

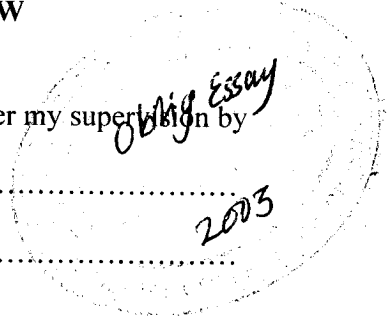
THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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PROSECUTION IN ZAMBIA: WHY THE FAILURES?

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02.12.2002

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SUPERVISOR

PROSECUTION IN ZAMBIA: WHY THE FAILURES?

BY

JANE JOLEZYA MULAYE

AN OBLIGATORY ESSAY SUBMITTED TO THE FACULTY OF THE
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DECLARATION

I JANE JOLEZYA MULAYE - COMPUTER NUMBER 99313936 do hereby declare that I am the author of this Directed Research Paper entitled: **Prosecution in Zambia: Why the failures** and confirm that it is my original work. I further declare that due acknowledgement has been given where other scholars' work has been used. I verily believe that this research has not been previously presented in the School for academic purposes.

Student's signature: Jane J. Mulaye.....

Date 02.12.2003.....

DEDICATION

This work is dedicated to my dear husband, Alfred, and my children; Besa, Chanda, Kasongo and Mutinta. Your patience and understanding while I spent long hours on the PC inspired me to go on. I also dedicate it to my mother, Anastasia Maingu Jolezya, who has been and is still a fighter and shall forever be an inspiration!

I appreciate you all,

Jane.

PREFACE

The author was inspired to do this work following the numerous criticisms levelled at the Criminal Justice in Zambia, particularly the Investigative wings and the Courts. The work undertaken by these institutions is widely criticised but hardly is the Prosecutor ever mentioned, yet he too is in a powerful position and if he carries out his job effectively, he may help re build the confidence that has been eroded in the system.

The work is divided into five chapters; the first chapter is an introductory part which focuses on the justification for de linking the Prosecution function from the Law Enforcement Agencies, (Police, Anti-Corruption Commission, Drug Enforcement Commission and others) so that these institutions are freed to concentrate on their core functions of investigating.

The second chapter traces the role of the Prosecution in all the stages of trial up to the sentencing stage and highlights the immense power that the Prosecutor wields in deciding whether to take a matter to court or not. The third Chapter discusses the major challenges faced by the Prosecution and how these have impacted adversely on performance of Prosecutors in general. These are serious practical challenges which if not seriously addressed soon, the Public will never have confidence in the system- already there is public outcry on the numerous acquittals and *nolle prosqui* in numerous criminal matters of public interest.

The fourth chapter focuses on steps that may be taken to make the Office of the Director of Public Prosecutions more efficient by way of Restructuring and or Reorganisation. It also looks at the relationship between the Office of DPP and other stakeholders in the criminal justice system. The last chapter concludes the essay with recommendations, the most important being the enactment of legislation to provide for modalities of prosecuting and to supplement to article 56 of the Republican Constitution.

ABSTRACT

This research is a study of the Prosecution function in Zambia, it discusses the important role played by the Prosecutor in the Criminal Justice System and the various problems the Zambian Prosecutor faces. These problems have contributed to delays in dispensation of justice thereby eroding Public confidence in the system.

A holistic approach is desirable in resolving the problems that are encountered by the Criminal Justice System; Restructuring the Office of the Director of Public Prosecutions will have far reaching effects as it will affect not only the Office itself but all other investigative wings.

It is hoped that the problems discussed will supplement the efforts of the authorities in their quest to improve operations of the DPP's office and it is submitted that with the requisite political will and a complete restructuring of that office, the Public will once again develop confidence in the system.

ACKNOWLEDGEMENT

It is my pleasant duty to express my profound gratitude to my supervisor, S.E. Kulusika and Dr. M. Munalula (the Co-ordinator) for the guidance and directions in the preparation of this work.

I also owe special gratitude to the State Advocates at the Office of the Director of Public Prosecutions in particular Mr. C.F.R. Mchenga and the Prosecutors at Police Service Headquarters especially Mr. Mboneka and Mr. Nalube who were always ready to render assistance.

I am further indebted to Prosecutors at Choma Police Station, in particular Ms. L. Sibaalwa for the invaluable input into this work. Finally, I cannot forget the many wonderful friends I made while at UNZA and they will forever occupy a special place in my heart; these are Lydia Kwibisa Matapo, Arida Mercy Chulu and Dorica Bulongo Kafunya.

