A CRITICAL ANALYSIS OF THE JUDGES' RULES IN ZAMBIA

by

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OBLIGATORY ESSAY submitted in partial fulfillment of the requirements for the degree of Bachelor of Law (LLB)

UNIVERSITY OF ZAMBIA

SEPTEMBER 1991
DEDICATION

This work goes deep in appreciating my girlfriend’s most uncommon faith in this world. She took all the responsibilities surrounding myself just to see this essay produced.

Mwamba Lukwesa Mpandamula my love, I wish you the most comfortable life that a faithful woman like you deserves. May the Almighty God bind us stronger than before.
ACKNOWLEDGEMENTS

This essay would have been a failure but for many people. I wish I had the time to mention each one in this paper.

My deep gratitude goes to my Supervisor Mr. Enock Mweetwa Simaluwani who fought tirelessly in shaping my work up to this level. I at times lost hope of finishing this paper but for the encouragement of him. May the Lord bless his teaching profession.

I would also like to thank Miss Mary Phiri who really showed much concern in typing this paper especially that she sacrificed much of her pleasure time just to sit in front of the typewriter and produce this work.

In the least, I would like to thank myself for compounding this Obligatory Essay.

MUTEMWANI THOMAS SILWEYA
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CHAPTER ONE

INTRODUCTION

The context of crime and criminal justice is a subject that has no beginning and it certainly has no conclusion. Neither is is perfect nor totally indefensible. Perhaps this is founded on the notion that over many centuries, the purposes of those who have framed criminal Law and of those who have enforced it, have undoubtedly been many and various.

However, in a modern Legal system, two views have been accepted as forming the proper aims or criminal justice. It is firstly argued that it operates to forbid and prevent conduct that unjustifiably and inexcusably inflicts substantial harm to individual or public and secondly to safeguard conduct that is without fault from condemnation as criminal. In the accomplishment of its purposes, it not only restrains but also facilitates our social relationships. For instance, it protects citizens from abuse of authority by Law enforcing agents through the prescription and application of specific rules which impose limitations upon the exercise of this authority.

This principle of Legality as a juridical quest for Legitimacy is based on the concept of the Rule of Law which implies the assurance of some sort of predictability in the conduct of state officials by the prior existence of a basic law covering the subject matter that falls within their fields of operations. It thus embraces procedural guarantees necessary to assure fairness in adjudication and the application of sanctions without hamstringing the administration of justice or frustrating the imposition of basic order in the community. In short, Law enforcing agents are
expected to enforce the Law through the observance of specific written
rules of criminal procedure and the substantive Law thereto. For instance,
for any arresting officer of which usually is the policeman to charge a
citizen with the offence of Treason, must ensure that the citizen has
contravened Section 43 of the Penal Code Chapter 146 of the Laws of Zambia
and not what he himself thinks to be the offence of treason. Furthermore
for a police officer to arrest an individual without a warrant, he must be
sure that he is in total satisfaction of Section 26 of the Criminal
Procedure Code, Chapter 160 of the Laws of Zambia which provides for such
situations. Therefore, as a police officer, acting outside the provisions
of the Penal Code and those of the Criminal Procedure Code when enforcing
criminal justice is total abuse of authority and contrary to the doctrine
of the Rule of Law and the Philosophy of Humanism in our country.

In the hope of strengthening and promoting a fair and just criminal justice,
a set of rules was formulated in England in 1912 adding flavour to the already
existing major statutes namely the Penal Code and the Criminal Procedure
Code. These rules were termed the Judges' Rules and were directed and
published for the instruction of members of the police force and other
Law enforcement agencies when they are interrogating suspects and accused
persons indicating what conduct on their part the court will regard as
improper. The rules thus defined the relationship expected to exist
between the interrogating officer and the suspect or accused person so
as to promote a fair and calm interrogation session.

Inspite of all these codified rules and the infusion of the Judges' Rules
in criminal law, the Legal content of police powers and other Law enforcement
agents concerning the interrogation of suspects remains obscure. There has
been a number of complaints of malpractices concerning the manner in which law enforcement agents handle suspects and accused persons in relation to the procedural and administrative rules. Quite often, courts have heard of how accused persons get detained against their will before being charged with any offence nor any formal arrest as procedurally required. From time to time, Lawyers have contested the legality of police officers taking people into custody for the mere reason of putting questions to them regarding the particular offence the police happen to be investigating. Police brutality in this country has now become a common public scene which has culminated into something like a universal folk ritual and almost reached its peak.

In streets and other public vicinities such as Markets and Pubs, we almost everyday witness the brutal beating and kicking of suspects by police officers whilst being led to police stations. Protracted questioning of prisoners is commonly employed. Threats, illegal detension and refusal to allow access of counsel to the prisoner is common. Even where the Law requires prompt production of a prisoner before a court of Law, the police not infrequently delay doing so and employ the time in efforts to compel confession. It is also not uncommon to learn of accused persons who have been held in incommunicado unable to get in touch with friends, family and counsel.

More worse are the common stories of detained suspects living in police custody without water and food for many hours and even days for the most unfortunate ones. Forinstance, in 1969, the High Court for Zambia heard of how two accused men were detained in police cells from the Morning of August 19th until about 7 p.m. on August 20th without food or drink and were exposed to harsh interrogation several times for quite substantial periods.⁴

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There is thus an outcry out there in society that before punishing suspects, the zealous executive agents of public authority must demonstrate the suspects offence to impartial judicial officers and insistence is placed on the correlative principle that the citizen may stand mute without prejudice in the face of official accusation.

In all these aforementioned circumstances, the Judges' Rules seem to be playing a relaxed role in as much as the Administration of criminal justice is concerned. It is in this light that the writer wishes to examine how effective these rules have been in this country since their inception to the just administration of criminal justice. The text at hand will mostly be an examination of the rules themselves in line with the Law enforcement agents vis-a-vis the accused or the suspected person.

LITERATURE REVIEW ON THE SUBJECT

Like the saying goals in English, "No man is an Island," Knowledge or Learning is a two way human aspect. The author has had opportunity to read what others have written on the issues related to the subject.

Mr. Phiri Macdonald E.B. in his obligatory essay entitled "Impact of Police Powers on Personal Liberties" discusses the ever growing extent and dimension of police powers in relation to the constitutionally granted Rights and Freedoms of the individual. He discusses this in Chapter Four basing his analysis on Detention for questioning, arrest, search and seizure of the suspect.
Achiume Charity in her essay *Confessions and Administration of Justice in Zambia*, centres the discussion on the abuse of Confessions and the Control mechanism aimed at maintaining justice. The writer also had an opportunity of reading the work of Duncan Kaela Mubanga, an obligatory essay entitled, *The Admissibility of Confessions and the Discretionary Powers of the Courts: The Zambian Experience*. In his Chapter One, he brings forth the aspect of how the Judges' Rules came to regulate the aspect of confessions in criminal proceedings.

