

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW



I RECOMMEND THAT THE OBLIGATORY ESSAY PREPARED UNDER
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THE IMPACT OF NON-COMPLIANCE WITH THE
JUDGES' RULES IN ZAMBIA

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Rule of law — in Zambia

THE IMPACT OF NON-COMPLIANCE WITH THE
JUDGES' RULES IN ZAMBIA

BY

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SEPTEMBER, 1993

THE UNIVERSITY OF ZAMBIA

DEDICATIONS

To my parents (Mr. & Mrs. Musaluke) for all financial and moral support rendered to me in my education.

To my brothers and sisters who have borne the burden of my expenses and continuous absence from their company.

To all of you I say thank you; God be with you.

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The final responsibility for all remaining errors and defects however, is of course mine alone.

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CHAPTER ONE

INTRODUCTION

The law deals with two main branches, the civil law and criminal law. Civil law deals with contracts, marriages, divorce, private injuries called torts etc. Criminal law on the other hand has to do with crimes and punishments. In general, criminal law may be defined as a body of rules regarding human conduct which are prescribed by governmental authority and enforced by penalties imposed by the state.¹

Criminal law is one of the oldest laws in the world and various theories have been advanced to explain the origin of criminal law, but no one really knows how or when it began.² Writers such as Montesque wrote about the administration of criminal justice and advanced that the historical study of crime and law review that it was employed to protect society against offenders and to exact retribution for a particular unacceptable crime.³

It is important to mention that criminal law is administered through the courts, it is one main area in which courts are largely active and hence to administer criminal justice, many things have to be taken into consideration before a judge arrives at his/her judgement. Since it has been said that law was employed to protect society, there was need to have law enforcement agents. The Police Force hence emerged with the duty to serve man kind, to safeguard lives and property, to protect

the innocent against deception, the peaceful against violence or disorder and to respect constitutional rights of all men to liberty, equality and justice. Law enforcement agents are expected to observe specific written rules of criminal procedure and the substantive law. It is hence a new science the properties of which can be said to consist judicial powers which lead to punishment of law breakers. However, it has long been observed that individuals have suffered at the hands of the law enforcement agents and this has led to the violation of the same rights which they purport to protect. For instance, the word interrogation sends a fear into many people as they perceive real or imaginary scenes of suspects being beaten up and humiliated by Police in order to extract confessions from them. We have also witnessed a lot of incidents when the Police brutally beat a suspect when being taken to the Police station or in fact at Police Stations.* The role of the Police and other law enforcement agents is to investigate systematically a case by coming up with facts relating to the offence which may secure a conviction for the suspect. Unfortunately in our country, the Police investigations are synonymous with torture in any form.

The date 30th December 1992 still ring in most Zambian people's minds when we heard on the media of the death of a suspect in a Police cell in Emmasdale in Lusaka.

These few examples and many more others only suggest that the Police have been running away from the presumption that a suspected criminal is presumed innocent until proved otherwise

in a competent court of law.⁵ This means that suspects have freedoms and rights particularly when they are not yet deprived by the courts.

The Police in Zambia have not been adhering strictly to the judges' rules which are rules of conduct and procedure for the guidance of Police Officers and others concerned in the arrest, detentions and interrogation of suspects. These rules were written in order to enhance proper administration of justice.⁶

However, despite these rules we have heard in courts during trials when a particular suspect complains that he was brutally treated and confessed due to the threat or actual injury inflicted on him.⁷ It seems the judges' rules have played a minimal role in all this. What does a judge or magistrate do when he/she becomes aware of the non compliance to the judges' rules? Are there any prejudices in the proceedings of the case? How effective are the judges' rules in the administration of justice? It is with these questions that the writer wishes to examine the application and the interpretation of the judges' rules in Zambia by the judges and Magistrates. The writer will also endeavour in relating the non compliance with judges rules to the violation of human rights.

LITERATURE REVIEW

The writer had chance to read what others have written on the issues related to the subject at hand. Chilufya Raphael

Kakungu's essay⁸ entitled: "Police and Judges Rules", tries to discuss the role played by the judges rules, whether there is any relevance for them and justification for their existence. He also goes on to reveal the effects and criticisms of the judges rules.

Silweya Thomas⁹ in his essay entitled, "A Critical Analysis of the Judges' rules in Zambia", discusses the judges' rules in relation to the law enforcement agents. He discusses this in Chapter three (3) where he critically inquires into the extent that Zambian courts have interpreted and enforced the judges rules. He also tries to look at how law enforcement agents have been influenced by the judges' rules.

This essay differs with these two essays in that it deals mainly with the non compliance with the judges rules vis a viz human rights in Zambia.

METHODOLOGY

The essay gives a descriptive analysis of the subject at hand. This has been supplemented by the texts from Personal interviews with the Public Relations Officer (Zambian Police Force), Magistrates and a Lusaka based Lawyer. The writer got their views on the subject at hand in relation to the administration of justice in Zambia. Books, relevant journals and other judicial materials have been used in the process of this research.

ESSAY ORGANISATION

Chapter One: This includes the general introduction of the topic, method of research, essay organisation and literature review.

Chapter Two: It deals with the historical background to the Judges' rules and their present form.

Chapter Three: This is the core of the essay and includes critical analysis of the judges' rules. Why are they not followed in Zambia? The writer also in this Chapter tries to look at the effects of non-compliance in relation to human rights.

Chapter Four: This is the last Chapter and includes conclusion, suggestions and proposals for reforms.

