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**THE EFFECT OF LAW MAKING BAIL PENDING APPEAL DISCRETIONARY ON
THE CONVICT'S RIGHT TO APPEAL**

By

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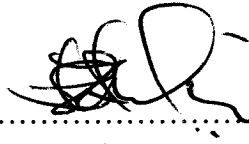
**AN OBLIGATORY ESSAY SUBMITTED IN PARTIAL FULFILLMENT OF THE
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2012

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ABSTRACT

This paper reviews the law making bail pending appeal discretionary in Zambia and draws attention to the need for reforms that will help the courts strike an equitable balance between the convicts right to be granted bail pending appeal and the interest of society. In order to critically analyse the case at hand, qualitative research is used by focusing on primary and secondary information. The secondary data is drawn from authors of books, journals and scholarly articles who have systematically analysed the issues relating to bail pending appeal in relation to rights of convicts particularly right to liberty.

The paper, in investigating the case of Zambia, also draws a comparative analysis from the Unites states of America, Nigeria, India and Australia and concludes that the most distinctive feature of Zambia's criminal justice system is the absence of legislative guidelines for exercise of discretionary power on bail pending appeal. This should be seen as a huge drawback of the criminal justice system that purports to deliver effective justice to accused persons in Zambia. The paper further concludes that since liberty of the subject is one of the most fundamental and treasured concepts in our society, in criminal appeal cases, it is important that the convict is allowed to attain the lost liberty at least temporary to go through the appeal process and fight for the valuable right to freedom.

The paper, draws recommendations from a comparative analysis and notes *inter alia* that there is an urgent need for amendment to the Zambian Criminal procedure Code to set out visibly and in sufficient detail, criteria to be followed by the courts when granting bail pending appeal. In this vein, there is also need for reforms by judicial activism and provision of legal aid services and transparent justice to accused persons. Moreover, this will require not only the participation of government but also the private sector and the Zambian community in general.

DEDICATION

I dedicate this paper and my Law Degree to my Almighty Father in heaven with many thanks for the protection and guidance he accorded me throughout my stay in the School of Law. Daddy your presence in my life is absolutely amazing.

When I entered the Law School, I wondered how I was going to pull through and proceed to Ziale. While I was contemplating you instructed me through Joshua Chapter 1 not to fear nor be dismayed but to be strong and of good courage for you my God will be with me wherever I go.

Your word Daddy has prepared me for the race ahead. Even when things seem hard I will never accept to give up in the face of any challenge because in Isaiah 43 you have assured me that you are He who formed me and you have called me by name I am yours. I know therefore that even when I pass through the waters they shall not overflow me for you are with me.

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Daddy receive this dedication in the name of JESUS

Amen.

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CHAPTER ONE

INTRODUCTORY CHAPTER

1.0 INTRODUCTION

Every person has human rights which include personal liberty.¹ Convicts are not therefore by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess.² The right to liberty is thus considered as the second most important right from the right to life as without liberty, a person can do nothing at all and hence this calls for protection of this right. It is this reason that makes it important for every convict to be granted bail pending appeal to fight for the valuable right to liberty. Despite this being the case, convicts are rarely granted bail pending appeal. This is because the decision as to whether the appellant will be granted bail or not pending appeal is entirely at the mercy of Judges who most of the time exercise their discretionary power in a casual and cavalier fashion hence putting the convicts right to bail pending appeal at risk.

This paper aims at critically analysing the effect of law making bail pending appeal discretionary on the convict's right to appeal. In order to ensure a systematic approach to this topic, the essay has five chapters as follows: This chapter, gives an introduction on the law making bail pending appeal discretionary in relation to the appellant's right to appeal. The chapter also gives statement of the problem, objectives of the study, rational and justification for the research, and methodology used.

In chapter two, the paper analyses the arguments in favour and against judicial discretion on applications for bail pending appeal against the convict's right to liberty pending determination by the appellate court.

¹Article 6 of African Charter on Human and Peoples' Rights 1986 - liberty and security for purposes of Article 6 means physical liberty and security such as is interfered with by arrest and detention.

²Per Justice V.R. Krishna Iyer in Sunil Batra vs. Delhi Administration AIR 1978 SC 1575 1978 at page 15.

Chapter three discusses various case authorities in Zambia to consider how the courts have sought to balance the convict's right to appeal and the right to liberty against the interests of society. The chapter also looks at the powers of the appellate court as well as the orders that may be made on appeal. Consequences of refusal of denial of bail pending appeal on the convict's right to liberty will also be discussed.

Chapter four discusses models adopted in the United States of America, India, Nigeria and Australia on the law making bail pending appeal discretionary by way of comparative analysis with the view of assessing what lessons can be drawn for Zambia.

Chapter five gives conclusions on the findings from the preceding Chapters and recommendations.

1.1 STATEMENT OF THE PROBLEM

After conviction, a person sentenced to prison must typically begin serving time immediately unless he/she is allowed to remain free on bail until the completion of his/her direct appeal.

Bail pending appeal however is rarely granted by the court.

The question therefore to be addressed is the effect of the law making bail pending appeal discretionary on the convicts right to appeal.

1.2 OBJECTIVES OF THE STUDY

This research seeks to carry out an examination of the law making bail pending appeal discretionary, as provided by section 332 (1) of the Criminal Procedure Code³ on the

³Chapter 88 of the Laws of Zambia.

convict's right to appeal and assess the real value of the right to appeal where bail pending appeal has been denied. The research paper will look at the following specific objectives:

1. Briefly discuss various case authorities in Zambia to consider how the courts have sought to balance the rights of an accused person against the interests of society. This will be done by analyzing arguments in favor and against the current law on bail pending appeal.
2. To assess whether the use of discretionary power on bail pending appeal is justifiable in modern practice in relation to the convict's right to appeal.
3. Discuss various models adopted by the United States of America, Australia, Nigeria and India that also have the law making bail pending appeal discretionary but are implementing measures to remedy the injustice on bail laws and to recommend accordingly on reforms that can be implemented by Zambia.

1.3 RATIONALE AND JUSTIFICATION

This study is justified on the basis that it is cardinal to examine the effect of the law making bail pending appeal discretionary on the convicts' right to appeal and the real value of the right to appeal where bail pending appeal has been denied.

In this regard, this study will add value to already existing literature by assessing whether an equitable balance has been achieved between an individual's right to appeal and the interest of society under the Zambian law. This will be done by considering principles on bail pending appeal in Zambia and other countries and the circumstances under which they operate.

1.4 METHODOLOGY

The research is a qualitative research which will use primary and secondary information. The secondary data is drawn from authors of books, journals and scholarly articles who have systematically analysed the issues relating to bail pending appeal in relation to rights of convicts particularly right to liberty as well as a number of relevant UN Conventions.

CHAPTER TWO

ARGUMENTS IN FAVOUR AND AGAINST THE LAW MAKING BAIL PENDING APPEAL DISCRETIONARY

2.0 INTRODUCTION

This chapter addresses the arguments in favour of and against the law making bail pending appeal discretionary in Zambia and foreign countries.

In discussing these arguments, reference will be made to case law from the United States of America (USA), India, Nigeria and Australia which also have the law making bail pending appeal discretionary. The Justification for citing the foreign jurisprudence is because arguments have been advanced in these countries for and against the law making bail pending appeal discretionary and it is on that basis that the foreign jurisdictions have proceeded to embark on implementing measures to remedy the injustice on bail laws. This will help to extensively discuss possible reforms that Zambia can adopt to respond to emerging trends in bail laws in the subsequent chapters. Before discussing the respective arguments, it is important to discuss the foundational basis for the argument for the right to bail generally.

2.1 BAIL AS A FUNDAMENTAL HUMAN RIGHT

Bail, is a very important aspect of the criminal justice system as it enables an accused person to be released from custody at least temporarily in order to fight for the valuable right to liberty. The importance of the right to liberty is provided for in the Universal Declaration of Human Rights. Of relevance to this research, is Article 3 of the Declaration which provides that 'everyone has the right to life, liberty and security of person.'⁴ This Article reaffirms the faith of member countries in fundamental human rights. This is being done, by promoting

⁴ Article 3 of the Universal Declaration of Human Rights 1948.

dignity and worth of the human person and the equal rights of men and women which shows the determination to promote social progress and better standards of life in larger freedom. It is because of this that a number of countries including Zambia have adapted this declaration and are thus implementing its spirit by incorporating the principles of the Declaration in local legislation.

