EXTENUATING CIRCUMSTANCES IN MURDER CASES: A COMPARATIVE STUDY BETWEEN THE ZAMBIAN AND THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEMS

By

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Being a Directed Research essay submitted to the University of Zambia Law Faculty in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.
DECLARATION

I, CHENELA MWALE, computer number 28018770, do hereby declare that this Directed Research Essay is my genuine work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.

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ABSTRACT

The purpose of this dissertation was to examine the law governing extenuating circumstances in the Zambian and the South African Criminal Justice Systems. It attempted to establish what amount to extenuating circumstances and what does not amount to extenuating circumstances in both the Zambian and the South African Criminal Justice Systems.

The research primarily relied on desk research and field research of which the latter entailed the conducting of interviews with eminent advocates and scholars on the subject matter. Through the research, it was found that witchcraft, drunkenness and youth of a person are some of the circumstances which have been considered to be extenuating circumstances in the Zambian Criminal Justice System and it has been found that the Penal Code Chapter 88 Of the Laws of Zambia expressly provides that extenuating circumstances will not apply in the case of aggravated robbery. It was also found that in the South African Criminal Justice System, witchcraft and deindividuation used to amount to extenuating circumstances, while the youth of a person was not considered to be an extenuating circumstance. However it was also found that this doctrine of extenuating circumstances has some short falls and this can lead to discrepancies in the way the doctrine is applied.

Considering the fact that this doctrine was brought in to reduce the moral blameworthiness of the accused, the dissertation recommends that there should be some law enacted which will contain all the circumstances which are considered to be extenuating circumstances.
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This paper is dedicated to my mother Mrs. B. Mwale, my brother, John Mwale, my fiancée, Victor Simbotwe and my son Shawn Simbotwe.

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CHAPTER 1

GENERAL INTRODUCTION

1.0 INTRODUCTION

This chapter gives an introduction to the research and in general terms gives the outline of the research. It also deals with the basic aspects of the research. These include the statement of the problem, objectives of the research questions, significance of the study, the methodology and the chapter lay out.

1.1 DEFINITION OF EXTENUATING CIRCUMSTANCES

Extenuating circumstances are any circumstances that reduce the accused’s moral guilt or blameworthiness.¹ The doctrine of extenuating circumstances softens the rigidity of the mandatory death sentence. In theory the doctrine allows the judge to consider circumstances that impacted a defendant’s mind at the moment of the crime.²

1.2 HISTORY OF EXTENUATING CIRCUMSTANCES IN ZAMBIA

Murder is the most common offence for which the death penalty is retained and some countries in Commonwealth Africa have retained the mandatory death penalty for this offence.³ Zambia inherited the death penalty from the colonial era and successive constitutions have continued to provide for this penalty. Part III of the Zambian Constitution guarantees fundamental rights and freedoms of the individual. One of the rights guaranteed under the Constitution is the right to

¹ Dr Lovemore Madhuku, An Introduction to Zimbabwean Law, (Harare: Weaver Press, 2010) 126
life. However, under Article 12 (1) the death penalty is permissible if it is in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted. Under the provisions of the Penal Code, three crimes are punishable by death and these are treason, murder and aggravated robbery.\(^4\)

Zambia like other countries have done away with mandatory death sentence for murder and the sentence is instead discretionary as it allows for the consideration of extenuating circumstances.\(^5\)

The Penal Code Amendment Act No. 3 of 1990 represents a landmark in that it introduced several major changes to the Penal Code. The most major change had to do with extenuating circumstances. The Court had to impose on a person convicted of murder any other sentence in the case were there are extenuating circumstances.\(^6\)

1.3 HISTORY OF EXTENUATING CIRCUMSTANCES IN SOUTH AFRICA

Capital punishment as a means of punishing offenders in South Africa is old. It was used during the nineteenth century primarily as a means of punishing murderers, rapists and people who committed treason. Several judges took the view that in the case of murder it should not be mandatory and there was therefore a measure of uncertainty on the point. Then in 1917 Section 339 of the Criminal Procedure and Evidence Act 31 of 1917, made the death penalty mandatory

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\(^5\) Chenwi, *Towards the Abolition of the Death Penalty in Africa*. 44

for murder, with the exception of where perpetrators of the crime of murder was under the age of sixteen years or where such a person was a woman who had murdered her newly born baby.\(^7\)

The 1917 Criminal Procedure and Evidence Act was amended in 1935 to introduce the doctrine of extenuating circumstances. This doctrine of extenuating circumstances allowed the Court to impose sentences other than death were extenuating circumstances existed\(^8\)

After the advent of apartheid, more offences were placed in the capital punishment category. Most of these offences were common law crimes. Consequently the death penalty was applied at an alarming rate in South Africa. Many scholars then tried without success to challenge the justifiability of the law on the issue of death penalty. During the 1980s, more urgent questions began to be asked about the rationale behind the high level of execution in the country. The issue of abolishing the death penalty became more politicized and pressure began to mount on the Government of South Africa to change its penal policies. Consequently on 2\(^{nd}\) February 1990, the then President F W de Klerk suspended executions and proposed an extensive procedural reform of South Africa’s death penalty. The law reform that followed this announcement was very dramatic. The effect of the revision of the Criminal Procedure and Evidence Act was that death was no longer mandatory for any crime. Rather judges were allowed to impose a sentence of death after making findings on the presence or absence of aggravating or mitigating factors. This provision of the amendment of the Criminal Procedure and Evidence Act applied to the crimes of murder and rape. These changes provided much greater discretion for the sentencing judge. With the help of the amended Act, it appeared that the problem of requiring a judge to


\(^8\) Prof OS Koyana *The Demise of The Doctrine of Extenuating Circumstances in The Republic of South Africa and Transkei*,

3
sentence an offender to death without considering properly presence or absence of mitigating or
aggravating circumstances had been solved.\textsuperscript{9}

A critical examination of the South African situation then showed that judges were given wide
discretion in sentencing offenders to death. The increase of judicial discretion showed added to
the existing problems of arbitrariness and racial discrimination in the administration of the death
penalty in South Africa. Judges while applying their minds in the act of sentencing offenders
were influenced by non-judicial factors. The issue of death penalty in South Africa remained
unchanged, after its initial reform in 1990 until 1994 when the Constitutional Court interpreted
the newly written South African Constitution to mean that the death penalty violated certain
constitutional rights and was therefore unconstitutional in the case of \textit{S v Makwanyane}. That
judgment resulted in the abolition of the death penalty in South Africa.\textsuperscript{10}

The objective of this paper is to assess the efficacy of extenuating circumstances in relation to
murder by drawing a comparison between the Zambian criminal justice system and the South
African justice system. The starting point will be to give a general introduction of what
extenuating circumstances in murder are. The research paper will look at the Zambian Criminal
justice system by looking at what would amount to extenuating circumstances in relation to
murder and what would not amount to extenuating circumstances and what standard is used if
any. The paper will also look at what used to amount to extenuating circumstances in the South
African criminal justice system and what did not amount to extenuating circumstances and what
standards or factors were used to determine whether there were extenuating circumstances or not.

\textsuperscript{9} O.S. Mwimnobi \textit{The Reasonableness of Reinstating The Death Penalty in South Africa: A Juridico-Philosophical
\textsuperscript{10} O.S. Mwimnobi \textit{The Reasonableness of Reinstating The Death Penalty in South Africa: A Juridico-Philosophical
Approach},
In addition a general critique of extenuating circumstances in relation to murder will be given. Finally a conclusion, summary of the contents of the paper will be given and recommendations will be made.

1.4 STATEMENT OF THE PROBLEM

Although this doctrine of extenuating circumstances is welcome, the court is only able to take into consideration only those factors which are associated with the offence. There are no clear guidelines for determining whether or not extenuating circumstances exist. This leaves it to each judge to decide what weight to attach to extenuating circumstances that may be presented to court. It is therefore difficult to determine which defendant will receive the death sentence and which will not.

1.5 OBJECTIVES OF THE RESEARCH

1.5.1 GENERAL OBJECTIVE

To determine what factors are considered to be extenuating circumstances in Zambia and what factors are not considered to be extenuating circumstances in the Zambian Criminal Justice system and also to determine what factors were considered to be extenuating circumstances in the South African Criminal Justice system and what factors were not considered to be extenuating circumstances in the South African Criminal Justice system.

