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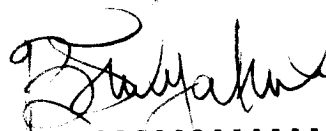
**MILITARY TRIALS AND RULES OF EVIDENCE**

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**MILITARY TRIALS AND RULES OF EVIDENCE**

by

**CLEMENT MWENDALUBI MUDENDA**

An Obligatory Essay submitted to the University of Zambia  
in partial fulfilment of the requirement of the Bachelor of  
Laws (LL.B) Degree Programme.

17TH NOVEMBER 1994

**PREFACE**

Lord Thring describes Military Law as "that law relating to and administered by military courts, and concerns itself with the trial and punishment of offences committed by officers, soldiers and other persons who are from circumstances subjected, for the time being, to the same law as soldiers."

Chambers Encyclopedia (New Revised ed) Vol. g at page 395 describes military law on the other hand as "a system of law which governs the members of the Army of a state, enabling discipline to be maintained and subjecting personnel to trial and punishment tribunals.

Much as the two definitions generally agree, military law, although a law peculiar to the defence force, is one recognised by domestic provisions of the law. The Defence Act, upon which the code of military discipline hinges, is an enactment of Parliament. The need for near uniformity of procedures between the civil courts and military courts meant that those rules considered pertinent to the application of equitable justice had to apply on equal basis on the two forms of courts.

Rules of evidence in particular have, as far as the two systems are concerned, to be strictly followed, except differences have been so specified by law on specific issues. This paper attempts to discuss the military trial system in areas where observance of rules of evidence is desirable, and

where such rules have not been observed, to the detriment of an accused and ultimately the cherished aim for justice in the disposal of cases.

An attempt has been made to contrast the Zambian military trial procedures with those of other common law jurisdictions.

An attempt has also been made to recommend changes that could be made in the disposal of cases in order to improve on rules that are so essential and yet regularly flouted.

NOVEMBER 1994

C.M. MUDENDA

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**DEDICATION**

**TO MY CHILDREN**

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**ABBREVIATIONS**

ASA	Appropriate superior authority
C M	Court Martial
C O	Commanding Officer
J A	Judge Advocate
P R	Procedure rules
J R	Summary Jurisdiction Regulations

## CHAPTER 1

## INTRODUCTION

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The Defence Act, Chapter 131 of the laws of Zambia is the statute that established the Zambia Defence Force, on 18 September 1964.

The Defence Act was enacted to, inter alia, "provide for the discipline of the Defence Force and for the trial and punishment of members of the force who commit such military offences as are set out in the Act, or civil offences; to make provision for the arrest of members of the defence force who commit an offence against any provision of the act and for the investigation of and summary dealing with charges preferred against such members; to provide for the creation and constitution of courts - martial to try persons subject to military law under the act, for the procedure to be followed by such courts-martial, for the awarding of punishments and for the confirmation, revision and review of proceedings of courts-martial and the review of summary findings and awards."<sup>1</sup>

There are four levels of "Courts" through which a case may proceed in the defence force, viz, Subordinate Commander,

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<sup>1</sup> Preamble to Defence Act Cap 131

Commanding Officer (CO), Appropriate Superior Authority (ASA) and Court Martial (CM).

Depending on the accused's rank and the gravity of the offence, he may progressively be made to appear before the "Courts" in like ascending order, or he may be made to appear in only one of the courts and have his case disposed of in much the same way as the civil justice system operates. The highest military court, the Court-Martial has the same status as the High Court of Zambia.

However, unlike in the civil court system where officers of the court are trained personnel with recognisable legal qualifications, members of the Defence Force conferred with powers to dispose of disciplinary cases do not possess any meaningful legal training. The most they possess is rudimentary military law training imparted on them during their basic military training and other administrative courses. The basic requirements of courtroom evidence gathering procedures and rules of evidence are alien to the culture of the average trier of disciplinary cases in the military legal system.

It is primarily due to this reason that legal questions arise in the disposal of disciplinary cases by the Military Courts. We shall now attempt to discuss the courts.

## SUBORDINATE COMMANDER

The Defence Act describes a Subordinate Commander as "... the Officer Commanding a squadron, company or equivalent sub-unit."<sup>2</sup> A Subordinate Commander derives his powers from statutory powers given a Commanding Officer (CO).

A CO may "... delegate to a subordinate Commander, whatever his rank may be, who is under his command and directly responsible to him in disciplinary matters, the power to investigate and deal summarily with charges with which he himself may so deal."<sup>3</sup>

A subordinate commander will, ideally, be an officer holding the rank of major. In some instances however officers of the rank of Lieutenant have held such appointment and have therefore had powers to try offenders delegated to them. The Subordinate Commander will have powers to investigate and deal with a charge brought up against soldiers up to the rank of Corporal,<sup>4</sup> otherwise he will refer the case for trial before the CO. As explained in the introduction earlier on, knowledge of law is not a qualifying fact for appointment as Subordinate Commander.

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2 Regulation 2, Summary Jurisdiction Regulations, Defence Act

3 Regulation 4(1) *ibid*

4 Regulation 11 (I), Summary Jurisdiction Regulations, Defence Act

Subject to any restriction which may be imposed by the CO, a Subordinate Commander may award the following punishments: (a) if the accused is a non-commissioned officer below the rank of Sergeant,

- i) a fine of a sum not exceeding the equivalent of seven days' pay;
- ii) reprimand or admonition;
- iii) where the offence has occasioned any expense loss or damage, stoppages not exceeding twenty kwacha;

(b) if the accused is a private soldier,

- i) a fine of a sum not exceeding the equivalent of seven days' pay;
- ii) where the offence has occasioned any expense, loss or damage, stoppages not exceeding twenty kwacha;
- iii) confinement to barracks for a period not exceeding seven days;
- iv) extra guards or pickets;
- v) admonition<sup>5</sup>

During the trial, a soldier is not entitled to legal counsel and has to prepare his own defence. The trial is conducted orally and the proceedings are not recorded in writing.

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5 Regulation 11 (2) S J R, Defence Act

The Subordinate Commander investigates the case without the assistance of any prosecutor but proceeds to hear evidence presented by the prosecution witnesses, asking questions where the need for any clarification arises.

Problems have been known to arise from this form of investigation but these will be discussed in latter chapters.

#### COMMANDING OFFICER

A Commanding Officer (CO) in relation to a person charged with an offence means the officer for the time being commanding a unit or detachment to which the person belongs or is attached.<sup>6</sup>

A CO is in practical terms an officer of the rank of Lieutenant Colonel appointed to act as so. He has powers to try a non-commissioned officer, soldier or civilian.