In Zambia this is noted in the Bill of Rights of the Constitution which provides *inter alia* that the right to liberty should be protected and can only be taken away on compelling circumstances.⁵

The reasons given above led to the development of the concept of bail which ensures release of accused person's from detention if the interests of justice permit subject to reasonable conditions.⁶ In this regard, accused persons are accorded bail hearing which is concerned with whether it is necessary, in the interests of justice, to interfere with an individual's right to freedom. In this context the interests of justice need to be determined with reference to the specific facts placed before the court.⁷

The law clearly spells out bailable and non bailable crimes. It must be noted that even if some crimes are non bailable as provided by statutes, the accused can still be granted constitutional bail for serious crimes if there has been delay in trial.⁸

⁵ Article 13 of the Constitution, Chapter 1 of the Laws of Zambia.

⁶ Justice Centre- *Staff Directory*, http://www.justicecenter.csg.org/about_us/staff_directory (accessed Jan. 24, 2012).

⁷ Frank Frederick, *Bail and Human Rights* (New York: Oxford University Press, 2009), 89.

⁸ Per Ngulube C.J in *Chetankumar Shantkal Parekh v The People* 1995/SCZ/11a (Unreported).

It is also important to note that despite the fact that the law prescribes bailable and non bailable offences for accused persons, once a person is convicted, it is almost impossible to be granted bail even if the crime for which one is convicted is bailable.⁹ This is because bail after conviction is entirely discretionary and is only granted in exceptional circumstances.

In view of the foregoing, some scholars have argued that there is a general appreciation that the use of discretionary power on bail pending appeal is important as it allows Judges to consider whether or not to grant bail pending appeal on the circumstances surrounding the case to ensure protection of society.¹⁰

Other scholars, have however opined that because bail pending appeal is discretionary, the rights of convicts, particularly the right to appeal and right to liberty, are at risk of infringement.”¹¹ Most importantly to note is that criminals are entitled to their liberty if the ultimate court has not proven their guilt beyond reasonable doubt. Beyond reasonable doubt is thus a moral way of making sure that innocent people do not go to prison for a crime for which there is no substantial evidence that they committed.¹²

2.2 ARGUMENTS IN FAVOUR OF THE LAW MAKING BAIL PENDING APPEAL DISCRETIONARY

A number of scholars have argued for and against the law making bail pending appeal discretionary. As will be shown below this law has been criticized for putting the rights of

⁹ Robert Davidson, *An analysis of bail pending appeal* (London: University Press, 2010), 56.

¹⁰ Christopher Stanley, *Prisoners and Justice* (London: Manchester University Press, 2007), 53.

¹¹ Gerald Martin, Anne Herzberg and Jordan Berman, *Best Practices for Human Rights and Humanitarian NGO Fact-Finding* (India: Martinus Nijhoff Publishers, 2012), 87.

¹² W. Stephenson, “Bail Pending appeal”, New Times Paper, (May 15 2002), (accessed 6th September , 2012), <http://www.Artcles on bail. Com>.

convicts to appeal at risk due to lack of statutory conditions on granting bail pending appeal. This is because, there being no guidelines to grant bail pending appeal, the decision whether or not to grant bail on appeal depends on the existence of exceptional circumstances as the court deems just. The question how good those circumstances must be raises the important issue of approach.

It would as most scholars have noted be a very serious step and one which Judges should be reluctant to take, save in very clear cases, to deny a convict bail pending appeal to fight for the valuable right to liberty. Despite the foregoing position, arguments in Zambia and in foreign countries have been advanced in favour of the law making bail pending appeal discretionary.

In Zambia the position in favour of judicial discretion on applications for bail pending appeal begins with the Criminal Procedure Code, Chapter 88 of the Laws of Zambia. Section 332 (1) of the Criminal Procedure Code confers unlimited discretionary power on the courts to admit an appellant to bail where such an applicant has lodged an appeal. There are as such no statutory guidelines in Zambia on the exercise of discretionary power to grant bail pending appeal. The courts therefore have been clothed with discretion to determine whether one fits to be put on bail or not pending appeal.

In **Malyoti Katenga Jamu v The People**¹³ Cullinan J stated that the power to admit an applicant to bail under the then s. 336, which was couched in similar terms as the now s 332 of the Criminal procedure Code, is clearly discretionary. The court is therefore given room to decide whether the appellant fits to be put on bail pending appeal or not by considering

¹³Malyoti Katenga Jamu v The People (1981) Z.R. 99 (S.C).

whether exceptional circumstances exist to warrant release of the convict on bail pending appeal.

It is therefore submitted that in Zambia, the mere grant of leave to appeal against conviction, which presupposes the existence of prospects of success, is not on its own sufficient to entitle a convict to be released on bail pending appeal. Exceptional circumstances which are determined by the court must exist to warrant the court to exercise the discretionary power in favour of a convict.

The above position is supported by the case of **Kayumba v the People**¹⁴ in which the Supreme Court stated *inter alia* that when granting bail pending appeal each case is considered on its own merits, depending on what may be presented as exceptional circumstances. The court further noted that for instance, if the record of appeal is voluminous and could take months to prepare, this can be considered as an exceptional circumstance having regard to the length of the sentence.

In view of the above, it is therefore safe to argue that Judges in Zambia are in favour of the law making bail pending appeal discretionary. This is because the discretionary power, allows them to consider whether or not to grant bail pending appeal. This is to ensure that convicts are only released where necessary so as to prevent them from committing similar or any other offences that would highly likely endanger the safety of society and for many other reasons.

When commenting on right to bail pending appeal, Justices Muyovwe, Mwanamwambwa and Wanki in **Anuj Kumar Rathi Krishnan and the People**¹⁵ had this to say “it is important

¹⁴Kayumba v the People SCZ/9/77/2011.

¹⁵Anuj Kumar Rathi Krishnan and the People SCJ No. 19/2011.

to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict and sufficient reasons must exist before such a convict can be released on bail pending appeal”.

It can thus be argued that in Zambia, arguments in favour of judicial discretion lie on the need of the court to balance between the appellant’s right to bail and the lawful sentence that the appellant is serving and the overriding need to protect the larger public safety. It follows therefore that because of the foregoing reasons when granting bail pending appeal the courts are guided by the fundamental principle that the allowance of bail pending appeal should be exercised not with laxity but indeed with grave caution and only for strong reasons, considering that the accused has in fact been convicted by the trial court.

In Nigeria like in Zambia, bail pending appeal is discretionary. In the case of **Ogundemu Munir v Republic of Nigeria**¹⁶ His Honour, Justice Adamu, stated that undoubtedly due to lack of statutory guidelines in most states, the court has the power and discretion to grant bail pending appeal, but for the sake of public interest and safety such discretion like any other discretion must be exercised prudently. It can be argued that this argument comes in light of the need to protect the interest of society from convicts.

Carlstone Astone¹⁷ in his book on bail law in India has also pointed out that that discretionary power to grant bail pending appeal conferred on the courts by statutes relates to those powers whose exercise is essential to the function of the judicial department, to the maintenance of its authority and to its capacity to decide cases in the best interest of society. It can thus be

¹⁶Ogundemu Munir v Republic of Nigeria (2008) LPELR-CA/L/465M/08.

¹⁷Astone Carlstone, *A study on the right to liberty* (New Delhi: India Academic Press, 2004), 90.

noted that this clearly establishes the basis upon which the court exercises discretionary power on bail pending appeal to ensure protection of society.

Weatherburn Quinn and Rich G¹⁸ provides a survey to bail laws in Australia particularly on bail pending appeal. They suggests that their findings found in part that the law making bail pending appeal is important as it presents Judges to consider whether or not to grant bail pending appeal on the circumstances surrounding the case. These circumstances change from time to time and cannot therefore be determined by strict rules of statutes.

In **Lepesh v. United States¹⁹** the court stated that a criminal defendant sentenced to prison must typically begin serving time quickly unless he/she is allowed at the discretion of court to remain free on bail until the completion of the direct appeal.

It is thus submitted that bail to a convict sentenced to a term of imprisonment cannot be made as a matter of course due to the compelling need for protecting the safety of society.

2.3 ARGUMENTS AGAINST THE LAW MAKING BAIL PENDING APPEAL DISCRETIONARY

In as much as the law making bail pending appeal has been supported by a number of Judges and Scholars, it has also not gone without criticism. The author has not found any literature on arguments against discretion on bail pending appeal from Zambia. The arguments under this part, will therefore be based on literature and jurisprudence from the United States of America, Nigeria, Australia and India.

¹⁸John Weatherburn, Mark Quinn and Gerald Rich, "Drug charges, bail decisions and absconding" *Australian and New Zealand Journal of Criminology* 101, no 45 (June 1987). , <http://www.bailjournals.com> (accessed January 10, 2013).

¹⁹Lepesh v. United States No. 99-CR-516-BR, 2006 WL 2381857.

It should also be mentioned that some of the contributions by various scholars discussed here have helped the above named countries to adopt flexible bail laws to respond to modern trends in criminal justice systems. Some of these arguments will also be used in making analyses with the view of drawing recommendations on how Zambia can improve her bail laws in the subsequent chapters.

