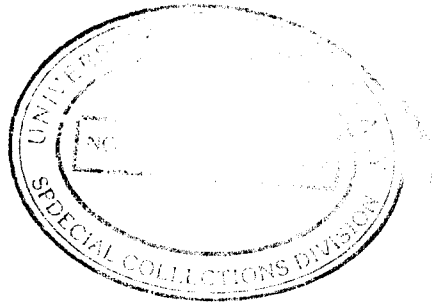


A CRITICAL ANALYSIS OF THE LEGAL ISSUES SURROUNDING THE IDENTIFICATION OF THE ACCUSED AND THE DEFENSE OF ALIBI IN THE ZAMBIAN LEGAL SYSTEM



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BY

BWILA MUSUKWA

A paper presented in partial fulfillment of the requirements for the Award of the Degree of
Bachelor of Laws of the University of Zambia.

UNZA

2012

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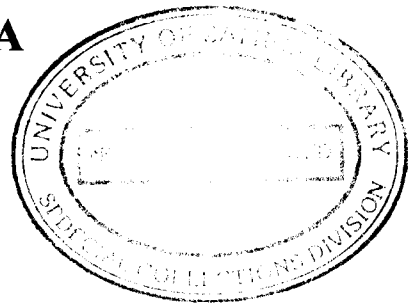
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ABSTRACT

This dissertation considers the critical analysis of the legal issues surrounding the defense of alibi and the identification of an accused person in the Zambian Legal System. The study tries to highlight the issues relating to the defense of alibi and the identification of the accused and their importance. It also tries to analyse how effective identification procedures are carried out to remove possibilities of mistaken identities. The study also tries to analyse the defense of alibi and the measures put in place to prevent the use of the defense as a means of escaping criminal liability. Finally, the study carries out a comparative analysis with other jurisdictions: The United States of America, Britain and India in respect to how the defense of alibi is handled and how identification procedures are carried out.

The research carried out through interviews with appropriate legal institutions, case law, journals and text books found that Zambia mainly relies on identification parades even in special circumstances when other viable identification procedures can be used. The research further found that the right to legal counsel during identification parades is not recognized as a constitutional right. This therefore increases the chances of the accused implicating himself. The research further found that there is no independence in the way identification parades are conducted. This is because the procedure is mainly left in the hands of the police who are capable of inducing witnesses to pick out the preferred suspect. Finally, the research established the need for legislation that will expressly lay down the procedure to be followed when conducting an identification parade.

In relation to the problems that have been raised by the research, recommendations are made to the effect that there is need for legislation that will expressly provide the procedure that the police will use when conducting an identification parade. The paper also recommends that in special circumstances that do not require identification parades, other methods should be used to conduct the identification. The paper further recommends that the right to legal counsel during identification parades should be recognized as a constitutional right to prevent self-implication. Finally, the essay recommends that the identification parades should be conducted by independent and impartial persons or institutions to prevent bias, and miscarriage of justice. There is therefore need to prevent innocent people from being convicted of crimes they did not commit.

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Heartfelt thanks go to my Supervisor, Mr. L. Zulu for his supervision and guidance without which, it would not have been possible to put up this scholarly work. Many thanks also go to Mutinta Chilufya, Majory Simataa, Grendah Kabunda, Chilombo Sakala and Mwangala Mwala for proof reading this piece of academic writing and ensuring that all the corrections that were highlighted by Mr. Zulu are taken care of.

Finally, the author is indebted to the scholastic prowess prevailing in the School of Law at the University of Zambia. The invaluable contributions of the learned women and men lecturing in the School have molded me into a Lawyer. Their determination will certainly for a long time to come linger in my mind.

Many thanks go to Professor M.M. Munalula, who taught me that successful people never give up, the fight till they finish the race.

DEDICATION

To my wonderful mother, Hellen Daka, who has had to forego so much, financially and who gave me the strength to go on when I felt like giving up, thank you very much, I love you.

To my late father, Mr. A. Musukwa, who always saw the best in me when everyone else saw nothing in me, who taught me that hard work brings the best things in life, May your soul rest in peace.

To the rest of my wonderful family, I love you. May God bless you all! I would certainly not be here without your support.

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CHAPTER ONE

INTRODUCTORY CHAPTER

1.0 INTRODUCTION

This chapter is intended to provide a basis for analysing the legal issues surrounding the defense of alibi and the identification of the accused in the Zambian Legal System. A general introduction to defenses will be given with emphasis on alibi. A general introduction to methods of identifying accused persons will also be given with an emphasis on identification parade. In order to fully address this title, the statement of the problem, the objectives and significance of the study will also be given. The system for collecting and organising data, that is, the methodology that is intended to be used for data collection will also be provided.

1.1 GENERAL INTRODUCTION

Criminal law is a very sensitive part of law. This is because it deals with a lot of issues concerned with the deprivation of one's basic human rights and liberties. Murder is one branch of criminal law that even goes to lengths of taking away one's right to life. It is for this reason that this crime comes with the chance of one to redeem himself by raising a defense. One type of defenses involves giving reasons as to why the accused committed murder, for example self-defense, insanity and diminished responsibility. The other type of defense open to an accused person is that of non-participation also known as the defense of alibi. This defense, if successfully proved, leads to an acquittal. Linked to this defense is the identification of an accused. Identification is important in that a person might be wrongly convicted either due to lack of credibility of a witness or lack of an effective identification parade or because of mistaken identity. It is for this reason that this essay will critically analyse the two issues.

1.2 GENERAL DEFENSES

General defenses are those available to an accused person which he or she may use to negative criminal liability for whatever offence he or she is charged with. Among the general defenses include defenses which affect the accused capacity to commit the offence he or she is charged with, these include infancy, insanity and automatism. Where these defenses apply, the law presumes that the accused person is incapable of committing the offence.¹

Other defenses are those which operate to negative an element of crime such as mens rea, for example self defense, prevention of crime or mistake. Some other defenses such as duress and necessity are some of the defenses where the prosecution can prove the various elements of the offence, including the actus reus and the mens rea but the law determines that the criminal liability of the accused person is negated by excusatory circumstances.²

1.3 THE DEFENSE OF ALIBI

An alibi is a type of defense found in legal proceedings by demonstrating that the defendant was not at the place where an alleged offence was committed. An alibi is a judicial mode of defense under which a defendant proves or attempts to prove that he or she was in another place when a crime was committed: as to set up an alibi; to prove an alibi.³

An alibi is different from all of the other defenses. It is based upon the premise that the defendant is truly innocent. In the Latin language alibi means somewhere else.

The defense of alibi tries to redeem the accused from criminal liability on the grounds that the accused could not have possibly committed the crime because of the absence of the two elements of crime. These being the mens rea and the actus reus. Under the defense of alibi,

¹ Simon. E. Kulusika. *Text, Cases and Materials on Criminal Law in Zambia*. (Lusaka: UNZA Press, 2006), 196

² Simon. E. Kulusika. *Text, Cases and Materials on Criminal Law in Zambia*. (Lusaka: UNZA Press, 2006), 196

³ C.M.V. Clarkson. *Understanding Criminal Law*. (London: Sweet and Maxwell publishers, 2002)

the accused completely denies participation. Thus, the defense of alibi is unlike other defenses where the accused admits committing the crime but is excused on grounds of insanity, automatism, duress or self defense.⁴

Under the defense of alibi, the prosecution has the burden of proving beyond a reasonable doubt that the defendant committed the crime as he or she was actually present at the scene of the crime and not somewhere else as he or she claims. When the prosecution fails to discharge this burden of proof beyond a reasonable doubt or where there is any doubt on the prosecution then the accused is entitled to an acquittal.⁵

1.4.0 PROCEDURES USED IN IDENTIFYING AN ACCUSED PERSON

Currently there are four different identification procedures conducted before the trial begins⁶:

1. Video identification
2. Group identification
3. Confrontation identification
4. Identification parade

1.4.1 VIDEO IDENTIFICATION

In a video identification, the witness is shown a set of images of the suspect and at least eight other people who need to resemble the suspect in general appearance and position in life. If there are two suspects of roughly similar appearances they may be shown together with at least twelve other people.