This paper differs from the above mentioned three papers in the sense that; the focal point in this discussion is the effectiveness of the Judges' Rules. It pronounces whether the rules have achieved their intended goals or not and the various factors influencing their operation.

**METHODODOLOGY**

The present study is based on descriptive analysis of Law relating to the matter at hand. It has been supplemented by personal interviews with the appropriate authorities to get their views about the problems they encounter in the process of investigation with specific reference to the subject. Judicial precedent and relevant journals form a large share of the paper.

**ORGANISATION OF THE ESSAY**

This chapter provides a brief introduction to the problems noted in this country in as far as the Law enforcement agents and the suspect or accused meet under the umbrella of criminal justice.

Chapter Two discusses the evolution of the Judges' Rules up to their present status in detail.
Chapter Three forming the theme for our discussion inquires into the extent that the Zambian Courts have interpreted and enforced the Judges' Rules. It goes further to ascertain how Law enforcement agents have been influenced by these rules.

Chapter Four provides the conclusion and the proposals for reform.
1. J.C. Smith and Brian Hogan, Criminal Law (6th Ed.)

2. T. Ocran, The Rule of Law as the Quest for Legitimacy
   (In Law in Zambia ed) East African Publishing House, Nairobi,

3. Zeka Chinyama V The People (1971) ZR 426 at 431

CHAPTER TWO

THE ORIGIN AND STATUS OF THE JUDGES' RULES"

The manner of interrogating suspects in criminal offences and the value of evidence brought to court had overtime, just as it is now, been a subject of comment by courts and otherwise. Throughout these debates, arguments have sought to strike a balance between the desirability of sufficient Law enforcement means of investigating criminal activities whilst ensuring in the same process the protection of individuals' liberty.

Historically, Law enforcement agents such as the police have long functioned under a regime of wide duties but limited powers, that is to say, that while they are under general duties to prevent crime, breaches of peace and to detect criminals, they do not have all those powers which, it might be thought, would be resonably necessary for them to do so.¹ Forinstance, Police interferences with individual liberty must, if they are to be valid, be founded upon some rules of positive Law. Perhaps this is the reason why an arrest is mostly interpreted by courts as prima facie illegal until justified under some Legal authority.

Throughout common Law, statements made by the accused were regarded as both reliable and cogent evidence of guilt and indeed saw no objection to a conviction in cases where a confession was the only evidence against the defendant. However, this same common law recognised that a confession could be regarded as reliable only when given freely
and voluntarily.\textsuperscript{2} This meant that once coerced or forced, the reliability of the confession might be fatally compromised and the integrity of the system of administration of justice itself made to suffer. This exclusion of evidence obtained by torture, force or other coercive methods was the means of protection of the defendant developed by the judges during the eighteenth and nineteenth centuries.

For instance in 1847, Patterson J. showed much concern when he instructively stated;

"A prisoner is not to be prohibited from saying anything if he chooses. A constable is not to lead a prisoner to say a thing but if the prisoner chooses to say anything, it is the duty of the constable to hear what it is he has to say" \textsuperscript{3}

In a similar vein, Keating J. elaborating on the nature of an inducement said;

"The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of threat or hope of profit from the promise"\textsuperscript{4}

As if almost summing up the extent to which defendants were to be protected, Cave J. in \textit{R.U. Thompson}\textsuperscript{5} emphatically stated;

"By the Law of England to be admissible a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible... The material question consequently, is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively, and who in event of any doubt subsisting on his head will reject the confession"\textsuperscript{6}

/10.....
Accordingly, evidence obtained unethically by a trick or oppressively by long questioning has often been admitted. Reliability of the information procured seems from a long time ago been treated by English courts as the primary consideration and the requirement of voluntariness received much insistence, for the most part, because its absence was thought to render it unsafe to receive a confession.

But at common law the courts distinguished neatly between interrogation of persons who were in custody and those who were not. The court at common law position holds that a police officer or anyone whose duty it is to inquire into alleged offences may question persons likely to be able to give him information and that whether he suspects them or not provided that he hasn't made up his mind to take them into custody.7 Perhaps the rationale for this general questioning may be an opportunity on the part of the policeman to determine whether there is reasonable ground to suspect him. But a citizen is entitled to refuse to answer questions and his refusal cannot be taken as a ground itself of suspicion. What common Law advanced was thus, that, once a law enforcing agent has determined to arrest or has already put in custody a citizen, no questions were to be put to such person. However, this was not an absolute prohibition for as Leigh (1975) advocates that common law courts allowed the questioning of the accused in custody for an offence other than that which formed the subject of interrogation, at any rate if a caution were first given and that no decision was made by the police to charge the suspect with the offence at the beginning of the interrogation.

/11....
In this regard, we are left to assume that where the charges for which
the suspect was interrogated were closely related to those for which
he had been charged, the courts may have been reluctant to admit evidence
gathered out of such interrogations for the accused, may psychologically
think he is answering to the charge that has made him be in custody.

However, on the otherside of the coin, the courts or rather some judges
under common law allowed much less freedom to the police after the suspect
had been taken into custody especially after the abolition by statute of
magisterial interrogation of prisoners. These judges felt that the police
had no right to interrogate prisoners in custody on the understanding that
the uttered statements by prisoners in such contexts denoted involuntariness.
May be this is why Smith J. in R V Gavin\(^8\) said:

"When a prisoner is in custody, the police have
no right to ask questions. Reading a statement
over and then saying to him; "What have you to
say?" is cross examining the prisoner and thus
I shut it up. A prisoners mouth is closed after
he is once given in charge and he ought not to be
asked anything. A constable has no more right to
ask questions than a judge to cross examine"\(^9\)

In this respect, some judges may be said to have been prohibiting cross
examination of prisoners in custody. By the late nineteenth century,
some judges had shown great distrust of what they termed "unregulated
police interrogation" and were inclined to reject automatically any
confession made in police custody. In R V Male and Cooper\(^10\), such
unregulated conduct by police officers were heavily condemned when
Cave J. stated:

/12....
"... a policeman should keep his mouth shut and his ears open.... It is not the policeman's business to put questions which may lead a prisoner to give answers on the spur of the moment" 11

In most decisions, a caution was looked upon as an essential preliminary to interrogation such that interrogation was proper if preceded by a caution. For instance in *R v Histed* 12, on a charge of bigamy, no evidence was adduced as to the identity of the accused, Mrs Elizabeth Histed. In ascertaining the prisoners identity, the detective went to the police station with the last witness and took him to the charge room to see the prisoner who was at that time remanded in cell. Pointing out on to the witness, the detective said to the accused; "Do you know this gentleman?" The answer which appeared upon the depositions was as follows; "Yes you're the Mr Cobb who married me and Charles Histed on 4th Sept, 1886." Hawkins J in disallowing the question and answers in evidence said:

"I shall not allow this question to be put.... A prisoner must be dealt with fairly. In this case, no caution was given by the detective. In my opinion, when a prisoner is once taken into custody; a policeman should ask no questions at all without administering previously the usual caution" 13

From this decision, we clearly note that the courts were very much concerned with regulating police conduct which invited the accused to increase the evidence against himself. No one was to be compelled to incriminate himself. Perhaps this rule was promoted in those days when the penalties of criminal law were so savage and unregulated that need for every precaution to prevent an unjust conviction became important.
Interesting enough, contrary though not contradictory, are cases in which all the above discussed authorities have been described, in effect, as insufficient to divest the court in any specific case of its judicial discretion to admit or exclude. By 1909, the court of criminal appeal decisively rejected a strict exclusionary rule. From that time, the greater number of judges regarded the interrogation of prisoners in custody as undesirable but not of itself enough ground to require the exclusion as a matter of law of a statement which was apparently made voluntarily by the prisoner. In *R v Best* 14 in which the prisoner was convicted of theft by trick a charge to which he pleaded not guilty, Lord Alverstone C.J. dismissing the appeal stated.

