

**USE OF TOY GUNS IN AGGRAVATED ROBBERY; SHOULD IT ATTRACT THE
MAXIMUM SENTENCE?**

By

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SCHOOL OF LAW

Being a Directed Research essay submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB) Degree

DECLARATION

✱

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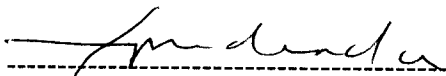
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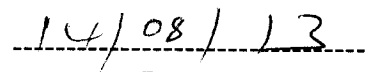
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MR. FREDRICK MUDENDA



DATE

ABSTRACT

The purpose of the criminal justice system is to deliver an efficient, effective, accountable and fair justice process for the public. The underlying logic of the criminal justice is to contain and repress criminal behaviour. The purpose of the criminal justice system is therefore to deliver justice for all, by convicting and punishing perpetrators and helping them reform, while protecting the innocent. As a consequence of this, the law imposes a very stiff punishment for offenses such as aggravated robbery, especially armed robbery. The aim of this research was to investigate whether a toy gun fits the description of an offensive weapon and firearm as provided in the Penal Code and Firearms Act respectively and whether its use should warrant its inclusion in the ambit of the offense of aggravated robbery with an offensive weapon. This research primarily involved desk research. The research firstly introduced the unsettled legal positions on what is the appropriate offense and punishment for aggravated robbery involving toy guns and further considered in a comparative analysis how robberies involving toy guns have been dealt with in other jurisdictions by both the legislature and the courts, bringing out the difficulties their respective courts have had in deciding with such matters.

Furthermore, the cases *The People v Joseph Simukoko* and *Jordan Nkoloma v The People* as well as case law from other jurisdictions were analysed thereby illustrating the need to consider treating aggravated robbery involving toy guns differently from aggravated robbery with real firearms. In addition, the statutory provisions in Zambia and other jurisdictions were discussed to determine the way the offense of aggravated robbery involving toy guns is dealt with and the level of sentence imposed for such offenses. The research concluded by highlighting a number of vital recommendations aimed at addressing the foregoing concerns. Notable among the recommendations included amendment to the Zambian legal infrastructure by creating consistency in the definition of an offensive weapon as well as the definition of a firearm. The research also recommended the removal of cross referencing between Penal Code and Firearms Act as well as the need to lessen the sentence of aggravated robbery involving toy guns.

DEDICATION

To my loving family.



ACKNOWLEDGEMENTS

I wish to thank the Almighty God for the grace he has granted me in pursuing the Law Degree at the University of Zambia.

I also wish to sincerely express my indebtedness to my Supervisor Mr. Fredrick Mudenda, Lecturer in Law at the University of Zambia, whose advise and directions in preparing this work were always adequate and to the point. I could not have accomplished a task of this magnitude without his able counsel and discourse. I thank you for being open and accommodative.

I appreciate my children who could not understand why I had to go for work very early and come home from school very late. This Law Degree is for you.

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My gratitude also goes out to all my lecturers and course mates in the School of Law at the University of Zambia, for your knowledge sharing, and moral support during the entire period of my study. I am forever grateful for your unfailing kindness. May the almighty God richly bless you all.

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CHAPTER ONE

1.0 INTRODUCTORY CHAPTER



1.1 INTRODUCTION

This research endeavours to investigate whether the crime of robbery with a toy gun should be deemed as aggravated robbery whilst armed with an imitation firearm and warrant its inclusion in the ambit of the offense of armed robbery and the corresponding death sentence contrary to section 294(2) of the Penal Code.¹ To achieve this, the first chapter will introduce the subject matter and background of the research, its aim and objectives. Chapter two will focus on the studies undertaken on aggravated robbery especially where toy guns are used in the commissioning of such crimes. It will also look at case law on the subject matter from various jurisdictions. Chapter three will examine the law that outlines the offence of aggravated robbery involving toy guns and its sentence in various jurisdictions. In particular, the relevant sections of the laws will be considered regarding the offense of aggravated robbery involving toy guns. Chapter four will examine the main concerns or anomalies found in the current law and judgments in Zambia through a comparative analysis. The chapter will also examine the cases *The People v Joseph Mulenga Simukoko*² and *Jordan Nkoloma v The People*³ and consider the implications of the judgments in the aforementioned cases on jurisprudence in Zambia. Lastly, chapter five will conclude the findings of the research and attempts to answer the research questions. It will further provide recommendations on how to

¹ Chapter 87 of the Laws of Zambia

² 2010/HK/42 (unreported)

³ (1978) ZR 278

improve the existing law and practice in dealing with the offence of aggravated robbery involving toy guns in Zambia.

1.2 BACKGROUND



Aggravated robbery is one of the most serious offenses that exist in society to which a heavy punishment is imposed on perpetrators.⁴ The offense becomes more serious when it involves the use of a weapon such as a gun or firearm. The use of such a weapon causes fear and induces a reasonable apprehension of danger, panic, or hysteria in the victim.⁵ It is common cause that a toy gun does not create any possibility of loss of life. However, where a toy gun is used in aggravated robbery, the law in Zambia still imposes the same punishment as would aggravated robbery commissioned using real guns. This leaves a heavy burden on the Judiciary to the extent that it is faced with two competing interests when determining such matters; the interest of the accused and the interest of the victim and the public at large.

It is paramount to note that the Penal Code⁶ of Zambia does not use the term “armed robbery”, instead it uses the term aggravated robbery with an offensive weapon when referring to robberies involving offensive weapons such as a firearm. Subsection 1 of section 294 of the Penal Code⁷ defines aggravated robbery as follows:-

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

⁴ Jenny Mouzos and Maria Borzycki, *An Exploratory Analysis of Armed Robbery in Australia*, Australian Institute of Criminology Technical and Background (Australian Institute of Criminology, Paper Series No. 72003), p 13; accessed September 18, 2012, <http://www.aic.gov.au/documents/F/6/.pdf>

⁵ <http://legal-dictionary.thefreedictionary.com/Aggravated+robbery>

⁶ Chapter 87 of the Laws of Zambia

⁷ Chapter 87 of the laws of Zambia

stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years.

Subsection 2 of section 294 of the Penal Code provides for armed robbery. The subsection provides:-

(2) Notwithstanding the provisions of subsection (1), the penalty for the felony of aggravated robbery under subsection (1) shall be death-

(a) where the offensive weapon or instrument is a firearm, unless the court is satisfied by the evidence in the case that the accused person was not armed with a firearm and-

(i) that he was not aware that any of the other persons involved in committing the offense was so armed; or

(ii) that he dissociated himself from the offense immediately on becoming so aware; or

(b) where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offense, unless the court is satisfied by the evidence in the case that the accused person neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offense.

In creating the offense of aggravated robbery with use of a firearm, the Penal Code relies on the Firearms Act⁸ for the definition of a firearm. Section 2 of Firearms Act defines a firearm

as:-

(a) any lethal barrelled weapon of any description from which any shot, bullet, bolt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet, bolt or other missile;

(b) any weapon of any description designed or adapted for the discharge of any noxious liquid, gas or other thing;

(c) any barrel or any frame or body to which a barrel may be attached, incorporating a mechanism designed to cause controlled detonation or discharge of any shot, bullet, bolt or other missile and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing such weapon;

but does not include an air gun which is not of a type declared by regulations made under this Act to be specially dangerous or any apparatus designed specially for the discharge of insecticides, fungicides, industrial or fire-fighting chemicals or for medical or surgical use.

⁸ Firearms Act Chapter 110 of the Laws of Zambia

However, the same Act in section 49 defines an imitation firearm and deems it to be an offensive weapon for purposes of widening the definition of an offensive weapon.

Section 49 of the Firearms Act provides as follows:-

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

(6) In this section, "imitation firearm" means anything which has the appearance of being a firearm, whether or not it is capable of discharging any missile or noxious liquid or gas, as the case may be.

The above definition of an imitation firearm suggests that a toy gun clearly fits the above description.

Section 38 of the Violent Crime Reduction Act 2006 of the Laws of England, which was enacted to penalise the manufacture, import or cause to be brought into, or sell of realistic imitation firearms in Great Britain, has gone further in defining an imitation firearm. The Act provides for a "realistic imitation firearm" and defines it as:-

An imitation firearm which has an appearance that is so realistic as to make it indistinguishable, for all practical purposes, from a real firearm.