The CO shall hear the evidence himself. "Each prosecution witness shall give evidence orally in the presence of the accused; the accused shall be allowed to cross-examine any prosecution witness; the accused may on his own behalf give evidence on oath or may make a statement without being sworn; the accused may call witnesses in his defence, who shall give their evidence orally and in his presence;

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<sup>6</sup> S.84(1)(a), Defence Act

the evidence shall not be given an oath unless the CO so directs or the accused so demands.<sup>7</sup>

If he records a finding of guilty the CO may award one or more of the following punishments;

- a) if the accused is a non-commissioned officer,
    - i) a fine of a sum not exceeding the equivalent of seven days' pay;
    - ii) severe reprimand or reprimand;
    - iii) where the offence has occasioned any expense, loss or damage, stoppages;
    - iv) admonition;
  - b) if the accused is a private soldier,
    - i) detention for a period not exceeding twenty-eight days, or, if the accused is on active service, field punishment for a period not exceeding twenty eight days;
    - ii) a fine of a sum not exceeding the equivalent of seven days' pay;
    - iii) where the offence has occasioned any expense, loss or damage, stoppages;
    - iv) confinement to barracks for a period not exceeding fourteen days;
    - v) extra guards or pickets;
    - vi) admonition
- 

<sup>7</sup> Rule 7, PR, Defence Act

A CO may dismiss a charge if he is of the opinion that there is insufficient evidence against an accused. Where he is of the opinion that there is sufficient evidence against an accused and he does not have powers to award punishment against the accused, or the offence committed is one that merits punishment in excess of powers conferred on him, the CO shall refer the case for trial before a higher authority,<sup>8</sup> or Court-martial.<sup>9</sup>

Where the CO submits to a higher authority a charge against an officer, or warrant officer or he has remanded a non-commissioned officer, a private soldier or a civilian for trial by Court-Martial he shall send to higher authority;

- a) a copy of the charge on which the accused is held;
- b) a draft charge sheet containing the charges upon which the CO considers that the accused should be dealt with summarily or tried by Court Martial;
- c) the summary or abstract of evidence;
- d) a statement of the character and service record of the accused; and
- e) a recommendation on how the charge should be proceeded with.<sup>10</sup>

The accused during this process of the trial before the CO is not entitled to legal representation. He conducts his own defence.

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8 5.82(1), Defence Act

9 5.81(2), *ibid*

10 Rule 12 PR, Defence Act

APPROPRIATE SUPERIOR AUTHORITY

Appropriate Superior Authority (ASA) in relation to a person charged with an offence means:

- i) in the case of officers of the rank of Major and below and of Warrant Officers, any officer of the Defence Force not below the rank of Colonel;
- ii) in the case of officers of the rank of Lieutenant and below and of Warrant Officers, any officer of the Defence Force not below the rank of Lieutenant Colonel who is not the CO of such person.<sup>11</sup>

Evidence is recorded in writing when an accused is brought for trial before ASA but the same procedure is followed such as that before the Commanding Officer. If ASA records a finding of guilty, the authority may award one or more of the following punishments:

- a) forfeiture in the prescribed manner of seniority of rank, where the accused is an officer the forfeiture being of seniority of rank either in the Defence Force or in the corps to which the accused belongs, or in both;
- b) a fine of a sum not exceeding the equivalent of twenty-eight days' pay;

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11 5.84(6) Defence Act

- c) severe reprimand
- d) here the offence has occasioned any expense, loss or damage, stoppages.<sup>12</sup>

An Appropriate Superior Authority shall, if the accused elects be tried by Court Martial or ASA, in the course of investigating the charge determines that it is desirable that the charge should be tried by Court Martial, either himself convene the Court-Martial or refer the charge to higher authority."<sup>13</sup>

The accused is not represented by Legal Course during the trial and has to put up his own defence.

#### APPEALS

An accused cannot appeal against any conviction and/or sentence imposed by any of the three courts discussed, to any one higher court.

Any appeals lodged are handled administratively by the Administration Branch at Army Headquarters. The appeal may be allowed without the benefit of any court sitting.

#### COURT MARTIAL

A Court Martial is a court of record and shares the status of the High Court for Zambia. It is the most senior court in the Defence

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12 S.82(5) Defence Act

13 Rule 20 PR, Defence Act

Force. A Court Martial (CM) is not a standing court and therefore, unlike in the civil system where, an appellant not satisfied with proceedings before a lower court may lodge an appeal with the High Court, a member of the Defence Force is precluded from appealing to a C-M over proceedings held in a lower military court.

A C M shall have power to try any person subject to military law under the Act for any offence which under the Act is triable by C-M and to award for any such offence any punishment authorised by the Act for that offence.<sup>14</sup> A C-M is convened only for the purpose of trying specific cases as the need arises, and, not being a standing court, is dissolved on conclusion of any such case.

It may be convened by an officer not below the rank of Colonel or by any officer not below field rank in the name of such officer and authorised by him to convene Courts-Martial.<sup>15</sup>

A C M shall consist of the President of the court and not less than two other officers as members, provided that the court shall consist of the President and not less than four other officers as members if

- i) an officer is to be tried; or
- ii) the only punishment or the maximum punishment which can be awarded in respect of the charge before the court is death.<sup>16</sup>

14 S.86 Defence Act

15 S.87(1) Defence Act

16 S.88(10) Defence Act



Although the JA, in order to officiate at the trial, sits with the court, he is not a member of the court and at no time does he become a member of the court. He is purely an officer of the main duty is to advise the court on the law relating to the case. This was observed by the court in the Nigerian case of FRANCIS V THE NIGERIAN NAVY.<sup>2</sup> In this case, whose facts are not relevant here, Nnaemeka-Agu, J C A, said, "I have to bear in mind the fact that the CM is composed of persons not necessarily learned in the technicalities of law, for, although there is a provision for the appointment of a JA to guide the C-M, he is in fact not a member of the court as such."

The trial procedure in a CM is essentially the same as that which obtains in civil courts save for a few minor differences. The Defence Act provides that the rules as to the admissibility of evidence to be observed in proceedings before Court-Martial shall be the same as those observed in civil courts in Zambia, and no person shall be required in proceedings before a Court-Martial to answer any question or to produce any document which he could not be required to answer or produce in similar proceedings before a civil court in Zambia.<sup>3</sup> Whereas procedural details are clearly outlined in the Act, no guidelines exist to follow generally in the area of rules of evidence. No consideration is made to the fact that the President and members of

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2 (1986) L.R.C (crim)

3 S.98(1) Defence Act

the court do not possess even rudimentary knowledge of law or that that could be their first sitting. The JA is expected to advise on any lapses occurring during trial but this has in many instances not worked out as expected and problems have arisen, mainly to the detriment of an accused person.

When it comes to punishment a C-M has powers peculiar to it. It is provided for that before the court close to deliberate on their sentence the accused may request the court to take into consideration any other offence against the Act committed by him of a similar nature to that which he has been found guilty, and, upon such a request being made, the court may agree to take into consideration any of such other offences as to the court seems proper.<sup>4</sup> Thus for example if an accused person is convicted for having stolen certain items from 'A', he can request the court to take into consideration the fact that he had also stolen from 'B' and 'C'. If the court does so, then the accused cannot be prosecuted for theft against 'B' and 'C' after having served his sentence.