FOOTNOTES

1. Robert Caldwell, Foundation of Law Enforcement and Criminal Justice. Bobbs-Merrill Educational Publishing, Indianapolis (1971), p.146.
2. Ibid.
3. V.A. Gatrell, Crime and Law. Europe Publications Ltd., London (1980), p.6.
4. Sunday Mail, March 21, 1993, Page 7.
5. The Constitution of Zambia Act 1991. Article 18(2)(a).
6. Zeka Chinyama V. The People. [1971] ZR 426 at 431
7. Nalishiwa V. The People [1972] ZR 26.
8. OBligatory Essay, 1988/89
9. OBligatory Essay, 1990/91

CHAPTER TWO

HISTORICAL BACKGROUND TO THE JUDGES' RULES AND THEIR PRESENT FORM.

The history of Law enforcement dates as far back as the 17th Century. During this period France and other continental countries in Europe had professional Police Forces of a sort. England however, fearing that these forces might bring the same kind of oppression to her that had so often caused on the continent, did not establish Police Organisations, in the modern sense of the term until the nineteenth century.¹

In modern times, it has been recognised that there is no public agency or institution which is of greater importance to the community than the Police. If this statement seems surprising one need only to consider these facts: The Police are charged with the maintenance of order and the enforcement of law, they must therefore act to regulate and protect the community with respect to public health, comfort, morals, safety and prosperity. It is not surprising then, that the Police Officer is usually the first point of contact between the citizen and the law.² Indeed the Police are the law, and for this reason their appearance, conduct, and effectiveness do much to destroy or create respect of law.

When a Police Officer is at the outset of this inquiry, it has been long recognised that he faces a lot of challenges in his

search for the evidence that will convict the perpetrator of any evidence that may have been committed. Once a Police Officer arrests that person, he goes on with the interrogations. What then are the suspect's rights when he is in Police custody as regards the statements he/she makes? At common law it was recognised that a prisoner could make a statement which can be repeated in court, so long that statement was not induced upon the Prisoner. In the case of R.V. Gavin,³ Smith J. stated.

"When a Prisoner is in custody the Police have no right to ask him questions. Reading a statement over and then saying to him, 'what have you to say?' is cross examination..... A Prisoners' month is closed after he is once given a charge and he ought not to be asked anything. The constable has no more right to ask a question than a judge to cross examine...."

It is also worth noting that, a Constable has no right to ask questions and if the Prisoner answers, the answers are not admissible in evidence against him. This was decided in a later case of R.V. Male and Cooper², where Cave J. stated:

".... It is quiet right for a Police Constable, or any Police Officer, when he takes a person into custody to charge him, and let him know what it is he is taken up for.... under such circumstances a police man should keep his mouth shut and his ears open."

From very early in English legal history it has been accepted learning that any statement, whether oral or writing, made by an accused person, must in order to be acceptable be voluntary.⁵ According to Abrahams, the word voluntary means that it shall be psychologically free, that it shall not have been influenced by any fear of consequences or be any hope of benefit that has been communicated to the accused by any person in authority.⁶

In the case of R.V. Warickshall,⁷ it was recognised that:

"A confession forced from the mind by the flattery of hope or the fortune of fear comes in so questionable a shape when it is considered as evidence of guilt that no credit ought to be given to it."

Using Abrahams words again, courts acting on long experience, make the assumption that a majority of persons especially ignorant persons, and especially persons under anxiety, find it difficult not to talk to a questioner whose personality and function are psychologically impressive.

Hence it was laid down in the case of R.V. Thompson,⁸ that the burden of evidence is on the prosecution, to show in evidence that any statement tendered was made as a voluntary statement.

It is clear then that statements of an accused person were not accepted and in order to facilitate the practise or administering justice, a caution was developed in England at least as early as

the beginning of the eighteenth century. In those days it was administered by Magistrates before whom arrested persons had to be brought. A usual form was as follows:

"You are not obliged to say anything unless you wish to, but anything you say will be written down and maybe used as evidence against you."

It has been said that this form was right when the danger to the accused was that in his ignorance he might not realise that he was inculcating himself.' As we shall see later in the essay, the words 'against you' have been removed from the caution, this has been necessitated by the increase in literacy and intelligence in the Police Force and the general public.

It has for many years been seen by courts the need to safeguard the interests of a person taken into police custody for questioning. There was hence need for a method which would attempt to ensure that oppressive tactics and inducements are not used to secure confessions. There was need to bring up rules which would limit the powers of the Police Officers to interrogate suspects, provide legal representation at the Police Stations and for contacting friends and relatives.

These safeguards are primarily set down in judges' rules whose first pronouncements (in England) by a judge as an advice to constables can be traced back to 1882 when Lord Brampton better known as Mr. Justice Hawkins made an address to constables.¹⁰

This was followed by a letter written in 1906 by Lord Alverton (the Lord CJ) to the Chief Constable of Birmingham to answer his request for guidance on the proper method of proceeding to question prisoners. Lord Alvertone wrote:

"There is as far as I know, no difference of opinion whatever among any of the judges of the Kings bench division upon the matter. The practice which has been definitely followed, and approved for many years, is that whatever a constable determines to make a charge against a man, he should caution him before taking any statement from him. Whether there is any necessity for a caution before a formal charge is preferred must depend upon the particular circumstances of the case, no definite rule can be laid down.

"In many cases a person may wish to give an explanation which would have exonerated him from any suspicion, and he ought not to be prevented from making it. On the other hand, there are cases in which it would be the duty of the Constable to caution the person before accepting any further statement from him, even though no charge has actually been formulated.