It is pertinent to observe that the punishment imposed when an accused is convicted of armed robbery in Zambia is death. This entails that once an accused is found guilty of aggravated robbery whilst armed with an imitation gun, the maximum mandatory sentence of death applies. Mandatory sentencing refers to the practice of Parliament setting a fixed penalty for

irrespective of their level of culpability or other extenuating circumstances, are subject to the same level of punishment.¹⁴ On a similar point, it is opined that mandatory sentences do not provide offenders with any incentive to plead guilty and as a result, court proceedings regarding offenses attracting a mandatory sentence are likely to take longer and thus cost more. There is also the argument that mandatory sentences cause sentencing discretion to be transferred from the courts to state prosecutors. As a result of this, state prosecutors rather than courts decide, by means of the charge preferred, whether a mandatory sentencing regime should or should not apply. There is also a strong belief that Judges and Magistrates, after considering mitigating factors, are sometimes compelled to go to some great length in avoiding inflicting mandatory sentences on offenders where they feel the sentence is unjust.¹⁵

In view of the above arguments for and against mandatory sentences, there is a strong case as to whether toy guns in aggravated robbery should attract the mandatory maximum sentence of death contrary to subsection 2 of section 294 of the Penal Code.

1.3 STATEMENT OF PROBLEM

It is not uncommon to hear that a successful robbery has occurred where toy guns are used for the simple reason that it is usually impossible to distinguish a real gun from a toy gun used by robbers, especially where the victims are in a state of panic, anxiety and hysteria. However, looked at from a different perspective, the use of a toy gun in robbery entails that the danger of loss of life from use of a gun is non-existent as such an instrument is not capable of taking a life as would a real gun.

¹⁴ *Mandatory Sentences*, Law Reform Commission of Ireland, p97.

¹⁵ Declan Roche, *Mandatory Sentencing*, p 5

The punishment leveled against the use of toy guns in a robbery in Zambia is death as the law regards such a crime as aggravated robbery whilst armed with a firearm. Punishment must be based on the gravity of the offense¹⁶. Punishment must also be based on the doctrine of proportionality. Proportionality is a general principle of the law that signifies the ideas of equilibrium, justice, reasonability and also the necessary adequate fitting of the measures adopted by the State to the existing situation and the legitimate target aimed at¹⁷.

In view of the above, this research endeavours to investigate whether the crime of robbery with a toy gun should be deemed as armed robbery and warrant its inclusion in the ambit of the offense of aggravated robbery and the corresponding death sentence contrary to section 294(2) of the Penal Code.¹⁸

1.4 PURPOSE AND OBJECTIVE OF STUDY

Cases involving the use of toy guns in aggravated robbery have been decided upon differently in a number of jurisdictions including Zambia. The issue as to whether a toy gun qualifies as an offensive weapon is not settled law as such cases have been handled differently with varied judicial decisions. The general objective of this research is to investigate whether a toy gun fits the description of an offensive weapon and firearm as provided in the Penal Code and Firearms Act¹⁹ respectively and whether its use should warrant its inclusion in the ambit of the offense of aggravated robbery with an offensive weapon.

¹⁶ Declan Roche, *Mandatory Sentencing*, p 1
¹⁷ Marius Andreescu, *Proportionality - A Constitutional Principle*, University of Pitești, accessed on 6th July 2013; <http://connection.ebscohost.com/c/articles/51004400/proportionality-constitutional-principle>
¹⁸ Chapter 87 of the Laws of Zambia
¹⁹ Chapter 110 of the Laws of Zambia

1.5 RESEARCH QUESTIONS

- 1. Does the use of a toy gun in aggravated robbery qualify as an offensive weapon?
- 2. Should it be a mitigating factor that a toy gun is used in an aggravated robbery?
- 3. What are the issues that arise in a case where a toy gun is used?
- 4. Does the judgement in the case of *The People v Joseph Mulenga Simukoko*²⁰ critically address the use of a toy gun in light of the definition of “offensive weapon”?
- 5. What are the ramifications of the said judgment on jurisprudence in Zambia?
- 6. Are the statutory provisions dealing with such an offense in Zambia effective in ensuring the rationale of the offense is achieved?

1.6 METHODOLOGY

This research will primarily rely on desk research. Secondary data in the form of books, journals, scholarly articles as well as the use of the internet will be consulted in order to attain the most recent information on the subject matter.

1.7 CONCLUSION

This chapter has endeavored to introduce the contents of this research. To this effect, this chapter has given an introduction of the controversy where a toy gun is used in aggravated robberies in Zambia. It also highlighted the legal provisions regarding aggravated robbery in Zambia and the definition of a firearm for purposes of determining the offense of armed robbery. The chapter further considered the case against the prevailing system of imposing

²⁰ 2010/ HK/42 (unreported)

mandatory sentences for offenses such as robbery whilst armed with a toy gun in Zambia. The next chapter considers how robberies involving toy guns have been dealt with in various jurisdictions, and illustrates the difficulties that courts have had in deciding such matters.



CHAPTER TWO

2.0 USE OF TOY GUNS IN AGGRAVATED ROBBERY



2.1 INTRODUCTION

This chapter considers how robberies involving toy guns have been dealt with in various jurisdictions by both the legislature and the courts and illustrates the difficulty courts have had in deciding such matters. The chapter will highlight how the courts in different jurisdictions have interpreted the definition of an offensive weapon when dealing with aggravated robbery whilst armed with a toy gun, and the reasoning for such interpretations. One of the key issues of this research is whether such a robbery falls within the ambit of aggravated robbery contrary to sections 294(2) of the Penal Code.¹ This is premised on the interpretation of an offensive weapon under the Zambian law and whether it deserves the same punishment as would be the case where real guns are used.

Section 294(1)(2) of the Penal Code provides that:-

- 1) Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years
- 2) Notwithstanding the provisions of subsection (1), the penalty for the felony of aggravated robbery under subsection (1) shall be death-
 - (a) where the offensive weapon or instrument is a firearm, unless the court is satisfied by the evidence in the case that the accused person was not armed with a firearm and:-

¹ Chapter 87 of the Laws of Zambia

- (i) that he was not aware that any of the other persons involved in committing the offense was so armed; or
- (ii) that he dissociated himself from the offense immediately on becoming so aware; or
- (b) where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offense, unless the court is satisfied by the evidence in the case that the accused person neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offense.
- 3) In this section "firearm" has the meaning assigned to it in section two of the Firearms Act.

2.2 THE STATUTORY DEFINITION OF A FIREARM

It is also important to note that a toy gun does not fit the statutory definition of a firearm (from which the definition of an offensive weapon is derived) as provided in section 2 of the Firearms Act² which reads:

"Firearm" means-

- (a) any lethal barrelled weapon of any description from which any shot, bullet, bolt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet, bolt or other missile;
 - (b) any weapon of any description designed or adapted for the discharge of any noxious liquid, gas or other thing;
 - (c) any barrel or any frame or body to which a barrel may be attached, incorporating a mechanism designed to cause controlled detonation or discharge of any shot, bullet, bolt or other missile and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing such weapon;
- but does not include an air gun which is not of a type declared by regulations made under this Act to be specially dangerous or any apparatus designed specially for the discharge of insecticides, fungicides, industrial or fire-fighting chemicals or for medical or surgical use;

However, section 49(6) of the Firearms Act gives a section specific definition of an imitation firearm. Section 49(6) of the Firearms Act provides that:

- (6) In this section, "imitation firearm" means anything which has the appearance of being a firearm, whether or not it is capable of discharging any missile or noxious liquid or gas, as the case may be.

² Chapter 110 of the Laws of Zambia

2.3 CASE LAW ON ARMED ROBBERY WITH USE OF TOY GUNS

Courts from various jurisdictions have adjudicated the issue of toy gun use in aggravated robbery variedly. The judgements that come out of the courts vary tremendously, making this particular subject worth investigating.

In the case of *The People v Joseph Mulenga Simukoko*³, the Kitwe High Court convicted the accused of attempted aggravated robbery after it held that he was armed with a firearm contrary to section 294(1) and section 391 of the Penal Code. It held that it was immaterial that the gun used was a mere toy gun, emphasizing that what was important was that the accused threatened his victims with it. The court was of the view that what was important was that the victims were afraid, believing the toy to be a gun and had obeyed him.

Similarly, in the case of *Jordan Nkoloma v the People*⁴, the Supreme Court held that a toy pistol was an offensive weapon within the meaning of section 294 of the Penal Code⁵ and the Firearms Act which provides under section 49(6) that an imitation firearm shall be deemed to be an offensive weapon. It further held that the Firearms Act provides that an imitation firearm shall be deemed to be an offensive weapon.