1.5.2 SPECIFIC OBJECTIVE

The ultimate objective of the research is to assess the efficacy of extenuating circumstances in relation to murder by drawing a comparison between the Zambian and South African criminal
justice systems by trying to assess whether we can learn anything from the South African criminal justice system on how they have determined what amounts to extenuating circumstances and what does not amount to extenuating circumstances

1.6 RATIONALE AND JUSTIFICATION OF THE RESEARCH

The intention of extenuating circumstances is to diminish morally the degree of guilt of the accused. The study is important because it has come at a time when no scholar has written any literature concerning the comparison between the Zambian and South African criminal justice systems on extenuating circumstances in relation to murder. The research is a modern contribution to literature on extenuating circumstances as it takes a different approach on the subject. In assessing the efficacy of extenuating circumstances, the research will be provide information on whether this doctrine of extenuating circumstances is adequately meeting its intended objective.

This research paper will be looking at a comparison between the Zambian criminal justice system and the South African criminal justice system on extenuating circumstances in relation to murder. It will look at what are considered as extenuating circumstances in both jurisdictions and it will also look at what does not amount to extenuating circumstances in both jurisdiction and see whether the Zambian Criminal Justice System can learn anything from the South African Criminal Justice System.
1. 7 RESEARCH METHODOLOGY

This research was done mainly by analyzing relevant literature on the doctrine of extenuating circumstances. Secondary sources have included Statutes, Judicial decisions, Textbooks, Articles and Reports. Questionnaires had been used sparingly and only where it was necessary.

1. 8 OUTLINE OF CHAPTERS

Chapter two will discuss extenuating circumstances in relation to murder in the Zambian Criminal Justice System. It will look at the legislation which deals with extenuating circumstances in Zambia, with particular reference to the Penal Code of Zambia. This chapter will also look at Zambian case law to determine what factors are considered by Zambian Courts to be extenuating circumstances. The chapter will also look at Zambian case law in which Courts have not found extenuating circumstances to exist. Then finally a conclusion will be given.

Chapter three will discuss extenuating circumstances in relation to murder in the South African Criminal Justice System. The chapter will look at the legislation which dealt with extenuating circumstances in relation to murder in the South African Criminal Justice System. This chapter will also look at what was considered to be extenuating circumstances by the South African Criminal Justice system and it will also look at what was not considered to amount to extenuating circumstances in relation to murder in the South African Criminal Justice system. The chapter will also look at the demise of the doctrine of extenuating circumstances. Then finally a conclusion the chapter will be given.

Chapter four will be a critique of extenuating circumstances in both Zambian and South African Criminal justice systems. The chapter will first try to determine whether there are any similarities
and differences with what the Zambian system has considered to be extenuating circumstances or not and with what the South African Criminal Justice System considered to be extenuating circumstances. The chapter will then give a general critique of extenuating circumstances in both jurisdictions and in some instances the critique will be with specific reference to either country. Finally the conclusion will be given. Finally chapter five will give a conclusion and recommendation on the law relating to extenuating circumstances in the Zambian jurisdiction.

1.9 CONCLUSION

This Chapter has dealt with the basic aspects of the research conducted and given a prelude to the subject. It has also highlighted the salient features of the subsequent Chapters. It is the opinion of this chapter that extenuating circumstances are those circumstances that reduce the moral blameworthiness of an accused as distinct from his legal culpability. However such an assessment is inevitably highly subjective and it is inevitable that inconsistencies shall occur. Chapter two looks at what Zambian Courts have held to be extenuating circumstances and what they have not held to be extenuating circumstances.
CHAPTER 2

THE ZAMBIAN CRIMINAL JUSTICE SYSTEM ON EXTENUATING CIRCUMSTANCES IN MURDER CASES

2.0 INTRODUCTION

Until recently, the Penal Code in Zambia which was first introduced in 1931 had essentially remained unchanged. The Penal Code Amendment Act of 1990 (Act No. 3 of 1990), therefore represents a landmark in that it has introduced several major changes to the Code. In particular, the Act alters the laws relating to murder, duress and self defense. Regarding the crime of murder, the Act makes a significant amendment of the removal (with one exception) of the mandatory death penalty. Thus the Court must now impose on a person convicted of murder any other sentence, where there are extenuating circumstances. 11

2.1 LAW APPLICABLE IN ZAMBIA

According to section 200 of the Penal Code, it provides that,

200. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Section 201 of the Penal Code further provides that,

201. (1) Any person convicted of murder shall be sentenced

(a) to death; or

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11 Hatchard, Developing the Criminal Law in Zambia, 103.
(b) where there are extenuating circumstances, to any sentence other than death:

Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under section two hundred and ninety-four.

(2) For the purpose of this section—

(a) an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person’s guilt;

(b) in deciding whether or not there are extenuating circumstances, the Court shall consider the standard of behavior of an ordinary person of a class of the community to which the convicted person belongs.\(^\text{12}\)

The test used to determine whether extenuating circumstances exist or not is virtually identical to the test used in matters of provocation. The use of the ‘ordinary person’ test is important because it enables a Court to take into account differing backgrounds of the people of Zambia, including local beliefs and conditions.\(^\text{13}\)

2.2 CASE LAW FOR EXTENUATING CIRCUMSTANCES

In the case of *Nelson Bwalya v The People*\(^\text{14}\), the brief facts of the case were that the deceased came to the house of the mother-in-law of the appellant to collect money from the people the deceased had treated. The deceased sent one Haringson Mambwe to call the appellant. The appellant came running with an axe in his hand saying he wanted to kill the deceased because he had killed his wife. On sentencing the High Court observed that although the witnesses alluded

\(^{12}\) The Penal Code Act Cap 87, ss 200-201

\(^{13}\) Hatchard, *Developing the Criminal Law in Zambia* 103

\(^{14}\) SCZ Judgment No. 29 of 2010
to the appellants belief in witchcraft, the appellant in his evidence repudiated that belief that he
did not believe that the deceased killed his wife through witchcraft. The lower Court was
satisfied that there were no extenuating circumstances to persuade it to pass a different sentence.
However on appeal, the Supreme Court held that a belief in witchcraft, though unreasonable, is
prevalent in our communities and as such a belief is an extenuating fact in cases of murder and
thus the death sentence was set aside and in its place the Supreme Court imposed a sentence of
15 years imprisonment with hard labour.

The reasoning behind the Judges holding that a belief in witchcraft was an extenuating
circumstance was that there was ample evidence in the case that the killing of the deceased was
done because the appellant believed that the deceased killed his wife through witchcraft. Thus
the trial judge having dismissed the evidence of the appellant in his defense remained with only
the evidence of the prosecution, which evidence clearly established extenuating circumstances
and this factor should have been taken into account in sentencing the appellant. Whether the
accused had remained silent or not in his defense the Trial Court should still have addressed its
mind to the issue whether there were extenuating circumstances on the evidence adduced.

In the case of Mbomena Moola v The People\textsuperscript{15} the appellant, Mbomena Moola, was convicted on
one count of murder, contrary to Section 200 of the Penal Code, Cap 87. The particulars of the
offence were that the appellant on 24\textsuperscript{th} November 1994, at Kaumpe Village in the Kaoma
District of the Western Province of the Republic of Zambia, did murder one Kaumpe Moola.
Upon his conviction he was sentenced to death. He appealed against both conviction and
sentence and it was argued that if the Court found that the conviction was proper; the sentence

\textsuperscript{15} SCZ Judgment No.35 of 2000
had be disturbed in that there were extenuating circumstances in the case which would render the
death sentence inappropriate, namely the appellant’s belief that his father was a witch who had
killed his children. This belief was confirmed in the evidence of the deceased’s wife and the
appellant himself.

On this ground of appeal, Court agreed entirely that a belief in witchcraft, though unreasonable,
was prevalent in our community and that such a belief is an extenuating factor in cases of murder
and as the killing here was done because of the belief in witchcraft, the learned trial Judge should
have taken into account this factor and accepted it as an extenuating factor and the Court
therefore, set aside the death sentence and in its place imposed a sentence of 15 years
imprisonment with hard labour with effect from 22nd February 1995, the date of the appellant’s
arrest.

