THE APPLICATION OF THE CONSTITUTIONAL RIGHT OF PRESUMPTION OF INNOCENCE IN THE BAIL PROCEEDINGS IN ZAMBIA. AN ANALYSIS

BY

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THE APPLICATION OF THE CONSTITUTIONAL RIGHT OF PRESUMPTION OF INNOCENCE IN THE BAIL PROCEEDINGS IN ZAMBIA. AN ANALYSIS

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DECLARATION

I Sheila Mwansa Kalobwe (Computer Number 92148743) do hereby solemnly declare that contents of this directed research are entirely based on my own findings. The work used herein that is not my own, I endeavored to acknowledge the same.

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ABSTRACT

The right to bail implements the basic presumption of innocence that the law assumes for every person charged with a criminal offence. An accused person is presumed to be innocent until actually convicted, and like all innocent people, does not belong in jail. The justification for bail in criminal administration is that, it is a way of attempting to resolve a clash between the danger of the accused person absconding trial when requested and his presumption of innocence, his right to liberty and not to subject him to punishment before conviction. The law of bail acknowledges the criminal jurisprudence that even a person accused of committing a felony, is presumed innocent until proven guilty. It would therefore seem harsh and unreasonable treatment that the accused are committed to imprisonment without a possibility for bail apart from the exceptional cases that are not bailable.

Bail supports the presumption of innocence until guilt is absolutely proven, beyond the shadow of a doubt. If it is not for bail, the accused persons would virtually be serving a sentence for a crime he or she has not been convicted on. Excessive bail has the same effect, if an accused bail is excessive; the amount is set higher than is reasonable. The idea behind bail is to make sure the accused is present during the trial.

In Zambia, the jurisdiction over bail is in the hands of the Judiciary and it has the inherent jurisdiction to bridge the gulf between the presumption of innocence and the right to bail.

This paper will endeavor to identify how the presumption of innocence is applied in bail proceedings. It shall further be established whether the administration of justice overrides the need for freedom and the right to a fair trial.
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Table of Statutes

1. The constitution of Zambia (amended) Act 1996
3. Criminal Procedure Code, Chapter 88, Laws of Zambia
6. The African Charter on Human and Peoples’ Rights
### Table of Cases:

1. S v Acheson 1991 (2) SA 805 (Nm) at 822 A-B
6. Xaviour Chungu v The People (2009) (Sub Court unreported)
8. Woolmington v DPP1953 AC 462
10. R v Oakes (1986), 50 CR (3d) 1
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17. R v Ndhlovu (1945) AD 369
19. R v Miller (decided on December 2 1974)
22. S v Dladla and Others (1999) (2) SACR 51(CC)
23. S v Moeti (1991)(1) Sacr 462 (b)
24. Uncedo Taxi Service Association v Maninjwa
25. S v Ramgobin 1985 ( 4 ) SA 130 (N)
TABLE OF CONTENTS

PREFACE..................................................................................................................vi
TABLE OF CONTENTS..............................................................................................vii
TABLE OF CASES.....................................................................................................viii
ACKNOWLEDGEMENTS............................................................................................ix

Chapter One
1.0 Introduction........................................................................................................1
1.1 Bail as a pre-trial release from custody of an accused person in a criminal trial........................................................................................................3
1.2 There is nothing unconstitutional in a provision which prohibits or restricts the grant of bail pending trial........................................................................4
1.3 The Jurisprudence of the Right to Bail under International Law......................8
1.4 Purpose & Justification for Bail and Presumption of Innocence.....................10

Chapter Two
2.0 Introduction........................................................................................................14
2.1 The nature of Bail system in Zambia..................................................................14
2.2 Models of Bail .....................................................................................................16
2.3 Types of Bail in Zambia......................................................................................17
2.4 General Overview of types of bail in Zambia.....................................................22
2.5 Rights of the Accused........................................................................................22
2.6 Presumption of Innocence..................................................................................23
2.7 The History of the Principle of Presumption Of innocence...............................24
2.8 A comparative Adversary and Inquisitorial Legal Systems.............................25
2.9 Presumption of Innocence in Inquisitorial and Adversarial Criminal System....26
2.10 The Right to Presumption of Innocence............................................................27
2.11 Justification for Application of the Presumption of Innocence.......................27
2.12 Application of Presumption of Innocence in Criminal Cases.......................28
Chapter Three

3.0 Introduction .................................................................................................................. 30
3.1 The Effect of Bail On Administration Of Justice ...................................................... 30
3.2 Practice and Procedure Jurisdiction Of Bail In The Courts ...................................... 31
3.3 Role of Subordinate Courts In Criminal Proceedings ................................................. 32
3.4 Practice and Procedure Followed by The High Court In The Exercise of its
   Jurisdiction in Bail Proceedings .................................................................................... 33
3.5 The Jurisdiction of the Supreme Court in Applications of Bail pending trial .......... 34
3.6 The onus of Bail application and Impact on Presumption of Innocence ................. 35
3.7 The Granting Of Bail .................................................................................................. 37
3.8 Considerations in the granting of bail ........................................................................ 38
3.9 Role of a Magistrate and their Discretionary Powers in Granting bail ..................... 39
3.10 Forfeiture of Bail ....................................................................................................... 40

Chapter Four

4.0 A comparative analysis with South Africa ................................................................. 41
4.2 Application of Presumption of Innocence on Bail Applications in South Africa .... 41
4.3 Legislation governing bail ......................................................................................... 43
4.5 Bail and Presumption of Innocence Pending Sentencing ....................................... 46
4.6 Bail and Presumption of Innocence after Conviction .............................................. 46
4.7 Summary Conclusion of Bail in South Africa and Zambia ....................................... 46

Chapter Five

5.0 Observations .............................................................................................................. 48
5.1 Recommendations ...................................................................................................... 49
5.2 Conclusion .................................................................................................................. 50

BIBLIOGRAPHY ........................................................................................................... 51
CHAPTER ONE

1.0 Introduction

The State, at times subject persons who are merely suspected of having committed a crime to the same nature of restriction on his or her liberty as that of a person that has been proven guilty of a criminal offence, and imprisoned after conviction. The Constitution of Zambia\(^1\) provides that any person charged with a criminal offence shall be presumed innocent until proven guilty. It therefore follows that an accused person, must not, except in rare cases, be placed in custody or remand. Accused persons should be released on bail unless in circumstances where they have no fixed abode and are likely to escape or are likely to interfere with witnesses or are a danger to the public. The principle of bail is basic to our system of justice and its practice as old as English law itself. Bail must be set at such a level as to ensure the attendance of an accused at trial, and to prevent flight from the jurisdiction. In criminal justice jurisprudence, the right to bail has often times been discussed in the context of the presumption of innocence and the right to liberty. As stated by Mahomed J in \(S v\ Acheson\)\(^2\) “An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.”

Bail is the condition of release from custody of an accused person or persons in a criminal trial. It is the process of procuring the release of one charged with an offence before and during trial proceedings and after conviction. Bail is not necessarily defined by any Zambian statute but the provisions as to bail are set out in section 123(1) of criminal Procedure code\(^3\) which provides that;

When any person is arrested or detained, or appears before or is brought before a subordinate court, the High court or the Supreme court he may, at any time while he is in custody or at any stage of the proceedings before such a court, be

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\(^1\) Cap 1 of the Laws of Zambia

\(^2\) 1991 (2) SA 805 (Nm) at 822 A-B

\(^3\) Cap 88 of the Laws of Zambia
admitted to bail upon providing a surety or sureties sufficient, in the opinion of
the police officer concerned or court, to secure his appearance, or be released
upon his own recognizance if such officer or court thinks fit:

Provided that any person charged with-

(i) Murder, treason or any other offence carrying a possible or mandatory
capital penalty;
(ii) Mispriison of treason or treason-felony; or
(iii) Aggravated robbery;

shall not be granted by either a subordinate court, High court of Supreme court or be
released by any police officer.

There are different types of bail that are available throughout the criminal proceeding.
There is bail pending trial, bail pending appeal, bail after conviction and the other one is
Constitutional bail. Details of the types of bail and how the law is applied will be
discussed in the next chapter.

It is worth noting that in Zambia, cases involving serious offences prescribed as non-
bailable, such as murder, treason and aggravated robbery the Courts are mandated to
refuse such applications for bail. Section 123(1) of the Criminal Procedure Code4
provides that any person accused of murder, aggravated robbery misprison of treason or
treason shall not be granted bail by the trial court.

The sources of the legal principles and rules governing the grant or refusal of bail in
Zambia are the Constitution of Zambia,5 the Criminal Procedure Code6 and case law. The
criminal procedure code of Zambia derives its basis from the Queensland Codes of 1889
and like many other common law African countries formerly colonized by the British;
Zambia continues the legacy as introduced by the British colonial authorities.

4 Ibid
5 Cap 3 of the Laws of Zambia
6 Cap 88 of the Laws of the Republic of Zambia
1.2 Bail as a pre-trial release from custody of a person accused of a criminal offence

It appears that bail matters arise more often than not the moment a person accused of a criminal offence is arrested and held in custody in police cells, this is the pre trial stage. Bail granted at this stage, is a condition of pre-trial release from custody of a person accused of a criminal offence. This type of bail entails that when a person has been arrested and charged with the commission of a criminal offence, there is inevitably an interval of time of trial proceedings. Bail relates to the accused right to freedom during this interval. It involves a pledge of money, property, or a signature bond as security that one will be available for trial when requested to appear. The object of the entire bail process is the continued future attendance of the accused to the trial proceedings. Failure of the defendant to appear may result in the forfeiture of the bail.