"There is no ground for interfering in this case. It is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found on him and the question might give an opportunity of him saying and showing that the thing found on him is his own property. In our opinion, *R v Gavin* is not a good decision; it is too wide and requires qualifications." 15

From this decision and those in line with it, one may thus sum up that by early twentieth century, some judges affirmed the view that the absence of a caution, in itself, need not in all circumstances be deleterious to the evidential effect.

Practically and theoretically speaking, it was for these uncertainties engulfing the practice of interrogating prisoners that the law enforcement agents; the police, sought guidance on what the courts
would regard as proper conduct. Moreover the technique of questioning and the use of caution became so important with the increase of police forces, the literacy of police questioners and the use of police stations for interrogations. If anything the judges saw that policemen like other officers of the crown were individually responsible for their wrongs and were to be blamed for any impropriety committed in the discharge of their duty.

In seeking for guidance, Chief constable for Birmingham wrote to the justices in consequence of the fact that on the same circuit, one judge had censured a member of force for having cautioned a prisoner while another judge had censured a constable for omitting to do so. In a letter dated 26th October 1906, the then chief Justice, Lord Alverstone as a reply wrote to the chief Constable of Birmingham and it read:

"There is, as far as I know, no difference of opinion whatever among any of the judges of the Kings Bench Division upon the matter. The practice which has been definitely followed, and approved for many years, is that whenever a constable determines to make a charge against a man he should caution him before taking any statement from him. Whether there is any necessity for a caution before a formal charge is preferred must depend upon the particular circumstances of the cases: no definite rule can be laid down. In many cases, a person may wish to give an explanation which would have exonerated him from any suspicion, and he ought not be prevented from making it. On the other hand, there are cases in which it would be the duty of the constable to caution the person before accepting any further statement from him, even though no charge has actually been formulated. The only other observation I have to make is that I think objection may reasonably be taken to the words, "against you" in the caution quoted in the rules, extracts from which you sent me. A statement made by a prisoner may frequently be used as much in his favour against him. I therefore, think it better that the last two words of the caution referred to should be omitted, and that the caution should end with the words "be given in evidence."

/15...
Pursuant to this correspondence, the first four Judges' Rules were formulated. These were increased to nine in 1918. Their formulation afterwards remained unaltered until 1964, 24th January when they were restated and published in the Home Office Circular No 31/1964.\footnote{18}

The circular besides setting out the new statement, also contains Administrative Directions on Interrogation and the Taking of Statements.

However, in Zambia today, the Judges' Rules that are in use are the Pre 1964 ones. There are nine Rules altogether and they are reproduced in the Zambia Police law and Police Duties Manual and in the Zambia Police Instructions.\footnote{19} We may at this point consider a discussion of some of these nine rules applicable in Zambia.

The general interpretation of the Pre 1964 Rules accepts closely the common law rules concerning the interrogation of suspects. We noted in the early part of this chapter that under common law no statement was acceptable in a court of law unless it was made voluntary, that is free from any fear of consequence or by any hope of benefit exercised by a person in authority. Tallying with the common law position, the rules also recognise the interrogation of persons in custody and those who are not in there. A clear and distinct phenomena in which each may arise has been afforded by the rules as we will shortly observe. For the actual rules refer to Appendix A.

The strict interpretation of Rule 1 is that it permits the police to question freely while they are attempting to discover who has committed the crime, and citizens are considered to be under a duty to respond to help the police apprehend the offender. This rule...
does not seem to qualify the right to question a suspect without caution whether or not the person has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted. The rule in its obscurity seems to be promoting the practice of detaining citizens for questioning as lord Devlin noted;

"It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police"\(^{20}\)

Rule 2 emphasizes that a warning need not be given to the suspect until the police has made up his mind to charge such a suspect with an offence. This rule seems to be of two folds. It in the first place facilitates preliminary inquiries which may not be related in their minds of infact to any suspicion against the person the police are interviewing to proceed without the formality of caution. In the next step, it ensures that once suspicion has fallen on a person whom the police are interrogating, his change of status in that respect should be formally brought to his notice. It has been argued that Rule 2 does not concern itself with protecting voluntariness of a confession but only with the administration of the caution. This may be true because it is possible to have a confession voluntary made without and that even where the caution is administered, a confession may be one which is involuntary.

In as far as custody and the suspect or the accused are concerned, Rule 3 provides for the questioning of persons in custody. A strict interpretation of the Rule is that, as long, as a person is in custody questioning must be preceded with a caution not withstanding that he is charged or informed that he may be charged. Forinstance in R V Booker,\(^{22}\)
the appellant after he had been arrested on a different charge, there
was found in his house a number of items which included portions of
clothing which had belonged to the deceased. They were then taken
to the police station where appellant was detained. The policeman
after identifying himself to the appellant said; "I now desire to
show you certain articles which have been found in your lodgings.
You need not give any explanation in respect of the items unless you
desire to do so. Should you give any explanation, it will be taken
down in writing and may be given in evidence. "The superintendent
said that when he put that caution, he had not made up his mind to
charge the appellant. The appellant went on to make various statements
which were given in evidence by the police. Delivering judgement,
Lord Chief Justice Hewart stated:

"....he said that he didn't intend to charge the
the appellant but that if he had failed to get
answers to the questions which he was putting,
he might charge him. The appellant was undoubtedly
a suspect..... But it is said that not only was
he a suspect but that he was at that time also in
his custody, although not on the charge of murdering
the boy, thus Rule 3 and not Rule 1 applies.
Rule 3 provides that "Persons in custody should
not be questioned without the usual caution
being first administered. "The superintendent gave
the caution which I have mentioned and in such
circumstances, the appeal must be dismissed"23

In a similar vein, the Zambian case of Chileshe V The People24 in
which the accused was convicted of office breaking contrary to
S273(i) of the Penal Code of which the conviction was solely supported
by the accused's confession admitted in evidence, the court said that
a person in custody whether he has been charged or not has to be
cautions before any interrogation takes place.
Thus, once the person concerned is so suspected as to be chargeable whilst he is in the custody of the police shouldn't be trapped into increasing the evidence against him. He should be cautioned.