⁴ Jonathan Herring. *Criminal Law*. 3rd edition. (Newyork: Palgrave Macmillan, 2002), 349

⁵ Muna Ndulo and John Hatchard. *The Law of Evidence in Zambia: Cases and Materials*. (London: Villiers Publishers, 1991), 22

⁶ Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Volume 1, 1995

If the suspect has an unusual physical features like scars or tattoos or visible marks, steps may be taken to conceal the location of the feature on the images of the suspect or replicate that feature on all other images. The images shown may be moving or still but shall as far as possible have the same sequence of movements for all people that have been included on the line up.⁷

1.4.2 GROUP IDENTIFICATION

This procedure is less formal in that the suspect is put into an informal group of people. It could be conducted with or without the consent of the suspect. The place used should be one where other people are either passing by or waiting around informally.⁸

1.4.3 CONFRONTATION AND IDENTIFICATION

This procedure involves a direct confrontation between the witness and the suspect. This will usually take place at a police station where the witness would normally be asked ‘Is that the person?’ However, force may not be used to make the suspect’s face visible to the witness.⁹

1.5 IDENTIFICATION PARADES

An identification parade involves the accused being put with other people on a line up from which the witness will be allowed to pick from, the person he saw committing the offence. Identification parades are only carried out for selective crimes mainly murder and aggravated robbery. As pointed above, there are various methods of conducting an identification of an accused but in Zambia the only method used is an identification parade.¹⁰

⁷ Australian Law Reform Commission, Evidence, ALRC 26 (interim) Volume 1, 1995

⁸ Australian Law Reform Commission, Evidence, ALRC 26 (interim) Volume 1, 1995

⁹ Australian Law Reform Commission, Evidence, ALRC 26 (interim) Volume 1, 1995

¹⁰ Interview conducted at the Central police Station, Lusaka: Mr. Kamanda 0977357595 and Mr. Shantimba 0977755601. 7th March 2012

The features of this procedure are that the suspect and eight other people are arranged in a line-up. The same principles apply to their physical resemblance to the suspect, that is, the other people on the line up should have similar physical appearances, and they should wear the same type of clothes and should stand in the same positions as the suspect. The suspect is allowed to choose their position in the line. If there is an unusual feature of the suspect, such should be concealed in so far as possible.¹¹

1.6 DEFINITIONS OF MAIN CONCEPTS

ALIBI

An alibi is a type of defense found in legal proceedings by demonstrating that the defendant was not at the place where an alleged offence was committed. An alibi is a judicial mode of defense under which a defendant proves or attempts to prove that he or she was in another place when a crime was committed: as to set up an alibi; to prove an alibi.¹²

An alibi is different from all of the other defenses. It is based upon the premise that the defendant is truly innocent. In the Latin language alibi means somewhere else.

BURDEN OF PROOF

This is the duty of a party to litigation to prove a fact or facts in issue. Generally, in criminal matters the burden of proof falls upon the party who substantially asserts the truth of a particular fact. The burden of proof is generally on the prosecution.¹³

¹¹ Interview conduct at Central Police station, Lusaka: Mr. Kamanda 0977357595 and Mr. Shantimba 0977755601. 7th March 2012

¹² C.M.V. Clarkson. *Understanding Criminal Law*. (London: Sweet and Maxwell publishers, 2002),

¹³ Muna Ndulo and John Hatchard, *The law of evidence in Zambia: Cases and Materials*. (London: Villiers Publication, 1991), 2

IDENTIFICATION

The Oxford Dictionary of Law¹⁴ defines evidence of identity as evidence that tends to prove the identity of a person. It states that a person may be proved or identified by direct evidence or by circumstantial evidence.

IDENTIFICATION PARADES

A line up which consists of different people, among them the accused, which affords the witness the opportunity to choose the person seen committing the alleged crime.¹⁵

CORROBORATION

This is evidence that defines the accuracy of other evidence in a material particular.¹⁶ The general rule in both criminal and civil matters is that a court may act on the testimony of one witness although there are occasions where the need for corroboration must be considered by the court. This is because experience has shown that in certain types of cases or with particular categories of witnesses, it is dangerous to convict in the absence of corroboration.¹⁷

1.7 STATEMENT OF THE PROBLEM

A lot of people have been sent to jail either because they were victims of mistaken identity or victims of false accusations. This was raised by Baron DCJ when delivering judgment in the case of *Bwalya v. The People*¹⁸ when he said that the court should make sure that issues of mistaken identity are completely ruled out before convicting an accused person. On the other hand, guilty people have found ways of escaping criminal liability through defenses like alibi.

It is thus these two problems that this essay is trying to address.

¹⁴ Jonathan Law and Elizabeth A. Martin.,ed. *The Oxford Dictionary of Law*. (Oxford: Oxford University Press,2009), 214

¹⁵ Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Volume 1, 1995

¹⁶ Jonathan Law and Elizabeth A. Martin, ed. *The Oxford Dictionary of Law*. (Oxford: Oxford University Press, 2009), 214

¹⁷ Muna Ndulo and John Hatchard, *The Law of Evidence in Zambia: Cases and Materials*. (London: Villiers Publication, 1991), 1

¹⁸ (1975) Z.R. 125

1.8 OBJECTIVES OF THE STUDY

1. To highlight the issues relating to the defense of alibi and the identification of the accused and their importance.
2. To critically analyse the role played by the court in making sure that effective identification procedures are followed and issues of mistaken or false identities are not common place.
3. To analyse the defense of alibi and the weight the court attaches to it and the measures put into place to make sure that the defense is not merely used as a means of escaping criminal liability.

1.9 SIGNIFICANCE OF THE STUDY

The research seeks to identify the problems that arise due to lack of proper identification procedures and the dangers faced by the accused in the absence of proper identification. It also tries to look into the issues that might give rise to mistaken identities, false identification and uncorroborated evidence. The study also seeks to look into the legal issues surrounding the defense of alibi and the possibility of the defense being used as a means of escaping criminal liability.

1.10. METHODOLOGY

Regard being had to the nature of the subject matter of the research, this research is primarily qualitative, in that it will focus on substantive matter rather than mathematical or quantitative matter. Therefore, the research will mainly be in the form of desk research and field investigation. The desk research will be conducted through the collection of data in form of text books , cases, law reports and journals, where as the field investigation will be conducted through interviews with appropriate persons and institutions.

1.11. LAYOUT OF CHAPTERS

CHAPTER ONE

INTRODUCTION

This chapter introduces the research paper and deals with the basic aspects of the research. These include the statement of the problem, objectives, research questions, significance and rationale of the study, the methodology and the chapter layout. The chapter is designed in such a way as to give a broad outlook on the study and to pave way for the main elements to be discussed in the research paper. It therefore introduces the subject matter in general terms.

CHAPTER TWO

THE DEFENSE OF ALIBI IN THE ZAMBIAN LEGAL SYSTEM

This chapter looks at the defense of alibi and the legal issues that surround the defense of alibi. These include the burden of proof, the duty to disclose, duty to investigate and false alibi. It will discuss how the Zambian courts deal with these issues.

CHAPTER THREE

IDENTIFICATION OF AN ACCUSED IN THE ZAMBIAN LEGAL SYSTEM

This chapter will look at how the Zambian courts deal with the identification of an accused person and the issues relating to it. This will be done by looking at the rich Zambian case law on the subject matter.

CHAPTER FOUR

COMPARATIVE ANALYSIS

This chapter will involve a comparative analysis, that is to say how do other countries handle issues of the defense of alibi and the identification of an accused person. The research will try to look at The United States of America, Britain and India.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

This chapter summarizes the important points that are raised in the research and gives recommendations and possible areas of reform in dealing with the defense of alibi and the identification procedures of accused persons. After that, a conclusion to the subject under research is given.

1.12 CONCLUSION

In conclusion, this chapter has dealt with the basic aspects of the research and given a prelude to the subject matter at hand. It has given a general overview of the concept of the defense of alibi and the identification of an accused person and outlined the statement of the problem which has necessitated this study. The chapter has also stated the objectives that the research sought to achieve. Besides this, the chapter has also given the methodology that will be used in the research.

CHAPTER TWO

THE DEFENSE OF ALIBI IN THE ZAMBIAN LEGAL SYSTEM

In ensuring that the law does not condemn innocent people, accused persons are granted a legal right to plead a defense to the crime. Criminal law has two categories of defenses. One is where the accused admits that he committed the offence but he did so because he was provoked, or because he was insane at the time he committed the crime, or he was not in control of his senses when he committed the crime. However, there are times when the accused claims that they did not in any way participate in the crime accused of thereof because they were not at the scene of the crime at the material time it occurred. This is what is termed, the defense of alibi. Therefore, this chapter looks at the legal issues surrounding the defense of alibi in Zambia.

2.0 THE DEFENSE OF ALIBI AS A DEFENSE

2.1 WHAT IS THE DEFENSE OF ALIBI

An alibi is a defense to a criminal charge alleging that the defendant was not at the place at which the offence was committed at the time of its alleged commission and as a result could not have been responsible for it.¹⁹

2.2 THE BURDEN OF PROOF WHERE THE DEFENSE IS PLEADED

It is a trite common law principle that he who alleges must prove. The accuser must provide the court with information that will attest to the fact that the accused did commit the crime accused of. The courts of law will not entertain any action that cannot be proven.

¹⁹Jonathan Law and Elizabeth. A. Martin,ed. *The Oxford Dictionary of Law*. (Oxford: Oxford University Press,2009), 28

Cross²⁰ distinguishes the burden of proof and the burden of adducing evidence. He states that at a criminal trial the burden of proof is borne by the prosecution on every issue except that of insanity and issues on which the burden of proof is cast on the accused by statute. He further goes on to state that the burden of adducing evidence is generally borne by the party bearing the burden of proof, but in criminal cases, the accused bears the burden of adducing evidence in support of many of the defenses that would be open to him on the strength of his plea of not guilty.

Reed²¹ on the other hand talks about the standard of proof by stating that the prosecution has an obligation to prove their case beyond reasonable doubt. And if the prosecution successfully discharges this burden then the verdict of the accused should be that of guilty but where the prosecution fails to discharge this burden then the accused is entitled to an acquittal. The writer further states that in cases where the burden is on the defendant, it does not need to be satisfied beyond reasonable doubt. Rather, the required standard is the balance of probabilities. This means, effectively, more likely than not.

