Sentencing murderers

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Part 1 - Introduction

Deciding whether to impose the death sentence

One of the most onerous functions of a judge is to decide whether to sentence to death a person convicted of murder. This decision must be made with the utmost care by the trial court and by the appeal court when it goes on automatic appeal. In cases of murder, even if the accused pleads guilty to a charge of murder, the court will always enter a plea of not guilty and there will be a full trial to determine the facts and decide whether the accused is guilty.[1] That determination of the facts is of crucial importance not only in respect of guilt but also in relation to the decision whether the death sentence should be imposed.

This article explores the changes brought about by the 2013 Constitution to the way in which the court is to make its determination on whether to impose the death penalty. It also looks at the sentencing approach when the court decides not to impose the death penalty.

Death penalty through the back door?

It is necessary first to comment on the unsatisfactory way in which the death penalty was re-instated following the 2013 Constitution. Section 48 of the Constitution provides for the right to life but section 48(2) then states that a "law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances." It further provides that the death penalty may not be imposed on a woman, on a man over the age of 70, or on a male who was under the age of 21 at the time the offence was committed.[2]

The murder provisions in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code") were amended[3] to allow for the death penalty to

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[1] See *S v Nangani* 1982 (1) ZLR 150 (S) at 154 B and s 271(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

[2] The Criminal Law Code still provides for the death penalty to be imposed for crimes other than murder. Section 20(1) of the Criminal Law Code provides that the death penalty can be imposed for treason, and section 23(1) provides that it can be imposed for the crime of insurgency, banditry, sabotage or terrorism where the commission of the crime results in the death of a person. Section 4 of the Genocide Act [*Chapter 9:20*] implicitly allows the death penalty to be imposed on anyone convicted of genocide involving the killing of a person [the implication arises because life imprisonment is the penalty for genocide that does not involve killing]. Section 3 of the Geneva Conventions Act [*Chapter 11:06*], again implicity, allows the death penalty to be imposed a grave breach of a Geneva Convention. The Defence Act [*Chapter 11:02*] also provides for the death penalty for various military offences. All these statutory provisions are unconstitutional, in so far as they purport to allow the death penalty to be imposed for offences other than murder committed in aggravating circumstances.

be imposed for murder in line with the constitutional provisions. Sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] were also amended[4] to reflect the constitutional provisions stipulating the persons upon whom the death penalty may not be imposed. These amendments were made without any prior debate on whether it was appropriate for the death penalty to be retained in Zimbabwe. This would have been a good opportunity for Parliament to fully debate whether or not to retain the death penalty at all, but the opportunity was lost, for no apparent reason. The use of the word "may" in section 48 of the Constitution gave a discretion to Parliament to decide whether the death penalty should continue to be used. A parliamentary debate on this issue was required, especially in the light of the publicly expressed opinion by the then Vice-President responsible for the Ministry of Justice (now the President) that the death penalty should not be imposed in murder cases.

It should also be noted that there has been a distinct disinclination to execute prisoners who have been sentenced to death. No executions have been carried out since 2005.

Discretion to impose the death penalty

Prior to the 2013 Constitution the High Court was obliged to impose the death for murder if the court considered there were no extenuating circumstances. Although there was case law[5] suggesting it was incumbent on the defence to establish that there were extenuating circumstances, in practice courts decided on extenuation in the light of all the evidence and the submissions made by both parties. Section 48(2) of the 2013 Constitution, as already stated, now provides that the death penalty may be imposed only for murder committed in aggravating circumstances. It also provides that the law providing for such penalty must permit the court a discretion as to whether or not to impose the penalty. In *S* v *Kufakwemba & Ors* 2016 ZLR 627 (H) at 635H the court pointed out that the constitutional provisions now give the court a discretion whether or not to impose a death sentence, even where there are aggravating circumstances.

Aggravating circumstances

The death penalty may now be imposed only if the court decides that there are aggravating circumstances. This determination must be made by the judge and the assessors with reference to the aggravating circumstances listed in the Criminal Law Code or other aggravating factors that they decide are present.

Sections 47(2) of the Criminal Law Code provide that when a court is deciding the appropriate sentence for murder, it **must** regard as aggravating in case of murder

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[5] *S v Lembete* 1947 (2) SA 603 (A) and the other cases cited in Reid Rowland *Criminal Procedure in Zimbabwe* (Legal Resources Foundation, 1997) at page 25-37.

the factors there set out, although it may regard other factors as aggravating in addition to those laid down. Among the factors which a court must regard as aggravating are if the murder was committed in the course of committing an act of terrorism or kidnapping or rape – and this includes situations where the murder was committed during the commission of an act constituting an essential element of such a crime (whether or not the accused was charged with or convicted of the crime)[6].

The effect of these provisions is that for the death penalty to be imposed for murder the prosecution has to prove that there are aggravating circumstances that warrant the imposition of the death penalty. Thus *S* v *Kufakwemba & Ors (supra)* at 635H the court stated that the onus of proving whether or not the death penalty should or should not be imposed has been shifted to the State. It might have been better if the Constitution had explicitly provided that the onus is on the State to prove the presence of aggravating circumstances.

As the court has a discretion to impose the death penalty, the court has to weigh any aggravating factors against mitigating factors and decide whether, taking into account all these factors, the aggravating factors outweigh the mitigating factors such that the imposition of the death penalty is justified. By stating that the courts shall regard these circumstances as aggravating, the impression might be created that the death penalty must be imposed where these circumstances are present. Section 47(4) of the Criminal Law Code only obliquely lays down that the death penalty is not mandatory for murder in circumstances of aggravation by providing that the sentence can be death, life imprisonment or at least twenty years. (The mandatory sentence of not less than twenty years is questionable as even where there are aggravating circumstances there may still be significant mitigating circumstances.)

The death sentence may only be imposed if the court finds that the murder was committed in aggravating circumstances. But the court does not have to impose the death penalty where it finds that a specified aggravating circumstance is present. What the provision says is that such a factor must be taken into account in deciding upon the appropriate sentence. The court is entitled to decide that although that aggravating circumstance was present, on the facts that aggravating circumstance was not serious enough alone to merit the imposition of the death penalty. Thus in *S v Chihota* HH-234-15 the court stated that State counsel quite rightly submitted that even where a court finds aggravating circumstances, it has an unfettered discretion not to impose the death penalty. See also *S v Milanzi & Ors* HH-398-17 where the court said that the fact an accused person has been

[6] This latter provision is too wide as it would allow the court to impose the death penalty where the State is only able to prove one element of the listed crimes even though it has seen fit to allege and prove that the listed crime in question has been committed.

convicted of murder in circumstances of aggravation does not bind the court to pass the death sentence.

Secondly, even where the court has found that aggravating circumstances were present which might point in the direction of the death penalty, the court must still take into account any mitigating circumstances that may exist and decide whether on balance the death penalty is justified. In other words, by providing in the Constitution that the death penalty should only be imposed where there are aggravating circumstances, it is envisaging that the death penalty will only be imposed where the murder is exceptionally grave or heinous. But even where the murder is exceptionally grave or heinous, there may still be significant mitigating circumstances that justify the court imposing a penalty other than the death penalty. This should have been made clear in the Criminal Law Code provisions by providing that the court must take account all possible mitigating circumstances that have been pleaded or which have emerged from the evidence in the case. In murder cases therefore defence counsel will still seek to establish that there are various mitigating factors which reduce the weight of the aggravating circumstances.

After convicting a person of murder, the court should proceed in this manner on the issue of whether to impose the death penalty:

1. Decide whether there are any of the specified aggravating circumstances set out in section 47 of the Criminal Law Code.
2. Decide whether there are any other circumstances which should be regarded as aggravating.
3. If there are such aggravating circumstances, decide whether those aggravating circumstances are serious enough to justify the death penalty.
4. If the aggravating circumstances on their own might justify the imposition of the death penalty, weigh these circumstances against the mitigating circumstances and decide on balance whether to impose the death sentence.
5. If there are none of the specified aggravating circumstances, the court must decide on the appropriate sentence taking into account any mitigating circumstances weighed against any aggravating circumstances that it considers are present, other than those specified in section 47 of the Criminal Law Code.

As will be seen later, all these processes afford considerable subjective discretion to the courts, and different judges may approach them in a different manner. Judges who are reluctant to impose the death penalty may more readily find that the aggravating circumstances are not serious enough to justify the death penalty. Or they may find that although the aggravating circumstances are serious, there

are sufficiently strong mitigating circumstances to lead to the conclusion that the death penalty should not be imposed.

When the death penalty is not in issue because none of the specified aggravating circumstances are present the courts still have to decide on the appropriate sentence to impose. Here again different judges may differ on what should be the sentencing outcome after weighing aggravating features against mitigating factors. A constant factor in this regard is that the accused has violently ended a human life but on the other side of the line there may be a range of mitigatory features.

The procedures suggested above are similar to the first of the approaches to extenuating circumstances suggested in *S v Jacob* 1981 ZLR 1 (A), following *S v Phineas* 1973 (1) RLR 260 (A):

> There are two permissible approaches to the assessment of extenuating circumstances in murder cases: the first is to make a finding that extenuating circumstances exist if there are any mitigating features in the case, and then to decide whether, notwithstanding that finding, the aggravating features necessitate the imposition of the death sentence; the second approach involves balancing at the outset the mitigating against the aggravating features and, depending on the result, finding that extenuating circumstances exist or imposing the death sentence.[7]

The court pointed out that both approaches involved a careful weighing up of the mitigating factors against the aggravating factors and the passing of the death sentence only when the latter outweighed the former.[8]

Part 2 - Aggravating circumstances set out in the Criminal Law Code

Section 47 of the Criminal Law Code, as already stated, deals with aggravating circumstances in murder cases. Section 47(2) sets out circumstances which a court must treat as aggravating, while section 47(3) sets out further circumstances that a court may find aggravating. And — again as already stated — section 47 is not exhaustive: a court may treat other factors, not listed in the section, as aggravating in the light of the facts of the particular case. But only if the court finds that there are aggravating circumstances, whether listed in section 47 or not, will the possible imposition of the death penalty become an issue.

In all cases of murder a constant factor is that the accused with actual or legal intention caused the death of a person. This is what makes murder such a serious offence, because it violates a person's right to life, guaranteed by section 48 of the Constitution, but it is not in itself an aggravating factor. All murder is serious,

[7] The headnote to *S v Jacob*.
[8] *Jacob's* case page 5B.

but there has to be something more than the killing of a person to make it aggravated murder.

The cases referred to in this section are cases where the death penalty has been imposed both before and after 2013—

(a) where the death penalty has been imposed because aggravating circumstances have been found to be present or

(b) where the death penalty has not been imposed despite the presence of aggravating circumstances.

Murder during commission of certain crimes [section 47(2)(a) of Code]

This provides that the court must treat as an aggravating circumstance that the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any of the following crimes (or of any act constituting an essential element of any such crime[9])—

- an act of insurgency, banditry, sabotage or terrorism; or
- the rape or other sexual assault of the victim; or
- kidnapping or illegal detention; or
- robbery; or
- hijacking, or
- piracy; or
- escaping from lawful custody; or
- unlawful entry into a dwelling house; or
- malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives.

Each of these will be dealt with below, citing any relevant case law.

Killing by bandits [section 47(2)(a)(i) of the Criminal Law Code]

Killing whilst implementing a plan to unlawfully overthrow the lawful government will attract the death penalty. So too where an individual kills in furtherance of political objectives by, say, planting a bomb in a public place. Armed gangs have previously operated in Zimbabwe in attempts to destabilise the country and cause unrest. Members of the security forces were killed during battles with armed dissidents who also killed civilians in order to induce the civilian population not to support the government forces. The actual perpetrators of these murders received the death sentence. Accomplices to such murders also received the death penalty

[9] The provision that aggravation applies even where the act constituted only an essential element of a listed crime is far too wide. If only one but not all of the essential requirements of the crime has been satisfied then the crime in question is not committed and it is therefore illogical and wrong to take this into account in aggravation.

unless the degree of participation was very minor or other factors were present such as a high degree of compulsion to force them to participate in the armed activities.

In *S v Nzima & Anor* S-55-84 armed bandits had opened fire on the police, killing one officer and injuring another. The appellants were young men but they had joined the gang to wage war. The death penalty was upheld.

In *S v Sibanda* S-5-87 a gang of armed bandits had attacked a mine to sabotage and stop its operations. They had killed a number of persons during this attack. They were found guilty of murder with constructive intent[10] and the death penalty was upheld.

Killing whilst committing rape or sexual assaults [section 47(2)(a)(ii) of the Criminal Law Code]

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

In *S v Mapiro* A-106-71 the accused committed a rape and a brutal murder. He was under the influence of drink and there had possibly been some provocation but the court nonetheless found that there were no extenuating circumstances.

In *S v Chihota* HH-234-15 the court imposed the death penalty upon a man who had brutally raped his 12–year-old niece whom he should have protected. He then strangled her to death in order to cover up the rape and stop her from disclosing what had happened to her and identifying him.

In *S v Phiri* HB-19-16 the accused, aged 30, had raped and killed a girl aged 15. He was found guilty of rape and murder with actual intent. He had meticulously planned to commit the crime. The court found that the accused had preyed on a vulnerable young girl. He was sentenced to life imprisonment for the murder.

[10] Constructive intent, in the context of murder, means that the killer realised there was a real risk or possibility that his conduct might cause death and persisted in his conduct despite that realisation. The term "constructive intent" has, however, been criticised on the basis that it may be misunderstood to imply that subjective foresight of the real risk of death may be artificially attributed to an accused which the accused may not have had. The term "legal intent" is sometimes used as a substitute but this term is not easily understood as portraying what this state of mind entails; this state of mind is also referred to by using the Latin term "*dolus eventualis*".

Murders during robberies and unlawful entry into a dwelling house [section 47(2)(a)(iii) and (iv) of the Criminal Law Code]

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

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

If an accomplice accompanies a person whom he knows to be armed and likely to use the weapon with fatal effect during the housebreaking or robbery, the blameworthiness of the accomplice is of a high order. As McNally JA said in *S v Ndebu & Anor* 1985 (2) ZLR 45 (S) at 47; 1986 (2) SA 133 (ZS):

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

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

Cases:

In *S v Chiramba* S-146-82 a young man aged between 20 and 23 brutally attacked a man and his wife after breaking into their house. He beat the man with an iron bar and strangled the wife. The death sentence was upheld.

In *S v Ndlovu* S-34-85 the court said it was the duty of the courts to protect members of the public against this type of offence which had become disturbingly prevalent. In the absence of weighty extenuating circumstances, murder during the course of robbery will attract the death penalty. Here the murder was committed with actual intention and it was a brutal and merciless attack on an

elderly, innocent and defenceless man in the sight of his wife. The attack was carried out after a demand for money had not been met. The appellant had shown no remorse. It was argued that his fellow robber had played a more dominant role in the robbery but the court found that the appellant had actively joined in the savage assault by striking the deceased with a knobkerrie.

In *S v Muchenje* S-81-85 robbers had entered a house with intent to steal. The elderly house owner had confronted them with a weapon but they had disarmed him, then brutally assaulted him and he had later died. They had also assaulted his wife. They were found guilty of murder with constructive intent only. Nonetheless the court found that the death penalty was appropriate as there were no extenuating circumstances.

In *S* v *Sibanda* 1992 (2) ZLR 438 (S) the death penalty was upheld for murder committed in the course of a robbery. The appellant had murdered the deceased with actual intention to kill. The trial court was unable to find any feature which diminished the appellant's moral culpability. He had callously and brutally killed a defenceless and terrified man who had done him no harm. The appeal court pointed out that warnings had frequently been given that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty.

In *S v Masuku* S-234-96 an 18-year-youth murdered with actual intent a 56-year-old woman during the course of a robbery. He struck her with stones and stabbed her with a pair of scissors. After the killing he stole various items. The death penalty was upheld despite the youthfulness of the offender.[11]

In *S v Ncube* S-179-98 the appellant stabbed to death a young man in the process of robbing him. The death penalty was upheld and the court said that even if the evidence established that only attempted robbery was committed, the death sentence would still be justified.