Secondly, regardless of the number of courts, the convicted accused person is punished with only one omnibus sentence.<sup>5</sup>

An officer may be awarded the following punishment by sentence of a Court-Martial.

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4 Rule 71(1) PR, Defense Act

5 Rule 73(1) *ibid*

- a) death;
- b) imprisonment;
- c) cashiering;
- d) dismissal from the defence force;
- e) forfeiture in the prescribed manner of seniority of rank in the defence force or in the corps to which the offender belongs, or in both;
- f) fine of a sum not exceeding the equivalent of ninety days' pay;
- g) severe reprimand or reprimand;
- h) where the offence has occasioned any expense, loss or <sup>A</sup> damage, stoppages.

On the other hand a soldier may be awarded the following sentence:

- a) death;
- b) imprisonment;
- c) discharge with ignominy from the defence force;
- d) in the case of a Warrant Officer, dismissal from the defence force;
- e) detention for a term not exceeding two years;
- f) where the offender is on active service on the day of the sentence, field punishment\* for a period not exceeding ninety days;

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6 5.74(2) Defence Act

- g) in the case of a Warrant Officer or non commissioned officer, reduction to the ranks or any less reduction in rank;
- h) in the case of a Warrant Officer or non commissioned officer, forfeiture in the prescribed manner of seniority of rank;
- h) where the offence is desertion, forfeiture of service\*;
- j) fine of a sum not exceeding the equivalent of ninety days' pay;
- k) in the case of a Warrant Officer or non-commissioned officer, severe reprimand or reprimand;
- l) where the offence has occasioned any expense, loss or damage, stoppages.<sup>7</sup> Every question to be determined on a trial by CM shall be determined by a majority of votes of the members of the court.<sup>8</sup> Where the votes are equal the court is obliged to acquit the accused.

#### CONFIRMING OFFICER

Where the CM makes a finding of guilty on any charge the accused is facing the record of proceedings shall then be sent to the Confirming Officer for confirmation of the finding and sentence of the court on that charge. Powers to confirm CM proceedings have been conferred on the following;

- a) the officer who convened the CM or any officer superior in rank to that officer;

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<sup>7</sup> 5.75(2) Defence Act

<sup>8</sup> 5.95(1) *ibid*

\*Forfeiture of period served and benefits accrued thereon

- b) the successors of any such officer or superior officer, or any person for the time being exercising the functions of any such officer or superior officers;
- c) failing any such officer as aforesaid, the (Republican) President.<sup>9</sup>

The following classes of officers are excluded from this function:

- a) any officer who was a member of the CM;
- b) any person who as CO of the accused investigated the allegations against him or who is for the time being the CO of the accused;<sup>10</sup>
- c) any person who, as ASA, investigated the allegations against the accused. The accused may present an appeal against the finding or sentence or both to the Confirming Officer. Where proceedings have already been promulgated he shall present his petition to the reviewing authority at any time within six months of promulgation.

#### REVIEWING AUTHORITY

The Reviewing Authority in the context of the CM are:

- a) any officer superior in command to the Confirming Officer;
- b) the President<sup>11</sup>

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9 S.106(1) Defence Act

10 S.106(2) ibid

11 S.108(2) Defence Act

Unlike in the civil court where the decision is final and is only subject to an appeal before a higher court, a CM in certain instances, may have it's finding quashed by the Reviewing Authority. The latter could in the alternative substitute a new finding for any finding of guilty made by a CM that is illegal or which cannot be supported by the evidence, if the finding could validly have been made by the CM on the charge, and if it appears that the court was satisfied of the facts establishing the offence specified or involved in the new finding. He could also substitute a new finding of guilty of some other offence if the court could have done so on any alternate charge that was laid and if it appears that the facts established proved the accused guilty of that other offence.

#### APPEALS

The Defence Act provides for appeal by a convicted person to the Supreme Court of Zambia. The Act provides that "... a person convicted by a CM may, with the leave of the Supreme Court, appeal to that court against his conviction; provided that an appeal as aforesaid shall lie as of right without leave from any conviction by a CM involving a sentence of death."<sup>12</sup>

#### PROMULGATION

All awards meted out on officers and soldiers are published in units' "Part Two Orders."

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12 S.136 Defence Act

*The printed material is distributed to all departments in a unit and copies sent to other units and Army Headquarters for their notice, and for the latter to effect deductions to and effect awards, where fines or forfeiture of pay and losses of seniority are awarded.*

#### PROBLEMS

Problems arise from the composition, procedures and practices of military courts, especially in the purview of rules of evidence, which problems we shall attempt to discuss in the next chapter.

Civilian Courts are empowered, under provisions of Section 122 of the Defence Act to try officers and soldiers charged with criminal offences, and referred for trial to such courts. Where an offence committed by an accused is triable by both civilian and military courts, the competent military authority has the discretion of choosing either of the two alternatives.<sup>1</sup>

When on active service, an accused will in almost all cases be tried by competent military authorities, primarily due to the need to dispense justice as expeditiously as possible in order to discourage a proliferation in cases of indiscipline.

"Active Service" is explained in the Defence Act as;

"in relation to any unit, that, it is engaged in operations against an enemy and, in relation to a person, that he is serving in or with such unit which is on active service."<sup>2</sup>

When serious cases like murder or manslaughter are committed however, the offender is generally tried by the ordinary civilian courts. Likewise cases of theft occurring inside barracks and other military cantonments are dealt with by the military authorities, under provisions of Section 49 and 50 of the Defence Act.

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1 S.49 Defence Act

2 S. 3(1) Defence Act

There are instances when a case may either be dealt with by military courts or the ordinary civilian courts. In a case where one serving member who is off duty assaults another who is equally off duty for instance, the aggrieved party may seek redress in either a military court or a civilian court. When dealt with by the military court provisions of Sections 38 or 67 that deal with striking a superior officer and subordinate officer or soldier respectively, are followed.

Where the complainant is not a serving member of the defence force the defendant may still be tried by a military court subject to provisions of Section 73 of the Act which provides for trial of an officer or soldier who commits a civil offence.

Military trials have always been the subject of criticism. Castigating the quality of military justice a congressman in America said;

"...the trial is frequently but an empty form, conducted by men who know no law and who frequently, in the name of discipline, are not disposed to do justice to the accused."<sup>3</sup>

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3 Achike.O "Groundwork of Military Law & Military Rule in Nigeria (Fourth Dimension Publishers. Enugu. 1978) P.87

Such generally held views are not without justification, because, although supportive legislation exists and the prospect for fair trials is attainable, a lot of factors have militated against achievement of this objective.