Carlstone Krugger²⁰ has argued that the bail system in various countries does not have a justifiable approach to the balancing of the individual's right to appeal and freedom against that of the interests of justice. He makes this observation while paying particular attention to the law making bail pending appeal discretionary in the United States of America. His observation is thus that with regard to the importance of the right to appeal and liberty, there must be a presumption in favour of bail at all times and this should apply even after conviction until the final court declares the conviction of the appellant legal and final.

In the case of **Common Wealth of Pennsylvania v William**²¹Lynn J when granting bail pending appeal held that in using discretionary power on bail pending appeal provided by the law the court has the duty to balance the scales of justice which however is not being done by majority of judges. This observation definitely calls for guidelines on the law that makes bail pending appeal discretionary to ensure that the discretionary power conferred on Judges is not abused.

What can be noted from the case cited above is that discretionary power bestowed on Judges in most states when considering cases on bail pending appeal, has not been exercised with great care and caution. This is so, because most states do not have guidelines on bail pending

²⁰Chris Krugger, *Theoretical legal procedure on bail* 13th Edition (London: Sweet and Maxwell, 2007), 67.

²¹Common wealth of Pennsylvania v William J Lynn appeal No. 2171 EDA 201.

appeal. The power is entirely in the hands of the court and it is for this reason that it has been subject to abuse by Judges thus putting the convicts right to appeal and fight for liberty at jeopardy.

It is because of the foregoing reasons that Honourable Justices M.B. Shah and D.M. Dharmadhikari, JJ of the Indian Supreme Court held in the case of **Mansab Ali vs. Irsan and Another**²² when overturning a ruling of a lower court on refusal for bail pending appeal that, the lack of statutory guidelines on bail pending appeal has led the discretionary jurisdiction to be exercised in a casual and cavalier fashion as noted in a number of cases.

The above, can be supported by the case of **United States v Salerno**²³ in which Rehnquist, CJ observed that in order to ensure protection of the convicts right to appeal, discretionary power must be exercised with the greatest caution because it basically gives the judicial officer unbridled discretion in making the determination on bail pending appeal.

It is therefore submitted that lack of statutory guidelines on bail pending appeal, has made bail laws rigid and this has made it difficult for convicts specially those convicted for less serious crimes to assume liberty at least temporally so that they can easily fight for their right to liberty until the final court declares their conviction legal and final. It can also be pointed out that tighter bail laws have had a ripple effect on the convicts right to appeal and have created a climate of doubt for offences not prescribed as exceptions to bail. This has prompted judicial officers to follow suit in the exercise of their discretion.

²²Mansab Ali vs. Irsan and Anr AIR 2003 SC 707.

²³United States v Salerno 481 U.S. 739 (1987).

Georgia Brignell of the Judicial Commission of New South Wales in his article, *Bail: An Examination of Contemporary Issues*²⁴ when analysing the importance of Bail Reforms in Australia noted that the gradual erosion of the presumption in favour of bail is what has been the subject of much criticism.

Weatherburn M and Rich G²⁵ authors on bail laws in Australia have also argued that ‘if public opinion no matter how poorly informed, is to become sufficient cause for removing a presumption in favour of bail, the reform created by the original *Bail Act* will disintegrate under the weight of all the exceptions.’

It can thus be argued that indeed if the current legislative trend continues in Zambia and other countries to put power to grant bail pending appeal entirely in the hands of Judges, the presumption in favour of bail may be the exception rather than the rule.

It must further be noted that refusal of bail pending appeal not only seriously infringes on an individual's right to appeal and fight for liberty, but also has broader ramifications in the subsequent criminal processing of that individual, such as lack of access to legal resources.

Ronald Wright²⁶ when evaluating the powers of judges on bail pending appeal in Nigeria has asserted that it is important to have guidelines on the law making bail pending appeal discretionary so that where a deprivation of liberty is contested the burden will be on a judge to start from the proposition that the person affected should be free. Pursuant to such a proposition the judge should only subject an application for bail pending appeal to guidelines clearly laid in the law. It can thus be argued that anything less than what has been stated

²⁴George Brignell, “*An Examination of Contemporary Issues on bail laws,*” 40 AUSTRALIAN LAW 34, no 35 (May 2009), <http://www.articles.org>, (accessed February 2013).

²⁵ John Weatherburn, Mark Quinn and Gerald Rich., “Drug charges, bail decisions and absconding”, page 56

²⁶ Wright Ronald, “*Trial Distortion and the End of Innocence in Federal Criminal Justice*” 56 USA CRIMINOLOGY 107, no 8 (March 10, 2012), <http://www.journals.org> (accessed December 10, 2012).

above would entail an abandonment of the rule of law and surrender to arbitrary treatment which is simply a violation of the person's right to liberty and right of appeal.

It is therefore submitted that due to lack of guidelines a number of appellants have been wrongfully denied bail pending appeal. This is because in most instances, convicts have had their convictions overturned on appeal, resulting in the gross injustice of a wrongful incarceration. This was an observation by Justice Stephens J in **Johnson v. United States**²⁷ in which he noted that bail pending appeal should be treated with care at all times as "the unjust deprivation, for a single hour of one man's liberty, creates a debt that can never be repaid".

Worthy of mention therefore is that the lack of statutory guidelines by the law making bail pending appeal discretionary has led to abuse of the discretionary power by the courts at an expense to the convicts right to appeal as noted in various cases cited above.

It can thus be stated that the observation by his Lordship G. S. Singhvi of the Indian Supreme Court in the case of **Rajasthan v. Balchand**²⁸ who stated that refusal of bail at any stage is a restriction on an individual right to appeal to fight for personal liberty guaranteed under the Constitution is justified.

2.4 CONCLUSION

This chapter has shown that arguments against the law making bail pending appeal discretionary have shown that in most states, statutes do not provide conditions for exercise of discretionary power. This, has led the discretionary jurisdiction to be exercised in a casual

²⁷Johnson v. United States 218 F.2d 578, 580 (9th Cir. 1954).

²⁸Rajasthan v. Balchand (1977) 4 SCC 308.

and cavalier fashion and has thus put the convicts right to appeal at risk. The result of this has been that an erroneously convicted accused who is denied bail usually loses his liberty to pay a debt to society he has never owed.

This chapter further showed that scholars and judges in favour of the law making bail pending appeal discretionary have argued that discretionary power on bail applications presents Judges with an opportunity to consider whether or not to grant bail pending appeal on the circumstances surrounding the case. This is done to protect society's compelling interest to swiftly incarcerate an individual who is found guilty beyond reasonable doubt of a crime serious enough to warrant prison time. Other recognised societal interests in the denial of bail pending appeal as shown above include the prevention of the accused's flight from court custody, and the protection of the community from potential danger and the avoidance of delay in punishment.

CHAPTER THREE

THE LAW ON BAIL PENDING APPEAL IN ZAMBIA

3.0 INTRODUCTION

This chapter critically analyses the law making bail pending appeal discretionary in the Zambian Context. This is achieved by looking at the jurisdiction of courts to determine appeals in criminal cases and by determining at what stage in criminal proceedings can bail pending appeal be granted. The chapter then proceeds to critically consider whether the courts in Zambia are striking an equitable balance between the convict's right to appeal and right to liberty against the interests of society. This will lead to a discussion on what are the consequences of refusal of bail pending appeal on the convict and lastly a conclusion is reached.

3.1 THE JURISDICTION OF COURTS TO DETERMINE APPEALS IN CRIMINAL CASES

The Zambian judicature as established by Article 91 is composed of the Supreme Court, the High Court, the Industrial Relations Court; the Subordinate Courts, the Local Courts; and such Lower Courts as may be prescribed by an Act of Parliament. The courts with criminal jurisdiction are the Supreme Court, the High Court and the Subordinate Courts.

The High Court and Supreme Court have jurisdiction to hear appeals in criminal cases by virtue of the power conferred on these courts by Article 92 and 94 of the Constitution respectively. The enabling Acts as to procedure on hearing criminal appeals is laid down in the Supreme Court Act Chapter 25, The High Court Act Chapter 27 and the Criminal Procedure Code Chapter 88 of the Laws of Zambia.

According to section 327(1) of the Criminal Procedure Code, on an appeal against:

(a) conviction, having regard to all circumstances the courts can (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a subordinate court of competent jurisdiction or by the High Court; or (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or (iii) with or without such reduction or increase, and with or without altering the finding, alter the nature of the sentence; and:

(b) On an appeal against sentence, the court can quash the sentence passed at the trial, and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

It must thus be stated that other rules that regulate the power of the courts to grant bail pending appeal have been laid down in case law over the years. One such a rule is that where a person appeals to the High Court against sentence only, the High Court cannot amend or change the conviction.