It would appear from the defense of alibi that the accused is the one who has the burden to prove that he was at another place at the time the crime was committed. However, this is not so as the general law on burden of proof also applies to the defense of alibi. In passing judgment, Judge R.M.C Kaoma in the case of *The People v Benny Mbaulu Fumbelo*²², stated the following:

“By law the burden is not on the accused to prove alibi. It is incumbent upon the prosecution to adduce evidence negating the defense once sufficient evidence thereof has been adduced.”

²⁰ Cross and Wilkins. *Outline of the Law of Evidence*. (London: Butterworth Publishers, 1986), 27

²¹ Alan Reed. *Criminal Law*. (London: Sweet and Maxwell Publishers, 2006), 8-9

²² HKS/41/2010

The law relating to onus of proof of an alibi is clear, and was laid down in the case of *Bwalya v The people*²³, namely that once evidence thereof fit to be left to a jury has been adduced the onus is on the prosecution to negative the alibi. The law on alibi was also clearly stated in the case of *Katebe v The People*²⁴ where it was stated:

"Where a defense of alibi is set up and there is some evidence of such an alibi it is for the Prosecution to negative it; there is no onus on the accused person to establish his alibi.

The principle the court was emphasizing on is the onus of proof. In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution takes a serious risk if they do not adduce evidence from witnesses who can discount the alibi, unless the remainder of the evidence is itself sufficient to counteract it.²⁵

Clarkson²⁶ on the other hand outlines the three exceptions to the general rule that the burden of proof is upon the prosecution.

1. Where the defendant admits the elements of the crime (the actus reus and mens rea) but pleads a special defense, the evidential burden is upon him to create at least a reasonable doubt in his favour. For example where the defendant raises the defense of self-defense.
2. Where statute expressly places persuasive burden on the defendant
3. Where the defendant pleads the defense of insanity, both the evidential and persuasive burden rest upon him.

²³ (1975) Z.R 125

²⁴ (1975) Z.R 13

²⁵ Katebe v. The People (1975) Z.R. 125

²⁶ C.M.V. Clarkson. *Understanding Criminal Law*. (London: Sweet and Maxwell publishers, 2001)

2.3 DUTY TO DISCLOSE

The law requires that the defence should disclose an alibi defense prior to a trial. The defence must disclose an alibi defense with sufficient time for the authorities to investigate the alibi, and with sufficient particularization to allow for a meaningful investigation. Failure to comply with the two requirements will result in the court making an adverse inference against the alibi defense²⁷. In the case of *The People v Benny Mbaulu Fumbelo*²⁸, it was stated that an accused is not obliged to disclose his defense to the arresting officer or to say anything unless he wishes to do so. However, when the defense is an alibi it should be disclosed as early as possible so as to enable the police to investigate it. This is therefore one of the legal issues that surround the defense of alibi.

2.4 DUTY TO INVESTIGATE

The police have a duty to investigate an alibi that an accused person has put forth. The accused may claim to be out of town on the day the crime was committed, or he may provide documentation to that effect. The accused might also give names of places he was at or the people he was with on the material day the crime was allegedly committed. Once the accused provides such information, the duty is on the police to investigate the information. That way, it will be easy for the prosecution to discharge its burden of proof.²⁹

In *Lubinda v The People*³⁰ the appellant immediately on being arrested said that at the time the murder was alleged to have been committed he was in the mess in the army barracks, and he gave the names of two soldiers who were with him in the mess; he repeated this alibi in the witness box. The police made no investigation whatsoever of the alibi. Doyle, C J, said at page 45:

²⁷Smith and Kenaan. *English Law: Text and Cases*. (England: Pearson Education Limited Publishers, 2007)

²⁸ HKS/41/2010

²⁹ *The People v. Fumbelo*. HKS/41/2010

³⁰(1973) Z.R 43

"Quite plainly it would have been the simplest thing in the world if there had been a responsible officer investigating this case to have gone to the commanding officer and asked to see, not merely (the named soldiers) but every person who was in the mess that night. In that way it would have been possible to test the truth or otherwise of the alibi. In effect the action of the prosecution has been to prevent that alibi being tested . . ."

In *Nzala v The People*³¹ the court said at pages 223 and 224 that where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi it is the duty of the police to investigate it. That duty is certainly not discharged by the investigating officer simply interviewing people. If in fact the various witnesses mentioned by the appellant had given information which was no supportive to the appellant's case this was obviously very important evidence in support of the prosecution case and should have been led by the prosecution.

The law on alibi as already stated was clearly laid in the case of *Katebe v The People*³² where it was stated:

"Where a defense of alibi is set up and there is some evidence of such an alibi it is for the Prosecution to negative it; that there is no onus on the accused person to establish his alibi. Further that it is dereliction of duty for an investigating officer not to make proper investigation of an alleged alibi."

Furthermore, in the Case of *Ilunga Kabala and John Masefu v The People*³³ it was rightly stated that, where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi, it is the duty of the police to investigate it.

³¹ (1976) Z.R. 221

³² (1975) Z.R 13

³³ (1981) Z.R 102

At this point, it is very important to point out that if the police fail to investigate an alibi and it leads to conviction, on appeal, such negligence can lead to an acquittal. Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the Investigating Agency fails to investigate it, it is in these circumstances amounting to a dereliction of duty, and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result; in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the derelictions of duty.³⁴

The case of *Lubinda v The People*³⁵ is illustrative of this principle. In that case the appellant and another man were convicted of murder. At the investigatory stage of the case he had let it be known to the police that he was going to rely on the alibi that he was in the Mess with other fellow soldiers and therefore could not have been at the place where the murder was committed. The investigating officer failed to investigate the alibi. The appellant was convicted on the evidence of witnesses who claimed that they had seen him assault the deceased. He appealed against conviction. In the course of delivering the Judgment of the Court, Doyle, CJ, had this to say:

“In a proper case and on a proper direction it is open to any court to find that they believe witnesses and do not believe other witnesses. In this case we are faced by the fact that the whole evidence for the defence has been seriously prejudiced by a dereliction of duty on the part of the investigating officers. Had an investigation of the alibi taken place it might have been in favour of the appellants. We do not consider that the evidence given for the prosecution was such that it was so overwhelming as to offset the

³⁴ *Lubinda v. The People* (1973) Z.R. 43

³⁵ (1973) Z.R. 43

prejudice which might have arisen from the dereliction of duty but we must therefore allow this appeal and quash the conviction and sentence."

It is therefore important to emphasize that the police have a duty to investigate any alibi information put forth by an accused person, failure to do so would lead to possible acquittal.

2.5 FALSE ALIBI

A false alibi is based on the findings by the police after a meaning investigation that the alibi information provided by the accused is false. The giving of a false alibi, besides resulting in possible subsequent criminal offences for example obstruction of justice or perjury, may result in negative ramifications for the trial itself. In some cases the giving of a false alibi may be used by the court as actual evidence of guilt.

The failure of the defense of alibi, however, does not prove an accused person's guilt nor does it relieve the burden of proof beyond reasonable doubt on the part of the prosecution. In commenting on false alibi, Chomba J in the case of *The People v Chitambala*³⁶ stated the following:

"I warn myself that because an accused puts up an alibi which is proved false, that does not mean that he is automatically guilty of the offence charged. The negating of his alibi goes to credit and is a circumstance to be taken into account with all the other evidence in deciding whether or not he has been proved guilty. Put differently the fact that the accused alibi has been proved to be false does not in any way relieve the prosecution of the burden of proof"

³⁶ (1973) Z.R. 118

It is also important to note the fact that it was stated in the case of *The People v. Swillah*³⁷ that a false alibi might be put forward for many reasons. An accused, for example who had only his own truthful evidence to rely on might stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence would not be enough. Alibi witnesses could make genuine mistakes about dates and occasions as could any other witnesses. It is only when the jury is satisfied that the sole reason for the fabrication is to deceive them and there was no other explanation for its being put forward, could fabrication provide any support for identification evidence. The jury should be reminded that providing the accused had told lies about where he was at the material time did not by itself prove that he was where the identifying witness said he was.

Furthermore, the Supreme Court said in the case of *Bwalya v The people*³⁸ that inference cannot be drawn that the accused has put forward a false alibi because he had been involved in the offence. In this case, the Court appreciated the fact that a man charged with an offence may seek to exculpate himself on a dishonest basis even though he was not involved in the offence.

This is to say that an accused person cannot be declared guilty mainly because he has put forth a false alibi. This is one of the critical legal issues that surround the defense of alibi. It is against the rules of natural justice for an accused to be convicted simply because he relied on a false alibi.

³⁷ (1976) Z.R. 388

³⁸ (1975) Z.R. 227

2.6 CORROBORATION

Corroboration is independent evidence which supports the evidence of a witness in a material particular.³⁹ The general rule in both criminal and civil cases is that a court may act on the testimony of one witness although there are occasions where the need for corroboration must be considered by the court. This is because experience has shown that in certain types of cases or with particular categories of witness it is dangerous to convict in the absence of corroboration.⁴⁰

In cases of alibi, it is important that evidence in form of documentation is to be corroborated. Corroboration in this instance includes making sure that the document is authentic. Where the accused claims to have been in public places, or where visual evidence can be produced, it is important that such evidence is verified. Corroboration will help strengthen the defense of alibi, the accused therefore has a burden to corroborate his alibi defense. As has been stated, it is therefore important for the prosecution to prove that such evidence is not authentic or that it is false.⁴¹

2.7 WITNESS CREDIBILITY

An accused person will usually provide evidence in relation to an alibi. This evidence may be in form of documentation or an individual that the person was with at the alleged time that the crime was committed. It is therefore important that the credibility of such a witness is established. It was held in the case of *R v. Brown*⁴² that although a defendant was entitled to a fair trial, that fairness did not require that his witnesses should be immune from challenge as to their credibility.