In the context of the right to bail the Constitution of Zambia encapsulates the constitutional rule that the defendant is presumed to be innocent until he is proven to be guilty. This rule extends the proposition that the defendant shall not be subject to unnecessary pre-trial deprivation of his freedom. This is enshrined under Article 13(3) and 18(1) of the Constitution; and Section 33(1) of the Criminal Procedure Code which provides that arrested persons are to be taken before a competent court without undue delay and if not tried within reasonable time should be released either conditionally or unconditionally. These are the fundamental provisions relating to bail and the protection of the rights of the detained person or the accused. The rest of the legislative principles, both substantive and procedural, are contained the in the Criminal Procedure Code. In essence, the primary policy is that in the interest of the security of the community or society and guaranteeing the completion of criminal proceedings and promoting the due process of the law, a person charged with a scheduled offence such as murder, treason and aggravated robbery are not eligible for bail. The Zambian legislature has accordingly legislated for bailable and non-bailable offences. As stated earlier, in the case of the

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7 Ibid
8 Ibid
latter, the Courts are mandated to deny bail for specific offences that are not bailable under section 123 of the Criminal Procedure Code.

The provisions in section 123(1) of the Criminal Procedure Code have been argued as curtailing the discretion of the courts to grant bail, the specified instances can be considered to be unconstitutional as Articles 13(3) and 18(1) of the Constitution that require any accused person charged with an offence to be afforded a fair hearing before an independent tribunal within a reasonable time. The automatic denial of bail negates the spirit of the provisions of the Constitution as such an accused person is ab initio denied the opportunity to appear before an impartial court and ventilate reasons why he believes he should be granted bail. In addition, the offending provisions can also be regarded as unconstitutional as they attempt to curtail the unlimited jurisdiction of the High Court to hear all civil and criminal matters; this is guaranteed under Article 94(1) of the Constitution.

1.3 There is nothing unconstitutional in a provision which prohibits or restricts the grant of bail pending trial

It is relevant to review some of the important constitutional issues that may arise as a result of proceedings of bail pending trial. It is important to familiarize with the precedent set in such important constitutional incidences of bail proceedings.

In a highly persuasive Supreme Court case of *Chetankumar Satkal Parekh v The People* Constitutional issues were raised on the bail pending trial in this well argued case, where the magistrate refused to grant bail because section 43 of Act 37 of 1993 prohibited bail for certain drug offences. The appellant therefore renewed his application for bail before the High Court submitting that it was unconstitutional for any Act of Parliament subordinate to the Constitution to prohibit or restrict the granting of bail pending trial. The brief facts of the case are that the appellant appeared before the subordinate court on

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9 Ibid
10 (1995 - 1997) ZR 78 (SC)
a charge of the unlawful possession of drugs contrary to section 8 of the Narcotic Drugs and Psychotropic Substances Act 37 of 1993. The magistrate refused bail and the appellant renewed his application for bail before the High Court and raised a constitutional argument, that it was unconstitutional for any Act of Parliament subordinate to the Constitution to prohibit or restrict the granting of bail pending trial and that section 43 of Act 37 of 1993 which prohibited bail for certain drug offences was accordingly unconstitutional.

The arguments brought forth by the counsel for the appellant was that, since article 18(2) (a) presumes innocence until an accused person has pleaded guilty or has been convicted after trial, it is therefore unconstitutional for a court to deny bail on a bailable offence. It was further submitted that any other provision of like effect, such as the prohibition of bail for certain offences under the terms of s 123(1) of the Criminal Procedure Code, should be similarly pronounced against as being unconstitutional. Under the Zambian law everyone has the right to be considered for bail on the merits by the court and therefore attention was drawn to article 13(3) of the Constitution which provides that;

'Any person who is arrested or detained ...

(a) for the purpose of bringing him before a court in execution of an order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia; and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Ngulube CJ in his judgment observed that,
"There is thus nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Section 7(1) of the Act which prohibits release on bail, not totally but subject to an exception if the magistrate is satisfied that there are special circumstances warranting the grant of bail, cannot in their Lordships' view be said to be in conflict with any provision of the Constitution."

The Constitution, while conferring a right to personal liberty also envisages a perfectly constitutional loss of such liberty, however, to facilitate the prosecution of criminal offenders it is relevant to quote art 13(1)(e) of the constitution which provides that;

'No person shall be deprived of his personal liberty except as may be authorized by law in any of the following cases:

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

It must be mentioned that article 18, apart from confirming the presumption of innocence, also requires a fair and expeditious hearing within a reasonable time. An accused is clearly entitled to be tried and to have a decision rendered in his trial within a reasonable time.

It was contended in this case that where any trial is unreasonably delayed through no fault of the accused person, the arrested person must be released on what one might call 'constitutional bail'. Such bail is available and clearly overrides any prohibitions in the lesser laws so that article 13(3) of the constitution would apply to any unreasonably delayed case, whatever the charge and whatever section 43 of the Act,\(^\text{11}\) or section 123 of the Criminal Procedure Code or any other similar law, may provide.

\(^{11}\) Narcotic Drugs and Psychotropic Substances Act 37 of 1993
Ngulube CJ disagreed with the argument advanced that section 43\(^{12}\) is inconsistent with article 13(3) of the constitution of Zambia because it does not contain any qualification or acknowledgement of the constitutional provision so that bail would be unavailable even where the trial was unreasonably delayed. He however stated that

"The supremacy of the Constitution is commanded in the Constitution itself - see art 1(2) - and it is not necessary that s 43 of the Act and similar provisions should be expressed to be subject to the Constitution, as Mr Mwanawasa proposed. This argument, together with one criticizing the Legislature's attempt to circumscribe judicial power by simply barring bail and predetermining by enactment who shall not be entitled to bail, has not found much favour in the senior courts of the Commonwealth. We are aware of Mr. Mwanawasa's arguments succeeding only in the Kenyan case of *Ngui v Republic of Kenya*\(^{13}\) which was considered and very respectfully, but properly in our view, rejected by the Court in the Zimbabwean case of *Bull v Minister of Home Affairs*.\(^{14}\)

In the holding of this case, further substantial reference was made to similar cases in the Commonwealth, in particular the case of Privy Council in *Attorney-General of The Gambia v Momodou Jobe*\(^{15}\) and the *Bull case* in Zimbabwe which are of very high persuasive value and which dealt with provisions very similar, if not identical, to those raised by the appellant in this case. The holding in the *Parekh case* is that there was nothing unconstitutional in a provision which prohibited or restricted the grant of bail pending trial: before the stage when a trial became unreasonably delayed it was constitutionally permissible to authorise deprivation of bail.

Other legal issues concluded in this case are that provisions that prohibit or restrict the granting of bail pending trial do not conflict with the article conferring 'constitutional

\(^{12}\) Ibid
\(^{13}\) (1986)LRC (Const) 547
\(^{14}\) (1987) LRC Const) 308
\(^{15}\) (1984) AC 689
bail' where there has been an unreasonably delayed trial as per provisions of article 13(3) of the Constitution. It follows also that the Constitution itself envisages that a person being tried can be in custody and that the accused cannot be said to be entitled to bail as a matter of right.

It is established that, the right to apply for bail is guaranteed under the Zambian Constitution and it is further guaranteed by International law. The International Covenant on Civil and Political Covenant Rights (ICCPR) contain a clear presumption of liberty. Article 9(3) of the International Covenant on Civil and Political Covenant Rights, (the ICCPR) provides that, it shall not be a general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial.

1.4 The Jurisprudence of the Right to Bail under International Law

Zambia is a party to many International Treaties and as a general application of the basic principles of the law of treaties, parties to international treaties are States, the UN and other international organizations and therefore such international standards and norms become binding on State parties either through the constitutional technique of legislative incorporation or automatic incorporation.

The right to bail falls under the general rubric of the right of personal liberty and international instruments such as the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights and the International Covenant on Civil and Political Rights (ICCPR), have provisions protecting the rights of the personal liberty of the individual both during pre-trial and trial proceedings and these provisions have been domesticated in the municipal of laws of most countries. Zambia has ratified to all the above instruments. The provisions are as follows:

1. Universal Declaration of Human Rights:

Article 11 (1) provides that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. The International Covenant on Civil and Political Rights (ICCPR)

Article 9(3) provides that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Article 9(4) provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

3. The African Charter on Human and Peoples’ Rights

Article 7(d) of the African Charter on Human and Peoples Rights states that every individual has the right to be tried within a reasonable time by an impartial court or tribunal.

Article 18(2) (a) of the Zambian constitution\(^{16}\) provides that “every person who is charged with a criminal offence …...Shall be presumed innocent until proven or pleaded guilty.” In bail proceedings different rules of law apply. The fact that bail is not a constitutional right under the Zambian Criminal procedure code\(^{17}\) is inconsistent with the justification behind the law of bail which acknowledges the criminal jurisprudence that even a person accused of committing a felony, is presumed innocent until proven guilty. It would therefore seem harsh and unreasonable treatment that the accused are committed to imprisonment as it will imply that “you are guilty until proven innocent”\(^{18}\) How then is the presumption of innocence applied in bail proceedings? This is one of the major questions that this essay shall endeavor to answer. It shall further be established whether the administration justice overrides the need for freedom and the right to a fair trial.

Bail supports the presumption of innocence until guilt is absolutely proven, beyond the shadow of a doubt. If it is not for bail, the accused suspect would virtually be serving a

\(^{16}\) The Constitution of Zambia Chapter 1 of the Laws of Zambia  
\(^{17}\) Cap 88 of the Laws of Zambia  
\(^{18}\) Trebach, A.S. The rationing of justice-Constitutional rights and the criminal Process, New Jersey Rutgers University Press 1964) pg 42
sentence for a crime he or she has not been convicted on. Excessive bail has the same effect, if an accused bail amount is set higher than is reasonable. The idea behind bail is to make sure the accused is present during the trial. Logically, bail is usually not set for an amount greater than the maximum monetary sentence for the crime with which the defendant is being charged.

In summary, under Zambian bail jurisprudence, the determination of whether or not an accused has the right to apply for bail depends on the classification of the offence. The Courts have unfettered discretion to entertain applications for bail in offences prescribed as bailable and make determinations on the applications taking into considerations a number of factors.

However, under the Zambian bail model, the rights of the accused stand compromised and susceptible to be violated.

1.5 Purpose and Justification for Bail and Presumption of Innocence

The right to bail implements the basic presumption of innocence that the law assumes for every person charged with a criminal offence. An accused is presumed to be innocent until actually convicted, and like all innocent people, does not belong in jail. The justification for release on bail in a criminal administration is that, it is a way of attempting to resolve a clash between the danger of the accused person absconding trial when requested and his presumption of innocence, his right to liberty and not to subject him to punishment before conviction. The jurisdiction over bail is the Judiciary and it has the inherent jurisdiction to bridge the gulf between the presumption of innocence and the right to bail. This essay will also endeavor to identify the bridging considerations or factors.

