

ANALYSIS OF THE DEFINITION OF OFFENSIVE
WEAPON IN RELATION TO AGGRAVATED
ROBBERY

BY

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UNZA

2013

**ANALYSIS OF THE DEFINITION OF “OFFENSIVE WEAPON” IN RELATION TO
AGGRAVATED ROBBERY.**

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By

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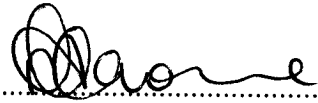
A research submitted to the faculty of Law of the University of Zambia in partial fulfillment of
the requirements for the award of the degree of Bachelor of Laws (LL.B)

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August, 2013.

Declaration

I, **Mambwe Kaoma**, computer number **20025831** do hereby declare that the contents of this dissertation are based on my own findings. I further declare that the information used herein that is not my own i have endeavoured to acknowledge.

I, therefore declare that all errors and other shortcomings contained herein are my own.

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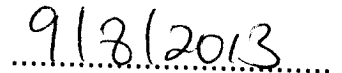
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Abstract

This research analyses the definition of “offensive weapon” in relation to aggravated robbery as provided in section 4 (b) of the Penal Code Chapter 87 of the Laws of Zambia. One of the determining factors in establishing aggravated robbery is the use of “offensive weapon”. In cases where a “firearm” is used it is referred to as “offensive weapon”. However, the Penal Code in its definition of “offensive weapon” does not include a “firearm”. The Penal Code further assigns the meaning of “firearm” to that provided by the Firearms Act Chapter 110 of the Laws of Zambia, which in turn does not stipulate that a “firearm” is an offensive. This research further considered a comparative analysis how British jurisdiction defines “firearm”. Subsequently, justice is said to be achieved and as a consequence the aims and objectives of criminal law when the accused is convicted of aggravated robbery.

This study primarily involved desk research in evaluating both primary and secondary data which include Zambian legislation and case law, British legislation and case law; text books, journals, articles and internet respectively. Therefore, this research found that the Penal Code does not define nor include “firearm” in its definition of “offensive weapon”. In addition, where a “firearm” is used case law has shown that the courts rule in the same manner as reliance is based on the need to prove that a “firearm” is one as assigned by the Firearms Act . Further, the provision referred to in the Firearms Act by the Penal Code is superfluous. Further, the evaluation of British law shows its provisions may not be borrowed and applied in Zambia. As such, this study recommends that the Penal Code be amended. In addition, the status quo of case law where a “firearm” is used in aggravated robbery must be reviewed so that administration of justice can be seen to be achieved.

Acknowledgements

I wish to thank my supervisor, Dr. Pamela T. Sambo, for her patience and guidance throughout the preparation and completion of this dissertation.

I would also wish to thank all my true friends and the staff of the School of Law of the University of Zambia for all their support throughout my years on campus.

UNZA,

Lusaka.

August, 2013.

Dedication

To my late father Arnold Kaoma, mother Emily Kaoma and siblings Arnold Kaoma, Ignatius and Mandinda Matawe; and Mwiche Mwila. Mum thank you for me and teaching me that I can achieve all things in life through faith and determination.

To all thank you for your encouragement, love and sacrifices in my dream. I can never thank you enough but whole heartedly wish you C

Table of Statutes

Constitution of Zambia, Cap. 1 of the Laws of Zambia

English Law (Extent of Application) Act, Cap.11 of the Laws of Zambia

Firearms Act 1968, Cap. 27 of the Laws of England

Firearms Act, Cap. 110 of the Laws of Zambia

Penal Code Act, Cap. 87 of the Laws of Zambia

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Grey v Pearson (1857) 6 HL Cas 61

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London Coal Board v Bowden (1956) Ch. D. 1039

Moore v Gooderham [1960] 3 All ER 575

Mutale v The Attorney General (1976) ZR 139

Mutambo and five others v The People (1965) Z.R. 15

Mwape v The People (1979) Z.R. 54

Mwewa Muroño v The People (2004) Z.R. 207

Nothman v Barnet Council [1978] 1ALLER 1243

R v Clarke (F), 82 Cr App R 308

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CHAPTER ONE

INTRODUCTION

1. Introduction

This research analyses the definition of “offensive weapon” in relation to aggravated robbery as provided in the interpretation section of the Penal Code Chapter 87 of the Laws of Zambia (hereinafter referred to as “the Penal Code”). An analysis will be undertaken to determine whether the definition of “offensive weapon” encompasses a “firearm”.

This chapter gives a general overview of the research as follows: the second chapter will critically analyse the definition of “offensive weapon” by examining the rules of statutory interpretation¹ and the principle of judicial notice². This is done in order to assist the research in determining whether the definition of “offensive weapon” encompasses a “firearm”. The chapter will also analyse The Firearms Act Chapter 110 of the Laws of Zambia (hereinafter referred to as “the Firearms Act of Zambia”) as the Penal Code makes reference to it. In addition the Firearms Act 1968 Chapter 27 of the Laws of England (hereinafter referred to as “the Firearms Act of England”) will be examined to have a comparative view of how other jurisdictions define “offensive weapon” and determine whether such provisions may be borrowed. Further, Zambian case law will be reviewed in order to ascertain whether the current definition of “offensive weapon” is adequately applied.

¹ Rules of statutory interpretation are a body of rules and principles that are used to construe the correct meaning of legislative provisions to be applied in practical situations. Per Lord Summands in *London Coal Board v Bowden* (1956) Ch.D. 1039 at 1101

² Judicial notice is the courts acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact; the courts power to accept such a fact. Bryan A. Garner, *Black’s Law Dictionary*, 8TH ed. (London: Thomson & West, 2004), 863-864

The third chapter will evaluate the offence of robbery as provided by English law because in instances where legislation is vague or ambiguous, the Penal Code allows for English interpretation to be applied in Zambia. The fourth and last chapter of this research will draw conclusions from the issues that will be outlined in the following chapters and will provide recommendations.

2. Background

In Zambia, as in many other Commonwealth countries, the Constitution is the supreme law³. Article 18(8) of the Constitution of Zambia Chapter One of the Laws of Zambia (hereinafter referred to as “the Constitution of Zambia”) provides that: ‘a person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law’. The effect of this provision is to declare that criminal offences in Zambia are, as a general rule, statutory offences⁴. This means that a person should not be prosecuted for an offence which is not defined by legislation⁵. For this reason, the Penal Code in conformity with the Constitution is one of the main sources of criminal law as it prescribes a number of offences and corresponding penalties.

It is important to note that the general principle underlying the operation of the criminal justice system in all mature legal systems is that it is desirable and within limits possible to ensure that those convicted of crimes are punished fairly in accordance with rules explicitly designed to

³Article 1 (3) of the Constitution of Zambia, Cap.1 of the Laws of Zambia (hereinafter referred to as “the Constitution of Zambia”). Commonwealth countries are independent countries which were formerly under British rule

⁴Simon E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia*, 8

⁵*ibid*, 8

satisfy society's purposes, most particularly that of social control⁶. Criminal law concerns itself with the established norms on the basis of which individuals or groups are prosecuted and either found guilty and subjected to punishment or adjudged and not guilty and acquitted.⁷ In essence criminal law is aimed at controlling misconduct; whether an act or an omission. According to Kulusika there are crimes for the commission of which the criminal law imposes severe penalties because they are seen as anti-social and the offender must be punished for failing to be responsible, for example aggravated robbery-an act. There are other offenses for which the criminal law imposes certain penalties as specified in a statute or Act of Parliament; driving a motor vehicle without triangles- an omission⁸.

There are essentially five widely accepted objectives for the enforcement of criminal law namely; Retribution, Deterrence, Incapacitation, Rehabilitation and Restitution⁹. Retribution entails that offenders ought to suffer in some way for the improper advantage or inflicted unfair detriment upon others. Whereas deterrence is aimed toward a specific offender and its aim is to impose a sufficient penalty to discourage the offender from criminal behaviour. This in turn discourages individuals from committing the crime. Incapacitation is another form of enforcement which is designed to keep criminals away from society so that the public is protected from their misconduct. Rehabilitation aims at transforming an offender into a valuable member of society. Lastly, restitution is a victim orientated theory of punishment. The goal is to repair through state authority any hurt inflicted on the victim by the offender. Of the five

W. Wilson, *Criminal Law: Doctrine & Theory* (London: Sweet & Maxwell, 2003), 47

Simon E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005), 1
It is outlawed not only in Zambia but Austria, Belgium and France for motorists to drive without warning devices; equilateral triangle. In Zambia section 26 of the Roads and Road Traffic Act Chapter 464 of the Laws of Zambia provides for this offence.