In *S v Mutsinze* HH-645-14 the accused was convicted on two counts of murder and one count of armed robbery. The court found that the murders were committed in circumstances of aggravation. The robbery was carefully planned and the accused and his accomplices went armed to the business centre intending to use the weapons to overcome any resistance. The judge decided not to impose the death penalty expressing the view that until such time an Act of Parliament was promulgated defining "the terms on which courts will impose the death penalty", including the definition of "aggravating circumstances", it might not be proper to impose a death penalty. If section 47 of the Criminal Law Code had been in its

[11] Note that under the current law a person who was under 21 at the time of the murder may not be sentenced to death.

current form when this case was dealt with, it is likely that the death penalty would have been imposed because the aggravating circumstance pertaining to the killing during a robbery would probably have outweighed the mitigating circumstances found by the court, namely that he had many wives and 10 children, he was a first offender and a church leader, he had been in prison for 13 years awaiting his fate and he had lost his mother and son whilst in prison.

In *S v Mlambo* HH-351-15 the accused shot and killed a money-changer. The accused had pursued the money-changer and had forced him at gun point to surrender his bag of money. He had then ordered the money-changer to surrender the money he had in his pockets. As the deceased was emptying his pockets the accused had shot him in the chest, and the deceased died in the clinic to which he had been taken. Both counsel agreed that the murder had been committed in aggravating circumstances. When the deceased was shot he was defenceless and terrified and was no threat to the accused. This was a callous murder and there was no mitigation to diminish the moral culpability of the accused. The judge said: "This case screams loudly for the imposition of death penalty."[12]

In *S v Chikanga* HH-555-15 the deceased, aged 83, had been paid money by the Government. He had buried the money close to his home. The accused and an accomplice went to the deceased's house armed with knives and a pick handle with the intention of robbing him of the money. They viciously attacked both the deceased and his elderly wife. The accused's accomplice fatally stabbed the deceased. The accused had common purpose with the accomplice and the accused had legal intention as he realized that during the course of the robbery the accomplice might stab to death the deceased. The two forced the badly injured deceased to reveal where he had concealed the money. They then took the money and shared it. The court decided that the accused had escaped the death penalty by a whisker. It took into account that the accused was guilty of murder with legal intention and that when they realized that the deceased had been seriously injured they had attempted to tie a cloth around his abdomen to avoid further exposure of his bowels and intestines.

In *S v Milanzi* HH-398-17 the three accused carried out a robbery with a firearm at the residence of the deceased. They attacked the police officer guarding the premises, disarmed him, handcuffed him with his handcuffs and severely assaulted him. They proceeded to hold the occupants of the house, including the police guard, hostage or captive tied with ropes in one of the workers quarters whilst part of their group ransacked the house taking away valuables. They subjected the occupants of the house to savage attacks and assaults. The deceased was assaulted with the butt of an AK rifle as he sat on his bed defenceless. The deceased never

[12] Whatever the circumstances of the case, such emotive language should not be used

fully recovered from his injuries and succumbed to them and died. The three robbers were sentenced to death.

In *S v Matibe* S-23-17 a murder was committed in the course of a robbery. When his fellow robber produced a pistol and shot the deceased the appellant did nothing to stop him. The appellant helped to dump the body. He participated in the disposal of the property belonging to the deceased and he shared in the loot. The court found that there was very little difference, if any, between the conduct of the appellant and the fellow robber who shot the deceased. The degree of participation in the crime was equal. The court dismissed the appeal against conviction and against the imposition of the death penalty.

In *S v Dolosi & Ors* HH-210-15 police officers connived with accused one and others to rob building materials at a police farm. The police officers agreed to provide their service pistols to facilitate the armed mission while accused one and another civilian were to provide getaway vehicles. When they went to the farm they knew the building materials were under guard by security guards. During the criminal enterprise the deceased went to investigate and was shot. The accused were found guilty of murder and sentenced to death.

In *S v Luphahla & Anor* HB 65-16 two robbers set upon a couple who were strolling along the Zambezi River. They assaulted the man with logs and then took away the woman and killed her by assaulting her with logs. The robbers then threw the woman's body into the river. One accused was 34, the other 28 years old. The elder accused was a first offender, married and a father of two minor children. He was the sole breadwinner. The younger accused was a vendor, married with children and had a previous rape conviction. They were sentenced to life imprisonment.

See also *S v Moyo & Anor* HB-162-11.

In *S* v *Kufakwemba & Ors* (*supra*) the court stated that murder during the commission of another offence has always been considered as an aggravating circumstance.

Murder during kidnapping, hijacking or piracy [section 47(2)(a)(iii) and (iv) of the Criminal Law Code]

The offences listed here seem rather arbitrary. Piracy in particular: Zimbabwe does not harbour many pirates. And if kidnapping is to be included, why not human trafficking?

Killing of guard during escape from lawful custody [section 47(2)(a)(iii) of Code]
In S v *Chauke & Anor* 2000 (2) ZLR 494 (S) dangerous prisoners attempted to escape by seizing weapons from prison guards. A gun battle ensued in which a prison guard was killed. The court found that even if the fatal bullets had been fired by fellow prison guards during the gun battle, the appellants must have foreseen a gun battle in which anyone in the vicinity might get killed as a result of the exchange of gun fire. The trial court found that there were no extenuating circumstances and the appeal court upheld this finding.

In *S v Mashayamombe* HH-933-15 an escaped convict had raped and killed a female prison officer after breaking into her house. He was sentenced to life imprisonment, the court finding that the death penalty would have been appropriate but that there was at that time a gap in the law because the legislature had not yet spelled out what constituted aggravating circumstances.

More than one murder [section 47(2)(b) of the Criminal Law Code]

This provides that it is an aggravating circumstance that the murder was one of two or more murders committed by the accused during the same episode or was one of a series of two or more murders committed by the accused over a period of time.

Murder with torture or mutilation [section 47(2)(c) of Code]

This provides that it is an aggravating circumstance that the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim.

Location of murder and means used [section 47(2)(d) of Code]

The court must treat as an aggravating circumstance the fact that the victim was murdered—

- in a public place; or
- in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance;

by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.

For a case where the murder was carried out in a public place see *S v Masango* HH-726-16.

Premeditation [section 47(3)(a) of Code]

Generally premeditated murders are more heinous than unplanned, spontaneous killings. If the accused decided to advance that he would kill his victim, planned how he would do it and then executed the plan, in the absence of strong mitigation, this may tip the scales in favour of the death penalty. The Criminal Law Code thus provides that in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, the fact that the murder was premeditated is to be regarded as an aggravating feature.

Person murdered

Section 47(3)(b) of the Criminal Law Code provides that in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, it is to be regarded as an aggravating circumstance that the murder victim was—

- a police officer;
- a prison officer;
- a minor;
- a pregnant female;
- a person who was of or over 70 years;
- physically disabled.

In South Africa it has been recognized as an aggravating circumstance that the accused killed his father or his mother.[13]

In *S v Muhlaba* A-76-73 the policeman was carrying out his duties at the time he was killed.

In *S v Muchaparara & Anor* HH-99-04 the accused shot and killed two police officers.

Previous convictions

The fact that the accused has previous convictions is not listed as an aggravating factor in section 47 of the Criminal Law Code: understandably, because few people manage to commit more than one murder in their lifetime. For that reason previous convictions should not given much weight as an aggravating factor unless perhaps the criminal record is especially bad.[14]

[13] See *S v Petrus* 1969 (4) SA 85 (A) at 90

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

Part 3 - Mitigating circumstances

As already stated, the court may now impose the death penalty only if it finds that there are aggravating circumstances which may warrant the imposition of the death penalty. But even if it finds that there are aggravating circumstances, it must then weigh them against all mitigating factors that are present and decide whether on balance the death penalty is warranted.

Previous case law on factors that constitute extenuation in murder cases remains relevant because what were previously referred to as extenuating circumstances can now be taken as mitigatory circumstances. On this see "Extenuating Circumstances: A Life and Death Issue" in 1986 Volume 4 *Zimbabwe Law Review* 60.

Cumulative effect of mitigatory circumstances

It was decided previously that the court must consider the cumulative effect of all possible extenuating circumstances and must not consider and dismiss each factor in isolation: *S v Sigwahla* 1967 (4) SA 566 (A) at 571 and *S v Jaure* 2001 (2) ZLR 393 (H). The same must apply now to mitigating factors: the court must consider the cumulative effect of these factors. This must be decided by the judge and the assessors.

Decision on mitigatory circumstances

In *S v Jaure* 2001 (2) ZLR 393 (H) the court pointed out that a murder trial concludes with the decision on whether or not there are extenuating circumstances. That question must be decided by the majority view of the court, that is to say the judge and the assessors, even if the judge is in the minority. Thus both the judge and the assessors must decide whether there are mitigating circumstances and whether the mitigating circumstances outweigh whatever aggravating circumstances are present

The death sentence may still be imposed after the judge and assessors have found that extenuating circumstances exist. If the judge concludes that the extenuating circumstances are far outweighed by the aggravating features; that is a matter for the judge alone though the assessors may give informal opinions on the issue to the judge. Under the new constitutional provisions, it would seem that the question as to whether aggravating circumstances exist that justify the imposition of the death penalty would have to be decided by a majority of the court.

Onus of proof

Previously in *S v Jaure* 2001 (2) ZLR 393 (H) it was observed that although the onus of proof of extenuating circumstances is said to be on the accused, counsel for the State can and should assist the court in arriving at an informed decision on

extenuation. The court should examine all the evidence and consider whether extenuating circumstances are shown on a balance of probabilities, regardless of who produced the evidence. The same approach must apply to mitigating circumstances.

Hunt[15] states that it was said to be trite that the onus of establishing extenuating circumstances was on the accused[16]. This onus need not be discharged by the accused giving evidence himself. The court may deduce extenuating circumstances from the evidence already led, including the State's evidence.[17] The onus could even be discharged where there was acceptable evidence *aliunde* to find extenuating circumstances, in spite of the evidence of the accused on the point being unacceptable.[18]

It is submitted that it is wholly artificial to say that there was an onus on the accused at all. The Criminal Procedure and Evidence Act made no mention of onus, either expressly or impliedly. It provided simply, in s 337, that "if the court is of the opinion that there are extenuating circumstances", it may impose a sentence other than the death sentence. There is indeed a line of cases which say that the onus is on the accused, but they all follow *R* v *Lembete* 1947 (2) SA 603 (A). This case was the first in which the question arose for decision. Greenberg JA made the point that before the court can be of the opinion that there are extenuating circumstances, it must find that such circumstances do exist, not merely find that the prosecution has failed to prove that they do not exist. The learned Judge of Appeal also considered that they need be proved by the accused on the balance of probability. His reasoning was, with respect, not very convincing: he based his conclusion on the premise that the onus rests on the person who asserts the affirmative.

Of course, the defence, rather than the State, would usually assert the presence of extenuating circumstances — it is in his interests to do so — but if the accused failed to assert them or if he was found to be untruthful, it was well established that the court was still entitled to find extenuating circumstances. Where there was credible evidence on the point, whether the evidence had been led by the State or by the accused, the court could make a finding of extenuating circumstances. To say in these circumstances that the accused had discharged the onus on him is artificial, as he has plainly not done so. The correct approach is that the court should, after convicting the accused, examine all the evidence and consider whether extenuating circumstances are shown on a balance of

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[15] Hunt *South African Criminal Law and Procedure Vol III Common Law Crimes* (Second edition Juta 1982) pp 386

[16] *R v Lembete* 1947 (2) SA 603 (A) which has been followed in numerous cases since. See, for example, *R v Jairos* 1966 RLR 115 (A) at 119I; *S v Munemo* 1986 (2) ZLR 71 (S), citing *S v Theron* 1984 (2) SA 868 (A) and *S v Nyoni* S-66-14

[17] *S v Mkhize* 1979 (1) SA 461 (A) at 463; *S v Felix & Anor* 1980 (4) SA 604 (A)

[18] *S v Kamusewu* 1988 (1) ZLR 182 (S)

probabilities. It does not matter who has produced the evidence, as long as the evidence is there. There should be no question of onus.

Hunt[19] provided a list of factors which have been considered as extenuating in various cases. These factors will now need to be considered as mitigating factors. Hunt's list has been modified and re-ordered in what follows:

1. Legal intention only
2. Absence of premeditation
3. Minor degree of participation
4. Youthfulness
5. Old age
6. Remorse, repentance and endeavours to assist victim before crime completed
7. Pre-trial incarceration
8. Accused is a first offender
9. Intoxication
10. Provocation and other emotional disturbance
11. Compulsion
12. Mental condition, other than mental conditions warranting special verdict
13. Belief in witchcraft
14. Mercy killing (consent of victim)
15. Political, social or other motives which are not ignoble[20]

Legal intention (constructive intent, *dolus eventualis*) only

This may be a mitigating factor.

Previously it was ruled that the fact that the murderer or accomplice had only legal intention to kill may be an extenuating circumstance. In *S v Mharadzo* 1966 (2) SA 702 (RA) at 703C; 1966 RLR quoted in *S v Jacob* 1981 ZLR 1 (A) pp G-H, Beadle CJ stated:

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

See also *S v Leonard* A-128-70.

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[19] Hunt *South African Criminal Law and Procedure Vol III Common Law Crimes* (Second edition Juta 1982) pp 381-86.

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

The fact that there was no actual intent to kill but only legal intention is a factor which should normally be considered as mitigatory. Granted there are some cases where it looks as if there may well have been actual intent to kill but the accused is given the benefit of the doubt and a finding of murder with legal intent is made. However, usually the murderer with actual intent is more morally blameworthy than the murderer with legal intent. If the aim and object of the accused is to kill, this is a different character of murder than the situation where the court finds as a matter of inference the accused must have and therefore did foresee the real possibility of death and continued to act recklessly as to whether the death eventuated.[21]

In *S v Siluli* 2005 (2) ZLR 141 the court ruled that where, on a charge or murder, only a constructive intent to kill is proved, the court need not necessarily find that this is a circumstance of extenuation, but the court should examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances. A constructive intent to kill is a factor which must be put in the credit side in the accuseds' favour in that weighing-up process. The court cited with approval the approach in *S* v *Sigwahla* 1976 (1) 4 SA 4 (A) that depending with the circumstances conviction of murder with *dolus eventualis* on its own or together with other factors may constitute extenuating circumstances. See also *S v Katsande* HH-854-15.

In *S v Chunda* S-14-84 the fact that the accused had legal intent was far outweighed by the aggravating factors.

In *S v Dube* S-39-85 a soldier had killed a woman. He was found guilty of murder with legal intention but the court nonetheless found that there was no extenuation.

Absence of premeditation

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

[21] Whaley (1967) "Criminal in our Courts: *Dolus eventualis*" *Responsa Meridiana* 117 and Feltoe (1985) "States of Mind" ZLJ.

expressed the difference in seriousness between sudden impulsive killings and premeditated killings in these terms:

> It has been convincingly argued that when a killing is impulsive, concepts which emphasise rational processes – forming an intention or contemplating a risk – have little meaning. The actor lost his self-control for whatever reason and the enquiry as [to] his *mens rea* will amount more or less to the negation of duress, insanity and fundamental mistake coupled with some minimal notion of foresight of consequences.
>
> Planned and premeditated killing is different. Here the actor has written the script for the drama that ensues. Having reasoned his way to kill, he presents a unique threat to his intended victim's life and, more generally, to the rules necessary for the preservation of social order. This is not to say that in all cases his crime is more serious than that of one who kills impulsively; we can think of very heinous instances of impulsive killing and less heinous examples of planned and premeditated killing. It is however to recognise that it is different and in general more seriously wrong than the other killings.[22]

From a policy standpoint, it would seem that generally non-premeditated murders should be treated differently from premeditated murders. Deterrence cannot be a justification for a capital punishment in cases of sudden, impulsive, emotional killings. In such cases the accused acts without thinking about the consequences and the threat of the death penalty cannot act as a deterrent. From the standpoint of deterrence the death penalty should be reserved for cases in which the imposition of this sentence may serve to discourage other potential murderers.[23] From the standpoint of retribution the issue is whether the sudden, impulsive killing by a person who is most unlikely ever to commit another murder should be treated on a par with the dangerous criminal who has used violence on a number of previous occasions against innocent people and has ultimately killed someone.