"The only other observation I have to make is that I think objection may reasonably be taken to the words 'against' in the caution quoted in the rules, extracts from which you sent me. A statement made by a prisoner may frequently be used as much in his favour as against him. I therefore,

think it better than the last two words of the caution referred to should be omitted and the caution should end with words ' be given in evidence'."

It was from this that the first four of the original judges' rules were formulated.

The origin and status of the rules proper were described in England by the Court of Criminal Appeal in R.V. Voisin¹² where it was stated:

"In 1912 the judges, at the request of the Home Secretary drew up some rules as guides for Police Officers. These rules have not the force of law; they are administrative directions, the observance of which the Police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial."

It can hence be said that Police Officers who ignore the judges' rules may face censure in court and at the judges' discretion evidence obtained in breach of the rules may be excluded. Apart from the right to contact a Lawyer, the suspect is entitled to contact a friend or relative, and again non compliance with these directions can technically give rise to disciplinary action against the Officer concerned.

In Zambia the judges' rules that are in force today are a product of the work of the judges in England. The 1912 rules are hence in force in Zambia and it has been recognised in Zambian Courts that the rules are merely administrative directives, given as a guide to Police Officers on how they should deal with suspects and accused persons. For instance in the case of Zeka Chinyama V. The People¹³, Baron D.C.J. as he then was said inter alia:

"..... The precise position of the judges' rules is important. Their breach does not render evidence, and in particular a confession automatically inadmissible; they are rules of practice indicating what conduct on the part of Police Officers the court regard as improper...."

It is clear thus that even in Zambia, the judges' rules may result in evidence adduced by the Police being rejected by a court or law. This depends in the Judges' discretion.

There are nine rules altogether and these are reproduced in the Zambia Police Law and Police Duties Manual (pp.182-186) and the Zambia Police Force instruments. These rules are reproduced at the end of this essay. It is however, worth mentioning that the judges' rules have undergone major changes in England. In England and Wales prior to 1984 interrogation of suspects was solely regulated by judges' rules and administrative directions. In 1984, following the enactment of the Police and Criminal Evidence Act, interrogation is now governed by codes of practise formulated under that Act.¹⁴ Unlike the judges' rules, the codes

of practise require the caution to be administered at the beginning of interrogation. Breach of codes of practise results in proceedings which may end in the dismissal of Police Officer concerned.¹⁵

Let us now examine some rules and consider how they are applied.

Rule 1: Permits Police questioning of anyone whether a suspect, even if he is in custody, provided he has not been charged or informed that he may be prosecuted for the offence concerned which the questions are put. This permits the questioning of someone in custody on one charge about some other offence, although questioning on a holiday charge has been disapproved. This was considered in the case of R.V. Buchan.¹⁶

Rule 2: This requires a caution to be given as soon as a Police Officer has evidence which would afford reasonable ground for suspecting that the interrogated has committed an offence. The object of the rule is, it appears two fold; first it enables preliminary Police inquiries which may not be related in their minds or in fact to any suspension against the person they are interviewing, to proceed without the formality of the caution; secondly is that, once suspicion has fallen on a person whom the Police are interrogating, his change of status in that respect should be formally brought to his notice. Rule 2 is not concerned with protecting voluntariness of a confession, but only with administration of the caution and it is of course perfectly possible that a confession may be as voluntary without any

caution as it is with one, and that even where caution is administered a confession may be made voluntary (if for example a suspect is threatened or maltreated after the caution has been administered). In the case of R.V. Prager¹⁷, the Lord Chief justice ruling in Prager, left wholly undecided whether the observance or non-observance of rule 2 matters, because he was asked in effect to rule on whether it did matter, he ruled on an entirely different question. Rule 2 is one of the important rules which is usually breached, especially in Zambia.¹⁸

Rule 3: Requires a caution when a person is charged or informed that he may be prosecuted, and provides that it is only in exceptional cases that questions may be put after the occurrence of the events. When such questions are put, a further caution must be administered. This means that when a person has been charged, or told that he may be prosecuted, questions relating to the offence can only be put to him when necessary to clear up an ambiguity in a question, answer a statement or prevent harm to somebody else. But before these questions are asked, the accused must again be cautioned and all the questions and answers must be contemporaneously recorded in full.¹⁹ The note must be signed by the accused or if he refuses by the interrogating officer.

Rule 4: Provides for the provision of a usual caution if the prisoner wishes to volunteer any statement.

Rule 8: This is concerned with the case of two persons charged with the same offence and has already been mentioned. This was considered in the case of R.V. Williams.²⁰

As can be seen from some of the rules cited above, it can be said that when a Police Officer has decided to arrest a suspect no questions will be put to him relating to the offence for which the arrest is made, other than such questions as may be necessary to establish his identity. An accused person will be asked if he wishes to confess, and no promise or threat will be made to induce him to do so. If while in custody he voluntarily asks if he can make a confession, then he will be allowed to do so.

Rules 2, 3, 4 and 8 have been treated by courts as important, but it is not demonstratable that their breach is more than a mitigating of the cogency of statements so produced. It is believed that, in cases at first instance, many judges on many occasions have rejected the product of questionable questioning, but always it appears, this has been an exercise of direction. If they are challenged, on account of the admission of the doubtful, the attack is on their direction on wrong principle, or their misdirection of the judge, rather than along the lines that the admission was of something inadmissible by law.