Andrew Ashworth, *Principles of Criminal Law* (London: Oxford University Press, 1999), 16-18

objectives, deterrence is the aim applied in the penalty prescribed for the felony of aggravated robbery where a “firearm” is used.

2.1 Definition of aggravated robbery

Section 294(1) of the Penal Code defines aggravated robbery as:

Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life....

This definition provides that in order for the offence of aggravated robbery to be established two requirements must be met:

- a) a person must be armed with an offensive weapon or instrument or
- b) be together with one person or more

As earlier stated¹⁰ the focus is on the use of offensive weapon in aggravated robbery. The Penal Code in its interpretation section defines offensive weapon as:

Any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article¹¹.

From this definition can it be stated, first that an article encompasses a firearm and if so, which provisions of the law define it comprehensively? Secondly, if an “article” along this line of definition does not include a “firearm”, can it be concluded that the courts ought to take judicial notice that a firearm is recognised to be an “offensive weapon”? The Penal Code as shown above however, clearly categorises instruments *inter alia* knife, spear and arrow as offensive weapon but does not include a firearm.

¹⁰ Section 1, Introduction

¹¹ Section 4 (b), The Penal Code of Zambia Chapter 87 of the Laws of Zambia

In instances where the “offensive weapon” or instrument used is a knife, screwdriver or stone it appears no difficulty arises¹². Where a “firearm” is used however, it is recognised as an offensive weapon. For example in the case of *John Timothy and Feston Mwamba*, the court found that:

To establish an offence under section 294 (2) (a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act¹³.

This statement shows that where a “firearm” is used, the court recognises that the person prosecuting the case against the accused in aggravated robbery must prove that the weapon used is a “firearm” as defined by the Firearms Act. This draws the discussion back to the definition of “offensive weapon” as provided in the Penal Code. It is from the Penal Code that the definition of “firearm” as assigned by the Firearms Act is adopted.

Section 294 (3) of the Penal Code assigns the meaning of firearm to that provided by section 2 of the Firearms Act. Section 2 (a) of the Firearms Act of Zambia defines firearm as follows:

Any lethal barrelled weapon of any description from which any shot, bullet, bolt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile.

Section 2 (a) of the Firearms Act of Zambia gives a description of what a gun must look like for it to be considered as a “firearm”. For this reason, it can be argued that the definition of a firearm as provided by the Firearms Act of Zambia does not expressly state that a “firearm” is

¹²“Cousins Convicted for robbery,” Times of Zambia, August, 8, 2012, accessed on 16th September, 2012, http://article.wn.com/view/2012/08/07/Cousins_Convicted_for_Robbery/. The accused used stones, a knife and screw driver in a robbery. The Penal Code precisely defines the instruments used as offensive weapons.

¹³ 1977) ZR 394

categorised as an offensive weapon. Furthermore, the Act was enacted in 1969 and may be considered outdated¹⁴.

It is generally agreeable that a good legal system requires precise laws to guard against injustice in society.¹⁵ In Zambia where legislation is vague or ambiguous on particular issues, English law is applicable. This may be termed the 'reserve law'¹⁶. Therefore, an analysis of the English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia (hereinafter referred to as "the Extent of Application Act") and the Interpretation and General Provisions Act Chapter 2 of the laws of Zambia (hereinafter referred to as "the General Interpretation Act") will also be undertaken so as to determine whether these two pieces of legislation provide meaningful contribution to the definition of "offensive weapon" in Zambia.

3. Statement of problem

There are other notable elements other than use of "offensive weapon" required in proving aggravated robbery such as presence of theft, use or threat of force, before or immediately at the time of stealing and the use of force must be directed against any person. However, a critical examination of the definition of "offensive weapon" as provided by the Penal Code in its interpretation section shows that there is no mention of "firearm". The Penal Code however interprets instruments such as a knife and spear as offensive weapons. Section 294 (3) of the Penal Code further adopts the definition of firearm as provided by section 2 (a) of the Firearms

¹⁴It is outdated in the sense that from the time of its enactment in 1969 no amendment to the definitions provided has been made. The law is not meant to be static but dynamic, it must move with time, accessed on 16th September, 2012, Kalombo Mwansa, "Aggravated Robbery and the Death Penalty in Zambia: an Examination of the 1974 Penal Code Amendment Act (No.2)". *Zambia Law Journal Vol.16* (1984):73. Accessed on 16th September, 2012. http://www.biiicl.org/files/2305_country_report_zambia_ngandu.pdf

¹⁵ATH Smith, *Glanville Williams: Learning the Law* 14thed. (London: Sweet & Maxwell, 2010), 33

¹⁶Margaret. M. Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries* (Lusaka: UNZA Press, 2004), 85. The application of English Law is determined by an Act of Parliament.

Act, which gives a description of the components of a firearm. The Firearms Act itself does not expressly provide that a “firearm” is an offensive weapon under section 2. The gravity of the penalty for the offence of aggravated robbery is death where a firearm has been used¹⁷.

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In the absence of any legislation in Zambia on any subject, English statutes passed until 1999 will apply¹⁸. Section 3 of the Penal Code provides for the relationship between Zambian Law and English Law in force through the Extent of Application Act. The Theft Act of 1968 Chapter 60 of the Laws of England (hereinafter referred to as “the Theft Act of England”) provides for the offence of robbery which is different from aggravated robbery as provided by the Penal Code in Zambia. On one hand section 8 of the Theft Act of England, 1968 provides:

A person is guilty of robbery if he steals and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

Section 294 (1) of the Penal Code on the other hand provides:

Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery...

The definition of robbery under the Theft Act of England and that of aggravated robbery in the Penal Code respectively differ because under English law robbery is essentially an aggravated form of theft; there is no offence of aggravated robbery. In Zambia on the contrary, the offence

¹⁷Penal Code, section 294 (2), the use of a firearm as an offensive weapon or instrument in aggravated robbery is the basis for the death penalty. The need to have a precise definition of offensive weapon arises because the use of firearm is what changes the penalty from imprisonment for life to death. However, a knife and axe *inter alia* are instruments that are categorized as offensive and when used can equally cause apprehension in a victim and grave injury. Therefore, the penalty should be the same as that of firearm when applied.

¹⁸The amendment Act No. 14 of 2002 of the Extent of Application amends section 2 by inserting paragraph (e) which now extends the English law application in force until 1999. Prior to the amendment, the application went as far as 17th August, 1911. Margaret Munalula, *Legal Process*, 86.

of aggravated robbery is an offence separate from the offence of theft and robbery; the inclusion of offensive weapon is what changes the offence from robbery to aggravated robbery. In order to establish liability certain elements of the crime alleged to have been committed must be identified. The first is the conduct which is prohibited known as the *actus reus* or 'guilty act'¹⁹.

The second element is the state of mind or fault element known as the *mens rea* or 'guilty mind'.

This is the state of mind the accused must be proved to have as required by the definition of the offence charged. The accused must be aware of the possible consequences of the conduct²⁰.

Subsequently, under English law all elements of theft that is the *actus reus*- guilty act and *mens rea*- guilty mind must be proven before a conviction may be secured²¹. The general basis for

imposing liability in criminal law is that the defendant must be proved to have committed a guilty act whilst having had a guilty state of mind. Consequently, the two elements go together,

there can be no *actus reus* without the *mens rea*. As a result an accused is therefore not guilty of robbery if he believed that he has a legal right to deprive the victim of the property²². For

example in the case of *R v Robinson*²³, it was alleged that D, who was owed £ 7 by V's wife, approached V, brandishing a knife. A fight followed, during which V dropped a £ 5 note. D picked it up and demanded the remaining £ 2 owed to him. Allowing D's appeal against

¹⁹ Simon Kulusika, *Criminal Law in Zambia*, 33

²⁰ An example of *actus reus* is shown in *R v Miller* [1983] 2AC. 161 Z fell asleep whilst smoking. He woke up to find the mattress smouldering. He woke up and simply moved to sleep in another bedroom. The house caught fire and Z was convicted of arson. On appeal the House of Lords dismissed the appeal since Z failed to take measures that lie within his power to counteract the danger that he himself created. In *Chandler v DPP* [1962] 3ALL ER 314 the accused and others tried to enter an airfield to protest against nuclear weapons carried by aircraft flying from the base. They intended to prevent aircraft from taking off by restricting the runway. The accused appeal against conviction was dismissed because their intention to obstruct the runway was prejudicial to aircraft safety and state security. This is an example of the *mens rea*.