The principle of witchcraft being an extenuating circumstance was also elucidated in the case of
Patrick Mumba, Pamela Mumba Mwansa, Annet Semushi, Jonas Kunda Emmanuel Chimense,
Mwila Feleshano, Frida Feleshano, Mary Feleshano, Monica Feleshano, Jenipher Mwansa v
The People\textsuperscript{16} in which the appellants were jointly charged with one count of murder contrary to
section 200 of the Penal Code, Cap 87 of the Laws of Zambia. The particulars of the offence
were that all the appellants, on 20th day of April, 2002, at Samfya, in the Samfya District of the
Luapula Province of the Republic of Zambia, jointly whilst acting together with other persons
unknown murdered one Paul Chitomondo. They all pleaded not guilty but after trial, they were
all found guilty of the offence. However, when it came to sentencing, the appellants were not
sentenced to the mandatory death sentence. The Judge having found that there were extenuating

\textsuperscript{16} SCZ Judgment No. 22 of 2004
circumstances in the matter, namely witchcraft sentenced the 1st and 2nd appellants to 20 years imprisonment with hard labour each and the rest were sentenced to 15 years imprisonment with hard labour each.

In the case of *The People v Bunda, Mumba and Kamwata*\(^7\), the accused were charged with the murder of a fellow villager in Ndola rural. The basic facts were that a day before the incident, a fight took place between the deceased and one of the accused. As a result the following day the accused in the company of the co-accused went in search of the deceased and having found him at his home, chased him into the nearby bush uttering threats to inflict fatal injuries. Shortly afterwards the deceased was found dead and the accused attempted to run away and had to be physically apprehended. They denied killing the deceased or acting in pursuance of a common design. However all three accused were guilty of murder and the evidence of the deceased having started a fight was regarded as an extenuating circumstance for purposes of sentencing under s.201(1) of Act 3 of 1990.

The Courts reasoning in holding that extenuating circumstances existed was that, since the deceased himself started the fight which resulted in one of the accused sustaining a red eye this aspect was taken as an extenuating circumstance. For that reason, death penalty was not imposed on the three accused persons. Instead Accused 1 and Accused 2 were each sentenced to 16 years' imprisonment with hard labour and Accused 3 was sentenced to eight years' simple imprisonment. The sentences are effective from the date they were remanded in custody.

\(^7\) (1990-1992) Z.R. 194
In the case of *Mwandama v The People*\(^{18}\), the appellant was sentenced to suffer death for the murder of one Philemon Banda on 13th November 1993 at Ndola. The evidence disclosed that the appellant and the deceased were both police officers and at the material time, both had been sent out to go on patrol duties in the Misundu area of Ndola. They decided to drink the powerful moonshine drink known as kachasu and went to a place from where they dispatched two bottles of the brew. On their return journey, the two quarrelled and fought and the deceased died as a result of a gun shot wound inflicted by the appellant. The evidence of the appellant and his warn and caution statement to the investigating officer showed that in the course of the fight, each had used the rifle in his possession as a battering rod. There was no eyewitness other than the accused who deposed at the trial that the deceased had overpowered him and would have shot him as he lay on the ground if he had not shot him first. The learned judge did not accept that the deceased had recocked his gun as the appellant was on the ground and dismissed all the defences canvassed. The appellant was therefore convicted of murder and sentenced to death but he appealed against the conviction and sentence. On appeal, the conviction was upheld but with regard to the sentence, the evidence which did not support the defences advanced nonetheless established circumstances which amounted to extenuation. The evidence of fighting by both parties was equally relevant, as was the youthfulness of the appellant who was only 23 years old. Court considered that the circumstances when taken cumulatively warranted a finding that there was extenuation. It was for the forgoing reasons that the Court dismissed the appeal against the conviction but substituted the sentence of imprisonment.

\(^{18}\) (1995-1997) Z.R. 133 (SC)
In the case of *Whiteson Simusokwe v The People*\(^{19}\), The appellant was tried and convicted on a charge of murder. The particulars alleged that between December, 1998 and March, 1999, at Kalulushi, in the Kalulushi District of the Copperbelt Province he murdered Nondo Sanfolosa. The appellant informed the trial court that he had killed the deceased and claimed that the deceased had become his mistress. On the fateful day he found her with another man in the act of intimacy. He fought the other man who ran away and then he turned on the deceased whom he beat with a stick. When she died, he secretly buried her. The learned trial Judge considered that this was a straightforward murder case and imposed the ultimate death penalty on the appellant. In the appeal it was argued forcibly that the case should have been considered to have been manslaughter and not a capital murder case. The Supreme Court held that a failed defence of provocation afforded extenuation of a murder charge therefore the Court quashed the death sentence and replaced it with one of twenty years with hard labour.

The reasoning behind the Courts decision was that failed defence of provocation nonetheless afforded the extenuation for the murder charge. The intimate relationship and the alleged infidelity which led to the assault was therefore an extenuating circumstance that justified the non-imposition of a mandatory capital sentence.

In the case of *Benson Phiri, Sanny Mwanza v The People*\(^{20}\), The appellants were sentenced to death following a charge of murder contrary to section 200 of the Penal Code. The particulars of the offence alleged that the two appellants, on 7th September, 2000, at Ndola District of the Copperbelt Province of the Republic of Zambia did murder Michael Chulu. The two appellants appealed against their sentences and the second appellants charge was reduced to common

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\(^{19}\) SCZ Judgment No. 15 of 2002

\(^{20}\) SCZ Judgment No 25 of 2002
assault and he was sentenced to 12 months imprisonment while the first appellants conviction
was still murder but his death sentence was substituted with 20 years imprisonment with hard
labour.

The reasoning behind the Courts decision as regards the first appellant was that Court accepted
the evidence that before the deceased was stabbed, there was a quarrel followed by a fight.
Although the first appellant did not raise the defence of provocation, and although the evidence
of the quarrel and the fight did not establish any provocation, Court accepted that there were
extenuating circumstances in the instant case warranting the imposition of any sentence other
than the death sentence. Court therefore set aside the death sentence and sentenced the first
appellant to 20 years imprisonment with hard labour with effect from the date of arrest.

In the case of *Jack Chanda and Kennedy Chanda v The People*21 the two appellants were
sentenced to death upon being convicted of murder by the High Court sitting at Kasama. One of
the grounds of the appeal dealt with the sentence. It was argued on behalf of the appellants that
the learned trial judge misdirected himself when he held that there were no extenuating
circumstance in this case. Capt. Naguyambo appearing for the appellants found extenuating
circumstances in the youthful age of the appellants and as his authority for this proposition he
referred the Court to a recent decision were they held that youthful age was an extenuating
circumstance. However, the Court stated that they had never decided any appeal in which they
had laid down the principle that the young age or for that matter old age is an extenuating
circumstance. What the Court has previously stated is that failed defence of provocation,
evidence of witchcraft accusation and evidence of drinking could amount to extenuating

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21 SCZ No. 29 of 2002

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circumstances. In this case there was evidence of drinking. The appellants had been drinking for about five hours. Therefore the learned trial Judge should have considered this evidence when deciding whether to impose the death sentences or a sentence other than death in terms of Section 201 (1) (b) of the Penal Code. Failure by the learned trial Judge to consider the evidence of drinking, which in fact was common cause, amounted to a misdirection. Therefore the Court interfered with the sentence imposed by the trial Judge and substituted it with one of 20 years imprisonment with hard labour effective from the date the appellants were taken into custody.

**2.3 CASE LAW WHEN EXTENUATING CIRCUMSTANCES DID NOT EXIST**

In *Mudenda v The People*\(^\text{22}\), the appellant was convicted by the High Court of aggravated robbery contrary to section 294 (2) of the Penal Code, Cap. 87 of the Laws of Zambia and sentenced to death. The appellant appealed against the sentence only. However the Supreme Court upheld the decision of the lower Court because there were no extenuating circumstances.