The objective of the right to bail is to minimize the interference with the accused’s right to freedom and to avoid anticipatory punishment before conviction and sentencing. In a similar context, in presumption of innocence an accused person should not be punished for an offence for which he or she has not been convicted on. In applications of this
nature, the onus is on the Applicant, as the eventual beneficiary of the measure solicited, to satisfy the court factually and legally, that he fulfills the conditions necessary for the exercise of this discretion in his favour as pleaded in his application. The Prosecution equally bears the burden, to convince and satisfy the court legally and factually, that the Accused is not likely to fulfill the conditions required to enable him to enjoy the benefit of the exercise by the court, of their inherent discretion to release him on bail or not. In effect, just as the accused canvasses for and justifies his release, the Prosecution bears the traditional burden of equally demonstrating to the satisfaction of the court, that there are good and compelling reasons for continuing to deprive the detainee of his fundamental right to liberty. This position finds its justification in Article 18(2) (a) of the Constitution of Zambia which is a restatement of a well known, tested and surviving principle of Customary International Law which is that the “Accused shall be presumed innocent until he is proven guilty, and that the burden of proving his guilt lies with the Prosecution.”

In Zambia it is within the powers of the magistrates and/or judges in their calculus of setting bail, to balance the value of presuming that an accused is innocent and the value of protecting the victims and the public at large.

It is against this background that the study will endeavor to identify factors considered to strike the balance between the calculus of setting bail and the value of presumption of innocence. Hence the study will be guided by the following considerations;

a) Establishing how the presumption of innocence applied in the bail process in Zambia,

b) Does the presumption of innocence act as a policy directive protecting the fundamental security and freedom of an individual when application is made for bail? If so, what is the content and does this content remain the same throughout the criminal justice process?
c) How is presumption of innocence applied in a system with protected fundamental rights?
d) establishing whether the right to bail as a human rights issue, is limited to the confines of the presumption of innocence, rather than in the general context of due process of the law,
e) Identifying the considerations taken into account in arriving at this balance and if they are justified,
f) To establish if it is justifiable for the State to subject persons who are merely suspected of having committed a crime to the same nature of a prison sentence of a person that has been proven guilty of an offence,
g) A review at outcomes of bail applications of some of the recent high profile criminal cases in Zambia. Were the reasons advanced by the magistrates in outcomes of these bail applications justifiable?
h) To determine whether excessive bail fines automatically negate the presumption of innocence

This essay, makes key reference to an article by Amoo Samuel Kwesi,¹⁹ on bail. This article forms part of the foundation of which my essay will develop.

Amoo, submitted that a statute which eliminates the judicial process in matters of personal liberty is plainly unconstitutional with an exception of internal security laws. He contends that due process of law does not necessarily imply court proceedings in every context, but apparently so in bail as part of trial proceedings. Release on bail on account of failure to prosecute the case within a reasonable time is not a proactive provision as it only seeks to address the issue after the fact. The automatic right to apply for bail is not specifically provided for by the Constitution. It is derived from the interpretation of the relevant provisions of the Constitution and the Courts in Zambia. However in their interpretations of the relevant provisions, they have taken a holistic approach by relying on legislation that denies the accused the right to apply for bail in offences statutorily classified as non-bailable. This mandatory denial of bail coupled with the fact that the

¹⁹ The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia.
constitutional right to release, addresses the issue after the fact, means that the right to liberty of the accused stands tremendously compromised since the accused is subjected to punitive conditions before trial. In order to remove these uncertainties, Amoo submits in his publication that the jurisdiction to determine bail be granted to the Judiciary and that appropriate provisions incorporated in the Constitutions. He further submitted that the correct jurisprudential approach to bail applications is that the Courts of law should adjudicate these matters and that as a matter of principle there should be no legislative or executive attempts to curtail or oust the jurisdiction of the Courts.²⁰

In criminal justice jurisprudence, the right to bail has often times been discussed in the context of the presumption of innocence and the right to liberty, and my research will expand further on the foundation laid by Amoo.

Chapter one basically discusses the general legislation governing the bail system in Zambia and its purpose and justification in reference to presumption of innocence. It acknowledges that the power to administer bail lies with the judiciary as also highlighted by Amoo in his article on bail. Chapter one also refers to the questions that will guide the objectives this essay.

²⁰ See generally S v Ramgobin 1985 (3) SA 587 (N); S v Ramgobin 1985 (4) SA 130 (N); Bull v Minister of Home Affairs 1986 (3) SA 870 (Z)
CHAPTER TWO

2.0 Introduction

Chapter two will discuss the nature of the bail system in Zambia, pointing out the stage at which it becomes necessary for an accused person to apply for bail. The chapter further shows the different models of bail and further demonstrates the different types of bail available in Zambia and how the law on bail applications is applied in each instance of type of bail. The rights of the accused person in a criminal offence will also be outlined in connection with presumption of innocence. For the sake of comparison, the chapter will briefly describe operations the two types of legal systems being the adversarial and inquisitorial systems and how presumption of innocence principle fits into them. The principle of presumption of innocence will be traced back to its history, defined, then to its justification and application in bail application.

2.1 The nature of Bail system in Zambia

At common law, an arrested person is said to be admitted to bail when he is released from the custody of Law enforcement officers and entrusted to the custody of sureties who are bound to avail him when required to do so. The surety who procures the release of the arrestee becomes responsible for his subsequent appearance at the stipulated time and place. The person arrested or detained is delivered into the hands of the surety and thus he binds himself for the due appearance of the accused in Court. This situation is commonly referred to as “standing bail for someone” and it is an extremely serious engagement. It should accordingly be taken seriously because if the accused fails to surrender to his bail, the consequence is that the Court will enforce the forfeiter of bail in full.

The law under section 33 of the Criminal Procedure Code\(^\text{21}\) provides that persons arrested must appear before a magistrate within 24 hours of their arrest; however,

\(^{21}\) Cap 88 of the Laws of Zambia
detainees are frequently held for much longer periods because prosecutors routinely require that officers collect additional evidence before presenting cases to a magistrate. An arrest affects a person’s life, liberty and privacy. In fact arrest is the most coercive pre-trial measure because it impacts on one of the fundamental human rights, in particular the right to liberty. An arrest can be defined as taking into Police custody, or capture and detention of a person suspected of committing an offence by Police officers or any authorized Law enforcers. The Criminal Procedure Code Act\textsuperscript{22} provides that authorities obtain a warrant before arresting a person for some offenses, but other offenses have no such requirement. For example, police are not required to obtain a warrant to arrest any person suspected of committing offenses including treason, sedition, and defamation of the president, unlawful assembly, or abuse of office. In practice, the police rarely obtain warrants before making arrests. It is after the arrest of an accused person that the issue of procuring bail comes into play. Bail, is the process of procuring the release of one charged with an offence before and during trial proceedings and even after conviction. If the accused applies for bail and is consequently released on bail, he or she is typically given a date of first appearance in the future.

Zambia has a functioning bail system; but in practice police generally do not seem to respect the prisoners' constitutional right to apply for bail and this has led to prisons being overcrowded and in part because of the numerous offences for which according to Section 123 of the Criminal Procedure Code\textsuperscript{23}, bail cannot be granted, including treason, murder, and aggravated robbery. Prolonged pretrial detention is a major problem in Zambia, and some accused persons wait for trial for as long as three years especially that many of such arrested persons have no means to post bail. The government’s legal aid office, responsible for providing representation for indigent detainees and defendants in criminal or civil cases, try to assist some of the arrestees in bail proceedings.

It is overwhelming to note that in Zambia there are persons incarcerated in prisons that have not been convicted of a crime nor received a trial date. Broad rules of procedure give wide latitude to prosecutors and defense lawyers to request delays or adjournments.

\textsuperscript{22} Ibid
\textsuperscript{23} Ibid
Prolonged pre trial detention are normally due to prison authorities not having fuel to transport prisoners to courts, judicial inefficiency, lack of resources, and lack of trained personnel also contributed to prolonged pre trial detention. It is unfortunate that the criminal law in Zambia, the practice or norm is that the arrested persons regardless of the crime committed, cannot be released until arrest ceases by right or is revoked or the accused is released on bail after languishing in the prison cells.

Our bail system is premised on constitutional right to apply for bail, promoting the due process of law and securing the presence of the arrestee before the jurisdiction and judgment of the court. The sources of the legal principles and rules governing the grant or refusal of bail are the Constitution, the Criminal Procedure Code Act\textsuperscript{24}, and case law. In the context of the right to bail, the Constitution of Zambia encapsulates the constitutional rule that the defendant is presumed to be innocent until he is proven to be guilty. From this rule flows the proposition that the defendant shall not be subject to unnecessary pre-trial deprivation of his freedom. This is contemplated under Article 13(3) and 18(1) of the Constitution; and Section 33(1) of the Criminal Procedure Code\textsuperscript{25} which provides that arrested persons are to be taken before a competent court without undue delay and if not tried within reasonable time should be released either conditionally or unconditionally.

2.3 Models of Bail

In criminal justice jurisprudence, the right to bail forms part of the due process of the law and requires the application of principles of rationality by the Courts. Therefore an application for bail will be judged in accordance with the tenets of the particular model applying in Law of a particular State. There are three basic models of bail; the first one is premised on a policy and a constitutional position that gives the Legislature the responsibility of determining the right to bail and leaves the Judiciary with the implementation of broad legislative directives. The legislative directive invariably includes mandatory denial of bail in certain offences such as murder and treason, further the Judiciary is left with the discretion to determine whether to grant or refuse bail in

\textsuperscript{24} Ibid
\textsuperscript{25} Ibid
other cases. The primary objectives of this model include promoting the due process of law and securing the presence of the arrestee before the jurisdiction and judgment of the court. Zambia is one of the countries that have adopted this bail model amongst other countries like Ghana, Malawi, India and certain states in the United States.