Since judges' rules have no force of law, what then is the need to have them? This question will be dealt with in the next chapter where the writer will examine non compliance to the rules. It has been seen that in some instances judges' rules

have been disregarded. Has justice still been done? Kakungu Raphael²¹ in his obligatory essay has written that these rules are difficult to apply and hence it is not conceivable that the Police would, in these circumstances abide by the judges' rules. Now the question to ask ourselves is, would society then applaud them (Police) if they abode by the judges' rules preferring that a guilty man (in the eyes of society) must go free and probably carry out further violent crimes like robberies? We however, find ourselves in a dilemma to answer these questions. The rules are procedures which were formulated by the courts and the executive in an attempt to preserve individual liberties, whilst also safeguarding the interests of society at large. They endeavoured to ensure that the Police act only within a restricted framework. Questions posed in this chapter will be considered and answered at length in the next chapter.

FOOTNOTES

1. Robert Caldwell; Foundation of Law Enforcement and Criminal Justice; Bobbs-Merill Educational Publishing, Indianapolis, (1971), p.4
2. Ibid, p.1
3. [1885] 15 Cox C.C. 656
4. [1893] 17 Cox 651
5. Gerald Abrahams; Police Questioning and Judges' Rules; Oyez Publications, London (1964), p.7.
6. Ibid
7. [1783] 1 Leach 263
8. [1893] 2 QB 12
9. Op cit Abrahams p.9.
10. Ibid p.13
11. Ibid p.17
12. [1918] 1KB531
13. [1977] ZR 426
14. Criminal Evidence Act 1984
15. K.T. Mwansa; Property Crime and Criminal Process in Lusaka magistrate Courts; Ph.D Thesis, University of London, 1992, p.234.
16. [1964] 1 ALL.E.R 502
17. [1972] 1WLR 260
18. Sunday Mail, March 21, 1993 p.7
19. David Lewis; Judges' Rules; Secker & Warbury, London (1975), p.62.
20. [1977] 67 Cr. App.10

21. Kakungu Raphael; Police and Judges' Rules; Obligatory Essay
1988/89

CHAPTER THREE

APPLICATION OF THE JUDGES' RULES

In the last two chapters we discussed the general introduction of the judges' rules and that they are only applied as guidelines for Police Officers and others that are involved in the arresting and interrogation of suspects. This chapter will deal with the practical aspect of the judges' rules. By practical, it means the real application of the rules and their interpretation by the courts. When does the issue of non-compliance to the rules come in? This brings us to the issue of confessions. What does the judge do when he becomes aware that the statement purported to be given freely by the accused was actually obtained by way of fraud, duress, promise of an advantage or some other way which may induce the suspect to say something?

There are several sources of unreliability of confessions, one is the risk that the confession was fabricated or misheard or misreported. Another is that the innocent man may say something of the desire for notoriety. It is realised that the confessor may say something with a view to protect another or confess to a minor crime in order to avoid conviction on a major crime or to obtain advantage from the detention.

Hence courts may render confessions inadmissible because they were found to have been obtained by improper methods in contravention of the judges' rules. It therefore, follows that

where the prosecution wish to adduce evidence of a statement made by an accused, whether a verbal statement or written statement, and that is against the interests of the accused, it is termed as a confession and its application is subject to special rules. There are some English cases which apply to subject at hand and its worth mentioning them though they are for persuasive purposes only. In short, they are not binding authority in Zambian Courts.

In the case of Commissioner of Customs and Excise V. Hatz', the term confession was held by the House of Lords to include any statement by an accused against his interests and it need not necessarily amount to a full admission of guilt. For a confession to be admissible it must have been made voluntarily. The phrase that "it must have been made voluntarily", was defined by the House of Lords in the case of DPP.V. PingLin', as meaning that it has not been obtained from the defendant either by fear of prejudice or hope of advantage exercised or held out by a person in authority or by oppression.

To be admissible, therefore, a confession must have been obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority and in addition, it must not have been obtained by oppression. Whether there is oppression or not, one has to take into consideration such things as the length of time intervening between periods of questioning, whether the accused has been given proper refreshments or not, and the characteristics of the person who makes the statement.

In the case of R.V. Allerton³, the accused on charge of possessing drugs had been detained by the Police for some hours in a cold cell without refreshments and the Police had repeatedly refused to tell her the time. The trial judge held that this did amount to oppression and evidence of a confession which the defendant had made was therefore not admissible.

A person in authority is any one whom the accused might reasonably have considered to have been capable of influencing the outcome of the Prosecution; for instance Magistrate, Police Office etc. An employer has authority over a prosecution for the theft or arson of his property by a servant. But he has no authority on a charge against a maid servant of murdering her own child so that a confession by the maid servant is admissible although it was induced.⁴ But it has been held that a village headman can be a person in authority in some circumstances.⁵

How then, do courts use their discretionary powers when it comes to this area of evidence? If a confession infringe judges' rules is it strictly in admissible? It was seen in the last chapter that judges' rules are rules of guidance to Police Officers which should be followed in dealing with suspects and persons in custody and that they do not have a force of law.

In the case of Mandu V.R., ⁶ Conroy J. stated:

"In deciding whether a statement is admissible the test which the court must apply is not whether the judges' rules have been infringed but whether the prosecution have affirmatively established that the statement was made freely and voluntarily. In applying that test it is relevant to consider whether the judges' rules have been complied with. If they have, this fact is of considerable assistance in deciding whether the statement was made freely and voluntarily. If they have not the burden is on the prosecution and will be difficult to discharge. There is one further manner in which the judges' rules are relevant; even though the court is satisfied that a statement was made voluntarily, it's nevertheless has a discretion to exclude such statement if it were obtained in a manner unfair to the accused. The observance or non observance of the judges' rules is a most relevant fact."