Minor degree of participation

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

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[22] P McKinnon (1985) "Two view of murder" 63 *Canadian Bar Rev*. 130

[23] See J Andenaes (1966) "The general preventative effects of punishment" *University of Pennsylvnia Law Revie*w 949 and Bedau *The death penalty in America* (3 Ed) 1982 OUP Chapter 4. Strong doubts can be raised as to the deterrent impact of capital punishment even in relation to premeditated killings.

as a possible and not probable outcome of the enterprise, minor participation would normally be extenuating.

In the case of *S v Mbirinyu* A-149-73 Beadle JC said, concerning the significance of the appellant as a *socius criminis*:

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

On the other hand, the fact that a fellow criminal shot the deceased will not necessarily mean that the death penalty should not be imposed on the accomplice. Thus in *S v Matibe* S-23-17 a murder was committed in the course of a robbery. When his fellow robber produced a pistol and shot the deceased the appellant did nothing to stop him. The appellant helped to dump the body. He participated in the disposal of the property belonging to the deceased and he shared in the loot. The court found that there was very little difference, if any, between the conduct of the appellant and the fellow robber who shot the deceased. The degree of participation in the crime was equal. The court dismissed the appeal against conviction and against the imposition of the death penalty.

Withdrawal from enterprise before murder carried out, but not disassociation such as to exempt from legal liability

This situation is dealt with in the Supreme Court case *S v Ndebu & Anor* S-72-85. In that case the accomplice had gone with another to rob a house. To the knowledge of the accomplice his fellow criminal was carrying a gun. The accomplice had fled from the house when a female inhabitant had screamed and the accomplice was not physically present when the principal offender fired the fatal shot. On all the facts, the Appeal Court found that the accomplice was nonetheless guilty of murder but it ruled that, as he had played a subsidiary role and as he had abandoned the common purpose just before the fatal shot was fired, there were extenuating circumstances

Remorse, repentance, endeavours to assist victim before crime completed and co-operation with the police

These may be mitigatory but probably only if combined with other factors. Repentance and endeavours by the accused to assist his victim before the victim's

death cannot, standing alone, amount to extenuating circumstances: *S v Jaure* 2001 (2) ZLR 393 (H)

In *S v Hahlekiye* HH-260-17 the court found that it was mitigatory that the accused had met the demands of the family of the deceased for compensation by paying the funeral expenses and part of the monetary compensation sought by the family. This showed contrition on the part of the accused.

The fact that the murder weapon was taken from the victim may not constitute a factor of extenuation see; *S v Mubaiwa & Anor* 1992 (2) ZLR 362 (S).

Pre-trial incarceration

The court can take into account in mitigation that the accused has spent a long period incarcerated before he was tried. However, this factor alone would not stop the death penalty being imposed in respect of a murder committed in serious aggravating circumstances.

Accused is a first offender

The court can take into account in mitigation that the accused is a first offender. However this factor alone would not stop the death penalty being imposed in respect of a murder committed in serious aggravating circumstances. Often persons tried for murder do not have previous convictions.

Youthfulness

If the youth was below the age of 21 at the time the murder took place he or she may not be sentenced to death.[24]

Before the age below which the death penalty may not be imposed was raised to 21, there were a series of cases in which the courts ruled that youthfulness could amount to an extenuating circumstance. For example, in the case of *S v Chininga* S-79-02 the court said youthfulness on its own or together with other factors can constitute an extenuating circumstance. Youthfulness connotes immaturity, lack of experience of life, thoughtlessness and a mental condition of susceptibility to external influences, especially those emanating from adult persons. See also S v *Ndlovu* S-91-94

Where the murderer is only 21 or only a few years older than this, the young age of the offender may still be taken into account in deciding whether the death penalty should be imposed. In *S v Makuchete & Anor* HMA-10-18 two brothers - one aged 25 and the other aged 21 - brutally assaulted another person causing his death. The court took into account that their consumption of alcohol must have reduced or

[24] Section 48(2)(c)(i) of the Constitution.

diminished their self-control and this might have been compounded by their youthfulness.

The courts are obviously very loathe to pass the death sentence on young offenders as youthfulness is associated with "immaturity, a lack of experience of life, thoughtlessness and especially a mental condition of susceptibility to external influences [particularly those emanating from] adult persons." Thus the policy of the courts is to give sympathetic consideration to youthfulness because to measure the youth's conduct using the yardstick of adult behaviour would be unfair. Considerations of humanity also apply as "no civilised State is anxious to send teenagers to the gallows" unless there are very exceptional circumstances.[25] Previously in South Africa when the death penalty was still in operation the courts adopted the approach that *prima facie* a youthful murderer is to be regarded as immature and on that ground extenuating circumstances will always exist unless it is found that the youth acted out of "inherent wickedness" in committing the murder. If the youth acted under the influence of an older person or because of "inherent wickedness" the factors to be considered include motive, personality and mentality, past history, nature of crime, manner of commission and any other relevant factors.

In Zimbabwe, however, in the case of *S v X* A-132-74 Lewis JP expressed the opinion that the "inherent wickedness" test was not very helpful, was not easy to apply in every case and should not be applied as a rule of thumb. Later he stated that, in finding that there was no extenuation despite the youthfulness of the accused, "the trial court had not overlooked the general principle that a person of this age is, *generally speaking* assumed to be less mature than an adult" and the trial judge had examined to what extent it could be said that what he did was attributable to his immaturity. Subsequent to the reservations expressed by Lewis JP about the "inherent wickedness" the test has been applied by the Supreme Court in a number of cases and in *S v Muchinika* (No.2) S-93-87 Korsah JA cited these judgments and said that he saw no reason to depart from it. In this case the appellant was under 19 at the time he committed the murder. The Appeal Court found (at least impliedly) that the youth had committed the murder not out of inherent wickedness but because of personality defects which he had acquired as a result of being subjected to traumatic experiences at a tender age.

Only if the court is quite satisfied that the murder was in no way the product of youthful immaturity should it rule that the *prima facie* assumption falls away and no mitigation exists of the grounds of youthfulness. Where such mitigation exists on the grounds of youthfulness, it is submitted that it should take extremely strong aggravating circumstances to justify any decision that the death penalty should

[25] The quotations in this paragraph are from the judgment of Rumpff CJ in *S v Lehnberg & Anor* 1975 (4) SA 553 (A) at 560.

still be imposed. Again from the general policy standpoint we should be extremely reluctant to hang youthful offenders.

In *S v Zimondi* HH-179-15 the accused stabbed to death his girlfriend following an altercation with her. When deciding upon sentence the court took into account the age of the accused. This is what the court said:

> The age of the accused at the time of the commission of the offence about 22 can certainly not be ignored. The court take judicial notice of the fact that immature adults and mature adults react differently and behave differently faced with the same set of facts or scenarios. Immaturity of the accused on matters of emotions and love can therefore not be ignored when one considers the moral blameworthiness of the accused for purposes of sentence…. The accused person even during trial per the court's observation depicted demeanor which displays youthfulness at play given his playful oblivious stance during the serious trial. We will therefore take note of the fact that at time of commission of the offence, the accused was indeed an adult but an immature adult.
>
> … given the accused's age at the time of commission of the offence, 22 and even now 24 at the time of sentence, it is our considered view that the sentence to be imposed to a relatively young man or young offender should not be that we should break him. There is room for the accused given his age to turn and be a better citizen in the country. It is mainly with the consideration of the accused's tender age at the time of commission of the offence that we will not consider life imprisonment as appropriate in the present circumstances, but we will consider a lengthy imprisonment term.

In *S v Masango & Ors* HH-726-16 a quarrel developed at a beer drink over a petty matter. The three accused stabbed the deceased with a knife and assaulted him with clenched fists and booted feet. The assailants were young persons aged 21, 24 and 23 respectively. They were found guilty of murder with constructive intention which the court found was a mitigating circumstance. The court accepted that the combined effects of youthfulness and intoxication reduced the moral blameworthiness of the accused. However, a deterrent sentence was appropriate. The court said: "Regrettably it has almost become a norm that petty disputes, particularly at beer drinks are resulting in needless deaths or loss of lives in this country. Such conduct must be declared deplorable and this court needs to reiterate and send a clear message that consumption of alcohol should not be used as an excuse to commit heinous offences such as the present one." The first accused who had a previous conviction for assault was sentenced to imprisonment for 20 years whereas the other two accused were sentenced to imprisonment for 15 years.

See also the following cases which are summarized in the cases section at the end of this article: *S v Masilela* HB-83-17; *S v Ncube & Ors* HB-303-16. (The court said that the accused are youthful offenders whose irresponsibility stemmed from

immaturity and that they were unsophisticated rural young men); *S v Ndlovu & Anor* HB-188-16; *S v Sibanda* HB-313-16; *S v Ndlovu* HB-332-16; *S v Mapurisa* HMA-16-18 (The court commented that murder cases were prevalent in the Masvingo province and it was disheartening that such murder cases were being committed by fairly young persons who readily resorted to violence at the slightest provocation or at no provocation at all); *S v Nyarusanga* HH-7-17; *S v Khumalo* HB-143-11; *S v Sibanda* HH-13-17.

Old age

The advanced age of an accused is a factor that will be taken into account. In *S v Chitange* HH-578-16 X, a 94 year old first offender, shot the deceased in the thighs and he bled to death. This shooting occurred after a dispute between X and the deceased over a field boundary. X co-operated with the police during investigations. He compensated the deceased's family by payment of US$1 500, 00 and eleven cattle and bore all the funeral expenses according to local custom. The community accepted that X had atoned for his wrong-doing. As a senior citizen X should have exercised better judgment in dealing with the dispute. However, the sentence imposed would be tempered with a measure of mercy in the light of the advanced age of X and he was sentenced to 9 years imprisonment.

Intoxication

If the court finds that despite the fact that the accused had voluntarily consumed alcohol or drugs, he or she was still able to form the intention to kill, he or she will be convicted of murder but the court can still consider whether the intoxication amounts to a mitigating factor in the circumstances.

Voluntary intoxication is a defence to murder if the accused lacked intention to kill because of intoxication but now, in terms of s 222 of the Criminal Law Code, after acquitting the accused of murder the court must convict him of the separate offence of voluntary intoxication leading to unlawful conduct for which the accused will be liable to the same punishment as if he or she had been convicted of murder and intoxication had been assessed as a mitigating factor in his or her case. Thus voluntary intoxication can still be a mitigating factor.

What is in issue therefore at the stage of mitigation is the impact of the alcohol or drugs upon the accused's mind and his behaviour when he perpetrated the murder. The degree of intoxication thus needs careful consideration. The quantity of alcohol or drugs consumed needs to examined but the important question is how the behaviour of the accused was affected by the quantity of intoxicant consumed. With some people it takes only a very small amount of alcohol to become extremely drunk whereas others can hold even considerable amounts and not become perceptibly drunk. Finally, therefore, the critical issue is how far was the accused's conduct the product of the intoxicant? The answer may be not at all, only to a minimal extent, to a significant degree or to a very appreciable extent.

Where the influence of the intoxicant was very significant, this should normally serve to reduce the moral blameworthiness of the accused despite that his intoxication was voluntarily induced. But, as Hunt points out, it has been held to be a misdirection in South Africa for the court to require proof that the accused "was so intoxicated that he would not otherwise have committed the murder." If the liquor has to some extent impaired or affected the mental faculties or judgment then the court must consider whether this constitutes extenuation. It is not a pre-requisite that the accused was drunk to an advanced extent.[26]

The general policy approach in South Africa is summed up in this quotation from Holmes JA in the case of *S v Ndhlovu* 1965 (4) SA 692 at 695:

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

In *S v Timothy* A-178-71 X had drunk a considerable amount of beer and he probably would not have raped and killed had he been sober. The death penalty was still appropriate.

In *S v Masaraure* A-189-75 X was very drunk and if he had been sober he would not have killed. Nonetheless the death penalty was still appropriate.

In *S v Gwete* HH-728-16 the accused murdered his cousin following an altercation in which the cousin had remonstrated with the accused about the accused's bad drunken behaviour. The court found as mitigating circumstances that the accused's youthfulness was exacerbated by his drunken state which played a major role in the situation. He had been remorseful and the fact that he had killed his cousin will haunt him for the rest of his life. However, murder was a serious offence which demanded the imposition of a severe sentence. The accused was sentenced to 14 years imprisonment.

In *S v Moyo* HB-306-16 the two accused had been drinking heavily at a bottle store. They got into a quarrel with the deceased and had together severely assaulted the deceased with a hammer and he died from the assault. The court found that the offence was not committed in aggravating circumstances.

> In considering sentence we accept that both accused persons are first offenders. They have spent 10 months in custody awaiting the conclusion of this case. They co-

[26] Op cit p. 382

> operated with the police but have shown no remorse. While accepting that the accused persons were drunk we wish the message to go far and clear that voluntary intoxication must never be regarded as a shield to cover such horrendous acts of violence like the one we dealt with in this case. Our society must learn that violence should never be resorted to in an effort to resolve disputes. Once again, life was needlessly lost in this case and we continue to call upon the citizenry to learn to respect the sanctity of life.

Each accused was sentenced to 22 years imprisonment.

In *S v Makuchete & Anor* HMA-10-18 two brothers, one aged 25 and the other aged 21, brutally assaulted another person causing his death. The court took into account that their consumption of alcohol must have reduced or diminished their self-control and this might have been compounded by their youthfulness.

Involuntary intoxication, that is intoxication that is not self-induced, can be a full defence to a charge of murder if the accused lacked the intention to kill as a result of someone else causing him to be intoxicated by, for instance, spiking his soft drink with an intoxicant without his or her knowledge. See s 220 of the Criminal Law Code.

Provocation and other emotional disturbances

Glanville Williams cites the statistic that in England "half of the intentional killings of adult males are in a rage or quarrel, and another 14 percent in jealousy or rage." A sampling of the Zimbabwean murder cases similarly indicates that a high proportion of murders take place in circumstances where the accused lose their tempers following verbal provocation or after witnessing events which provoke them. Very frequently these people have been drinking and the consumption of alcohol is a contributory factor to the violent behaviour. Alcohol lowers inhibitions so that the intoxicated person may more easily lose his temper, over-react to any provocation and more readily respond with extensive violence. Many drunken brawls are as a result of a trivial incident. The domestic quarrel can also be sparked from an insignificant incident, or due to suspicion between spouses or partnerships.

Provocation can only be a partial defence to a charge of murder. If the defence is successful the court will find the accused guilty of the lesser offence of culpable homicide. Under s 239 of the Criminal Law Code there is a two-stage approach to this defence. The first stage is to decide whether the accused formed the intention to kill despite the provocation. If he or she did, the accused will be found guilty of murder. But even if the court finds that the accused still had intention to kill even though he or she had been provoked, it must find him or her guilty only of culpable homicide if it decides that he or she has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose control.

Section 223(3) of the Criminal Law Code imposes a further limitation on the defence of provocation. This is if

> … a person, while in a state of voluntary intoxication, is provoked into any criminal conduct by something which would not have provoked that person had he or she not been intoxicated, he or she shall be guilty of voluntary intoxication leading to unlawful conduct.