The second model is premised on the constitutional position that grants the sole determination of the right to bail to the Judiciary. The arrestee has the prima facie constitutional right to apply for bail, irrespective of the seriousness of the alleged offence. Unlike the first model, this model does not prescribe for bailable and non-bailable offences. In Africa, Namibia is one of the countries that have adopted this bail model.

Finally the third model may be described as a hybrid of the above two approaches. This model vests power in the Judiciary to determine matters relating to bail. Further there is no legislative mandatory refusal of bail and the law does not draw a distinction between bailable and non bailable offences. However, there is a form of legislative guidelines that the Courts must follow in the exercise of their discretion to grant or refuse bail in serious offences. South Africa has adopted this model.

Once these models are brought into operation in respect of bail, the principles that distinguish them even become clearer. The purpose of any bail system should be to promote and protect interests of society as well as interests of individuals.

2.4 Types of Bail in Zambia

Whether an accused person should be granted bail depends on what stage of the proceedings the application for bail is made. In legal systems that have a bail procedure, its operation is highly discretionary. The Zambian legal system has an active bail procedure, and like many other legal systems, the operation of bail is highly discretionary. There are about five types of bail available at different stages in criminal proceedings and are detailed separately below.

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A. Bail Pending Trial

Bail pending trial should be allowed with great freedom with exceptions in the cases of murder or treason\textsuperscript{27} for an accused person is presumed innocent until he is proved guilty.\textsuperscript{28} In addition to the exceptional cases where bail pending trial cannot granted is in an offence of aggravated robbery and theft of motor vehicle. The purposes of bail pending trial in criminal cases are to avoid inflicting punishment upon an innocent person (who may be acquitted at trial) and to encourage the unhampered preparation of his defense. The amount of bail is generally set in relation to the gravity of the offence charged, although some magistrates take into account other factors, such as the strength of the evidence, the character of the accused, and his financial ability to secure bail.

One of the high profile cases in Zambia, where application for bail pending trial was granted is that of \textit{Xavier Chungu v The People}.\textsuperscript{29} In this case the former Zambia Security Intelligence Services (ZSIS) director general, Xavier Chungu was arrested and accused of forgery on the first count, that on unknown dates in 2003, he forged a passport for himself, purporting to show that it was issued properly when in fact not. In the second count, he is charged with falsifying a document contrary to Section 352 of the Penal Code CAP 87 of the Laws of Zambia.

Brief particulars of the offence are that, Chungu on December 3, 2008 in Lusaka, knowingly and fraudulently presented the passport in question to an alert immigration officer at Lusaka international airport. Chungu was arrested and taken into custody. His lawyer, applied for bail pending trial stating among other things that the health condition of his ailing client was in a state not suitable to be subjected to prison conditions, as a reason why he should be granted bail.

The Senior Resident Magistrate Joshua Banda considered the application and granted bail pending trial based on reasons advanced. The bail was granted at K100 million in his own

\textsuperscript{27} Criminal Procedure Code s. 123(1)
\textsuperscript{28} Magistrates handbook 6\textsuperscript{th} edition, E.J Swarbrick, LLB(hons) London page 187, see also Constitution Cap 1 of the Laws of Zambia, article 18(2) (a)
\textsuperscript{29} (2008) unreported
recognizance on the forgery case. Unfortunately Chungu was sent back to prison on other charges.

B. Constitutional Bail

Article 13(3) of the constitution of Zambia\textsuperscript{30} provides that where any person is arrested or detained and trial is unreasonably delayed through no fault of his or hers, the arrested person must be released on what one might call 'constitutional bail'. Such bail is available and clearly overrides any prohibitions in the lesser laws so that would apply to any unreasonably delayed case. The accused person shall be released without prejudice to any further proceedings that may be brought against him. The release can either be unconditionally or with reasonable conditions including those that are necessary to ensure that the accused person appears at a later date for trial or other preliminary proceedings.

Whereas, constitutional bail may be granted in cases in which a judge determines that the accused has been detained for an excessive period without evidence being presented against him or her or where an accused is entitled to bail if the trial does not take place within a reasonable period through no fault of the accused. The phenomenon of constitutional bail was stated in the case of Chetankumar Satkal Parekh v The People\textsuperscript{31} where it was held that constitutional bail could be granted in cases where bail was not available if it could be shown that the case had been unreasonably delayed through no fault of the accused.

C. Bail before Conviction

The magistrate's handbook provides for circumstances under which an application for bail before conviction can find cause. Circumstances are outlined as follows;

'When a case cannot be completed on one day or, perhaps, cannot for some reason be started, the question arises as to what should be done with the accused:

\textsuperscript{30} Cap 1 of The laws of Zambia
\textsuperscript{31} Supreme Court of Zambia unreported
1) If he has merely been summoned to appear, he need only be told of time, date and place at which he should appear again and the record should show that he has been so instructed;
2) If he is already, that bail may usually be extended unless circumstances dictate otherwise; again the record should reflect this;
3) If, however, he has hitherto been in custody, the question of releasing him on bail at this stage arises...\(^{32}\)

In deciding the third question the court will take into account the other factors.

**D. Bail Pending Appeal**

An appeal can only be lodged after the court have delivered judgment, judgment here includes sentencing; Section 123(5) of the Criminal Procedure Code\(^{33}\) provides that no trial court shall have power to release a convicted person on bail before the entering of an appeal.

It can be perceived that bail pending appeal rests on the presumption of innocence because an appeal may ultimately lead to an acquittal. If a conviction is overturned on appeal and the appellant was denied bail pending appeal, it can then be viewed as an unjust administration of the law but only if bail was unjustly denied. It must be considered that the criterion of granting of bail at this stage is not the same as that before trial.

**E. Bail after Conviction**

According to provisions of section 123(5) of the criminal procedure code,\(^{34}\) a person upon being convicted or sentenced, by a subordinate court or the High court, before entering an appeal against the conviction or sentence or both, the courts that administered the sentencing whether the High Court or subordinate court, will not have powers to release such a person on bail with or without securities.

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\(^{32}\) Magistrates handbook 6th edition, E.J Swarbrick, LLB(Hons) London page 188
\(^{33}\) Chapter 88 of The Laws of Zambia
\(^{34}\) Ibid
The Supreme Court only entertains bail applications after conviction, and different consideration are applied. Section 22, of the Supreme Court Act\textsuperscript{35} is the only section empowering the Supreme Court to entertain applications for bail. It clearly refers only to an application by a person who has been convicted by the High Court and whose application for bail pending appeal has been refused by the High Court in terms of Section 336 (1) of the Criminal Procedure Code.\textsuperscript{36} The power to admit an applicant to bail under section 336 of the Criminal Procedure Code is clearly discretionary.

In a high profile appeal case of bail after conviction is that of \textit{Kashiba Bulaya v The People}\textsuperscript{37} the Supreme Court Judge Marvin Mwanamwambwa sitting as High Court judge dismissed the application stating that it had no merit. Justice Mwanamwambwa maintained that Dr. Bulaya’s appeal had no chance of succeeding and that there will be no delay in disposing of the appeal if it goes to the Supreme court as claimed.

He further stated that bail application is a discretionary relief and Dr. Bulaya was not entitled to it as a right. The Judge further stated that for the court to exercise its discretion to grant bail, the appeal must have three things which include, a chance of succeeding or whether it will take long to be heard because of the delay in preparing the record of appeal. Justice Mwanamwambwa stated that the fact that Dr. Bulaya had been attending court trial while on bail was not an important consideration at that stage because during trial he was an innocent person and now he is a convict.

The Judge also observed that issues of personal health Dr. Bulaya and the possibility of contracting a communicable disease in prison were no effective consideration. Bail was therefore denied.

\textsuperscript{35} Chapter 52 of the laws of Zambia
\textsuperscript{36} chapter 88 of the laws of Zambia
\textsuperscript{37} 2008 (High Court unreported)
2.4 General Overview of Types of Bail

It is observed by the author that the law is applied differently in the various types of bail. Notably so is that constitutional bail is not necessarily granted by way discretionary powers of the magistrate or judges, it basically implements the provisions of Article 13(3) of the constitution when a case becomes apparently so and it is inevitable but to grant the accused person or persons constitutional bail.

2.5 Rights of the Accused in relation to presumption of innocence principal

The accused person has rights, and these rights apply to a person in the time period between when they are formally charged of a criminal offence by the police and when they are either acquitted or convicted by the courts. The Constitution of Zambia,\(^\text{38}\) and the International Covenant on Civil and Political Rights to which Zambia has ratified, has guaranteed the several rights to an accused.

Professor Alfred Chanda in his article on Human Rights provided the guaranteed rights of which are related to the essay have been listed as follows;

1. The right to be presumed innocent until he or she is proved or has pleaded guilty;
2. to be informed as soon as reasonably practicable, in a language that he or she understands and in detail, of the nature of the charge;
3. to appear before a public trial before an independent and impartial court of law within a reasonable time after having been charged;
4. to be represented by a legal practitioner of his or her choice, and where it is required in the interests of justice, to be provided with legal representation at the expense of the state, and to be informed of these rights;
5. to have recourse by way of appeal or review to a higher court than the court of first instance;

\(^{38}\) Chapter 1 of the Laws of Zambia
6. to be sentenced within a reasonable time after conviction; as soon as it is reasonably possible, but not later than twenty-four hours (in Zambia) to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he shall be released;

7. save in exceptional circumstances, to be segregated from convicted persons and to be subjected to separate treatment appropriate to his or her status as an unconvicted person; and

8. to be released from detention, with or without bail unless the interests of justice require otherwise.

Indeed, the person is presumed by the law to be innocent until proven guilty beyond a reasonable doubt. The law does not require a person to prove his innocence or produce any evidence at all. The burden of proving the persons guilt falls completely on the prosecution and if it fails to prove beyond a reasonable doubt, then as far as the law is concerned the accused person is not guilty. In other words, the presumption of innocence is not a determination of innocence, but rather it places the burden of proof entirely upon the prosecution who are tasked has to convince the court, whether only judge, judges or magistrate, that the accused is guilty beyond a reasonable doubt.