The reasoning behind the courts decision was that the Court found no authority upon which it could take extenuating circumstances into account so that Court could interfere with the sentence of death imposed for aggravated robbery committed while armed and pass any sentence other than death. In their quest for authority for the proposition that extenuating circumstances can reduce the severity of the sentence in aggravated robbery committed while armed with firearm, Court looked at section 201 (1) of the Penal Code Cap. 87 of the Laws of Zambia which deals with punishment for murder and extenuating circumstances which can entitle a person convicted of murder to any sentence other than death. After considering these provisions, Court was firm in its minds that these provisions do not apply to aggravated robbery committed while armed with a

\(^{22}\text{SCZ Judgment No.19 of 2002}\)
firearm. In fact, the proviso to section 201 (1) specifically excludes the application of the provisions in Section 201 (1) to armed robbery. In the circumstances, Court did not even find it necessary to consider whether in this case there were extenuating circumstances.

In the case of Chongo and Another v The People\textsuperscript{23}, on the material night of 29th January, 1997, the appellants broke into the complainants home while she was sleeping and demanded money. According to the complainant, they were armed and they threatened to shoot her. They then collected the items the subject of the charge. The appellants were subsequently arrested and charged. They were found guilty and sentenced to life imprisonment. The appellants appealed. Court held that the law of extenuating circumstances did not apply to the offence of armed robbery.

The reasoning behind the Courts decision was that in considering the sentence for the appellants, the lower court had erred when it said that armed robbery carries death sentence but since no life was lost and part of the property was recovered, this was an extenuating circumstance. However the Supreme Court stated that,

\begin{quote}
The most serious mistake of law made by the learned trial judge, and we take note that this is not the first time, was the conclusion that the law of extenuating circumstances for the offence of murder also applies to the offence of armed robbery. We want to make the point that the law of extenuating circumstances was introduced in Zambia as a measure between the extremes of the offence of murder and manslaughter. It was only intended for cases of murder and not any other offence under the Penal Code of or any written law. To invoke the principles of extenuating circumstances in sentencing an accused in an armed robbery offence other than murder is not only wrong in principle but also wrong in law.
\end{quote}

They were sentenced to eighteen years imprisonment with hard labour with effect from date of arrest.

\textsuperscript{23} SCZ Judgment No. 10 of 1998
In the case of *Justin Mumbi v The People*, the appellant was tried and convicted for the offence of murder, contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that, the appellant, on 14th May 2002, at Mufulira, in Mufulira District of the Copperbelt Province, of the Republic of Zambia, murdered Elias Kapolowe. Consequently, he was sentenced to suffer the mandatory penalty of death. The appellant appealed against the sentence and urged the Supreme Court to consider extenuating circumstances and impose an appropriate sentence. The Supreme Court held that drunken circumstances generally attending upon the occasion sufficiently reduced the amount of moral culpability, so that there is extenuation but on the facts of this case there was no extenuation.

The reasoning behind the Court’s decision was that when the appellant demanded for a pair of shoes from his uncle (the deceased) and his uncle did not attend to him, he disappeared but only to return later with a gun and subsequently shot the deceased and further evidence showed that the appellant went to the extent of breaking into someone’s house just to secure a gun in order to commit a crime. Therefore his drunken circumstance would not not amount to extenuation.

In the case of *Jack Chanda and Kennedy Chanda v The People*, one of the grounds of appeal argued on behalf of the appellants that the learned trial judge misdirected himself when he held that there were no extenuating circumstance in this case. It was argued that the youthful age of the appellants was an extenuating circumstance which the Court failed to take into consideration. However, the Court stated that they had never decided any appeal in which they had laid down the principle that the young age or for that matter old age is an extenuating circumstance.

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24 SCZ Judgment No. 12 of 2004  
25 SCZ Judgment No. 29 of 2002
2.4 Conclusion

This chapter has outlined some of the facts which are considered to be extenuating circumstances in Zambia. For instance witchcraft has been stated to be an extenuating circumstance. Just as drunkeness has also been said to be an extenuating circumstance to mention but a few. This chapter has also outlined instances in which extenuating circumstances were seen not to exist. For instance extenuating circumstances will not apply to cases of armed robbery as this is expressly provided for in the Penal Code of Zambia.

Chapter three will look at the South African Criminal Justice System and it will look at what was considered to extenuating circumstances in relation to murder and what was not considered to amount to extenuating circumstances when the South African law provided for it in its legislation.
CHAPTER 3

THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM ON EXTENUATING CIRCUMSTANCES IN MURDER CASES

3.0 INTRODUCTION

The death penalty was a highly contentious issue in South Africa. It was introduced into South Africa by the Colonial powers that first settled at the Cape in 1652. The death penalty was widely used in Roman-Dutch law. It could be imposed for a variety of crimes including murder, rape, arson, theft, robbery, fraud, sodomy, bestiality, falsifying coin, public violence and incest. During the seventeenth and eighteenth centuries criminal punishment in South Africa was very harsh and brutal. Torture was used to extract confessions, especially with slaves and where the death sentence was passed. The latter part of the nineteenth century saw the Courts of the South African states restricting the death penalty to the common law offences of murder, treason and rape. Even in the case of murder this sentence was not mandatory, as it was held by several judges.26

3.1 LAW APPLICABLE

The death sentence was mandatory for murder in South Africa, except in cases in which the accused succeeded in proving, on the balance of probabilities, the existence of extenuating circumstances. The concept of extenuation was introduced into South African law in 1935 to bolster public confidence in the legal system by shifting the discretion to exercise clemency from

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the executive to the judiciary. As General Smuts, who was then minister of justice, explained to Parliament;

Only between 11 per cent and 12 per cent of our death sentences are actually carried out, and all the rest are reprieved. Well, in a country like this that position is most unsatisfactory. The people sentenced for murder are mostly illiterate natives, and the present situation leads to a very unwholesome state of affairs in which the impression is gathered that the death sentence and all this frightening procedure of the white man's justice is so much bluff. That sort of thing undermines all respect of justice. The judge should not be compelled in every murder case to pronounce sentence of death; he should be guided by the evidence before him and by his knowledge of the case as to whether there were extenuating circumstances or not. 27

In 1935, on the insistence of General Smuts, the 1917 Criminal Procedure and Evidence Act was amended to introduce the doctrine of extenuating circumstances 28

3.2 CASELAW ON EXTENUATING CIRCUMSTANCES

The South African legislature did not define extenuating circumstances, nor did it place any limit on the factors that might be deemed to be extenuating. In principle, anything that tended to reduce the moral blameworthiness of a murderer's actions might count as an extenuating circumstance. In practice, the courts most often accepted as extenuating circumstances such factors as provocation, intoxication, youth, absence of premeditation, and duress (short of irresistible compulsion, which would exonerate the defendant entirely). The question of extenuation arises only after a defendant has been convicted of murder, which in South Africa, as in the United States, Britain, and elsewhere, requires the prosecution to have proved beyond reasonable doubt not only that the defendant committed the unlawful act (actus reus)

28 Prof O.S Koyana The Demise of The Doctrine of Extenuating Circumstances in The Republic of South Africa and Transkei.
but also that this conduct was accompanied by a prescribed mental state (mens rea) entailing criminal responsibility.\textsuperscript{29}

The first ever definition of extenuating circumstances given was by Lansdown JP in \textit{R v Biyana}.\textsuperscript{30} The meaning and application of this doctrine was further elucidated in the case of \textit{S v Dyalvane}\textsuperscript{31}, in which the appellant was convicted by PICKARD J and two assessors in the Supreme Court of Ciskei of the murder of Joyce Komiki which took place on the evening of 26 June 1982 at Mdantsane. The court found extenuating circumstances but, this notwithstanding, the trial Judge in the exercise of his discretion under sec 277(2) of Act 51 of 1977, decided to impose the death sentence. Arising out of the events of the same evening, the appellant was also found guilty of assaulting Tabo Dyalivani with intent to do grievous bodily harm, for which the appellant was sentenced to be detained until the rising of the court. With the leave of the trial Judge the appellant appealed to Court against the sentence of death and the Court set aside the death sentence and replaced it with imprisonment of 12 years.

The Court arrived at this decision because the trial judge in the previous Court sentenced the appellant to death based on his previous convictions and the trial judge did not take into account that the appellant at the time was young and immature. Thus the appellant's criminal record did not justify the conclusion reached by the trial Judge that the appellant in 1970 embarked on a "life of violence and assaults" nor that he was beyond reform. In arriving at these findings the trial Judge misdirected himself in the respects.