In R V SUSSEX JUSTICES<sup>4</sup> Lord Hewart C.J, stating the importance of the rule against bias, NEMO JUDEX IN RE SUA, made the forceful observation that;

"... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

In the defence force, it is not uncommon for an officer who may have witnessed the commission of an offence, and directed the framing of charges to also be the one to try the accused.

The Defence Act also does not disqualify an officer who tries an accused as CO for instance, to try the same accused as ASA, where the accused may have been so remanded by him for trial, if the CO is later appointed ASA for the accused.

In the case of MAJOR C R L PHIRI (2341),<sup>5</sup> the military authority who had earlier tried him as his CO was, eight months later, promoted in rank and appointed ASA for the unit. In spite of the

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4 (1924) 1 KB 256

5 (1993) ASA AHQ CAMP

fact that the officer had handled the case as CO he still went ahead to try the accused, found him guilty and awarded a punishment of a fine of 28 days pay, with severe reprimand.

ASA obviously had found the officer guilty when he was CO and this completely precluded the possibility of a fair and unbiased hearing in the second trial. It is interesting to imagine how the case might have been handled by a neutral person.

One interesting feature with military courts from Subordinate Commander level to ASA is that the accused has no legal representation. The trier of the case acts to an extent as prosecutor, defence counsel and Judge alternately within the same trial.

There is no prosecutor appointed for trials from Subordinate Commander to ASA. The trier of the case therefore gathers evidence from the witnesses in order to prove the truthfulness of the charge against an accused. When defence witnesses give evidence he weighs that against that given by prosecuting witnesses, in order to disprove the charge. The same trier of facts then acts as judge and passes his verdict in the case.

Although procedures for the trial are tabulated at Sections 7 and 19 of the defence force procedure rules the fact that a trier of facts is prone to lending more weight to one function to the detriment of the other cannot be ruled out.

It is not difficult to imagine therefore how a person saddled with all three responsibilities, without the benefit of legal training, can fairly dispense justice. Proponents of the system have argued that following the format of civilian courts would slow the pace at which trials are held and may even adversely affect the discipline of officers and men. As valid as the reason may be however the system has provided to be prone to errors of judgement and may have cost some officers and men dearly.

Fortunately however the scales of punishment for "everyday" offences as provided for by the Act are not of severe nature. The more serious cases, warranting stiffer punishment, are at the level of Courts Martial, at which level legal representation is mandatory.

#### BURDEN OF PROOF

It is the responsibility of a party who desires the court to give judgment as to any legal right or liability dependent upon the existence of facts he asserts, "to produce evidence sufficient to persuade the trier of fact that the existence or non-existence of particular facts in issue is established to the requisite standard of proof. The other responsibility obliges a party to produce some evidence to enable the trier of fact acting reasonably to find the existence or non-existence of particular facts in issue."<sup>6</sup>

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6 Hatchard J, Ndulo M, "The Law of Evidence in Zambia"

One expects therefore that where charges are brought up against an accused, the trier will require persons bringing up such charges, to produce evidence that is sufficient enough to persuade the former about the existence of such facts in order for a conviction to be secured.

In the civilian courts it is not too difficult a problem for the judge to make a well balanced and fair decision at the conclusion of a case after hearing the arguments from both the prosecution and the defence. The military court system however has had its problems.

In the case against LIEUTENANT K SIANGA (3490)<sup>7</sup>, it was stated by the chief prosecution witness that on 7 March 1993 he had found the officer in the bedroom of his sister at 0100 hours. The officer was allegedly drunk. On being asked by the witness what he wanted in his (witness') house the officer had answered that he had come to see his sick child. Whereupon the witness had forced the officer out of the house after telling the officer that he had no child in that house. A statement given by the sister to the court however contradicted that of Sergeant Simukonda. In her statement Miss EPHER NAMUKONDA admitted the existence of the officer's baby and further stated that Sergeant Simukonda had told the officer to come and see the child at a more appropriate time.

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7 (1993) ASA 1BDE HQ

The officer in his defence claimed that he had been informed that the baby was sick and hence his visit to Sergeant Simukonda's house at that hour. No evidence was adduced to negative the officer's claim and neither was any adduced to negative the fact that the officer had not broken into the house but was in fact let in by a member of the household. BARON D C J stated in MWELWA V THE PEOPLE<sup>8</sup> that;

"Once a special defence is set up the onus is on the prosecution to negative it."

In the case under discussion the onus fell on Sergeant Simukonda to prove the officer's wrongdoing but he failed to do so. ASA disregarded all this however and found the officer guilty as charged, and made recommendation for his dismissal from the army.

It becomes apparent on having discussed the three roles that a trier of facts plays in the lower courts, namely those of prosecutor, defence counsel and Judge, that in this particular case ASA tended to lend more weight to the prosecution and, guided by his subjective reasoning, failed to warn himself of the inadequacy of evidence required to effectively convict the officer over the offence he is alleged to have committed.

#### STANDARD OF PROOF

DENNING J. stated in MILLER V MINISTER OF PENSIONS<sup>9</sup> that;

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"The degree of cogency required to discharge a burden in a civil case ... is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; 'we think it more probable than not' the burden is discharged, but, if the probabilities are equal it is not."

It is well settled in the Zambia civilian courts that before an accused can be convicted in a criminal case the extent to which proof must be made is beyond a preponderance of probabilities.

In military courts however this important pre-requisite of our legal system is in many cases not attained. In some unfortunate cases the rank(s) of the witnesses, according to our considered opinion, plays a part in the conviction of an accused. Apparently the testimony of a General is considered to be more reliable than that given by a private soldier, no matter how unsound the General's testimony may be.

This attitude is without doubt derived from the colonial masters who considered an officer a gentleman beyond reproach. Practically, the telling of untruths by senior ranks in order to escape a likely embarrassing incident has not been a rare occurrence.

In his summary to a CM trying MAJOR C MWEEMBA (224Ø)<sup>10</sup> for, inter alia, drunkenness while on an official trip to Hong Kong, the JA advised the court thus;

"If you believe the seven witnesses to have given a very true testimony and you doubt the evidence given by the two Generals you have every right to acquit this gentleman. You are a court you should not be under any 'outside' influence."

That the JA emphasised the need for the court to avoid 'outside' influence lays credence to recognition of the fact that ranks of witnesses in some cases have a bearing on the outcome of a case. The two Generals in this case had been the delegation leader and his deputy and both had maintained throughout the trial that the accused had, at the time in question been very drunk and incapable of performing his official duties. The seven other witnesses were the lower ranking members of the delegation and had given testimonies contradicting that given by the two Generals. The lower officers "carried the day" on this occasion and the accused had the charge of drunkenness against him quashed.

Disregard for the requisite standard of proof by military courts still continues however and there are many cases which attest to this.