The above rule was laid down in **Lunga Mika v The People**²⁹. The brief facts of this case were that the appellant was convicted of burglary and sentenced to three years' imprisonment with hard labour by a Class I magistrate. This was the maximum sentence within the jurisdiction of the magistrate. On appeal, the appellate judge of the High Court enhanced the sentence to five years' imprisonment with hard labour. On appeal, the Supreme Court held that the appellant Judge of the High Court could not give a sentence which was not within the jurisdiction of the magistrate. The Sentence of five years' imprisonment with hard labour was therefore quashed and reduced to three years' imprisonment with hard labour in light of the jurisdiction of the Magistrate.

On the other hand, it must be noted that where a person appeals to the Supreme Court against sentence only, the finding can be changed or amended. This was established in the case of

²⁹Lunga Mika v The People (1970) Z.R. 61 (C.A.)

Patson Mwengwe v The People³⁰ in which the Supreme Court in a judgment delivered by Chomba, J.S held that on appeal from the subordinate court against sentence only the High Court has no jurisdiction to alter the conviction. The Supreme Court however has wider powers than those of the High Court in matters affecting the determination of criminal appeals, and has power under the Supreme Court of Zambia Act to interfere with conviction whether the appeal is against conviction or sentence only.

It must also be stated that Section 337 of the Criminal Procedure Code further provides the High Court with jurisdiction when considering appeals to call a record from the Subordinate Court for the purpose of examining and satisfying itself as to the correctness or legality or propriety of a sentence, finding or order. When the High Court calls for the record it may pursuant to S.338 of the CPC: (i) confirm the sentence; (ii) vary sentence; (iii) reverse decision; or (iv) order a re-trial. As regards the sentence, it may quash the sentence and pass another sentence. The Court may also ask the Subordinate Court to impose a particular sentence.

In view of the foregoing, it is submitted that there are conditions placed on the power of the High Court to review cases in relation to appeals. One such a condition was laid down by Blagden, J in **Patel v People**³¹ who held *inter alia* that where the High Court calls a case and reviews a decision of the Subordinate Court and passes a sentence, the appeal shall lie to the Supreme Court. But where the High Court calls the record and reviews and orders Subordinate Court to pass sentence, the appeal lies to the High Court.

³⁰ Patson Mwengwe v The People (1978) Z.R .1 (S.C.)

³¹ Patel v People [1967] ZR 35.

In view of what has been discussed above, it can thus be argued that the rationale for imposing restrictions on the power of the High Court to review records from the Subordinate Court is to ensure that the essence of appeal is not lost.

3.2 AN ASSESSMENT OF THE STAGE AT WHICH BAIL PENDING APPEAL CAN BE GRANTED IN CRIMINAL PROCEEDINGS

In Zambia, a person can only apply for bail pending appeal after the matter has come to an end in the trial court and sentence has been passed and he/she wishes to appeal against conviction or sentence.

Section 322 of the Criminal Procedure Code governs bail applications pending appeal. The relevant section provides inter alia that no appeal shall be heard against sentence, or conviction unless it is made within 14 days after date of the order.

Section 322 of the Criminal procedure Code was enforced by the Supreme Court in **Lanton, Edwards and Thewo v The People**³² in which the Court held that the appellant court has no power in cases where sentence has not been passed by trial court to consider an application for bail pending appeal as there is no conviction yet and therefore no appeal before the court.

Justice J.M. Siavwapa added in the case of the **People v Tembo**³³ by stating that in any case where an appeal is to be lodged, the question to be asked is whether, an appeal can be entertained in a matter where trial has come to an end but before the sentence is passed. The judge answered the question by further stating that in the ordinary course of events, once a

³²Lanton, Edwards and Thewo v The People (1998) SC.

³³People v Tembo (HNA/3/2011) [2011] ZMHC 43.

verdict is passed, the parties will wait for the court to pronounce the sentence before an appeal is lodged.

In sum, it is observed that it is only after an appeal is lodged against sentence or conviction that bail may be granted pending appeal.

3.3 COURTS' EXERCISE OF DISCRETION IN APPLICATIONS FOR BAIL PENDING APPEAL IN ZAMBIA

The power to grant bail pending appeal in criminal cases in Zambia is clearly discretionary. Therefore, the convict's chances to be granted bail pending appeal entirely depends on whether the court thinks it fit to order the sentenced to be released on bail at least temporarily pending appeal. This was established by Cullinan J.S in the celebrated case of **Malyoti Katenga Jamu v The People**³⁴.

It is therefore argued that since the law makes bail pending appeal discretionary, a step to draw a critical analysis on various Zambian case authorities in order to consider how the courts have sought to balance the convict's right to appeal and the right to liberty against the interests of society is justified.

In the case of **Kambarange Mpundu Kaunda v The People**³⁵ where the appellant was convicted of murder counsel for the convict in support of an application for bail pending appeal argued that by necessary implication, murder is now a bail- able offence in view of the amendment to (the then) section 201 of the penal Code, Chapter 146 by Act No. 3 of 1990 under which a person convicted of murder may now receive a sentence other than capital punishment where extenuating circumstances exist.

³⁴Malyoti Katenga Jamu v The People ³⁴(1981) Z.R. 99 (S.C).

³⁵Kambarange Mpundu Kaunda v People (SC.Z. Judgment No.1 of 1992).

In response to the above argument by counsel, Silungwe, C.J., Gardner, J., and Sakala, J.S of the Supreme Court held that bail cannot be granted in any appeal against a conviction for murder regardless of whether there are any extenuating circumstances or not.

Their Lordships further observed that they appreciated the ingenuity of the arguments; but went further to state that the fact remains that the appellant was charged with murder, rightly or wrongly, and remains so charged and, in this case, convicted until a successful appeal, if any. At that stage of the proceedings and mindful of the provisions of the then section 336 now section 332 of the Criminal Procedure Code which gives the court discretionary power to determine whether an appellant fits to be put on bail pending appeal or not the court could not entertain the bail application.

It can thus be argued that indeed the courts have been clothed with discretionary power to determine whether one fits to be put on bail or not. The question that arises therefore is whether the discretionary power bestowed on the courts is being exercised cautiously. That is to say on sound legal principles to ensure that the courts are not only focusing on protection of society but also ensuring that the convicts right to appeal and to be granted bail pending appeal is protected as the holding in the foregoing case does not seem to do so.

The Supreme Court had an occasion to respond to the above question in the case of **Oliver John Irwin v The People**³⁶ in which the appellant convicted of murder applied for bail pending appeal. The prosecution team argued that this question has already been decided by the court in the case of **Kambarange Kaunda** cited above that bail pending appeal cannot be granted to a person convicted of murder and the principle of stare decisis applies. Gardner J,

³⁶Oliver John Irwin v The People (1993) S.J. 6 (S.C.).

Justice Sakala and Chaila JJS held that the decision in the Kaunda case was made *per incuriam*-meaning through lack of care.

Their Lordships, further went on to state that section 123 (3) of the Criminal Procedure Code which provides that the 'High Court may, at any time, on the application of an accused person, order him, whether or not he has been committed for trial, to be admitted to bail or released on his own recognizance, and the bail bond in any such case may, if the order so directs, be executed before any magistrate 'should be constructed separately from ss.(1) of section 123 and that it gives the High Court unlimited power to grant bail in all cases without any exceptions.

It must be stated that the law cited above quite clearly gives the High Court power to grant bail in all cases without the exclusion of persons accused of murder or treason. There is nothing therefore to indicate that the legislature intended to deprive the High Court of its unlimited powers as to bail in all cases.

Their Lordships further noted, in **Oliver John Irwin v The People**, that

In other Commonwealth countries we find that the United Kingdom has a provision empowering the High Court to grant bail to persons accused of treason (the only offence there for which there is capital punishment) and denying such power to lower courts. The same rule in cases of treason and murder applies, so far as we are able to ascertain, in the other Commonwealth countries of Africa. There is no reason for Zambia to be an exception.³⁷

It can thus be argued that in Zambia bail can be granted in all cases as there is no exception as shown above.

³⁷ Oliver John Irwin v The People at page 6

Having established that bail pending appeal can be granted in all cases, it must be noted that the Judges have stated time and again that when granting bail pending appeal they are guided by the fundamental principle that the allowance of bail pending appeal should be exercised not with laxity but indeed with grave caution and only for strong reasons, considering that the accused has in fact been convicted by the trial court. In **Shamwana and 7 Others v The People**,³⁸ Honourable Silungwe, C.J, Ngulube, D.C.J., Muyovwe, J.S., Bweupe and Sakala J observed that in exercising discretion, the court must take into account all the factors, including those affecting the public; it is in the interest of the public that criminals, especially in serious crimes, should be promptly brought to justice.