It appears to be the duty of magistrates and, or judges to ensure that all these rights are protected, as deprivation of these rights will result in an unfair trial.

2.6 Presumption of Innocence

The basic tenet of criminal law is that the indictment or formal charge against any person is not the evidence of guilt. These rights of the accused are generally based on the maxim of "innocent until proven guilty" which is in other words the presumption of innocence and are embodied in the due process of the Law. In Zambia the presumption of Innocence is a constitutional right and is provided for under Article 18(2) (a) of the Zambian constitution.39

39 The Constitution of Zambia Chapter 1 of the Laws of Zambia
The aspect of proof of guilt beyond a reasonable doubt can be simplified to mean a threshold of proof in criminal cases in most modern criminal law systems which requires the trier of fact to be sure, of the guilt of the accused, before convicting.

In Zambia, like many other common law jurisdictions, the burden of proof in criminal law cases, generally, including cases of corrupt practices, lies on the prosecution. In other words, if the prosecutor accuses a person of committing an offence of theft or corrupt practices, the burden of proof requires the prosecution team to prove that you have, indeed, violated the law and committed the offence in question.

In Woolmington v DPP⁴⁰ the general rule stated was that 'he who asserts must prove.' The standard of proof here is such that the prosecution must prove beyond reasonable doubt that you have committed the offence. By contrast, although the burden of proof in civil law cases, like in criminal law cases, lies on the party bringing an action, the standard of proof in civil law cases is lighter and only requires the plaintiff to prove against the defendant on the balance of probabilities.

2.7 The History of the Principle of Presumption Of innocence

The principle of presumption of innocence has been traced by some scholars to the Biblical book of Deuteronomy and the Qur'an ⁴¹ with some looking as far back as the laws of Athens and Sparta in ancient Greece. Certainly, by the time of the Roman Empire, the principle had become an integral part of legal practice; Book 4 of the Roman Code declares, "Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day." ⁴² Even in medieval Europe, the maxim "innocent until proven guilty" it was set out as a priority, and has always been respected. The thirteenth-century Ius Commune provided that no individual could be coerced into giving self-incriminating testimony, and that no defendant, under

⁴⁰ (1953) AC 462
⁴¹ See Surahs 38:12 and 49:12.
⁴² Code L IV, T, XX, 1, 1.25.
any conditions, could be denied his right to a trial and a thorough, vigorous defence - the foundation of what we today recognize as the presumption of innocence.

Since history has moved forward, the presumption of innocence has endured. In the mid-1700s, Blackstone, writing in England, could observe that “the law holds that it is better that ten guilty persons escape than that one innocent suffer.” 4 A few decades later, during the French Revolution, Article 9 of the “Declaration of the Rights of Man and of the Citizen” held that “as all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner’s person shall be severely repressed by law.” Similar phrases are found in abundance in the chronicles of legal history.

2.8 A comparative Adversary and Inquisitorial Legal Systems

Zambia like most common law countries has adopted the adversary system of law. This adversarial system of law is one which relies on the contest between each advocate representing the position of their client (that is prosecution and the defence) and involves an impartial person or group of people, usually a magistrate, judge or a jury in other countries, try to legally determine the case based on the facts presented the before them. The primary responsibility for the presentation of evidence and legal arguments lies with the opposing parties, not with a judge. Each side, acts in its self-interest, is expected to present facts and interpretations of the law in a way most favorable to its interests.

This approach presumes that the accused is innocent, and the burden of proving guilt rests with the prosecution. Through counterargument and cross-examination, each side is expected to test the truthfulness, relevancy, and sufficiency of the evidence and arguments of the opponent.

Unlike the adversarial system, there is the inquisitorial system of law, where a judge or a group of judges are tasked to investigate a case. France is one of the Countries that have adopted the inquisitorial system of law.

41 Lord William Blackstone, Commentaries on the Laws of England, Book IV, Ch.27 (1765)
The inquisitorial system assumes that an accurate verdict is most likely to arise from a careful and exhaustive investigation. The examining magistrate or judge serves as the lead investigator also referred to as an inquisitor. He directs the fact-gathering process by questioning witnesses, interrogating the suspect, and collecting other evidence. The lawyers for the prosecution (the accuser) and defense (the accused) play a limited role in offering legal arguments and interpretations that they believe the court should give to the facts that are discovered. All parties, including the accused, are expected to cooperate in the investigation by responding to all the questions and supplying relevant evidence.

The case proceeds to trial only after completion of the examining phase and the resolution of factual uncertainties, and only if the examining magistrate determines that there is sufficient evidence of guilt. Under the inquisitorial approach, the trial is merely the public finale of the ongoing investigation. At this point, the accused assumes the burden of refuting the prima facie case of guilt developed in the examining phase. Critics argue that the inquisitorial system places too much unchecked power in the examining magistrate and judge, who both investigate and adjudicate the case.

The goal of both the adversarial system and the inquisitorial system is to find the truth. But the adversarial system seeks the truth by pitting the parties against each other in the hope that competition will reveal it, whereas the inquisitorial system seeks the truth by questioning those most familiar with the events in dispute. The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth.

In both modern adversary and inquisitorial systems, the state has the powers separated between a prosecutor and the judge and allow the defendant the right to counsel.

2.9 Presumption of Innocence in Inquisitorial and Adversarial Criminal Systems

It is perceived in common law countries that inquisitorial systems do not allow for the presumption of innocence; this is so because in the inquisitorial systems, an investigating magistrate supervises police investigations. In Zambia and the United State of America, a criminal defendant is not presumed guilty as in an inquisitorial system. Nevertheless,
since a case would not be brought against a defendant unless there is evidence indicating
guilt, the system does not require the presumption of innocence that is fundamental to the
adversarial system.

The inquisitorial system does not protect criminal defendants as much as the adversarial
system.

2.10 The Right to Presumption of Innocence

The presumption of innocence is supported by a long legal tradition, and modern
international law ensures adherence to this principle through a number of conventions. The Presumption of innocence is a constitutional right and is provided in the Zambian constitution under article 18(2) (a) and further under Article 11 of the Universal Declaration of Human Rights declares that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.” The International Covenant on Civil and Political Rights under Article 14 similarly provides that “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

In contrast to the presumption of innocence which Zambia provides as a constitutionalight to its citizens, other societies such as France have adopted the presumption of guilt. This is referred to as being inquisitorial and contrary to the principles of a free society.

2.11 Justification for Application of the Presumption of Innocence

If this principle is abandoned on any account, then there is a real danger that any system of criminal law will degenerate into a mockery and criminal trials become little more than a formality. It is important that the law, especially criminal law should be consistent and fair even at the cost of being slightly inefficient. This is a pragmatic approach to a
civilized democratic society. It is very crucial for the Zambian citizens to be aware of their rights and be prepared to stand up for them, unemotionally, rationally and legally.

In Zambia, trial by media has become increasingly common in the recent past, especially in high-profile cases. Examples of such high profile corrupt practices and abuse of office cases in Zambia involving Former second republican president of Zambia Fredrick Chiluba, Former Chief Intelligence Officer Xavior Chuangu, Former Permenent Secretary of Ministry of Health Kashiba Bulaya, to mention but a few. An accused is assumed to be guilty and discussed as a criminal even before a verdict from a competent court is delivered. It is easy for lay people and even some lawyers to be swayed by strong public opinion which replaces fact with emotion and solid evidence with unreliable hearsay. The reason that any system of Law establishes procedures of investigation and laws of evidence is to prevent arbitrary application of justice and to give every accused the opportunity to refute the charges against him/her. Audi alteram partem which means hear the other side is inherent in administration of justice. It would be absurd to argue that every accused person must be guilty. Even in the fairest and most transparent systems of law, innocent people can and do get entangled in criminal cases.

2.12 Application of Presumption of Innocence in Criminal Cases

The presumption of innocence is essential to the criminal process. The apparatus and administration of Criminal Law is a very powerful tool in the hands of the State against individual members of society and can be used to deprive them of liberty or life, two of the most important fundamental rights of any human being. Almost all Democratic States guarantees through their constitutions, the protection of the right of life and liberty to every individual and such a fundamental right must absolutely not be taken away without due process of law. This actually forms the basis of the "innocent until proven guilty" principle of criminal jurisprudence. Almost every system of law adheres to this in theory, but the application and measure of proof required varies and sometimes this general rule has special exceptions.
The mere mention of the phrase presumed innocent keeps the magistrates and Judges focused on the ultimate issue at hand in a criminal case: whether the prosecution has proven beyond a reasonable doubt that the defendant committed the alleged acts. It is important to consider why this principle is guaranteed; it can be argued firstly that in some cases, it might be impossible to prove a case in Law, however loudly the facts might speak for themselves. Secondly that it is equally unjust that a clearly guilty man may be set free because of lack of evidence. Ultimately the best consideration is that when it comes to a choice of evils, it is better that on occasion the injustice that some guilty people be allowed to go free is preferred in order to prevent the injustice of an innocent person being deprived of liberty, reputation and practically life where imprisonment is for a number of years. This is absolutely true, but perfect justice has never existed in human administered law.
CHAPTER THREE

3.0 Introduction

Chapter three will discuss bail in terms of its effect on the administration of justice. It will also discuss the practice and procedure in Zambia, with reference to the jurisdiction of the subordinate court, High court and the Supreme court in bail proceedings. It further looks at the rationale of granting or denying bail and the discretionary powers of the judicial officer in deciding on bail applications. It subsequently discusses the onus of bail and its impact on presumption of innocence.

3.1 The effect of Bail on the Administration of Justice

The law under section 33 of the Criminal Procedure Code44 provides that persons arrested must appear before a magistrate within 24 hours of their arrest. Arrest as earlier defined is the taking into Police custody, or capture and detention of a person suspected of committing an offence by Police officers or any authorized Law enforcers. The common law presumption of innocence is embedded under the Constitution of Zambia.... Thus prima facie, an accused person has the right to apply for bail. Bail is a right protected by law. The granting of bail by the Police or Court however is discretionary. That means it is not to be unreasonably withheld.