Provocation can be considered in mitigation despite that the trial court has already rejected the defence of provocation or the combined defences of intoxication and provocation. This means that the court will already have found that the accused had not so lost his self-control in response to provocation that he had not formed the requisite intention for murder. Or, if he had also been drinking, the combined effects of drink and provocation were not such that the accused failed to form the intention to kill. It will also have been found under the second stage of the test for provocation that the action of the accused was not partially excusable on the basis that the reasonable person would have reacted similarly in the same circumstances by intentionally killing.

Thus by the stage of mitigation the court will already have ruled that the accused is guilty of murder as he had killed his victim with actual or legal intention and the action taken was unreasonable in response to the extent of provocation received. But now on the separate issue of moral blameworthiness "nothing which influenced [the accused's] mind or emotions and thus his conduct can be ruled out of consideration merely because it was unreasonable for him to allow it to influence him..."[27] Therefore the court must carefully consider the effect which the provocation (or drink and provocation) has had upon the accused's mind and thereby on his conduct. It may be said that his mind was very little influenced, if at all, by these factors and that he knew full well what he was doing when he set upon his victim. (The nature of the accused's conduct may be such that it shows that he was little affected by the provocation.)

On the other hand, although he may just have been able to form legal intent to kill, he may have been seething with rage and may not have been able to stop himself from fatally assaulting his victim. One problem that arises from the latter type of case is that the precipitating factor may have been of a very minor nature. If that is the case, should the courts rule that, despite the extreme anger of the accused, no extenuating circumstances exist because his action in relation to the provocation received was totally disproportionate and unreasonable? It is submitted that to adopt such an objective approach at the extenuation stage is not correct and is unfair to the accused.[28] His moral blameworthiness is surely less in a

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[27] Hunt *op cit* 379

[28] It is arguable that the application of what seemed to be an objective test in one case was unfair. In *S v Ndhlovu* A-33-73 the court accepted that what drove the accused to carry out the murder was

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

Hunt points out that emotional upset arising out of events spread over a long period of time and not strictly amounting to 'provocation' may sometimes constitute extenuating circumstances.[29]

As regards marital quarrels and quarrels between lovers, in the case of *S v Karuze* 1971 (1) RLR 169 at 171 Beadle CJ adopted a fairly hard line approach to these situations, saying:

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

The *Karuze* case was an unusual one as the accused did not kill his wife whom he suspected of infidelity but instead a completely innocent child. Where, however, the accused believes his wife or lover to have been unfaithful and a full scale quarrel erupts over this and, during which the accused kills the woman having only legal intent to kill, it is submitted that a sympathetic approach should be adopted regarding extenuation. The approach to be taken by the courts, it is submitted, should be that adopted by the South African Appellate Division in the case of *S v Meyer* 1981 (3) SA 11 (A) summed up in the headnote as follows:

> In general, and in the absence of evidence of aggravation, the mental tension which leads to a murder committed in a situation where the act in question is usually the consequence of a quarrel between people who have a love relationship with each other, a quarrel out of which jealousy and provocation often arises and which, because of the circumstances, can lead to sudden physical assault and even death, can be regarded as an extenuating circumstances, and indeed so extenuating that the death

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his obsessional belief that his father had killed the accused's wife. This belief, said the court, was not extenuating because it was "not based upon reasonable grounds and was wholly irrational in the circumstances" (because, for instance, police investigation found that there was no substance in the accused's suspicions.)

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

sentence ought not to be imposed. Even should there be premeditation in such a situation of conflict, extenuating circumstances could, depending on the facts, be found which would make a sentence other than the death sentence appropriate. Every case should naturally in every instance be treated on its own merits.

Compulsion

The Criminal Law Code provides that compulsion can be a defence to a charge of murder providing that all the stringent requirements are satisfied.[30] Compulsion can be a defence to murder where an accused kills or assists in the killing of another because he is under an immediate and inescapable threat of being killed unless he so murders the other.

If the requirements for this defence are not fully satisfied (as is often the case, there frequently being ways available to break away from the compelling influence by, say, going to the police) the fact that the accused has not voluntarily carried out the murder but was compelled by threats of violence to himself or to members of his family is mitigatory because a murder carried out due to fear is less morally blameworthy than a murder carried out from motives of, say, revenge or greed. The court will, however, have to examine factors such as the nature and extent of the threat, whether or not the accused could easily have freed himself from the threat and whether or not the accused is to blame for placing himself in a position where such threats would be likely to be levelled against him by joining a criminal gang.[31]

Self-defence

If all the requirements exist for this defence set out in s 263 of the Criminal Law Code the accused will be found not guilty of murder. However, if the defence fails because, for instance, the accused used disproportionate or excessive force to avert the attack, the fact that he or she was under attack can still be a mitigating factor on a charge of murder. See *S v Toringa* HH-582-16.

Mental condition, other than mental condition warranting special verdict

In the case of *S v Nyathi* A-12-74 at p 5 Beadle CJ stated

> [i]t is true that judged by the standards of the ordinary decent man, the appellant is an abnormal man, but there are few criminals who commit cold blooded murders, and who are sentenced to death for those murders. There is some element of abnormality about all criminals who commit cold blooded brutal crimes of murder. The question here is to decide when that abnormality reaches a stage which justifies a court in imposing a sentence less than death. It would be highly undesirable, in my view, to attempt to lay down any hard and fast rules which would indicate when such

[30] Sections 243 and 244 of the Criminal Law Code
[31] See Hunt op cit p. 384

> abnormality was sufficiently great and when it was not. Each case must be judged on its own merits. The judge must make a value judgement and decide whether the circumstances are such, when all ... the merits of the case are weighed up, as to justify the imposition of a sentence other than death.

In our law the provisions relating to when the special verdict is to be rendered are very broad. It includes cases where the accused is suffering from a temporary disorder or disability of the mind at the time of the crime such as to make him not responsible at law for his actions. Given the breadth of these provisions, all serious permanent or temporary mental conditions which cause mental irresponsibility at the time murders are committed are encompassed. However, as Beadle CJ points out above, even though a special verdict is not warranted, any mental condition or abnormality which may have influenced the behaviour of the accused at the time is a possible extenuating circumstance. The nature and extent of the abnormality and the effect upon the accuseds' behaviour must be carefully considered in determining whether this factor is extenuating. From a policy standpoint it would seem that where the accuseds' conduct was heavily influenced by some mental abnormality or diminished responsibility such as a delusional belief or mental retardation, (but without the requirement for a special verdict), extenuating circumstances should be found as this type of murder is less reprehensible than a murder committed by a person with a normal mind.[32]

Where a mental disorder or defect is such as to negate rather than diminish X's mental capacity, X will be entitled to a complete defence in terms of s 227 of the Criminal Law Code.

On the other hand, diminished responsibility does not constitute a defence but is only taken into account in mitigation of sentence. Diminished mental responsibility, which falls short of constituting a mental disorder attracting a special verdict, may still constitute a mitigating circumstance. Thus the Criminal Law Code provides in s 218(1) that It will be mitigatory when X commits a crime when he or she is suffering from an acute mental or emotional stress, or a partial mental disorder or defect and this diminishes his or her capacity to appreciate the nature of his or her conduct or that his or her conduct was unlawful or to act in accordance with such appreciation.

Section 217 of the Criminal Law Code provides that "partial mental disorder or defect" means a mental disorder or defect as defined in s 226, the effect of which is not such as to entirely deprive the person suffering from it of the capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation.

Note that diminished criminal capacity caused by intoxication or provocation is dealt with under the rules relating to the defences of intoxication and provocation and not under the provisions relating to diminished responsibility. See sections 217

[32] For a commentary on the South African cases see Hunt op cit 381.

and 218 of the Criminal Law Code. The accused bears the onus of proving diminished responsibility on a balance of probabilities. See s 18 of the Criminal Law Code.

The plea of diminished responsibility is a plea by or on behalf of the perpetrator to the effect that his or her capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation was reduced by reason of some disorder or stress affecting the mind of the perpetrator.

The case of *S v Gambanga* 1998 (1) ZLR 364 (S) makes it clear that diminished responsibility may result from a "non-pathological incapacity" occasioned by severe emotional stress, and not only from a less than total mental disorder or defect as such. (See also *S v Mutsipa* S-3-90.)

If there are indications of mental instability on the part of the accused, this matter should be investigated. Odd, inexplicable and bizarre behaviour before, during or after the killing or from the way in which X instructs his lawyer or the way in which he behaves cannot be ignored, as it may provide the basis for establishing that there was at least diminished responsibility to an extent which constitutes extenuation. The defence lawyer has a duty to pursue this matter and to ask for a psychiatric examination where appropriate. The psychiatrist who carries out this investigation must be asked not only to give an opinion as to whether X was mentally irresponsible to an extent that a special verdict is justified, but also if X was suffering from diminished responsibility. See *S v Chitiyo* 1987 (1) ZLR 235 (S), *S v Taanorwa* 1987 (1) ZLR 62 (S), *S v Chin'ono* 1990 (1) ZLR 244 (H) and S v *Mukombe* 1991 (1) ZLR 138 (S).

Where the killing is apparently motiveless, this should alert the defence lawyer to the possibility that X may have been suffering from some form of mental instability when he committed the murder. Where the conduct of X was strange, the defence counsel would be well-advised to interview members of X's family, his friends, co-workers and former employers to ascertain whether he had any history of strange behaviour. See also S v *Nyati* 1974 (2) RLR 19 (A); S v *Mapfumo* A-48-79; S v Mutsipa S-3-90; S v *Sibanda* S-137-93; S v *Musimwa* S-198-94; S v *O'Neill* S-232-95; S v Dube 1997 (1) ZLR 229 (H).

In *S v Masilela* HB-83-17 there was no motive for the accused killing his elderly paternal grandmother who had had done a lot to assist him after the death of his mother. The accused has also smoked dagga before committing the murder. The late trial judge had imposed the death penalty but the Supreme Court ordered that the case be re-visited. The new trial court decided that the death penalty should not have been imposed.

In *S v Muchimika* S-93-87 although X, a youth, had carried out a cold-blooded killing, he had been brutalized and his personality had been affected by his war experiences and by being imprisoned at a tender age. The court found that there were extenuating circumstances.

In *S v Bontanquoi* S-171- 82 the court found that although first appellant was mentally backward and emotionally unstable these factors did not affect his actions when he carried out a premeditated robbery and murder.

The case of *S v Stephen* HH-40-92 is of considerable importance in relation to the issue of mental disturbance and mitigation in murder cases. In this case a man had killed one of his sons and had attempted to kill his second son and his wife. He had committed these acts whilst in a state of hysterical dissociation with only a very minimal degree of self-control. The court found that a person who is capable of some degree of self-control becomes capable of forming the *mens rea* for murder. Although he was suffering from a mental disorder or disability at the time he committed the crimes, he was still responsible at law for his actions and therefore a special verdict in terms of s 28 of the Mental Health Act was not returnable. Instead, the court found that he was guilty of murder, but with extenuating circumstances because of diminished responsibility. In the particular circumstances of this case the guilty verdict amounted really to a technicality. No moral blameworthiness attached to X. The court sentenced X to imprisonment until the court rose.

In *S v Dube* 1997 (1) ZLR 229 (H) X, an aide to President Banana shot and killed a police officer, D, at a sports stadium. D had remonstrated with X for urinating in public place. X said he was very intoxicated and had been provoked as D had referred to him as "Banana's wife". X said Banana had committed homosexual acts on him against his will and X said he had violently reacted to D's comment. According to the psychiatric evidence X was suffering from post-traumatic stress disorder as result of these acts. However, there was a conflict between the evidence of two psychiatrists. One said the combination of this disorder and drunkenness amounted to mental disorder such that X was not responsible according to law for his actions. The other psychiatrist said that the disorder would not have prevented X from appreciating what he was doing or the consequences of his actions. The court decided that although post-traumatic stress disorder could fall within wide definition of mental disorder in the Mental Health Act, on facts found proved, it was not a disorder that prevented X from being aware of what he was doing or of consequences of his actions. The combination of alcohol, drugs and stress disorder would, however, have meant that X was suffering from diminished responsibility.

In *S v Chikanda* 2006 (2) ZLR 224 (S) the court pointed out that the borderline between criminal responsibility and criminal non-responsibility on account of mental incapacity or illness is not an absolute one, but a question of degree. A person may suffer from a mental illness yet nevertheless be able to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation. Diminished responsibility only reduces the level of responsibility but does not completely absolve an accused person from his actions. Where the court finds that

the accused at the time of the commission of the act was criminally responsible for the act but that his capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing him. Medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence needs to be supported by some other evidence. On their own, such reports may not be conclusive. The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts. Where medical reports of diminished responsibility are not supported by some other facts from the evidence the court is entitled to reject the claim of diminished responsibility if there are other factors which justify that rejection.

In this case X, who had had a stormy relationship with his wife and was living apart from her, came to her house at midnight and stabbed her to death. Shortly afterwards, he grabbed his young child from the arms of her grandmother and stabbed her to death as well. The grandmother said in evidence that he was generally somebody who was not well and did not give respect to elders. He was not mentally normal, though not insane. The medical report on X said there was evidence of unstable abnormal behaviour and a tendency to violence, due to underlying suspiciousness of a paranoid nature. The trial court made a finding of diminished responsibility. The appeal court found that the conduct of X before and immediately after the killing did not seem to support the finding of diminished responsibility and the trial court had misdirected itself in so finding.

Where diminished responsibility due to X's fault [s 218(2)]

If the acute mental or emotional stress, or partial mental disorder or defect, is brought about through the person's own fault, a court may regard such person's responsibility as not having been diminished. The kind of situation contemplated is where a person who is required to take medication to relieve the symptoms of a partial mental disorder or defect knowingly fails to do so and thereafter commits a murder.

Political, social or other motives which are not ignoble

As regards social motives, Hunt cites a case where the accused believed that the person he killed was a witchdoctor who was a danger to the community and apparently this factor was taken into account in finding extenuating circumstances.[33]

Regarding political motives, whatever may be the position in the political circumstances of South Africa where the oppressed majority fought to overthrow

[33] Op cit p 386

the apartheid regime, it would seem that in Zimbabwe the fact the murder was done with a political objective will not be extenuating but may indeed be aggravating. Thus in the case of *S v Moyo*, A-71-81 for instance, it was stated that the killing of political opponents does not render the crime any less blameworthy.

Belief in witchcraft

If the accused killed in order to obtain parts of a victim's body for medicine, his belief in witchcraft would not be an extenuating circumstance. But in a case where the accused has killed a supposed witch to protect himself, his family or the community from the activities of the witch, the accuseds'avid belief in the evil power of witchcraft may be mitigatory. This is particularly so if the accused believes that the witch has caused deaths by witchcraft practices. To completely disregard a deeply held belief on the part of the accused on the basis that such a belief is unreasonable is totally unfair.[34]

In *S v Techu & Ors* HH-271-15, despite the fact that the accused brutally murdered a woman in her home, the court found that it was highly mitigatory that the accused appeared to have been affected by this strong belief in witchcraft which appears to be prevalent in their area and believed that the woman was a witch.

In *S* v *Hamunakwadi* 2015 (1) ZLR 392 (H) the court dealt with the possibility of provocation operating a partial defence in a case of witch killing. The court pointed out that many cultures across Africa embrace traditional healers and a persistent belief in witchcraft. The African concept of a witch does not encompass the potentially benign witch who, in some western countries, enjoys the status of an alternative religion. To the contrary, there is little redeeming about African witches who, through sheer malice, either consciously or sub-consciously employ magical means to inflict all manner of evil on their fellow human beings. The attempts of the common law courts to address witchcraft-inspired violence differed markedly from the suppression tactics of the various legislative initiatives. Whereas legislation acknowledges the widespread violence and seeks to curtail it, the criminal law has often recognised the belief that gave rise to the violence and carved out a witchcraft-provocation defence that could be offered as a mitigating factor in cases of witchcraft-related violence. Under this theory, accused persons could reduce their crimes or punishments upon proof that they believed they, or

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

persons under their immediate care, were bewitched and that this belief caused them to temporarily lose self-control. In some ways, this theory provides tacit recognition that in certain communities killing a "witch" is not merely explainable, or excusable, but praiseworthy.