Rule 8 is intended to forbid practices by policemen which may amount to cross examination of the accused after being arrested. This has been of great concern to most judges for over a long time now.

For instance, at the beginning of the twentieth century, Avory J. castigated this practice in *R v Gardner and Hancock* when he stated:

"We are told that a practice prevails with the police by which after prisoners have been separately charged, they are again charged jointly with the same offence, and statements made by their fellow prisoners behind their backs are read over to the prisoner who is incriminated. This practice must be condemned, as it amounts to cross examination after arrest, and the police have been constantly told that a prisoner after having been arrested and charged must not be cross examined." 

As to the taking of the statement, Rule 9 provides that a suspect who desires to make a statement should be told that it is going to be a written record of what he says. The police officer is obliged to take down the exact words uttered by the prisoner in order to avoid the production by the police of a statement containing what the police think the prisoner said or perhaps what they wish that he had said.

Having established the background of the rules and the interpretation of some of these rules, we are left with nothing but to appreciate the status of these Judges' Rules. Much has been said about the status of the Judges' Rules but the earliest description on this
matter was given by the Court of Criminal Appeal in R V Voisin where it was said by lawrence J. that;

"...In 1912, the Judges, at the request of the Home Secretary drew up some Rules as guides for police officers. These rules have not the force of law; they are administrative directions, the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice.

It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these Rules may be rejected as evidence by the Judges presiding at the trial"28

On the same matter, in the Zambian case of Chilufya V The People in which the appellant was convicted on one count of store breaking, the issue arose as to whether Judges' Rules were rules of law in Zambia. Silungwe, C.J. delivering judgement in the Court of Appeal said:

"In Zambia, we follow the 1912-18 Judges' Rules and not the 1964. Judges Rules are not rules of law; they are rules of practice drawn up for guidance of police officers"30

And in an earlier case on the status of the rules. Magnus J. in Chulu V The People also delivering judgement for Court of Appeal had this to say;

"...I appreciate, of course, that the judges' rules are merely administrative and advisory and a breach of them does not automatically invalidate anything done in pursuance thereof"32

In this regard, one is left with nothing but to assume that the consequences of violating the rules will depend on the facts of each particular case. For instance in the case of Musongo V The People, Silungwe C.J. stated:

/20....
"...the Judges' Rules were formulated for the guidance of police officers. They put police officers on guard with regard to what type of conduct on their part will or will not be regarded by judge as improper or unfair.... It follows that failure on the part of a police officer to administer a caution constitutes an impropriety in respect of which a trial judge may exercise his discretion in favour of the accused."

Perhaps the major significance of the rules is that they provide a basis of rejecting confessions even when no coercion can be shown. They rather buttress the more general requirement of voluntariness not really based on hope or fear. The preference of applying the rules on a more discretionary basis is probably a reflection of human desire to ensure that standards of fair play are observed in each case. On this aspect of fairplay, it was commented on by Convoy, C.J. in Zondo V The People when he said:

"In deciding whether a statement made by an accused person to the police is admissible, the test which the court must apply is not whether the Judges' Rules have been infringed but whether the prosecution has affirmatively established that the statement was made freely and voluntarily. Even though the court is satisfied that a confession was made voluntarily, it nevertheless has a discretion to exclude such statement if obtained in manner unfair to the accused."

This chapter has disclosed that prior to 1912, no regulated uniform pattern of rules was imposed on police officers when handling suspects. They were established as a protection device for both the citizen and law enforcing officers when matters of criminal interrogation arose. In essence, the rules brought forward a standard observance required of the police and were premised upon a particular view of the law, only seeking to regulate legitimate methods of inquiry. This being
the case of the rules, we shall thus in the next chapter deal with the role that these rules have been played in our nation Zambia. Have they promoted the desired standard observance required or not of law enforcement agents?
FOOTNOTES


3. R V Priest (1847) 2 Cox. C.C. 378

4. R V Reason (1872) 12 Cox C.C. 228

5. (1893) 2 Q.B. 12

6. Ibid, Pg 15


8. (1885) 15 Cox C.C. 656

9. Ibid, Pg 657

10. (1893) 17 Cox C.C. 689

11. Ibid, Pg 690

12. (1898) 19 Cox C.C. 16

13. Ibid, Pg 17

14. (1909) 1.K.B. 692

15. Ibid, Pg 693


18. O.P.cit G. Abrahams (1964) Pg 39

19. (PP 182-186) and (PP 92-93) respectively.

20. Shaaban B in Hussein V Chong Fook Kam (1969) 3 All ER 1626 at 1630
   New Law Journal, Vol 121
   No 5506, 1971, Pg 1039

22. (1924) 18 Cv App Pg 43
23. Ibid, Pg 49
24. (1972) ZR Pg Po
25. (1915) 25 Cox C.C. 221
26. Ibid, Pg 223-224
27. (1918) AII ER Pg 491
28. Ibid, Pg 494
29. (1978) ZR 138
30. Ibid, Pg 139-140
31. (1969) ZR 128
32. Ibid, Pg 130
33. (1978) ZR 266
34. Ibid, Pg 269
35. (1964) NRLR97
36. Ibid, P101
CHAPTER THREE

THE EFFECTIVENESS OF THE JUDGES' RULES

In the preceding chapter, we discussed the historical background of the Judges' Rules and the status that has been accorded to them since their inception. Most of all, we noted that the rules are in effect instructions to the police force and any other law enforcing organs on how to handle suspects and accused persons during investigation and interrogation sessions. More pronounced was the notion that these rules operate as rules of practice and not of law such that the discretion to disallow or allow a statement tendered by the accused to the police whether the Judges' Rules have been breached or not lies entirely in the Judges' discretion.

This chapter examines the yardsticks that Judges' use when determining whether there has been a derogation from the rules by law enforcing agents, so to say when the discretion to disallow or allow a confession arises. And more importantly, the chapter will explore the actual role played by these rules in this nation in the hope of gauging as to whether they afford a negative or positive contribution to the administration of justice.

It has been advanced in numerous judicial decisions that the court need not automatically in every case make a decision whether or not in the exercise of its discretion to exclude the confession. In every case, a basis for exercising its discretion must just be established. The facts must disclose that the accused was unfairly or improperly
treated in all the circumstance establishing a picture to the effect that it would be unfair to admit the confession or statement by the accused. There are many cases which have dealt with the exercise of the Judges' discretion with respect to statements made by the accused to the Police in Zambia. For instance, Clayden F.J. in an earlier case of Mbopeleghe V R\(^1\) explained:

"...If there is some obvious circumstances connected with the evidence which might indicate to a judge that there is danger of unfairness no doubt the matter would be considered.... But where, as here, there is nothing to indicate unfairness.... there is not in my view valid ground for complaint because there isn't a discussion by the trial judge of a discretion to reject"\(^2\)

As if the words of Clayden F.J. were not enough in the aforementioned case, the Supreme Court of Zambia later stated in Sekeleti V The People\(^3\) that where the only improprieties alleged were assaults and once the court satisfies itself that the alleged assaults did not take place, there remains no basis for the exercise of its discretion.