I thank you all.

Jane

ABBREVIATIONS/ ACRONYMS

DPP	Director of Public Prosecutions
ACC	Anti Corruption Commission
DEC	
NAPSA	Drug Enforcement Commission
ZAWA	Zambia Wildlife Authority
ZSIS	Zambia Security Intelligence Service
D G	Director General
NIPA	National Institute of Public Administration
BFSA	Banking and financial services
BOZ	Bank of Zambia

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CHAPTER 1

1.0 INTRODUCTION

The three commonly recognized main divisions in the Criminal justice system are the Police, the Courts and the Prisons but the Prosecutors are an equally important fourth division. Prosecutors provide a vital link between Police and the Courts and between the Courts and the Prisons. When the Police conduct an investigation and effect an arrest, it is the Prosecutor that the docket is submitted to and this Prosecutor has the power of deciding whether a case goes to court or not. It is Prosecutors, not Judges or Police Investigators that wield this decision making power. Prosecutors can therefore bring to a halt the whole criminal justice system in any given jurisdiction by failing to make a decision to prosecute after receiving dockets from Police Investigators hence Police investigations will go nowhere and the court will have no cases to adjudicate upon as a consequence.

A poorly performing Prosecution Service impacts negatively on the whole criminal justice system; it affects the ability of the Prison system to rehabilitate the prisoner in its care. If Prosecutors process cases slowly or do not apply their minds properly to a request of an accused person for bail, the number of awaiting trial prisoners increases causing over crowding in the State prisons. This overcrowding leads to quick spread of disease which in turn makes it difficult to rehabilitate the prisoners. If the Prosecutors do not operate efficiently, many accused persons will be acquitted of the charges against them; this would in turn lower the morale of the Police investigators and may actually foster the wrong view held by the public that 'crime pays'.

The successes of the Police in revealing high level fraudulent activity, arresting car thieves and foiling robberies receive substantial media coverage and equally their failures in important and landmark cases are also adequately publicized. Similarly, the Drug Enforcement Commission¹ receives much accolade when a drug syndicate is uncovered or when the Anti Corruption Commission² arrests prominent or public officials for offences against that particular Act. Unfortunately, the role of the Prosecution in the Criminal justice system receives far less publicity and is little recognized by the Public. This is so even when it is the Prosecutor who has the power to decide whether to prosecute at all as he shapes the course of events by deciding what specific offence to proceed with which may be different from the one indicated by the Investigator.

1.1 STATEMENT OF THE PROBLEM

Though the Prosecutors are on the same side of Law enforcement as the Police, they view issues quite differently. Prosecutors work mostly in and around criminal courts with lawyers and their primary concern is getting sufficient evidence to win cases; to them a higher rate of convictions is a measure of their success. The Police investigators on the other hand work everywhere else including streets to get information about criminals and apprehend them. Police investigators' main concern is to punish street criminals who they unconsciously pronounce 'guilty'. Police view some legal rules especially those leading to reduced charges and the strict rules of evidence as a mockery of their work. Their satisfaction is in seeing suspects convicted of maximum sentences available. Prosecutors also sometimes criticize the Police for shoddy investigations as such work weakens chances of conviction.

¹ Established under the Narcotic and Psychotropic Substances Act, Cap 96 of the Laws of Zambia.

² Established under the Corrupt Practices Act, Cap 91 of the Laws of Zambia

In Zambia when an offence has been committed it is the Police to investigate, charge and Prosecute. It is clear from the above that the two functions of investigating on one hand and of Prosecuting on the other, to be more effective should be done by two different bodies. Though the bulk of the prosecution is handled by the Police, there are other institutions such as the Anti- Corruption Commission, Immigration Department and Zambia Wildlife authority who also engage in prosecutions. In other words the prosecution service in Zambia is characterized by fragmented and un-coordinated sectoral prosecutorial regimes under various Law enforcement Agencies. The sectoral approach to criminal prosecution has had the effect of diffusing power and responsibility in diverse government departments and parastatal organizations without institutional mechanisms for co-ordination. Jurisdictional overlaps and conflicts have inevitably arisen, thereby inhibiting the effective and efficient prosecution of offences.