In *S v Chiurunge* HH-295-15 X approached the deceased at her homestead and accused her of practising witchcraft. He force-marched her to a number of locations whilst severely assaulting her with a log, from which assaults she eventually died. X was sentenced to 18 years' imprisonment. The court said:

> This case once again brings to the force the negative impact of this deep rooted belief in witchcraft by a number of communities in our nation. I must confess this belief is extremely controversial and as a court we cannot claim to have a solution to the impact of this system which dates back to the creation of mankind. … The method used by the accused was clearly wrong in this case. There are scattered throughout this country local and traditional leaders whose duty is to deal with cases like the one which confronted the accused. The accused had no right to take the law into his own hands because he is not qualified to deal with the situation that he attempted to resolve. The life of the deceased was not so cheap to be ended in the way it did and the accused was expected to contain his beliefs no matter how strong they may have been. Chaos and anarchy will enslave this country if those of the mind of the accused person are not adequately punished for their conduct.

In *S v Chikomo* HH-557-16 the accused killed his mother-in-law by striking her on her head with a stone. The accused believed that the deceased was bewitching him and had placed noxious herbs in his drink causing him to become ill. The accused had been accused by the deceased of being possessed by demons which needed to be cast out. The court found that he was suffering from diminished responsibility on account of acute mental or emotional stress.

In *S v Ndlovu & Anor* HB-188-16 the deceased aged 67 was killed by the deceased's son (accused 1) aged 19 at the time of the killing and 21 at the time of his trial and the deceased's daughter-in-law (accused 2). Accused 1 forcibly entered the deceased's bedroom and struck the deceased twice on the neck with a knobkerrie rendering him unconscious. Accused 1 then poured petrol all over the hut and ordered accused 2 to set the hut alight which she did and the deceased was burnt to death. Accused 1 had become angry after the *n'anga* told him the deceased was bewitching him. He decided to go and drink and smoke drugs to fortify himself to murder his father. The court took into account his strong belief in witchcraft and the fact that he had acted under the influence of a *n'anga*. However, the court said that the heinous killing nonetheless required the imposition of a lengthy term of imprisonment.

In *S v Chigayi & Ors* HH-248-17 four brothers killed their father by burning him with molten plastic on the unfortunate belief that he was a wizard. They also burnt him as they were burning his "artifacts" by tying him to a pole. Further they denied

him any medical attention that his senior wives attempted to give him. They were all found guilty of murder with actual intent. The court took into account the mistaken beliefs in witchcraft of the accused but said that the heinous nature of the murder required a stiff sentence.

In *S v Hahlekiye* HH-260-17 the court took into account that the accused's belief in witchcraft played a major role in the commission of the murder. The two accused severely assaulted an 86 year old man who later died. The old man was believed by the accused to have used witchcraft against the accused's family.

Mercy killing (consent of victim)

The Criminal Law Code provides that it is no defence to a charge of murder that the person acted in order to relieve suffering or the deceased person requested that his or her life be ended but the court may take any such factor into account in deciding upon an appropriate sentence.[35]

If an accused kills a person who is terminally ill or is suffering from an incurable disease and who has pleaded with the accused to end his pain by terminating his life, this will be a very strong mitigatory factor but in any event there will not be aggravating circumstances which would justify the imposition of the death penalty.

In *S v Hove* 2009 (1) ZLR 68 (H) a young unmarried mother killed her 5 month old baby. The child had been ill from birth, having been diagnosed with HIV, and had been hospitalized in various health institutions for a period of 5 months. The child had experienced excruciating pain as a result of gaping wounds and open sores all over the body and was always crying uncontrollably due to the chronic pain. The accused had been told by medical personnel that there was no help they could offer the child and that the child was facing imminent death. The court held that the circumstances surrounding the commission of this offence cumulatively amount to extenuating circumstances. The concept of mercy killing cannot escape the attention of the court in certain circumstances and as such will play a determining factor in sentencing. While murder *per se* is reprehensible, this case called for mercy and therefore the accused's moral blameworthiness was lower. While we are all responsible for our actions, sight should not be lost of the fact that society has a duty to accommodate and counsel wrongdoers, thereby preventing the resultant fatal consequences which may flow from those who are mentally and physical distressed. Such persons should receive the court's sympathy rather than further condemnation. The accused would be detained until the rising of the court.

In *S v De Bellocqui* 1975 (3) SA 538 a woman had killed her baby who was suffering from a grave disease.

[35] Section 54 of the Criminal Law Code

In *S v Mayer* 1985 (4) SA 332 (ZH) an elderly couple decided to commit suicide because they felt that they were destitute. X, the husband, killed his wife and tried to kill himself. He survived but he blinded himself in the suicide attempt. He was found guilty of murder but the circumstances were taken into account in mitigation of sentence.

In *S v Hartmann* 1975 (3) SA 332 (C) a doctor ended the life of his terminally ill father who had pleaded for him to do so. He was found guilty of murder but the circumstances were taken into account for the purposes of sentence.

In South Africa in the case of *Stransham-Ford v Minister of Justice And Correctional Services and Others* 2015 (4) SA 50 (GP); [2015] 3 All SA 109 (GP) the court authorised a terminally ill person to end his own life by being assisted by a medical practitioner either by the administration of a lethal agent or by providing the applicant with the necessary lethal agent to administer himself. However, this decision was later overturned on 6 December 2016 by a decision of the Supreme Court of Appeal.

Partial excuse

Partial excuse is a somewhat misleading heading for the category of cases which Hunt has in mind here. The cases included are those where the accused have used excessive force in the course of self-defence, defence of property or the apprehension of a suspected offender. These accused would have been able to raise successfully full defence to charges of murder if they had used a reasonable degree of force. If they have used totally disproportionate force, however, the defences raised will fail and the accused will be convicted of murder. The reason why they used such force may still nevertheless constitute extenuation in Zimbabwe as well as in South Africa.[36]

Absence of previous convictions

This will be taken into account but it is not a strong mitigating factor in a murder case. It seems to have been treated as a factor to be considered in respect of extenuation and it may be taken into account in mitigation. See for instance *S v Zuze A*-200-77

Evidence relating to the manner of the killing

Evidence relating to the manner of the killing (such as the extent of the planning, degree of brutality, number of blows struck etc.) may be relevant to the matter of extenuation in so far as this evidence may provide either evidence tending to substantiate or to contradict the alleged extenuating circumstances. See *S v Mutsunge & Anor* S-36-87 at p 9.

[36] See Hunt op cit p. 383. The case of *R v Detsera* 1958 (1) SA 762 (FSC) has been followed in Zimbabwean cases.

A few examples will serve to illustrate this point. If the accused alleged that he was extremely drunk at the time of the killing, this may be disproved by evidence of careful and methodical planning and execution. Or if the accused alleged that he completely lost his self-control as a result of provocation, the evidence of a seemingly rational and methodical course of conduct before and during the murder would tend to disprove the allegation of loss of self-control. On the other hand, a murderous attack of a wild and random nature may be consistent with and tend to verify alleged loss of self-control. However, if the court has already found that there were extenuating circumstances, it cannot then proceed to find that, because of the brutal and callous nature of the killing, these extenuating circumstances were neutralised or overridden and then proceed to impose the death penalty. That this is an entirely wrong approach was made quite clear by the Supreme Court in *S v Mateketa* S-99-85; *S v Chaluwa* S-75-55; *S v Mutsunge & Anor* S-36-87 and *S v Muchimika* S-93-87. Following the approach adopted by the South African Appellate Division, the Supreme Court ruled that the fact that the killing was a brutal nature cannot be used to justify a conclusion that the death penalty was still to be imposed despite the presence of extenuating circumstances. *See S v Ndwalane* 1985 (3) SA 222(A) which followed earlier decisions such as *S v Supetrus* 1969 (4) SA 85 (A)

Intoxication and provocation [s 218(3)]

Diminished capacity due to intoxication or provocation will be dealt with under these specific defences and not under diminished responsibility but it should be noted that in terms of section s 224 if X, while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, this is only mitigatory.

Defence counsel should explore a second or third line of defence in apparently motiveless murders, such as intoxication, provocation or insanity. Although the State is not obliged to establish a motive for the murder, the absence of a motive "should always set alarm signals ringing in the mind of defence counsel": McNally JA 1988 Vol 1 No 2 *Legal Forum* 6. In determining the issue of extenuating circumstances, everything which influenced the mind or emotions of the murderer must be taken into account: *S v Fundakubi* 1948 (3) SA 810 (A).

Whether death penalty imposable if extenuating circumstances found

In *Jaure* 2001 (2) ZLR 393 (H) the court pointed out that the death sentence may still be imposed after the judge and assessors have found that extenuating circumstances exist, if the judge concludes that the extenuating circumstances are far outweighed by the aggravating features.

Proof of murder conviction

The fact that there is an ongoing murder trial must not be referred to when extenuation is being considered: *S v Mubaiwa & Anor* 1992 (2) ZLR 362 (S). Proof of

a murder conviction should not be adduced if the court finds no extenuating circumstances: *S v Mlambo* 1992 (2) ZLR 156 (S).

Part 4 - Sentencing murderers where death penalty is not imposed

In *S v Ndlovu* 2012 (1) ZLR 393 (H) Kamocha J said that in cases of murder with actual intent, where the court is of the opinion that there are extenuating circumstances, the convicted person is usually sentenced to imprisonment for a period ranging from 21 years' imprisonment upwards. For murder with constructive intention, where there are extenuating circumstances, the sentence is usually between 14 years and 20 years.

These guidelines were put forward before the advent of the 2013 Constitution and the subsequent amendments to the Criminal Law Code to incorporate the constitutional provisions on the death penalty.

The relevant provision in the Criminal Law Code is now as follows:

> Section 47(4) A person convicted of murder shall be liable—
> (*a*) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*],[37] to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
> (*b*) in any other case to imprisonment for any definite period.

According to this provision where the court decides not to impose the death penalty and it also decides that a sentence other than life imprisonment should be imposed, it is obliged to impose a sentence of twenty years imprisonment if it finds that the crime was committed in any of the specified aggravating circumstances. It is submitted that the sentencing discretion should not have been restricted in this manner. As stated earlier the court may find that despite the fact that an aggravating circumstance was present, there are significant mitigating factors and where this is the case a sentence of less than twenty years might be appropriate.

Life imprisonment

Note must be taken of the ruling by the Constitutional Court that the legislative provisions precluding consideration of parole for those sentenced to life imprisonment are unconstitutional.

In *Makoni v Commissioner of Prisons & Anor* CCZ-08-16 the court ruled that a life sentence imposed on a convicted prisoner without the possibility of parole or

[37] Sections 337 and 338 simply reflect the constitutional provisions laying down the persons upon whom the death penalty may not be imposed.

release on licence constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the Constitution. It also ruled that the provisions of Part XX of the Prisons Act [*Chapter 7:11*], to the extent that they exclude prisoners sentenced to imprisonment for life from the parole or release on licence process, contravene the right to equal protection and benefit of the law under section 56(1) of the Constitution. It further ruled that pending the enactment of legislation amending the provisions of Part XX of the Prisons Act [*Chapter 7:11*] so as to conform with the right to equal protection and benefit of the law under section 56(1) of the Constitution, the respondents shall apply those provisions, *mutatis mutandis*, to every prisoner sentenced to imprisonment for life, including the applicant.

At the time of writing of this article the relevant provisions in the Prisons Act and the Criminal Procedure and Evidence Act had still not been amended to reflect this judgment.

Sentence for attempted murder or incitement or conspiracy to commit murder

Section 47(6) provides that persons who commit these offences are liable to be sentenced to imprisonment for life or any definite period of imprisonment. Thus the death penalty may not be imposed. However, if the inciter actually commissions a person to commit the murder, it may be possible to argue that the inciter committed the murder using an agent.

CASES

What follows is a summary of a selection of murder cases in which either the death penalty was imposed or where the death penalty was not applicable, the court had to decide on the appropriate sentence.

Death sentence imposed

S v Muchaparara & Anor HH-99-04

Main facts: The first accused fatally **shot two police officers** who were manning a road block after they questioned him about a car that he had stolen. He was found guilty of murder.	
Aggravation	**Extenuation/Mitigation**
The intentional killing of two police officers	X pleaded intoxication as a mitigatory factor that warranted other sentence than death penalty. The court rejected this argument. It was held that the intoxication concerned was voluntary in nature and in that regard it is the policy of the law to punish people who deliberately take alcohol leading them to commit crime. It was further held that the degree of the intoxication was not so grave that it could reasonably be said that X did not appreciate the nature and effect of his conduct when he shot the two police officers. The court

	found that he acted rationally.
Sentence: Death	

S v Moyo & Anor HB-162-11

Main facts: The two accused acted in common purpose to kill the deceased. They were provided with a lift by the deceased whom they proceeded to fatally strangle in the course of the journey. They took the belongings of the deceased and dumped his body at a place near a cemetery. **Robbery murder**	
Aggravation	**Extenuation/Mitigation**
The accused persons were motivated by greed and sheer evilness to kill the deceased. The original design of the accused persons was to rob the deceased and they could have easily done so without killing him since they were two of them.	There were no extenuating factors
Sentence: Death	

S v Mudenda S-214-12

Main facts: This was an appeal against a death sentence that had been passed in the trial of a murder case. The deceased was aged 19 years at the time he met his death. On one night, in the early hours of the morning, deceased walked into the hut holding his neck and writhing in pain. Deceased died thereafter. X admitted to the murder and confessed that they had **killed the deceased in ritual offerings.**	
Aggravation	**Extenuation/Mitigation**
The manner the murder was done was aggravating and nothing could extenuate it.	There were no extenuating circumstances in the present case.
Sentence: Death. The appeal against the death sentence was dismissed.	