\textsuperscript{29} Andrew M. Colman, \textit{Crowd Psychology in South African Murder Trials}.
\textsuperscript{30} 1938 EDL 310
\textsuperscript{31} (4/84) (1984) ZASCA 82 (31 August 1984)
In the case of *S v Ndwalane* 32 the brief facts were that on 27 May 1983 and at Lamontville, Durban, the appellant shot and killed one Aubrey Masheshisa Mahlabwa (hereinafter referred to as Mahlabwa) under the following circumstances. Mahlabwa was a prominent and leading figure in the township of Lamontville and so was one Dube. They both served on the Council of Lamontville and each conducted a taxi service in the township. During a bus boycott a disagreement arose between Dube on the one side and Mahlabwa and a number of his supporters on the other side. Dube was subsequently killed but no arrests were made but there was rumour that Mahlabwa had killed him with other people. The appellant was convicted on a charge of murder of Mahlabwa in the Durban and Coast Local Division before Howard J and assessors, and he appealed against the finding of the Court that there were no extenuating circumstances present and the consequent death sentence. The appeal Court however, found extenuating circumstances and it made reference to *R v Biyana* in making its decision. In *R v Biyana* 33 Lansdown JP said:

In our view an extenuating circumstance in this connection is 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.

In the courts view the circumstances were clearly from this point of view, extenuating. Dube was a close friend of the appellant's. He loved and respected him. He looked upon him as a father. When Dube was assassinated he was overcome with grief. He could not sleep and it is clear, he suffered excruciating anguish at this cowardly deed committed by the conspirators. In his mind Dube was a benefactor of the community. He was beset by feelings of outrage and frustration because the people responsible were not brought to book. He felt he owed it to Dube to avenge this terribly grievous wrong done to Dube, his family and himself and a touching illustration of

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33 1938 EDL 310 at 311
his relief at having been able to avenge the death of his great benefactor and friend was the moving prayer he said in the cemetery after the killing of Mahlabo. His overriding thought was not so much, as the court saw it, that he was performing a public service in ridding the community of Mahlabo; it was a feeling of satisfaction at having been able to bring just retribution upon Mahlabo. The appeal accordingly succeeded. The death sentence was set aside. The appellant was sentenced to ten years imprisonment.

In *S v Vela*, Bambz Lombard J accepted witchcraft as an extenuating circumstance because the deceased, an old lady, had walked from her homestead to that of the accused in broad daylight, stood in front of him and his mother, taken off her dresses and, when naked, declared: "I am responsible for your long illness, you will never be able to go to work or to raise a family." At night on the same day the accused went to the deceased's hut and hacked her to death. He was sentenced to 20 years' imprisonment. The core of the defense, of course, was inspiration of fear and the threats contained in deceased's statement, on which the court relied for its finding that extenuating circumstances existed.34

*S v Thabatha and Others* 35 arose from events that took place at the funeral of a popular civic leader who had recently been murdered. A crowd of more than 1,000 people, who had been singing, dancing, and listening to emotional speeches throughout the night, were attacked by a group of vigilantes. About 100 mourners, including the 6 accused, chased and killed one of the vigilantes and the entire incident was recorded on videotape by a journalist, from whom the tape was later confiscated by the police and used in evidence. Graham Tyson,

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34 Prof O.S Koyana *The Demise of The Doctrine of Extenuating Circumstances in The Republic of South Africa and Transkei*, 1988 (4) SA 272 (T)
who on this occasion had studied the videotapes of the incident and interviewed each of the defendants, testified that in his opinion it was highly probable that all of them were deindividuated at the time of the offense. The court found that the defendants had indeed been deindividuated and that this amounted to an extenuating factor, and they were all given custodial sentences.

Apart from the principles which the courts enunciated with regard to the doctrine of extenuating circumstances, the courts went further and laid down the rule that in a murder trial the onus of proving the existence of extenuating circumstances rests on the accused and has to be discharged on a balance of probabilities. This rule was first laid down by Greenberg JA in *R v Lembethe*, 1947 2 603 (A).36

3.3 CASE LAW WHEN EXTENUATING CIRCUMSTANCES DID NOT EXIST

In *S v Ganadi*37, the appellant, a Black man aged 26 years, together with one Madoda Rala appeared before PICKARD J and two assessors in the Supreme Court of Ciskei, on a charge of murdering Selinah Mneke on 21 July 1982. Rala (who was No 2 accused at the trial) was found not guilty and discharged, but the appellant was found guilty of murder and, no extenuating circumstances having been found, he was sentenced to death. With the leave of the trial Judge he appealed to the Court against the finding that there were no extenuating circumstances. The issue before the trial court, and again on appeal, was whether the appellant's belief in witchcraft constituted an extenuating circumstance under the particular circumstances of this

36 Prof O.S Koyana *The Demise of The Doctrine of Extenuating Circumstances in The Republic of South Africa and Transkei.*
case. The trial court’s conclusion that the appellant’s belief in witchcraft did not, on the facts of the present case, constitute an extenuating circumstance, was stated in the following words:

Applying these principles to the facts of this case, one may well say that in this case, although the belief in witchcraft of this accused which in all probability did exist, may have motivated his offence, the nature of his fear - a fear for which he had very little reason to believe that the deceased was responsible and which was not an immediate fear and which could have been avoided by the fact that they moved away and the steps he allegedly subsequently took, would not have reduced the blameworthiness of his offence.

In the appeal Court, the judge upheld the decision of the Trial Court saying that the belief in witchcraft in these circumstances did not amount to an extenuating circumstance.

In the case of S v. Mthembu\textsuperscript{38} The State case was that an uncle of the appellant had hired the appellant and one Siboniso Nxele to kill the deceased, and that they had carried out this mandate by forcing their way into the hut of the deceased on the night of 4 August 1988 and stabbing him to death. The uncle of the appellant, Velaphi Mbonambi, was charged together with Nxele and the appellant with the murder of the deceased. There was so little evidence against him however that he was discharged at the end of the State case. Nxele and the appellant were both convicted of murder, but extenuating circumstances were found in the case of Nxele and he was sentenced to 15 years’ imprisonment. The appellant was convicted of murder in the Circuit Local Division for the Zululand District. No extenuating circumstances were found and he was sentenced to death. Leave was subsequently granted to him by the trial Judge to appeal to Court against the sentence.

However the Court of appeal stated that no extenuating circumstances existed in this instance because as regards the youth of the appellant it appeared to be common cause that he was 23

\textsuperscript{38} (148/89) (1989) ZASCA 150 (23 November 1989)
years and 10 months old at the time of the commission of the offence. He passed Standard VII at school in 1984 and had been employed at a factory for two years. He then worked for a veterinary surgeon for a few months before resorting to coaching soccer teams. A clinical psychologist, who examined him at the request of his Counsel, found that he had an average range of intelligence, was socially skilled and well able to function as a leader. He was also of the view that the appellant was "possessed of sufficient intellect and powers of reasoning to have made a balanced and reasoned decision to execute the contract" he had entered into with his uncle. Youthfulness can therefore hardly be said to have constituted an extenuating circumstance in the present case. As regards the other two features referred to by Mr. Jeffrey's namely, the alleged influence of the appellant's uncle over him, and his alleged belief in witchcraft, there did not seem to be any evidence to support these allegations. The appellant had made no such allegations. On the contrary he had denied all complicity in the killing of the deceased. The only reference to witchcraft on all the evidence is to be found in Nxele's confession. Such a confession was clearly inadmissible as evidence against the appellant (sec. 219 of Act 51 of 1977).

In the case of *S v. Mpontshane*[^39], the appellant was convicted by Shearer J and two assessors, in the Zululand Circuit Court, of the murder of Fikile Mkhabela - the 21 month old daughter of one Neliswe Tembe at or near Kwambuzi, in the district of Ingwavuma, on 17 November 1983. The court found that there were no extenuating circumstances and the appellant was consequently sentenced to death. The facts were common cause and the sole issue in the appeal was whether the trial court erred in finding that there were no extenuating circumstances. Counsel for the appellant contended that the trial court failed to have sufficient regard to the cumulative effect of

[^39]: (461/84) (1985) ZASCA 42 (28 may 1985)
the facts relevant to the question of extenuation and that it over-emphasised the heinousness of the crime and in the Courts view, there is no substance in this contention. It was quite apparent from the judgment on extenuating circumstances, that the trial court had due regard to all the relevant facts and circumstances and their cumulative effect. The trial court gave due consideration to the following facts namely; (a) that the appellant was upset because his relationship with Neliswe had just come to an end (b) that there had been a minimal degree of premeditation and (c) that the appellant had consumed a substantial quantity of liquor the previous day. But, as against these circumstances, the trial court also took into account, as it was obliged to do (a) that this was a deliberate killing in which the appellant had an opportunity of reconsideration; (b) that he was taking the life of a defenseless infant simply to punish the mother and (c) that the appellant directed his mind to the concealment of the crime by throwing the child into the dam. The appeal Court could not find any fault with the approach of the trial court.

