenuation only on facts proved prior to verdict or whether he has the right to lead such evidence after verdict and at the stage of the "distinct procedural step" concerning the finding of extenuating circumstances gave rise to some difficulty in the unsatisfying decision in R v Malopi[19] and, it must also be said, to some difference between the law there stated and the practice of some courts.

In R v Mfoni,[20] Krause, J P examining the effect of the then section 206(2)[21] soon after its insertion in the Criminal Procedure Act in 1935 said:-

> "In my view it is necessary that the court or jury should in the first place consider whether or not there is legal evidence to support a conviction and only when a verdict of guilty of murder has, on the facts ascertained, been returned must the judge consider whether he can legally exercise his discretion .....
>
> It will thus be seen that it is obligatory on the judge to require the jury to state (but only after verdict) whether there are extenuating circumstances and that he may require them to specify what those circumstances are. In my opinion the judge should, before requiring the jury to state whether there are such extenuating circumstances or not (seeing that

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19) 1954(1) S A 390 (A D).

20) 1935 O P D 191, p.192 - 193.

21) Act No. 31 of 1917.

the question whether there are such circumstances or not after verdict then becomes an issue before the Court), allow both the Crown and the defence to call such evidence as they may deem necessary to clear up the issue".

An examination of the reported cases on the question of extenuating circumstances indicates that this practice was widely followed.[22)]

In Malopi's case, however, Greenberg, J A held that the accused had no right to lead or give evidence in extenuation after verdict except in certain limited circumstances mentioned below. In that case the accused had denied anything to do with the killing and denied that he was drunk at the time or had had anything to drink. Two State witnesses had said he was under the influence of liquor. After verdict the accused's counsel was asked whether he wished to say anything in "mitigation" and when, after adjournment, he recalled the accused and sought to lead evidence that he was drunk on the night in question the trial

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22) In the following cases the question of extenuating circumstances, evidence on extenuation and addresses on extenuation were dealt with after and apart from the verdict: R v Molikwa 1940(2) P H H207 (T P D); R v Qenele Xutu 1941(1) P H H7 (W L D); R v Blokland 1946 A D 942; R v Fundakubi 1948(3) S A 801 (A D); R v Taylor 1949(4) S A 702 (A D), p.716; R v Sandi 1950(2) P H H132 (A D); R v Mcunu 1950(4) S A 624 (A D), p.626; R v Ndlovu 1951(1) P H H47 (O P D); R v Koortz 1953(1) S A 371 (A D); R v Mkize 1953(2) S A 324 (A D), p.332; R v Kubeka 1953(3) S A 691 (T P D), p.695; and R v Ndhlovu 1954(1) S A 455 (A D), p.456. Even after Malopi's case this procedure has been followed without reference to the special reasons mentioned by Greenberg, J A in the case, i.e. where the accused is misled or misunderstands his position. See, for instance, R v Owen (supra); R v Matonsi 1958(2) S A 450 (A D), p.454; R v Bungweni 1959(3) S A 142 (E C D), p.145 (addresses); and S v Babada 1964(1) S A 26 (A D), p.27.

judge, Roper, J indicated that he was not going to rehear the case if that was all the accused was going to say. The next sentence of the record shows that the accused was found guilty of murder without extenuating circumstances. In his report to the appeal court the trial judge made a somewhat remarkable statement:-

> "It did not appear to me that counsel was entitled to raise, under the guise of extenuating circumstances, an issue which had failed in evidence on the merits .....".

This statement in that form is, of course, a little incomprehensible as it is in fact often just in those cases, in which certain factors such as provocation or intoxication fail as a defence, that they succeed in being regarded as circumstances diminishing moral blameworthiness for extenuating circumstances. What the learned judge possibly meant, however, was that he was not going to let the accused attempt to prove that he was drunk when that would conflict with his evidence at the trial. Would the judge, for instance, on the basis of his remark, have prevented counsel from arguing a point in extenuation which had been argued and rejected prior to verdict on the question of guilt?

Be that as it may, leave to appeal was granted and Greenberg, J A gave the judgment of the Appellate Division in which Centlivres, C J concurred. Schreiner, J A gave a dissenting judgment. In his judgment, Greenberg, J A states that the cases of Mfoni[23] and, to a lesser extent, Kubeka[24] are

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23) Supra.

24) Supra.

authority for the contention that, after a verdict of guilty, evidence for the State and defence could be called on the question of extenuation. The learned judge's argument against this authority proceeded broadly in three stages: firstly, the grammatical construction of the sub-section as it then was; secondly, a statement as to the issues in a murder trial; and finally, an examination of certain factors which could lead to a waiver of the strict application of his construction of the section.

Greenberg, J A therefore found that the accused was not entitled to lead the evidence which he sought to lead and that there was consequently no irregularity. The three exceptions allowed by the learned judge were:-

(a) where the accused is misled by the court into not leading evidence before verdict on the understanding that it would be permitted later;

(b) where the accused has not led the evidence because of some other misunderstanding; and

(c) where the judge exercises his discretion to admit such evidence at any stage.[25]

As the Legislature left as an open question the determination of the place and limits of the distinct procedural steps the question arises whether the courts can determine that open question by fixing a rule. Schreiner, J A in his dissent was of opinion that they may not. He said:-[26]

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25) Malopi's case (supra), p.395. R v Twala 1961(1) P H H63 (A D).

26) p.396.

"It is, I think, clear that the accused is entitled to lead evidence on extenuation and is not obliged to limit himself to such evidence as is also relevant to the issue of guilty or not guilty. In R v Lembete (1947(2) S A 603 (A D)) this court decided that the onus rests upon the accused to prove to the triers of fact that there are extenuating circumstances. As a basis for persuading them to exercise a moral judgment in his favour he must convince them by a balance of probabilities of the existence of the facts required to support such judgment. It is not a matter of judicial discretion; the accused has the right to put such relevant evidence before the triers of fact as he thinks fit, subject to any control the judge may properly exercise in seeing that the process of the court is not abused. There is no rule of practice, so far as I am aware, that confines the hearing of evidence directed only at extenuation either to the period before verdict or to the period after verdict. The circumstances of different cases may obviously vary greatly".

It will have been noticed that from the wording of section 274(1) (previously section 186(2)) generally in no trial has the accused a right to lead evidence related to sentence. In terms of the section the court has a discretion whether to hear such evidence or not. This discretion must, of course, be exercised judicially under pain of being taken on appeal or review. It could hardly be said of any judicial officer, who simply refused to hear any evidence relative to sentence and mitigation or which might be so regarded, that he was acting judicially. The presence of this requirement virtually has the force of a substantive legislative

provision regarding the admission of evidence in mitigation in respect of any reasonable application. It is submitted that this can reasonably take place even where the defence was an absolute denial or an alibi. If, in the case of a refusal by the judicial officer to hear evidence in mitigation, the case were taken on review and the substance of the evidence sought to be led indicated in the affidavits it would in most cases be very difficult for the appeal court to say that such evidence might not reasonably have influenced the court in determining sentence. Therefore, while an accused in any trial might have no absolute right to lead such evidence, he has in effect something that comes close to it. In the case of extenuating circumstances Schreiner, J A considered there was a clear right: there is no specific provision and to this extent only, it is submitted, is Greenberg, J A correct in his judgment. But the judge who controls the proceedings generally cannot in exercising such power deprive the triers of fact of the opportunity of hearing evidence relative to an issue to be determined by them. The Legislature left this in the hands of the triers of fact, of which he is one, and he must so order the procedural matters of the trial as to permit the triers of fact adequately to determine the issues which have been left to them.