²¹ Section 1 (1) of the Theft Act defines theft: "as any person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it." The elements of theft comprise of the *actus reus*- appropriation, property and belong to another and the *mens rea*-dishonesty and intent permanently to deprive the owner.

²² Michael Jefferson, *Criminal Law* 6th ed. (Essex: Pearson and Education Limited, 2003), 477

²³ [1977] Crim LR 173

conviction for robbery, the Court of Appeal held that the prosecution had to prove that D was guilty of theft, and that he would not be if he honestly believed that he had a right in law to deprive V of the money, even though he knew he was not entitled to use the knife to get to it.

In other words if the theft is completed before the assault takes place then robbery cannot be proved, because of the requirement that the force must be used 'in order' to steal. This can be determined only on the facts of each case. Furthermore, section 8(2) of the Theft Act preserves the offence of assault with intent to rob, which is triable only on indictment and carries a maximum penalty on conviction of life imprisonment. The intent to rob may be proved from the surrounding circumstances and any admission or confession made by the defendant.

In common law, two separate standards of proof are recognised-proof beyond reasonable doubt and proof based on the balance of probabilities. Proof beyond reasonable doubt is the standard adopted while dealing with criminal cases while proof based on the balance of probabilities is the standard in use in case of civil suits.²⁴ According to Mwenda,²⁵ where one accuses another of committing an offence, the burden of proof requires the prosecution to prove that the accused has indeed violated a law and committed the offence in question. The general rule is that 'he who asserts must prove'. Consequently, the standard of proof is such that the doubt is one that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty. In the case of *Mwewa Muroho v The People*²⁶ the

²⁴ Janet Dine, James Gobert & William Wilson, *Cases & Materials on Criminal Law*, 5th ed. (London: Oxford University Press, 2006), 19

²⁵ Kenneth Mwenda, *Legal Aspects of Combating Corruption: The Cases of Zambia* (New York: Cambria Press, 2007), 446

²⁶ (2004) Z.R. 207 at page 210. The same principle was stated in *The People v Davies Mambwe* HK/51/2011 at page 15

Supreme Court of Zambia affirmed the position of the necessity to prove in criminal cases beyond reasonable doubt:

In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused, lies from beginning to end, on the prosecution. The standard of proof is high. The case must be proved beyond all reasonable doubt.

In the same way, the court in the *Zambian case of The People v Kajilo Muzungu* held that:

The law requires that the prosecution prove the case against the accused person beyond reasonable doubt. Should the court harbour any doubt as to the guilt of the accused, it is required by law to resolve that doubt in favour of the accused and to acquit him²⁷.

The court in these two cases above recognise the standard of prove beyond reasonable doubt. Therefore, according to the court the onus is on the prosecution to prove that all elements of an offence are met before an accused can be convicted. To achieve this, the prosecution must establish that the elements of robbery are proved beyond reasonable doubt. These elements include presence of theft, use or threat of force, before or immediately at the time of stealing and the use of force must be directed against any person²⁸. Subsequently, the standard of proof beyond reasonable doubt requires that should doubt arise in criminal matters, the court will acquit.

However, where a “firearm” has been used, it has been noted that: ‘the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act’²⁹. Therefore, the required standard of proof beyond reasonable doubt cannot be said to have been met by the prosecution. The Firearms Act of Zambia does not mention that a “firearm” is an offensive

²⁷ HKS/08/2011.

²⁸ Simon Kulusika, *Criminal Law*, 598.

²⁹ John Timothy and Feston Mwamba v The People. *Supra*, footnote 13, 5.

weapon in section 2. What the Firearms Act of Zambia has done is to give a description of the components of a firearm. As a result, the underlying principle of the administration of justice is not fully achieved³⁰. The failure for the achievement of justice can be attributed to the fact that prosecutors and courts continue to rely on definitions that have been in existence from the time of enactment of the Acts; as a result a practice appears to have been formed³¹. Therefore, a need to revisit the legal terminology of terms such as “offensive weapon” as defined by legislation arises.

4. Objectives of the study

- a. To critically analyse whether the definition of “offensive weapon” in the Penal Code in relation to the offence of aggravated robbery includes a firearm.
- b. To ascertain whether the current definition of “offensive weapon” in the Penal Code is adequately applied in deciding aggravated robbery cases.
- c. To critically analyse whether the application of English law to the Zambian law assists in understanding the definition of “offensive weapon”.

³⁰ Administration of justice refers to the rules of law that govern the detection, investigation, apprehension, interviewing and trial of persons suspected of crime and those persons whose responsibility it is to work within these rules (not confined to courts it also encompasses officers of the law). Lloyd Duhaime, *Duhaime's Legal Dictionary*, (Toronto: Advocates' Society, 1982), 237

³¹ In cases of aggravated robbery where a firearm is used, a practice seems to have developed by both the prosecution and court to rely on the provision of the Firearms Act section 2 without addressing the issue on whether the Penal Code encompasses a firearm in its definition of offensive weapon. For instance the case of *John Timothy and Feston Mwamba v the People* at page J15 and *The People v Friday Mwamba* [2011] ZMHC 4 at J14

5. Significance of the study

The general operation of the criminal justice system in Zambia cannot be overemphasised³². Prior to 1974, the penalty for aggravated robbery was imprisonment, where the convicted prisoner had to serve not less than 15 years. It can be argued that the reason for the increase in the penalty is to serve as a deterrent to potential armed robbers³³. The use of offensive weapons as a basis for the penalty of death in offences of aggravated robbery cannot be disputed especially in instances where a firearm is used. A "firearm" as described by the Firearms Act under section 2 (a) can cause grave harm when discharged. There have been a number of aggravated robbery cases that have been tried and convictions secured and it is recommendable that the aims and objectives of criminal law are achieved. However, the problem is that section 294 of the Penal Code that is applied by the administrators of justice gives rise to injustice. The aim of criminal law is to control misconduct and bring forth the objectives of criminal law; this cannot be achieved where the law applied is not clear as in the definition of offensive weapon where a firearm is used. Subsequently, from the time that the accused is charged and arrested up to the period of trial and conviction, justice cannot be said to have been served. For justice to be seen to be achieved in the implementation of the aim and objective of criminal law there is an urgent need to revisit the definition of offensive weapon in relation to aggravated robbery.

6. Methodology

The research methodology employed in this research is documentary analysis. The research critically analyses relevant legislation and precedents within the Zambian context. Secondary

³² Supra, footnote 6, 2

³³ Kalombo Mwansa, "Aggravated Robbery and the Death Penalty in Zambia". *Zambia Law Journal Vol.16*

data collection from text books, journals and the internet will also be undertaken. Further, since Zambia inherited its legal system from England at independence, reference will also be made to British legislation and case law.

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7. Conclusion

This chapter has provided the structure of the research starting with a general overview of the definition of “offensive weapon” and background material that has necessitated this study. The following chapters will build on chapter one and proceed to critically analyse the definition of offensive weapon and whether the application of English law in Zambia assists in the understanding of what is an offensive weapon as provided by the law.

CHAPTER TWO

AN ANALYSIS OF THE DEFINITION OF OFFENSIVE WEAPON AND ITS APPLICATION

1. Introduction

This chapter critically analyses the definition of “offensive” weapon and how it has been applied in prosecuting aggravated robbery cases. This analysis will be achieved using the rules of statutory interpretation³⁴. This research utilises both intrinsic and extrinsic aids to statutory interpretation in arriving at a conclusion³⁵. The Penal Code provides a meaning of “firearm” in addition to the Firearms Act of Zambia. This research will also analyse the Firearms Act of Zambia in order to determine its usefulness in understanding what offensive weapon is. Mention will also be made of the provisions of the Firearms Act 1968 Chapter 27 of the Laws of England (hereinafter referred to as “the Firearms Act of England”) so as to give a comparison between the Zambian and British approaches. In conformity with Article 18 (8) of the Constitution of Zambia³⁶, the Penal Code is the main source on criminal law as it prescribes a number of offences and corresponding penalties³⁷. The effect of this provision is to declare that criminal

³⁴Supra, footnote 1, 1

³⁵Intrinsic aids are those found within the statute being interpreted and can include long and short title of a statute, preamble, headings and side notes. While extrinsic aids consist of everything not found within the statute and can include dictionary definitions, legal text books and treaties.

³⁶A person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in written law'

³⁷Sections 43-383 prohibit various offences

offences in Zambia are as a general rule, statutory offences³⁸. This means that a person should not be prosecuted for an offence which is not defined by legislation with sufficient clarity³⁹.