3.4 DEMISE OF THE DOCTRINE OF EXTENUATING CIRCUMSTANCES IN SOUTH AFRICA

Race had clearly played a key role in the imposition of the death sentence. Various authors had seen the death penalty as an instrument used by the former white apartheid government to suppress other races. Statistics in South Africa had shown that more blacks had been given the death sentence than their white counterparts in similar cases. Racial bias in the imposition of the death penalty was indeed an emotionally charged issue. Professor John Dugard wrote the following:
It is impossible to divorce the racial factor from the death penalty in South Africa. Of the 2 740 persons executed [between 1910 and 1975], less than 100 were white; no white has yet been hanged for the rape of a black; and only about six whites have been hanged for the murder of blacks. Conversely, blacks convicted of murder or rapes of whites are usually executed.

South Africa has had the 3rd highest judicial execution rate in the world. The use of the death penalty in South Africa came to international attention during the 1980s when the execution rate increased sharply when people received the death sentence for political crimes. These cases received worldwide attention. There were 537 hangings between 1985 and the middle of 1988, making South Africa, with its population of about 35 million, a global leader in judicial executions. Recent research corroborates the accusation of racial bias in the imposition of the death penalty in South Africa. Convicted blacks were in greater danger of receiving the death penalty than convicted whites, especially when the victim was white. Between June 1982 and June 1983, of the 81 blacks convicted of murdering whites, 38 were hanged. Of the 52 whites convicted of murdering whites, only one was hanged. None of the 21 whites convicted of murdering blacks was hanged. Of the 2 208 blacks convicted of murdering blacks, 55 were hanged.\textsuperscript{40}

The campaign against the death penalty in South Africa was rapidly gaining momentum. This was reflected by the growth of organisations concerned with the issue and a consequent increase in public awareness and outrage at this legalised act of violence.\textsuperscript{41} Consequently on 2nd February 1990, the then President F W De Klerk suspended executions and proposed an extensive procedural reform of South Africa’s death penalty. The law reform that followed this announcement was very dramatic. The effect of the revision of the Criminal Procedure Act was

\textsuperscript{40} Prof Le Roux, \textit{The Impact of the Death Penalty on Criminality}.
\textsuperscript{41} Graeme Simpson and Lloyd Vogelman, \textit{The Death Penalty in South Africa}.
that death was no longer mandatory for any crime. Rather judges were allowed to impose a sentence of death after making findings on the presence and absence of aggravating and mitigating factors. This provision of the amended Criminal Procedure Act even applied to the crimes of murder and rape.\textsuperscript{42}

The issue of the death penalty in South Africa remained unchanged, after its initial reform in 1990, until 1994 when the Constitutional Court interpreted the newly written South African Constitution to mean the death penalty violated certain Constitutional rights and was therefore unconstitutional.\textsuperscript{43} This was in the case of \textit{S v Makwanyane and another}\textsuperscript{44} which was heard by the Constitutional Court between 15 and 17 February 1995. The accused had been convicted of murder without extenuating circumstances and sentenced to death. The convictions were upheld on appeal, but the finding on the sentence held in abeyance pending the decision of the Constitutional Court. The appeal court, however, found that the crimes committed by the accused were heinous in the extreme and stressed that the heaviest of sentences permitted by law should be meted out. Judgment was delivered on 6 June 1995. The President of the Constitutional Court, Justice Arthur Chaskalson stated the following:

\begin{quote}
Constitutional rights vest in every person, including criminals convicted of vile crimes. Such criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life ...\end{quote}

This judgement resulted in the abolishment of the death penalty in South Africa and the subsequent demise of the doctrine of extenuating circumstances.

\textsuperscript{42} O.S Mwimiobi, \textit{The Reasonableness of Reinstating the Death Penalty in South Africa: A Juridico-Philosophical Approach}.
\textsuperscript{43} O.S Mwimiobi, \textit{The Reasonableness of Reinstating the Death Penalty in South Africa: A Juridico-Philosophical Approach}
\textsuperscript{44} CCT/3/94
3.5 CONCLUSION

This chapter has outlined some of the facts which were considered to be extenuating circumstances in South Africa. For instance witchcraft has been stated to be an extenuating circumstance. This chapter has also outlined instances in which extenuating circumstances were seen not to exist. For instance youthfulness of a person was said not to constitute an extenuating circumstance. The chapter has also outlined the demise of the doctrine of extenuating circumstances after the pronouncement of the decision in *S v. Makwanyane*.

Chapter four will look at the similarities and differences if any between the South African Criminal Justice System and the Zambian Criminal Justice System. It will look at some of the criticisms levied against this doctrine of extenuating circumstances in both jurisdictions.
CHAPTER 4

4.0 INTRODUCTION

This chapter will first begin by outlining the similarities and differences in the doctrine of extenuating circumstances between the Zambian and the South African Criminal Justice Systems. The chapter will then give a critique of the doctrine of extenuating circumstances and in some instances the critiques will be specific to a certain country and in some instances the critiques will be general.

4.1 SIMILARITIES AND DIFFERENCES BETWEEN THE ZAMBIAN AND THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEMS

In terms of similarities it can be said that in both jurisdictions, witchcraft was considered to be an extenuating circumstance. This can be illustrated through the case of *S v Vela* in which Bambz Lombard J accepted witchcraft as an extenuating circumstance. The deceased, an old lady, had walked from her homestead to that of the accused in broad daylight, stood in front of him and his mother, taken off her dresses and, when naked, declared: "I am responsible for your long illness, you will never be able to go to work or to raise a family." At night on the same day the accused went to the deceased's hut and hacked her to death. He was sentenced to 20 years' imprisonment. The core of the defense, of course, was inspiration of fear and the threats contained in deceased's statement, on which the court relied for its finding that extenuating circumstances existed.\(^{45}\) In the case of *Nelson Bwalya v the People* the Supreme Court held that a belief in witchcraft, though unreasonable, was prevalent in our communities and as such a belief is an extenuating

\(^{45}\) Prof O.S Koyana *The Demise of The Doctrine of Extenuating Circumstances in The Republic of South Africa and Transkei.*

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fact in cases of murder and thus the death sentence was set aside and in its place the Supreme Court imposed a sentence of 15 years imprisonment with hard labour.

In terms of differences, it can be seen that in the Zambian criminal justice system, the Penal Code of Zambia expressly states that the doctrine of extenuating circumstances will not apply in the case of aggravated robbery and this has been seen in cases such as *Mudenda v. the people*. While in the South African criminal justice system, the Act did not expressly state when the doctrine would not apply but had left it to the judges to determine when the doctrine would apply.

The final difference is that in the South African Criminal Justice, deindividuation was considered to be an extenuating circumstance in the case of *S v Thabetha and Others*. While in the Zambian Criminal Justice system mob justice was not considered to be an extenuating circumstance but reduced the charge of murder to manslaughter. This was decided in the case of *Francis Mayaba v The People*.46 The brief facts of the case were that the appellant and co accused apprehended the deceased on suspicion that the deceased had stolen money from the appellant’s mother. When the money was not found on him, the deceased was assaulted and tied to tree and left over night to die. It was submitted by Counsel for the appellant that the trial Judge misdirected himself in law and fact by convicting the appellant on the evidence of a single witness and he misdirected himself by convicting the appellant on a confession statement which was not well proved. It was also argued that the appellant was a young man aged 20 and therefore deserved leniency. The Court stated that the facts of the case did not support a conviction of murder because quite apart from the element of provocation and drunkenness negating intent to kill, this

46 SCZ Judgment No. 5 of 1999
was a case of mob instant justice and there was no evidence to show that the appellant or the juvenile delivered the fatal blow that caused the death. The sentence was too excessive and the conviction for murder was quashed and substituted with a conviction of manslaughter.