It is therefore submitted that it is because of what has been stated above that the law on bail pending appeal in Zambia is very stringent. This can be illustrated by the fact that the appellate courts have continued to rely on the case of **Stoddard v The Queen**³⁹ which laid down the often quoted principles that a convicted person should not be released on bail pending appeal unless exceptional circumstances are disclosed. This principle may be distilled as follows. First, that a convicted person should not be released on bail. Second, that where however exceptional circumstances are disclosed, a convicted person may be released on bail pending appeal.

In the case of **Faustin Kabwe and Aaron Chungu v The People**⁴⁰ the Supreme Court in refusing to grant bail pending appeal cited the case of **Stoddard v the Queen**⁴¹ and stated that unlike bail pending trial, bail pending appeal is granted with reserve because the applicant is

³⁸Shamwana and 7 Others v The People³⁸SCJ No 2 of (1985).

³⁹Stoddard v The Queen³⁹(No.1) 5 N.R.L.R. 288.

⁴⁰Faustin Kabwe and Aaron Chungu v The People⁴⁰ (HPA/21/2011) [2011] ZMHC 69 (17 May 2011).

⁴¹Stoddard v The QueenNo.1) 5 N.R.L.R. 288.

a convicted person and the conviction is good unless and until an appellate Court quashes the conviction. Their Lordships were also quick to state the following:

In an application for bail pending appeal, it is important to observe that the status of the applicant is that of a convict and as a result the applicant does not enjoy the same status as that of a free or innocent person. A convict does not also enjoy the same status as a person who is facing criminal charges and it is for that reason that bail pending appeal ought to be granted with utmost circumspection, and in exceptional circumstances.

In light of the above, it can be argued that where the court is faced with a situation like the one in the foregoing case there exists the obvious tension between the need to protect the interests of society and to release the convict on bail at least temporarily to allow him to fight for his right to liberty until the final court of appeal declares his conviction legal and final. The courts in Zambia are only seen to protect the interest of society and are not paying due regard to promoting the convicts right to appeal by granting bail panting appeal.

It can therefore be argued that because the law makes bail pending appeal discretionary in Zambia and does not provide for guidelines on the use of discretionary power, the bail system does not have a justifiable approach to balancing of the individual's right to appeal and freedom against that of the interests of justice. This conclusion is based on the analysis of the law making bail pending appeal discretionary and case law discussed above. This observation is made in light of the fact that with regard to the importance of the right to appeal and liberty, there is no presumption in favour of bail at all times which is supposed to exist even after conviction until the final court declares the conviction of the appellant legal and final.

In the case of **Anuj Rathi Krishnan and the People**⁴² the appellant applied for bail pending appeal on ground that he was convicted for four years and served one year and that if he is not released on bail pending appeal he was highly likely to spend a substantial part of his sentence by the time his appeal is heard. In passing Judgment Honourable Justices Mwanamwambwa, Wanki and Muyovwe JJS cited the case of **Stoddard v The Queen** and noted that it is settled law that bail is granted at the discretion of the court and for it to be granted, the court must be satisfied that there are exceptional circumstances that are disclosed in the application and that the fact that there would be delay in hearing the appeal is one such an exceptional circumstance.

The court in the case above refused to grant bail pending appeal on grounds that it was highly unlikely that the convict would serve a substantial part of his four year sentence having regard to the fact that the court was willing to promptly dispose off his case.

The court distinguished the case of **Anuj Rathi Krishnan** from that of **Kayumba v the People**⁴³ in which it granted bail pending appeal where the appellant was sentenced to two years imprisonment and this was considered a short period such that by the time his appeal was heard, he would have served his sentence, hence the admission of the appellant to bail pending appeal. The Judges also opined that each case is considered on its own merits, depending on what may be presented as exceptional circumstances.

It must also be stated most importantly that their Lordships also stated that ‘in applications for bail pending appeal, it is important to bear in mind that the court is dealing with a convict

⁴²Anuj Rathi Krishnan and the People SCJ No 19/2011.

⁴³Kayumba v The People SCZ/9/77/2011.

and sufficient reasons must exist before such a convict can be released on bail pending appeal’.

What can be observed in light of the foregoing cases is that the courts should be faulted for their failure to draw an equitable balance between the individual’s right to appeal and freedom against the interests of justice. This is so because it is not justified for the court to deny bail pending appeal on grounds that one’s sentence is longer and therefore is unlikely to spend a substantial part of it before the appeal is heard. Whether an appellant has been convicted for a short or long sentence, the consequences of incarceration are the same.

It can thus be argued that at all times the convict should be entitled to bail pending appeal before the final court declares the conviction legal and final having regard to the importance of the convicts valuable right to liberty. This argument is thus justified by the observation by Stephens J in **Johnson v United States**⁴⁴ who stated that ‘the unjust deprivation of liberty for a single hour of one’s man liberty creates a debt that can never be repaid’.

It must also be stated that their Lordships’ holding in the **Krishnan** case cited above that in applications for bail pending appeal the courts are dealing with a convict and sufficient reasons must exist before such a convict is released on bail is exactly what is of much criticism.

⁴⁴Johnson v. United States 218 F.2d 578, 580 (9th Cir. 1954).

As Baron JA observed in **S v Tengende and Others**⁴⁵ since there no statutory conditions on granting bail pending appeal, “the decision whether or not to grant leave to appeal depends therefore, of course, on prospects of success. But how good those prospects must be raises the important issue of approach. It would be he noted a very serious step, and one which he would be reluctant to take save in very clear cases, to deny a man bail pending appeal from a conviction at first instance”. It follows therefore that bail pending appeal should be granted at all times especially in cases where the convict was granted pre-trial bail to enable him to fight for his personal liberty.

It can thus be argued that indeed lack of statutory guidelines on bail pending appeal in Zambia has led to the discretionary jurisdiction to be exercised in a casual and cavalier fashion as it has given Judges unbridled discretion in making the determination on bail pending appeal hence putting the convicts right to be released on bail pending determination of an appeal at risk. It should thus be stated that if this legislative trend continues in Zambia to put bail pending appeal entirely in the hands of Judges then indeed the presumption in favour of bail will be the exception rather than the rule.

3.4 THE CONSEQUENCES OF DENIAL OF BAIL PENDING APPEAL

It must be stated that the essence of bail pending appeal is to ensure that the appellant is released from custody at least temporarily so that he can fight for his valuable right to liberty which is so fundamental to the fulfilment of purpose for very individual.

⁴⁵S v Tengende and Others 1981 ZLR 445.

Krugger Carlstone⁴⁶ has asserted that because bail pending appeal is granted at the decency of Judges this has jeopardised the convicts right to appeal because Judges have failed to draw an equitable balance between the convict's right to appeal and fight for personal liberty and the interest of society. The effect of this is that the convicts rights particularly the right to appeal and right to liberty, are at risk of infringement. It follows therefore that a remand in custody following refusal to grant bail pending appeal significantly impacts on the person through:

the deprivation of liberty, exposure to and experience of custodial conditions and gradual demoralization; time spent in custody unnecessarily if they are eventually acquitted; an inducement to plead guilty to finalise the matter despite their innocence; loss of opportunity to make a better impression on the appeal court by appearing at liberty rather than ex-custody since there conviction is not final until the ultimate court says so.⁴⁷

Stephens W⁴⁸ has added by stating that denial of bail pending appeal acts as a restriction on the convict to regain liberty at least temporarily before the ultimate court proves his guilt beyond reasonable doubt. Beyond reasonable doubt is thus a moral way of making sure that innocent people do not go to jail for crimes they did not commit.

It is therefore argued that denial of bail pending appeal simply means that liberty for convicts is lost for longer than is absolutely necessary and cannot thus be readily recovered since the convict is incarcerated and therefore cannot freely fight for his right to liberty through the process of appeal.

⁴⁶Chris Krugger, *Theoretical legal perspective on criminal procedure*, p.65.

⁴⁷Gerald Martin, et al., *Best Practices for Human Rights and Humanitarian NGO Fact-Finding*, 87.

⁴⁸Wright Stephenson, "Bail Pending appeal", New Times Paper (May 15 2002), <http://www.Artcles on bail. Com> (accessed 6th September, 2012).

It is therefore submitted that indeed the ripple effect of denial of bail pending appeal on the convict creates a debt that can never be repaid as also observed by Justice Stephens in **Johnson v. United States**⁴⁹.

In view of the foregoing it is therefore safe to argue that where bail pending appeal is denied, the right to appeal is rendered meaningless due to consequences that follow on the convict as a result of incarceration.

3.5 CONCLUSION

This chapter has critically analysed the law making bail pending appeal discretionary in the Zambian context. A clear and detailed account of the jurisdiction of courts in Zambia to hear appeals was given and it has also been ascertained that in Zambia, a person can only apply for bail pending appeal after the matter has come to an end in the trial court and sentence has been passed and he/she wishes to appeal against conviction or sentence.