There has been extensive research conducted in the field of criminal law with specific reference to aggravated robbery⁴⁰. A close examination of these cases reveals that particular attention has not been paid to the definition of offensive weapon⁴¹. The lack of clarity on whether a "firearm" is an offensive weapon is a matter requiring resolution in this research. The Penal Code in its definition categorises instruments such as a knife or a spear as offensive weapons but is silent with regard to a firearm⁴².

2. Analysis of the definition of "offensive weapon" in the Penal Code

The law cannot fulfil its role to regulate and maintain order if it cannot be understood. If written rules are to be obeyed, they must first be understood⁴³. It is for this reason that rules and principles of statutory interpretation are called into effect to resolve ambiguities, obscurities and uncertainties that may arise in a statute. Rules of statutory interpretation are a body of rules and principles that are used to construe the correct meaning of legislative provisions to be applied in practical situations⁴⁴. The definition of the term offensive weapon provided by the Penal Code

Simon Kulusika, *Criminal Law in Zambia*, 8

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The eminent author Simon Kulusika has written a text book on criminal law in Zambia and reference is given to aggravated robbery. Muna Ndulo & John Hatchard in their text of *A case Book on Criminal Law* at page 382-383, Malombo Mwansa, "Aggravated Robbery and the Death Penalty in Zambia," *Zambia Law Journal Vol.16*, Simon : 218-238 and The International Covenant on Civil and Political Rights in its communication No 0/1990:Zambia.11/17/1995 to the International Court of Justice. This was a case on aggravated robbery.

For example in the case of John Timothy and Feston Mwamba v The People; the court stated that the prosecution must prove that the weapon used was as a firearm within the meaning of the Firearms Act. The principle is also stated in the case of The People v Friday Mwamba.

Section 4 (b) does not expressly mention that a firearm is an offensive weapon

Margaret Munalula, *Legal Process*, 160

supra, footnote 31,11

can be subject to interpretation using these principles. Section 4 (b) of the Penal Code defines offensive weapon as:

Any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article.

This definition means that an offensive weapon is an article made or modified into something that produces an effect or result, or an injury that is in the process of being committed to the person. Furthermore the person must have in mind a specific purpose to reach a desired objective using the article.

Generally, interpretation of statutes can have an impact on the proper administration of justice and on the maintenance of and sustenance of the rule of law. Therefore, it can be argued that whenever a provision of the law is being construed there is an element of justice⁴⁵. Legislative drafting is not always as clear as it appears when enacted; as a result when a statute is applied there will always be cases for which the provisions are inadequate. This is because of lack of human prescience⁴⁶. Further, the English language is not an instrument of mathematical precision as Lord Denning said in *Seaford Court Estates Ltd v Asher*⁴⁷. Therefore statutory interpretation or more precisely judicial understanding of legal text is the process of assigning the meaning to the legislative text or provision under construction. According to Anyangwe⁴⁸, the rules of statutory interpretation include the literal rule, golden rule, mischief rule, fringe meaning and context rule. In order to understand the definition of ‘offensive weapon’ as provided by the Penal

⁴⁵ Justice is the fair and proper administration of laws which is a difficult and problematic concept that is beyond the scope of this research.

⁴⁶ D Mazumba, *Statutory Interpretation and its Implication for Zambian Courts with Special Reference to Fabian Kasonde and Others v Attorney General* (1995) Obligatory Essay, UNZA Law School, 2.

⁴⁷ [1949] 2 K.B.481. English language is not as precise as calculating a mathematical equation that is either black or white. English language is a shade of grey because words can have a number of connotations and not a single meaning when applied.

⁴⁸ Carlson Anyangwe, *An Outline of the Study of Jurisprudence* (Lusaka: UNZA Press, 2005), 98-103

Code, the rules of statutory interpretation shall be applied. Smith and Bailey state that other than the rules of statutory interpretation, there are aids that assist in the interpretation of statutes. Statutory aids to the interpretation of statutes include both intrinsic and extrinsic aids⁴⁹.

2.1. Meaning of the term “article”

Sometimes words of a statute may have a plain and straight forward meaning. It is the primary rule of interpretation; literal or plain meaning rule that if the meaning of the words is clear, it should be put into effect and indeed equated with the legislature’s intention. In *Mutale v The Attorney General*⁵⁰ the Supreme Court held that in using the literal rules of interpretation, the words in the statute are given their natural and grammatical meaning. Nothing is added and nothing is taken away. However, this research cannot apply the literal rule because it has identified a problem in the definition of ‘offensive weapon’ to which if the literal rule were to be applied it would cause a further ambiguity. If the literal rule was applied to the term “article” and the company of words it keeps then a firearm does not match the description of similar instruments such as knife, spear, axe and stones.

The golden rule entails that a court may depart from the ordinary meaning where that would lead to absurdity to produce a reasonable result. In *Grey v Pearson*⁵¹ Lord Wensleydale said:

... the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

⁴⁹Smith & Bailey, *The Modern English Legal System*, 3rd ed. (London: Sweet & Maxwell, 1996), 351

⁵⁰ (1976) ZR 139

⁵¹ (1857) 6 HL Cas 61

This statement means that words of a statute should be interpreted in its natural and ordinary meaning and its effect must be respected or observed. However, if that ordinary sense of words where to give rise to some inconsistency or contradiction between two or more parts of the same instrument, then the words may be changed or altered so as to avoid that absurdity and inconsistency. To this effect the Supreme Court of Zambia in the case of *Attorney General v Movement of Multiparty Development v Lewanika and 4 others*⁵² held that:

The golden rule is applied to avoid absurdity and the courts sometimes should allow themselves to construe a statute in such a way as to produce a reasonable result even though this could involve departing from the prima facie meaning of the word.

According to the Supreme Court of Zambia, the golden rule permits judges to read into the law and bring forth a reasonable result and not absurdity. Therefore, it is the courts responsibility to bring forth a reasonable result from the definition of “offensive weapon” by reading into the whole definition as provided by the Penal Code and thereby encompass a ‘firearm’ without adding to the ambiguity already existing.

The mischief rule of statutory interpretation is the doctrine that a statute should be interpreted by first identifying the problem that the statute was designed to remedy and then adopting a construction that will suppress the problem and advance the remedy⁵³. To this end judges may use this rule to add words to the statute in order to give it the meaning intended by Parliament⁵⁴. Therefore, in order to advance the remedy, disputed words are subjected to the scrutiny of

⁵² SCZ Judgment No. 2 of 1991

⁵³ Bryan A. Garner, *Black's Law Dictionary*, 1019

⁵⁴ *Lane v London Electricity Board* [1995] 1 All ER 158

principle, purpose, scope and object of the statute as a whole to see what mischief was intended to be off set. In the English case of *Nothman v Barnet Council*⁵⁵ it was found that:

Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it by reading words in if necessary so as to do what Parliament would have done had they had the situation in mind

The English courts have generally found that interpretation must be in accordance with what the reader believes the author must have been thinking at the time of the writing and no more. Therefore judges can read into a statute so as to give it a meaningful remedy which the drafter would have made if they had the situation in mind. This brings about a narrow meaning and in instances that such bring in contradictions and an unjust situation then judges have a duty to remedy the situation. This is done by reading into the statute if necessary so as to do what Parliament would have done if they had the very situation in mind. Therefore, it can be stated that the legislatures cannot have every situation in mind at the time that the statute is enacted. As a result it is important to note that statutes operate in a time-continuum and are generally of indefinite duration⁵⁶. In this regard the aim, purpose and scope of the Penal Code is to control misconduct by imputing penalties to offences that are precluded. As a result it can be stated that the definition of “offensive weapon” is meant to act as a guide as to what instruments can be used in criminal offences in helping determine the correct charge, an example of aggravated robbery.

The fringe meaning rule of statutory interpretation refers to a situation where a word may have wide or narrow meaning in theory and applications. The words of the statute as they stand do not give an answer to the question before the judge and the question is therefore legislative rather

⁵⁵ [1978] 1 ALLER 1243

⁵⁶ This rule is known as the Heydon’s Case (1585) 3 Co. Rep. 8

interpretive. This means that although words may have a core meaning they also have a fringe of uncertainty. In the *Zambian case of Attorney General v Steven Luguru*⁵⁷ it was espoused that this rule refers to a situation where a word may have wide or narrow meanings in theory and application outside the core meaning. As such when judges use this rule, they are often legislating and they try to give effect to the words contained in the statute.