4.2 CRITIQUE OF THE DOCTRINE OF EXTENUATING CIRCUMSTANCES

In Southern Africa, a sentence of death is mandatory upon a conviction of murder unless the defendant can show beyond a preponderance of the evidence that extenuating circumstances exist. The effect of this doctrine is to create a new class of crime, "guilty of murder with extenuating circumstances." This doctrine is one method of reducing the harshness of a mandatory death penalty. This section will consider the major criticisms of the sentencing process.

The first problem is that the doctrine of extenuating circumstances is too inflexible to properly consider all relevant facts. Court is only able to take into consideration factors which are associated with the offence. This is arguably too restrictive, in that other factors unrelated to the crime, such as the youth of the accused, his or her behavior after the commission of the crime, or the fact that he or she has no criminal record, might be equally important in determining sentence. In this respect, it would have been preferable to require the court to take into account all the relevant factors, both mitigatory and aggravating.\(^{47}\) For instance in Zimbabwe, in the case *Jauré*\(^{48}\) the court pointed out that there are two approaches for determining whether or not a murder was committed with extenuation. Either approach is permissible and the end result should be the same. The court stated that these two approaches were captured in Reid Rowland

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\(^{47}\) Hatchard, *Developing the Criminal Law in Zambia*

\(^{48}\) 2001 (2) ZLR 393 (H)
Criminal Procedure in Zimbabwe at pp 25-36 as follows: "The first approach is to consider, first, all those factors which reduce the moral blameworthiness of the accused. If, in the opinion of the court, the facts so warrant, it should find that extenuating circumstances exist. The approach at this stage is largely subjective and aggravating features, many of which may be of an objective character, are not considered. The second stage is then to decide on sentence. At this stage, all aggravating features, including the brutality of the crime and all those objective factors which would assist in the determination of the sentence, are considered. The court may well then decide that, despite the existence of extenuating circumstances, they are outweighed by the aggravating circumstances and the accused should be sentenced to death. The second approach is for the court to consider all the usual factors which may be regarded as extenuating and weigh them against the aggravating features. If the court considers that the aggravating features outweigh those which reduce the accused's moral blameworthiness, the court will find that extenuating circumstances do not exist. If the court is of the opinion that aggravating features do not outweigh those which reduce the accused's moral blameworthiness, it will find that extenuating circumstances do exist."

The second problem is that the doctrine of extenuating circumstances shifts the burden to the defendant. The burden is on the accused to prove the existence of extenuating circumstances beyond a fair preponderance of the evidence, either by introducing new evidence or by presenting evidence rejected at trial in a new light. Therefore the trial court has the responsibility and duty to examine the evidence after conviction.⁴⁹

⁴⁹ Novak, Guilty of murder with extenuating circumstances
From a transparency perspective, the doctrine of extenuating circumstances is not as successful at protecting the rights of prisoners as a discretionary death penalty with clear judicial sentencing guidelines. Defense advocates may be ill-equipped to carry the burden of proof given the poor pay, short notice, and lack of experience that characterizes pro deo representation. Artificially separating a legal culpability inquiry from a moral blameworthiness one distorts the judicial role in a trial, places the onus on a defendant to introduce new evidence or reinterpret old evidence after his conviction, judges this evidence according to a vague and ill-defined standard, and leaves the final decision, largely unreviewable, to a single finder of fact. Former Chief Justice Dumbetshena of Zimbabwe admitted that the common practice among judges is to lean towards a finding of manslaughter or finding extenuating circumstances. Judges are reluctant to sentence people to death.\(^{50}\)

Most importantly, the doctrine has one further disadvantage. In a discretionary regime, a judge bears the onerous and lonely task of literally deciding between life and death, which forces the judge to understand the gravity of his task. In a pure mandatory regime, it is the law and the law alone that sentences a convicted murder to death.\(^{51}\)

As these varying results make clear, mandatory death penalty regimes do not remove the discretion inherent in a sentencing decision. Such regimes only make this discretion less transparent: prosecutors will not prosecute; jurors will not convict; executives will grant clemency. The doctrine of extenuating circumstances does not properly guide this discretion. If a judge finds that extenuating circumstances exist, he makes a largely unreviewable determination that the convicted defendant should not die. As Hood writes, legislation “fails . . . to give any

\(^{50}\) Novak, Guilty of Murder with Extenuating Circumstances

\(^{51}\) Novak, Guilty of Murder with Extenuating Circumstances
guidance as to what can constitute an extenuating circumstance.” This system is not as rational and consistent as a guided discretionary death penalty regime in which a judge must articulate a specific aggravating factor in order to warrant the death penalty. A lack of transparency in sentencing contributes to arbitrariness or the possibility of mistake.  

According to the Penal Code Chapter 87 of the Laws of Zambia, in deciding whether or not extenuating circumstances exist, the court must consider the standard of behaviour of an ordinary person of the class of the community to which the convicted person belongs.” This indicates a subjective approach of judging behavior according to one’s own peculiar circumstances. A judge should consider the totality of the circumstances, mitigating with aggravating factors, excluding prior convictions.  

The other disadvantage of this doctrine of extenuating circumstances is that there are no clear guidelines for determining whether or not extenuating circumstances exist. This leaves it to each Judge to decide what weight to attach to extenuating circumstances that may be presented to the court. It is therefore difficult to determine which defendant will receive the death sentence and which will not. Unlike in Zimbabwean Criminal Justice System all factors which are considered to be extenuating circumstances are dealt with in detail in an article entitled "Extenuating Circumstances: A Life and Death Issue" in 1986 Volume 4 Zimbabwe Law Review 60. Therefore a judge cannot decide upon a factor which has not been stated in the article.  

There are many examples of instances where the trial Judge did not find extenuating circumstances and imposed the death sentence but on appeal the Supreme Court found  

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52 Novak, Guilty of Murder with Extenuating Circumstances  
53 Novak, Guilty of Murder with Extenuating Circumstances  
54 Ngandu, the Death Penalty in Zambia  
extenuating circumstances and therefore allowed appeals against the sentence. Some examples of such circumstances include drunkenness - *Lemmy Bwayla Shula v The People* were the appellant was tried and convicted of a charge of murder. The particulars alleged that on 30th July, 1994 at Ndola he murdered Lister Kamwengo and was sentenced to death. When court heard the appeal on 2nd April they dismissed the appeal against conviction. However, court allowed the appeal against sentence and court considered that the drunken circumstances generally attending upon the occasion sufficiently reduced the amount of moral culpability so that there was extenuation and imposed a sentence of 10 years with effect from 31st July, 1994, the day the appellant was taken into custody.

In South Africa, the doctrine of extenuating circumstances certainly lasted for a very long time. One is curious to know why it was so. The reason is to be found in the fact that the moral blameworthiness of an accused person is and will always be an important factor when considering a person’s guilt and, consequently, the sentence to be imposed. The doctrine gave prominence to this aspect and that is where its strength lay. On the other hand, the doctrine had a fundamental weakness which was indeed its heel of Achilles. This weakness relates to the problem that arises at trials which accused persons tended to turn into double trials, at first denying everything and later changing their story to an admission, and then seeking to rake up some extenuating circumstances. This weakness was ably exposed by Van den Heever J in *S v Diedericks*. When an accused changes his story and admitted having lied to the court when he initially said he had been elsewhere when the alleged murder took place, and said that instead he

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56 Ngandu, *the Death Penalty in Zambia*
57 SCZ Judgment No. 6 of 1996
58 Koyana, *The Demise of the Doctrine of Extenuating Circumstances in the Republic of South Africa and Transkei*
59 1981 3940
had been provoked by the deceased in one way or another. In these circumstances the surprising aspect is not the fact that the doctrine of extenuating circumstances fell when it did in 1989/90, but that it lasted as long as it did over so many years.\footnote{Koyana,}

**CONCLUSION**

In conclusion it can be seen that there are some similarities and differences between the Zambian and the South African Criminal Justice Systems. The similarities being that in both jurisdictions witchcraft is considered to be an extenuating circumstance. The difference being that in Zambia, the Penal Code expressly provides for that extenuating circumstances will not apply in aggravated robbery cases. While in South Africa, there was no such express provision but it was only left to the Courts to decide in which cases extenuating circumstances would not apply. This chapter has also outlined some of the weakness inherent with this doctrine of extenuating circumstances. The chapter has shown that some of the weaknesses include the fact that the doctrine shifts the burden to the accused and the fact that there are no clear guidelines in helping the Court to determine whether extenuating circumstances exist or not.