In *Simon Mudenda v The People*⁶, the appellant was convicted by the High Court of armed robbery contrary to section 294 (2) of the Penal Code⁷ and was sentenced to death. At the Supreme Court hearing the appellant withdrew his appeal against conviction and decided to appeal against the sentence only. The ground for appeal was that the sentence passed by the

³ 2010/ HK/42 (unreported)

⁴ (1978) ZR 278

⁵ Chapter 89 of the Laws of Zambia

⁶ SCZ No. 19 of 2002.

⁷ Chapter 87 of the Laws of Zambia

High Court was excessive on the basis that though the appellant had had the opportunity to use his firearm, he did not use it. The appellant further contended that even when he had been hit with an iron bar, he did not resort to the use of the firearm. The Supreme Court dismissed the appeal and held that no appeal shall lie against any sentence the imposition of which is fixed by law. Extenuating circumstances do not apply to aggravated robbery committed while armed with a firearm and cannot mitigate the severity of the death penalty in a case of aggravated robbery committed while armed with a firearm. The Supreme Court further stated that such an issue can properly be raised before the executive at the prerogative of mercy committee.

However, in the case *Jonas Nkumbwa v The People*⁸, the appellant was sentenced to death as a consequence of his conviction on the charge of aggravated robbery involving the use of a firearm, where it was found that the firearm was in fact an air gun. The Supreme Court exercised leniency and quashed the death sentence and imposed a sentence of 18 years imprisonment with hard labour. Ngulube, D.C.J in delivering the judgment of the Supreme Court stated:-

There was no direct evidence of the use of firearms as they had not been fired nor were they subsequently found and tested to be firearms within the meaning of the Firearms Act. As Mr. Mwanachongo properly observes, they may have been imitations. In the premises we find that it would be unsafe to uphold a conviction on charge of armed aggravated robbery. We quash the conviction for that offense and in its place we substitute a conviction for ordinary aggravated robbery. It follows that the death sentence must be set aside and that we must now impose an appropriate sentence.

The above case, though an earlier decision of the Supreme Court, to which the *Mudenda case* invariably overturned without recourse to the above case, brings out the aspect that the

⁸ (1983) Z.R. 103

judiciary is alive to the fact that mitigating factors plays a critical role in deciding whether an accused ought to be sentenced to death for armed robbery where the extenuating factors are so overbearing that it would be unjust to impose the mandatory sentence. An example of such a factor would be robbery whilst armed with a toy gun and there is no loss of life or injury. Observably, the Supreme Court opted to convict the accused of a lesser charge of aggravated robbery in its quest to avoid imposing the mandatory sentence to death for armed robbery.

In the Botswana case of *Sokwe v The State*⁹, the accused had appealed against a conviction of armed robbery and its mandatory minimum sentence of 10 years for having been armed with a dangerous or offensive weapon or instrument. The High Court of Botswana held that a toy handgun was not a dangerous weapon or instrument even if the victim was unaware that it was a toy gun and believed that it was a proper gun. The High Court of Botswana opined that it could not be described as an offensive weapon or instrument under any circumstances and was therefore inappropriate to charge the appellant with armed robbery. The High Court of Botswana further stated that the Magistrate Court erred in convicting the appellant of this offense and imposing the mandatory minimum sentence of 10 years for armed robbery.

In the Uganda case of *John Wasaja v Uganda*¹⁰, where the appellant was charged with robbery and threatening to use a deadly weapon, the Court of Appeal of Uganda held that:

The vital consideration is that the weapon must be shown to be deadly in the sense of “capable of causing death”. As we have indicated, toy pistols, broken guns incapable of discharging bullets, or guns without ammunition, or imitation guns are not and cannot be, deadly weapons.

However, in *Shaban Birumba v Uganda*¹¹, the Supreme Court of Uganda overturned its earlier decision in *John Wasaja v Uganda* and held that there was no difference between an

⁹ 2002/HC/BLR 308

¹⁰ E.A (1975).

unloaded gun and an imitation firearm. The Supreme Court of Uganda opined that their effect is the fear induced in the victim to part with his or her property and that very few victims would wait to see whether the weapon facing them is a loaded gun or a mere imitation firearm. In arriving at its decision, the Supreme Court relied on the Firearms Act of 1970¹² which widened the definition of a dangerous or offensive weapon or instrument to include an imitation of a firearm.

In the United States of America case of *Choate v The State*¹³ where the appellant was convicted of armed robbery by use of a toy gun, the United States Court of Appeal upheld the appeal by stating that a toy gun is not an offensive weapon within the meaning of Code Ann. 26-1902.¹⁴ The Court of Appeal did not follow the precedent set in the Supreme Court's decision of *Pettiford v State*¹⁵, which classified a toy pistol as an "offensive weapon" within the meaning of Code Ann. 26-1902.

However, in the celebrated case of *McLaughlin v United States*¹⁶, the United States Supreme Court held that an unloaded gun is a "dangerous weapon" within the meaning of 18 U.S.C. Section 2113(d)¹⁷. The Penal sanctions in the Title 18 of the United States of America uses the presumptive sentencing as opposed to mandatory sentencing for various robbery offenses and provides as follows:-¹⁸

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to,

¹¹ Cr.Appeal No.32 Of 1989
¹² Firearms Act No.23 of 1970 of the Laws of Uganda
¹³ 158 Ga. App. 8, 279 SE2d 459, (1981)
¹⁴ Code Annotation 26-1902 of the United States of America
¹⁵ 235 Ga. 622, 221 SE2d 43 (1975)
¹⁶ 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986)
¹⁷ Title 18 of the United States Code
¹⁸ bulk.resource.org/courts.gov/c/F2/918/918.F2d.1.90-1369.html; accessed on 7th February 2013

or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; ...Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both;

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

The Supreme Court, in the *McLaughlin case* articulated three reasons for finding that an unloaded gun is a dangerous weapon. In its ratio decidendi, the Supreme Court stated that;

Firstly, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

The *McLaughlin case* also took full cognizance of the fact that the dangerousness of a weapon used in a bank robbery is not simply a function of its potential to injure people directly. Its dangerousness results from the greater burden that it imposes upon its victims and law enforcement officers. It therefore concluded that an unloaded gun that only simulates the threat of a loaded gun is a dangerous weapon. The use of a gun that is inoperable and incapable of firing also will support a conviction under section 921(a) (3) and section 2113(d) which deals with robbery using an offensive weapon. Following the precedent set in the *McLaughlin case*, a good number of courts have concluded that a toy gun is also a dangerous weapon.

In the case *United States v Medved*,¹⁹ which followed the precedent in the *McLaughlin case*, the Ninth Circuit Court held that a toy gun is a "dangerous weapon or device". It stated that:-

A robber who carries a toy gun during the commission of a bank robbery creates some of the same risks as those created by one who carries an unloaded or inoperable genuine gun. First, the robber subjects victims to greater apprehension. Second, the robber requires law enforcement agencies to formulate a more deliberate, and less efficient, response in light of the need to counter the apparent direct and immediate threat to human life. Third, the robber creates a likelihood that the reasonable response of police and guards will include the use of deadly force. The increased chance of an armed response creates a greater risk to the physical security of victims, bystanders, and even the perpetrators. Therefore, the greater harm that a robber creates by deciding to carry a toy gun is similar to the harm that he creates by deciding to carry an unloaded gun.

Likewise, in *United States v Cannon*²⁰ and *United States v Martinez-Jimenez*²¹, the Ninth Circuit Court held that toy guns that perpetrators used during bank robberies were "dangerous weapons" as defined by 18 U.S.C. Section 2113(d)

In *United States v Crouthers*²² where the accused and his companion were, unknown to the victim, acting to rob a bank, and the defendant represented to the victim that his companion had a loaded gun, the United States Court of Appeals held that even though the victim did not see the gun and the gun was in fact unloaded, because a reasonable person in the victim's position would have believed his life was in jeopardy and that evidence was sufficient to establish that the victim's life was put in jeopardy by the "use" of a dangerous weapon.

¹⁹ 905 F.2d 935 (6th Cir.1990), cert. denied, 498 U.S. 1101, 111 S.Ct. 997, 112 L.Ed.2d 1080 (1991)

²⁰ 903 F.2d 849 (1st Cir.), cert. denied, 498 U.S. 1014, 111 S.Ct. 584, 112 L.Ed.2d 589 (1990)

²¹ 864 F.2d 664 (9th Cir.), cert. denied, 489 U.S. 1099, 109 S.Ct. 1576, 103 L.Ed.2d 942 (1989).