In S v Shabalala,[27] Rumpff, J A dealt with this matter which was raised indirectly in a special entry regarding the production of previous convictions after verdict but before extenuating circumstances were determined. He said:-

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27) 1966(2) S A 297 (A D). See also comment in (1966) 83 S A L J 271 by S Evans.

"Nieteenstaande die meerderheidsbeslissing in R v Malopi 1954(1) S A 390 (A A) is daar heelwat regters wat konsekwent voortgaan om 'n moordsaak in twee fases te laat verhoor. My eie mening is dat dit die korrekte prosedure is. Ek wil nie die argumente pro en contra herhaal nie. Vir my is van deurslaggewende belang nie die bewoording van die betrokke wetsartikel nie (tans artikel 141(2)) - die bewoording is, myns insiens, neutraal - maar die feit dat die bewyslas op die Staat rus om die skuld van die aangeklaagde te bewys terwyl die bewyslas op die beskuldigde rus om die aanwesigheid van versagtende omstandighede te bewys. Hoewel daar dus wel een ondersoek is nl. of die beskuldigde skuldig is aan moord met of sonder versagtende omstandighede, is daar twee afsonderlike geskilpunte ten opsigte waarvan die bewyslas nie op dieselfde party lê nie, en na my mening sou 'n uniforme prosedure om die ondersoek in twee fases te verdeel meer in die belang van geregtigheid wees as 'n prosedure wat vereis dat 'n beskuldigde sy getuienis aangaande versagtende omstandighede moet lei terwyl die vraag van sy skuld of onskuld ondersoek word. Die prosedure wat die verhoorhof in die onderhawige saak gevolg het[28] ..... was, myns insiens, dus korrek".

The wording of the present section 277(2) "..... 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" does not

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28) Regarding the two phases but not the production of previous convictions which will be discussed later.

determine the position with any clarity.[29] It is submitted that the Legislature should have taken the opportunity to do so. The legislative language suggests that the opinion as to extenuating circumstances is to be held at the time of convicting the accused whereas court practice before or after Malopi's and Shabalala's cases has continued to leave the matter open as to when the opinion is to be entertained whether before or after verdict as long as it is formulated before the sentence is finally determined.

There is much to be said for not clouding or complicating the substantive issue of guilt with considerations relating to the evaluation of blameworthiness. Comparative studies of the problem of punishment for murder and the various means of limiting the operation of capital punishment and achieving a just sentence show this approach to be a most desirable one.[30]

It is submitted therefore that procedurally as well as substantively it is wiser to deal with the question of extenuating circumstances as something distinct from guilt for at least the following reasons:-

(a) The finding on extenuating circumstances is a distinct procedural step, not in relation to guilt on the indictment as laid but in relation to the power to sentence a convicted murderer.[31]

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29) The signed Afrikaans text has „by skuldigbevinding .....".

30) Report of the Royal Commission on Capital Punishment, 1949 - 1953, Cmd. 8932, para. 555 and M G Paulsen and S H Kadish, Criminal Law and its Processes (1962).

31) R v Taylor 1949(4) S A 702 (A D), p.717.

(b) The tests to be applied in regard to verdict and the finding of extenuating circumstances differ even regarding the same factors.[32)]

(c) No rule should operate against that number of cases where no factors of extenuation will have been revealed during the course of the evidence prior to verdict, for example alibi.

ONUS

A perusal of the reported cases indicates that it was only in 1947, twelve years after the introduction of extenuating circumstances, that the courts gave their attention to the question of the onus of proof of such circumstances. While the incidence and degree of the onus had not been determined before R v Lembete[33)] the courts and the triers of fact appeared to find such facts upon all the proved facts without directly locating the incidence and also appeared to treat the degree as a balance of probability.[34)] Certainly there appear to be no reported cases where it can be ascertained from the facts that any heavier onus was placed in the proof of these circumstances. Had there been, the question might have raised its head at an earlier stage.

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32) S v Mula 1975(3) S A 208 (A D), p.213.

33) 1947(2) S A 603 (A D).

34) See cases like R v George 1938 C P D 486; R v Hugo 1940 W L D 285; R v Lloyd 1941 C P D 162; and R v Molehane 1942 G W L 64.

In Lembete's case Greenberg, J A pointed out[35] that the legislative provisions concerning extenuating circumstances were in favour of the person convicted of murder and were introduced to mitigate the rigour of the law as it then existed.[36] He proceeds to the prima facie conclusion that it would not be surprising if the Legislature required the convicted person to prove the circumstances which would make it permissible for the court to pass a more lenient sentence. This prima facie opinion was supported by the general principles of the incidence of onus, namely that the onus rests on the party who asserts the affirmative.

The words of the original section in relation to the jury[37] or the words of the present sub-section do not give any indication as to onus. Indeed, they do not even indicate that such circumstances may be found only in evidence on the record. For instance, if the triers of fact from their own observation form the opinion that the accused is dull-witted or possessed of simple mental processes[38] and they state this, whether on its own or with other circumstances, to be an extenuating circumstance, this places the court in the position to exercise its discretion as to sentence. This would fall within the words of the sub-section, namely "..... where the court, on convicting a person of murder, is of the opinion that there are extenuating circumstances .....".[39]

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35) p.609.

36) See Chapter III above, p.105 et seq.

37) As to which, see p.383 above.

38) R v Molehane 1942 G W L 64, p.72 and S v Khumalo 1968(4) S A 284 (T P D).

39) Section 277(2) of the Act.

In other words, it does not appear clearly from the words of the sub-section that the triers of fact are required to form an opinion only on the proved facts.[40]

Greenberg, J A had indicated in Lembete's case that the statutory language used points clearly to the view that the onus rests on the accused.[41] With respect, this is not at all clear. It is submitted that the argument is on surer ground in relying on the so-called "prima facie opinion" together with the general principles of onus.

While the opinion as to extenuating circumstances is to be formulated by the triers of fact and may therefore be said to be a factual issue, the use of the word "issue" in the manner used by Greenberg, J A in his judgment in its technical sense sounds a little strange in relation to the practice in extenuating circumstances. However that may be, the Appeal Court laid it down that the onus rests on the accused to prove the existence of extenuating circumstances and that the extent of this onus is governed by decisions such as Ex Parte Minister of Justice in re R v Bolon,[42] i.e. that he must prove it by a preponderance of probability.