³⁹ Muna Ndulo and John Hatchard. *The Law of Evidence in Zambia: Cases and Materials*. (London: Villiers Publication, 1991)

⁴⁰ E. J. Swarbrick. *The Magistrate Handbook*. 6th edition. (Lusaka: National Institute of Public Administration, 1991),

⁴¹ E.J. Swarbrick. *The Magistrate Hand Book*. 6th edition. (Lusaka: National Institute of Public Administration, 1991),

⁴² [1997] 3 ALL E.R

There are many reasons why a person can act as an alibi witness. A witness may claim to be an alibi witness for fear of his life or the lives of those close to him, he may even be paid to lie that he was with the accused on that particular day. He might also be a party to the crime or an accomplice. It was pointed out in the case of *Phiri (E) and others v The people*⁴³ that the evidence of a witness who has an interest of his own to serve must be treated in the same way as that of an accomplice and this means that there must be something more than a mere belief that the witness is telling the truth.

It is common place that an alibi witness can lie on behalf of the accused. The witness may have a personal interest in the matter as well. This is why witness credibility is one of the legal issues that surround the defense of alibi. However it is also important to note that a lie by the witness does not necessarily mean the accused is guilty of the crime committed. As has been stated, there are various reasons an accused may have decided to rely on a false alibi despite being innocent.

2.8 CONCLUSION

The defense of alibi is totally based on non-participation. The accused has such a duty to disclose upon his arrest that he is going to rely on the defense of alibi. This gives the police a duty to investigate whether the defense is true or false. The fact that the alibi turns out false does not in itself prove that the accused is guilty of the offence charged. The accused is not precluded from relying on any evidence that will prove his innocence.

Furthermore, the prosecution always has the duty to discharge its burden of proof beyond a reasonable doubt that the accused was at the scene of crime on the day that the crime was committed. Should the prosecution fail to discharge this burden, the accused is entitled to an acquittal.

⁴³ S.C.Z. Judgment No. 31 of 1978

The defense of alibi also requires credible witnesses, both prosecution and defence witnesses. The court should warn itself of prosecution witness who may be seeking their own personal interests and defence witnesses who maybe paid to substantiate the alibi or simply be accomplices who are scared of being prosecuted too once the accused is found guilty.

Corroboration is another important element of the defense of alibi. The court should warn itself before acquitting or convicting the accused in the absence of uncorroborated evidence. Both the prosecution and the defence should be able to corroborate its alibi evidence. However, it is important to note the fact that the overriding principle is that the burden of proof entirely rests on the prosecution and not on the accused.

CHAPTER THREE

LEGAL ISSUES SURROUNDING THE IDENTIFICATION OF AN ACCUSED IN THE ZAMBIAN LEGAL SYSTEM

3.0 INTRODUCTION

Chapter three discussed in depth the defense of alibi and the legal issues that surround the defense. The success of the defense of alibi depends on the identification of an accused person. Where there is sufficient identification, and in the absence of mistaken identity and personal interests, it is established that the accused was indeed the one that the witness saw on the material day that the crime was committed, then the prosecution discharges its burden of proving that indeed the accused committed the crime. The defense of alibi thus fails.

3.1 WHAT IS IDENTIFICATION OF AN ACCUSED PERSON

In criminal procedures, for a person to be found guilty of an offence all elements of the offence need to be proven by the Prosecution and further it must be proven for the judge to be sure that it was the Defendant who committed the offence. Therefore, in a number of murder and aggravated robbery cases the main issues turn to be based on identification and possible mistakes as to who committed the act alleged or complained of.⁴⁴ The judges have for a number of years recognised the problems related to witnesses being genuinely mistaken in their identification of the Defendant. Further, the other issue is based on the fact that a mistaken witness could be a convincing one when put before the court.

In response to those troubles, there are prescribed ways in which the link between the accused and the crime can be established. In broad terms there are two situations- where the accused

⁴⁴Brian L. Cutler and Steven D. Penrod. *Mistaken Identification*. (Cambridge: Cambridge University Press, 1995), 5

is identified by a person giving live evidence at court or where the accused is being identified before the trial begins.

3.2 PRE -TRIAL IDENTIFICATION

Currently there are four different identification procedures conducted before the trial begins⁴⁵:

1. Video identification
2. Group identification
3. Confrontation identification
4. Identification parade

3.3 VIDEO IDENTIFICATION

In a video identification, the witness is shown a set of images of the suspect and at least eight other people who need to resemble the suspect in general appearance and position in life. If there are two suspects of roughly similar appearances they may be shown together with at least twelve other people.

If the suspect has any unusual physical features like scars, tattoos or any other visible marks, steps must be taken to conceal the location of the features on the images of the suspect or replicate that feature on all other images.

The images shown may be moving or still images but shall as far as possible have the same sequence of movements for all people.⁴⁶

⁴⁵ Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Volume 1. 1995

⁴⁶ Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Volume 1. 1995

3.4 GROUP IDENTIFICATION

This procedure is less formal in that the suspect is put into an informal group of people. It could be conducted with or without the consent of the suspect. The place used should be one where other people are either passing by or waiting around informally.⁴⁷

3.5 CONFRONTATION AND IDENTIFICATION

This procedure involves a direct confrontation between the witness and the suspect. This will usually take place at a police station where the witness would normally be asked 'Is that the person?' However, force may not be used to make the suspect's face visible to the witness.⁴⁸

3.6 IDENTITY PARADES

An identification parade involves the accused being put on a line up with other people from which the witness will be allowed to pick from, the person he saw committing the offence. Identification parades are only carried out for selective crimes mainly murder and aggravated robbery. As pointed above, there are various methods of conducting an identification of an accused but in Zambia the only method used is an identification parade.⁴⁹

The features of this procedure are that the suspect and eight other people are arranged in a line-up. The same principles apply to their physical resemblance to the suspect, that is, the other people on the line up should have similar physical appearances, and they should wear the same type of clothes and should stand in the same positions as the suspect. The suspect is

⁴⁷ Australian Law Reform Commission, Evidence, ALRC 26 (Interim). Volume 1, 1995

⁴⁸ Australian Law Reform Commission, Evidence, ALRC 26(Interim). Volume 1, 1995

⁴⁹ Interview conducted at the Central Police Station, Lusaka. Mr. Kamanda 0977357595 and Mr. Shantimba 0977755601. 7th March 2012 .

allowed to choose their position in the line. If there are any unusual features of the suspect, such should be concealed in so far as possible.⁵⁰

In an Identification parade, only one witness is to look at the images or line up at any one time. Before the procedure the witness is told that the suspect may not appear in the images or line-up and if they cannot make any positive identification they should say so. They are advised to look at each person or image individually and not to make a decision before they have seen the rest of the people on the line up at least twice or until they have considered them carefully. In instances where there is more than one witness, each witness should be called one at a time. Once the witness has identified the suspect, the witness should not be allowed to mix with other witnesses to prevent him or her from interfering with the other witnesses yet to undergo the identification parade identification.⁵¹

It was held in the case of *Toko v. The People*⁵² that it is necessary to point out that it is improper for a witness who has identified a suspect at an identification parade to be brought into contact with witnesses who are yet to visit the parade. The police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

In Zambia, the identification parade is conducted by an inspector and scene of crime officer whose duty is to take photos to be used in the courts of law. The whole essence of an identification parade is to preserve the presumption of innocence doctrine; it is the duty of the police to preserve the innocence of a person. To achieve this, the police are mandated to get an inspector from another police station and not the one where the crime was committed. This

⁵⁰ Interview conducted at the Central Police station, Lusaka: Mr. Kamanda 0977357595 and Mr. Shantimba 0977755601. 7th March 2012

⁵¹ Interview conducted at Zambia Central police Station on 7th March 2012.

⁵² (1975) Z.R. 196

is to prevent biasness. Furthermore, if the inspector is also the person investigating the crime, he will not be allowed to conduct the identification parade.⁵³

The sole object of an identification parade is to test the ability of an identifying witness to pick out a person he claims to have previously seen on a specified occasion, and in order to achieve that objective, those charged with the duty of conducting identification parades must ensure that such parades are free from bias and unfairness.⁵⁴

When an identification parade is conducted, it must be shown by the prosecution to have been conducted properly and fairly. The accused persons alone should not be presented to the witnesses for identification, a more reliable procedure for identification is to present the accused together with other persons to the witnesses for the latter to identify, unassisted, their assailants.⁵⁵

On this point of identification, according to the Laws of Halsbury⁵⁶, the Prosecution must then prove that the defendant is the person who committed the offence charged; there must be no prompting or suggestion, however unintentional, on the part of the police when they are dealing with potential witnesses of identification. A witness may state that he has seen the person for the first time when he is in the dock. The accused should not have been previously be placed with other persons and the witness asked to pick him out; nor should the witness be asked to identify a prisoner when the prisoner is alone in a room, nor should the witness be asked, "Is that the man?" nor allowed to see the prisoner before an identification parade; nor should the suspected person be described to the witness.