Perhaps the most outstanding judicial pronouncement on the exercise of the judge's discretion with respect to statements or confessions made by the accused to the police or any other law enforcing agents was echoed in the case of Zeka Chinyama and others V The People\(^4\) in which the appellants were convicted of murder. In explaining when the discretion arises, Baron, D.C.J. said:

"In practice, when dealing with an objection to the admission of an alleged confession, the trial court will satisfy itself that it was freely and voluntarily made; if so satisfied, the court in a proper case must then consider whether the confession should in the exercise of its discretion be excluded, notwithstanding that it was voluntary and therefore strictly speaking admissible, because in all the circumstances the strict application of the rules as to admissibility would operate unfairly against the accused."
He then went further and said, "We have said "in a proper case," the position is not as was argued before us that the court must automatically in every case make a decision whether or not in the exercise of its discretion to exclude the confession. For instance, where the only impropriety alleged or suggested by the evidence, is assaults inducing the confession, once the court has rejected this allegation and satisfied itself that the confession was voluntary, there remains no ground on which the court's discretion could be properly exercised."  

From the ongoing discussion, we may thus, infer that the circumstances in which the discretion to exclude a confession made to a police officer falls to be considered are when such confessions have been held to have been voluntarily made but there has been a breach of the judges' rules or other unfair conduct surrounding the making of the confession, either on the part of a police officer or some other person, which might indicate to a judge that there is danger of unfairness.

From this, the precise test as to whether the discretion should be exercised by the court depends on whether adherence to the strict rules of admissibility would work unfairly against the accused or else this will depend on the facts of each case. But where does the court draw the inference of unfairness against the accused?

Obviously, the only assumption we can begin with is that, unfairness arises from the circumstances surrounding the obtaining of a statement by the police from the accused or the suspect. On this matter, several cases have dealt with the aspect of unfairness but hardly have these
decisions established a clear cut of what really amounts to unfairness. Each case brings forth its own interpretation of unfairness.

Since Zambia lies in the common law jurisdiction, English cases may persuasively be applied in this country. As a starting point therefore, we may for the sake of our discussion borrow two English cases in which an almost exhaustive illustration of unfairness was made.

The case in mind is that of Callis V Gunn. In that case, Lord Parker in explaining what could amount to unfairness stated:

"In any criminal case, a judge has a discretion to disallow evidence, even if in law relevant and, therefore, admissible if admissibility would operate unfairly against an accused. I would add that in considering whether admissibility would operate unfairly against an accused, one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused."?

In as much as these words by Lord Parker seem to be laying a general base for determining unfairness, they however, fall short of clarity. For instance, it would be wrong to have a general form of "oppression", because this in an individual case depends on several elements. Perhaps this is the reason why Sachs J. in R V Priestly said that oppression may include issues such as unnecessary lengthy time of questioning and whether the accused person had been given proper refreshment or not. He then concludingly stated that what would be oppressive in respect of a child or an old man may turn out not to be so in regard of a tough person and an experienced man of the world. We may thus, state that unfairness is not a unique thing at all. Strict considering of the facts of each case may help us determine whether the accused was fairly or not fairly treated by the police.
Focussing on Zambian cases, we also note that just like English decisions, there appears no settled form of unfairness. Each case is always considered on its own facts to determine the same. A first suggestion or rather a principle of law has been to the effect that, where two confessions are made and the first is held not to have been freely and voluntarily made, the second will be equally inadmissible even though there has been no fresh inducement unless it is shown that the previous inducement has ceased to operate on the mind of the accused. The prosecution must prove beyond reasonable doubt, any form of inducement which might have caused the accused to make the statement. In the case of Chigowe V The People, the appellant was convicted of the murder of one Mudekorozwa. Upon further enquiries, the appellant, who was then in detention under the preservation of public security regulations, was taken from the Lusaka Central Prison to the Central Police Station for interrogation during which a warned and cautioned confession statement was recorded from him. The conviction in the High Court was solely based on this confession statement. The accused in objecting to the confession alleged that he was beaten on May 9th, 1975 by the policemen and that that fear and pain persisted upto June 12th 1975 when the second statement confession was recorded from him. He argued that he sustained injuries in the ears which was supported by his further evidence that he saw the doctor in clinic at the prison. The trial court ruled that since the statement was taken one month after the alleged beatings, the fear that the accused might have had spent itself by effusion of time. In allowing the appeal, Bruce-Lyle, J.S. stated:
"We hold the view that in considering whether the earlier threat or inducement had dissipated at the time of the taking of the confession statement, the prosecution must show that the earlier inducement ceased or else the statement made subsequent to the threat or inducement is not admissible.... It was not controverted that the appellant had defective hearing while in custody and that this defect was present at the time of the recording of the confession statement and that the defect persisted to the time of the trial and there is evidence on record by the appellant that he sustained the injury to the ears when he was beaten up at Police Force Headquarters on May 9th 1975. If the Learned trial judge had properly directed himself, we are not in the position to say that he would inevitably have held that the effects of the beating which the appellant received in May had dissipated when he made the statement in June and that no fresh inducement was involved." 11

In this respect, where there is a continuous flow of an inducement operating on the mind of the accused, no any statement tendered in such circumstances will easily be admissible for this is likely to work unfairly against the accused person. This is one instance of unfairness that the courts in Zambia have noted.

It has also been the courts trend in Zambia that unnecessary prolonged questioning of the accused in custody amounts to unfairness. As to the duration of the questioning involved, Blagden J.A. (as he then was) in the case of Zondo V R12 stated:

"...prolonged police questioning may amount to an inducement, since it may excite the hope in the victim that it will be discontinued if he makes a statement and the fear in him that it will continue if he does not make a statement.... In each case, whether the questioning has amounted to an inducement, that is to an overbearing of the will of person questioned to remain silent must be determined by reference to the nature and extent of questioning and the circumstances in which it took place."13

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In an interesting case of Chulu v The People, both accused were detained in the police cells from the morning of August 19th until about 7 p.m. on August 20th without food or drink and were interrogated several times for quite substantial periods. Both allegedly made confessions. Excluding the confessions Magnus J. said:

"When an accused has been kept in custody for a long period without food and has been subjected to interrogation for long periods, I think that these are circumstances which are unfair to the accused and a statement obtained in such circumstances is open to the gravest suspicion. For that reason alone, I feel that those statements ought not to be admitted and in the exercise of my discretion, I direct that they should both be excluded." 15

Furthermore, it has also been established that failure to administer a caution to the accused in custody may amount to unfairness.