²² 669 F.2d 635, 638-39 (10th Cir.1982)

In the case *James Everett Perry v United States*²³, the appellant contended that the evidence was insufficient to support his conviction for the use of a dangerous weapon or device to rob a bank in violation of 18 U.S.C. Section 2113 (a) and (d). The brief facts of the case are that the appellant had carried a wooden gun into the bank and intended to display the gun, but the wooden gun got stuck in his pants when he tried to remove it during the robbery, but had however managed to rob the bank. The United States Court of Appeals affirmed the conviction under 18 U.S.C. Section 2113(a), but reversed the conviction under 18 U.S.C. Section 2113(d) and remanded the case for resentencing. However, the United States Court of Appeals had a dissenting view from one of its Judges regarding the matter. Below is an excerpt of the dissenting view of Celebrezze, Senior Circuit Judge:-

I must respectfully dissent from the opinion of the majority. For reasons which I will more fully explain below, I would AFFIRM the judgment of the district court.

The majority finds that the evidence adduced at trial was insufficient as a matter of law to uphold a conviction pursuant to 18 U.S.C. Section 2113(d). Defendant argues that it was error to instruct the jury on armed bank robbery where the evidence shows that he only carried a toy gun which was never brandished or displayed in any way. Defendant, while acknowledging that a toy gun can be considered a dangerous weapon, argues that there must at least be some evidence the gun was used in the robbery. Defendant asserts that the only link between the toy gun and the armed bank robbery is the subjective fear of the bank teller which is not sufficient evidence that the gun was used in the robbery.

The majority concludes that the evidence was insufficient for a jury to find that defendant used a dangerous weapon or device. There is, however, no question that a toy gun may be a dangerous weapon. The case of *McLaughlin v United States*, (1986), established the principle that an unloaded gun is a dangerous weapon within the meaning of 18 U.S.C. Section 2113(d) because: 1) it is an article typically and characteristically dangerous; 2) it creates an imminent danger of a violent response; and 3) it can be used as a bludgeon. This court subsequently extended this holding declaring that a toy gun can also be considered a dangerous weapon under 18 U.S.C. Section 2113(d). The Medved court noted that a toy gun carries many of the same risks as a real gun, viz.: 1) subjecting the victim to great apprehension; 2) inhibiting the response of law enforcement agencies; and, 3) increasing the chance of a

²³ 905 F.2d 935 (6th Cir.1990)

violent response. *Medved*, 905 F.2d at 940. Thus, because a toy gun is clearly a dangerous weapon for purposes of 18 U.S.C. Section 2113(d), the question before this court is solely whether the toy gun must be brandished or displayed to the victim.

Therefore, the next step in the analysis should be to determine whether defendant's use of the gun was an assault or placed anyone's life in jeopardy. Viewing the facts, in a light most favorable to the prosecution, there is no doubt in my mind that the answer is that defendant did jeopardize the teller's well being. Through defendant's specific, albeit inept, actions in using the gun, the bank teller inferred that defendant had a gun. This is not so remarkable a conclusion when one considers that, indeed he did possess a convincing replica of a gun. It seems to me to be eminently reasonable for the bank teller to have experienced the same greater apprehension that this court articulated in *United States v Medved*. The *Medved* court quite appropriately noted that such apprehension could "bring on heart attacks and other untoward medical consequences." Accordingly, I would AFFIRM the conviction.

The United States Supreme Court's decision in *Pettiford v State*²⁴, classified a toy pistol as an "offensive weapon" within the meaning of Code Ann. 26-1902. The United States Supreme Court was upholding the ruling in *Watts v State*²⁵, where the court held that if it reasonably appeared to the victim to be deadly, then the appellant should be held to the consequences of using a deadly weapon.

It can be inferred that the United States Courts have held different positions regarding the use of toy guns in aggravated robberies or have had a lot of dissenting views from other judges mainly as a result of varying State Penal Provisions²⁶. This seems to suggest that there is no set standard on how to classify, charge and appropriately sentence perpetrators of the crime of aggravated robbery where a toy gun is used. Below are cases where a toy gun was deemed not to be an offensive weapon.

²⁴ 235 Ga. 622 (221 SE2d 43) (1975)

²⁵ 142 Ga. App. 857, 859 (237 SE2d 231) (1977)

²⁶ John C. Klotter, Joycelyn M. Pollock, *Criminal Law*, (New York: LexisNexis, 8th Ed, 2006), p 293

In the US case of *Fann v State*²⁷, the United States Court of Appeals reversed a conviction of armed robbery by use of an offensive weapon and stated that "the weapon used in the robbery was a starter's pistol designed for and capable of producing a noise but incapable of firing a missile of any kind". It was described by a detective testifying for the state as being quite harmless.

In another US case, *Hamilton v State*²⁸, where the appellant committed a robbery using a toy gun, and was subsequently convicted for robbery with a weapon in violation of Section 812.13(2)(b) of the Florida Statutes, the main ground of appeal was that the appellant used a toy gun instead of a real firearm, and therefore did not actually endanger his victim. The Circuit Court held that committing a robbery with a toy gun will generally not support a conviction for the enhanced offense of "Robbery with a Weapon," even though the victim did not know the gun was not real. Accordingly, the Circuit Court ruled that the appellant should be convicted only of Robbery under 812.13(2)(c) of the Florida Statutes, a second degree felony.

It can be concluded from the above United States cases that there is no common position in the United States regarding charging and sentencing of armed robbery perpetrators. This can be attributed to the different state laws as the United States is a federal state.

In the English case of *R v Avis and Others*²⁹ where the accused were charged with the offense of affray and possession of an imitation firearm, the Court of Appeal reviewed the level of sentencing for offenses concerned with possession of firearms and ammunition, with

²⁷ 153 Ga. App. 634 (266 SE2d 307) (1980)

²⁸ 36 FLW D2242a (Fla. 4th DCA)

²⁹ (1998) 2 Cr App R (S) 178

a view to setting guidelines for Judges. Lord Bingham CJ said at page 181 that a sentencing court should ask itself the following questions:-

- (1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.
- (2) What (if any) use has been made of the firearm? It is necessary for the court, as with any other offense, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offense is likely to be.
- (3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offenses under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offense). The more serious the act intended, the more serious the offense.
- (4) What is the defendant's record? The seriousness of any firearms offense is inevitably increased if the offender has an established record of committing firearms offenses or crimes of violence.

In view of the above, the Court of Appeal reviewed the sentences of the lower Court, ordered that the sentences run concurrently and then suspended the sentences for five years. The Court of Appeal further ordered the payment of £250 compensation to each of victims.

2.4 CONCLUSION

This chapter has given an overview of aggravated robbery involving toy guns. It has highlighted how robbery cases involving toy guns have been dealt with in various jurisdictions by both the legislature and the courts, and illustrated the difficulty courts have had in deciding with such matters. The chapter specifically identified cases that pointed out the various opinions on the definition of an offensive weapon and whether a toy gun qualifies as one for the purpose of defining the offense of aggravated robbery whilst armed with a

firearm. From the various case law discussed in the chapter, it was identified that the treatment of armed robbery whilst armed with a toy gun differs from jurisdiction to jurisdiction. In light of this, the chapter highlighted the different penalties imposed for the offense of aggravated robbery whilst armed with a toy gun bearing in mind the kind of sentencing regime the particular jurisdiction has.

In Zambia, from the cases discussed, the Courts regard the use of a toy gun as an imitation firearm and hence constitutes armed robbery. On the other hand, the position in the United States is very diverse due to the “sovereignty” of the states that enable them to enact their own laws. For this reason, the offense in question ranges from armed robbery to mere robbery, with varying penalties, coupled with other mitigating circumstances such as first time offender. In England, the Courts have discretion to determine the sentence based on the severity of the offense. The next chapter looks at the law in Zambia and other jurisdictions regarding aggravated robbery whilst armed with a toy gun and the penalty imposed for such an offense.