Section 123(1) of the Criminal Procedure Code cap 160 provides that when any person, other than a person accused of murder or treason, is arrested or detained without warrant by an officer in charge of a police station, or appears before or is brought before a court, he may, at any time while he is in the custody of such officer, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient in the opinion of such officer or court, to secure his appearance, or released upon his own recognizance if such officer or court thinks fit.

44 Cap 160 of The Laws of Zambia
It is quite evident from the section that any police officer in charge of a police station, or
the court before whom any person is accused of an offence other than murder, aggravated
robbery or treason, has powers to grant such person bail. Bail granted by the police is
commonly known as police bond. A police bond will normally require an accused person
to present himself before the police station or court on a mentioned date, time and place,
and if before then it appears to the police that the accused is about to leave the country or
disappear or is interfering with or likely to interfere with witnesses or about to commit a
similar offence, the police may arrest the accused, cancel the bond and detain him in
custody pending appearance in court. The police therefore have the power to revoke a
police bond.

This was well illustrated in the case of The People V Benjamin Sikwiti, Chitungu Joseph
Antonio Arthur and David Mazuma45 where the accused were on police bond prior to the
commencement of trial which was cancelled. The accused were charged with theft of a
motor vehicle contrary to Section 281(a) of the Penal Code. Their application for bail
pending trial in the magistrate's court was denied. The accused then applied to the High
Court arguing that there was no valid reason to support the denial of bail. The holding in
this case was that a police bond does not automatically cease once the accused appears in
court, the Court has the power to inquire into the reason for cancellation of the bond and
if the reasons are not adequate to issue or extend bail. Further, that neither the police nor
the Court have the power to cancel bonds issued by either of them.

3.2 Practice and Procedure Jurisdiction of Bail in the Courts

The presumption of innocence is an active principle throughout the criminal justice
process. The words of Dickson CJ in R v Oakes46 replicate the status of bail under the
Zambian law;

"The presumption of innocence protects the fundamental liberty and
human dignity of any and every person accused by the state of criminal
conduct. An individual charged with a criminal offence faces grave social

45 (1990 - 1992) ZR 190 (HC)
46 (1986), 50 CR (3d) 1
and personal consequences, including potential loss of physical liberty, sujection to social stigma and ostracism from community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the state proves an accused guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."

Bail applications are not criminal proceedings but described to be sui generis in S v Pienaar\textsuperscript{47} by Both J and further affirmed in Ellish En Andere v Prokureur General, Witwaterand\textsuperscript{48} as follows

"Bail applications are sometimes sui generis. By the nature of things they are mostly urgent. No rigid format or procedure has been described nor is it advisable to do so. It is the function of the judicial officer concerned having regard to the circumstances of the case, to give such directions as will ensure that all the parties concerned can put their views across"

3.3 Role of Subordinate Courts in Criminal Proceedings

Subordinate courts handle the bulk of criminal trials. Although the High Court has unlimited original jurisdiction, in practice it deals only with the most serious offences such as homicide, treason, armed robbery, aggravated robbery, infanticide, etc. Even these cases are handled by magistrates in their preliminary stages before they are referred to the High Court. International and regional human rights instruments as well as national constitutions provide both substantive and procedural safeguards for the accused in order to ensure a fair trial.

\textsuperscript{47} 1992 (1) SACR 178 (W) at 180h
\textsuperscript{48} 1992(5) BCLR 1 (W)
When an application for bail is refused the accused should be informed of his right to apply to the High Court for bail notwithstanding the magistrate's decision. It is the authors view that the majority of people in Zambia are not aware of their right to bail. Magistrates must therefore ensure that the accused persons are informed of this procedural privilege of bail.

3.4 Practice and Procedure followed by The High Court in the exercise of its Jurisdiction in Bail Proceedings

It is convenient at this stage to briefly examine the practice and procedure followed by the High Court in the exercise of its jurisdiction in bail proceedings. Under Section 10 of the High Court Act, it is provided as follows:

"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice".

It is worth noting that the High Court Act is silent on practice and procedure in bail matters. The relevant sections are in the Criminal Procedure Code under section 123 (3). Whilst the High Court can admit any person to bail at any time on the application of an accused person, (provided he satisfies the Court on a balance of probabilities that he will be available to stand trial when required) there is nothing provided for as to what procedure should be adopted when the High Court has denied bail. The Zambian Criminal Procedure Code is silent as to whether a refusal to grant bail is subject to appeal or to a fresh application from one magistrate to another magistrate or from one judge to another judge. Sakala J, held in Rahim Obaid v The People (2) Nadehim Quasmi

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50 Chapter 50 of the laws of Zambia
51 Chapter 88 of the laws of Zambia
52 Ibid
v The People\(^{53}\) that once an applicant has been refused bail by a judge of the High Court another judge of that court has no jurisdiction to entertain a fresh application for bail. However Section 10 of the High Court Act seems to direct the High Court of Zambia to exercises its jurisdiction in default of practice and procedure in our own laws in substantial conformity with the laws and practice observed in England in the High Court of Justice.

### 3.5 The Jurisdiction of the Supreme Court in Applications of Bail pending trial

The Supreme Court Act in Section 22,\(^{54}\) the only section empowering the Supreme Court to entertain applications for bail, clearly refers only to an application by a person who has been convicted by the High Court and whose application for bail pending appeal has been refused by the High Court in terms of Section 336 (1) of the Criminal Procedure Code\(^{55}\). This was so illustrated in a Supreme Court case of Rosemary Chilufya v The People\(^{56}\) where the applicant was charged with infanticide and was committed to the High Court for trial. Her application to the High Court for bail pending trial was denied. She applied to the Supreme Court seeking to be admitted to bail pending her trial.

The issue raised in this application was whether the court had jurisdiction to entertain an application of this nature. Section 22 of the Supreme Court Act\(^{57}\) making provisions as to bail read as follows:

"22 (1) Where the High Court has, in exercise of its powers under section three hundred and thirty - six of the Criminal Procedure Code, refused to admit an appellant to bail or to postpone the payment of any fine imposed upon him, the Court may, if it deems fit, on the application of the appellant, and pending the determination of his appeal or application for leave to appeal to the Court in a criminal matter -

\(^{53}\) (1977) ZR 119 (HC)
\(^{54}\) Chapter 52 of the laws of Zambia
\(^{55}\) Cap 88 of the laws of Zambia
\(^{56}\) (1986) ZR 32 (SC)
\(^{57}\) Cap 52 of the Laws of Zambia
(a) admit the appellant to bail, or if it does not so admit him, direct him to be treated as an unconvicted prisoner pending the determination of his appeal or of his application for leave to appeal, as the case may be; and

(b) Postpone the payment of any fine imposed upon him."

There are two conditions precedent to the exercise of the jurisdiction conferred by this section. These are; the High Court must have exercised its powers under Section 336 of the Criminal Procedure Code and refused the application. Secondly the applicant must be an appellant whose appeal is pending for determination before, the Supreme Court.

The application was dismissed though the Supreme Court Judge observed that the offence in question was a bailable one, however the fact that the appellant had not been convicted of a criminal offence and that for the Supreme Court to have jurisdiction in such matters the following must be the circumstances:

(a) The High Court must have exercised its powers under section 336 of Cap. 160 and

(b) The applicant must be an appellant whose appeal is pending before the Supreme Court.

Given the circumstances of case of bail pending trial, it follows therefore that in terms of Section 22 Cap. 52 the Supreme Court has no jurisdiction application for bail pending trial.

3.6 The onus of Bail application and Impact on Presumption of Innocence

It is the opinion of the author that the presumption of innocence principle should be limited to only the Law and the Courts for its applicability, given the rigidity in the law, which insists on the presumption of innocence as an absolute and fundamental right, and requiring that he who asserts must prove beyond reasonable doubt.

It is worth noting here, that the law does not actually instruct anyone to presume anyone innocent until proven guilty, it simply states the position in Law that a person accused of a criminal offence is presumed innocent until proven guilty. This is so provided as a constitutional right and is provided in the Zambian constitution under article 18(2) (a)
and further under Article 11 of the Universal Declaration of Human Rights which declares that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." The International Covenant on Civil and Political Rights under Article 14 similarly provides that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

The onus of bail cases is obviously the civil standard, namely proof on a balance of probabilities. Although a bail application is a court proceeding, it is relatively informal, inherently urgent and serves a uniquely interlocutory purpose distinct from that of the trial: the issue is not guilt but where the interest of justice lies in relation to bail.\(^{58}\) There is a fundamental difference between the object of bail proceedings and that of trial. In bail proceedings the court is concerned with question of probable guilt in the interest of justice as regards to bail requirements. The focus at the bail stage is to decide whether the interest of justice permits the release of the accused, pending trial.\(^{59}\) The onus is on the accused person to show the court on a balance of probabilities that he will be available to stand trial when released on bail. This can be interpreted to be the burden of proof, which in simple terms can be defined as the duty placed on a party by rules of law to prove a fact in dispute.

It is important to distinguish the application of the principal of presumption of innocence in bail proceedings and in a trial. In the later, the presumption of innocence principal is applied for the purpose of justice; it effectively puts the burden of proof, not on the accused, but on the prosecution. In fact, even the prosecutors do not assume someone innocent until proven guilty. The prosecution already assumes that the accused person is guilty when they are bringing in witnesses, they are only there to prove to the court, here

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\(^{59}\) See s v Dlamini and Others, s v Schielekat, s v Joubert 1999, volume 2, South African law reports page 51, constitutional Court of South Africa
the Court and the Law presumes the accused innocent. The court will therefore be legally on the side of this accused person, until the prosecution convinces the court beyond any Reasonable doubt that he is indeed guilty.

From the above, it can be adduced that our courts recognize the presumption of innocence principle as provided under Article 18(2) (a) Zambian constitution, but where bail applications are concerned, the court do not seemingly uphold the principle as they seem to be torn between this constitutional fundamental right and interest of the State. It is obvious that the interest of the State outweighs consideration of the presumption of innocence principle. Unlike civil trial proceedings, the burden of proof rests with the prosecution or the State, in bail proceedings the burden of proof shifts to both the prosecution and the accused; this should be done on a balance of probabilities. However there appears to be uncertainty on the onus of the State to prove that bail should not be granted.