It can hence be said that provided a confession is voluntary a confession obtained in contravention of the judges' rules is still admissible in evidence but the court will normally exclude it in its discretion. It should be noted that statements by the accused before the Police decides to charge him are admissible at his trial. When therefore, the prosecution seek to adduce evidence of something said by the accused during the investigations, the defence will cross examine to ascertain whether the Police had decided to charge the accused at the time he made the statement. If it appears that the Police did intend to charge the accused at this stage, then the court will

generally exclude the accused's statement if not made under a caution because it is a breach of the judges' rules.

In the case of Zondo and Others V.R⁷, Conroy J., said that its trite law that a judge has a discretion to exclude a statement even though freely and voluntarily made otherwise admissible, if he considers it was in circumstances unfair to the accused person.

Hence even where a confession is made voluntarily and there has been no oppression, judges/magistrates have sometimes excluded evidence as was stated in R.V. Sang⁸, by the House of Lords that, evidence of a confession could be excluded if the defendant might otherwise be deprived of a fair trial. The effect of this case is that the principles of fair conduct underlying the judges' rules always exist independently of them and that evidence which is legally admissible may in the discretion of the judge be excluded if it appears that it was obtained by means so improper or unfair to the accused in all circumstances of the case that it would be unjust to rely upon it.

We can then say that the question of discretion hinges on fairness, the court must consider whether it is fair or unfair to admit a confession. In the case of Petrol V. The People⁹, it was said that:

"When the facts found by the court amount to a rejection that the circumstances surrounding the taking of the statement were unfair or improper the question of the exercise of the court's discretion does not arise."

When then can the court draw the inference of unfairness against the accused person?

It was stated in the case of Nasilele V. The People¹⁰, that the court must consider notwithstanding that a confession is held to have been voluntarily made whether its discretion to exclude it should be exercised in favour or the accused. There must be surrounding circumstances which could raise a suggestion of unfairness.

Also in the case of The People V. Habwacha¹¹, it was held that the court has a discretion to exclude any evidence if its admission would operate unfairly against the accused, that the onus is on the prosecution to show that the statement was voluntary.

It can be deduced from the cited cases that discretion is used if the court is satisfied that the reception of a confession will operate unfairly to the accused. For instance failure to administer a caution may be one of the circumstances which may operate unfairly to the accused.

Hence, it is trite law that judges/magistrates have a discretion to exclude admissible evidence tendered by the prosecution where its prejudicial effects out-weighs its probate value. In such cases, the judges/magistrates ought to consider whether the evidence is substantially vital having regard the purpose for which its directed. If so far as that purpose for which its concerned, it can in the circumstances have only trifling weight, the judge will be right to exclude it.¹²

It should be remembered that the exercise of discretion by the judges is two fold, in that firstly the court tries to protect the accused whose rights have been infringed and secondly, to protect society by not considering some of the complaints by the accused and siding with the prosecution depending on the facts of the case. For instance in the case of R.V. Priestly,¹³ it was stated:

"Nevertheless, in these days of ever mounting crime, it is indeed essential not to fetter the hands of the Police unnecessarily so as to hinder them in their difficult and vital tasks."

DO JUDGES' RULES SERVE ANY PURPOSE IN THE ADMINISTRATION OF JUSTICE?

In consequence of the cases on the judges' discretion as regards non observance of the rules, the writer was afforded an

opportunity to talk to some Lusaka based Magistrates on the matter.

A second class Magistrate¹⁴ based in Lusaka started be telling the writer that once the court becomes aware of the non-observance with the judges' rules, it must order a trial within a trial. However, she said she had only attempted to hold one such trials two years ago. She went on saying that prosecutors have a tendency of suspending a case through a process of nolle prosequi, once it is found that the confession on which they are solely relying has been contested by the accused or his lawyer. This happens when there is no any other evidence available for the prosecution apart from the confession and hence a "don't prosecute" order will be sought as provided by the criminal procedure code (CPC).¹⁵ This means that the accused will be discharged but can be re-arrested when fresh evidence comes up which implicates him on account of the same facts.

Asked if there are any prejudicial effects in her judgements or proceedings of the case once she knows about the confession which was involuntarily given; she said; "I do not in fact consider the confessions on many occasions especially if it will be unfair to the accused. Even without the confession being tendered you can know the direction of the case from the first witnesses. I am in no way prejudiced by such evidence."

Asked what she would do if the statement tendered was not voluntarily given and that there is no any other evidence apart

from the confession, she said that she would (and does) acquit the accused. She went on to say that the Police Officers do not follow the judges' rules due to over zealousness and also that their working mechanisms are not well set out. For instance you find that the arresting officer is the same person who starts the investigations which should not be the case.

The writer also had an opportunity of talking to a Kafue based Magistrate Class III⁴ who is currently at the Law Practising Institute as a student. He said that the first thing to do is to look at the statement which is being contested by the accused. If the statement was given under circumstances which would operate unfairly to the accused, then he excludes such statements and proceeds with the case with some other evidence if at all there is any. He went on to say that since the judges' rules have no force of law, judges/magistrates have a discretion to exclude a confession depending on the facts of each case. He went on to say that if judges/magistrates had no such discretion, then no justice could be done since judge/magistrates interpret the law in order to protect society and uphold liberties of the accused until found guilty. He gave an example of a case he came across where a house-servant had carnal knowledge of a two (2) year old girl. The child could not give evidence and the only evidence was that of the confession given by the accused who later contested that evidence, saying that he was beaten before confessing. Mr. Mulimbeni said that he could not refuse the reception of that evidence considering the nature of the case, since he had to weigh what society demands and the evidence of

the accused. Even if the accused was beaten, that evidence did not make him innocent of a crime committed.