CHAPTER THREE

3.0 A COMPARATIVE STUDY OF HOW AGGRAVATED ROBBERIES INVOLVING TOY GUNS ARE HANDLED

3.1 INTRODUCTION

This chapter considers the way various jurisdictions have defined the term “offensive weapon” taking into account that this has a direct bearing on the way a case involving the use of toy guns in aggravated robberies is dealt with. The chapter also considers the level of punishment imposed for the offense of aggravated robbery whilst armed with a toy gun. Of interest is whether these jurisdictions have separated the offense and sentence of aggravated robbery with a real firearm from that of an imitation or a toy gun. The chapter will first analyse legislation in four jurisdictions and then make a comparison of the provisions with the law in Zambia.

3.2 UNITED STATES OF AMERICA

The United States of America has a federal system which allows states to have separate laws with a total of 50 state jurisdictions and a federal jurisdiction. The various state jurisdictions have enacted legislation establishing the definition of an aggravated or armed robbery as well as the classification of an offensive weapon and firearm. It is interesting to note that the way a fire arm is defined and the classification of the offense of robbery differ from state to state. This study has considered the penal provisions of the state of Texas, Washington and New York. Below are the statutory provisions as contained in their various laws.

3.1.1 Texas State

The Texas statutes have two robbery offenses: Robbery and Aggravated Robbery, the latter of which involves the use of a firearm (as well as other circumstances)¹.

If a robber uses a toy as an instrumentality of the robbery and the victim is in fear, then the perpetrator may still be charged with the more serious crime.²

Section 29.03 of the Texas Penal Code ³states:

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

- (1) causes serious bodily injury to another;
- (2) uses or exhibits a deadly weapon; or
- (3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

Section 1.07 of the Texas Penal Code defines a deadly weapon as follows:-

(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or

(B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

From the above provisions, a toy gun is clearly not a deadly weapon. It is in such instances where the Courts have the discretion to determine whether a robbery with use of a firearm qualifies as armed robbery.⁴

¹ David L. Carter, Allen D. Sapp, Darrel W. Stephens. *Toy Guns: Involvement in Crime and Encounters with the Police*, (Washington DC: United States Congress Public Law, 1990) p, 28, www.ncjrs.gov/pdffiles1/Digitization/124543NCJRS.pdf

² David Carter, Sapp and Stephens. *Toy Guns*, p 27

³ Texas Penal Code, accessed on 24th June 2013, <http://law.onecle.com/texas/penal/29.03.00.html>

3.1.2 Washington State

Washington State statutes provide for robbery, first degree robbery, and first degree robbery with a firearm. While a person with an imitation gun could be charged with a first degree robbery, he/she could not be charged with first degree robbery with a firearm.⁵

Section 9A.56.210 of the Washington Criminal Code⁶ provides for the offense of robbery in the first degree. This Code clearly provides for imitation guns or toy guns. It states that:-

- (1) A person is guilty of robbery in the first degree if:
 - (a) In the commission of a robbery or of immediate flight there from, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon; or
 - (iii) Inflicts bodily injury; or
 - (b) He or she commits a robbery within and against a financial institution as defined in RCW⁷ 7.88.010 or 35.38.060.
- (2) Robbery in the first degree is a class A felony

The Revised Code of Washington (RCW) provides for the different sentences based on the class of the offense⁸. The RCW in Chapter 9A.20.021 provides that:-

- (1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:
 - (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;
 - (b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;
 - (c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.
- (2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail

⁴ Klotter and Pollock, *Criminal Law*, p 292

⁵ Carter, Sapp and Stephens. *Toy Guns*, p 27

⁶ Washington Criminal Code; accessed on 24th June 2013, <http://law.onecle.com/washington/penal/html>

⁷ Revised Code of Washington, United States Codes

⁸ Washington State Legislature, <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A>, accessed on 11th July 2013

for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

It is clear from the provision above that in an instance where a toy gun is used in a robbery in Washington State, all things being equal, the offender would be charged with robbery in the first degree⁹. Further, in Washington, armed robbery attracts a mandatory sentence to life imprisonment.¹⁰

3.1.3 New York State

Robbery, under New York Penal Law¹¹ section 160.00 is defined as "forcible stealing." Thus it differs from other theft crimes for which force is not an element. In this legal context, "forcible" means threatening or using physical force¹². The force element can be satisfied in any number of ways including a simple threatening fist pump and pushing a victim repeatedly into a corner to waiving a box cutter and brandishing a weapon in the victim's face.¹³

Section 160.10 of the New York Penal Code,¹⁴ which provides for robbery in the second degree, states as follows:

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or
2. In the course of the commission of the crime or of immediate flight there from, he or another participant in the crime:

⁹ Carter, Sapp, Darrel and Stephens. *Toy Guns*: p, 28

¹⁰ Carter, Sapp, Darrel and Stephens. *Toy Guns*: p, 28

¹¹ New York Penal - Article 160 - (160.00 - 160.15) Robbery; accessed on 24th June 2013, <http://law.onecle.com/new-york/penal/part3.tj.a160.html>.

¹² *The Confluence of Robbery & Weapon Crimes in the New York Penal Law: Possessing and Displaying a Firearm During a Theft*; October 24, 2011; accessed on 28th June 2013, <http://www.newyorkcriminallawyer-blog.com/2011/10/the-confluence-of-robbery-weapon-crimes-in-the-new-york-penal-law-possessing-and-displaying-a-firear.html>, accessed on 24th June 2013

¹³ *The Confluence of Robbery & Weapon Crimes in the New York Penal Law*, <http://www.newyorkcriminallawyer>

¹⁴ New York Penal - Article 160

- (a) Causes physical injury to any person who is not a participant in the crime; or
 - (b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
 - 3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.
- Robbery in the second degree is a class C felony.

On the other hand, the New York Penal Code¹⁵ in section 160.15 clearly provides for robbery in the first degree. It states that;

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight there from, he or another participant in the crime:

- 1. Causes serious physical injury to any person who is not a participant in the crime; or
- 2. Is armed with a deadly weapon; or
- 3. Uses or threatens the immediate use of a dangerous instrument; or
- 4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged.

Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Robbery in the first degree is a class B felony.

It is worth noting that in the above provisions, the critical component with regards to carrying a firearm during a robbery is whether that gun is loaded. Under New York Penal Code¹⁶ 160.10(2)(b) if a robber displays what appears to be a firearm, that alleged robber will be convicted of robbery in the Second Degree. On the other hand, a defendant can only be convicted of robbery in the First Degree if that firearm was loaded and a shot readily capable of producing death or other serious physical injury could be discharged contrary to section 160.15(4) of the New York Penal Law. Further, the above provision makes it clear that if the

¹⁵ New York Penal - Article 160

¹⁶ New York Penal - Article 160

defendant proves that the firearm was not capable of causing death or other serious physical injury, termed “affirmative defense” the crime is reduced to robbery in the second degree.¹⁷

3.2 UNITED KINGDOM

The Theft Act of 1968¹⁸ governs the common criminal sanctions in the United Kingdom.¹⁹

Section 10 of the Theft Act of England has adopted a wider meaning of the term offensive weapon as well as firearm to include an imitation firearm. It provides as follows:

(1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offense, or any explosive; and for this purpose-

(a) ‘firearm’ includes an airgun or air pistol, and ‘imitation firearm’ means anything which has the appearance of being a firearm, whether capable of being discharged or not; and

(b) ‘weapon of offense’ means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and

(c) ‘explosive’ means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

(2) A person guilty of aggravated burglary shall on conviction on indictment be liable to imprisonment for life.

From the aforementioned section, it is clear that the offense of aggravated robbery where a toy gun is used is clearly armed robbery and also attracts the maximum sentence of life imprisonment.

3.3 BOTSWANA

The law governing armed robbery offenses in Botswana are contained in the Penal Code of Botswana²⁰. The Penal Code of Botswana provides that: -

¹⁷ *The Confluence of Robbery & Weapon Crimes in the New York Penal Law*, <http://www.newyorkcriminallawyer>

¹⁸ Chapter 60 of the Laws of England

¹⁹ Crown Prosecution Service, accessed on 11th July 2013, http://www.cps.gov.uk/legal/theft_act_offenses/

²⁰ Chapter 08:01 of the Laws of Botswana

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

292(1) Any person who commits the offense of robbery is liable to imprisonment for a term not exceeding 20 years with corporal punishment.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or if, at or immediately or immediately after the time of robbery he wounds, beats, strikes, or uses any other personal violence to any person, he shall be sentenced to a term of imprisonment of not less than 10 years.

Section 2 of the same Act defines an offensive weapon as follows:

Offensive weapon means any article made or adapted for use for causing injury to the person or intended by any person having it with him for such use by him and includes a spear, axe, hatchet and club and knife with a blade exceeding four inches in length.