The chapter further showed that the lack of statutory guidelines for exercise of discretionary power on bail applications in Zambia has led Judges to only focus on the protection of society's interest at an expense of the convicts right to appeal and fight for liberty. This was done by citing leading cases on the law making bail pending appeal discretionary. The chapter finally discussed consequences of refusal of bail pending on the convict by showing, *inter alia*, that where bail pending appeal is refused, the right to appeal is deemed pointless as a result of incarceration. The next chapter looks at the need for reform of the law on bail pending appeal discretionary in Zambia.

⁴⁹Johnson v. United States 218 F.2d 578, 580 (9th Cir. 1954).

CHAPTER FOUR

THE NEED FOR REFORM OF THE LAW ON BAIL PENDING APPEAL IN ZAMBIA

4.0 INTRODUCTION

The principle of bail is deeply rooted in the law and practice of most states. In Zambia, it is incorporated in the Constitution⁵⁰ and the Criminal Procedure Code. While most countries are coming up with reforms to provide guidelines on the law making bail pending appeal discretionary, Zambia has held on to the law that has exclusively made bail pending appeal to be granted at the decency of Judges.

This legislative trend has led to the discretionary power to be exercised in a casual and inconsiderate fashion by Judges and hence is compromising the convicts right to appeal and fight for personal liberty. It is against this dissatisfaction with the current state of criminal justice in Zambia that has motivated the author's interest in the long-standing problem to draw a critical investigation on the need for reforms on the law making bail pending appeal discretionary.

This chapter highlights the need for law reform in Zambia by looking at reforms that are being implemented by the United States of America, Nigeria, Australia and India all former British colonies whose bail law like that of Zambia is largely influenced by common law principles. This discussion will in turn present various models which include Judicial and Legislative Reforms that Zambia can adopt to improve her bail laws.

⁵⁰ Chapter 1 of the Laws of Zambia

4.1 THE NEED FOR REFORMS IN ZAMBIA

Every country has a justice system which is tasked with the administration of criminal matters. A notable feature of the criminal process in Zambia is the absence of legislative guidelines for exercise of discretionary power on bail pending appeal. The Criminal Procedure Code provides the law relating to bail pending appeal but does not in any way provide any guidelines as to the considerations that adjudicators must take into account to grant bail pending appeal. The Criminal procedure Code thus only provides for procedural aspects of bail pending appeal.

It is thus noted with concern that lack of changes to bail provisions in the Criminal Procedure Code, Chapter 88 of the Laws of Zambia to a larger part holds the key to the current trend on the law making bail pending appeal discretionary in Zambia. This trend, has thus eroded the convicts right to appeal and fight for personal liberty. This is because the consideration and interpretation of every conceivable factor has been left to individual bail authorities, and their approach has not been consistent. This injustice has to be addressed considering that in criminal appeal cases the final court has not declared the conviction legal and final. In such a case, it is important that the convict is allowed to attain the lost liberty at least temporary to go through the appeal process and fight for the valuable right to freedom.

Due to lack of guidelines on the law making bail pending appeal discretionary Judges in Zambia rely heavily on rules laid at common law particularly in the case of **Stoddard vs. The Queen**⁵¹ which established the most quoted principles that a convicted person should not be released on bail pending appeal unless exceptional circumstances are disclosed. The

⁵¹Stoddard v The Queen ⁵¹(No.1) 5 N.R.L.R. 288.

principles in Stoddard were not decided in Zambia and thus rely heavily on English decisions between 1912 and 1932.

Bearing in mind the importance of the convicts right to appeal and fight for liberty, it is important that our Judges do not just rely on bail principles laid down in English Court decisions. But should develop home grown principles to serve the interest of Zambians and to respond to new changes in bail applications.

In view of the submission made above, the author is also alive to the fact that the courts in Zambia when making decisions are guided by the principle of *stare decisis*.

In **Abel Banda v The People**⁵² the Supreme Court had the following to say at page 14:

The principle of *stare decisis* requires that a court should abide by its ratio decidendi in past cases. Put simplistically in order to have certainty in the law decisions of courts should be consistent and should not be so readily changeable as to make it certain at any given time what the law is on a given issue.

In **Kasote v The people**⁵³ The Supreme Court further stated that being the final court in Zambia it adopts the practice of the House of Lords in England concerning previous decisions of its own. Such practice is that before deciding not to follow its previous decision it will consider first whether in its view the previous case was wrongly decided and secondly if so whether there is a sufficiently good reason to decline to follow it.

The Court went on to say that were justice is not served, it is justified to overturn a previous decision because the “symbolic scales of justice mean that just as an accused person should not be convicted unless there is sufficient and cogent evidence proving his guilt beyond

⁵²Abel Banda v The People (S.C.Z. Judgment No. 25 of 1986) [1987] ZMSC 1; (1986) Z.R. 105 (S.C.) (28 January 1987).

⁵³Kasote v The People (1977) Z.R. 75.

reasonable doubt, the State also should not be made to lose a case unless the evidence it adduces cannot, in law, support a conviction; that way the scales of justice are balanced⁵⁴..

In view of the cases cited above, it is not suggested that the Supreme Court should depart from its previous decisions on bail which the court made by relying on common law principles. But that the court should add on those principles by developing home grown standards that reflect the current trend on bail laws. This will help the courts to draw an equitable balance between the convicts right to appeal and fight for liberty and the interest of society to promptly incarcerate a convicted person.

The above submission has been made because Common law principles to a greater extent appear to only protect the interest of society and thus putting the convicts right to appeal and fight for liberty on gamble.

It is thus argued that due to concerns raised above, there is need for reforms on the law making bail pending appeal discretionary in Zambia

The proposal for reforms is justified because the lack of statutory guidelines on exercise of power to grant bail pending appeal leaves so much room that each Judge may decide in whatever way he wishes. Because of this it is highly likely that the discretion is abused and this is exactly what is of much criticism as it has compromised the convicts' right to be granted bail while going through the process of appeal to fight for the valuable right to liberty.

It is also important to note that one of the functions of the criminal justice system in Zambia is to ensure application of due process of the law to every citizen⁵⁵. In a broad sense, due

⁵⁴Kasote v The People(1977) Z.R. 75

process is interpreted as the right to be treated fairly, efficiently and effectively by the administration of justice⁵⁵. Therefore, for an accused to be treated fairly and effectively, they must be allowed to obtain bail and go through the appeal process to fight for the most important right to liberty. The present trend of the law on bail pending appeal in Zambia is not suitable for the attainment of the aims the criminal justice system purportedly serves.

There is need therefore to quickly re-look at the law making bail pending appeal discretionary in order to bring it in line with the emerging trends on bail laws and this justifies proposals for reforms which will be discussed in the subsequent chapter.

4.2 COMPARATIVE REVIEW OF LAWS ON BAIL PENDING APPEAL IN OTHER COMMON LAW JURISDICTIONS

This section draws a comparative study between the Zambian law and the bail laws applicable in the United States of America (USA), India, Nigeria and Australia which also have the law making bail pending appeal discretionary. The Justification for the comparative analysis is justified on the ground that these foreign jurisdictions have proceeded to embark on implementing measures to remedy the injustice on bail laws. This will help to extensively discuss possible reforms that Zambia can adopt to respond to emerging trends in bail laws in the subsequent chapter. The comparative discussion is as follows:

4.2.1 Reforms by Judicial Activism in India

India's law on bail pending appeal like that of Zambia is largely influenced by British laws that confer discretionary power entirely on the court to decide whether an appellant should be

⁵⁵ A summary of 2010 Human Rights Report Zambia, <http://www.state.gov.org> (accessed June 19, 2013).

⁵⁶ Muna Ndulo, "Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System" (paper presented at the LAZ annual Meeting, Livingstone, Zambia, April 27, 2012).

granted bail pending appeal or not.⁵⁷ This law has been criticised on ground that it is subject to abuse by Judges as there are no statutory guideline's to limit the power of the court bearing in mind the need to protect the appellant's right to bail pending appeal and fight for personal liberty. In order to remedy the injustice on bail laws, India has over the years embarked on implementing reforms by judicial activism to improve bail laws.

Indian Author Adjmal Kasan⁵⁸ has stated that Senior Supreme Court judge Justice S Rajendra Babu recently released a book considered to be a "blueprint" on reforms by judicial activism. He asserts that the book, titled 'Rejuvenating Judicial System through E-Governance and Attitudinal Change' by Justice G C Bharuka is based on inter-disciplinary clinical research on judicial reforms, aimed at reduction of pendency and arresting delays in civil and criminal cases.