3.7 The Granting Of Bail

The point of granting bail is vital in every justice system. Any person who is held in custody pending or throughout the criminal proceedings suffers the same restrictions on his liberty as one serving a sentence of imprisonment after conviction.

The public duty of the Court is to grant bail provided that the accused provides evidence before the court that satisfies the court on a balance of probabilities that the he or she will stand his trial if he were to be released on bail. The prosecution on the other hand must satisfy you on the balance of probabilities that an accused should not be granted bail. There is substantial case law that regulates this subject. The case of *Oliver John Irwin v The People*\(^{60}\) is instructive and clearly spelt out in Archibold, 36th edition\(^{61}\) under paragraph 203 that in any case for bail the proper test of whether bail should be granted or refused is whether it is probable that the applicant will appear to take his trial. In applying this, the Court takes into account the following considerations:

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\(^{60}\) (1993-94) ZR 7

\(^{61}\) Archibold Criminal Pleading, Evidence and Practice 36th ed para 203--205.
(i) The nature of the accusation against the applicant and the severity of the punishment which may be imposed.

(ii) The nature of the evidence in support of the charge.

(iii) The independence of the sureties if bail is granted.

(iv) The prejudice to the applicant if he is not admitted to bail.

(v) The prejudice to the State if bail is granted.

In addition to the five foregoing considerations that are normally taken into account when granting or refusing bail, it is worth noting that there could be special circumstances that the Court may consider the five which may be peculiar to the particular applicant.

3.8 Considerations in the Granting Bail

Much as bail is a right, it is not guaranteed, the granting or denying it, falls in the discretionary powers of the magistrate. The Magistrates handbook provides the crucial test that magistrates must use when determining bail applications. The essential test is whether or not the defendant will appear at the resumed hearing and the following points will fall to be considered:

(a) The nature of the charge;

(b) The nature of the evidence in support of the charge

(c) The punishment likely to be imposed if convicted;

(d) The likelihood of repetition of the offence;

(e) The independence and reliability of the sureties.\textsuperscript{62}

After the defendant applies for bail, the magistrate will hear from the prosecutor for any objections against the bail application if at all, and if so the objections will be put on record. After considering the objections of the prosecutor if any, and the points listed above, he will make a ruling on the application and record it.\textsuperscript{63}

\textsuperscript{62} Magistrates handbook 6\textsuperscript{th} edition, E.J Swarbrick, LLB(Hons) London page 188

\textsuperscript{63} Ibid
3.9 Role of a Magistrate and their Discretionary Powers in Granting bail

Generally, magistrates decide the terms of bail by examining certain facts about the accused such as the nature and circumstances of the offense charged, weight of the evidence, character of the accused, his family ties, employment, financial resources, length of residence in the community, involvement in education, and past record. If, after examination of these facts, magistrates are not reasonably sure that the accused will appear for trial, the magistrates, in their discretion, will require the execution of a bail with surety in a reasonable amount and may impose such other conditions deemed reasonably necessary to insure appearance at trial. The monetary sum of the bail bond can be forfeited as a penalty if the accused fails to appear in court or violates any condition of bail. On an application for reconsideration of a bail decision, the court may impose or vary bail conditions or withhold bail altogether.

In my research I took time to interview at least of the Resident Magistrates in the Subordinate court in order to establish in practice, the extent of discretionary powers applied by magistrates aside the laid down conditions. In the interview Mrs Arida Chuulu, she confirmed that the laid down law on bail as per Criminal procedure code S123 (1). Though this section does not provide the criteria on bail on which the magistrates must rely when determining bail, it is basically provides for procedure.

Magistrate Arida Chuulu, affirmed the stage of intervention of the prosecutor, when she advanced that the prosecutor just has to say something in objection or at least anticipated to do so, and normally they do pass an objection. She further affirmed that the discretionary powers of a magistrate are exercised beyond the five considerations advanced. Considerations are on case by case basis, she emphasized on issues surrounding the risk of flight, whether the accused is of a fixed abode and of traceable address, the nature of the offence charged, character of the accused, the accused's family ties, employment, financial resources, involvement in education, and past record, amongst others.
Magistrate Chuulu further stated that with juvenile cases, considerations that apply are quite differently. In her job as Magistrate she deals with Juvenile cases, and she stated that dependant on the case they tend to release juveniles in the custody of parents and in principle shift the burden of ensuring attendance to court in the hands of the responsible parents. In her experience as Magistrate, normally considers welfare of a juvenile that is whether they are in school, college or university, and my release them on bail in order to give them continuity in their studies. She cited an example of a Law student from University Of Zambia whose name she kept unanimous was charged with obtaining money by false pretences, he was granted bail one of the discretionary factors being that he can continue attending class and upon conviction he was given a three month suspended sentence and he continued to pursue his career in law. The three months hardly elapsed, the same student was brought before Magistrate Chuulu for a similar offence, reference was made to the previous offence and he was finally convicting to 18 months imprisonment which he is currently serving.

She further stated that high bail fines that do not correlate with seriousness of the offence, may in the real sense mean denying someone bail and it basically negates the presumption of innocence. On the hand, if a case involves goods or property of a certain value, then the bail is also set high. No authority was cited per se, but the author is tends to agree with the statement. Lastly, Magistrate Chuulu stated that Congestion in the prison cells is not a factor of the Magistrate to consider that coerce the granting of bail to an accused person.

3.10 Forfeiture of Bail
Section 131 of the criminal procedure code, provides for discretion by the court to penalize an accused or his surety if the accused person on bail does not appear at trial on the date stated in the recognizance form. The courts however, do not apply this provision literally, and penalize the accused or his surety. The magistrate should enquire into the reasons for non-appearance of the accused and hear the accused and his surety before making an order in the matter.64

64 Ibid
CHAPTER FOUR

4.0 A comparative analysis with South Africa

In South Africa law, the well known common law maxim of presumption of Innocence of an accused person until his guilt has been established by the court appears to prominently apply at trial stage of proceedings. Section 35(3) (h) of the South African Constitution provides that every accused person has a right to a fair trial which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings. As the constitution forms the basis for this right of presumption of innocence in South Africa, the effect of this right at trial is focused on the understanding that if conviction is possible despite the existence of reasonable doubt of guilt then the presumption of innocence is violated. In \textit{R v Ndhlovu}\textsuperscript{65} the Appellate Divison contended that the presumption of innocence requires the State to prove the guilt of an accused beyond reasonable doubt otherwise the accused is entitles to his acquittal.

4.1 Application of Presumption of Innocence on Bail Applications in South Africa

In South Africa, reference to bail is made under section 35(1) f of the State Constitution. However it does not set the ground upon which bail conditions must be set in order to guarantee and accused person to appear for trial. This therefore leaves room for preventative detention as a ground for denying bail. The Constitution therefore balances an individual’s right to freedom with the interests of justice to arrest and detain people under appropriate conditions. At the same time it provides the broad framework for considering the release on bail of an accused pending trial.

Whilst the application and scope of presumption are arguably limited to the strict evidentiary rule at trial some courts have held that this provision had to be considered when bail was adjudicated. When a person has been lawfully arrested on a charge of a criminal offence, his right to be released on bail until he is sentenced in the trial court is regulated by Chapter 9 of the Criminal Procedure Act.\textsuperscript{66}

\textsuperscript{65} 1945 AD 369
\textsuperscript{66} Sections 58-71
In *S v Mbale*\(^{57}\), it was held that a bail application was not a criminal proceeding as proved facts did not have to be weighed. The high Court of South Africa in adjudicating a bail application held that the presumption of innocence operates in favor of the applicant even where there is a strong prima facie case against him. However, if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing him bail.\(^{68}\)

Whilst in *S v Miller*,\(^ {69}\) it was held that a fundamental requirement of the proper administration of justice that an accused person stand trial. However, if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence.

Most bail provisions that were introduced by the Criminal Procedure act by act 85 of 1997( the code), the constitutional Court addressed the role of preventative detention.\(^{70}\) Kriegter J stated that

"Section 35(1) f presupposes a deprivation of freedom by arrest –that is constitutional. This deprivation is for the limited purpose of ensuring that the arrestee is duly and fairly tried. But section 35(1) f neither expressly nor impliedly requires that in considering whether the interests of justice permits the release of that detainee pending trial, only trial related factors are to be taken into account. The broad policy considerations contended by the ‘interest of justice’ endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionality acceptably a risk that the detainee will endanger a particular individual or the public at large. Less obviously, but fairly serious offence can be taken into account. The important proviso throughout is that there has to be likelihood that is a probability that such risk will materialize. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such

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\(^{57}\) 1996(1) SACR 212 (W)

\(^{58}\) *S v Ramgobin* 1985 (3) SA 587

\(^{69}\) (Decided on December 2 1974)

\(^{70}\) See 27-53 of *S v Dladla* 7 others
likelihood that is no more than a factor, to be weighed with all others, in deciding what the interest of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial; the reprehensible institution really targeted when one speaks of preventive detention. Absent a proper basis for the original arrest, it will be aside. But if there was a proper cause, one cannot justify release solely on the absence of trial related grounds.

In this case, what the court did not decide was whether such crimes and dangers as might be entailed by release had to have any bearing upon the offence, or the conduct of the case, in respect of which the bail application had been arrested. This leaves room for any person perceived to be a dangerous criminal to be incarcerated without trial as long as the arrest for any offence is justified. Surely such a course of conduct would indeed be detention without trial, and would violate the presumption of innocence.⁷¹

In this case, the court accepted the constitutionality of taking into account the vigilante veto (the relevance of, broadly speaking the public reaction to a bail decision) in deciding upon bail introduced by subsections (4) and 60(8A) of section 60 of the code as amended by Act 85 of 1997.

4.2 Legislation governing bail

The granting of bail is governed by Chapter 9 of the Criminal Procedure Act 51 of 1977 as amended (‘The Act’). A general principle relating to bail is that anyone who has been arrested may not be detained for longer than 48 hours unless he or she is brought before a court which orders further detention.⁷² The Act does however make provision for bail to be granted by certain police officers and prosecutors in less serious offences.⁷³ The majority of bail proceedings and certainly all of those involving more serious offences are decided after a formal bail hearing held at court.