The Penal Code of Botswana does not clearly define what an offensive weapon is with regards to firearms and does not provide for a categorisation of robbery either as aggravated or armed robbery. It instead imposes a higher punishment for robbery where an offensive weapon is used. The Botswana case of *Sokwe v The State*²¹ clearly demonstrates that in Botswana, the offense of aggravated robbery whilst armed with a toy gun will not be treated as armed robbery warranting a higher sentence.

²¹ 2002/HC/ BLR 308

3.4 UGANDA

In Uganda, the offense of robbery with a firearm is provided for in the Penal Code of Uganda²². Section 286 of the Penal Code of Uganda²³ states that:-

- (1) Any person who commits the felony of robbery is liable—
 - (a) on conviction by a magistrate's court, to imprisonment for ten years;
 - (b) on conviction by the High Court, to imprisonment for life.
- (2) Notwithstanding subsection (1)(b), where at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death.
- (3) In subsection (2), "deadly weapon" includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death.
- (4) Notwithstanding section 126 of the Trial on Indictments Act, where a person is convicted of the felony of robbery the court shall, unless the offender is sentenced to death, order the person convicted to pay such sum by way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person, and any such order shall be deemed to be a decree and may be executed in the manner provided by the Civil Procedure Act.

Further to the above section, the Firearms Act²⁴ in section 31(4)(5) provides that:-

- (4) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or any missile, be deemed to be a dangerous weapon or instrument for the purposes of sections 286 and 287 of the Penal Code.
- (5) In this section "imitation firearm" means anything has the appearance of a firearm whether it is capable of discharging any shot, bullet or other missile or not."

From the above provision, it can be ascertained that the use of a toy gun in robbery will be deemed to be armed robbery and will thus attract the mandatory sentence of death.

²² Chapter 120 of the Laws of Uganda

²³ Chapter 120 of the Laws of Uganda

²⁴ Chapter 120 of the Laws of Uganda

3.5 COMPARISON OF ZAMBIAN SITUATION WITH THE JURISDICTIONS

ANALYSED

Following the analysis given of how various jurisdictions treat the offense of aggravated robbery where a toy gun is used and the kind of sentence imposed, a comparison with the Zambian law can now be given. In Zambia, the offense of aggravated robbery where a toy gun is used is contained in two statutes namely the Penal Code²⁵ and the Firearms Act²⁶. The Penal sanction for such an offense is found in section 294(2). Section 294 (2) provides that:-

(2) Notwithstanding the provisions of subsection (1), the penalty for the felony of aggravated robbery under subsection (1) shall be death-

(a) where the offensive weapon or instrument is a firearm, unless the court is satisfied by the evidence in the case that the accused person was not armed with a firearm and-

(i) that he was not aware that any of the other persons involved in committing the offense was so armed; or

(ii) that he dissociated himself from the offense immediately on becoming so aware; or

(b) where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offense, unless the court is satisfied by the evidence in the case that the accused person neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offense.

(3) In this section "firearm" has the meaning assigned to it in section two of the Firearms Act.

Further to the above section, section 49 of the Firearms Act provides punitive sanctions for use of an imitation gun. Section 49 of the Firearms Act states as follows:-

(1) Any person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to resist or prevent the lawful apprehension of himself or any other person shall be guilty of an offense and liable on conviction to imprisonment for a term not exceeding fourteen years. Penalty for use and possession of firearms in certain cases

(2) Where any person commits an offense under subsection (1) in respect of his own lawful apprehension for any other offense committed by him, he shall

²⁵ Chapter 89 of the Laws of Zambia

²⁶ Chapter 110 of the Laws of Zambia

be liable to the penalty herein provided in addition to any penalty to which he may be liable for that other offense.

(3) Any person who, at the time of his committing any offense specified in the Second Schedule or of his apprehension therefor, has in his possession any firearm or imitation firearm shall, unless he satisfies the court that he had such firearm or imitation firearm in his possession for a lawful purpose, be guilty of an offense and liable on conviction, in addition to any penalty to which he may be liable in respect of such other offense, to imprisonment for a term not exceeding seven years.

(4) On the trial of any person for an offense under subsection (1) the court may convict him of an offense under subsection (3).

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

(6) In this section, "imitation firearm" means anything which has the appearance of being a firearm, whether or not it is capable of discharging any missile or noxious liquid or gas, as the case may be.

The above section gives the High Court powers to inclusively add a toy gun to the definition of firearm, on the basis that a toy gun is clearly an imitation of a real firearm. However, unlike the Theft Act of England, section 2 of the Firearms Act precludes an air gun from being a firearm, which in turn means an air gun is not an offensive weapon. It would probably be a question of interpretation whether an air gun qualifies as an imitation firearm for purposes of section 294(2) of the Penal Code²⁷. Just like in Zambia, jurisdictions such as England and Uganda, include the use of an imitation gun as firearm for the offense of aggravated robbery with a firearm or armed robbery as the case may be and further imposes the same punishment as would aggravated robbery with a real firearm.

A look at the various State Penal provisions in the United States clearly shows that the definition of an offensive weapon is not consistent to the extent that the offense of robbery whilst armed with a toy gun is either treated as mere robbery or aggravated robbery with use

²⁷ Chapter 87 of the Laws of Zambia

of a firearm. The State of New York, however, has a very unique way of addressing this issue where a toy gun is used in aggravated robbery, taking into consideration the justifications put up for the need not to impose the maximum mandatory sentence for such an offense. This approach uses the principle of proportional justice.²⁸ This principle assists in discerning the correct balance between the restriction imposed by a corrective measure and the severity of the nature of the prohibited act²⁹.

The fundamental principle behind proportionality is that the punishment should fit the crime. In *Solem v Helm*³⁰, the U.S. Supreme Court ruled that courts must do three things to decide whether a sentence is proportional to a specific crime:-

1. Compare the nature and gravity of the offense and the harshness of the penalty,
2. Compare the sentences imposed on other criminals in the same jurisdiction; i.e., whether more serious crimes are subject to the same penalty or to less serious penalties, and
3. Compare the sentences imposed for commission of the same crime in other jurisdictions.

It is important to note that the above principle is used in Zambia when determining the appropriate offense where a life is lost at the hands of another person, for example, by providing the separate offenses of manslaughter and murder contrary to sections 199 and 200 respectively of the Penal Code depending on the circumstances.

3.6 CONCLUSION

This chapter has examined provisions from various jurisdictions relating to aggravated robbery where a firearm is used and in particular looked at how the said provisions deal with

²⁸ New York State Commission on Sentencing Reform. *The Future of Sentencing in New York State: Recommendations for Reform*, 2009. http://criminaljustice.state.ny.us/pio/csr_report2-2009.pdf, accessed on 14th July 2013

²⁹ Angelo J. Corlett. *Responsibility and Punishment*, (Boston: Kluwer Academic Publishers, 2001), p 73

³⁰ 463 U.S. 277 (1983)

the use of toy guns in the commissioning of such crimes in various jurisdictions. It can be concluded that various jurisdictions define the offense of armed robbery with the use of a toy gun differently. The law in Zambia expressly provides the definition of a firearm as well as an imitation firearm for purposes of establishing the offense of armed robbery. The controversy, however, remains as to whether the mandatory sentence should be imposed in such a case.

The Penal provisions of New York state seems to be the fairest system in terms of providing various offenses and sentences under the general offense of aggravated robbery depending on the instrument used and whether in the cases of armed robbery, the instrument used was toy gun or imitation of a real firearm.

The next chapter analyses the cases *Joseph Simukoko* and *Jordan Nkoloma* in light of the legal issues identified and the various principles set out in the preceding chapters regarding the offense of aggravated robbery with use of a toy gun.

CHAPTER FOUR

4.0 AN ANALYSIS OF ROBBERIES INVOLVING TOY GUNS IN ZAMBIA

4.1 INTRODUCTION

This chapter attempts to analyse the cases of *Jordan Nkoloma v The People*¹ and *The People v Joseph Mulenga Simukoko*² in light of the legal issues identified and the various principles set out in the preceding chapters regarding the offense of armed robbery with use of a toy gun.

Drawing upon the scholarly articles, the legal provisions and various case law, both Zambian and from other jurisdictions, the chapter examines whether a toy gun qualifies as an offensive weapon for purposes of defining the offense of aggravated robbery whilst armed with a toy gun. The chapter also considers whether it should be a mitigating factor that a toy gun is used in an armed robbery and discusses the issues that arise in a case where a toy gun is used. The chapter ends by examining whether the statutory provisions dealing with such an offense in Zambia are effective in ensuring that the rationale of the offense is achieved.