Asked if there could be some reform or changes to the present judges' rules, both magistrates were in doubt and pointed out that the only solution was to re-educate the Police on the procedures of investigating crimes. They said that though judges' rules may not be observed on many occasions by the Police, doing away with them would entail giving Police more powers than they should possess, the mere presence of the rules serve as a code for fear in some minds of the Police Officers. A Lusaka Resident Magistrate,¹⁷ started by saying that she has never ordered a trial-within-a trial ever since she went on the bench three years ago. She however said that she has tried to stick to the judges' rules as much as possible despite their abuses. She said that non-observance of the rules are highly contested by those that are presented by Lawyers, "those that can not afford a Lawyer are the victims of such tricks of the Police." She however said that when that is the case, she disregards statements rendered in contravention of the rules.

Asked if there is need to retain the judges' rules, she said there was need to reform some of the rules which are vague and that there is need to educate the Police so that they appreciate the importance of the judges' rules. She attributed non compliance also to the frustrations arising from poor housing, salaries and in general unfavourable working conditions in the Police force. She said that the Police are not keen to

investigate on the crime under consideration in that the 'drive' is not there, and therefore, they would use the method they consider simple in obtaining relevant evidence. This is the reason why Police Officers would opt to beat the suspect so that he/she confesses from which they start investigations.

She was of the view that though there is need to make some changes, the rules should be retained since they ensure that he Police use a uniform pattern when handling suspects and accused persons. Also that judges/magistrates are afforded with the assurance that persons in Police custody are dealt with in accordance with one principle of natural justice - that of fairness though this is hard to come by.

In conclusion, she said that non-compliance with he judges' rules as far as she is concerned is not a very important issue since evidence adduced by an involuntary confession can be excluded and the case can go on smoothly thereafter. Judges' rules are guidelines for Police Officers and if they do not follow them, there are other administrative measures to be instituted on such officers she said.

On the other hand the Police Public Relations Officer, " had the following to say when asked to comment on the impact of non-compliance with the judges' rules by the Police Officers: "The Police Officers are aware of the judges' rules and its one of the topics being taught at Lilayi Police Training School." Mr. Chingaipe went on to say that every Police Officer knows the warn

and caution rule by heart and that they follow them strictly. Asked if he was aware of the non-compliance with the rules, he admitted this fact but attributed this to the human err and over zealousness especially in some young officers. He went on to point out that those who do not follow the laid down procedures are displied administratively and that there is a Department at the Police Force Headquarters which deals with public complaints and legal matters. He admitted that in very few and unfortunate circumstances, suspects are deprived of their rights depending on the officer making the arrest.

As regards reform to the judges' rules as has happened in United Kingdom, he said that reform would not be appropriate at the moment. He said that we have different developmental stages with the United Kingdom, "what is desirable in U.K. can not be desirable in Zambia, what we need is some reform in the training of Police Officers." He said that his office has already made some recommendations as regards the training of the Police Officers and their selection to relevant authorities.

He went on to say that Police Officers do not sometimes follow the judges' rules in instances where the suspect shows resistance especially hard 'core' criminals who cannot confess on a soft touch.

He gave more justifications for the retention of the judges' rules saying that judges rules represent a code of administrative direction addressed to the Police and inevitably supply the

standard observance required of the Police. The rules are premised upon a particular view of the law and only seek to regulate legitimate methods of inquiry. Since information obtained by the Police through questions is used and admissible as evidence, it is necessary that Police procedure should be regulated and hence the need for the judges' rules to do so.

A Lusaka Lawyer who opted to remain anonymous had a different view on the judges' rules. He said that judges' rules are outdated and not very clear. He emphasized the need to reform them and said that Lawyers sometimes are not allowed to be present when their clients are being interrogated and hence suspects are deprived of the right to have a lawyer present at the time of questioning. He said that judges' rules should have a force of law such that discretionary powers to deal with non-compliance to the rules are limited.

After considering the views given by different people on the issue at hand, the writer (of this paper) came up with conclusion, that accused person's or suspect's rights are infringed whenever there is non-compliance with the judges' rules. The rules are not a safeguard to a person undergoing questioning in the seclusion of a Police Station, although Police Officers regard these rules with considerable irritation. As seen from the view of the Police Public Relations Officer, Police Officers consider it an absurdity that when a person is blurting out his guilty secrets, a Police Officer must stop him and tell him he need say no more. Former School of Law Dean" at the

University of Zambia in his paper presented at the seminar on "Questioning by Police and judges' rules", he said that the rules are vague, that is, they are not self explanatory. This view can further be supported by saying that judges' rules are unclear in that their interpretation differ from judge to judge, and hence this lack of clarity and efficacy only show that the rules do not protect the person who is questioned by Police Officers. The discretion of the judges as regards the judges' rules also contribute on a large extent to the violation of the accused's rights. For instance in the case of Zondo and Others V.R.,²⁰ where conroy J. said that a judge has a discretion to exclude a statement even though freely and voluntarily made otherwise admissible, if he considers it was in circumstances unfair to the accused. But as has already been seen it is very difficult to draw a line between unfairness and fairness. A judge may think something is fair in his own moral judgement though there is a violation of somebody's right. This goes to show that there is too much discretion given to the judges as regards the application of judges' rules in dealing with non observance.