The next chapter will give a general conclusion on this doctrine of extenuating circumstances and it will give recommendations as to what can be done to improve this doctrine of extenuating circumstances in Zambia.
CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.0 INTRODUCTION

Having discussed the doctrine of extenuating circumstances in relation to murder in both the Zambian Criminal Justice System and the South African Criminal Justice System, this chapter discusses conclusions and possible areas of reform in this doctrine of extenuating circumstances in Zambia.

5.1 GENERAL CONCLUSIONS

Murder is the most common offence for which the death penalty is retained and some countries in common wealth Africa have retained the mandatory death penalty for this offence. Hatchard and Coldham point out that the retention of the mandatory death penalty for murder appears harsh as the definition of the offence contained in the Penal Codes of some common wealth African countries is considerably broader than the definition in contemporary English law. Countries like Zambia have done away with mandatory death sentence for murder. The sentence is discretionary as it allows for the consideration of extenuating circumstances.\(^{61}\)

The focus of this paper has been to determine what amounts to extenuating circumstances and what does not amount to extenuating circumstances in the Zambian and South African Criminal Justice Systems. An evaluation of the adequacy of this doctrine of extenuating circumstances has been given and a general conclusion can be drawn that even though this doctrine was brought in

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\(^{61}\) Chenwi, Towards the Abolition of the Death Penalty in Africa. 44
to help the accused, it can be seen that it has quite a number of shortfalls which have been highlighted.

The paper has shown that the Penal Code Chapter 87 of the Laws of Zambia is the instrument which provides for extenuating circumstances in Zambia and it gives a definition as to what extenuating circumstances are and it provides that extenuating circumstances will not apply in the case of aggravated robbery. The Penal Code also provides that the Court shall consider the standard of behaviour of an ordinary person of the class of the community to which the convicted belongs.

Some of the factors which have been considered to be extenuating circumstances in the Zambian Criminal Justice System include witchcraft as was stated in the case of *Nelson Bwalya v The People*. There is a lot of case law in which witchcraft was considered to be an extenuating circumstance such as *Mbomena Moola v the People*. Other factors which have been considered to be extenuating circumstances are drunkenness as well held in *Lemmy Shula v the People*. In the *People v Bunda*, the court stated that since the deceased had stated the fight himself, this was considered to be an extenuating circumstance. Finally in the case of *Mwandama v the people*, the Court held that the youthfulness of the accused was an extenuating circumstance to mention but a few.

The paper has also outlined instances in which the court held that extenuating circumstances will not apply. In the case of *Mudenda v the people* the court stated that extenuating circumstances do not apply in the case of aggravated robbery. In the case of *Justin Mumbi v the people*, the court held that although drunkenness is an extenuating circumstance, in this case it did not amount to
an extenuation because the accused broke into another person’s house to get a gun just to shoot
the victim for refusing to give him a pair of shoes.

The paper has then made a comparison with the South African Criminal Justice System and it
has been seen that this doctrine of extenuating circumstances was in existence in South Africa
from 1935 till 1990 when it was abolished. This doctrine was introduced through the amendment
of the 1917 Criminal Procedure and Evidence Act.

The paper has also shown that witchcraft is also considered to be an extenuating circumstance in
the South African Criminal Justice System as was held in the case of S v Vela. In the case of S v
Thabeta and Others, the court stated that deindividualisation amounted to an extenuating
circumstance. In the Case of S v Ndwalane, the court stated that the fact accused was so close to
Dube and his killers were not caught by the police, this amounted to an extenuating
circumstance.

The paper has also shown instances in which Court did not consider extenuating circumstances
to exist. In the case of S v Mpontshane were the Court held that there were no extenuating
circumstances because the accused killed a defenseless child just to get back at the child’s
mother and the fact that the accused tried to conceal the crime was not an extenuating factor. In S
v Khumalo, the court said that the absence of previous convictions in itself cannot be an
extenuating circumstance. In the case of S v Mthembu, the court said that the youth of the
accused could not be considered to be an extenuating circumstance.

The paper has also shown that in South Africa, race clearly played a role in the imposition of the
death sentence. The were campaigns against the issue of the death penalty. This issue of death
penalty remained unchanged after its initial reform in 1990 until 1994 when the Constitutional
Court interpreted the newly written South African Constitution to mean that the death penalty violated certain rights and was unconstitutional as was held in the case of *S v Makwanyane*.

The paper has gone further to outline some of the weaknesses of this doctrine of extenuating circumstances. While the doctrine of extenuating circumstances successfully channels some of the discretion inherent in any death penalty case, recognizing that no death sentence is truly “mandatory,” the doctrine ultimately misplaces that discretion. The doctrine is too rigid because it constrains the judge to consider only those factors affecting the accused at the moment the crime was committed, excluding important policy reasons, religious conversion, familial obligations, health considerations, and most importantly irregularities in the arrest, trial, and sentencing of the accused from the judge’s calculus. The doctrine fails to allow a judge to save a defendant’s life even where a person’s trial was not fair the ultimate extenuating circumstance. The extent to which a judge does consider these factors only underscore the lack of guided discretion in the determination of a sentence.

In addition, by shifting the burden to the defendant to prove extenuating circumstances, the state stresses the weakest link in the chain who are the often inexperienced and always underpaid *pro deo* counsel of an indigent defendant.

**5.2 RECOMMENDATIONS**

Having discussed the doctrine of extenuating circumstances in both the Zambian and the South African Criminal Justice Systems and the critiques of this doctrine of extenuating circumstances, there are some recommendations which can be made as to how this doctrine can be improved on in the Zambian Criminal justice System.
The first recommendation which can be made is that there should be some type of instrument which will provide for all circumstances which are considered to be extenuating circumstances unlike leaving it up to the judges to decide then that a certain factor is an extenuating circumstance. For instance in Zimbabwe these factors are dealt with in detail in an article entitled "Extenuating Circumstances: A Life and Death Issue" in 1986 Volume 4 Zimbabwe Law Review 60.

The second recommendation is that there should be two approaches in determining whether extenuating circumstances exist. Like in Zimbabwe, in the case Jare 2001 (2) ZLR 393 (H) the court pointed out that there are two approaches for determining whether or not a murder was committed with extenuation. Either approach is permissible and the end result should be the same. The court stated that these two approaches were captured in Reid Rowland Criminal Procedure in Zimbabwe at pp 25-36 as follows: "The first approach is to consider, first, all those factors which reduce the moral blameworthiness of the accused. If, in the opinion of the court, the facts so warrant, it should find that extenuating circumstances exist. The approach at this stage is largely subjective and aggravating features, many of which may be of an objective character, are not considered. The second stage is then to decide on sentence. At this stage, all aggravating features, including the brutality of the crime and all those objective factors which would assist in the determination of the sentence, are considered. The court may well then decide that, despite the existence of extenuating circumstances, they are outweighed by the aggravating circumstances and the accused should be sentenced to death. The second approach is for the court to consider all the usual factors which may be regarded as extenuating and weigh them against the aggravating features. If the court considers that the aggravating features outweigh
those which reduce the accused's moral blameworthiness, the court will find that extenuating circumstances do not exist. If the court is of the opinion that aggravating features do not outweigh those which reduce the accused's moral blameworthiness, it will find that extenuating circumstances do exist."

5.3 CONCLUSIONS

Extenuating circumstances are those circumstances which reduce the moral blameworthiness of the accused and the court takes these circumstances into consideration when determining what sentence to pass. If extenuating circumstances exist the sentence is not death but imprisonment for a certain term while if extenuating circumstances do not exist, the sentence is death. However it is contended that this doctrine has shortfalls and these short falls can be improved upon by the above recommendations. This therefore calls for appropriate measures to be put in place to better develop this doctrine of extenuating circumstances in Zambia.
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