It is submitted, however, that the case should not be interpreted as constricting the plain but unclear meaning of the terms of section 277(2) of the Act but should rather be accepted as far as it goes to produce a consonancy between

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40) The use of the word "circumstances" in relation to "facts" was commented on above in Chapter III, p.116.

41) p.609.

42) 1941 A D 345.

the sub-section as it then stood or as it now stands and existing principles of adjective law.

The decision in Lembete's case has been followed since 1947 with or without specific citation in, among others, R v Taylor,[43] R v Padhla,[44] R v Kubeka[45] and R v Dena.[46] Each of these cases refers to the proof of or showing the "existence of" extenuating circumstances and not to the proof of facts which justify the finding of extenuating circumstances.

Insofar, however, as it may be said that it is for the accused "to show that there are extenuating circumstances" this does not mean that the defence in submitting or the court in dealing with them is limited to circumstances appearing from the evidence led by the defence. The court in exercising its function in this respect is bound to have regard to all the relevant evidence which includes evidence led on behalf of the State.[47] An accused therefore who pleads an alibi or a denial or who does not lead extenuatory

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43) 1949(4) S A 702 (A D).

44) 1948(1) P H H87 (A D). As the accused led no evidence there was a "mere possibility" as to the influence on his conduct.

45) 1953(3) S A 691 (T P D).

46) 1962(2) P H H237 (O P D). On onus in mitigation generally, see the helpful judgment of Colman, J in S v Shepard 1967(4) S A 170 (W L D).

47) S v Ndlovu 1970(1) S A 430 (A D) and S v Mdletshe 1978(3) S A 75 (A D).

evidence as such is not deprived of the consideration of possible extenuating circumstances by the court or the actual finding of such.

ADDRESSES ON EXTENUATION

Section 175(1) of the Act states that after all the evidence has been adduced the prosecutor may address the court and thereafter the accused may address the court.[48] This section suffered no modification in 1935 on the introduction of extenuating circumstances and clearly the section was not framed with a view to the possibility of two distinct procedural steps, i.e. before and after verdict in a trial for murder. Before sentence is passed in a murder trial it is possible for there to have been three addresses by each of the State and defence counsel on three different aspects of the evidence or, in fact, evidence of three different kinds. These are:-

> evidence of each party as to the substantive issue of guilt on the indictment; and
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> evidence pertinently addressed to the question of extenuating circumstances and, if such are found to exist, then
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> evidence such as previous convictions or a probation officer's report or other evidence received by the court in terms of section 274(1) in order to inform itself as to the proper sentence to be passed.

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48) Formerly section 222 of the original Criminal Procedure Act No. 31 of 1917 and 183 of its successor Act No. 56 of 1955.

Section 274(2) does say that the accused may address the court on any evidence received under sub-section (1) as well as on the matter of sentence and thereafter the prosecution may likewise address the court.

It may be that this section 274 was considered sufficient to authorise or permit evidence and argument on extenuation after a formal verdict has been pronounced on guilt. But this section cannot be said to correllate happily with its near-neighbour 277(2) regarding the opinion as to extenuating circumstances.

Very early on Krause, J P who had not dealt with this matter specifically in Mfoni's case[49] took the opportunity twelve days later in R v de Wet and Pienaar[50] to indicate that after verdict and before any finding of the jury as to whether there are extenuating circumstances counsel for the accused and the State should have an opportunity of leading evidence on the point and of addressing the court on that evidence. In R v Blokland[51] a special entry had been made to the effect that it was an irregularity for the court to give its opinion on the question of extenuating circumstances without first hearing the defence. Davies, A J A[52] said:-

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49) 1935 O P D 191.

50) 1935(2) P H H145 (O P D).

51) 1946 A D 940.

52) p.942.

"The court should no doubt have asked the attorney (this was in the Aliwal North Circuit Court) who appeared for the accused whether he wished to address it on this point but had he desired to address it he should at once, and without being invited, have said so (cf. R v Cooper 1926 A D 54) .....".

In view of the fact that the question of extenuating circumstances is regarded as a distinct procedural step in regard to the power to avoid the capital sentence and evidence pertinent to such finding may be led after verdict, it is submitted that the only correct view, seeing that it is a question of factual evaluation, is for counsel for the State and defence to be allowed to address the court upon all such evidence. Indeed, section 175(1) should clearly be held to give the defence the right to do so. It would also appear that even where no additional evidence is led after verdict and where counsel in address prior to verdict did not for technical or tactical reasons deal with the question of extenuating circumstances he should be permitted to do so after verdict when the question is crisply raised. Even where counsel does not indicate a desire to do so and the trial judge considers that the court may possibly impose a death sentence he should ask the defence counsel to deal with the matter to assist the triers of fact.

ASSESSORS AND THE COURT

In any case of murder which is to be tried before a superior court, if the presiding judge "is of the opinion that in the event of a conviction and having regard to the circumstances of the case, the sentence of death may be imposed or may have

to be imposed"[53] he shall summon two assessors to his assistance. Section 145(4) of the Act provides that an assessor who has been sworn in becomes a member of the court. The sub-section provides that the judge alone shall decide upon any question of law or any question as to whether any matter constitutes a question of law or of fact and it also provides that the decision of the majority of the members of the court shall be the decision of the court. Section 146 provides that whether the judge sits with assessors or not he shall give reasons for the finding of the court on any question of fact and if there is a difference of opinion among the members of the court the judge shall give the reasons for any such different finding of the member of the court who is in the minority. As there is the potential for the imposition of the death sentence in most murder trials the presiding judge will normally summons assessors when a plea of "not guilty" has been entered.

In the light of this indication of the function of assessors the double use of the word "court" in section 277(2) raises the question whether the assessors must be party to the actual sentence to be imposed even though it will be the judge as judicial officer who passes the sentence. The relevant portion of the sub-section reads (my underlining):-

> "..... 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".

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53) Section 145(2) of the Act.

The word "court" at its first appearance clearly means the judge and the assessors who are the triers of fact required to give an opinion as to extenuating circumstances. The assessors are members of the court and as we have seen are only excluded from determining legal questions but are required to be part of the decision-making on questions of fact.[54)]

The second use of the word "court" relates to the discretion to impose sentence. There seems to be an apparent difference between the use of the words "impose" and "pass" in the Act. Section 276 refers to the types of sentence which may be "passed" and section 277(1) says that "sentence of death may be passed by a superior court only".[55)] Further examination of other sections in Chapter 28 of the Act dealing with "sentence" leads one to the conclusion that probably no real difference is intended in the use of these words. But this does not ease the confusion which the use of these words causes in relating sections 274(1), 277 (1)and 277(2). The argument may proceed as follows:-

(a) The "court" (judge and assessors) are to express an opinion as to extenuating circumstances - section 277(2).

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54) This has always been accepted to be the role of assessors. See R v Fundakubi 1948(3) S A 810 (A D), p. 817 ; R v Taylor 1949(4) S A 702 (A D), p. 717; and S v Letsolo 1970(3) S A 476 (A D).

55) "Superior court" is defined in section 1 of the Act as meaning a provincial or local division of the Supreme Court. See also sections 278(1) and 279(1) for further use of the word "passed" and sections 282, 285(2) and (5) and 287(1) for use of the word "impose".