⁵³ Interview conducted at the Central Police Station on 7th March 2012

⁵⁴ Muna Ndulo and John Hatchard. *The Law of Evidence in Zambia: Cases and Materials*. (London: Villers Publication, 1991), 308

⁵⁵ Muna Ndulo and John Hatchard. *The Law of Evidence in Zambia: Cases and Materials*. (London: Villers Publication, 1991), 308

⁵⁶ Halsbury's Laws of England. 3rd edition. Volume 10. Page 439 and 440, paragraph 814

In any case where justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, the court should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent and they should be most scrupulous in seeing that it is so. In the case of *Toko v. The People*⁵⁷ it was held, that the police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

Investigating officers should take the greatest care to obtain and record the fullest possible description of assailants at the time when the initial report is made. If thereafter when the witness comes to give evidence in court his evidence as to the features by which he alleges to recognise and identify the accused is challenged as a recent fabrication, his written statement made to the police immediately after the event will be available to rebut such an allegation.⁵⁸

To put suspects with visible injuries on their bodies on an identification parade consisting of other persons having no such injuries, is tantamount to providing identifying witnesses with a clue.⁵⁹

3.7 MISTAKEN BELIEF OR HONEST MISTAKE

A person is said to have made an honest mistake when he or she mistakes A for B. Both of whom may have similar features. Stress of the moment is the most common cause of persons making honest mistakes.⁶⁰

⁵⁷ (1975) Z.R. 196

⁵⁸ *Crate v. The People* (1975) Z.R 232

⁵⁹ Interview conducted on 7th March at Zambia Central Police Station

⁶⁰ *The People v. Phiri and Siagutu* (1980) Z.R .249

The case of *Mbundi Nyambe v The People*⁶¹ illustrates that identification by a single witness can be fallible; the court had this to say:

"There is perhaps no area in which there is a greater danger of honest; mistake than in the area of identification, particularly where the accused was not known to the witness prior to the occasion on which he is alleged to have been seen. The question is not one of credibility in the sense of truthfulness, but of reliability, and the greatest care should therefore be taken to test the identification. It is not enough for the witness simply to say that the accused is the person who committed the offence; the witness should be asked to specify by what features or unusual marks, if any, he alleges to recognize the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed; the state of the light, the opportunity for observation and the stress of the moment should be carefully canvassed. The foregoing considerations are not, of course, exhaustive, but are intended merely to illustrate that the adequacy of evidence of personal identification will depend on all the surrounding circumstances and each case must be decided on its merits."

Although recognition may be more reliable than identification of a stranger, even when the witness is purporting to recognise someone whom he knows the trial judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake; the poorer the opportunity for observation the greater that possibility becomes.⁶²

3.8 MISTAKEN IDENTITY

Mistaken identifications are the leading cause of wrongful convictions. Mistaken eyewitness identification is when a crime victim or eyewitness mistakenly identifies someone as the perpetrator of a crime even though that person didn't commit the crime. The witness identifies the wrong person.⁶³

⁶¹ (1973) Z.R. 228

⁶² Mwansa Mushala and others v. The People (1978) Z.R. 58

⁶³ Brian L. Cutler and Steven D. Penrod. *Mistaken Identification*. (Cambridge: Cambridge University Press, 1995) , 5

Mistaken identity usually arises when identification is by a single witness. In identification cases, the question of mistaken identity does not arise unless the witness making identification is an honest witness. Particularly in cases of identification by a single witness the honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation.⁶⁴ It is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated. In *Haamenda v The People*⁶⁵, the Supreme Court had occasion to consider the guidelines given by Lord Widgery, C.J., in *R v Turnbull*⁶⁶ as to what duties a judge should observe whenever the case against an accused turns wholly or substantially on the correctness of one or more identifications which the defence alleges to be mistaken. These duties are:

- (a) Firstly, that the judges should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identifications.
- (b) Secondly, the judges should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.

It was held, inter alia: that where the quality of identification is good and remains so at the close of the defence case the danger of mistaken identification is lessened; the proper the quality, the greater the danger. In the latter event the court should look for supporting evidence which has the effect of buttressing the weak evidence of identification. odd coincidences can provide corroboration.

In single witness identification, corroboration or supporting evidence which has the effect of buttressing the weak evidence of identification is required.⁶⁷ In the case of *Situna v. The*

⁶⁴Chimbini v The People (1973) Z.R. 191

⁶⁵(1977) Z.R. 184

⁶⁶[1976] 3 ALL ER 549

⁶⁷Muna. Ndulo and John Hachard. *The Law of Evidence in Zambia: Cases and Materials*. (London: Villiers Publication, 1991), 309.

People,⁶⁸ the appellant was convicted of one count of aggravated robbery and two counts of attempted murder. The trial court considered that the appellant had been properly identified at the parade by the single identifying witness despite allegations by the defence that the parade was improperly conducted and the inherent danger of an honest mistake in the circumstances. Hearsay evidence was admitted supporting the conviction. The Supreme Court held that the evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note must be taken of all the prevailing conditions and the basis upon which the witness claims to recognise the accused. It was further held that if the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.

It is therefore important that the court takes into account issues of mistaken identity so as not to convict innocent people

3.9 BURDEN OF PROOF

When an identification parade is conducted, it must be shown by the prosecution to have been conducted properly and fairly. Showing an accused person to the witnesses before the formal parade is improper and unfair. The burden of proof as regards the identity of an accused person lies upon the prosecution and must be discharged beyond any reasonable doubt. The burden of proof lies on the prosecution to establish its case and to do so beyond all reasonable

⁶⁸ (1982) Z.R. 115

doubt. There is no onus on any accused person to prove his innocence and any reasonable doubt entitles him to an acquittal.⁶⁹

3.10 PROSECUTION WITNESSES

Prosecution witnesses also raise concerns as to the identification of an accused person. A group of people can agree to commit perjury by falsely identifying the accused when he is not the one they saw committing the crime and in most instances; they might never have even witnessed anything at all nor had an ample opportunity to identify the accused person. A witness must have a good opportunity to make a reliable observation so that there can be no doubt about the reliability of the identification and the correctness of it. The court therefore has to address itself on issues of prosecution witnesses fabricating stories. In *kambarange Mpundu Kaunda v The People*⁷⁰ it was held that prosecution witnesses who are friends or relatives of the deceased may have a possible interest of their own to serve and should be treated as suspect witnesses and that the court should warn itself against the danger of false implication and should go further to ensure that the danger has been excluded.

3.11 IDENTIFICATION AT COURT

In court eyewitness identifications are also known as dock identifications. Those should not and are generally rarely allowed. The reasoning behind such rule is that there is no great difficulty to pick out the person standing rather obviously in the dock. Therefore, such identification lacks strength.⁷¹

Further allowing a dock identification where there has been no other previous identification by that person would go against the principles for conducting out of court identification, this

⁶⁹ The People v. Kamwandi (1972) Z.R. 131

⁷⁰ (1996/92) Z.R. 215

⁷¹ Australian Law Reform Commission, Evidence, ALRC 26 (Interim) volume 1, 1995

being through an identification parade or other methods outlined. However, where the accused has refused to attend a parade, dock identification may be permissible.⁷²

In the case of *Santosh Devidas Behade v. State of Maharashtra*⁷³ the Court stated that it is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where the identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court. When the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial.

From this point of view it is a matter of great importance, both for the investigating agency, this being the police, and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution.

3.12 CONCLUSION

Identification of an accused person is very important. Considering the fact that identification parades are conducted when the crime in question is aggravated robbery or murder, before the courts of Law sentence a person to death or life in prison, these being the maximum punishment for the two crimes, it is important that the courts are satisfied that they have the right person. In Zambia the police are mandated with carrying out identification parades

⁷² Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Volume 1, 1995

⁷³ (2009) 3 SCALE 727

which allow the witness to identify the person they saw on the material day that the crime was committed.

It is therefore important that the police do not in any way influence the decision of the witness through suggesting to the witness the person who should be pointed out on the parade or arrange for prior contact between the accused person and the witness. The accused should be given a fair, unbiased and proper identification parade.

The courts also have an obligation to warn itself and rule out the dangers of all instances of honest belief and possibilities of mistaken identities by a witness. The court also has an obligation to ensure that all the necessary procedures and legality of identification parades have been complied with. Should an accused person claim unfair and improper identification procedures and produce evidence to that effect, the identification of the accused by the witness as the one who committed the crime will be thrown out by the court and the prosecution will not be allowed to rely on the results of the identification parade. The prosecution will be obligated to rely on other evidence and not the identification parade.

CHAPTER FOUR

A COMPARATIVE ANALYSIS BETWEEN ZAMBIA AND OTHER FOREIGN JURISDICTIONS ON THE LEGAL ISSUES SURROUNDING THE DEFENSE OF ALIBI AND THE IDENTIFICATION OF AN ACCUSED PERSON

Chapter two and three dealt extensively with the legal issues relating to the defense of alibi and the identification of an accused person in the Zambian legal system respectively. This chapter will try to draw a comparative analysis between the Zambian legal system and other foreign jurisdictions: United States of America, India and Britain.