But at what point does a person become in custody of the Police? In Chileshe v The People, the accused was convicted of office-breaking contrary to section 273 (1) of the Penal Code, the conviction being supported solely by the accused's confession admitted in evidence. The accused made the confession just when the police officer concerned was trying to discover by whom the offence in question was committed and he merely asked the accused whether he had any knowledge of the crime. In dealing with the question of admissibility of the appellant's alleged confession, the trial magistrate had recourse to the Judges' Rules, 1964, Rule 1. which states, "When a police officer is trying to discover where or by whom the offence has been committed he is entitled to question any person, whether suspected or not from whom he thinks

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useful information may be obtained. This so whether or not the person in question has been taken into custody as long as he has not been charged with the offence or informed that he may be prosecuted." At no time since he was taken to help in the inquiries was he told that he was not in custody or that he was free to leave for his home if he so desired. Chomba J. allowing the appeal said that the appellant to all purposes and intents was thus in custody and going by Rule 3 of the Pre 1964 rules, persons in custody are to be questioned only after the usual caution has been administered. Since what applies in Zambia are the Pre 1964 rules, the trial judge misdirected himself by considering the 1964 Rules. Since, it was established that the appellant was in custody, he was to be cautioned before any interrogation took place according to the Pre 1964 rules applicable in Zambia. Hence, the appellant's confession was excluded.

In another case in similar vein of Nalishwa V The People whose facts are that immediately after the discovery of the deceased at 6 p.m. on 6th April, 1971, the appellant was tied to a tree by his fellow villagers. He remained tied to the tree until he was taken into custody by the Police some hours later. He was questioned by the police without any warning being administered for the whole of that night and the following day. At 6 p.m. on the 5th, he made a warned and cautioned statement. Baron J.P. allowing the appeal said that it was the clearest possible impropriety on the police officer in questioning the appellant when in custody without administering a caution and in questioning him throughout the night and the following day before
finally obtaining a statement on the evening of the 5th. He went on to say that had the trial judge considered this matter, he might have exercised his discretion in favour of the appellant and there was enough evidence to support such a decision. This case seems to be a proper case for both decisions that failure to administer a caution and prolonged questioning of the accused in custody may operate unfairly on the part of the accused person.

But in *Mbopeleghe v R* [18] it was said by Briggs F.J. that principles of fair conduct underlying the judges' rules always existed independently of them and that the issue in every case must always be whether the accused was so unfairly or improperly treated in the circumstances that evidence ought to be rejected.

In consequence of these cases on the judges' discretion, I was afforded a calm opportunity to talk to two Lusaka based judges of the subordinate court namely Mrs Sakala and Mr Chiwaya on what to them in criminal investigations may be considered as unfairness. Mrs Sakala, Magistrate Class 1 began by stating that police current irregular conduct is an aspect that has evolved from colonial era. Just like colonial policemen especially whites believed that you can't get anything out of an African without pressure, so do the present police officer. She then emphatically stated that in all cases she has handled during her seventeen years on the bench, police have tried to get advantage of the ignorant African whom it is assumed does not know his rights in relation to police investigations. She stated, "It's very seldom to come across cases in which citizens such as Lawyers and Ministers..."
have tried to challenge, police brutality and the like for policemen know that these people are aware of their rights."

In order to determine unfairness, Honourable Mrs Sakala stated that she in most cases apply three steps. According to her, the first thing she does whenever an accused is brought before court is to find out when he was arrested so as to determine how long the accused has been kept in custody. On this point she strongly believes that the amount of time spent in custody by the accused has a bearing on what the accused will say to the police officer when being interrogated. Usually, the longer the accused is kept in custody, the weaker becomes his will to confess hoping that he might be set free after that. In her second step, she stated that she pays much attention to the physical appearance of the accused when he comes for plea so as to note if he manifests any signs of "not feeling well" or "been beaten." She said that if the accused has been ill treated in custody, she notices as soon as he walks into the dock. She said, "usually they fail to walk properly." Finally, she said that if the prosecution advances an intention to tender the accused's confession, she quickly stops them and asks the accused whether he has any objection to it or not. It is at this point when truth comes out. On this point, perhaps what governs her is the principle laid down in Chisokola V The People\(^9\) which says that where a police officer is about to give evidence as to an alleged confession, the trial court ought to inquire whether there is any objection to the admission of that evidence.
She finally said that more of ten than not, accuseds get convicted inspite of inadmissible confession because the police often produce other relevant evidence. This happens because in Zambia the fruits of the poisoned tree are accepted.

Mr. Chiwaya, Magistrate Class 2, began by saying that most of police irregular condit is a consequence of frustrations such as low salaries and stagnant promotions. It is for this reason that they are lazy to carry out an extensive investigation on a particular case. They are usually on empty stomachs and can't walk long distances to gather evidence. They would rather bring the suspect to police station as soon as an arrest has been effected, torture him and make him confess and that becomes their reliable evidence. According to him, the best time to determine whether the accused was fairly or unfairy investigated is to pay recourse to what happened from the time of arrest to the time of detention. He said, "The manner in which the suspect is arrested and treated before he reaches the police station will have a great bearing on whatever he utters to the police at the police station for by the time he reaches the station he is already put in a shape to implicate himself in fear or further man handling of him". Like Mrs Sakala, he too condemns physical brutality.

In all these circumstances and the cases aforestated, it must be noted and remembered that it is up to the judge to interpret the phenomenon of questioning so as to hold the burden discharged or not as the case may be. However, whilst admissibility is being considered, the judge
certainly also has the opportunity of considering the evidential value of the thing if admitted. As a result, in most cases the issue changes from one of admissibility to that of cogency.
DO THE JUDGES' RULES SERVE A USEFUL ROLE IN ZAMBIA?

Many observers believe that in general, there is widespread compliance with the Judges' Rules by Law enforcement agents. On this aspect, a substantial part of the general public that the author came into contact with suggested that the police violate the rules frequently but deal with most suspects tactfully enough to create an appearance of compliance. On the other hand, a handful of the general public argued that the violation that occurs is inevitable and urged the realities of law enforcement be candidly acknowledged by extension of the right to question.

The majority of the law enforcement officers, the police to be precise, whom the author had an opportunity to share talks with argued that due to the nature of their work which subjects them to numerous public duties, strict or even mere observation of the judges' rules amounts to a definite anomaly for the rules go to the depth of hampering their duties. They feel the need of a power to hold a suspect before there is sufficient evidence on which to prefer a charge is obvious. On this point, a Sub Inspector at Chelstone Police who declined to be mentioned said that if a suspect is released, may escape and the crime on which he is investigated may be too serious to warrant the grant of bail. He further stated that it was via pre-arrest questioning of suspects that in most cases they have managed to effect, detect and prevent criminal activities. In his remarking words he said, "The dominant issue is the law in action - how the police do behave - rather than the law in books - how they should." According to the Sub Inspector
remark, one is left with nothing but to conclude that it is not what the Judges' Rules stipulate that matters to police officers but what in a given circumstance an individual police officer may regard to be proper a thing to do.