S v Nyoni S-66-14

Main facts: The appellant had been found guilty of murder with actual intent by the High Court The facts of the case are that the appellant **fatally struck his estranged lover** on the head with a log and an axe. He was sentenced to death by the court a *quo*. He appealed against the decision of the court of first instance that he was guilty of murder with actual intent. He also appealed against the death penalty. Regarding sentence, the appellant argued that the court *a quo* had ignored two mitigatory factors whose consideration warranted other sentence than death penalty.	
Aggravation	**Extenuation/Mitigation**
	On appeal, the appellant argued that the court *a quo* had ignored two mitigatory factors whose consideration warranted other sentence than death penalty. He argued that the fact that the murder was committed in connection with a quarrel by lovers was mitigatory. He further argued that the court *a quo* had ignored evidence showing that he was suffering from severe mental and emotional stress which was mitigatory. The appellate court rejected the argument on the basis that the onus to prove extenuating factors is on the accused and in this case the appellant had not discharged that onus. The appellate court held that in any event, the factors that the appellant sought to rely upon were not mitigatory. On that basis, it dismissed

	the appeal and upheld the death sentence that had been imposed by the court *a quo*.
Sentence: Death	

S v Kichini HH-25-17

Main facts: X **killed his blood brother** because the deceased had denied him access to food. The accused proceeded to dismember the body of the deceased and buried it in a shallow grave.	
Aggravation	**Extenuation/Mitigation**
The seriousness of the offence of murder and the brutality with which the murder was committed. The fact that X had lied that he had killed and buried a bird in the shallow grave when he was confronted about it in the first place in a bid to cover up the offence. In the result, the court was convinced that the aggravating circumstances were so overwhelming that the death penalty was the appropriate sentence which met the justice of the case.	X was a young first offender He had pleaded guilty
Sentence: Death	

S v Masilela HB-83-17

Main facts: X, aged 32, **murdered his 83 year old grandmother**. He was sentenced to death by the High Court. Upon hearing the appeal, the Supreme Court ordered that the accused's sentence be revisited in light of the principles of sentencing in murder cases set out in section 48 (2) of the Constitution.	
Aggravation	**Extenuation/Mitigation**
When the matter was remitted to the High Court, both counsel were *ad idem* that the murder was not committed in such aggravating circumstances as to warrant the imposition of the death penalty. But the High Court did find that there were the following aggravating circumstances: The painfulness of the death of the deceased of having been subjected to a fatal blow by X after narrowly escaping death from a burning hut, The blameworthiness of the conduct of the accused of consciously partaking of dagga before committing the murder. The failure by X to protect instead of killing his grandmother The sanctity of human life	The relative youthfulness of X The trouble that would haunt X for the rest of his life for having murdered his elderly grandmother The trauma and pain that X had suffered of having been on the death row for a period of over a year awaiting the execution of the death penalty The remorse exhibited by X for having needlessly killed his grandmother The particular peculiarity of the matter and the lack of motive for the murder.
Sentence: Death sentence altered to 18 years	

S v Mateketa S-99-85

Main facts: The appellant was convicted of murder by the court *a quo* **for having killed her husband** with actual intent and sentenced her to death. The deceased was in the habit of assaulting the appellant. On the fateful day in question, the deceased told the appellant that he was going to kill

her. The explanation which the deceased gave for wanting to kill the appellant was that he had a dream which indicated that he was going to die a painful death. He has said that he wanted to kill the appellant before he suffered the painful death because he did not want the appellant to be inherited by other men after his death. The appellant became fearful for her life and so she fatally struck the deceased with an axe three times on his head whilst the deceased was asleep so as to forestall the imminent death which she was facing.	
Aggravation	**Extenuation/Mitigation**
The appellate court said it was held that the circumstances relating to the seriousness of the crime and the callousness and brutality of the murder were aggravating.	The appellate court held that there were extenuating factors in the evidence given by the appellant which the court *a quo* failed to properly consider. In that regard, it held that it was mitigatory that the deceased and the appellant loved each other and that the appellant had been forced by the imminent death which she faced to kill the deceased. It was held that the fear for her life which affected the appellant at the time she committed the offence operated to reduce her moral blameworthiness and the court *a quo* misdirected itself by failing to attach due weight to that factor.
Sentence: Originally sentenced to death. The Supreme Court altered the sentence to 10 years imprisonment	

Imprisonment when death sentence not applicable

In *S v Malundu* HH-68-15[38] X was the head of security at farm. The deceased who was a farm worker was accused of stealing some farm equipment. The accused and another badly beat the deceased with a rubber baton stick resulting in the death of the deceased. **The beating was done to try to extract a confession from the deceased that he had stolen the property**. The judge decided upon sentence as follows:

> In arriving at the appropriate sentence, I took into account the personal circumstances, social and health status of the accused as outlined by his counsel. He is a 49 year old first offender with a wife and two minor children who look up to him for sustenance. He also supports his elderly and blind mother and three nieces and nephews. He is the sole breadwinner. He was employed as the head of security at the farm in question. He will lose his job as a result of the conviction. He is of ill health. The case has been pending for the past 6 years. Even though he was on bail, he suffered the agony and anxiety associated with criminal trials while awaiting the conclusion of this matter. All these constitute mitigation.

In aggravation, he killed a fellow employee and breadwinner with two others who are at large. He abused his position of authority over the deceased. The assault which resulted in death was brutal and callous. It was inflicted on a defenceless deceased whom he suspected of theft of irrigation pipes. He took the law into his own hands. He used a rubber baton stick. His duty after apprehending the deceased was to hand him over to law enforcement agents for investigation. He did not protect the deceased from harm.

The circumstances in which the crime was committed and the nature of the crime far outweigh the mitigatory features advanced by the accused. The aggravating features found do not, however, call

[38] This case is summarized in detail to illustrate how a court balances aggravating circumstances against mitigating circumstances.

for the imposition of the death penalty. The appropriate sentence, in line with precedent, for a conviction of murder with constructive intent is a term of imprisonment. See *S* v *Sibanda* HB-30-2013, a culpable homicide conviction, where a 39 year old son who killed his mother with a brick was sentenced to 8 years imprisonment and *S* v *Gatsi* S-37-1990 where a wife who poisoned her husband in retaliation of a brutal assault perpetrated on her was on appeal found guilty of murder with constructive intent and sentenced to 8 years imprisonment. Society looks up to the courts for the protection of the sanctity of life.

The appropriate sentence that reflects society's disapproval of his actions but takes into account his mitigation is one of 10 years imprisonment."

In *S v Zimondi* HH-179-15[39] the accused was convicted of a grave offence of murder with constructive intention. He stabbed his girlfriend with a kitchen knife and the deceased succumbed to hypovolemic shock due to stab wounds in the chest. Regarding sentence the judge said this:

> Both the defence and State counsels addressed the court and agreed there are extenuating circumstances. Both alluded to the youthfulness of the accused at the time of the commission of the offence and also to the fact that the accused stands convicted of murder with constructive intention.
>
> The *locus classicus* on extenuating circumstances *S* v *Mugwanda* case, *S* v *Siluli Sithole* and a plethora of other cases have clearly defined extenuating circumstances as circumstances reducing the moral blameworthiness of the accused albeit not the criminal liability of the accused. Indeed the factors ought to be considered cumulatively. We agree with both counsel's observations that there are indeed extenuating circumstances in the present case. The age of the accused at the time of the commission of the offence about 22 can certainly not be ignored.
>
> The court take judicial notice of the fact that immature adults and mature adults react differently and behave differently faced with the same set of facts or scenarios. Immaturity of the accused on matters of emotions and love can therefore not be ignored when one considers the moral blameworthiness of the accused for purposes of sentence. We have taken the cumulative effect of the extenuating circumstances as highly mitigatory. The accused person even during trial per the court's observation depicted demeanor which displays youthfulness at play given his playful oblivious stance during the serious trial. We will therefore take note of the fact that at time of commission of the offence, the accused was indeed an adult but an immature adult.
>
> Also in mitigation is the fact that accused has not been given as a repeat offender at least no such submissions were made to the extent that it can be taken it is his first flouting of the law. The accused was given as a bread winner of his terminally ill mother. We cannot ignore such responsibility in our assessment of sentence.
>
> In passing sentence the court will not lose sight of the pre-trial and during trial, incarceration period. The court is alive to the fact that prison life is not easy for the obvious infringement of dignity and freedom. Further we are alive to the fact that from the time of commission of the offence, that is 24 April 2012, the accused has today suffered anxiety over uncertainty as regards his fate with a murder charge hovering over his head.

[39] This case is summarized in detail to illustrate how a court balances aggravating circumstances against mitigating circumstances.

The period of suspense is certainly traumatic and the situation is worsened by incarceration.

In passing sentence then, the pre-sentence time of incarceration will be taken as part of punishment already served and suffered. The defence counsel also submitted that the accused is remorseful for the death of his girlfriend.

In our endeavour to reach at any appropriate sentence we have also taken note of submissions by the State counsel in aggravation. It is correct going by the weapon used, a sharp about 30cm long kitchen knife, aimed at the chest and the number of stabbed wounds that the murder was callous, ruthless, brutal and cruel. When someone stabbed the chest with a dangerous weapon like a knife he gives the other person no chance to survive.

Further in aggravation is the fact that precious human life was lost at a tender age of 20 and that precious human life was lost unnecessarily. The court will not lose sight of the sanctity of human life. ….
It is in aggravation that the deceased a 20 year old was robbed of life at the prime stage and stopped from living life to its fullness. The lost human life can never be replaced. In any event no amount of compensation can bring back lost life.

In assessing an appropriate sentence, the court has taken into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis* the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with constructive intent and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done. The accused, a youthful, immature adult stands convicted of a brutal murder of a young girl. Society on the other hand requires protection from dangerous criminals and in fact the society looks up to the court to do justice not condone crime in a manner which would intrigue society into losing confidence in the whole justice delivery system.

The accused by unnecessarily resorting to violence as a way of resolving a dispute acted in a barbaric manner occasioning the death of the deceased. Sacred human blood was lost and the court frowns at such violent criminal conduct. We should show displeasure at such violent conduct leading to loss of life by the corresponding sentences imposed. The offence was observed correctly by both counsel as an offence deserving of removal of accused from the community. The State and defence counsel did not agree as regards the period of removal. However, given the accused's age at the time of commission of the offence, 22 and even now 24 at the time of sentence, it is our considered view that the sentence to be imposed to a relatively young man or young offender should not be that we should break him. There is room for the accused given his age to turn and be a better citizen in the country. It is mainly with the consideration of the accused's tender age at the time of commission of the offence that we will not consider life imprisonment as appropriate in the present circumstances, but we will consider a lengthy imprisonment term. That term is 18 years' imprisonment."

Killing of wife or lover because of adultery or suspicion of unfaithfulness or killing spouse or lover during quarrel

S v Basera HH-316-14

Main facts:

A husband fatally attacked his wife with a dibble (small implement for digging holes) on her head and knee several times. The attack took place in the presence of the children. He was accusing her of engaging in an adulterous affair with another man. X sought to rely on the defences of provocation and self defence but these defences did not avail him because their respective requirements were not satisfied on the facts of the case.	
Aggravation	**Extenuation/Mitigation**
Human life is sacrosanct and once lost it cannot be regained The brutality and callousness of the assault The fact that the deceased was pregnant which entailed the death of the unborn baby The weapon used was dangerous The crime was committed in the full glare of the children.	It was a crime of passion X had already spent 1 year 5 months in custody X was a first offender X had tried to make peace with his in-laws by giving them some cattle as compensation The fact that there are certain customary consequences associated with the murder of a person.
Sentence: 25 years imprisonment	

S v Tiyavo HH-293-15

Main facts: X, a fairly young man, killed his wife believing that she had been unfaithful to him because she had contracted a sexually transmitted disease. He had constructive intention to kill. He had killed her as a result of a sustained attack. He then buried her.	
Aggravation	**Extenuation/Mitigation**
X killed this defenceless woman who regarded X as her only pillar of strength in a foreign country. X had taken the deceased from afar and across the border and the deceased died a painful death. The persistent lies told by X, starting with lying against the police and openly lying in the court are not consistent with a remorseful individual. The secretive burial of the deceased's remains demonstrate a resolve to conceal the evil done by X. X cruelly cut short the life of the deceased in its prime age.	Fairly young first offender In custody for 1 year and 3 months Caused death of person who should have been dear to him and this misfortune is likely to haunt him for a considerable length of time. It is the pride of every man to feel that his wife is morally upright. We do accept that X must have been annoyed or hurt by discovering that his wife had contracted a sexually transmitted disease. To this end X must have felt both insecure and vulnerable by the invasion of his conjugal entitlement.
Sentence: 22 years	

S v Khumalo HB-143-11

Main facts: X at the time of committing the crime was 17 years old. He stabbed to death the deceased after having a squabble over a girl.	
Aggravation	**Extenuation**
X showed no contrition He was the one who started the fight and walked around with an okapi knife indicating that he was ready to start a fight anywhere.	X's youthfulness He had already spent 18 months in pre-trial incarceration
Sentence: 10 years	

S v Kasiko HH-579-16

Main facts:

A woman had terminated her relationship with X because of X's violent behaviour. X was jealous of the fact that she had started a relationship with the deceased. Armed with a knife, he had attacked and stabbed to death the deceased who was naked.	
Aggravation	**Extenuation/Mitigation**
The attack was callous and unprovoked. X had consumed alcohol to give him the courage to carry out the murder upon the deceased whose only crime was to be found together with X's ex-lover.	
Sentence: 19 years	

S v Mupuna HH-209-16

Main facts: X suspected that his wife was having an extra-marital affair with a fellow villager. X fought the fellow villager and lost the fight. Later at night while his wife was asleep, he armed himself with an axe and **struck his wife** twice on the head after which he fled to an unknown place. The wife died instantly of head injuries. The accused was found guilty of murder with actual intent.	
Aggravation	**Extenuation/Mitigation**
The crime was well-planned and pre-mediated. The deceased lost her life in a cruel, violent and callous manner. Her life was ended in a cold blooded murder.	X was 39 years old and had 4 children, 3 of which are minors. He is now the only surviving parent of the children. He had been in custody up to date His wife's infidelity provoked him beyond measure.
Sentence: 15 years	

S v Togara HH-13-17

Main facts: X was the husband of the deceased and the marriage was going through serious problems as X suspected that the deceased was indulging in acts of adultery with her superiors at work. On the fateful day in question, X fatally slit the throat of his wife with a knife by stabbing her four times. He was found guilty of murder with constructive intention.	
Aggravation	**Extenuation/Mitigation**
	X was a first offender. There was an element of provocation X was a young person who was 28 years old. The stigma that would attach to X as a wife killer was a punishment in its own. X had shown contrition.
Sentence: 18 years imprisonment	

S v Wakeni HH-15-18

Main facts: X killed his wife after a fight between them. There were allegations that the wife was involved in extra-marital affairs. On the fateful day, after the two had failed to discuss and solve their matter amicably, they started fighting. The wife ran away and fell and at that moment X struck her with a pestle and left her to die.	
Aggravation	**Extenuation/Mitigation**
The brutality of the murder	The court rejected the argument in mitigation that X had been in an unhappy marriage. It said that he should have resorted to divorce
Sentence: 22 years	

S v Mamvura S-22-05

Main facts: The appellant had been found guilty of murder by the High Court for killing his wife. The accused had returned from drinking beer and had enquired about the whereabouts of his axe. He became infuriated when he was told by the deceased that it had been borrowed. He started to assault the deceased, initially with switches from a gum tree and later on with a mattock handle. Finally, he attacked the deceased with a pestle with which he delivered numerous blows to her chest. The deceased eventually succumbed to the injuries which she sustained from the attack.	
Aggravation	**Extenuation/Mitigation**
The High Court was convinced that there overwhelming aggravating factors mainly arising out of the brutal nature of the attack and the age of the deceased who was 20 years old at the time of her death.	The High Court considered extenuating factors arising out of the young age of the appellant and the fact that he had been at a beer drink.
Sentence: 25 years. This sentence was upheld on appeal to the Supreme Court	

S v Phiri HH-581-16

Main facts: X, a school teacher, had quarrelled with her husband on a number of occasions. She killed her husband by striking him with an axe whilst he slept. This was a pre-planned and brutal murder. X had tried to clean up the scene after the murder.	
Aggravation	**Extenuation/Mitigation**
This case ranked as one of the worst cases of domestic violence, incidences of which were on the rise. This case required that a severe sentence be imposed.	X had expressed remorse for her crime and her family had paid compensation to the deceased's family. The court found that X was not suffering from a mental disorder at the time of the killing.
Sentence: 20 years	

S v Chikunda S-99-05

Main facts: The appellant had been found guilty in the High Court of two counts of murder. The appellant had been involved in numerous domestic disputes with his wife. On the day in question, he killed his wife with a knife and proceeded to also kill his minor child.	
Aggravation	**Extenuation/Mitigation**
	The High Court accepted that there were extenuating circumstances mainly in form of diminished responsibility. On appeal the Supreme Court disagreed with the trial court as regards the presence of diminished responsibility. It concluded that on the facts of the case there was no evidence which conclusively proved diminished responsibility on the part of the appellant. That finding notwithstanding, the Supreme Court did not alter the sentence that was imposed by the High Court.
Sentence: 12 years on each count to run concurrently	

S v Toringa HH-582-16

Main facts: X, a married woman, had gone armed with a knife to confront her husband and the woman with whom he was having an affair. When the teenage son of the paramour of her husband had tried to drive away X using a stick, X had produced the knife and had fatally stabbed the son.