(b) The "court" (in the same sub-section should have the same meaning, namely judge and assessors) may impose any sentence other than death - section 277(2).

(c) A "court" may, before passing sentence, receive such evidence as it thinks fit to inform itself as to the proper sentence to be passed - section 274(1).

(d) Sentence of death may be passed by a "superior court" only.

The suggestion arises that assessors should be party to the decision as to what sentence should be imposed. But this has not been accepted to be the position.[56] The presiding judge alone has a discretion to determine what the sentence shall be and to "impose" such sentence and/or "pass" it and he may take other factors into account than may be taken into account in assessing extenuating circumstances.[57] The presiding judge may informally consult his assessors on the question of sentence but he alone in practice remains responsible for the determination of sentence. However, it is submitted that section 277(2) should be amended to replace the second use of the word "court" in that section by the words "presiding judge". This will eliminate the anomalous aspect of the section.

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56) R v von Zell 1953(3) S A 303 (A D); R v von Zell(2) 1953(4) S A 552 (A D); R v Owen 1957(1) S A 458 (A D), p.461; R v Roberts 1957(4) S A 265 (A D), p.271; R v Tarusika 1959(1) S A 122 (F S C); and R v Tarusika (2) 1959(1) 395 (F S C). See also J C de Wet and H L Swanepoel, Strafreg (3rd ed. 1975), p.201, note 13.

57) See particularly R v Owen (supra); R v Roberts (supra); and S v Sparks 1972(2) P H H75 (A D) regarding section 109 of Act 56 of 1955, presently section 145.

In Rhodesia the law was identical to that of the Republic. Section 232A introduced by the Criminal Procedure and Evidence Amendment Act of 1949 into the Criminal Procedure and Evidence Act, Chapter 28 was in the same terms as the then section 141(2) of the South African criminal code.[58] In 1952, however, an amendment in the form of section 223B(1)(e)[59] was introduced to empower the presiding judge to consult the assessors regarding sentence "if he thinks fit". Such consultation, however, is not to be permitted to affect the discretion which the judge alone must exercise, after a finding of extenuating circumstances, as to whether or not the death sentence is to be imposed.[60] Having exercised the discretion not to impose the death sentence he may apparently consult the assessors on the actual sentence to be imposed. In practice this does and can occur in South African courts.

In the Tarusika cases[61] the trial judge and assessors considered whether there were any "mitigating circumstances" and having agreed that there were the judge on his own found that other circumstances outweighed these and he did not exercise his discretion in favour of the accused. "The assessors were party to a decision that there were mitigating factors but it does not appear from the record that they at

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58) Criminal Procedure and Evidence Act No. 31 of 1917.

59) Act No. 14 of 1952, section 22. See R v Tarusika(2) 1959(1) S A 395 (F S C), p.396 and S v Frashishiko 1977(2) P H H170 (H C, R).

60) R v Tarusika(2) (supra), p.396. See also R v von Zell (2) 1953(4) S A 552 (A D).

61) 1959(1) S A 122 (F S C) and (2) 1959(1) S A 395 (F S C).

any time considered these factors in relation to the other circumstances of the case or formed any judgment as to how far, on the case as a whole, the conduct of the appellant could be extenuated".[62] The appeal court remitted the matter and at the further hearing the triers of fact found "extenuating circumstances which enabled a sentence other than death to be passed ....." and went on: "But if we as triers of fact are asked to say whether we find extenuating circumstances in the sense that we recommend a sentence other than death, we make no such finding".[63] The judge's second exercise of his discretion against the accused led to a further appeal where he was held to have erred in bringing the triers of fact into the second finding, namely whether a sentence of death is recommended or not. The appeal court therefore on this occasion itself passed an imprisonment sentence.

In determining the question of extenuating circumstances it would seem as though the triers of fact, the judge and the two assessors theoretically each carry equal weight. A majority decision in favour of finding extenuating circumstances enables such to be recorded. The majority may be either the judge and one assessor or the two assessors.[64] It is advisable for the trial judge to record the findings of a minority assessor, or of himself when in the minority, in favour of extenuating circumstances or of the two assessors when they form the majority in favour of extenuating circumstances.

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62) Per Tredgold, C J in the first Tarusika case (supra), p.123.

63) R v Tarusika(2) (supra), p.395.

64) S v Meyer 1968(1) P H H171 (A D).

JUDGE'S DISCRETION

Upon a finding by the triers of fact of extenuating circumstances the trial judge is given a discretion in law as to whether he shall pass a sentence other than the death sentence.[65] As early as 1939 in R v Blom[66] this discretion was emphasized by Stratford, C J where he indicated that even if in the opinion of the trial court there are certain extenuating circumstances the court still has a discretion regarding the sentence and the appeal court would not interfere with a reasonable exercise of such discretion. This view has been adhered to over the years in spite of attempts to upset it.[67]

A trial judge may, in spite of a finding of extenuating circumstances by the triers of fact, even if such finding was unanimous, i.e. included himself, sentence an accused to death.[68] He may refrain from imposing the sentence of death by accepting the finding of extenuating circumstances and impose some other sentence. Even though he does not accept the finding of the triers of fact, for example where he was in the minority, their finding enables him to pass some sentence other than death and this he may do on any view of the facts he might hold as opposed to that held by the

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65) Section 277(2) of the Act reading "judicial officer" for "court" where it appears a second time.

66) 1939 A D 188, p.199.

67) R v von Zell 1953(3) S A 303 (A D) and R v Roberts 1957(4) S A 265 (A D).

68) R v von Zell (supra) and R v Roberts (supra).

triers of fact.[69] He may also take into consideration the facts found by the triers of fact in determining the actual sentence or he may reject them entirely or he may take them into consideration in conjunction with his own view of the facts.

The trial judge may therefore in the exercise of his discretion not only take a different view of the facts to that of the triers of fact but may also differ in regard to the moral assessment of the facts or circumstances found to be extenuatory.[70] Furthermore, the trial judge may, when there has been any finding of extenuating circumstances but not otherwise,[71] receive such evidence as he thinks fit in order to inform himself as to the proper sentence to be passed.[72] This may include evidence such as previous convictions[73] and theoretically any other evidence in mitigation, which may not have been led at an earlier stage on the question of extenuation, or matters of policy. In R v Owen,[74] Schreiner, J A said:-

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69) This is implied in R v von Zell(2) 1953(4) S A 552 (A D), p.561.

70) R v von Zell(2) (supra) and R v Roberts (supra), p.271. See also R v von Zell 1953(3) S A 303 (A D), p.312H.

71) Because he then has no discretion regarding sentence in a case of murder.

72) Section 274(1).

73) R v Ndhlovu 1954(1) S A 455 (A D); S v Owen 1957(1) S A 458 (A D); and S v Shabalala 1966(2) S A 297 (A D).

74) Supra at p.461. See also R v Roberts (supra), p.271. R v Sebereke 1959(2) R & N 5 (F C).