4.1 BRITAIN

4.1.2 THE DEFENSE OF ALIBI

The British Criminal Procedure and Investigations Act of 1996 in section 5 emphasises that a notice of alibi must be given in advance of trial on indictment⁷⁴. Section 5 of the Act is designed to prevent the use of 'sprung' or late alibis which were once so widespread in criminal trials. The section provides that, in general, notice of alibi must be given in advance of a trial on indictment.

The section further states that it must be clear by a warning to the defendant that he will not be allowed to bring in evidence of an alibi, that is, that he was somewhere else when the offence was committed unless notice of it is given to the solicitor for the prosecution either as part of the committal proceedings or within 7 days of the end of them. Although this warning need not be given if it is seen unnecessary having regard to the nature of the offence charged. It should as a general rule be given where there is any doubt, because the Act

⁷⁴Smith and Keenan .*English Law: Text and cases*. (England: Pearson Education Limited Publishers, 2007) , 138-139

provides that failure to give it will allow the defendant to introduce a last minute alibi at his trial.⁷⁵

However, there is discretion in the trial judge to allow alibi evidence to be heard even though particulars of it were not given within 7 days, provided the prosecution has been given time to investigate the alibi before the trial started. It is unusual for the defence to give notice of an alibi at the committal proceedings.⁷⁶

4.1.3 IDENTIFICATION

At common law, it is recognised that the identification parade is the most reliable mechanism available for identification of suspects. Gibbs CJ stated:

*It is most undesirable that police officers who have arrested a person on a charge of having committed a crime should arrange for potential witnesses to identify that person except at a properly conducted identification parade. Similarly, speaking generally, an identification parade should, wherever possible, be held when it is desired that a witness should identify a person who is firmly suspected to be the offender.*⁷⁷

Despite its preference for identification parades, the common law stops short of holding that the admissibility of evidence of a prior act of identification depends on the fact that an identification parade had been held. Thus, evidence of identification using photographs or other means is admissible at common law, even if there is no valid reason why an identification parade has not been held. The proper approach at common law is to consider whether the conviction can safely be sustained on the whole of the evidence,⁷⁸ with the trial judge having discretion to exclude identification evidence if its prejudicial effect on the

⁷⁵Smith and Kennan .*English Law: Text and Cases*. (England: Pearson Education Limited Publishers,2007), 138

⁷⁶ R v Sullivan [1970] 2ALL ER 681

⁷⁷ Alexander v The Queen (1981) 145 CLR 395,401

⁷⁸ Davies and Cody v The Queen (1937) 57 CLR 170

accused is outweighed by its probative value.⁷⁹ The use of means of identification other than an identification parade (such as photos) goes to the weight and sufficiency of the evidence, rather than to its admissibility.

Under the uniform Evidence Acts, the common law preference for identification parades becomes a requirement for admissibility of identification evidence. Section 114(2) (a) establishes the general rule that visual identification evidence adduced by the prosecutor is not admissible unless an identification parade that included the defendant was held before the identification was made. There are two exceptions to this general rule: where it would not have been reasonable to have held an identification parade; and where the defendant refused to take part in such a parade.

Section 114(3) lists non-exhaustive factors which may be taken into account in determining whether it was reasonable to hold an identification parade, including the nature of the offence, the importance of the evidence, and the practicality and appropriateness of holding a parade. It is presumed that it would not have been reasonable to hold a parade if it would have been unfair to the defendant to do so.⁸⁰ If a defendant refuses to take part in a parade, that will be enough to make the holding of a parade unreasonable—unless the defendant refuses to participate on the ground that the defendant’s lawyer or other nominated person was not present, and it would have been reasonably practicable for that person to be there.⁸¹

Britain unlike Zambia, has a code that assists the police in the identification of an accused person called, Code D. Code D, an English Code⁸² concerns the main methods used by the police to identify people in connection with the investigation of offences. These include video identification this is where the witness is shown moving images of a known suspect, together

⁷⁹ *Alexander v The Queen* (1981) 145 CLR, 402 Per Gibbs CJ, 430 Per mason J

⁸⁰ Section 114(4) of the Uniform Evidence Act

⁸¹ Section 114(5) of the Uniform Evidence Act

⁸² Codes of practice established under the Police and Criminal Evidence Act 1984

with similar images of others who resemble the suspect; identification parades, this is where the witness sees the suspect in a line of others who resemble the suspect; and group identification, where the witness sees the suspect in an informal group of people.

Code D also deals with identification by finger prints; identifications using footwear impressions; and identification by using body samples to generate a DNA profile for comparison with material obtained from the scene of a crime or a victim.⁸³

The case of *R v. Turnbull*⁸⁴ provides that whenever the case against an accused depends wholly or substantially on the correctness of an identification of the accused that the defense alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification.

The case of *R v. Turnbull*⁸⁵ further states that the judge should also direct the jury to examine closely the circumstances in which the identification was made. When the quality of the identification evidence is good, the jury can be left to assess the value of the identifying evidence even though there is no other evidence to support it. The case further states that when the quality of the identifying evidence is poor, for example when it depends solely on a fleeting glance or on a longer observation made in difficult condition, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence that goes to support the correctness of the identification.

⁸³ Codes of Practice Established Under The Police And Criminal Evidence Act 1984

⁸⁴ [1977] QB. 224 (CA)

⁸⁵ [1977] QB. 224 (CA)

4.2 UNITED STATES OF AMERICAN (USA)

4.2.1 THE DEFENSE OF ALIBI

The alibi defense in the U.S. serves to show that the defendant was not present at the location of the alleged crime thus proving his innocence. Federal and state jurisdictions may require disclosure on the intent to use an alibi defense early on in the criminal proceedings.

Under the Federal Rules of Criminal Procedure section 12.1, the government can request in writing a defendant's alibi statement before the criminal trial proceedings begin. The defendant must then reply to the government within 14 days, providing a list of the exact locations the defendant is claiming to have been during the alleged criminal activity and the contact information of all alibi witnesses the defense intends to call. The government must then provide the defense with a list and contact information for its witnesses as well. In its discretion, the court can exclude witness testimony not disclosed under the rule and also has the ability to excuse failures of disclosure on a showing of good cause.⁸⁶

State courts have also upheld statutes requiring the disclosure of alibi witness information before trial. In *Williams v. Florida*⁸⁷, the U.S. Supreme Court held that a state law requiring alibi witness disclosure did not violate the 5th Amendment right against self-incrimination – the alibi witness disclosure rules allow sufficient discovery to ensure a fair and speedy trial and prevents unnecessary surprise during criminal proceedings.⁸⁸

Similarly, the State is required to disclose rebuttal and evidentiary witnesses to the defense in order to comply with the rules of due process for the alibi defense.⁸⁹

⁸⁶[http://www.law.cornell.edu/rules/frcrmp/Rule 12 1.htm](http://www.law.cornell.edu/rules/frcrmp/Rule%2012.1.htm)

⁸⁷ (1970) 399 U.S 78

⁸⁸ *Williams v Florida*, 399 U.S 78 (1970)

⁸⁹ *Wardius v. Oregon*, 412 U.S 470 (1973)

In the Case of *The United States of America v Kenneth Delton Robinson*⁹⁰, the judge considered three things on the defense of alibi: its effect, the burden of proof and witnesses. On effect, he stated that if the defendant establishes that he was not at the place the crime was committed or if the prosecution fails to prove participation of the defendant, the defendant is then entitled to a plea of not guilty. On the burden of proof the judge stated that the burden of proof is on the prosecution to prove that it is false and that the defendant participated in the crime. He further stated that an alibi charge which shifts the burden of proof to the defendant is a constitutional error. On witness credibility the judge emphasised the need that as a matter of law, alibi witnesses should be received with suspicion.

In the case of *Johnson v. Bennett*⁹¹ at the petitioner's trial for murder in 1934, several witnesses testified that the petitioner was in another city when the crime was committed. In accordance with Iowa law, the trial judge instructed the jury that the defendant had the burden of proof on an alibi defense. The Petitioner was convicted, and his conviction was upheld by the Iowa Supreme Court. Contending that it violated the Due Process Clause of the Fourteenth Amendment to place on him the burden of proving an alibi defense, the petitioner sought a writ of habeas corpus. The District Court denied the writ, and the Court of Appeals affirmed. After this Court granted certiorari, the Court of Appeals, sitting en banc in another case, held that to place on the defendant the burden of proving an alibi defense violated due process.

In his habeas corpus proceeding, the petitioner argued, among other points, that the State had denied him due process of law by placing on him the burden of proving the alibi defense. The United States District Court for the Southern District of Iowa rejected this argument and denied the petition. The United States Court of Appeals for the Eighth Circuit affirmed. The

⁹⁰ US Court of Appeals, sixth circuit-602f. 2d 760

⁹¹393 U.S. 253 (1968)

Court of Appeals for the Eighth Circuit, sitting en banc, held in another case that the Iowa rule shifting to the defendant the burden of proving an alibi defense violates the Due Process Clause of the Fourteenth Amendment.

4.2.2 THE IDENTIFICATION OF AN ACCUSED

The Sixth Amendment⁹² guarantees an accused the right to counsel not only at his trial but at any critical confrontation by the prosecution at pretrial proceedings where the results might well determine his fate and where the absence of counsel might derogate from his right to a fair trial. The presence of counsel at the lineup will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification.