In view of this, the chapter begins by analysing the cases of *Jordan Nkoloma v The People* and *The People v Joseph Mulenga Simukoko*.

4.2 JORDAN NKOLOMA v THE PEOPLE

In this case, the appellant was convicted of aggravated robbery by the High Court. It was alleged that with another man the appellant entered the house of the complainant on the pretext of wishing to speak to him, and then produced a firearm and threatened the

¹ (1978) Z.R. 278

² 2011/HK/42 (unreported)

complainant with it. It had been submitted in the High Court by the appellant that since no actual violence was used and since it was accepted by the trial court that the threat was with a toy pistol, the offense of aggravated robbery was not committed. On appeal, the Supreme Court held that where violence is not actually used but is merely threatened the essence of the offense of aggravated robbery is the threat; putting a person in fear by threats, even though the threatener is not in a position to carry them out, is squarely within the words used by the legislature in section 294(1) of the Penal Code.

The Supreme Court further held that by providing in section 49(5) of the Firearms Act³ that a firearm or imitation firearm shall be deemed to be an offensive weapon or instrument within the meaning of section 294 of the Penal Code, the legislature clearly intended that to threaten another with an imitation firearm should come within the definition of aggravated robbery. The Supreme Court opined that before a sentencing court comes to consider whether or not to accord leniency it must first consider what a proper sentence for the offense itself is, and only then, after having made that decision, decide whether that sentence should or should not be reduced in light of any mitigating factors that may exist. The Supreme Court stated that where the legislature has laid down a minimum sentence it would be quite wrong to attempt to draw fine lines and that there is a broad spectrum of offenses which must be regarded as coming within the ambit of the minimum sentence. The Supreme Court considered the fact that the threat having been accepted by the trial court as having been with toy pistol and no actual violence having been used, the circumstances were within the broad spectrum of offenses attracting the minimum sentence of 15 years imprisonment.

³ Chapter 110 of the Laws of Zambia

From the above case, it can be observed that the Supreme Court was compelled to pass the minimum sentence for the offense of aggravated robbery with a toy gun contrary to section 294(1) of the Penal Code as opposed to section 294(2) of the same Act which provides for armed robbery. It can only be assumed that the Supreme Court interpreted section 49(5) widely as the section refers to section 294 of the Penal Code in a general manner when it states that a firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any missile or noxious liquid or gas, as the case may be, be deemed to be an offensive weapon or instrument within the meaning of sections 294 and 295 and of paragraphs (a) and (b) of section 305 of the Penal Code. However, this line of interpretation does not clearly spell out whether an unloaded gun would equally be classified as aggravated robbery with use of an offensive weapon contrary to section 294(1) of the Penal Code as opposed to armed robbery contrary to section 294(2) of the Penal Code. What was clear in this case, however, was the fact that the Supreme Court could not impose a lower sentence than the legislated minimum mandatory sentence, which in this case was 15 years imprisonment as provided in section 294(1) of the Penal Code.

4.3 THE PEOPLE V JOSEPH MULENGA SIMUKOKO

The particulars of this case were that on 3rd January 2011, at Chingola, the appellant whilst armed with an offensive weapon attempted to steal a motor vehicle. It was alleged that the appellant in attempting to steal the vehicle used and threatened to use actual violence in order to retain or overcome resistance from the property owners. The court was told that the appellant had ordered the people in the vehicle to get out and pointed the gun to the head of the driver whilst saying “*get out before I shoot you.*” The appellant was later overpowered

and disarmed by his victims and then taken to a Police Station. It was later discovered at the Police Station that the gun the appellant had used was a toy gun.

The High Court, being satisfied with the evidence of the witnesses, found that the appellant was armed with a gun when he attacked the victims and held that the appellant was guilty of attempting to commit a felony namely aggravated robbery whilst armed with a “gun”. In passing judgment, the High Court relied on the Supreme Court decision in the case *Jordan Nkoloma v The People* and held that the appellant was guilty of attempting to commit aggravated robbery since the appellant was armed with a “gun”. The High Court stated that it was immaterial that the gun was a mere toy gun and further said that what was important was that the appellant had threatened his victims and they, being afraid, believing the toy to be a gun had obeyed the appellant.

From the facts of the case, the High Court had a different interpretation of a toy gun for purposes of armed robbery from the *Jordan Nkoloma* case. While the *Jordan Nkoloma* case relied on section 294(1) of the Penal Code, this case relied on sections 294(1) and 391 of the Penal Code. The point of deviation was the fact that in the *Joseph Simukoko* case, the accused was charged with an attempt to commit a felony, in this case attempted aggravated robbery, which imposes a sentence of imprisonment for 7 years pursuant to section 391 of the Penal Code.

What is interesting about the *Joseph Simukoko* case is that the Judge found the accused guilty of aggravated robbery whilst armed with a “gun” which entails that the offense in question is clearly armed robbery contrary to section 294(2) but ended up convicting the offender on the

lesser offense of aggravated robbery contrary to section 294(1) coupled with section 391 of the Penal Code.

4.4 ANALYSING THE OFFENSE OF ARMED ROBBERY WITH A TOY GUN

The description of an offensive weapon or instrument with regards to its definition in section 4 of the Penal Code, which describes an offensive weapon as being any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article, is clear enough. Conversely, the concept of an offensive weapon or instrument is not as clear with regards to imitation or toy guns. For example, the definition of a firearm in section 2 of the Firearms Act shows that a firearm is a weapon capable of causing injury by discharging a shot, bullet, bolt or other missile or any noxious liquid, gas or other thing dangerous to human beings, but expressly excludes an air gun. An air gun is incapable of use as a firearm but very closely resembles a real firearm. From the provisions of section 49(5) of the Firearms Act, an air gun which is expressly excluded as being a firearm, though having the appearance of real firearm becomes an offensive weapon or instrument for purposes of section 294 of the Penal Code. The provisions as they stand can be said to be contradictory and may be fatal, especially for such a serious offense that carries the mandatory sentence of life imprisonment or death.

From the decisions in the cases *Jordan Nkoloma* and *Joseph Simukoko*, the offense of armed robbery whilst armed with a toy gun entails that such an offense falls within the ambit of aggravated robbery contrary to section 294(1), on the basis that the definition of an offensive weapon includes an imitation firearm. What is not clear from the Penal Code and the

Firearms Act is whether a toy gun is classified as an offensive weapon for purposes of charging an offender with the offense of aggravated robbery or as a firearm for purposes of charging an offender with the offense of armed robbery.



It can, however be stated that the less serious cases of armed robbery with an imitation firearm may attract less imprisonment in the High Court or Supreme Court, by interpreting the sections widely or by invoking section 391 of the Penal Code where the armed robbery was a mere attempt. It can also be deduced from the cases *Jordan Nkoloma* and *Joseph Simukoko* that the Courts are more inclined towards imposing the minimum sentence where toy guns are used in robberies. This is buttressed by the fact that all the cases cited have not resulted in the accused being sentenced to death or life imprisonment for armed robbery whilst armed with a toy gun.

The High Court of Botswana in the *Sokwe case* gives a fine example of a different and less hash perspective to the definition of a toy gun as an offensive weapon. It opines that a toy gun is clearly not a dangerous weapon or instrument even if the victim is unaware that it is a toy gun and believes, as in this case, that it is a proper gun. This case clearly favours the proposition for a lesser sentence for use of toy guns in aggravated robbery.

The issue of amending the sentencing regime lies with the legislature, to which the Judiciary has no powers to interfere. Section 26 of the Penal Code which gives the Courts discretion to sentence according to the merits of a case, expressly denies the Courts such discretion where the law provides for mandatory sentences. The quest for a more graduated sentencing regime, therefore, has merit and deserves to be looked into in order to best serve justice for all.

4.5 CONCLUSION

This chapter has analysed judicial pronouncements where toy guns were used in robberies in Zambia. The cases provided an insight of how the judiciary try and sentence robbers who use toy guns in Zambia and the main arguments or issues that arise from such cases. The chapter observed that the Courts are more compelled to pass the minimum sentence for the offense of aggravated robbery with a toy gun as opposed to the maximum sentence set out in section 294 of the Penal Code. The chapter further observed that the Courts interpret section 49(5) of the Firearms Act widely as the section refers to section 294 of the Penal Code in a general manner when it states that a firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any missile or noxious liquid or gas, as the case may be, be deemed to be an offensive weapon or instrument within the meaning of sections 294 and 295 of the Penal Code.