In the case against MAJOR J SOMBOKA (2862),<sup>11</sup> the accused was charged with a case of insubordination to a superior officer contrary to Section 38(1)(b) of the Defence Act. The facts of the case were that, while at an officers mess on 30 January 1994, when the accused was ordered by a Colonel to pay for a bottle of spirits that he intended taking away he allegedly answered the Colonel that "I do not like blind loyalty because one day I will also be somebody big and even if you are a member of the GENERAL STAFF<sup>12</sup> so what."

The charge was raised by the Colonel but the two witnesses whom he put down failed to corroborate his allegation during the trial. Thus, one could rightly argue that the standard of proof desired by courts was not discharged. Yet, the accused was found guilty on the charge and awarded punishment. It may be worth mentioning here that the Colonel did not attend the trial and merely submitted a written statement. The accused was therefore not accorded an opportunity to question the chief prosecution witness. A lot of such cases abound in the military courts.

#### CORROBORATION

Corroboration is generally independent evidence which supports the testimony of a witness. The general rule in both criminal and civil cases is that the court may convict an accused on the

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11 (1993) ASA 1 BDE HQ

12 Officers of the rank of Colonel and above

testimony of one witness. In R V BASKERVILLE<sup>13</sup> Reading C.J stated that;

"we hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."<sup>14</sup>

In some cases corroboration is required as a matter of law while in others it is required as a matter of practice.

In the latter case courts can convict in the absence of corroborative evidence but the judge must warn himself of the danger of convicting without corroboration.

Baron C J stated inter alia in MACHOBANE V THE PEOPLE<sup>15</sup> that;

"Where there was nothing save the uncorroborated evidence of the suspect witness the court must acquit, but where there was something more, though not constituting corroboration, which satisfied the court that the dangers of convicting without corroboration had been excluded, it could convict."

13 (1916) 2 K.B 658

15 (1972) Z.L.R 101

14 ibid at P. 667

The MAJOR SOMBOKA case above in one way illustrates how much little attention is paid towards corroborating witnesses' testimony. It could be assumed through study of the on-going trend that uncorroborated testimony of a senior ranking person can convict an accused presumably in the military's quest to "maintain discipline in the forces."

In one interesting case, 70938 STAFF SERGEANT CHICHONI<sup>16</sup> was in February 1993 charged with an offence against section 38(1)(b) of the Defence Act for having used insubordinate language to a superior officer. The main complainant did not even give evidence during the trial and instead had two soldiers testify against the accused. The latter however failed to verify the utterance allegedly made and this fact was recorded by the CO conducting the trial. The soldier should under normal circumstances have been given a complete discharge as the evidence offered was not corroborative of the charge brought against the soldier, and no witness turned up during the trial to state the occurrence of the use of insubordinate language alleged. The court however found the accused guilty of the charge and awarded him seven days extra duties. Interestingly however the CO wrote on the charge sheet below the award given, almost as if it was an after thought, the words "FOR LACK OF STRONG EVIDENCE."

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BARON D.C.J stated in MUSUPI<sup>17</sup> THE PEOPLE that;

"At the end of the day the question is whether the suspect evidence, ... receives such support from the other evidence or circumstances of the case as to satisfy the trier of the fact that the danger inherent in the particular case of relying on that suspect evidence has to be excluded; only then can a conviction be said to be safe and satisfactory."

In the CHICHONYI case it can be argued that there was even no evidence to corroborate as the chief prosecution witness did not even give evidence. The fact that the CO noted that there was insufficient evidence on which to convict should have warned him of the danger of convicting the accused. He however still went ahead and convicted the accused. Sadly, this was not the first accused to be convicted under such circumstances and will probably not be the last, as long as the military's need for discipline takes a higher seat than justice.

#### EVIDENCE OF CHARACTER

COCKBURN, C.J, stated in R V ROWTON<sup>18</sup> thus;

"Does (evidence of character) mean evidence of general reputation or evidence of disposition? I am of the opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing

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or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question -what is the tendency and disposition of the prisoner's mind? - put directly."

Evidence of character is, as a general rule, not admissible in a court of law. It would be against principles of justice to convict someone over his character, as it would negative the presumption of innocence.

Section 275 of the criminal procedure code reads, inter alia that;

"Where an information contains a count charging an accused person with having been previously convicted of any offence, the procedure shall be as follows:

- a) The part of the information stating the previous conviction shall not be read out in court, nor shall the accused be asked whether he has been previously convicted as alleged in the information, unless and until he has either pleaded guilty to or been convicted of the subsequent offence."

The safeguard contained in this provision is obviously with a view to preventing any past record of an accused from having any influence on the court in the trial of the accused.

Section 157 (vi) of the Criminal Procedure Code provides the only exceptions there are to this rule and reads that;

"A person charged and called as a witness, in pursuance of this section, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless:-

- a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;
- or
- b) he has, personally or by his advocate, asked questions of the witnesses for the prosecution with a view to establishing his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the complainant or the witnesses for the prosecution;
- or
- c) he has given evidence against any other person charged with the same offence."

The Defence Act however provides at Section 12 (d) of the procedure rules that when a CO submits to higher authority a charge against an officer or warrant officer or has remanded a

non-commissioned officer, a private soldier or a civilian for trial by CM he shall send to high authority, inter alia, "a statement of the character and service record of the accused." In the statement of character, the CO is, according to practice, required to give a physical description of the accused, explain his general personal conduct and discipline and bring out all past offences committed.

The higher authority will, by the time he goes through the statement, undoubtedly be influenced, no matter how little, by the CO's opinion of the accused. Notwithstanding this knowledge of the character of the accused the 'higher authority' is still expected to try the accused and where he finds him guilty award appropriate punishment.

The essence of not reading out past convictions of an accused during trial as provided for in the CPC is so that each case is treated on its own merit, provided provisions of Section 157 (vi) are not invoked.

The element of influence by such information provided could be seen in the light of punishment meted out to the accused in cases where such statements of character of an accused have contained adverse details. It could be argued that submission of the statement of character to a higher authority before the trial, is tantamount to reading out to a civil court information on an accused's previous convictions, before trial. This would

undoubtedly have a bearing on the outcome of the case.

In the case against LIEUTENANT J SIMBEYE (3275),<sup>19</sup> the officer was charged with, inter alia, illtreatment of men of inferior rank in that on 29 January 1993 at Army Headquarters, he struck a Staff Sergeant. The latter claimed that the officer had slapped him. He was the only person to attest on the validity of this allegation, during the subsequent trial. The officer denied the charge.

In the statement of character of the accused the CO wrote that;

"Lieutenant Simbeye is an energetic officer who carries himself with alot of confidence ... he however has difficulty conducting himself in line with military discipline and often gets into trouble over this. He is also rather temperamental thereby easily over-stepping his limits when exacting discipline over his subordinates."

The officer was convicted on the charge albeit there was no corroborative evidence. It is not hard to imagine that the damaging statement of character by his CO may have influenced the higher authority's mind when deciding the case.