It was urged in the case of *United States v Wade*⁹³ that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant, his right to a fair trial at which the witnesses against him might be meaningfully cross-examined. American cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads:

"In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful defence.

In the United States, a 'line-up' is recognised as the most reliable form of evidence, but line-ups can be based on live line-ups or photographic line-ups. There is no requirement that any particular form of procedure be used. Pre-trial photographic identification and subsequent in-court identification based on pre-trial procedures must be excluded only if the photographic

⁹² The American Constitution

⁹³ 388 U.S 218 (1967)

identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.⁹⁴

4.3 INDIA

4.3.1 IDENTIFICATION

India has also codified some requirements that are to be met when dealing with issues of identification. This is found in section 162(1) of the Indian Code of Criminal procedure.⁹⁵

Section 162(1) of the Code provides that the presence of a police-officer at the place where an identification parade is held (or where any identification of property or place is made), vitiates the whole evidence as to the identification and renders it inadmissible.

In the case of *Ramkishan Mithanlal Sharma v. State of Bombay*⁹⁶ in dealing with section 162(1) of the code of criminal procedure the court held the following:

1. If police officers are present at the time of identification, the whole process of identification gets hit by section 162, and no distinction whatsoever can be made on the ground that the statement was made to the panch (an ordinary person who is not a police officer) witnesses and not to the police, or on the ground that the record of the identification was prepared by the panchas and not by the police officer. In such a case, the entire proceeding is inadmissible, and no evidence as to such identification can be given whether the evidence is the oral testimony of the identifier, or the panchas or the police officer present, or whether it be the record of such identification in a panchnama, whosoever be the person who prepared it. To hold otherwise would amount to circumvention of the provisions of section 162(1).

⁹⁴ US Department of Justice-National Institute of Justice. *Eye Witness Evidence: A Guide for Law Enforcement*. (1999)

⁹⁵ J.K. Soonavala. *The Supreme Court on Criminal Law 1950-1966. 2nd edition. Volume 1* (Bombay: Kaiser-Hind Press, 1968), 742

⁹⁶ J.K. Soonavala. *The Supreme Court on Criminal law 1950-1966. 2nd edition. Volume 1* (Bombay: Kaiser-Hind press, 1968), 742

2. On the other hand, if after arranging for the parade, the police officers completely obliterate themselves and the whole process of identification is held under the exclusive direction and supervision of independent witnesses, so that no police officer is present at the time when the identifier identifies a particular person from a number of others as being the one concerned in the offence, such identification is free of the bar imposed by section 162(1), and the evidence thereof is perfectly admissible.

It can be seen from the above case that, in India, the criminal code has tried to emphasis the absence of a police officer when an identification parade is conducted to prevent the witness being influenced in identifying the person most preferred by the police.

The Indian Criminal Procedure Code further states the effect of contravening section 162(1). The effect of improper admission of Evidence as to an identification parade which is inadmissible under section 162 by reason of the presence of a police officer at the place where the parade was held, is that it is inadmissible evidence which must be altogether excluded from consideration. The balance of evidence remaining thereafter must be carefully considered to see whether it is or it is not itself sufficient to convict a person.⁹⁷ What the Act simply states is that where section 162(1) is contravened by a police officer being at the scene of identification, such identification regardless of other procedures being followed, becomes void. The prosecution cannot therefore rely on the identification of the accused by the witness; the prosecution has to look at other independent evidence excluding the identification parade.⁹⁸

The code further goes on to state that long delay in holding the identification parade after the arrest of the accused raises suspicion as to its genuiness and affects the weight of the

⁹⁷ J.K. Soonavala. The Supreme Court On Criminal Law. 1950-1966. 2nd edition. Volume 1. (Bombay: Kaiser-Hind Press, 1968), 744

⁹⁸ The Indian Criminal Procedure Code.

identification of the accused by the witness in court.⁹⁹ In the case of *Muthuswami v The State of Madras*¹⁰⁰ it was held that if an identification parade is held during the investigation of an offence a long time after the occurrence at which the accused was seen by the witness, and the witness deposes to have identified the accused at such parade, the fact that a long interval of time has elapsed between the day when he saw the face of the accused for a brief space of time, and the day when he recognised him at such parade, is a circumstance which the court must take into consideration before accepting the evidence as to such identification.

The court further stated that in such a case, as a result of the long delay, suspicion must arise as to the genuineness of the identification at such a parade, particularly if the parade has not been held immediately after the arrest of the accused. The court also emphasised in this case that the human mind is not ordinarily capable of registering an impression of a face seen only once for a brief moment, for a long time thereafter, unless that person has special features or peculiarities which help to fix its memory on the mind of the witness.

The Indian code further states that an omission to hold an identification parade during investigations considerably weakens the weight of the evidence of a prosecution witness at the trial as to the identity of the accused as being the assailant he had seen long back at the time of the occurrence of the crime.¹⁰¹

In *Kanta Prashad v. Delhi Administration*¹⁰² the court held that when the witness deposes in court to having recognised an accused in the court as being the person whom he saw a long time back for the first time in his life in the commission of an offence, the fact that during the

⁹⁹ J.K. Soonavala. *The Supreme Court on Criminal Law 1950-1966*. 2nd edition Volume 1. (Bombay: Kaiser-Hind Press, 1968), 745

¹⁰⁰ J.K. Soonavala. *The Supreme Court on Criminal Law. 1950-1966*. 2nd edition. Volume 1. (Bombay: Kaiser-Hind Press, 1968), 745

¹⁰¹ J.K. Soonavala. *The Supreme Court on Criminal Law. 1950-1966*. 2nd edition. Volume 1. (Bombay: Kaiser-Hind Press, 1968), 745

¹⁰² J.K. Soonavala. *The Supreme Court on Criminal Law. 1950-1966*. 2nd edition. Volume 1. (Bombay: Kaiser-Hind Press, 1968), 745

investigation of that offence an identification parade was held short time after the incident and that the witness identified the accused from the line of men placed before him as being the person he earlier saw at the time of the incident, is an important piece of evidence in corroboration of his evidence in court as to the identity of the accused as being the offender who committed the offence.

The case further stated that if no such identification parade has been held in a case during its investigation by the police, such identification cannot make the evidence of the witness identifying the accused as being the offender inadmissible, because a witness is perfectly competent to depose to anything which he has seen with his own eyes. But admissibility of a particular piece of evidence is a matter quite apart from its evidentiary value.

Therefore, when during investigation no parade has been held for the purpose of enabling witnesses to identify an offender whom they had seen at the incident, such omission considerably affects the weight which can be attached to the evidence of such witnesses for the purpose of establishing the identity of the accused as being the offender. The rule is that a witness must be given the earlier available opportunity to identify an assailant whom he had seen for the first time in his life at the time of the occurrence, and the denial of such opportunity detracts from the weight of his evidence.¹⁰³

According to Soonavala,¹⁰⁴ in India, failure or mistake of a witness in identifying the accused at the time of the identification parade held during investigation renders his substantive evidence of identification of the accused at the trial unreliable. Soonavala admits that it is true that the substantive evidence is the evidence made in court. However, he argues that the purpose of test identification during investigation is to test that evidence, and the safe

¹⁰³ J.K .Soonavala. The Supreme Court on Criminal Law . 1950-1966. 2nd edition. Volume 1. (Bombay: Kaiser-Hind Press, 1968), 746

¹⁰⁴ J.K .Soonavala. The supreme court on criminal law. 1950-1966. 2nd edition. Volume 1. (Bomba: Kaiser-Hind Press, 1968), 745

rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses ordinarily requires corroboration, and such corroboration can be furnished in the form of an earlier identification of the same accused at the identification proceedings held in the course of the investigation into the same offence.

Soonavala¹⁰⁵ further goes on to state that there may be exceptional cases to the above rule where the court is satisfied that the evidence of a particular witness is such that it can be safely be relied upon without the precaution of an earlier identification proceeding. But ordinarily, when the court is not prepared to consider a witness to be of that exception, corroboration to the substantive evidence by an earlier identification proceeding must be looked for before identification in court can be relied upon, even though the witness may be a disinterested witness.

Further, when a test identification has in fact taken place, its effect on the evidence of the witness in court must always be assessed, and if there are any circumstances in connection with such earlier identification which render it unsafe to place reliance upon it for the purpose of such corroboration, the evidence of that witness must be rejected in spite of the fact that he is a disinterested witness.¹⁰⁶

4.4 A COMPARATIVE ANALYSIS BETWEEN ZAMBIA AND THE THREE FOREIGN JURISDICTIONS ON THEIR APPROACH ON THE LEGAL ISSUES SURROUNDING THE DEFENSE OF ALIBI AND THE IDENTIFICATION OF AN ACCUSED PERSON

¹⁰⁵ J.K. Soonavala. *The Supreme Court on Criminal Law. 1950-1966*. 2nd edition. Volume 1. (Bombay: Kaiser-Hind Press, 1968), 746

¹⁰⁶ J.K. Soonavala. *The Supreme Court on Criminal Law 1950-1966*. 2nd edition. Volume1. (Bombay: Kaiser-Hind Press, 1968), 747

The chapter has discussed in depth how the three countries: India, American and Britain deal with issues of the defense of alibi and the identification of an accused person. It is therefore imperative that this chapter compares the three to the Zambian system.