Lastly, the context rule of statutory interpretation stipulates that in interpreting statutes, judges should always take into account the circumstances in which a particular Act was enacted. Judges should also look at what was in place before the Act came into force. The circumstances surrounding the use of a particular term or word are also looked at⁵⁸. Can it be stated that by analysing the company that the word article keeps, that a firearm on the one hand is an offensive weapon in that it is one made or adapted for use for causing or threatening injury and on the other hand, its offensive usage is dependent on the intention of the one using it. The term firearm is defined as: ‘a weapon that expels a projectile by the combustion of gunpowder or other explosive’⁵⁹. Subsequently, it is arguable that a firearm is a weapon when used can cause or threaten injury to the person. The second aspect of the definition: “intended by the person in question for such use” means that the person must use the weapon for the purpose of causing or threatening injury. The issue arises in the third sentence of the definition: “...includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article”. In cases where a “firearm” is used it is deemed to be an offensive weapon however, in view of the provision it means that offensive weapons include knife, spear *inter alia* or similar article. Therefore, can it be argued that a

⁵⁷ SCZ Judgment No. 2 of 2001

⁵⁸ Clement M. Kasonde, *Statutory Interpretation and its impact on the Proper Administration of Justice and the Rule of Law* (2007) Obligatory Essay, UNZA Law School, 16. The context rule entails understanding the word by the company it keeps (*Noscitur a sociis*)

⁵⁹ Bryan A. Garner, *Black's Law Dictionary*, 666

firearm is an article similar to the instruments mentioned? The answer is in the negative. What then is an article?

This research now addresses the issue of intrinsic and extrinsic aids to statutory interpretation. According to Smith and Bailey, intrinsic aids may include 'definition sections' of the statute in which the meaning of words and phrases found in the statute are explained⁶⁰. In this case reference can be made to the interpretation section 4(b) of the Penal Code which has no definition of the term article. Smith and Bailey further include an examination of the whole of a statute, or at least those parts which deal with the subject matter of the provision to be interpreted; these should give some indication of the overall purpose of the legislation. It may show that a particular interpretation of that provision will lead to absurdity when taken with another section. For example, section 294(3) of the Penal Code assigns the meaning of firearm as that provided by section 2 of the Firearms Act. Section 2 of the Firearms Act provides a description of a firearm and does not necessary state that a firearm is an offensive weapon.

Intrinsic aids to statutory interpretation may include headings, titles and explanatory notes found in a statute. The Penal Code prescribes offences in categories for example the heading of 'offences against the person' has a number of offences falling under different titles such as Murder and Manslaughter; theft, robbery and aggravated robbery. Aggravated robbery is categorised under the heading 'Robbery and Extortion'. Robbery as a title gives a general outlook of offences that involve the use or threat of violence in depriving one of their property and the prescribed punishment. Section 297 (1) of the Penal Code provides for extortion by

⁶⁰ *The Modern English Legal System*, 390-403

giving a number of situations in which the offence can be said to be committed⁶¹. However, the Penal Code does not expressly define extortion. What is more, explanatory notes as per Lord Steyn in an English case of *West Minister Council v National Asylum Support Service* stated that: ‘as intrinsic aids they cast light on the objective setting of a particular section’⁶². This statement means that explanatory notes are helpful as they assist in easy location and understanding of a particular section, before reading it in depth. Nonetheless, the research finds the aids not as helpful in determining whether an article can be regarded as a “firearm”.

Other than intrinsic aids, there are several extrinsic aids that can be consulted in interpreting statutes namely; dictionaries and other literary sources such as text books. The word ‘article’ in the *Black’s Law Dictionary* is defined *inter alia* as: ‘generally a particular item or thing or a separate and distinct part (as a clause or stipulation) of writing especially in a contract, statute or constitution’⁶³. Nowhere in this definition is a “firearm” encompassed as an article.

As a rule courts follow the doctrine of judicial precedent as a result of the principle of *stare decisis*⁶⁴. The principle of *stare decisis* is binding on lower courts once made by the highest court in a state within the same provisional jurisdiction; Supreme Court of Zambia and the decisions made are legally right⁶⁵. Apart from this, the Supreme Court of Zambia has the power to overrule itself in a situation where it has made a mistake however; it will not do so lightly⁶⁶. This is because the court will as a rule, follow its own previous decisions in accordance with the

⁶¹ It is the intent of any person to gain or obtain anything or compelling some action by illegal means as by force or coercion; or in writing from any person.

⁶² [2002] UKHL 38. These are notes that appear at the right end of the page near the title.

⁶³ Bryan A. Garner, 119

⁶⁴ Latin word meaning to stand by decided cases. Margaret M. Munalula, *Legal Process*, 210.

⁶⁵ M. Perell, “Stare decisis and Techniques of Legal Reasoning and Legal Argument” *Legal Research Update 11* (1987). Accessed on 5th August, 2013, <http://legalresearch.org/writing-analysis/stare-decisis-techniques/>

⁶⁶ Margaret Munalula, *Legal Process*, 210. The principle of *stare decisis* brings about certainty and stability in law and also the achievement in the administration of justice and fairness.

principle of *stare decisis* and hence the presumption that the Supreme Court of Zambia never acts mistakenly or *per incuriam*⁶⁷. The doctrine of precedent as espoused by Munalula⁶⁸ is based on the *ratio decidendi* of a case or the rule upon which the decision is founded. As a result, the courts decide cases the same way when presented with legally material facts that are the same. Therefore, the practice followed by the courts in the past may be a guide to interpretation⁶⁹. For instance, in reference to the term “offensive weapon” it is a practice of the court that the term firearm be assigned the meaning of section 2 under the Firearms Act. It can be argued that the court in cases of aggravated robbery where a firearm has been used generally expects the prosecution to prove that the firearm is one as assigned by the Firearms Act⁷⁰. Invariably, section 2 (a) of the Firearms Act does not clearly state that a firearm is an offensive weapon.

In contrast the Court of Appeal in England in *R v Simpson*⁷¹ where the respondent, without lawful authority or reasonable excuse, had with her in an aerodrome in the United Kingdom an article, namely a butterfly knife, made or adapted for causing injury contrary to section 4(4) of the Aviation Security Act 1982. The court found that there are three categories of offensive weapon:

(a) An article made for use for causing injury to the person, commonly known as weapons offensive per se. This would include obvious weapons such as bayonets, flick knives, knuckledusters, rice flails etc, which have no apparent innocent use.

(b) an article adapted for use for causing injury to the person This would include items that may have had an innocent use, but which have been altered, such as a broken bottle, a hammer with a Stanley knife taped to the head, a washing-up bottle filled with ammonia or acid, a length of wood with protruding nails, etc.

⁶⁷ An opinion handed down by an appellate court without identifying the individual judge who wrote the opinion. Byran A. Garner, *Blacks's Law Dictionary*, 1125

⁶⁸ Legal Process, 210. *Ratio decidendi* is made up of material facts of the case and the decision thereon.

⁶⁹ Smith & Bailey, *The Modern English Legal System*, 400.

⁷⁰ Supra, footnote 13, 5. This is an accepted practice by the court. However, the research does not agree to this practice because the court in essence does not critically analyze the definition of offensive weapon.

⁷¹ [1983] 1 WLR 1494

(c) An article which the person carrying it intends to use for the purpose of causing injury to the person. This is perhaps the most difficult of the three categories to define, as the weapon's use is dependent on the intention of the person carrying it. Such matters will be for the police, the prosecuting authorities and the courts to decide on and it is anticipated that most cases will be clear-cut.

✱

From the Simpson case, an article has been broken into three categories of offensive weapon, but none of which have included a firearm. Nonetheless, it is important to note that an effort has been made by the court in the case of *R v Simpson*⁷² to at least differentiate the categories of knives. As a consequence, the courts in Zambia can equally take steps in categorising offensive weapons.

Another extrinsic aid may include other statutes in *pari materia*; these are related statutes dealing with the same subject matter as the provision in question may be considered both as part of the context and to resolve ambiguities.

2.2 Judicial notice of the term article

Judicial notice is a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well known, or so authoritatively attested, that it cannot reasonably be doubted⁷³. In Zambia there is no specific codified statute that provides expressly for judicial notice. For judicial notice to be applied the courts look for two elements, the kind of fact and the kind of law⁷⁴. A judicially noticed fact must be one not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

⁷² Supra, footnote 68, 23

⁷³ Supra, footnote 2, 1

⁷⁴ Albert Shamash, "A Tangled Web? The Developing Law of Judicial Notice of Website Information" *New Hampshire Bar Journal* (Spring 2009). <http://www.nhbar.org/uploads/pdf/BJ-50-38.pdf>. Accessed 1st June, 2013.

questioned. Whereas, a court may take judicial notice of law which includes the decisional, constitutional, and public statutory law, rules of court, regulations of governmental agencies, and ordinances⁷⁵. Therefore, the research will rely on the available precedence that has discussed the issue of judicial notice.