"When it comes to the imposition of sentence the judicial officer is no doubt entitled to take a wide range of factors into account, including the accused's bad or good character, his apparent reformability and the like".

In the exercise of his discretion the trial judge must not act upon any wrong principle; must not bring a biased judgment to bear on the question of sentence; and must exercise his discretion judicially.[75]

SENTENCING

The question of determining and passing sentence in a murder case is properly the function of the judicial officer or the court. Where the accused is found guilty and no extenuating circumstances are found the trial judge must pass the sentence of death.[76] Where the triers of fact have found that in their opinion there are extenuating circumstances the trial judge, as we have seen, whether he agreed with that opinion or not at the time of its formulation, has a discretion whether to impose the death sentence or to impose any other competent sentence.[77] If a sentence of imprisonment is imposed it shall not be for a period less than four days unless the sentence is that the convicted

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75) R v Roberts (supra), p.272 and S v Meyer 1968(1) P H H171 (A D).

76) Section 277(1)(a) of the Act.

77) Section 277(2) of the Act. R v von Zell(2) 1953(4) S A 552 (A D).

person be detained until the rising of the court.[78] In S v de Bellocq[79] the court found the accused guilty of murder and, extenuating circumstances being found, de Wet J P discharged the mother who had drowned her young baby believed to be diseased beyond the possibility of recovery and ordered her to "enter into recognisances to come up for sentence within six months if called upon". It is submitted that this is not a "sentence" for the purpose of section 277(2) of the Act, i.e. "Where a woman is convicted of the murder of her newly born child ..... or where the court is of opinion that there are extenuating circumstances ....., the court may impose any sentence other than the death sentence". This, notwithstanding the provisions of section 297(1) of the Act which empower a court convicting a person of any offence for which the law has not prescribed a minimum punishment, inter alia, to postpone the passing of sentence for a specified period on certain conditions.[80]

In respect of persons under the age of eighteen years who are convicted of murder, whether extenuating circumstances are found or not, the "court" has an absolute discretion in sentence and is not required to pass the death sentence.[81] Persons under the age of eighteen years may also be dealt with in terms of section 290(1) of the Act, i.e. be placed

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78) Section 284 of the Act. S v Pepenene 1974(1) S A (O P D) and S v Hartmann 1975(3) S A 532 (C P D).

79) S v de Bellocq 1975(3) S A 538 (T P D). The judgment, although only reported in 1975, was delivered in May 1968.

80) Section 352 of the Criminal Procedure Act No. 56 of 1955.

81) Section 277(2).

under the supervision of a probation officer or in the custody of a suitable person or be sent to a reform school. A person over the age of eighteen years but under twenty-one years may, where extenuating circumstances have been found but not otherwise, be dealt with in a similar manner in terms of section 290(3) except the placing in the custody of a suitable person.

It is probably the more appropriate view to regard sentencing as a dynamic process in which the facts of the case and more particularly the "moral quality"[82] as well as the constraints arising from the legal and social systems and the person of the accused are "interpreted, assimilated and made sense of in ways compatible with the attitudes" of the judicial officers[83] and the reasonable expectancy of the society in which this takes place. The discussion in Chapter III[84] on punishment and sentencing has relevance here. The relationship of extenuating circumstances to sentencing policy and to mercy has been dealt with above.[85]

What falls to be dealt with here is the question of the proof of previous convictions in relation to the extenuation-sentencing procedure. In the early case of R v Ndhlovu[86]

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82) J Hogarth, Sentencing as a Human Process, p.371 and D A Thomas, Principles of Sentencing, p.45.

83) J Hogarth, op. cit., p.382.

84) p.91 et seq.

85) At p.378 and 79 respectively.

86) 1954(1) S A 455 (A D).

in 1953, after defence counsel had addressed the court on extenuating circumstances, it was inclined to the opinion that there were no such circumstances but considered that if the accused had no previous convictions this together with certain other facts of the case could well provide extenuating circumstances. Prior therefore to determining this issue the judge enquired of the prosecutor as to previous convictions. The accused had a list of previous convictions and the court saw them. Centlivres, C J on appeal held that the accused in the case had not been prejudiced. He left it as an open question whether in every case it was permissible for the prosecutor to prove previous convictions when the question of extenuating circumstances is raised.

Four years later more positive steps were taken by the Appellate Division in R v Owen[87] to clear up this question. In this case, immediately after the accused had been found guilty, the previous convictions were handed in without invitation from the judge. Schreiner, J A[88] distinguished Ndlovu's case. The argument that where in terms of Malopi's case the trial judge allows the question of extenuating circumstances to be investigated after verdict the State is entitled as of right to prove previous convictions, Schreiner, J A quite rightly rejected but pointed to the accepted exceptions, namely where the accused has placed his character in issue or where proof of previous convictions is relevant to meet a particular line of defence. In the case of the former this could arise at the extenuation stage but in the case of the relevance to defence this would more normally

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87) 1957(1) S A 458 (A D).

88) p.460.

only arise during the trial and before verdict. Owen's case was remitted for the hearing of further relevant extenuation evidence and sentencing afresh.

In S v Shabalala,[89] Rumpff, J A made it clear that at the extenuation stage previous convictions were prima facie not relevant and it would be irregular for them to be put to the accused at this stage. The exceptions mentioned above were recognised but in such cases the learned judge considered that application must be made to the trial judge and only when this is granted should the step be taken.

The trial court in determining sentence must proceed in the normal manner of sentence determination. The remarks of M T Steyn, J in S v J[90] are relevant:-

> "Wanneer 'n Hof moet besluit watter straf opgelê moet word, moet hy derhalwe aandagtig daaraan wees dat die doodstraf die onbeskryflyk uiterste stap is wat die samelewing kan doen en dat 'n menslike lewe uitgewis behoort te word alleenlik wanneer dit onder die omstandighede van die besondere saak algeheel onvermydelik is en daar dus in werklikheid vir die Hof geen ander keuse is nie".[91]

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89) 1966(2) S A 297 (A D), p.300. See also S Evans "Procedure in considering extenuating Circumstances", 1966(83) S A L J 271, p.272.

90) 1975(3) S A 146 (O P D), p.159. See also S v Letsolo 1970(3) S A 476 (A D), p.477.

91) See also S v de Bruyn 1968(4) S A 498 (A D), p.513C; S v Letsolo (supra), p.476; S v Whitehead 1970(4) S A 424 (A D), p.439; and S v K 1972(2) S A 898 (A D).

In the consideration of sentence the basic purposes of punishment (deterrence, prevention, reformation and retribution) must be related to the circumstances of the accused and the particular circumstances of his crime.[92]

LEAVE TO APPEAL

Section 316 of the Act provides that an accused who has been convicted before a superior court may within fourteen days of the passing of sentence apply to the judge who presided at the trial for leave to appeal against his conviction or sentence.[93] The question as to the existence of extenuating circumstances involving, as it does, findings of fact and the appropriateness of any sentence imposed as a result of or notwithstanding such finding may be the subject of an appeal. Questions concerning extenuating circumstances and the relevant procedure may also be made the

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92) S v Matthee 1971(3) S A 769 (A D), p.774. See also p.96 above.