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19 (1993) ASA AHQ

The case of LIEUTENANT R ZYAMBO (W 3347)<sup>20</sup> illustrates just how damaging statements of character may be and how strongly they go against the principle on evidence of character.

The lady officer was charged with the military offence of courting a male soldier. Any such relationship with a fellow officer would not have called for any sanction, but open fraternisation across ranks is not kindly looked at.

In the statement of character sent to ASA her CO stated that;

"Lieutenant Zyambo is a very quiet officer who is however unpredictable about what she is capable of doing. She can sometimes be rude and arrogant. Her character is rather deceiving as she portrays a different outward picture from what she really is."

ASA found the officer guilty on the charge.

It is difficult to imagine how ASA would have beheld a different picture of the officer other than what the CO had written.

It is hard to contemplate why such provision was included in the Defence Act but it obviously runs contrary to provisions of the Criminal Procedure Code.

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## CONFESSIONS

The general rule is that confessions, when voluntary are admissible as evidence in a court of law. Involuntary confessions however are inadmissible.

CHARLES, J. pointed out in *ZONDO V R*<sup>1</sup> that;

"The basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and due administration of justice."

The rationale, it will be seen, in the inadmissibility of involuntary confessions is to prevent acts by persons in authority that may be prejudicial to the constitutional rights of an accused. Therefore any statement obtained by inducement, threat, force or promise by a person in authority will be rendered inadmissible by a court of law.

In declining to receive self-incriminating statements made by the accused in *R V KAHYATA*,<sup>2</sup> CHARLES J stated;

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1 (1964) N.R.L.R 97

2 (1964) N.R.L.R 84

"The application of the law relating to incriminating statements is, no doubt, one which places a heavy burden on the police in conducting their investigations. Nonetheless, it is, in my opinion, of constitutional importance, for transcending the proof of guilty individuals, that it be not whittled down and that it be applied by the courts strictly: to do otherwise will open the door to the inquisition and the Gestapo, and to the police usurping the functions of the courts."

In *MUWOWO V THE PEOPLE*,<sup>3</sup> the appellant was convicted of murder, the evidence relied on by the prosecution being a confession.

In allowing the appeal CHARLES, J stated, inter alia, that;

"... a statement is not made in the exercise of such a choice (voluntary) if it is made as a result of the accused's will to remain silent having been overborne by a person in authority inducing him to break silence or to continue speaking or to change his story by the use of violence, intimidation, persistent importunity or sustained or undue insistence or pressure or any other means whereby hopes of material benefit or fears of material evil, immediate or ultimate are roused."

The "guardroom" is the gazetted place for holding soldiers serving sentences of detention, as well as for holding those pending trial, where it is felt by a CO that such soldiers might abscond if let loose.

Section 3(1) of the Procedure Rules however provides that where a person is detained his CO shall within forty-eight hours have him tried for the offence. Where a person is held for a longer period Section 3(2) directs that the CO should report such occurrence to a higher authority, while Section 4 of the same rules provides for raising of eight-day delay reports to facilitate continued detention of a person. Section 5 sets a ceiling of seventy-two days by which time a CM should have been convened to try the person.

Section 58 of the Defence Act makes it an offence to unduly delay the investigation of charges against a detainee.

In practice however, soldiers have, in some cases, been held for periods for in excess of that without trial or reports. Such detainees are held in normally unhospitable cells and there are no programmed visits by relatives. All are subjected to extra drill and in some cases field punishment.<sup>4</sup>

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4 Section 76 of Defence Act reads that field punishment shall consist of such duties and drills, in addition to those the offender might be required to perform if he were not undergoing punishment, and such loss of privileges ... and may include confinement in such place or manner as may be provided and such personal restraint as may be necessary to prevent the escape of the offender and as may be so provided.

It is not surprising therefore that soldiers held under such conditions "willingly" confess to having committed offences that they may not even be aware of, in order to escape the unpleasantness of the guardroom.

Such practices are not documented for obvious reasons and the victims do not expose such acts probably due to ignorance of the provisions of the Defence Act or fear of prolongation of such treatment, if discovered.

Confessions from suspects are also obtained after beatings are administered on them. There are no trials within a trial conducted in military courts. In one case Warrant Officer Class 1 Nyirenda died of injuries reportedly sustained while undergoing interrogation. A confession had been extracted from him in which he admitted having stolen some military weapon(s).

A lot of confessions are obtained in like manner and others under duress especially during trial before Subordinate Commanders and COs. However as the trials at the two levels are not fully documented allegations of wrongdoing are difficult to prove.

There has however been no recorded case where a confession was thrown out as being involuntary. Further, the nature of trials at Subordinate Commander and CO being of verbal nature, and in the absence of any appeal by an accused on a court's having convicted on the basis of an involuntary confession, evidence on particular

cases of such confessions being thrown out by courts is non-existent.

#### REDRESS

All complaints of unfairness during trial are meant to be handled by the legal cell at Army Headquarters, on behalf of the Commander. Most of them do not reach the headquarters however but are suppressed at lower headquarters. As such redresses are handled administratively as there is no standing court that hears appeals, little regard is given by those responsible for ensuring that they reach Army Headquarters, as they are in most cases, the same people who would have contravened the rules. Additionally there is but only one qualified lawyer at Army Headquarters to handle all the volume of work.

The Defence Act too seems to provide some regulations that are at variance with some rules of evidence.

## CHAPTER 3

## NEUTRALITY

Major General H C Lupogo of the Tanzania Peoples Defence Forces stated, inter alia, in his address to the Southern African Military Law Conference in September 1991 that:

"The common tendency for most of us is to take good discipline for granted. We seldom inquire into or question a well disciplined unit. Good discipline is what we expect, so we applaud and leave it at that. On the contrary we descend very heavily on indisciplined units ... Our codes of service discipline often deal with what happened seldom do they bother with underlying causes. We have to look elsewhere for that. This is particularly apparent in our summary trials and investigations. No wonder it is said of us that we march in the guilty persons rather than the accused at our trials."<sup>1</sup>

Proponents of strict Military justice have argued on the other hand that the need for maintenance of discipline in the defence force is of so paramount an importance that requirements of normal rules of law as applied on other members of society have to be waived.

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1 Lupogo H C "Law and The Enforcement of Discipline in the Military" (Senga & Company Dar-es-Salaam 1991)

Achike argues that;

"On a proper examination of the administration of justice in Nigeria by the military, it may be observed that military justice ... not only compares favourably with that of ordinary civil jurisdictions, but in fact provides adequate, if not superior safeguards, for ensuring a high standard of justice."<sup>2</sup>

This view could be understable in view of the fact that the Nigerian Military justice system is highly developed and by 1978, proper rules had been put in place, that ensured that military courts acted within bounds and were closely guided by clearly laid down legislation. Where any rules were contravened a proper system of appeals existed through which a member of the defence forces could seek redress.