Aggravation	Extenuation/Mitigation
This was a premeditated crime but that she had vented her anger not on her husband or his lover but on the teenage son. If the son had been using the stick to beat her, X had used excessive force to defend herself and was not entitled to the defence of self-defence.	
Sentence: 15 years imprisonment	

S v Mapuna HH-209-16

Main facts: X killed his wife with an axe. He suspected his wife of adultery and had fought with the man whom he suspected was committing adultery with his wife.	
Aggravation	**Extenuation/Mitigation**
Cases of domestic violence leading to loss of life particularly of female spouses are very prevalent and deterrent sentences are necessary.	X was a first offender who had spent a long time in custody awaiting trial.
Sentence: 15 years	

S v Mutemi HH-729-16

Main facts: X stabbed to death her husband who had previously subjected her to domestic violence.	
Aggravation	**Extenuation/Mitigation**
	The court rejected the defence of self-defence. The husband was lying on the floor when he was stabbed.
Sentence: 18 years imprisonment	

S v Sibanda HB-313-16

Main facts: X was aged 25 years while the deceased was aged 27 years. The parties were at a beer drink and there had been a misunderstanding over a girlfriend. X, who had been drinking, slapped and struck the deceased with a sjambok. The deceased tried to run away but was pursued by X and an accomplice. They caught up with the deceased and assaulted him with stones and a beer bottle causing his death. X was found guilty of murder with actual intent.	
Aggravation	**Extenuation/Mitigation**
"… the accused and his colleague behaved like bullies on the day in question. They appear to have targeted the deceased from a very early stage and routinely used him as a punching bag for no apparent reason. Even the accused himself could not point to any untoward conduct on the part of the deceased which would inform repeatedly beating him up. When the deceased eventually left the bar going home they followed him and literally crushed him like a snake for no reason at all. It is the kind of conduct which is unbelievable. Apart from being senseless in the extreme, it betrays a trait that is fast becoming the badge of our youthful people especially in this part of	

the country. Young men who seem to have no scruples whatsoever to take the life of another human being and celebrate after doing it. Alcohol cannot be an excuse for that kind of behaviour. If anything it is a factor in aggravation because the accused spent the whole night drinking to gain Dutch courage only to then prey on the deceased in the early hours of the morning. The courts will not tire to send accused persons who commit such gruesome crimes to prison. In fact it is a borderline case in that this may have been murder in the course of a robbery. The accused is lucky that we have found no proof that the deceased was robbed."	
Sentence: 20 years	

S v Chitsungo & Anor HH-9-17

Main facts: The accused persons assaulted the deceased person with open hands and tree logs on the basis of the suspicion that he was having an extra marital affair with the wife of one of them. They also threw the accused into the fire. They continued to assault the accused despite the attempts by the people milling around the scene of the attack to restrain them.	
Aggravation	**Extenuation/Mitigation**
The seriousness of the crime of being a danger to the sanctity of life protected by the Constitution The upsurge in the crime of murder hence the need to curb this crime The age of the deceased who was 71 years old The lack of remorse on the part of the accused persons	The social status of the accused persons of being unsophisticated rural persons The fact that one of the accused was HIV positive The economic status of the accused of being breadwinners for their respective families The intoxication to which the accused persons were subject when they committed the crime.
Sentence: 20 years	

S v Sibanda HB-93-16

Main facts: X fatally assaulted his girlfriend for an unknown reason. He buried the lifeless body of the deceased in a shallow grave in a bid to conceal the crime. The body was later on discovered.	
Aggravation	**Extenuation/Mitigation**
The court held the following factors as increasing X's moral blameworthiness; The loss a young life occasioned by the murder of the deceased who was 33 years of age at the time of her death The death of the deceased left her four minor children with no one to fend for them The resort to brutal violence by X The need to send a strong signal to society that violence is wrong The trauma to which the relatives of the deceased were subjected by the conduct of X after the murder who feigned ignorance of the fate and whereabouts of the deceased.	X had made an effort to accept his liability through pleading guilty to the lesser charge of culpable homicide He was a first offender He had been in custody for a period of about 5 months He had expressed some sort of remorse through his legal practitioner.
Sentence: 22 years imprisonment	

S v Nkomo HB-91-16

Main facts: X was convicted by the court of murder with constructive intent for having killing his young wife. The marriage between the two was characterised with quarrels. On the day in question, a quarrel for an unknown reason occurred resulting in a fight between the estranged couple. X stabbed the deceased with a knife in the course of the fight. The deceased subsequently succumbed to the injury which she sustained.	
Aggravation	**Extenuation/Mitigation**
The upsurge in the domestic violence-related murder cases The need to protect human life since it cannot be regained once lost The needless loss of a young life and the brutality of the murder concerned	The influence of the alcohol under which X laboured The contrition which he exhibited The responsibilities that he had as a family man
Sentence: 25 years imprisonment	

S v Shava HH-124-17

Main facts: X was 64 years old. X's wife was committing adultery and X had taken steps to try to persuade the adulterer and his wife to put a stop to this relationship. But X was also involved in an extra-marital relationship. The marital strife led to X's wife attacking him with a home-made mattock. X wrestled the weapon away from her and then he savagely attacked the deceased who was lying on the bed and trying to get up. He repeatedly struck the deceased on the head using a dangerous weapon. X struck 3 fatal blows and the wife died a painful death. He had used excessive force when he was no longer under an imminent attack.	
Aggravation	**Extenuation/Mitigation**
The courts will not condone the use of violence as a means of resolving matrimonial disputes. This was a barbaric and despicable attack on a defenceless woman. The sentence must reflect the seriousness of the offence.	
Sentence: 20 years	

Witchcraft cases

S v Chikomo HH-557-16

Main facts: X killed his mother-in-law by striking her on her head with a stone. X believed that the deceased was bewitching him and had placed noxious herbs in his drink causing him to become ill. The deceased had accused X of being possessed by demons which needed to be cast out.	
Aggravation	**Extenuation/Mitigation**
Moral blameworthiness not very high	The court found that he was suffering from diminished responsibility on account of acute mental or emotional stress. X had been in custody for nearly two years before his trial. The court said that pre-trial incarceration is a factor to be taken into account in assessing sentence and is not considered in isolation but together with other relevant circumstances of the matter.
Sentence: 3 years wholly suspended for 5 years	

S v Hahlekiye HH-260-17

Main facts: X **struck his** 86 year old neighbour with a stick on his head and back over the allegation of witchcraft. He subsequently kicked the deceased indiscriminately all over his body. The deceased eventually succumbed to the injuries which he sustained as a result of the attack. The attack was motivated allegations of the use of witchcraft by the deceased against the accused's family.	
Aggravation	**Extenuation/Mitigation**
The brutality of the crime The old age of the deceased The assault on this old man was unprovoked and he was too old to defend himself. The needless loss of the sacrosanct human life occasioned by the murder Society abhors this kind of gratuitous violence where individuals take the law into their own hands over perceived wrongs committed by fellow citizens. The old age of the deceased person.	The contrition exhibited X by meeting the funeral expenses. He also paid compensation to the family of the deceased in part payment of the death.
Sentence: 20 years	

S v Chigayi & Ors HH-248-17

Main facts: Four brothers killed their father by burning him with molten plastic in the unfortunate belief that he was a wizard. They also burnt him as they were burning his "artifacts" by tying him to a pole. Further they denied him any medical attention that his senior wives attempted to give him. They were all found guilty of murder with actual intent.	
Aggravation	**Extenuation/Mitigation**
The dire nature of the crime of adult sons literally roasting their father in a burning furnace. They also prevented their mothers from rendering medical assistance to their father.	The mistaken belief in witchcraft of each of the accused
Sentence: Each sentenced to 20 years	

S v Ndlovu & Anor HB-188-16

Main facts: The deceased aged 67 was killed by the deceased's son (accused 1) aged 19 at the time of the killing and 21 at the time of his trial and the deceased's daughter in law (accused 2). Accused 1 forcibly entered the deceased's bedroom and struck the deceased twice on the neck with a knobkerrie rendering him unconscious. Accused 1 then poured petrol all over the hut and ordered accused 2 to set the hut alight which she did and the deceased was burnt to death. Accused 1 had become angry after the n'anga told him the deceased was bewitching him. He went to drink and smoke drugs to fortify himself for the murder of his father. Accused 1 was convicted of murder but accused 2 was acquitted on the basis of the defence of compulsion.	
Aggravation	**Extenuation/Mitigation**
The heinous killing nonetheless required the imposition of a lengthy term of imprisonment.	In sentencing accused 1, the court took into account in mitigation the youthfulness of the accused. His strong belief in witchcraft and the fact that he had acted under the influence of a n'anga.
Sentence: 15 years	

Killing of child[40]

S v Moyo HB-150-16

Main facts: X, who was 43 at the time of the murder, killed his 5 year old daughter possibly for ritual purposes. He had drunk strong illegal liquor to give himself courage to carry out the killing. He had killed her with an axe and had severed one of her arms.	
Aggravation	**Extenuation/Mitigation**
X had killed his own daughter in such a manner.	X was only brought for trial 16 years later when he was 59 and the matter had been hanging over his head for that period of time. X is in ill-health as he is HIV positive and is under treatment.
Sentence: 20 years	

S v Tsumele HH-559-15

Main facts: X had an adulterous relationship with his uncle's wife, resulting in the woman falling pregnant. After she gave birth, the woman brought the newly-born to X to ask him to assist in getting a birth certificate for the child. Fearful of the uncle finding out about the adulterous affair, X and the woman took the baby to a secluded place at night and X strangled to death her baby. They dug a hole and buried the dead child.	
Aggravation	**Extenuation/Mitigation**
This was a bad case of murder of an innocent baby with premeditation	X had shown genuine remorse and had confessed to the murder.
Sentence: 30 years	

S v Hamandishe HB-29-16

Main facts: X, a 29 year woman, killed her 2½ year old son. She had re-married and had taken her son, fathered by her previous husband, with her to her new husband's house. However, her in-laws were not comfortable with the son living with them. The in-laws advised X to surrender custody of the boy to her former husband. She made an attempt to surrender the child to her former husband but she was unsuccessful. X returned home but on the way she decided to kill her son so that she could protect her marriage.	
Aggravation	**Extenuation/Mitigation**
X's moral blameworthiness is of a high degree. Her decision to terminate her child's life was purely selfish. She acted after careful planning and there was an element of premeditation. Her conduct was utterly cruel as she took the life of her child by strangulation. She killed her own child who looked to her for protection. The offence is inexcusable, and the court must impose a sentence that should blend leniency and mercy with a just and proper sentence.	
Sentence: 10 years, of which 3 years conditionally suspended	

[40] Note that killing of a child can be an aggravating circumstance for the purposes of imposition of the death penalty.

S v Elderman HB-165-11

Main facts: X strangled to death his 2 year old son	
Aggravation	**Extenuation/Mitigation**
The murder was premeditated The attack was brutal and callous The deceased was a child and his young life had been unnecessarily lost and the court had the duty to protect the sanctity of human life.	The fact that X was suffering from the psychological pressure of having the child not accepted by his family He was a first offender He was relatively young and he was also a breadwinner for his family.
Sentence: 30 years	

S v Moyo HB-150-16

Main facts: X killed his 5 year old daughter whilst left in charge of the deceased. He killed the child during the night. The deceased's body was found without an arm.	
Aggravation	**Extenuation/Mitigation**
The callousness of the murder in light of the fact that it had been brutally committed by a parent against his child. The need to uphold the sanctity of human life.	X's age who was now 59 years old. X's ill-health since he was HIV positive and under treatment. The inordinate delay of 16 years that occurred before the finalisation of the matter which was considered as a punishment on its own.
Sentence: 20 years imprisonment	

S v Shoriwa HH-576-16

Main facts: X killed her brother-in-law's 4 year old girl child by pushing her into a river where she drowned. She claimed she was suffering from diminished responsibility due to emotional distress. She had been deserted by her husband and her sister-in-law had taunted her over her failed marriage and accused her of having committed adultery with a brother of her husband.	
Aggravation	**Extenuation/Mitigation**
There are more aggravating features in this case than mitigatory ones. X had acted with unparalleled cruelty when she pushed an innocent 4 year old toddler who was in no way involved in the problems of X to her death. Such a heartless crime requires a stiff sentence. Even accepting that X may have been acting under severe mental and emotional stress, a stiff sentence was required.	
Sentence: 20 years	

S v Chikandiwa HH-281-17

Main facts: X with intent to kill forced his biological daughter to drink some poisonous substance thereby causing her to die. He also drank the poison. He alleged that he had a moment of insanity. The allegation was not substantiated by anything whatsoever and the court was of the view that he intended the consequences of his action and cannot escape conviction.	
Aggravation	**Extenuation/Mitigation**

The killing of his daughter was callous, brutal and heartless. It is cruel for any parent to inflict such kind of pain on his child.	The court took note of X's past drug abuse history, which resulted in him getting a less lengthy sentence. He alleged that he was going through a stressful situation
Sentence: 12 years	

Killing of parent, sibling or relative

S v Muchini HMA-4-17

Main facts: X was convicted of murder with constructive intent for killing his own brother with constructive intent. There was a dispute between the deceased and his parents over the use of family cattle. The deceased became angry and pushed his parents to the ground. X was incensed by his brothers' conduct of attacking their parents and he intervened and attacked the deceased with the handle of a hoe. He pursued the deceased when the latter ran for his life. X continued to attack his brother with the handle of the hoe till the deceased died.	
Aggravation	**Extenuation/Mitigation**
The court frowned upon the prevalence of murder cases in Masvingo area and emphasised the need to send a signal that violence is not tolerated. It also considered the sanctity of human life and the need to protect it at all costs. The murder was senseless X's lack of remorse	X was a young man of 22 years and a family man with responsibilities. X would have a guilty conscience that would torment him for having killed his own brother and this was a punishment on its own. X was a first offender.
Sentence: 20 years	

S v Chunda HB-36-17

Main facts: X murdered his own brother by striking him twice on the head with a chisel. On the day in question it is provided that the deceased had ordered X who was just lying around to work and a brawl immediately surfaced. X holds that on the day he was already agitated as he was suffering from diarrhea. He struck his brother twice on the head with a chisel which eventually caused the death of the deceased. X was found guilty of murder with actual intent.	
Aggravation	**Extenuation/Mitigation**
However there is a need to take into account that the deceased was senior to X and in a managerial post and thus X was meant to be subordinate to him.	X a first offender and a family man with a number of children including deceased's children. He took care of funeral expenses and medical expenses. He lost a brother at his own hand - a stigma he will live with forever. He also spent 1 year and 4 months in pre-trial custody.
Sentence: 14 years	

S v Sibanda HB-262-16

Main facts: X, who was a young man, had stabbed to death his mother after she had refused to drive her vehicle to go out and she had also refused to give him money. After the stabbing, the accused locked the doors, took the murder weapon and concealed it in the garage. He then took the vehicle

and money and drove to see his girlfriend. Later he teamed up with his friend, collected more money belonging to the deceased from a neighbour and went to a club to drink beer. The following morning he took his friend and girlfriend to Harare in his mother's vehicle. This was after he had stolen fuel from a garage. He dropped his girlfriend in Harare and returned to Gweru. On the way he hit a pedestrian near Norton and he abandoned the car and returned to Harare by public transport. He decided to travel to Gweru and boarded a vehicle from which he was spotted by some of his relatives who caused his arrest. The court found that despite his intoxication from drugs and alcohol he had the intention to kill his mother. He was found guilty of murder with actual intention.	
Aggravation	**Extenuation/Mitigation**
The brutal manner in which the accused had killed his mother. The court said: "… it is unthinkable that a child could do such a thing to a parent. It appears accused acted out of sheer wickedness. He is a rogue son to say the least. Had the accused been older than he is, we would have sentenced him to a much longer term of imprisonment. Quite clearly the accused has been saved by his tender age."	That he was a young man
Sentence: 20 years	

Drunken brawls and quarrels arising from property disputes

S v Ndowa HH-257-17

Main facts: X killed the deceased in a brawl that arose between them by assaulting him with the axe he had and stabbing him with a tiny sword on the cheek. There were allegations that the deceased had taken the accused's ex-wife and accusations of witchcraft. The accused was found guilty of murder with actual intent.	
Aggravation	**Extenuation/Mitigation**
The court came to the conclusion that there are more aggravating features than mitigatory ones. Society abhors such disregard for human life.	The court found out that he had not acted in self-defence but on the belief that the deceased had found the affection of his ex-wife.
Sentence: 18 years	

S v Moyo & Anor HB-218-16

Main facts: The two accused persons were father and son. A fist fight broke out at a drinking place. The father handed his son a knife which was used to stab to death the deceased who was trying to flee. The father had encouraged the use of the knife by the son.	
Aggravation	**Extenuation/Mitigation**
Even though the father was not the actual perpetrator it was his conduct which caused this unfortunate event. His moral blameworthiness is therefore extremely high. A deterrent sentence was required	
Sentence: The two accused were sentenced to 17 years' imprisonment.	