Adjmal Kasan has also observed that in relation to bail laws, reforms by judicial activism are designed to encourage Judges as they pass decisions to ensure that they develop principles that do not purely reflect the common law but home grown principles as well developed to serve the interest of Indians and to respond to emerging developments in bail applications whether pre or post-conviction.

The reforms by judicial activism are providing answers to a number of concerns made against the law making bail pending appeal discretionary. Among the concerns are those raised by Honourable Justices M.B. Shah and D.M. Dharmadhikari, JJ of the Indian Supreme Court who stated, in **Mansab Ali vs. Irsan and Another**,⁵⁹ that the discretionary jurisdiction of

⁵⁷Salmond William. *Jurisprudence: The Theory of the Law* (2nd ed.), (London: Stevens and Haynes Press, 1970), 87.

⁵⁸Adjmal Kasab, "Blueprint of judicial reforms," India Times, (September, 2003), <http://articles.timesofindia.indiatimes.com/keyword/judicial-reforms> (accessed June 20, 2013).

⁵⁹Mansab Ali vs. Irsan and Another AIR2003SC707.

court to grant bail pending appeal has been exercised in a casual and cavalier fashion as has been noted in a number of cases.

In view of the foregoing the courts are now willing and indeed well prepared to apply principles laid by Justice Bhagwati in **Hussainara Khatoon v. Home secretary, State of Bihar and Patna**⁶⁰ who established an eight points alternative formula to the conventional grounds for granting of bail whether pre or post-conviction. The eight alternative principles laid by Justice Bhagwati are as outlined below:

First, (1) the court will consider The convicts length of residence in the community,(2) his employment status, history and his financial condition,(3) his family ties and relationships,(4) his reputation, character and monetary conditions,(5) his prior criminal record including any record of prior release on recognizance or on bail,(6) the identity of responsible members of the community who would vouch for his reliability,(7) the nature of sentence in so far as this factors is relevant to the risk of non-appearance; and (8) any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear⁶¹.

In recently decided cases of **Jayandra Saraswathi Swamygalv State of Tamilna**⁶² and **Prasanth Kumar Sarkar v.Asish Chaterjee**⁶³, the Apex Court held that at all times, while exercising its discretionary power under sec. 437 of the Criminal Procedure Code the court will always exercise such power fairly, justly & reasonably to ensure that the accused or convicted person's rights to bail and appeal are not endangered.

The court made the above observation in light of the comments by Justice Iyer who as early as 1977 anticipated reforms on the law on bail and thus stated in **Gudikanti Narasimhulu and Others. Vs. Public Prosecutor, High Court of Andhra Pradesh**⁶⁴ that 'The issue of bail is one of liberty, justice, public safety and burden of the public treasury', all of which

⁶⁰Hussainarakhatoon v. Home secretary, state of Bihar (1980) SCC (cri) 2.

⁶¹Hussainarakhatoon v. Home secretary, state of Bihar⁶¹ (1980) SCC (cri) 2.

⁶²Jayandra Saraswathi Swamygalv State of Tamilna 2005 Cr.L.J 883(SC).

⁶³Prasanth Kumar Sarkar v.Asish Chaterjee 2011 Cr.L.J 302(SC).

⁶⁴Gudikanti Narasimhulu and Others. Vs. Public Prosecutor, High court of Andhra Pradesh 1977 AIR 429SCR (2) 37.

insist that a developed jurisprudence of bail is needed as it is integral to a socially sensitized judicial process to protect appellants on pre and post- conviction. Two years later, a Supreme Court Bench in **Gurbaksh Singh v. State of Punjab**⁶⁵ headed by the then Chief Justice Chandrachud, Y.V re-emphasised the need to exercise the power to grant bail pending appeal with utmost care to ensure that the convicts right to appeal while being released at least temporality is not endangered.

In the case of **Gudikanti Narasimhulu v. Public Prosecutor**⁶⁶ Justice V.R. Krishna Iyer, sitting as Chamber Judge, enunciated the principles of bail in relation to the convict's right to be granted bail to appeal and fight for the precious right to liberty, He stated that what, then, is judicial discretion in a modern bail context? He stated that in the elegant words of Benjamin Cardozo:

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life.⁶⁷

In view of the above Shiva Srinivasan⁶⁸ has argued that it is because of the fundamental right to bail that Section 439(1) of the new Criminal Procedure Code of India, confers special powers on the High Court or the Court of Session in respect of bail. He contends that Unlike under Section 437(1) of the old Act there is no ban imposed under Section 439(1), of the new Procedure Code against granting of bail by the High Court or the Court of Session to persons accused at any stage. He has also stated that the considerations in granting bail to which the

⁶⁵Gurbaksh Singh v. State of Punjab 1980 Cri LJ417 (P&H).

⁶⁶Gudikanti Narasimhulu v. Public Prosecution, p 10.

⁶⁷Gudikanti Narasimhulu v. Public Prosecution, p 11.

⁶⁸Shiva Srinivasan, "A Commentary article on Bail in India," the Daily Paper, (July 24, 2012), <http://www.worldpress.com> (accessed June 3, 2013).

court pays regard are those laid in the new Criminal Procedure Code Act which include the history of the case as well as the standing of the accused in society.

It is therefore submitted that Judicial activism in India has helped to establish a legislative liberal bail philosophy in India's jurisprudence through amendments to the Code of Criminal Procedure to provide further guidelines on exercise of power on bail applications. The Amendments includes the 2009 amendment⁶⁹ relating to the imposition of conditions on certain defendants charged with an offense involving family violence. This presents Zambia with a model that can help improve her bail laws.

4.2.2 Reforms in the United States of America

In the United States of America Bail as, Justice Douglas famously wrote in **Herzog v. United States**⁷⁰ "is basic to the system of law. It symbolizes the country's bedrock concern for personal freedom and the idea incorporated from English common law that "only those incarcerations which arise from absolute necessity are just."

In the United States like in any other countries there are high stakes involved in deciding⁷¹ circumstances under which a defendant can obtain bail pending appeal against the overriding interests of society to promptly incarcerate the defendant.

Congress has struck the necessary balance between the interest of society and the defendant in the Bail Reform Act of 1984. The Act provides that a defendant is entitled to bail pending appeal when, among other things, he can prove '(1) that he will not be a flight risk or a

⁶⁹ Amendment to the Indian Code of Criminal Procedure, <http://www.legis.state.org>, (accessed June 20, 2013)

⁷⁰ *Herzog v. United States*, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955).

⁷¹ Doug Keller, "resolving a substantial question: just who is entitled to bail pending appeal under the bail reform act of 1984" USA online paper, (May 24 2012) www.justlaws.com, (accessed March 17 2013).

danger to the community while out on bail and (2) that his appeal will be meritorious enough to raise at least one “substantial question which is reasonably decided by the courts”⁷².

In light of the above, in the case of **United States v Salerno**⁷³ Rehnquist CJ when granting bail pending appeal observed that in light of the Bail Reform Act, in order to ensure protection of the convicts right to appeal, discretionary power is to be exercised with the greatest caution. This is important as it helps judges to draw a reasonable balance between the interest of society to quickly imprison an offender and the need to allow an accused to be released from prison to fight for the right to liberty

It is therefore observed that the statutory guidelines on the exercise of discretionary power on bail pending appeal are a check on the exercise of such power by the courts to ensure that there is no abuse bearing in mind that the courts are dealing with the convict’s valuable right to liberty. The Bail Reform Act definitely reflects the present development on the law making bail pending appeal discretionary and presents Zambia with a model for Reforms.

4.2.3 Legislative reforms in Australia

Georgia Brignell⁷⁴ has argued that in order to ensure that the convicts right to appeal is not jeopardised by abuse of judicial discretion on bail pending appeal Australia enacted the Bail Act (the Act), in 1978⁷⁵, which sought to codify all bail legislation and establish specific criteria for courts when determining bail.

⁷² The USA Bail Reform Act of 1984.

⁷³ *United States v Salerno* 481 U.S. 739 (1987).

⁷⁴ George Brignell, “An Examination of Contemporary Issues on bail laws,” 40 AUSTRALIAN LAW 34-35.

⁷⁵ The 1978 Bail Act of Australia –available at <http://www.austlii.edu.au/> (access June 2013).

The Bail Act thus provides that if there is a conviction or sentence and an appeal pending in the Court of Criminal Appeal, s 30AA requires special or exceptional circumstances to justify the granting of bail.

In **R v Wilson**⁷⁶ it was held that bail will not be granted pending an appeal unless the applicant can establish "something more arguable" and be "most likely to succeed". The court added by stating that in order to determine these exceptional circumstances, the court is to be guided by criteria outlined in s 32 of the Bail Act. The relevant section provides that when determining applications for Bail, the court should consider: the probability of the accused person appearing in court, the interests or needs of the accused person, the protection of victims or their close relatives, and the protection and welfare of the community.⁷⁷ Sully J in **R v Hall**⁷⁸ stated that these factors are exclusive, mandatory and exhaustive.