In Zambia however, the apparent lack of written rules in some areas of military law has had a negative outcome in military trials. Triers of military offenders on occasion forget the neutral role that they are expected to play.

Lord Justice DENNING in JONES V NATIONAL COAL BOARD<sup>3</sup> stated:

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 2 Achike O "Groundwork of Military Law and Military Rule in Nigeria." (4th Dimension Publishers Enugu 1978) P.87

3 (1957) 2 All ER 155 at 159

"The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure ... if he goes beyond this he drops the mantle of a judge and assumes the role of an advocate, and the change does not become him well"

In more developed countries legislation has been put in place to ensure equitable disposal of cases coming before military courts.

In the United States of America, the "WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE" was set up prior to 1946 and stated in their report in the same year that some military sentences bordered on the fantastic.

The report also found that the Commanding Officer had tremendous influence over the proceedings of the Courts-Martial, to the extent that the capacity for a fair and impartial trial was lost. This report led to the production of the "Uniform Code of Military Justice for American Armed Services" in 1949, which became law on 5 May 1950, and has since then guided proceedings in the military.

Similarly, some common law jurisdictions which recognised the absence of fairness in military trials have also introduced

safeguards to ensure this.

Though there are in Zambia a number of statutes which address specific areas of the law of evidence they are of very limited scope. There is no comprehensive evidence code or Act and great reliance is placed on common law rules, that are yet to be codified.

An attempt is made in this chapter to contrast some areas of the law of evidence as practiced in the Zambia Military (see Chapter II) with that obtaining in some countries with a common law background.

#### UNITED KINGDOM

The United Kingdom from which most Zambian legislation emanates has comprehensive rules contained in the "QUEENS REGULATIONS FOR THE ARMY" and the "MANUAL OF MILITARY LAW". The latter specifically guides military courts on rules that are to be followed during trial. Together with the ARMY ACT, it is a basis for any appeal by an accused where procedural rules are flouted. The United Kingdom further has an evidence Act. Common law rules on evidence of character and confessions are of particular interest.

We discussed in the second chapter that in the Zambia Defence Forces, when a Commanding Officer submits to a higher

authority a charge against an officer, or warrant officer or has remanded a non-commissioned officer, a private soldier or a civilian for trial by Court-Martial he shall send to higher authority, among other documents, a statement of the character and service record of the accused.<sup>4</sup>

This has in practice normally included a description of the accused, details of offences committed in the past and a description of the accused's character and/or shortcomings.

Such information has tended to prejudice the case of an accused and normally has had an adverse bearing on the outcome of a case. The United Kingdom "Manual of Military Law" reads that,

"... character or general reputation of the accused person is not admissible as evidence of his guilt. This rule is the most important to prevent the injustice which might arise from prejudice or unpopularity."<sup>5</sup>

The manual tabulates at appendix II what should be contained in a statement as to character of an accused as merely a listing of the total number of times an accused would have been convicted by Courts-Martial or a civil court in the preceding period of twelve months and also the total number

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4 Rule 12 Procedure Rules Defence Act

5 Manual of Military Law P.59

since the accused's enlistment. It has no provision for describing the character of an accused. Interestingly, the Zambian Defence Act does not state what should be contained in a statement of character of an accused person.

The Manual of Military Law stresses that the prosecution must prove that the circumstances under which a confession was made were free and voluntary in order for such statement to be admissible as evidence against an accused.<sup>6</sup>

Thus, even a confession or statement made at a court of inquiry cannot be used as evidence against an officer or soldier before a Court-Martial in the United Kingdom.<sup>7</sup> But this is apparently not so in Zambia.

#### CANADA

The Canadian Forces are subject to the National Defence Act, a highly developed legislative enactment of the Parliament of Canada. The substantive and procedural military law contained in the Code of Military Discipline is amplified and explained in a variety of regulations and orders, the most important of which are those published in the "Queens Regulations and Orders for the Canadian Forces."

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6 Manual of Military Law P.74

7 Ibid P.75

not only of lectures but exercised in which mock trials are conducted. This helps ensure that all aspects of Canadian law relevant to the conduct of trials is strictly applied practically.

In contrast with Zambia where an appeal from C-M lies only in the Supreme Court of Zambia, an appeal from a Canadian Forces' C-M lies in the Court Martial Appeal Court, composed of civilian judges. Where an appeal fails a member has the further option of lodging another appeal with the Supreme Court of Canada. At this stage any lapses in procedure or otherwise would have been observed.

#### ZIMBABWE

The present Zimbabwe Defence Act came into operation on 3 November 1972 as the Rhodesia Defence Act, and has since then had numerous amendments made to it, including the title.

The Act is read in conjunction with the Zimbabwe Evidence Act, Defence Forces (Discipline) Regulations of 1978 and the Defence Forces (Courts-Martial Procedure) Regulations of 1956.

The Zimbabwe Defence Forces establishment provides for a directorate of legal services. The directorate comprises legally trained lawyers and its director is the legal

advisor to the Defence Forces' Commanders. All legal matters including review of summary awards and punishment as well as convening of and final disposal of Courts-Martial proceedings are therefore handled by well qualified and competent personnel. The Zimbabwe Defence Act has several similarities with the Queens Regulations for the Army and the Army Act of United Kingdom, and also with the Zambian Defence Act. The Zimbabwe Act provides inter alia that the law which shall be observed in the trial of any charge before military courts as to:-

- "(a) The onus of proof; and
  - (b) the sufficiency or admissibility of evidence ; and
  - (c) the competency, compellability, examination and cross-examination of witnesses; and
  - (d) any matter of procedure;
- shall be the law in force in criminal proceedings in the civil courts."<sup>8</sup>

The existence of a corps of advocates ensures that provisions of the law are complied with and punishment is not unduly metted out.

Whereas in Zambia Defence Forces an appeal arising from a summary trial is not assured due to legal inadequacies, the Zimbabwe Defence Act provides that:-

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"The proceedings of any summary trial other than where the charge was dismissed or the punishment imposed was not greater than extra duties, may within seven days of the conviction be reviewed at the instance of the accused or any other person who, in the opinion of the director of legal services is a properly interested party."<sup>9</sup>

A member of the Zimbabwe Defence Forces convicted of an offence by a CO has the right to a review of proceedings of his summary trial. No variation in the finding or punishment however shall be made without the reviewing officer first having consulted the Director of Legal Services. Involvement of the latter is necessary to ensure that the case is studied by qualified counsel, in order to guarantee that legal procedures were followed during trial and that, inter alia, the rules of evidence were complied with to the letter.