It was also noted in the chapter that while certain jurisdictions clearly provided for aggravated robbery where toy guns are used, the issue of passing the maximum sentence has been a key consideration for the courts in Zambia.

The next chapter will give a conclusion of this research and advance a number of recommendations on the research question as to whether the use of a toy gun in aggravated robbery should warrant the mandatory sentences set out in section 294 of the Penal Code.

CHAPTER FIVE

4.0 CONCLUSION AND RECOMMENDATIONS

5.1 GENERAL CONCLUSION

The objective of this research was to investigate whether a toy gun fits the description of an offensive weapon and firearm as provided in the Penal Code¹ and Firearms Act² respectively and whether its use should warrant its inclusion in the ambit of the offense of aggravated robbery with an offensive weapon.

Chapter one introduced the research regarding aggravated robbery where toy guns are used in the commissioning of such crimes and the fact that cases involving the use of toy guns in aggravated robbery have been decided upon differently in a number of jurisdictions including Zambia. It further highlighted the arguments for and against a harsher punishment for use of toy guns in aggravated robbery.

The second chapter considered how robberies involving toy guns have been dealt with in various jurisdictions, and illustrates the difficulty courts have had in deciding such matters. The chapter also examined the definition of an offensive weapon as is defined in the Penal Code³ and the Firearms Act⁴ respectively.

Chapter three considered and examined legislative provisions on aggravated robbery and the definition of an offensive weapon or firearm in various jurisdictions. Furthermore, a comparison was made with Zambia and from the analysis and comparison made, it was

¹ Chapter 87 of the Laws of Zambia

² Chapter 110 of the Laws of Zambia

³ Chapter 87 of the Laws of Zambia

⁴ Chapter 110 of the Laws of Zambia

ascertained that the New York Penal Code has a more proportional punishment system in place as the Penal Code in New York State provides for various degrees of robbery, based on the nature of the instrument used with varying sentences as opposed to having one mandatory capital punishment for armed robbery.

Chapter four examined the case *Jordan Nkoloma v the People*⁵ which held that a firearm or imitation firearm shall be deemed to be an offensive weapon or instrument within the meaning of section 294 of the Penal Code and that the legislature clearly intended that to threaten another with an imitation firearm should come within the definition of aggravated robbery as well as the case *The People v Simukoko*⁶ where the High Court held that the appellant was guilty of attempting to commit aggravated robbery since the appellant was armed with a “gun”. It also referred to case law from other jurisdictions on how the courts have decided cases involving the use of toy guns in aggravated robbery. In examining these cases, the varied interpretation of penal provisions were illustrated and how courts in various jurisdictions have decided such cases.

This concluding chapter in part seeks to advance recommendations regarding robberies involving the use of toy guns. These recommendations include; amending the Penal Code to clearly outline the various offenses that fall under the offense of aggravated robbery and provide an appropriate definition of an offensive weapon as well as a firearm, removing the reliance of the definition of firearm and offensive weapon from the Firearms Act and expressly providing the same in the Penal Code for purposes of defining what constitutes aggravated robbery with a firearm. This is premised on the fact that the Firearm Act’s

⁵ (1978) Z.R. 278

⁶ 2011/HK/42 (unreported)

definition of a firearm is based on the functional aspect of the instrument, while for the purpose of charging a perpetrator, the appearance of a gun qualifies for the use of a firearm or an imitation of a firearm. It also seeks to recommend that the Legislature also ban the sale of imitation guns or toy guns that closely resemble real guns as a way of reducing the occurrences of such robberies and that the penal laws be amended to provide for a much lesser sentence for aggravated robbery involving toy guns in comparison to aggravated robbery with real firearms.

5.2 RECOMMENDATIONS

a) Amending of aggravated robbery offenses and sentences

The punishment imposed when an accused is convicted of armed robbery in Zambia is death. This is regardless of whether the perpetrator used a defective gun, an unloaded gun or indeed an imitation gun pursuant to section 49(5) of the Firearms Act.⁷ However, this research has observed inconsistencies in case law from Zambia as well as other jurisdictions regarding the appropriate charging and sentencing for the offense of use of toy guns in aggravated robbery. The Courts in Zambia have attempted to lessen the punishment for the offense of aggravated robbery involving toy guns on the basis that it does not result in death as would be the case with real firearms. Resultantly, there is need to have different classes of offenses and sentences falling under the broad offense of aggravated robbery, with the most severe offense of aggravated robbery with a loaded gun attracting the heaviest punishment as is provided for in the New York Penal Law.⁸ In view of this, it is the recommendation of this research that the Penal Code⁹ be amended to provide for different classes of offenses and sentences falling

⁷ Chapter 110 of the Laws of Zambia

⁸ New York Penal Law – Article 160

⁹ Chapter 87 of the Laws of Zambia

under the broad offense of aggravated robbery. This should include a separate offense for aggravated robbery whilst armed with an imitation or toy gun.

The Penal Code should also provide for a minimum sentence for such offenses so as to give the courts some form of discretion when sentencing based on the facts and other mitigating circumstances.

b) Providing a clearer definition of an offensive weapon

Toy guns do not fit the statutory definition of a firearm, from which the definition of an offensive weapon is derived, as provided in section 2 of the Firearms Act¹⁰ and section 49(5) of the same Act which provides that a firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any missile or noxious liquid or gas, as the case may be, be deemed to be an offensive weapon or instrument within the meaning of sections 294 of the Penal Code. This provision does not clearly state whether the offensive weapon relates to section 294(1) or 294(2) providing for the offenses of aggravated and armed robbery respectively. This research has identified this as a serious weakness in the definition of an offensive weapon in relation to imitation firearms. The determination as to whether a toy gun is deemed to be a firearm or merely an offensive weapon such as a knife has been left up to the courts to interpret as the Penal Code and the Firearms Act do not clearly address this. There is therefore need for the law to provide clearer guidance as to whether use of a toy gun falls under mere aggravated robbery or armed robbery.

¹⁰ Chapter 110 of the Laws of Zambia

c) Introduction of sentences for first time offenders

One of the noticeable extenuating factors in criminal offenses in the United States of America is where the accused is a first time offender¹¹. Such a factor is provided for in a number of state penal laws in the United States of America as was illustrated earlier in this study. In view of the above, it is recommended that the Penal Code be amended to impose lighter sentences for first time offenders.

d) Removal of cross referencing between Penal Code and Firearms Act

From the analysis of penal provisions from other jurisdictions, especially the United States of America and England, it was noted that all the elements for the correct identification of the appropriate criminal offense were contained in one statute. This makes the law simpler and much easier to interpret. In view of the above, it is also recommended that all the necessary elements in determining and sentencing for the offense of aggravated robbery be placed in the Penal Code.

e) Ban of sale of imitation guns

As a way of curbing the ever increasing use of toy guns in aggravated robbery in Zambia, the state can impose a ban on the sale of toy guns so as to limit the availability of such instruments.

f) Lessen the sentence of aggravated robbery involving toy guns

The Botswana case *Sokwe v The State*¹² and the Uganda cases *John Wasaja v Uganda*¹³ both brought out the principle that a toy gun is not a dangerous weapon capable of causing death

¹¹ *The Confluence of Robbery & Weapon Crimes in the New York Penal Law*,
<http://www.newyorkcriminallawyer>

¹² 2002/HC/ BLR 308

to warrant charging the offender with the offense of armed robbery. The Uganda case *Shaban Birumba v Uganda*¹⁴, having attracted the full Supreme Court bench of Uganda in determining the offense and sentence regarding aggravated robbery involving toy guns, got the support of the majority of the Supreme Court Judges despite being overturned by the Chief Justice of Uganda. In light of this, it would therefore be just to amend the Penal Code to provide for a much lesser sentence for aggravated robbery involving toy guns in comparison to aggravated robbery with real firearms.

5.3 CONCLUSION

Cases involving the use of toy guns in aggravated robbery have been decided upon differently in various jurisdictions including Zambia. The issue as to whether a toy gun qualifies as an offensive weapon has been handled differently with varied judicial decisions by various jurisdictions. To this end, this chapter sort to advance recommendations regarding robberies involving the use of toy guns.

¹³ E.A (1975).

¹⁴ Cr.Appeal No.32 Of 1989

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