Fortunately enough, I landed myself in the hand of Lusaka Central Police; Criminal Investigations Officer, Mr Kennedy Mbeha. Asked on whether his subordinates have recourse to the Judges' Rules, he partially agreed. In his opening remarks he said that Judges' Rules are part of the courses taught at Lilayi and that at the time of passing out, most police officers know them by heart. He further said that these rules are taught at our training centre because we are members (Zambia) of the International Community. In criticising the sanctioning of the Judges' Rule in Zambia, he said that the rules were formed in an absolute different environment in the United Kingdom in which both the type of crimes and criminals differ such that importing the rules in an exact form as they were formulated becomes absurdity. Asked on whether this was really enough a ground to warrant the breach of the Judges' Rules, he commented, "Clearly unnecessary and, therefore, illegal police conduct such as breaching of the Judges' Rules during arrest and interrogation of suspects occur for a variety of reasons. Some Police officers resort to using excessive forces to control an arrestee who shows any resistance. Others during interrogation sessions, they are faced with hardcore criminals such as robbers and motor car thieves who are usually reluctant to confess at a soft touch. The only way of getting evidence out of these people is certainly by pressing them, thus torture becomes inevitable".

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At the same police station, a sergeant in the same department stated that in Zambia, economical problems have contributed to the uncertain conduct by the police officers investigating crimes. One such contributing factor was the issue of transport. Most of the vehicles are packed at the Central Police Station either because there is no fuel or can't be repaired. Police officers are forced to walk or cycle long distances whilst investigating perpetrators of crime such that by the time the accused is found, the officer is already both tired and angry and has no choice but to brutally induce the suspect to confess there and then without administering any warning or caution to him for this is usually regarded as boring and time consuming.

However, a Lusaka based lawyer took a different perspective from that advanced by police officers. He argued that Judges' Rules in Zambia are more often breached than they are understood, by law enforcing officers. Mr. Andrew Luo pointed out that most of the rules are vague such that a police officer has no choice but to ignore them or interpret them in his own understanding. In supporting his argument, gave an example of Rule 2 of the Judges' Rules which states; "Whenever he has made up his mind to charge a person with a crime he should first caution such a person before asking any questions or any further questions, as the case may be."

According to Mr. Luo, this rule promotes subjective thinking on the part of policemen such that each individual officer will exercise his discretion and continue questioning the suspect.
until according to his own satisfaction a disclosure of conclusive
evidence is obtained. This as we have seen from the preceding
chapter in the case of Chuulu V The People\textsuperscript{20} leads to unnecessary
and prolonged detention of the accused, a situation that the courts
have come to regard as unfair on the part of the accused. Perhaps
this is why Baron D. CJ had this to say in Zeka Chinyama V The People\textsuperscript{21}.
"It is necessary for us to comment on a practice of investigating
officers which is to be deprecated. The Judges' Rules concerning the
administration of a caution before inviting a reply to a charge seem
to be regularly followed; on the other hand, the rules concerning the
proper conduct of police officers in relation to persons in custody
and persons whom it may be decided to charge are not followed\textsuperscript{22}

On this same issue of vagueness, an old time lecturer in the School
of Law stated;

"... a quick look at the Rules will show that a good
number of them are vague, that is they are not self
explanatory. It is not surprising that these Rules
are bent or disregarded everyday\textsuperscript{23}

In a similar vein, the author had ample time to scrutinize the
implication of some rules. It was brought to light that nothing
exists in the rules which deals with the practice of detention for
questioning despite the seeming acceptance of the practice. It was
also discovered that the rules are absolutely silent on the taking
of statements from persons under the influence of drugs or alcohol
and yet most of the Zambian criminals or suspects are in the habit
of feeding on drugs as a stimulant during the commission of crimes.
Furthermore, just how definite the police may be in reducing the
statement to writing so as to maintain the accused's meaning remains questionable. What is usually produced in court as evidence in as far as the confession of the accused is concerned is to a large extent an edited version of the police. This may work to the diadvantage of the accused.

Despite the criticisms levelled at the Judges' Rules, one thing still remains unchallenged, that is, the Zambian courts, have more often than not played an important role in the enforcing of these rules. They have been very adamant with the citizens welfare and civil rights. They have now and then castigated unruly police conduct on individual rights. For instance we have seen from decisions in this paper that detention for questioning and keeping the citizen in custody without food and water have received the greatest or heaviest condemnation from the bench. In short, the Zambian courts have hardly allowed a breach of the rules to go without a say about it such that the rules are more often treated as rules of law and not of practice.

Strictly speaking, when one considers seriously the criticisms put at the Judges' Rules, he is left with nothing but to agree with the abolition of the rules, due to their unreasonable contraints in terms of duties the law enforcement officers are expected to perform. It is overtly clear from our discussion that the rules seem to favour the suspect as he is still privileged against self incrimination. In a nut shell, I concur with many Lawyers and law enforcement agents belief that the suspect should be under an obligation to say something when questioned by police and be obliged to give evidence and be subjected to cross examination.
As much as we appreciate that the law must strive to reconcile two highly important interests which are liable to come into conflict namely the interest of the citizen from irregular invasions of his liberties by the law officers and those of the state to achieve evidence and pursue justice, it should be noted in concluding this chapter that the protection of the citizen should primarily be that of innocent ones and not of the guilty heads. These are the competing interests that the judge must be seen to uphold and treat accordingly.
FOOTNOTES

1. (1960) R & N 508
2. Ibid, Pg 513
3. Supreme Court of Zambia, Case No. 36 of 1974 Unreported
4. (1977) ZR 400
5. Ibid, Pg 426
6. (1963) 3 Aller 677
7. Ibid, P 680
8. (1965) 51 (v App 1
9. (1965) ZR 91
10. (1977) ZR 21
11. Ibid, Pg 21 - 22
12. (1963-64) Z & N.R.L.R. 97
13. Ibid, Pg 110
14. (1969) ZR 128
15. Ibid, Pg 129
16. (1972) ZR Pg 48
17. (1972) ZR P 26
18. (1960) R & N 508 at 519
20. (1969) ZR 128
21. (1977) ZR 400
22. Ibid, Pg 412
CHAPTER FOUR

CONCLUSION AND PROPOSALS FOR REFORM

In this paper, it has been seen that in the whole of commonwealth jurisdiction, no standard of guidance as to the manner of interrogating suspects and the accused persons existed prior to 1912. What was, however, in force were Common Law rules governing the admissibility of confessions. We have noted that under Common Law, statements made by the accused were regarded as both reliable and cogent evidence of guilt and indeed were admissible where they were given freely and voluntarily.