When the three systems are compared to Zambia, it is clear that all the countries, Zambia inclusive try to address the same legal issues when dealing with both the defense of alibi and the identification of an accused person. All the four countries agree that the burden of proof generally lies on the prosecution to prove that the accused was the person who indeed committed the murder. From the thorough discussion carried out, it is evident that all the four countries address the same legal issues in relation to the defense of alibi and the identification of an accused person.

From the research carried out as seen in the discussion on Chapter four, the difference lies in the approach that the countries take. Zambia, in comparison to the other three countries: India, Britain and the United States of American, has not tried to codify any of the legal issues surrounding the defense of alibi and the identification of an accused person

In American for example, it is a constitutional right as stated in the 6th Amendment of the American Constitution for an accused person to be represented by counsel when the police are conducting an identification parade, the absence of counsel is considered to be undue process.¹⁰⁷ In Zambia on the other hand, the rights of an accused are outlined in Article 26¹⁰⁸ which outline a fair trial. Article 26 (1) (d) states that the accused has the right to legal representative but does not in any way address the circumstances in which the legal counsel can be present. From the interview conducted at the Central Police¹⁰⁹ most accused persons lined up on identification parades do not have legal representatives. Not even the criminal

¹⁰⁷ United states of America v. Wade 388. U.S. 218 (1967)

¹⁰⁸ Chapter One Of The Laws of Zambia

¹⁰⁹ Interview conducted a the Central Police Station, Lusaka: Mr Kamanda 0977357595 and Mr. Shantimba 0977755601.
7th March 2012

procedure code¹¹⁰ outlines the rights of an accused person during the identification parade procedure.

Furthermore, on identification, India has made it mandatory in Section 162 of the Indian Code of Criminal Procedure¹¹¹ that the presence of a police officer at the place where the identification parade is held vitiates the whole evidence as to the identification and renders it inadmissible. The Act actually gives the accused the right to object to the presence of a police officer at the scene of an identification parade. In Zambia on the other hand, according to the interview conducted at the central police¹¹², the officers who were reading from the police officers handbook on identification parade stated that an identification parade in Zambia is carried out by an inspector. The Indian Act¹¹³ tries as much as it can to avoid an identification parade being biased by the presence of the police thus the requirement that ordinary persons known as panchas should carry out the identification parade. In Zambia on the other hand, the identification parade is strictly carried out by inspectors and scene of crime officers.¹¹⁴

The major contrast between Zambia and the three countries discussed is that the three countries have tried as much as possible to codify the law on the defense of alibi and the identification of an accused person. The countries recognise that the two issues are fundamental in that they relate to the right to life of an individual; this is because the two issues, the defense of alibi and the identification of an accused person mainly relate to aggravated robbery and murder whose main punishment is death. Recognizing this, the three countries have tried to codify the procedures and the rights that an individual has to avoid injustices. For example Britain has Code D¹¹⁵ which police officers are to abide by when

¹¹⁰ Chapter 88 of the Laws of Zambia

¹¹¹ The Code of Criminal Procedure

¹¹² Interview conducted on 7th March at the Central Police Station, Lusaka

¹¹³ The Indian Code of Criminal Procedure

¹¹⁴ Interview conducted on 7th March at the Zambia Central Police Station, Lusaka

¹¹⁵ Codes of Practice Established Under The Police and Criminal Evidence Act 1984

dealing with the investigation of offences. It also has the Uniform Evidence Act which deals extensively with issues relating to the identification procedures to be followed when any type of identification procedures are being conducted.

India on the other hand has section 162 of its Code of Criminal procedure which has extensively tried to lay down the law on identification of the accused. One of the most important points laid down in the section is the inadmissibility of identification where there was the presence of a police officer.

In conclusion, it can therefore be said that Zambia, in comparison to other countries discussed, tries to address the same legal issues when dealing with the identification of an accused person and the defense of alibi. In contrast, it has not really tried to codify the law and the rights of the accused on the defense of alibi and the identification of an accused person. Much of the law and the procedure on the two issues are to be found in case law. This in some way disadvantages accused persons who do not know where to find the law in relation to the two legal issues.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS.

5.1 GENERAL CONCLUSIONS

The focus of this study has been to bring out the legal issues that surround the defense of alibi and the identification of the accused in the Zambian Legal system.

5.2 DEFENSE OF ALIBI

The study has shown that the defense of alibi is a very complex defense. The defense does not simply end at the accused denying non participation by simply stating that he was not present at the scene of crime because he was somewhere else. The study has shown that the success of a plea of defense of alibi comes with it legal obligations that have to be met by both the accused and the prosecution.

The research has shown that the accused has an obligation to disclose its defense as that of alibi so as to afford the investigating authorities ample time to investigate whether the defense is true or false. Non disclosure can have a lot of legal ramifications for the accused.

Finally on alibi, the research has shown that where the accused pleads the defense of alibi which turns out to be false, the accused has the right not to be condemned on that factor alone. The research has shown that the least the accused can be charged with is perjury. The court is under an obligation not to use it as actual evidence of guilt. It therefore suffices that the prosecution is still under an obligation to discharge its burden of proof and not to shift the burden to the accused simply because the defense turns out to be false.

The research further showed that Zambian law especially legislation has not fully addressed the issues of the defense of alibi. The research has further shown that unlike other defenses

among them, self defense and provocation, the defense of alibi has not gained any statutory recognition. Neither the Penal Code nor the Criminal Procedure Code recognise the defense of alibi.

5.3 THE IDENTIFICATION OF AN ACCUSED

The research showed that issues relating to the identification of an accused in Zambia need a lot of reform. The first problem on identification established by the research is the conducting of identification parade. The research has shown that the only reliable method of identifying suspects in Zambia is through identification parades. The research further showed that in certain cases other methods of identification might be more reliable but the police can only restrict itself to identification parades as it the only method of identification.

The research further established weaknesses in the way the identification parades are conducted in Zambia, this being after doing a comparative analysis between Zambia and India, America and Britain. The research established that were as in India, the police are not in any way allowed to conduct identifications in order to rule out biasness and leading the witness in identifying the preferred person, in Zambia, identification parades are carried out by police inspectors. The research therefore established that Zambian identification parades are biased.

The research further established that the accused rights are undermined under the Zambian identification parades. Under the comparative analysis, the research established that under the American system, the accused is granted a constitutional right to have the presence of counsel when the identification is being conducted. The research conducted through an interview at the Central Police Station, showed that an accused person is usually represented by counsel when the matter is taken to court after the identification parade is conducted. The implications of this is that the accused has high chances of unknowingly implicating himself in

the crime even when he had no involvement in the crime, thus the American requirement to have legal counsel at the time any form of identification procedure is being carried out.

5.4 RECOMMENDATIONS

Having discussed the legal issues surrounding the defense of alibi and the identification of an accused person in the Zambian Legal System, and some of the problems that the accused persons have due to the poor conducting of identification parades by the police, there is need for both the legislature, the courts and the police to assist in the maintenance of the presumption of innocence until a person is found guilty by the courts of law. It is against this background that measures are to be taken in the following ways:

5.4.1 IDENTIFICATION METHODS

It has been shown that Zambia has only restricted itself to identification parades, even when an identification parade is not the best method to identify an accused person. The research therefore recommends that where it is impossible to conduct an identification parade the police should resort to other methods of identification, for example, the group identification method. This is where the accused is put in an informal group of people, usually a crowd. This method is good because it is done without the accused consent, thus reducing the chances of the accused acting nervous which the witness may mistaken for guilt and eventually pick out the accused from the line up.

5.4.2 THE RIGHT TO LEGAL COUNSEL

The accused right to counsel is very restricted. It has been shown that most accused persons do not have legal representations when an identification parade is being conducted. It is therefore recommended that the right to legal counsel at an identification parade should be expressly included in the Constitution and Criminal Procedure Code, Chapter 1 and Chapter

88 of the Laws of Zambia respectively, and the Judge's Rules on the rights of the accused prior to and during trial.

5.4.3 CONDUCTING IDENTIFICATION PARADES

The research has established that the police are responsible for conducting identification parades in Zambia. The research has also shown that India has excluded the police from conducting identification parade; the parade is to be conducted by ordinary persons known as the panchas. India has further given the requirement statutory effect by including it in its criminal procedure code. The Code has further declared any evidence from an identification parade conducted by a police officer to be inadmissible. It is therefore recommended that Zambia should take this approach.

5.4.4 LEGISLATION

From the research conducted it was established that the issues relating to identification parades and the defense of alibi have not been give authority by statutes. It is said that ignorance of the Law is not a defense, neither should be express inadequacy of the law be used as a means of trapping ignorant offenders. It is therefore recommended that the legislature should try to address issues relating to identification by enacting statutory provisions or they should try to incorporate them in the already existing laws like the Criminal procedure Codes. The Judge's Rules , which are also so hard to find by a lay man, who are usually the offenders, are not sufficient to cover the issues of identification and alibi.

5.5 CONCLUSION

In conclusion, this chapter has concluded that issues of identification where the defense of alibi has been pleaded are a very big problem in our country. The courts have tried to outline the legal issues and the procedures that the police are to take when dealing with identification

of an accused. However, until the factors which have been raised herein as some of the problems the accused face during identification parades are addressed, some innocent people who do not know the law coupled with improper or lack of legal representation will always be likely to be sent to prison for crimes they did not commit.

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