In an appeal case against the conviction of murder, the court in a Zambian case of *Mutambo and Five Others v The People*⁷⁶ held that: 'Judges are entitled to take judicial notice of that which is the common knowledge of the great majority of mankind'. In other words the court was stating that it is permitted to take judicial notice of facts that are known to be such by the majority of the population and not by a few. For this reason the court took judicial notice of the fact that there had been violent friction for some time between the Lumpa sect and United National Independent Party and that the Party formed the Government both facts which were so notorious as to be a matter of judicial knowledge. Similarly in the case of *Shamwana and Others v The People* reference was given to the principle of judicial notice as follows:

Judicial notice refers to facts which a Judge can be called upon to receive and to act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer⁷⁷.

Not only can the court take judicial notice of common knowledge known by the majority, it can also take such notice based on its general knowledge or it has the discretion to refer by way of inquiries to any source of information it deems fit. Imperatively the court may be called upon to take judicial notice on the aspect of the article encompassing a firearm. For instance in *Mwape v*

Albert Shamash, "A Tangled Web? The Developing Law of Judicial Notice of Website Information" New Hampshire Bar Journal. 2006) Z.R. 15
2005) ZR 415

*The People*⁷⁸ the appellant was convicted of aggravated robbery. It was alleged that with others he robbed a ZCBC shop during which time a night watch man was stabbed and generally assaulted. The state argued that the court should have taken judicial notice that ZCBC shops were guarded by watchmen and that consequently the appellant knew or ought to have known that violence would be used against the watchman concerned. Furthermore, in instances where the court does not take judicial notice of the facts, any party to a case may call upon the court to take judicial notice of any fact. This can include the aspect of the article. In the case of *Kapata v The People*, the court held that:

In so far as the utilisation of personal knowledge is concerned, the general rule is that a court may, in arriving at its decision in a particular case, act on its own personal knowledge of facts of a general nature that is notorious facts relevant to the case⁷⁹.

In most aggravated robbery cases brought before the court, neither the court nor the party has ever raised the issue of judicial notice on the issue of offensive weapon. For example in the case of *John Timothy and Feston Mwamba v The People*, the court held that:

To establish an offence under section 294 (2) (a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act⁸⁰.

In addition moreover, in the case of *The People v Friday Mwamba*⁸¹, the court relied on section 294 (2) (a) and section 294 (3) of the Penal Code on convicting the accused for aggravated robbery. The provisions state as follows:

⁷⁸ (1979) ZR 54

⁷⁹ (1984) Z.R. 47

⁸⁰ Supra, footnote 13, 5

⁸¹ [2011] ZMHC 4

(2) Notwithstanding the provisions of subsection (1), the penalty for the felony of aggravated robbery under subsection (1) shall be death- (a) where the offensive weapon or instrument is a firearm unless the Court is satisfied by the evidence in the case that the accused person was not armed with a firearm.

(3) In this section “Firearm” has the meaning assigned to it in section two of the Firearm Act.

Similarly in the Zambian case of *Kayamba and Albert Kapopo v The People*,⁸² the court on appeal that the firearm used was not a firearm within the meaning of the Firearms Act convicted the accused for aggravated robbery on the basis of section 2 of the Firearms Act. The court made reference to the case of *John Timothy and Feston Mwamba v The People*⁸³ in its ruling based on the doctrine of *stare decisis*.

In short, it has been shown by the case law studied that when cases of aggravated robbery where a “firearm” was used come before court, it must be proven that the accused was armed with any “offence weapon” and the accused was with one or more persons. However, in proving whether the weapon used is a firearm the courts refer to the Firearms Act section 2. It is evident that neither the court nor the party involved has ever raised the need for judicial notice concerning the definition of offensive weapon. Therefore, it can be argued that when the court takes judicial notice on an article encompassing a “firearm”, then no need would arise in cases of aggravated robbery as the courts rely on the principle of *stare decisis*⁸⁴.

3. Critical analysis of the term “firearm” as defined by the Firearms Act

Section 2 (a) of the Firearms Act defines a firearm as follows:

⁸² [2000] ZMSC 68

⁸³ (1977) ZR 394

⁸⁴ Supra, footnote 63, 22

Any lethal barrelled weapon of any description from which any shot, bullet, bolt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile.

In this definition, the Firearms Act gives a description of what a firearm must look like for it to be considered as a firearm. For this reason, it can be argued that the definition of a firearm as provided by the Firearms Act does not expressly state that a firearm is categorised as an offensive weapon. However, it must be noted that section 49 (5) of the Firearms Act states that:

A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any missile or noxious liquid or gas, as the case may be, be deemed to be an offensive weapon or instrument within the meaning of sections two hundred and ninety-four and two hundred and ninety-five and of paragraphs (a) and (b) of section three hundred and five of the Penal Code.

Therefore, the Penal Code's reference to section 2 of the Firearms Act is superfluous, because section 49 (5) clearly stipulates that a firearm is an offensive weapon. To this effect the court in *Jordan Nkoloma v The People*⁸⁵ held that an imitation firearm just like a firearm is an offensive weapon.

This research refers to the Firearms Act of England so as to have insight into what it provides in comparison to the Firearms Act of Zambia. The Firearms Act of England defines a firearm as:

A lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged which includes:

- a) any prohibited weapon whether it is such a lethal weapon as aforesaid or not; and
- b) any component part of such a lethal or prohibited weapon; and
- c) Any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon⁸⁶.

⁸⁵ (1978) Z.R. 278

⁸⁶ Section 57 (1)

Further section 5 of the Firearms Act 1968 gives a detailed description of a firearm *inter alia*;

any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger; any self-loading or pump-action rifle other than one which is chambered for .22 rim-fire cartridges and any smooth-bore revolver gun other than one which is chambered for 9mm. rim-fire cartridges or loaded at the muzzle end of each chamber.

In contrast the description of “firearm” provided by section 2 of the Firearms Act of Zambia is not as detailed as that provided by section 5 of the Firearms Act of England. This means that the stakeholders in the prosecution of the accused work on assumptions or inference as to the inclusion of “firearm” as an offensive weapon which in turn compromises the administration of justice. Further, in criminal cases the standard of proof is high; beyond reasonable doubt. In view of this description given in the Firearms Act of England, need arises for the Penal Code and the courts decisions to be reviewed as reliance is based on the wrong section of the Firearms Act of Zambia.

As one might expect case law under English jurisprudence discusses issues of firearm. Subsequently, English case law defines firearm as follows: In *Moore v Gooderham*,⁸⁷ the court looked at the word ‘lethal’ and held that the weapon in question must be one likely to cause injury of the sort which might result in death. They rejected a contention that a lethal weapon was one which was merely capable of causing injury though not injury of the sort likely to cause death. It can be argued that this decision is contrary to the element of apprehension caused in a victim because of the weapon used that needs to be proved under robbery. Section 8(1) of the Theft Act 1968, Chapter 60 of the Laws of England (hereinafter referred to as “the Theft Act of England 1968”) provides:

⁸⁷ [1960] 3 All E.R. 575

A person is guilty of robbery if he steals and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

Therefore, a weapon such as firearm is lethal irrespective of the fact that it is one that can cause death or not. The importance of this ruling however, is that in as much as the term 'lethal' is a complex issue, only a court can decide whether any particular weapon is a firearm for the purposes of the Act.

Furthermore, in *Grace v DPP*⁸⁸ the divisional court held that the prosecution must prove that the firearm 'from which any shot, bullet or other missile can be discharged' has to be capable of discharging a missile either in its present state or with adaptation. To prove that a weapon is a firearm, it is essential to call evidence as to whether a bullet or missile can be discharged from the weapon or which can be adapted to discharge any missile. In this case the conviction was quashed as there was no evidence that the air rifle could have been fired.

In *R v Clarke*⁸⁹ it was stated that the 'component parts' of a prohibited weapon is itself a prohibited weapon. Although there is no statutory definition, the Home Office Guidance to the Police states the following:

The term "component part" may be held to include (i) the barrel, chamber, cylinder, (ii) frame, body or receiver, (iii) breech, block, bolt or other mechanism for containing the charge at the rear of the chamber (iv), any other part of the firearm upon which the pressure caused by firing the weapon impinges directly. Magazines, sights and furniture are not considered component parts⁹⁰.