The Judges' Rules in particular, though not carrying the force of law, came into establish a procedural manner of handling suspected persons. This was necessary and complied with the principle that a person is not guilty until proven so beyond reasonable doubt by a court of competent jurisdiction. They were thus formulated as one important mode of controlling power with an effort to protect constitutional rights. For instance, the significance of excluding an involuntary confession is that it eliminates the possibility of false confessions from a prisoner, regulates fair police practices and restricts police temptation to obtain a confession anyhow with hope that nevertheless will be admitted in evidence. The ideal theme of the rules has been noted as being based on fairness in as far as the law enforcement agents and the accused meet under the umbrella of criminal justice.
On the aspect of fairness, this paper has attempted to demonstrate that this crucial issue lies in the discretion of the judge as to whether the confession was fairly obtained or not to render it admissible in court. However, it has been a judicial trend that the discretion usually arises in two circumstances. The first is when there has been a breach of the judges' rules on the part of law enforcement agents and secondly where the strict admission of the statement will operate unfairly against the accused. On this aspect, Charles J. in R V Kahyata\(^1\) said; "The most devious forms of inducements which viciate confessions are physical torture and prolonged questioning under the so called third degree process whereby the will of a suspect not to incriminate himself is broken"\(^2\).

It must however, be remembered that the two aforementioned instances of when the judges' discretion arises are not the precise definitions just as we noted in Zeka Chinyama and Others V The People\(^3\) that circumstances in which the reception of evidence would operate unfairly against an accused depends on the facts of a particular case and do not lend themselves to precise definitions.

It is the role of the Judges' Rules in this nation that the writer centred his work. It has at this point in the writers view become evidently clear that the Judges' Rules are not much of a safeguard to a person undergoing questioning in the seclusion of a police station although police officers regard these rules with considerable irritation. The rules have more often than not been regarded as absurdity by police officers. For instance, most if not all policemen consider it ridiculous to stop an accused and tell him that he need not say anything when in fact what he is blurring out are his guilty secrets.

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Now and then persons are kept in custody for lengthy periods without food and are denied sleep. It is suggested that this is so because the present Judges' Rules have failed to provide a mechanism via which the handling of suspects in police custody may be observed by outsiders.

The writer also finds the status accorded to the rules as being insufficient to render an effective form of criminal justice. As we have already noted, the rules do not have the force of law but only qualifies to the extent of being administrative directions guiding police officers, so that non-conformity to rules may render answers and statements obtained liable to be excluded from evidence. It is observed that:

"If it makes so much difference to the conduct of police interrogations whether or not they are conducted under "rules of Law," then the sooner we have rules of law the better"4

The writer feels that in as far as human conscious is involved, anything that carries with it the force of law is much feared and observed than that with a force of practice.

Since the rules seem to be silent on various significant issues such as obtained finger prints whether obtained freely or by trick and the searching of the accused which in practice is the concomitant of arrest, too much unfairness exist in these aspects because the police officers rush to the not provided for so as to exercise their discretion without any castigations. There is yet another draw back on the sanctioning of the Judges' Rules in the sense that the rules are uncleared and vague as a result their interpretation

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differ from policeman to policeman and from judge to judge especially those rules calling subjective thinking such as Rule 2 discussed in the preceding chapter.

In the least, the rules do not provide for independent observers during interrogation such that those who do not know their rights are easily made to trap themselves. This is the gravest thing that can happen to man. This does not call for lawyers because it would be expensive for the accused but just for other independent observers strictly for this job.
PROPOSALS FOR REFORM

In spite of all these criticisms advanced on the Judges' Rules, they shouldn't nevertheless be abolished for they haven't completely injured the aim of criminal justice. At most what we need is to reformulate the rules with respect to the Zambian crimes, policemen and criminals. These rules were formulated in England, a context which is purely distinct from ours such that adopting them just as they were initiated there is like going to England on a bicycle. You will reach but you won't be yourself neither will be the bicycle. Perhaps this is why Lord Denning in *Nyali V A.G.* stated:

"Just like an English Oak, so with English Common Law, you can't transplant it to the African continent and expect it to retain its tough character which it has in England. It will flourish indeed but it needs careful tendering, so with Common Law. It has many principles of manifest justice and good conscious which can be applied to the advantages of the peoples of any race, colour all over the world. But it has also many refines, subtleties and technicalities which are not suited to other folk. These off shoots must be cut away. In these far off lands, people must have laws which they understand and which they will respect. Common law cannot fulfill this role except with considerable qualifications.""}

In line with this suggestion is another one that our police officers and the training they undergo should be intensified and made to match with prevailing Economical, Social and Political transition of our nation. At most they should be taught to appreciate the individual civil liberties. What is actually being suggested is that police syllabus must include an understanding of Constitutional aspects of Human rights.
Also in line with this second suggestion is an indirect proposal that police resources namely their salaries must be substantial to avoid frustrating these officers. Frustration has got an effect on how much an officer will operate fairly with the accused. As one constable remarked at Lusaka town centre, "You don't expect me to observe precisely the law when am on an empty stomach and at the same time I have no relish at home. I will take the shortest initiative way"

On the aspect of vagueness of the rules, we suggest that once the Judges Rules it is decided that they shall be reformed, the Legislature should try to avoid the use of vague language in the wording of statutes. This may remove language which promotes subjective thinking and encourage objective understanding of the statutes or any other legal instrument concerning the rules. It is usually vagueness and ambiguities that contribute to the unfettered police discretion.

For the safeguard of the accused, it is suggested that the Judges' Rules must be reformed and provide in them the notion of conducting all questioning under tape recording. This might help in lessening police misbehaviour in relation to the accused before he is taken to the police station for in most circumstances, police brutality occur at the time of arrest such that by the time the accused reaches the police station, he is already shaped to incriminate himself due to preliminary softening-up techniques.
A further suggestion is that the concept of cautioning and the right to silence should at least only be limited to suspected persons instead of its current and general applicability to suspects and accused persons. This is especially supported by the criticism that the effect of the Rules is to favour the defence.

All in all, the accused or rather the general public must be educated on their rights especially their relationship with the police.

At this end of our paper, it shall be of such significance to reflect on our Zambian Philosophy of Humanism which states that man is the centre of all activities. He shall not be oppressed nor tortured and shall have the right to live.

As a result, from the time of arrest to the time of conviction, it must be ensured that the suspected person is treated according to our philosophy of humanism. Moreover, under our Constitution we are all innocent till proven guilt. No one must hence deprive the other such rights or else face serious repercussions. All citizens are equal before the law and no reason can be afforded in punishing the innocent one. In short the notion or practice of imprisonment before trial I condemn and will condemn forever for ours is a humanist and just society.
1. (1963) 64) ZNRLR 84
2. Ibid, Pg 85
3. (1977) ZR 426
   New Law Journal, Vol 121, No 5506, 1971, Pg 1039
5. (1956) 1 Q.B. 1
6. Ibid, Pg 8
LIST OF CASES

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1. Judges' Rules

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APPENDIX A

JUDGES' RULES

Interrogation of Suspects.

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

(1) When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

(2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions, or any further questions, as the case may be.

(3) Persons in custody should not be questioned without the usual caution being first administered.

(4) If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence".

(5) The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence". Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.
(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

(7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

(8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply, the usual caution should be administered.

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

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

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