⁷² Section 50(1) of the Act.
⁷³ Sections 59 and 59(a) of the Act respectively
Section 60 confirms the principle that an accused person is entitled to be released on bail if the court is satisfied that the interests of justice so permit. Section 60(4) of the Act sets out five considerations for determining when it is not in the interests of justice to release an accused person on bail:

1. The likelihood that the accused will endanger an individual or the public at large
2. The likelihood that the accused will not present himself/herself for trial
3. The likelihood that the accused will threaten the prosecution by interfering with witnesses or destroying evidence
4. The likelihood that the accused will undermine the objectives of the criminal justice system and
5. The likelihood that the release of the accused will disturb the public order

These considerations are not exhaustive, and like the Zambian bail system the court retains its discretion to make an appropriate order on a case-by-case basis.

However the most contentious component of section 60 are the provisions which deal with persons accused of having committed ‘serious offences’ (Schedule 5 offences) and persons accused of ‘extremely serious offences’ (Schedule 6 offences). Schedule 5 offences include treason, murder, rape, and indecent assault on a child under 16. Whilst Schedule 6 offences include premeditated murder; murder of a law enforcement officer; murder of a witness; multiple rape; gang rape; armed robbery; robbery causing grievous bodily harm; and indecent assault on a child under the age of 16 years involving the infliction of grievous bodily harm.

S60(11) provides that:

Where the accused has been charged with a ‘serious’ (Schedule 5) offence, the accused may only be released if s/he produces evidence to satisfy the court that the interests of justice permit his/her release.

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74 Section 60(1)(a) of the Act.
Where the accused has been charged with an ‘extremely serious’ (Schedule 6) offence s/he may only be released if s/he produces evidence to satisfy the court that exceptional circumstances exist which in the interests of justice permit his/her release.

There are two components to the contentious nature of this section. The first relates to the exact legal meaning of the section while the second relates to the fact that the legislature has deemed it appropriate to curtail the freedoms of individuals charged with these categories of offences. In *S v Vanqa*\(^75\) it was held that this provision places a heavy onus upon an applicant for bail since it requires the applicant to adduce evidence of exceptional circumstances.

While it may be argued that this approach adversely limits a person’s right to freedom, the relevant sections have been tested by the Constitutional Court which upheld the validity of the legislation in case of *S v Dlamini*\(^76\) and in *S v Dladla and Others*\(^77\). Currently, in respect of s60(11), there is neither certainty on what evidence needs to be produced in order to satisfy a court that the interests of justice permit release, nor what evidence is required to convince a court that ‘exceptional circumstances’ exist which are in the interests of justice to permit release.

The law on bail in serious offences as described above, forms a clear comparison to the law applicable in Zambia, the Criminal Procedure Code\(^78\) under section 123(1) which provides that any person accused of murder, aggravated robbery misprision of treason or treason shall not be granted bail by the trial court. The Law on non bailable offences in Zambia is certain and it leaves no anticipation for possibility of release on bail in the minds of the persons accused of such an offence unlike the South African law.

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\(^75\) (2000) (2) SACR 371 (TKHC)  
\(^76\) (1999) (4) SA 623 (CC).  
\(^77\) (1999) (2) SACR 51 (CC).  
\(^78\) Cap 88 of the Laws of Zambia
4.3 Bail and Presumption of Innocence Pending Sentencing

An accused person has a right to bail and may apply to the court to extend his bail whilst he waits to be sentenced. Section 58 of the Criminal Procedure act provides for the extension of bail. In S v Moeti\textsuperscript{79}, an accused applied for bail pending sentencing. Hendler J came to the conclusion that the normal principles of bail were not applicable. It was held that the presumption of innocence, which operates in favor of the accused and is a cornerstone on which the principles of bail rely, did not apply after conviction. Further, the question of liberty of the applicant and the outcome of the trial played no role. The court further held that the correct approach would be similar to the position when bail is granted pending appeal and at this stage the accused will carry the burden of proof. The presumption of innocence does not function in favor of the accused at this stage and he is burdened to convince the court as to why he should be released. The decision to grant bail pending appeal remains at the discretion of the court. The South African Law Commission recommended that the granting of bail, either on review or on appeal, should be in the discretion of the court.\textsuperscript{80}

4.4 Bail and Presumption of Innocence after Conviction

In Terms of section 60 of the Criminal procedure act, an accused person is entitled to be released on bail preceding his conviction. It follows therefore that after an accused person has been convicted his bail lapses. However in terms of section 35(3) every accused person has a right to a fair trial which includes the right to be presumed innocent and the right to an appeal or review by a higher court. It can therefore be inferred that an accused person remains so accused until the final appeal or review of a higher court.

4.5 Summary Conclusion of Bail in South Africa

In South Africa, the application of presumption of innocence in bail proceedings seems to be dominant at trial stage. Unlike in Zambia it arises from prosecution, trial and up to conviction, basically at all stages of a criminal proceeding.

\textsuperscript{79} 1991(1) Sacr 462 (b)
\textsuperscript{80} 1994 at 82 and 85
The operation of presumption of innocence is at trial where the guilt of an offence is a bone of contention. This principle seems to create a procedural and evidentiary rule at trial and that the prosecution must prove guilt beyond a reasonable doubt. One may argue then that this procedural and evidentiary rule has no application at the bail stage.

Under the South African law, there seems to be very little content and scope of presumption concerning bail, though a relationship between liberty and the presumption of innocence was evident in the decision of *Uncedo Taxi Service Association v Maninjwa*\(^{81}\) where Judge Pickering held that it was unconstitutional to deprive a person of his liberty upon proof merely on a balance of probabilities.

South African law has generally treated bail hearings as inquisitorial in nature unlike Zambia which has adopted the adversary system of law.

\(^{81}\) 1998(3)SA 417(E) 4261
CHAPTER FIVE

5.0 Observations

From the research done on this essay, it has been observed that the apparatus and administration of Criminal Law is a very powerful tool in the hands of the State against individual members of society and can be used to deprive them of liberty or life, two of the most important fundamental rights of any human being. This observation is based on the application of the principle of "right to life and liberty" with respect to the presumption of innocence of accused persons in criminal cases. Presumption of innocence as already established, is a constitutional right and is provided under article 18(2) Zambian constitution.

It is the authors view to conclude that, it is the Law that presumes an accused person innocent. As an individual, one can decide whether someone is guilty of something or not, but the law and the courts will presume that the particular person is innocent until his guilt is proved before a competent court. This is for the purpose of justice; it effectively puts the burden of proof, on the prosecution.

It will be safe here for the author to point out that in fact, the prosecutors do not presume someone innocent until proven guilty. It is the authors’ conclusion that the prosecution presumes the accused person guilty and that is why they bring witnesses before the court to prove to them beyond any reasonable doubt that the accused is guilty.

On the other hand, guaranteeing the presumption of innocence extends beyond the judicial system. The presumption of innocence principle is also captured by journalists, in many countries journalistic codes of ethics state that journalists should refrain from referring to suspects as though their guilt was certain. For instance, they refer to those accused of committing a crime as "suspect" or "defendant" and use "allegedly." In Zambia, some the media houses tend to misrepresent in their reporting, and hence create a presumption of guilt in the minds of any ordinary Zambian.
5.1 Recommendation

It is of crucial importance that anyone reviewing the legal position of an applicant for bail to know whether this presumption of innocence has any application outside the context of trial, but specifically at a bail hearing. If bail did not exist, an innocent person who is merely accused of committing a crime would virtually be serving a sentence for a crime he has not been convicted of. Further excessive bail fine has the same effect.

Trial by media, both the print and broadcast media has become increasingly common in Zambia especially in high-profile cases. An accused is assumed to be guilty and discussed as a criminal even before a he has been proven so before a competent court. It seems easy for any lay person and even judicial officers to be swayed by strong public opinion which replaces fact with emotion and solid evidence with unreliable hearsay. Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

It is therefore recommended that the presumption of innocence principle is upheld in order to prevent arbitrary application of justice and to give every accused the opportunity to refute the charges against him/her. It is further recommended that the Law makers enact a law that will bar media houses to misrepresent facts, because not every accused person must be guilty, even innocent people can and do get entangled in criminal cases.

Relevant Zambian statutes do not define bail, and the majority of Zambian people are not aware of the right to bail. Much as bail is not a guaranteed right, the people ought to be aware of this option because only a few criminal offences are non bailable. The onus of notifying the accused persons of their right to apply for bail and to appeal if denied falls on the magistrates or judges. The need for this notification to be a mandatory requirement cannot be over emphasized.
Delays in the Administration of Justice leads to some cases being dragged on for years and this deprives the liberty and freedom of those persons (sometimes innocent people) in prison who may have been denied bail pending trial or as the case may be. Magistrates must manage their caseloads effectively and by all means avoid granting adjournments at the slightest excuse. As the old saying goes ‘justice delayed is justice denied.’ In Zambia it seems as though delays in the justice delivery system are endemic.

It is important that the law, especially criminal law should be consistent and fair even at the cost of being slightly inefficient. If the principle of presumption of innocence is abandoned on any account, then there is a real risk that any system of criminal law will degenerate into a farce and criminal trials will become little more than a formality.

5.2 Conclusion

Zambia like many systems of Law in democratic States guarantees the protection of the right of life and liberty to every individual and such a fundamental right must absolutely not be taken away without due process of law. This is the basis of the "innocent until proven guilty" principle of criminal jurisprudence. The presumption of innocence in practice, acts as a policy directive protecting the fundamental security and freedom of an accused person when an application for bail is made. Bail can therefore be granted in the Court's discretion, because there are no considerations to seriously impede such a grant or raise the possibility of the applicant failing to attend Court and avoid trial.

Lastly, I tend to reflect and agree with the opinion advanced by Harishanker in the article on application of the principle of "right to life and liberty" with respect to the presumption of innocence in criminal cases, where he stated that "The best answer is that when it comes to a choice of evils, it is better that on occasion the injustice that some guilty people be allowed to go free is preferred in order to prevent the injustice of an innocent person being deprived of liberty, reputation and practically life where imprisonment is for a number of years."82

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