S v Macheke HH-556-15

Main facts:

X, a fairly young person, stabbed and killed the deceased with constructive intent. The stabbing occurred during a quarrel in which X accused the deceased of stealing his money.	
Aggravation	**Extenuation/Mitigation**
X had used a knife to kill when he should have left it to the authorities to deal with the matter.	X was a fairly young first offender He showed remorse when he found out that the deceased had died by surrendering himself to the South African authorities so he could be returned to Zimbabwe for trial.
Sentence: 18 years	

S v Ndlovu HB-263-16

Main facts: X quarrelled with the deceased at a beer drink. The deceased stabbed X. The deceased fled with X in pursuit. The deceased fell down and X struck him several blows to the head with a wooden stool thereby causing his death. X raised unsuccessfully the defence of self-defence, the court finding that when he retaliated X was not under attack. X was found guilty of murder with constructive intention.	
Aggravation	**Extenuation/Mitigation**
X used excessive force using a dangerous weapon and had crushed the skull of the deceased	X was not the initial aggressor and the deceased had inflicted serious injuries upon him X was intoxicated.
Sentence: 15 years	

S v Chishaka HH-264-17

Main facts: X was one of the squatters who had been evicted on the Wattle Company property. When the deceased was assigned to go and mark the place for business operational purposes, the gang came to the deceased and X assaulted him with a knife by stabbing him once on the left arm causing serious injuries from which the deceased died. The accused person sought to rely on the defence of killing in defence of property which was not substantiated.	
Aggravation	**Extenuation/Mitigation**
However there were more aggravating factors as a life was lost unnecessarily. Further, the deceased had relinquished his firearm to the guard who was in his company and thus he was no longer a threat to the accused, yet he still attacked.	X was a first offender and a man with a large family for whom he was responsible.
Sentence: 18 years	

S v Masuna HB-221-16

Main facts: There had been a dispute over the control of a mine between two persons. This dispute had been settled by a court order in favour of Y and Z was to be evicted from the mine. Z had in his employ X who was the operations manager of a security company which had been employed to provide security services to Z. In violation of the court order Z deployed X and other security guards to deal with Y's workers who were seeking to occupy the mine. These workers were throwing stones. X, who was an ex-police officer, ended up shooting and killing one of Y's workers. Anyone who chooses to kill merely because he does not agree with a court process shows total disregard of the law and a killing in such circumstances would qualify to be murder committed in aggravating circumstances.	
Aggravation	**Extenuation/Mitigation**
An innocent life was needlessly lost in circumstances which show total disregard of a court order. That total disregard of the law calls for stiffer penalty.	X had no criminal record and that as an adult aged 50 years this is a notable consideration. X has fairly heavy family responsibilities. The deceased's company were engaged in

Those who decide to kill merely because they disagree with a court order as in this case are clearly a danger to society and they must not expect mercy from the courts. To compound matters, X is not an ordinary citizen. Through his profession he had committed himself to maintaining law and order as a highly ranked police officer. According to him he was an expert in the use of fire arms like the one he used in this murder. He said he had been so exposed to the use of firearms for the past 18 years. He should not have retorted to the use of such a dangerous weapon on an innocent civilian who was not even the owner of the disputed mine but an ordinary worker who was trying to earn a living. By any standard, this was brutal murder and under normal circumstance this offence should attract capital punishment. However, it was accepted that there are indeed compelling factors in mitigation, the most pronounced being the fact that almost everyone who testified confirmed there was stone throwing.	throwing stones at X and his group.
Sentence: Life imprisonment	

S v Kurangana HH-267-17

Main facts:	
X was invited by the deceased to his homestead for a beer binge. They listened to the radio during the course of the beer binge. After the beer binge, X took with him the radio of the deceased. X proceeded towards his homestead with the deceased's radio despite the call by the deceased not to do so. The deceased followed X and an altercation ensued. X eventually struck the deceased with an axe. Eventually the deceased died of the injuries which he sustained from the attack by X. The court found X guilty of murder on the basis of legal intention to kill.	
Aggravation	**Extenuation/Mitigation**
The case was fraught with aggravating factors such as: the seriousness of the crime, the brutality with which it was committed using such a lethal object as an axe, the lack of contrition by X who had lied to the court as to what happened his covetousness of taking a possession that belongs to another person	There were negligible mitigating factors
Sentence: 18 years	

S v Mpofu HB-99-15

Main facts:	
X and the deceased had fought over a hoe. X had tested his weapon of choice to ensure it was lethal thus leading him to leave a wooden stick he had picked for the metal rod. X struck the deceased on the back of the head with the iron rod causing the deceased to fall down and X continued to assault deceased while he was on the ground. X was restrained and disarmed by another person.	
Aggravation	**Extenuation/Mitigation**
The seriousness of the offence The degree of recklessness exhibited by X accused.	X was a first offender X was assaulted for no apparent reason by the deceased on the night in question

X inflicted a number of blows to the deceased causing a series of injuries. The courts must discourage people from taking the law into their own hands in the face of provocation. X had had ample opportunity to report the assault to the police which he did not do. Life was needlessly lost and the courts must uphold the sanctity of human life by imposing appropriate sentences.	Previously the deceased had assaulted X and deceased was not punished After being kicked on the chin/mouth by the deceased X was deeply angered and decided to take revenge X had been drinking beer prior to the altercation X is married and has 8 children He is remorseful He had spent 10 months in pre-trial incarceration.
Sentence: 15 years imprisonment of which 3 years conditionally suspended	

Youthfulness

S v Mutinhima HH-16-18

Main facts: X stabbed the deceased on his right rib with an okapi knife causing his death. X is a 17 year old who was involved in a fight with deceased over his phone that was ringing in church. X was the aggressor at all material times.	
Aggravation	**Extenuation/Mitigation**
The court was of the view that when a young person acts in such a manner they emancipate themselves.	X was between 16 and 17 years old, therefore immaturity played a big role.
Sentence: 9 years	

S v Ndlovu HB-332-16

Main facts: Following a dispute over the ownership of a shovel X went to the deceased house and stabbed to death the deceased who was a male juvenile. X was found guilty of murder with actual intent. X was a youthful first offender.	
Aggravation	**Extenuation/Mitigation**
The killing was premeditated and well planned. At the time of the savage attack on the deceased, X had already secured the shovel in question and there was no reason why he continued to pursue this issue. X had faked drunkenness when it was clear that he was in his sober senses when he committed this offence. The only reason why he tracked down the deceased was because he wanted to stab him. X was much older than the deceased and there was no need for him to behave in such an irrational and vengeful manner. The deceased had not shown any signs of posing a threat to the accused person. It was disturbing that throughout this trial X had not been able to show any traces of remorse or regret towards his conduct. The deceased had done nothing deserving the termination of his life in such a brutal manner. Such youngsters like the accused are dangerous and much as they require to be treated with mercy they must be kept away from the	X was a youthful first offender.

mainstream society for quite some time. The court hoped that by the time the accused comes out of prison he would have matured enough to be a useful member of society.	
Sentence: 25 years. But for the accused's age, this is the offence that required serious consideration of capital punishment.	

S v Sibanda HH-13-17

Main facts: X caused the death of deceased by stabbing him with a knife on the right side of his chest thereby causing injuries which led to his death. X sought to allege that his companion had killed the deceased but the court denied this as he had no motive. X and the deceased had had consecutive fights outside the bar over a bar stool.	
Aggravation	**Extenuation/Mitigation**
The crime was not committed in aggravating circumstances taking into account the totality of the circumstances.	X was 19 years old at the time of commission of the crime. Generally youthful offenders are treated with leniency. He was in pre-trial incarceration for over a year.
Sentence: 20 years	

S v Moyo HMA-16-17

Main facts: X stabbed to death the deceased, aged 21, using an okapi knife after he had encountered the deceased on a footpath.	
Aggravation	**Extenuation/Mitigation**
Lack of contrition and X was simply unwilling to disclose and be truthful as to what happened between him and the deceased. The manner in which X killed the deceased was brutal and savage. Cases of murder are very prevalent in Masvingo province and this trend should be worrying to every law abiding person who respects the sanctity of human life. Many young persons resort to the use of dangerous weapons like knives at the slightest provocation.	X is a first offender who is married with no children. He is unemployed. He had already suffered pre-trial incarceration of 8-9 months.
Sentence: 25 years	

S v Makuchete & Ors HMA-07-16

Main facts: Accused 2, aged 25 years at the time, was one of three brothers arrested for the murder of their cousin. By the time of trial only accused 2 was available. The accused and his brothers caused the death of the deceased by striking him with knobkerries and a slasher all over the body.	
Aggravation	**Extenuation/Mitigation**
X showed no contrition and he had tried to go after deceased's wife to kill her also. He tried to disown responsibility.	X has 3 children and a wife and his wife is unemployed and disabled. X was 25 years of age at the time of the commission of the crime, hence he was youthful. On the day the crime was committed, X had drunk too much alcohol, resulting in induced lack of self-control. He was also serving 7 years for attempted murder that occurred in the same transaction.
Sentence: 25 years	

S v Mapurisa HMA-16-18

Main facts: At New Year's celebrations, a quarrel occurred between X's brother and another person. The deceased tried to intervene to stop the fight but X warned him not to interfere and when he did not heed the warning, X knocked down the deceased, sat on his chest, drew a knife and stabbed the deceased in his head which led to the death of the deceased. X had brushed aside attempts to restrain him. Before inflicting the fatal wound, X cut the deceased twice on the face. X was found guilty of murder with actual intent. X was 22 at the time of the murder and the deceased was 23 years old.	
Aggravation	**Extenuation/Mitigation**
A brutal murder of an innocent person X had shown no remorse and his moral blameworthiness was very high. "This court is worried by the prevalence of murder cases in Masvingo province. What is disheartening is that such murder cases are being committed by fairly young persons. The mind boggles as to why such young persons readily resort to violence at the slightest provocation or at no provocation at all. We do not even understand why on this day you were moving around with a knife in your pocket. This was a day for merry making. The knife itself is very unique. People should be discouraged to move around with such dangerous weapons."	The court said it was difficult to find anything of a mitigatory circumstance. X was a first offender who had spent one year and two months in pre-trial custody. Although X was a youthful offender and youthfulness can to some extent denote immaturity, in the present case the court should not place undue weight on this factor.
Sentence: 25 years	

Brutal planned attacks

S v Katsande HH-854-15

Main facts: X was convicted of murder with constructive intention. He has brutally assaulted a defenceless woman and thrown her body into a raging river. X had impregnated the wife of the brother of his cousin. He committed the murder to conceal the fact that he had impregnated the woman.	
Aggravation	**Extenuation/Mitigation**
Brutal assault on defenceless woman	
Sentence: 20 years	

S v Moyo HB-343-16

Main facts: X with accomplices stabbed to death with actual intention to kill the defenceless deceased who was being held down by the accomplices.	
Aggravation	**Extenuation/Mitigation**
X was sentenced to 30 years imprisonment as the killing was unprovoked and without justification and a life was needlessly lost.	X was brought for trial only after 14 years when he was finally tracked down. He was a first offender who was in ill-health.
Sentence: 30 years	

S v Ncube & Ors HB-303-16

Main facts: The three accused armed with knobkerries, spears and axes assaulted a person at a tuck shop leaving him unconscious. When some people confronted the accused about the earlier assault, the accused attacked these people with their weapons causing the death of the deceased. The accused were found guilty of murder with constructive intent.	
Aggravation	**Extenuation/Mitigation**
"… the kind of banditry exhibited by the accused persons on the day in question is alarming indeed. They first severely assaulted [one person] in a gang attack thereby setting in motion the events which led to the fatal attack on the deceased. It is now a norm rather than exception that youthful people roam the neighbourhood and frequent business centres on a daily basis especially at Christmas time where they spend lengthy periods of time not engaged in any useful activity but consuming large amounts of alcohol, abusing drugs and showing off. Once intoxicated they become menancing wantonly attacking others and at times causing unnecessary loss of life. Our youths have become blood thirsty and are no respecters of human life. They are arrogant, rude and violent. These courts have repeatedly decried the cancer of violence and alcohol abuse which is tearing our social fabric and it would appear that these people are not taking heed. It is however the duly of the court to underscore and respect the sanctity of human life by imposing deterrent sentences against those that cross the line in order to protect our people from the likes of the accused persons. Sentences must mirror the revulsion of society against the kind of conduct as exhibited by the accused persons in this matter.	The ages of the accused (28, 21 and 20) who were first offenders. They are youthful offenders whose irresponsibility stemmed from immaturity. They are unsophisticated rural young men. The episode leading to the death had been triggered by an attack upon the accused.
Sentence: Each accused sentenced to 15 years	

S v Nyarusanga HH-7-17

Main facts: X, who was 18 years old at the time of the commission of the crime, struck the deceased with an iron bar on the head whilst he was sleeping. He also struck him with bricks and stones to ensure that he had died. X also removed the skin of the scalp of the deceased, cut his left ear and disgorged his left eye.	
Aggravation	**Extenuation/Mitigation**
The brutality of the crime and the heinous manner in which it was committed in so far as it was accompanied by physical torture and mutilation of the body. It also considered the importance of the right of life. The fact that the murder was committed consequent upon an unlawful entry into a dwelling.	The personal circumstances of X exercised the mind of the court. His upbringing was pathetic in so far as he had not been provided with an opportunity to continue with education. He had also been left to fend for himself at a tender age. He was therefore forced to resort to crime to take care of himself. The court also took into account his young age as a youth.
Sentence: 25 years imprisonment	

S v Dube HB-92-16

Main facts: X, without warning, struck the deceased twice with a pestle on the head which caused his death. X plead the defence of self-intoxication but this was rejected. X had to walk some 20 kilometres to fetch the striking tool, indicating that he had intention to murder the deceased.	
Aggravation	**Extenuation/Mitigation**
This was a premeditated murder	X was a man of 36 years old with heavy responsibilities (had 3 children and a wife). He is the sole breadwinner. He was a first offender He had been drinking.
Sentence: 30 years	

S v Mafukidze HH-255-17

Main facts: The pair pre-planned the attack carefully choosing their victim by reason of her age and hermit-like-life. They unleashed gratuitous violence, consisting of the vicious assault against her in her hut before strangling her to death.	
Aggravation	**Extenuation/Mitigation**
The pair pre-planned the attack carefully choosing their victim by reason of her age and life style. They unleashed gratuitous violence, consisting of the vicious assault against her before strangling her to death. The murder was committed in aggravating circumstances; an innocent life was lost needlessly.	The accused were 22 years old and first offenders.
Sentence: 20 years	

S v Makoni & Ors HB-201-16

Main facts: There was a tribal altercation pitting the *Ndebele* speaking group on one side and the *Shona* speaking on the other. The deceased was hit twice on the head with a heavy concrete slab. The two accused were part of a gang whose common objective was to assault those of *Ndebele* extraction. They were found guilty of murder with actual intention.	
Aggravation	**Extenuation/Mitigation**
This was a brutal murder carried out on tribal grounds.	Neither of the accused actually struck the fatal blows
Sentence: Both accused were sentenced to 30 years imprisonment.	