Judges' rules as they stand now, do not protect the suspects or accused persons in that Police Officers know how to manipulate them and afterwards pretend they followed them, since they know they have no force of law. Also when a case goes to court the matter is left to the judge to consider whether he should accept the concession tendered by the Police or not. It has been seen that judges tend (sometimes) to side with the Police where a certain crime has become rampant for instance, with the aim of

protecting society but without protecting the rights of those who under go Police brutality. Judgments of the courts are on the writer's view, misconceived where so far as the view of interrogation is concerned. As it is commonly known, interrogation of suspects is specifically directed to the conviction of the guilty or to the acquittal of the innocent, but not to the elucidation of the facts. But judges on most occasions contend that granted that the rules were broken, that did not matter in the particular case because suspects who were improperly interrogated are nevertheless found to be guilty."

It can be said that no set of rules governing the interrogation of suspects is capable of being devised which will eliminate all risks of prejudice. However, the present judges rules do not exclude at least potentially prejudicial instances of interrogation and this can be attributed to the way in which courts inteprete and apply them."

It can also be noted that we have not adopted the American principle that if evidence is obtained by the Police in breach of the judges' rules laid known to observe when interrogating suspects, the evidence will be inadmissible." This operates as a sanction against the breach of the rules. Our approach on the other hand is an encouragement to infringements of the judge's rule and consequently human rights, even if within the limits of what is known to be the court's tolerance.

The learned author of the Art of breachmaship further suggested

that; " If it makes so much difference to the conduct under the 'rules of conduct' then the sooner we have the 'rules of law' the better."²⁴ He goes on to state that it was the judges who devised such rules as we have seen, and that they should therefore be seen to be on the side of their observance rather than them allowing non-observance to go by default and perpetrating infringement of people's rights.

FOOTNOTES

1. [1967] AC 760
2. [1976] AC 574
3. [1979] Crim. LR 725
4. [1852] 2 DEN 522
5. 5 NRLR 176
6. [1962] RN 298
7. [1963-64] 2 NRLR 97
8. [1978] 3 WLR 267
9. [1973] ZR 145
10. [1972] ZR 197
11. [1971] ZR 154
12. Colliu Tapper; Cross & Wilkins outline of the law of Evidence; Butterworths London (1986), P. 223.
13. [1965 51 Cr. APP 1
14. Mrs. Kabinga; II Class Magistrate, Lusaka.
15. Criminal Procedure Code Chapter 160 of the laws of Zambia, Section 81 (1).
16. Mr. Mulimbeni; III class Magistrate, Kafue.
17. Ms. Chawatama; Resident Magistrate, Lusaka.
18. Mr. Peter Chingaibe, Police Public Relations Officer, Lusaka.
19. Dr. Josua Kanganja; Former Law School Dean, University of Zambia.
20. [1963-64] 2 NRLR 97.
21. "The Art of Breachmanship," New Law Journal; volume 121, No. 5521, 1971 Page 1037.

- 22. IBid.
- 23. IBid.
- 24. IBid Page 1038

CHAPTER FOUR

CONCLUSION, SUGGESTIONS AND PROPOSALS

In the preceding chapters we have discussed the judges' rules and how they have not been followed by the Police in their quest to apprehend criminals. We have discussed the role of the Police in Society (the Prevention of crime and investigating systematically a case by coming up with facts relating to the offence in question). We have seen how the judges' rules developed (Chapter 2) and what the initial aim was at the time of their inception.

Judges' rules have not been followed strictly in zambia; we quiet of ten read in news papers and law reports of a court trial going into a trial-within-a trial where the defence is trying to prove that the suspect was either Induced into making a confession through force, or that the Police did not follow proper procedures when interrogating the suspect.' A trial-within-a trial influences the course of the whole case particularly if it is proved that the suspect was assaulted or that other undue methods of getting the suspect to talk were initiated.

When an argument like this one comes up, some people may be left to wonder what the work of the Police should then be if their powers can be impaired by some rules which do not provide a clear policy on police arrests and investigations.

It can however, be said that there is need to strike an equitable balance between the police powers and protection of individual rights as provided by the constitution.² On this point one writer wrote;

" Somehow two public interests must be balanced: The need to ensure that criminals are caught on one hand, and on the other the rights of citizens and their business without unnecessary interference".³

It can hence be said that no one can deny the importance and usefulness of the Police, but nevertheless, this does not give the Police arbitrary power to question, arrest and take into custody an individual without regard to his rights. When a Police Officer violets the procedural matters such as charging and cautioning the individual he arrests, it amounts to breach of authority and law and hence the concerned officer should be subjected to disiplinary actions.

How can we help our Police Force to understand human rights and consequently respect them? Do we really need the judges' rules so as to achieve this aim?

In the view of the writer (of this paper), judges' rules have helped little in this area. It is hence the contention of the writer that they should be abolished and be replaced with other means through which those undergoing Police questioning and arrest should be protected. Judges' rules have failed to

provide a method through which rights of those being questioned in Police custody could be secured.

It is hence suggested that the judge's rules be replaced with a code of practise which can have a force of law. For instance, in England and Wales the interrogations are now governed by codes of practise which require the caution to be administered at the beginning of interrogations. Breach of these codes of practise result in proceedings which may end in the dismissal of Police Officer concerned.*

Judge's rules have been seen to be vague and contradictory in terms of duties the Police are expected to perform. Hence there is need to have a clear and unambiguous Piece of legislation which can regulate the conduct of Police Officers in their quest to apprehend criminals. This piece of legislation should include among other things the need to have a presence of somebody independent of the Police force (preferably a lawyer) to monitor the questioning of persons in Police custody. This hence means that there should be a Provision that there should^{be} some independent lawyer to monitor the interrogations and also there should be legal representation on part of the suspect during the interrogations. Those who cannot afford a lawyer, the department of Legal aid should be providing one.