93) Examples of such appeals are: Fundakubi 1948(3) S A 810 (A D) (witchcraft as extenuating circumstances); Hloka 1949(2) P H H182 (A D) (intoxication); Taylor 1949(2) S A 702 (A D) (intoxication); Sandi 1950(2) P H H132 (A D) (mental abnormality); Kennedy 1951(4) S A 431 (A D) (psychopathic personality); Mkize 1953(2) S A 324 (A D) (witchcraft); von Zell(2) 1953(4) S A 552 (A D) (judge's discretion); Sonti 1954(2) P H H196 (A D) (no premeditation); Hercules 1954(3) S A 826 (procedure with jury); Hlatshwayo 1955(2) P H H255 (misdirection on facts); Balla 1955(3) S A 274 (facts); Ndara 1955(4) S A 182 (mistaken belief); Myeni 1955(4) S A 196 (witchcraft); Roberts 1957(4) S A 265 (psychopath); Muller 1957(4) S A 642 (intoxication); and Matonsi 1958(2) S A 450 (accused "prevented" by counsel from giving evidence).

subject of a special entry in terms of section 317[94] or the reservation of a question of law under section 319.[95]

The usual tests for granting leave to appeal apply to questions of fact or law arising out of extenuating circumstances.[96] The trial judge must attempt to deal with the merits of the application as objectively as possible and ask himself whether there is a reasonable prospect of success.[97] In Myeni's case[98] the trial judge refused leave to appeal against the conviction but granted leave to appeal on the question of extenuating circumstances because he was of the opinion that another court might take a different view of the facts. The appeal court held that this was not a sufficient

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94) Special entries were made in cases such as the following: Malunga 1952(1) P H H8 (non-compliance with section 141(2)); Malopi 1954(1) S A 390 (evidence after verdict); Ndhlovu 1954(1) S A 455 (proof of previous convictions prior to finding of extenuating circumstances); Anderson 1956(4) S A 756 (procedure with jury); Owen 1957(1) S A 458 (proof of previous convictions prior to finding of extenuating circumstances); and Twala 1961(1) P H H63 (procedure re evidence of extenuation).

95) Questions of law were reserved in these cases: Blom 1939 A D 188 (whether finding of no extenuating circumstances was unreasonable); Valachia 1945 A D 827 (certain evidence excluded); Mcunu 1950(4) S A 624 (questions on extenuating circumstances indicating variance with verdict); Koortz 1953(1) S A 371 (irresistible impulse not explained to jury); and Anderson (supra) (procedure with jury).

96) See The Law of South Africa, ed. W A Joubert, Vol. 5, para. 666.

97) R v Baloi 1949(1) S A 523 (A D). Also S v Shabalala 1966(2) S A 297 (A D).

98) 1955(4) S A 196 (A D).

ground for granting leave to appeal and referred to Taylor's case[99] to the effect that the appeal court cannot substitute its opinion for that of the triers of fact merely because it considers their opinion wrong. In R v Muller[100] it was indicated that in borderline cases the gravity of the crime and the consequences to the applicant are undoubtedly elements to be taken into account but that even in capital cases the primary consideration was whether there was a reasonable prospect of success.[1] In S v Shabalala[2] the trial judge said:-

> "With great reluctance it seems to me I should grant leave to appeal, the two main considerations being, firstly, that the death sentence was imposed and, secondly, that the conclusion of guilt was based entirely on circumstantial evidence. Although I feel in my own mind that this circumstantial evidence was of such a nature that the conclusion was inevitable, yet it may be possible for another Court to find a possible flaw in the reasoning and perhaps come to the conclusion that the explanation given by the accused could reasonably have been true".

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99) 1949(2) S A 702 (A D), p.717. See also S v Tshabalala 1974(1) P H H12 (A D).

100) 1957(4) S A 642 (A D).

1) S v Shabalala (supra), p.299.

2) Supra, p.299.

Judge Rumpff on appeal, however, felt that the death sentence in itself and the fact of circumstantial evidence only are not sufficient grounds to grant leave to appeal. The trial court had to be satisfied that there was a reasonable prospect of success on appeal. This prospect of success can pertain to the facts of the case or to the question of irregularity or misdirection by the trial judge of himself and his assessors regarding the facts in respect of verdict or of extenuating circumstances or by the trial judge only in respect of his determination of sentence.

The Criminal Procedure Act of 1977[3] has introduced a new form of appeal whereby if the Minister of Justice, in any case where a person has been sentenced to death, has any doubt as to the correctness of the conviction and the convicted person has not taken any steps to challenge the conviction he may on behalf and without the consent of such person refer the court record to the appeal court. He shall also with the record submit a statement of the ground for his doubt. The appeal court shall then consider the correctness of the conviction in the same manner as if it were considering an appeal by a convicted person against his conviction.[4]

Further Evidence

Where an application for leave to appeal is made and it is shown by affidavit that further evidence is available which was not led at the trial and which will presumably be accepted as true and that if accepted the evidence could

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3) No. 51 of 1977, section 323.

4) See J Dugard, South African Criminal Law and Procedure, Vol. IV, p.110.

reasonably lead to a different verdict or sentence then the court hearing the application may receive that evidence and any further evidence necessarily arising out of such evidence including rebuttal evidence of the State or evidence called by the court.[5] Save in exceptional cases there must be a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.[6]

THE APPEAL COURT'S APPROACH

Before the full right of appeal to the Appellate Division was granted by the Legislature in 1948[7] the approach of this court to appeals concerning extenuating circumstances was that it would not interfere with the findings as to the existence of such circumstances unless reasonable grounds were advanced why it should interfere[8] or the finding was one to which no reasonable person could have come.[9]

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5) Section 316(3).

6) Section 316(3)(c). See the two early cases of R v Odendaal 1949(2) P H H131 (A D) and R v Sandi (supra) as well as S v Vontsteen 1972(4) S A 551 (A D) and S v Lehnberg 1975(4) S A 553 (A D), p.558.

7) Criminal Procedure Amendment Act No. 37 of 1948 and The Law of South Africa, op. cit., para. 671.

8) R v Blom (supra).

9) R v Mosete 1946(2) P H H289 (A D).

The approach that the findings as to absence of extenuating circumstances must be unreasonable before interference from the Appellate Division can be solicited was echoed in R v Taylor,[10] R v Hlokoca[11] and R v Mkize.[12]

It follows from the statement in Taylor's case that the finding on extenuating circumstances results essentially from a moral judgment of the triers of fact[13] and that the appeal court cannot substitute its moral judgment for that of the triers of fact arrived at in a bona fide and proper manner. In Myeni's case[14] it was further indicated that the word "misdirection" in relation to this subject should be limited to cases like Fundakubi's[15] where the judge had directed the triers of fact to exclude a belief in witchcraft from their consideration. In R v Bureke[16] an appeal court considered there could be no interference unless the trial court had acted on a wrong principle or the decision was unreasonable

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10) 1949(2) S A 702 (A D), p.717.