Similarly, unlike in the Zambia Defence Force where a CO refers a charge to a higher authority for trial together with a statement of character of the accused, the requirement for inclusion of the latter does not arise in a similar case in the Zimbabwe Defence Force. Each case is therefore tried on its own merit by the higher authority.<sup>10</sup>

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<sup>9</sup> 5.26(1) Defence Forces (Discipline) Regulations 1978  
<sup>10</sup> s.27 Ibid

## TANZANIA

The Tanzania Peoples Defence Forces were established by the National Defence Act of 1966. All the land, air and naval forces are subject to the same legislation. The first schedule to the National Defence Act, the Code of Service Discipline, is the part that deals with the actual administration of justice within the defence forces. Members of the Tanzania Peoples Defence Forces (T.P.D.F) are additionally subject to the laws of the land. Therefore all procedural rules in civilian courts, including rules of evidence are also applicable in all military trials, whether they be summary trials or Courts-Martial.

The T.P.D.F legal system is a highly developed one and has at it's helm a Judge Advocate General based at the Ministry of Defence, to direct all legal matters in the forces. He is additionally the advisor to the Minister of Defence on law in the military. At T.P.D.F Headquarters is a legal services directorate with a full complement of trained lawyers. The directorate advises on and monitors the disposal of all disciplinary cases in the forces. Lawyers are further attached to formation headquarters to advise formation Commanders on legal matters.

The "Courts" in the T.P.D.F are organised on almost similar lines as those in the Zambia Defence Force. However at the

level of Courts-Martial the T.P.D.F has three types of C-M, viz, General, Disciplinary and Standing Courts-Martial whose only difference is their jurisdiction. The Standing Court-Martial is in addition presided over by an officer who is required to be a trained advocate." <sup>11</sup>

Higher up in the heirachy is the Court Martial Appeal Court which consists of three or more judges of the High Court of Tanzania.<sup>12</sup>

The court has appellate jurisdiction, hearing and determining appeals from Courts-Martial.

An appeallant may, where his appeal is dismissed by the Court Martial Appeal Court, lodge a further appeal with the Supreme Court of Tanzania.

The deployment of qualified lawyers at all high levels of the T.P.D.F checks against abuse of or non-conformity with the laid down procedures by military courts. Where this may go unnoticed the Court Martial Appeal Court which deals specifically with such appeals helps check the errors. This is amply illustrated in the case of CAPTAIN MATHEW MWITA V JUDGE ADVOCATE GENERAL.<sup>13</sup> In this particular case the

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<sup>11</sup> Section C.103 Code of Service Discipline

<sup>12</sup> Section C.146 ibid

<sup>13</sup> (1986) Appeal No. 4 (Unreported)

appellant was convicted by a General Court-Martial of theft. At the hearing of the appeal counsel for the appellant argued that the President and other members of the court that tried the appellant were not sworn or affirmed as required by law and he urged the court to declare the proceedings a nullity. The court quashed the conviction and set aside the sentence. The fact that had the appeal before the Court Martial Appeal Court failed the appellant would still have been accorded another appeal before the Supreme Court provides more than sufficient guarantee of a fair hearing.

#### CONTRASTS

It may be observed that the Zambia Defence Force legal system has mainly two shortcomings when compared to other jurisdictions referred to above. The first is the lack of trained lawyers to help train and advise the military on the proper conduct of legal issues including trials.

The second is the lack of a comprehensive Codified Evidence Act which may indirectly be the reason why those that the Defence Act has conferred powers on to conduct trials are not following laid down procedures, as common law rules of evidence are an area alien to them.

One cannot help but wonder however whether intentional misinterpretation of the law is not, in some cases, one of

the causes of a lot of injustices being perpetuated by the Defence Force by those given powers to dispense justice.

## CHAPTER 4

## FAILINGS

The two major failings of the Zambia Defence Force legal system are the lack of qualified lawyers and the absence of a comprehensive Codified Evidence Act. Allied to these is the existence of a Defence Act that is urgently in need of review and the inability to centrally supervise military courts in view of an establishment that does not presently allow the exercise of such control.

In order to rid the system of factors that inhibit the fair and equitable disposal of cases a number of areas will need to be addressed.

## CODIFICATION

Ignorance of the rules of evidence by triers of military offences has in a lot of cases had an adverse effect on the outcome of such cases. The Defence Act does not offer an guidance in this area and the fact that military law training is not comprehensive tends to place an accused person at a disadvantage from the outset.

We have observed that in other jurisdictions there exists Evidence Acts and other regulations that help regulate military trials and ensure fairness in the disposal of cases.

Civil courts in Zambia observe rules of evidence during trial due to the fact that judges and magistrates undergo comprehensive legal training. The same cannot be said of triers of military offences however.

There is urgent need therefore to codify the rules of evidence in comprehensive form in order to regulate the conduct of military courts. The codified rules could either be introduced as an addendum to the Defence Act, or separately.

#### COURT-MARTIAL APPEAL COURT

The present military legal system does not offer any urgent means of redress arising from a conviction and sentence by a Court-Martial. An appellant has to rely on the Supreme Court of Zambia, a court already burdened to capacity by other appeals from the lower courts of law.

The ever present possibility that an accused may not have received equitable justice from a Court-Martial highlights the urgent need for a special court to hear any appeal as expeditiously as is practically possible.

There should therefore be included in the hierarchy of the Defence Force legal system a Court Martial Appeal Court. The court should have appellate jurisdiction to hear and

determine appeals from Court-Martial and should consist of judges from the High Court of Zambia.

The court may not be a standing one but should only be convened as and when required.

An appellant should further be able to take leave to appeal to the Supreme Court of Zambia where his appeal before the Court Martial Appeal Court fails.

#### CENTRALISED SUPERVISION

Decisions by military courts are not based on precedents. One court may give a very light sentence for which another, ruling on a case of exactly the same merits, may impose a very severe punishment. The decision on what punishment to impose is mainly based on the subjective reasoning of the trier of the case and precedent has no "seat" at all.

This has tended to cast a very negative light on military courts and rightly, questions have been raised on the neutrality of the system.

It is our considered opinion that the entire legal system should be brought under one umbrella and centrally controlled, unlike the case is at present.

Trained counsel should monitor the conduct of trials from Ministry of Defence and the department should further allow for deployment of trained lawyers down to formation level. Counsel should be directly answerable to Ministry of Defence on matters related to trials, in order to avoid the incidence of intimidation by immediate Commanders.

Any awards by military courts would then be reviewed by such trained Legal Counsel.

Courts-Martial could further be convened by the Judge Advocate's office in order to avoid giving the task to Unit Commanders who may have an interest to serve in the matter.

#### AMENDMENTS

The Defence Act came into being on 18 September 1964 and there has been very little review done to it since then.

Some provisions that may have been suitable several years ago can no longer be viewed as reasonable and suitable for present day needs. Detailed review as suggested above should be made to the Act to cover areas that have been covered in preceding chapters.

Generally, courts must be presided over by trained officers to make it possible to incorporate much of the general law

into military law.

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