It must thus be stated that in **R v Sinanovic**⁷⁹ the court dealt with an application for bail when an application for special leave to the High Court was pending. There, Justice Greg James said that the test in s 30AA was the same as the common law test applied by the High Court in determining bail applications, that is, whether special or exceptional circumstances exist. The huge difference is that in this case when considering exceptional circumstances the court is guided by statutory criteria laid down in section 32 of the Bail Act.

It is therefore submitted that in Australian criminal justice system there is no loophole for abuse of discretionary power on applications for bail pending appeal because statute has made the law certain by establishing a criteria to be followed by all Judges in bail applications. This in turn has ensured that the convicts right to appeal and fight for personal liberty is protected.

⁷⁶*R v Wilson* ⁷⁶(1994) 34 NSWLR.

⁷⁷ Section 32 of the 1978 Bail Act of Australia.

⁷⁸*R v Hall* (16/1/97, NSW Sup Ct).

⁷⁹*R v Sinanovic* ⁷⁹[2001] NSWSC 16.

4.2.4 Bail Reforms in Nigeria

It has been reported by the United Nations⁸⁰ that Nigeria is implementing reforms on bail laws by *inter alia*, providing legal aid services to accused persons. The United Nations has also stated that the right to legal aid is the foundation for the protection of individual liberties in most states. This is because it allows suspects, to make use of the legal profession to represent their interests in the criminal justice system. For without this support, those who come into contact with the intricacies of the system and rules of procedure would be unfairly pitted against the stronger, publicly funded criminal justice system machinery.

It is thus submitted that the provision of the right to legal aid to accused persons in Nigeria is a demonstration of the need to level the powers of the State to those of the suspect to ensure a free and fair trial and therefore presents Zambia with a model for Reforms.

4.3 Conclusion

This chapter has endeavoured to show that there is need to amend the law making bail pending appeal discretionary in Zambia. This is because lack of statutory guidelines on the exercise of such unfettered power has influenced the failure by Judges to draw an equitable balance between the need to incarcerate a convict promptly and the need to release a convict on bail pending appeal to fight for the fundamental right to liberty. To this effect this chapter has also discussed reforms that are being implemented in other jurisdictions that were also colonised by Britain like Zambia that are tailored to draw an equitable balance between the convicts right to appeal and fight for the valuable right to liberty and the interest of society.

⁸⁰ United Nations Office on Drugs and Crime (UNODC), Report on improving access to legal aid in Africa, New York, 2011, Available at <http://www.unodc.org/pdf/criminal/>, accessed August 6, 2013.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 SUMMARY OF FINDINGS

Chapter one of the essay introduced the concept of the law making bail pending appeal discretionary and stated the problem of the position of the law in the criminal justice system in Zambia.

Chapter two looked at the background to the protection of an individual's fundamental right to liberty as the core purpose for which the concept of bail was developed. Bail, as Justice Douglas famously wrote in **Herzog v. United States**⁸¹, is "basic to the system of law". It symbolizes the country's bedrock concern for personal freedom and the idea incorporated from English common law that "only those incarcerations which arise from absolute necessity are just"⁸².

Chapter two also extensively discussed arguments in favour and against the law making bail pending appeal discretionary by looking at literature from Zambia and foreign countries. The chapter showed that the law making bail pending appeal discretionary has been favoured because it presents Judges with an opportunity to consider whether or not to grant bail pending appeal to ensure protection of society's interest. Other scholars have however noted that there is need to come up with guidelines to guide the courts in the exercise of such power as it is being exercised in a casual and cavalier fashion as noted in a number of cases cited in the chapter hence putting the convicts right to appeal at risk. The consequence of this

⁸¹Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955).

⁸²⁸² Herzog v. United States, at 351

has been that an erroneously convicted accused person who is denied bail usually loses liberty to pay a debt to society he/she has never owed.

Chapter three examined the law making bail pending appeal discretionary in the Zambian context and established that the High Court and Supreme Court do have jurisdiction to hear criminal appeals. The chapter further ascertained that in Zambia, a person can only apply for bail pending appeal after the matter has come to an end in the trial court and sentence has been passed and he/she wishes to appeal against conviction or sentence.

Furthermore, chapter three established that lack of statutory guidelines on the use of discretionary power has made Judges fail to draw a justifiable approach balance between the individual's right to appeal and freedom against that of the interests of justice. This, has therefore put the convicts right to appeal and fight for the fundamental right to liberty at risk. The chapter finally discussed consequences of refusal of bail pending appeal on the convict by showing *inter alia* that where bail pending appeal is refused the right to appeal is deemed meaningless as a result of incarceration.

Chapter four established that there is an urgent need in Zambia of reforms on the law making bail pending appeal discretionary. It has thus been submitted that the problem in Zambia is to a larger part that the Criminal Procedure Code vests broad discretion in the court to grant bail pending appeal. The consideration and interpretation of every conceivable factor has thus been left to individual bail authorities, and their approach has not been consistent. The present law is therefore uncertain and has led to injustice in the bail system.

The uncertainty is principally due to the fact that there are no well-defined criteria to guide the courts in the exercise of discretionary power on bail pending appeal. To this end, the

chapter also discussed reforms in other jurisdictions that were also colonised by Britain like Zambia. It has also been shown that the reform's in foreign jurisdictions are tailored to meet the emerging trends in bail laws. These, could provide a model for Zambia and has been a basis upon which recommendations will be made below.

5.1 RECOMMENDATIONS

In this section, recommendations regarding institutional and legal structures for effective administration of justice in the bail system are made. These are based on the findings of the study. The recommendations given are those which, in the author's measured opinion could be effected promptly bearing in mind the urgent need to reform the law making bail pending appeal discretionary in Zambia. If this is done, it will curtail the unbound judicial discretion of Judges and thus ensure that the law is made certain at all times to protect the convicts right to bail while going through the appeal process.

5.1.1 Legislative Amendment

In order to ensure effective administration of bail pending appeal, it calls for amendment to the Criminal procedure Code, Chapter 88 of the Laws of Zambia to set out visibly and in sufficient detail, criteria to be followed by the courts when granting bail pending appeal. This approach has helped the United States of America, India and Australia to narrow down the extensive discretion conferred on the courts. If Zambia does the same, this will aid the country to ensure safeguards against abuse by Judges bearing in mind that the courts are dealing with the convict's right to appeal and fight for the valuable right to liberty.

5.1.2 Reforms by Judicial Activism

In order to respond to the concerns raised in this paper, instead of just amending the provisions on bail in the Criminal Procedure Code, Zambia should also embark on reforms by

judicial activism to be implemented by Judges when deciding cases. This has proved successful in India where Judges are developing an alternative formula to the conventional grounds at common law for granting pre or post-conviction bail. If Zambia does the same, this will ensure that bail principles, do not purely reflect the common law but home grown principles as well on bail laws bearing in mind the importance of a convicts right to liberty.

In order to embark on reforms by judicial activism on the law making bail pending appeal discretionary in Zambia, it is important that library facilities in courts be upgraded to modern standards so that our Judges are able to conduct meaningful research if they are to pass decisions that reflect the current trends on bail pending appeal. In India, this has been achieved by providing the judiciary with E-Governance and Attitudinal Change based on inter-disciplinary modern clinical and library research on reforms by judicial activism. .

5.1.3 Transparent justice

It is important that plans for reforms on bail laws are built on transparency so that the public can understand what happens when a crime is reported and how the criminal justice system is striking an equitable balance between the convicts right to appeal and fight for liberty and the interest of society. This is not about institutions and buildings, but about ensuring that those working in the criminal justice system, including magistrates, engage with the people in their communities to listen to what they have to say and give the public a voice in how criminal justice services are delivered in their areas. If this approach is adopted it will to help the country to develop a responsive bail system.

5.1.4 Provision of legal aid services to accused persons

Recognizing that legal aid is an essential element of a functioning criminal justice system and is a foundation for ensuring fundamental fairness and public trust in the criminal justice process, it is important that Zambia emulates Nigeria by guaranteeing the right to legal aid services to help accused persons access legal representation as they fight for the right to liberty through the process of appeal.

5.2 CONCLUDING REMARKS

In conclusion, it must be stated that the season for reforms on the law making bail pending appeal discretionary in Zambia has arrived. This however will involve a complex process that requires time and resources. It will therefore require not only the participation of government but also of all stakeholders in the criminal justice system which includes the private sector and the Zambian community in general. This will ultimately ensure prompt implementation of reforms on the law making bail pending appeal discretionary to bring it in line with modern trends on bail laws tailored indeed to meet the needs of Zambian's.

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