This statement is of importance in that although there is no statute defining the term "component parts" steps have been taken to ensure that a breakdown or description of the parts of a "firearm"

⁸⁸[1989] Crim L.R.365

⁸⁹(F), 82 Cr App R 308, CA

⁹⁰*R v Clarke* (F), 82 Cr App R 308, CA

are defined thus no doubt arise. It is clear from the cases that English courts have taken an active role in not only interpreting legislation but also assisting in making laws that are of relevance in matters where the legislature would not have foreseen. This is seen in the manner in which the court in its seating applied to the law a definition that was not founded by statute. Subsequently, it has been shown that section 2 of the Firearms Act of Zambia does not give a clear breakdown of the “firearm” nor does it state that it is an “offensive weapon”. Therefore, an example may be borrowed from the steps taken by the Home Office in guiding the police on a term not defined by statute in **R v Clarke**⁹¹.

Implicitly the Police can best take this role of ensuring that a clear breakdown of “firearm” is provided or incorporate that a “firearm” is an offensive weapon. This can be made possible by the concept of delegated legislation which is legislation made by a person or body other than Parliament⁹². Delegated legislation can be used to make technical changes to the law, such as amending definitions under given statutes. Accordingly, Article 62 of the Constitution of Zambia confers the legislative powers of the Republic of Zambia in Parliament, which is made up of the President and the National Assembly. Notwithstanding this provision, Article 80(1) of the Constitution of Zambia provides that Parliament can confer on any person or authority the power to make statutory instruments that is instruments, which have the force of law⁹³. Another example of delegated legislation other than statutory instrument is by-laws. By-laws have been defined as rules made by some authority subordinate to the legislature for the regulation, administration or management of a certain district, property, undertaking; and binding on all

⁹¹ Supra, footnote 89, 30

⁹² Delegated legislation is also referred to as secondary legislation. Parliament through an Act of Parliament can permit another body or person to make legislation. This legislation must be in accordance with the purposes laid down in the Act of Parliament. Law Teacher “Delegated Legislation.” Accessed on 5th August, 2013, <http://www.lawteacher.net/english-legal-system/resources/delegated-legislation.php>

⁹³ The General Interpretation Act defines statutory instrument as any proclamation, regulation, order, rule, notice or other instrument (not being an Act of Parliament) of a legislative, as distinct from an executive, character.

persons who come within their scope⁹⁴. These empower authorities to make laws which suit their area. Therefore, the Police need not always wait for the legislature to respond by enacting laws but they can be empowered by way of delegated legislation in formulating laws that can be of guidance to the court so long it is not repugnant to the scope of the Penal Code.

4. Conclusion

To sum up, this chapter in its analysis of the definition of “offensive weapon” as provided by the Penal Code in section 4 (b) applied the rules of statutory interpretation and the principle of judicial notice. This was done in order to determine whether a “firearm” as an instrument used in aggravated robbery is an offensive weapon as defined by the Penal Code. Furthermore, section 2 (a) the Firearms Act of Zambia was analysed as the Penal Code makes reference to it. To which, the Penal Code’s reference to section 2 (a) of the Firearms Act is superfluous. Since Zambia inherited its laws from Britain, the Firearms Act of England was discussed so as to have insight on whether the English law defines a “firearm” as an “offensive weapon” in comparison to section 2 of the Firearms Act of Zambia. To conclude, the definition of offensive weapon as provided by the Penal Code does not include a firearm. The next chapter will evaluate English jurisprudence to have insight on how “offensive weapon” has been defined in aggravated robbery.

⁹⁴ Bryan A. Garner, *Black's Law Dictionary*, 213-214

CHAPTER THREE

AN EVALUATION OF ROBBERY UNDER THE ENGLISH JURISDICTION

1. Introduction

This Chapter evaluates the offence of robbery as provided by the Theft Act of England in order to determine whether English law can assist in the examination of the definition of “offensive weapon” to include a “firearm” in Zambia as provided by the Penal Code. This is because the Penal Code does not define nor include “firearm” in its definition. Therefore, in the absence of any legislation in Zambia on any subject, English statutes passed until 1999 will apply⁹⁵.

2. Application of English law in Zambia

There is a relationship between Zambian Law and English Law as a result of section 3 of the Penal Code which provides that: “this Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England”. The application of English Law is determined by an Act of Parliament⁹⁶. As a consequence, the English Law (Extent of Application) Act, Cap.11 of the Laws of Zambia (hereinafter referred to as “the Extent of Application Act”) shows the existence of a relationship between English Law and Zambian Law. The problem is that the Extent of Application Act provides for the application of common law, doctrines of equity and statutes, that were in force in England until 1999⁹⁷.

⁹⁵ Supra, footnote 18,7

⁹⁶ Supra, footnote 16, 6

⁹⁷ Supra, footnote, 18,7

This is a problem because most statutes in England have undergone major reforms to suit the current environment in which society now finds it⁹⁸. Although it must be stated that the Extent of Application Act does not expressly limit the reception of English statutes of general application.

In *Ruth Kumbi v Robinson Kaleb Zulu*,⁹⁹ the courts were of the opinion that:

Extent of Application Act no longer merely filled gaps in our rules of procedure but is now binding in its entirety on our courts of law. The intention of the legislature is to ensure consistency, uniformity and fairness in determining cases where the relevant provisions contained terms which are unclear and ambiguous.

Subsequently, courts in Zambia are expected to rely on principles of interpretation developed by English courts of criminal jurisdiction, but this must be in conformity with prevailing circumstances in the legal order of Zambia¹⁰⁰. As a result in the case of *DPP v Chirwa*¹⁰¹ the court found that: 'It is only correct English interpretation, which if consistent and not expressly provided against, must be used in interpreting the Penal Code'. Further to the courts holding in *DPP v Chirwa*,¹⁰² the interpretation section of the Penal Code is meant to be a guide not a directive to the courts of criminal jurisdiction in Zambia as the courts can examine the English decisions to see whether they have been correctly decided before using them in interpreting law in Zambia. Therefore, with regard English law on robbery, the Theft Act of England is what is applicable. The question arising from this discussion is whether English law can clearly assist with the interpretation of the term offensive weapon under Zambian jurisdiction.

⁹⁸ An example, the Firearms Act 1968 has undergone the following amendments; Firearms (Amendment) 1988, 1992 and 1997 which regulates the manufacture, sale and use and possession of firearms.

⁹⁹ SCZ No. 19 of 2007

¹⁰⁰ Simon Kulusika, *Criminal Law*, 9

¹⁰¹ (1968) ZR 28

¹⁰² (1968) ZR 28

3. Analysis of the Theft Act 1968 Chapter 60 of the Laws of England

The Theft Act of England was based on the Eighth Report of the Criminal Law Revision Committee, Theft and Related Offences, 1966¹⁰³. The committee decided that the law required thorough overhauling because it was complex and failed to tackle several instances of dishonest dealing with property. The English jurisprudence provides for robbery under section 8 (1) of the Theft Act of England and not aggravated robbery as provided in Zambia.

On one hand section 8 of the Theft Act of England, 1968 provides:

A person is guilty of robbery if he steals and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

Section 294 (1) of the Penal Code on the other hand provides:

Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery...

Accordingly, robbery is essentially an aggravated form of stealing which combines theft and assault, but which may lead to a greater potential penalty than if each of these offences had been charged separately¹⁰⁴. As robbery is an aggravated form of stealing, it follows that if a defendant is not guilty of theft he cannot be guilty of robbery¹⁰⁵. Subsequently, all elements of theft that is the *actus reus and mens rea*¹⁰⁶ must be proven before a conviction may be secured. Notably, the

¹⁰³ Michael Jefferson, *Criminal Law*, 431

¹⁰⁴ Janet Dine, James Gobert & William Wilson, *Cases and Materials on Criminal Law*, 409

¹⁰⁵ The court held this position in *R v Robinson* [1977] Crim LR 173

¹⁰⁶ *Supra*, footnote 19, 8

provision of robbery under English law is similar to the provision of robbery as provided in section 292 (1) of the Penal Code which states:

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained...

Nonetheless, the definition of robbery under the Theft Act of England and that of aggravated robbery in the Penal Code respectively differ because under English law robbery is essentially an aggravated form of theft; there is no offence of aggravated robbery. In Zambia on the contrary, the offence of aggravated robbery is an offence separate from the offence of robbery¹⁰⁷; the inclusion of “offensive weapon” is what changes the offence from robbery to aggravated robbery. Apart from this the provision on robbery under section 8 (1) of the Theft Act of England does not mention issues of offensive weapon. Therefore, as robbery is a form of aggravated theft under English law, the research focuses on theft and robbery respectively as provided by the Theft Act of England.