There is also a further suggestion that; the Police and the public should be educated in terms of their duties and rights respectively. The Law association of Zambia can play a very

important role in the education campaign of the people on Police powers and rights of individuals. Pamphlets on this topic can be circulated to the general public and some radio and Television programs can be introduced where such campaign talks can be discussed.

As regards the training of Police Officers, it is recognised that the period of training is too short for the officer to be well equipped with the difficult task that he faces after training. Diploma courses and if possible degree courses should be introduced in the Police force so that dedicated and well equipped officers are produced. Those Police officers will know how to detect crime and methods of investigations without using physical force as is the case now.

We have seen advertisements where enrolment for Police only requires a grade nine certificate or grade twelve failures. How can somebody who has failed his examinations in school be expected to pass the Police academy courses and be a good investigator? Police should engage qualified manpower and even taking professionals like sociologists, lawyers and other disciplines necessary in the functioning of the Police Force.⁵

The training should also give more emphasis on human rights than military drills and apprehension of suspects using physical force.

The other point to note is the supervision of the Police and discipline. Police departments throughout the Country should be given powers to institute disciplinary measures on those Police officers who fail to follow the laid down procedures. At the moment all cases are referred to the Inspector General of Police in Lusaka. Lack of proper supervision and review of police action by superior within police departments have contributed to the continued violation of human rights by the police. One writer referring to the Federal Police of the United States of America observed that:

"The real answer, to the problem... has been said to be the department of control of an administrative nature, which would permit decision to be carefully reviewed within the police departments."

The above quotation applies to the American institution and hence it is only persuasive or for authoritative purpose. The idea then which is borrowed from the above quotation is that Police Powers should be decentralised so as to give head of the departments to institute disciplinary measures to erring officers. It is suggested also that questioning of persons in custody should not be left to over zealous, young and unqualified interrogators. Senior Police officers should ensure that persons who enter police stations are treated respectfully and fairly.'

It should be noted that courts can play a very important role in controlling and prevention of the violations by police officers.

Courts should be able to supervise, confine and eliminate abuses of human rights by Police Officers. The process of awarding damages or compensation by courts should be practised more than before, if it is proved that the aggrieved person was assaulted by the Police for instance.

However, we have seen that courts are sometimes relaxed and tolerant when it comes to admitting evidence which might have been illegally obtained as exemplified in the case of Liswaniso V. The People,⁶ where evidence obtained as a result of an illegal search and seizure was admissible. It is hence important to limit the court's discretion when it comes to non-compliance of judges' rules. While recognising that discretion is indispensable to any legal system it should still remain the duty of the legislature to eliminate unnecessary discretion in criminal law.

Finally, it can be said that when legislation as regards the conduct of Police Officers is about to be enacted, the Police should have an input in its preparation. If this is not observed (as was the case with the judges' rules), Police conduct and operation will be impeded.

It is therefore suggested that Police should be given an opportunity to contribute to any legislation as regards their operations.

FOOTNOTES

1. Belemu V. The People [1973] ZR 41.
2. The Constitution of Zambia Act, 1991; Articles 11-24.
3. Street, H.; Freedom, the Individual and the Law. Macgibbon & Kee Co. Ltd. (1967), London P.13.
4. Police and Criminal Evidence Act (England & Wales) 1984, Section.
5. K.T. Mwansa; Property Crime and the Criminal Process in Lusaka Magistrate Courts; Ph.D Thesis, University of London, 1992, p.511.
6. W.R. La Fave; Arrest, Decision to take a Suspect into Custody; Little Brown and Co. (1965), Boston, p.157.
7. Kanganja J., "Questioning by Police and the Role of the Judges' Rules in Zambia", paper presented at a seminar on Police and the Public, 1992.
8. [1976] ZR 277.

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(b) Journal

New Law Journal; Vol. 121, No. 5521, 1971.

(c) Statutes

The Constitution of Zambia Act 1991.

The Criminal Procedure Code, Cap 160.

The Police and Criminal Evidence Act (England & Wales) 1984.

(d) Others

Sunday Mail, March 21, 1993.

Weekly Post; July 16-22, 1993.

REPRODUCTION OF JUDGES' RULES

Interrogation of Suspects.

The rules set out below, are commonly known as the Judges' rules, formulated in England in 1912, are published for the instruction of members of the Zambia Police Force and other Law enforcement agencies, when they are interrogating suspects and accused persons:-

- (1) When a Police Officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from who he thinks that useful information can be obtained
- (2) Whenever a Police Officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions, or any questions, as the case may be.
- (3) Persons in custody should not be questioned without the usual caution being first administered.
- (4) If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence".

- (5) The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words: "Do you wish to say ^{some} thing in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence". Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.
- (6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.
- (7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.
- (8) When two or more persons are charged with the same offence and statements are taken separately from the persons

charged, but each of such persons should be furnished by the Police with a copy of such statements and nothing should be said or done by the Police to invite a reply, the usual caution should be administered.

(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

2. When a Police Officer has decided to arrest a suspect, no questions will be put to him relating to the offence for which the arrest is made, other than such questions as may be necessary to establish his identity.

3. An accused person will on no account be asked if he wishes to confess, and no promise or threat will be made to induce him to do so. If while in custody he voluntarily asks if he can make a confession then he will be allowed to do so.