11) 1949(2) P H H182 (A D).

12) 195 3(2)S A 423 (A D), p.336.

13) Supra, p. 717. Also S v Letsolo 1970(3) S A 476 (A D).

14) 1955(4)S A 196 (A D) and The Law of South Africa, op. cit., para. 657.

15) 1948 (3) S A 810 (A D) or where an unduly objective test was applied - S v Ntanzi 1975(1) P H H8 (A D). See also R v Kgolane 1960(1) P H H110 (A D).

16) 19 60(1) S A 49 (F S C) and S v Bowers 1971(4) S A 646 (A D), p. 649. See also R v Tomasi 1956 R & N 2 (F S C).

on the facts. The appeal court will also not interfere with the bona fide and proper exercise of a discretion vested in the trial judge.[17]

Even where the appeal court could have been persuaded that the probabilities of the facts could warrant a finding of extenuating circumstances the test of interference remains whether the trial court's finding was one to which no court could reasonably have come.[18]

In appeals on the question of extenuating circumstances since 1970, for example, the appeal court has in numerous cases declined to interfere with the finding of the trial court[19] while in an almost equal number of cases the appeal court has set aside the finding that there were no extenuating

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17) R v Mcunu 1950(4) S A 624 (A D); R v von Zell(2) 1953(4) S A 552 (A D); and S v Melinda 1971(1) S A 798 (A D).

18) S v Ndlovu 1970(1) S A 430 (A D), p.435 (witchcraft). The fact that the appeal court might have imposed a different sentence is not in itself sufficient ground to interfere - R v Durawati 1958 R & N 164.

19) Ndlovu (supra); Karuzi 1971(4) S A 246 (R, A D) (apparent vengeance motive); Bowers 1971(4) S A 646 (A D) (a rape-murder); Hawanba 1975(1) P H H30 (A D) (dolus eventualis); de Bruyn 1976(1) S A 496 (A D) (psychopathic tendencies); Mnyanda 1976(2) S A 751 (A D) (mentality); Maarman 1976(3) S A 510 (A D) (youthful gang terrorism); and Ceaser 1977(2) S A 348 (A D) (inner vice).

circumstances and altered the sentence to one of imprisonment.[20]

These are cases where the appeal court, in some cases but not others and on the basis of one or other of the grounds indicated above, has come to a different view of the facts or moral judgment on the facts as providing extenuating circumstances.

Further, regarding the question of sentence and the judge's discretion here, the appeal court will also not normally interfere with the bona fide and proper exercise of a discretion vested in a trial judge.[21]

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20) X 1974(1) S A 344 (R, A D) (terrorist socius criminis); Ntanzi 1975(1) P H H8 (A D) (provocation); Mula 1975(3) S A 208 (A D) (intoxication and provocation); Lehnberg 1975(4) S A 553 (A D) (youth and influence); Matabane 1975(4) S A 564 (A D) (youth); Hlongwana 1975(4) S A 567 (A D) (youth and influence) - the judgment in this case and that of Matabane were handed down the day before Lehnberg's case; van Rooi 1976(2) S A 580 (A D) (youth); Mapatsi 1976(4) S A 721 (A D) (youth-inner vice); and Mdletshe 1978(4) S A 75 (A D) (dolus eventualis).

21) R v von Zell(2) 1953(4) S A 552 (A D); S v Melinda (supra); and S v Morgan 1972(2) P H H137 (A D).

Over the same period from 1970 the appeal court has declined to interfere with sentence in a number of cases even where in some cases extenuating circumstances had been found[22] but in other cases has chosen to set aside the death sentence on the ground of some misdirection.[23]

In earlier years the appeal court tended, when interfering on the question of extenuating circumstances or when setting aside a death sentence, to remit the case to the trial court for sentence afresh[24] or for the hearing of further evidence and sentence afresh.[25] In other cases, for special reasons such as that the trial judge was no longer available[26] or so

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22) S v Melinda (supra) (extenuating circumstances found); S v Matthee 1971(3) S A 769 (A D) (extenuating circumstances found); S v Pietersen 1973(1) S A 148 (A D); S v Sibiya 1973(2) S A 51 (A D); S v Nxele 1973(3) S A 753 (A D); S v Phineas 1973(3) S A 897 (R, A D); and S v de Maura 1974(4) S A 204 (A D) (slight extenuating circumstances found).

23) S v Letsolo (supra) (non-consideration of the imprisonment alternative but compare S v Matthee (supra) and S v Pietersen (supra); S v Whitehead 1970(4) S A 424 (A D) (cumulative sentence reduced); S v Ndhlovu 1971(1) S A 27 (R, A D) (frenzied spontaneity) S v Lamont 1974(2) P H H49 (A D) (intoxication); and S v Maimela 1976(2) S A 587 (A D) (youth of sixteen years; sentence of death "disturbingly inappropriate").

24) R v von Zell 1953(3) S A 303 (A D), p.314; R v Anderson 1956(4) S A 756 (A D), p.761; R v Owen 1957(1) S A 458 (A D), p.463; S v Babada 1964(1) S A 26 (A D), p.28; and S v Ndhlovu(1) 1965(4) S A 688 (A D), p.691.

25) R v Tarusika 1959(1) S A 122 (F S C).

26) S v Sigwahla 1967(4) S A 566 (A D), p.572.

as not to keep the accused persons waiting unnecessarily lengthy periods, the Appellate Division increasingly from 1965 onwards tended to dispose of the matter of sentence itself.[27] In S v Robinson,[28] Holmes, J A said:-

> "I consider the latter course to be preferable, unless in a particular case there are cogent considerations pointing the other way, to which Counsel for the State would doubtless draw the Court's attention. As a matter of justice and humanity it is not desirable that persons waiting in the death-cell should be subject to fluctuating uncertainties as to their fate, if this can reasonably be avoided".

In certain cases for special reasons the appeal court may nevertheless remit a case to the trial court for reconsideration of extenuating circumstances which may involve the leading of further evidence.[29]

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27) S v Ndhlovu(2) 1965(4) S A (A D), p.697; S v Manyathi 1967(1) S A (A D), p.440; S v Sigwahla (supra); and S v Robinson 1968(1) S A 666 (A D).

28) Supra, p.678.

29) R v Eric 1966(1) S A 548 (R, A D), p.549 (arising out of statement in answer to the allocutus); R v Mharadzo 1966(2) S A 702 (R, A D), p.704; and S v van der Berg 1968(3) S A 250 (A D), p.253A.

In S v Pietersen,[30] Potgieter, J A summed up the principles which govern the occasions of the interference by the Appellate Division regarding the death sentence in cases of murder. The "question is not whether the Appellate Division would have imposed the sentence, but whether it could be found that the trial judge applied a wrong principle or had not maintained an impartial judgment in the imposition of sentence, or exercised his discretion arbitrarily[31] or that the sentence was void because of an irregularity or misdirection,[32] or, the sentence, judged in the light of all the evidence, was of such a nature that it could be regarded as disturbingly or startingly inappropriate".[33] These principles apply when, notwithstanding a finding of extenuating circumstances, the death sentence is imposed or in cases where an accused is under eighteen years of age.[34]

The Appellate Division has carried to some lengths its view not to interfere in the question of extenuating circumstances other than on the stated grounds by indicating that it would not express its views that extenuating circumstances might or

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30) Supra.