3.1 Definition of theft and its elements

The Theft Act of England, 1968 in section 1 (1) provides that:

Any person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

¹⁰⁷ Section 292 (1) provides that on conviction of robbery, punishment for the offence is imprisonment for fourteen years. While section 294 (2) (a) provides the penalty for the felony of aggravated robbery under subsection (1) shall be death where the offensive weapon or instrument is a firearm...

The section can be broken down into (a) an appropriation,¹⁰⁸ (b) of property,¹⁰⁹ (c) which belongs to another¹¹⁰, (d) dishonestly¹¹¹ and (e) with intent permanently to deprive the person to whom the property belongs of that property¹¹².

Despite the Penal Code making reference to English law in cases of lacuna, English law provisions on theft do not assist the research in its analysis on whether the definition of “offensive weapon” encompasses a “firearm” under section 4 (b) of the Penal Code.

3.2 Definition of robbery and its elements

Section 8 (1) of the Act provides that:

A person is guilty of robbery if he steals and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

This shows that section 8 is satisfied only if the defendant is found to have used force on any person and whether that force caused apprehension in the person. The question arising is whether the force must be used to overcome resistance to the theft or is force used to gain possession of an article? In *R v Donaghy*,¹¹³ the accused ordered the taxi driver to take him from Newmarket to London and made threats to his life. Once in London he stole twenty-two pounds from the driver. He was not held guilty of robbery because the threats were not made in order to take the money.

¹⁰⁸ Section 3(1) of the Thefts Act of England 1968 defines appropriation *inter alia*, “any assumption... of the rights of the owner. This is the *actus reus* of the crime.

¹⁰⁹ Section 4 (1) of the Thefts Act of England 1968 defines property *inter alia* “money and all other property... This is the *actus reus* of the crime.

¹¹⁰ Section 5 (1) of the Thefts Act of England 1968 stipulates that “property shall be regarded as belonging to any person having possession or control of it... This is the *actus reus* of the crime.

¹¹¹ Section 2 of the Thefts Act of England 1968 does not expressly define dishonesty. This is the *mens rea* of the crime and key concept in theft.

¹¹² Section 6 of the Thefts Act of England 1968 provides that the intention of the defendant must be to deprive the victim of the whole of his interest in the property. This is the *mens reas* of the crime

¹¹³ [1981] Crim LR 644

The force must be used 'on' the person. An example is putting a hand over the victim's mouth to stop her screaming¹¹⁴. It is imperative to note that the section states that the force be used 'on any person' not 'against'. In *Corcoran v Anderton*¹¹⁵ there was robbery where a handbag was tugged away from the victim, even though she did not lose control. This simply shows that an accused is guilty of robbery even when he has not been successful. The Criminal Law Revision Committee responsible for drafting the Theft Act of England, 1968 said that they would not regard mere snatching of property, such as a handbag, from an unresisting owner as using force for the purpose of the definition. Therefore, it can be stated that in the determination of what amounts to force is a matter for the jury to decide.

Further, the Criminal Law Revision Report stipulated that it is not robbery where the accused uses force to escape. The threat must be one which puts the victim 'there and then' in fear of force¹¹⁶. Therefore a future threat is not sufficient. In the *Hale* case, counsel submitted that the theft was completed when the jewellery box was first seized and therefore any force thereafter could not have been 'immediately before or at the time of stealing'. The issue of appropriation arises under robbery. Appropriation is a continuing act, thereby it cannot cease at the moment when the accused takes a hold of the property. This is because issues of ownership rights come in play. Moreover the intention to permanently deprive the owner of the property (*mens rea*) which accompanies the assumption of the owner's rights is a continuing one at all material time. As a result, like in the 'use of force' it is for the jury to determine whether the appropriation has been completed.

¹¹⁴ *R v Hale* [1978] 68 Cr App R 415. The two defendants broke into a woman's home. One went upstairs and took some jewellery from her bedroom. After taking the jewellery the two of them tied her up. They were convicted of robbery and appealed on the grounds that the force came after they had appropriated the jewellery and thus did not come within the requirement of being immediately before or at the time of stealing.

¹¹⁵ [1980] 71 Cr App R 104.
¹¹⁶ Michael Jefferson, *Criminal Law*, 478

Unfortunately, according to Jefferson, the Theft Act of England has not turned out in the way that its progenitors hoped. Interpretation of the Act has led to difficulties even in simple situations. For example offences overlap and there are problems with key concepts such as dishonesty. Where the statute looks as if it does not cover certain forms of conduct the courts have sometimes read the statute widely to convict the 'manifestly guilty'¹¹⁷. This phenomenon is especially common in theft. To this effect in *R v Hallam* the Court of appeal found that:

The 1968 Act was in urgent need of simplification and modernisation because juries should not 'grapple' with concepts and public money should not be spent on hours of semantic argument divorced from the real merits of the case¹¹⁸.

Does the Theft Act of England assist the research in its analysis of the definition of offensive weapon as provided by the Penal Code? It has already been stated that the definition of robbery under English law differs from that of aggravated robbery in the Penal Code of Zambia¹¹⁹. Under English law theft forms part of the definition of the crimes of robbery; there is no offence of aggravated robbery. Subsequently, all elements of theft that is the *actus reus* and *mens rea* must be proven before a conviction may be secured. As a result, an accused is therefore not guilty of robbery if he believed that he has a legal right to deprive the victim of the property. Whereas in Zambia, theft is an offence separate from aggravated robbery under section 264 of the Penal Code. In view of the aforementioned, theft has different penalties in relation to the kind of theft involved for example section 276 prescribes a penalty of imprisonment for seven years for offences relating to stealing of goods. Section 277 prescribes a penalty of imprisonment for fifteen years where the accused is in public service. It can be argued that under aggravated robbery in Zambia the emphasis is on proving that an offensive weapon was used and the penalty being death regardless of the state of mind of the accused where a firearm is used. To sum up,

¹¹⁷ Michael Jefferson, *Criminal Law*, 431

¹¹⁸ [1995] Crim LR 323

¹¹⁹ Section 3, Statement of problem

the intention of the Extent of Application Act is to ensure consistency, uniformity and fairness in determining cases where the relevant provisions contained terms which are unclear and ambiguous as stated by the court in the case of *Ruth Kumbi v Robinson Kaleb Zulu*¹²⁰. In addition, in the Zambian case of *DPP v Chirwa*,¹²¹ the court of Zambia found that English interpretation can only be correctly applied when interpreting the Penal Code if it is consistent and not expressly provided against. Therefore, in line with the court's opinion in the Ruth Kumbi case, the research may refer to the Theft Act of England in determining whether assistance can be obtained in understanding the definition of "offensive weapon" as provided by the Penal Code. However, as to whether the Theft Act of England assists in understanding with clarity the definition of "offensive weapon" as provided by the Penal Code, it can be argued that the provisions of the Theft Act of England on robbery is inconsistent with the provisions on aggravated robbery by the Penal Code. Therefore, the Theft Act of England offers no assistance in the research's analysis of the definition of offensive weapon.

Regardless of the position taken by the research that the Theft Act of England offers no assistance, it is important to learn from the number of amendments made to the Theft Act. For example the Theft (amendment) Act 1997 of England made changes to its section 15 by the insertion of section 15A providing for the 'obtaining a money transfer by deception' and by the insertion of section 24A providing for 'dishonestly retaining a wrongful credit'. These amendments try to work on the complexity of the term dishonesty. The amendments indicate the operation and active role of both the legislature and the judiciary in ensuring that the law is in line with the dynamics of society.

4. Conclusion

In short, this chapter evaluated the offence of robbery as provided by the Theft Act of England in order to evaluate whether English law can be of assistance in determining whether “offensive weapon” includes a “firearm” under Zambian law. Reference to English law was conducted because in instances of lacuna in Zambian legislation, the Penal Code and the Extent of Application Act allows for English interpretation to be applied. Since under English law robbery is an aggravated form of theft; this research evaluated theft and robbery with its elements respectively. This was undertaken in order to have insight on whether under the offence of robbery a “firearm” is defined as “offensive weapon”. In conclusion English law provides for a different offence from that of aggravated robbery as provided by the Penal Code. Therefore, the Theft Act of England does not assist in the analysis of the definition of offensive weapon as defined by the Penal Code.

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