31) R v Ramanka 1949(1) S A 417 (A D); S v Melinda (supra), p.804; and S v Morgan (supra).

32) S v Malinga 1963(1) S A 692 (A D); S v Bowers (supra); S v Mula 1975(3) S A 208 (A D); S v de Bruyn (supra), p.500; and S v Moswedi 1976(2) P H H190 (A D).

33) S v Ivanisevic 1967(4) S A 572 (A D) and S v Narker 1975(1) S A 583 (A D).

34) S v Matabane (supra); S v Hlongwana (supra); and S v Maimela (supra), p.595.

should have been found. In R v Sonti[35] the appeal court had before it certain facts as extenuating circumstances but in view of the limitation on its power to interfere with the trial court's finding in this regard the appeal court could do no more than draw the attention of the Executive to these mitigating features in the appellant's evidence. In R v Balla,[36] however, Schreiner, J A dealt with the matter more fully in saying:-

> "It should not however be supposed that in practice the members of this court express such views as that extenuating circumstances might well or apparently should have been found by the trial court. On the contrary, there are many cases in which some or all the members of this court hearing an appeal do hold such views but give no expression to them because, in general, it is not our function as it is of the trial judge, to advise the executive on the exercise of the prerogative of mercy ..... It would be extremely unfortunate if any assumption were countenanced that the absence of any comment from this court favourable to the existence of extenuating circumstances indicated in the slightest degree that in the view of its members there were no features in the case in question pointing away from execution of the death penalty".

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35) 1954(2) P H H196 (A D).

36) 1955(3) S A 274 (A D), p.275 and The Law of South Africa, op. cit., para. 675.

This view was restated in R v Muller[37] and followed by the Federal Supreme Court in R v Bureke.[38]

STAY OR EXECUTION

Where an accused has been sentenced to death the execution of such sentence is suspended pending the outcome of the appeal proceedings.[39]

In the case of S v Malai[40] an application was made for the stay of execution the day before it was scheduled to be carried out. The court considered that it was a serious matter to raise hope in the mind of a person on the eve of his execution unless there was some ground for believing that there was a prospect of having his sentence commuted. In this case the applicant had assisted a co-accused to kill a witchdoctor because the other accused feared him. In respect of the co-accused extenuating circumstances were found and imprisonment imposed as he was found to be labouring under a delusion that the deceased could do him harm in a supernatural way. The applicant who had consumed liquor to give him courage to carry out his purpose and who had no similar excuse or motive was sentenced to death. Marais, J after examining these facts dismissed the application.[41]

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37) 1957(4) S A 642 (A D).

38) 1960(1) S A 49 (F S C).

39) Section 321(1).

40) 1972(4) S A 402 (T P D).

41) p.404.

Where a sentence of death has been passed upon a woman who is found to be pregnant a court on application shall order the stay of the execution until the child is born or until it is no longer possible in the course of nature that she should be so delivered.[42]

COMMUTATION OF SENTENCE

Where the sentence of death has been passed and there is no appeal or an appeal has not been successful the only recourse which an accused has to avoid the execution of the sentence is for the sentence to be commuted by the State President.[43] This is regarded as the act of extending mercy and may be carried out without the consent of the accused[44] and any other punishment provided by law may be imposed. Factors in the trial record or which become evident after the trial,[45] whether after further police investigations or not, or as a result of a petition to the State President to supply further evidence[46] may give rise to the exercise of this power.

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42) Section 278.

43) Section 326 and The Law of South Africa, op. cit., para. 675.

44) Section 326(1).

45) The Law of South Africa, ibid.

46) Section 327.

CHAPTER - IX

CONCLUSION - THE "VIA MEDIA"

"Extenuating Circumstances" was introduced into the South African law of murder by statute in the barest of references in the written word. Beyond this the system is not statutory in the sense that the statute enunciates the type of circumstances, the level or degree required or the manner or procedure of application. Forty-five years of the application of the system has given rise to a substantial though not inordinate body of case law. It is a system which was introduced against the background of the maintenance of the mandatory death penalty for the crime of murder and which recognises the wide variety of circumstances inherent and evidenced in homicide cases. It is a system which, upon the recognition of a moral differentiation in circumstances associated with the accused or the homicide itself and which can be said to be relevant to the morally adjudged blameworthiness of the accused, permits a differentiation in sentence from the irrevocable and absolute sentence of death.

Man's thinking about and reaction to the act of homicide have deep historical roots such as tend to give rise to instinctive reactions of retaliation. The meaning of punishment to man has established various emphases of purpose or justification and various principles of distribution of punishment.

Among the principles of distribution of punishment in accordance with the degree of condemnation or denunciation are those which measure by type of offence and, within these, those which measure or attempt to measure differences in capacity or circumstance within any type of offence. Traditionally in the crime of murder it has not been possible to do justice to this latter concept because the historical punishment for murder, generally speaking, has been death.

If, however, it is a principle of justice that morally disparate cases should not, in the absence of some instant purpose of overriding importance, be punished with the same severity then in order to maintain a consistent, sensitive and reasoned theory of criminal justice it should be possible to reflect this disparity in the fixing of sentence as far as is humanly possible. A fixed single penalty for murder, or indeed for any crime, does not permit the recognition of observable moral differentials or observable differences in moral denunciation for the particular criminal act in the particular circumstances of its commission by a particular accused person.

A concept of extenuating circumstances is inherent in the application of the principles of distribution in any criminal justice system.

The "via media" chosen by the South African government for enactment in 1935 is a practical and needful means of tempering the rigidity which the death sentence or other fixed penalty for murder has permitted. More than twenty years later it became the prime recommendation of the British Royal Commission on Capital Punishment, 1949 - 1953 but was not adopted by the government for enactment. The concept as practised in South Africa was, however, introduced

into Rhodesia in 1949 and into the then British High Commission Territories of Bechuanaland (Botswana), Swaziland and Basutoland (Lesotho) and this two years after the passing of the British Homcide Act, 1957. In recent years the British Criminal Law Revision Committee has been busy still attempting to clarify the definition of or categorise murder so that practice from definition might relate more clearly to justice in sentence as deriving from a grading of homicide offences.

The trend of judicial definition of extenuating circumstances over the last fifteen years gives the appearance of narrowing the extent of the consideration of such circumstances in a way which does not have statutory warrant. The argument in Chapter III of this thesis and the manner of analysis and development in Chapters IV to VII, while clearly illustrating the relevance of these definitions, attempt to keep a broader base of enquiry open as relates also to the earlier accepted definitions and the plain statutory language. This might then also provide a base for the use of the analysis or any principles or guidelines in the field of sentencing practice generally and not only as related specifically to the crime of murder.

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