The ideal situation would be for the Prosecution function to be removed from the Police function proper so that the Police are free to concentrate on their core functions as provided for in the Police Act³ and the Republican Constitution.⁴ The functions of the Police are: mainly preserving the peace, prevention and detection of crime, and apprehension of offenders against the peace.

The criminal courts are institutions central to the Criminal Justice system in any jurisdiction.

These courts have several leading participants including the Prosecutor

³ Police Act, Cap 107, s.5

⁴ Constitution of Zambia, Cap 1, art 104

who decide whom to prosecute, what charges to file and represent the state's case in the proceedings. In this capacity Prosecutors are independent criminal justice professionals with wide discretion whose other duty is to see that justice is done. This means that they are under a duty to vindicate the innocent, "find" the guilty and protect society and individual victims.

There is an already established institution under which all Prosecutors in Zambia ought to fall – the Director of Public Prosecutions (the DPP).⁵ The different investigative agencies including the Police would then refer cases to this office, which would have the responsibility of deciding whether or not to accept to prosecute. The determining factor being based on the following grounds:

- (a) That factors brought to their attention do not constitute a crime under the penal code any other written law and/or
- (b) That even if there has been infringement of a law, exhaustive investigation has failed to turn up sufficient evidence to prove one or more elements of the crime beyond reasonable doubt.

The Prosecution on acceptance of a docket of case from the Police or any other investigative agency will engage in analyzing of the facts and may actually investigate further, secure all the evidence including exhibits and record statements from witnesses if not already done by the Investigator. It would be good practice to get the basic evidence relating to the case while it is still fresh.

It would also be in the best interests of the criminal justice system if the Office of DPP is staffed by legally trained personnel. The minimum qualifications for a

Prosecutor currently is that he or she should have a Prosecution Certificate from National Institute for Public Administration (NIPA); it is hereby advocated for that this standard be raised to a first degree in any Social Science preferably Law and the Certificate from NIPA a supplementary qualification. This is important because the Prosecutor at present is disadvantaged as he is up against legally trained defence counsel while he or she is of humble educational and professional qualifications. In other progressive jurisdictions like in the United States Prosecutors fall under the District Attorney's office and are all qualified Lawyers while in England and Wales they fall under the Crown Prosecution Service and in South Africa they fall under the National Director of Public Prosecutions. These are all independent Agencies headed by trained Criminal Lawyers who have the power to appoint and disappoint their subordinates. It is interesting to note that other institutions created under the Constitution are further governed by a Statute except for the Office of the DPP.

In Zambia, Prosecutors are appointed by the DPP but are transferred, disciplined and have their services terminated by the different Administrators under which they fall. In the Police Service, they are under the Inspector General of Police; in the Drug Enforcement Commission, they are under the Commissioner; this applies to those under the Anti- Corruption Commission.

1.2 ANALYSIS OF SOME STATUTES

An analysis of the Police Act particularly sections 5, 6 and 10 is useful in determining the functions of the Police and how the Service is to be administered. The administration and Control of the Police service through out Zambia vests in the

⁵ Constitution of the Republic of Zambia, Cap 1, art 56

Inspector General of Police who also has power to terminate an Officer's appointment. The core functions are as already stated earlier.

The Corrupt Practices Act also gives special powers of investigations to its Officers. Section 12 of that Act empowers the Commissioner to authorize an Officer to investigate any bank account, share account, purchase account, expense account or any other safe deposit box in any bank. These Officers also have powers of arrest and may arrest without warrant on reasonable suspicion that an offence has been or is about to be committed.

The relevant provisions of the Narcotic Drugs and Psychotropic substances Act are sections 5, 23 and 25. The functions of the Commission *inter alia* are to receive and investigate any complaint of alleged or suspected breach of the Act and to enable them do that have wide powers of arrest and detention, power of entry, search and seizure etc.

Such wide powers conferred on Police, DEC and ACC Officers shows that they are primarily investigative agencies and not Prosecuting agencies. As for the DEC and ACC Acts, they further provide that permission is to be obtained from the DPP before any Prosecution proceedings are instituted. This act of obtaining permission from the DPP can be done away with if Prosecutors themselves fell under his Office and were actually directed and controlled by him.

CHAPTER 2

2.0 THE PROSECUTOR'S ROLE

Given the crucial role the Prosecutor plays in any given legal system, it is appropriate at this juncture to examine briefly his/her functions. His primary role in the criminal justice system is to assist the court arrive at a just verdict and in the event of a conviction, fair sentence based upon the evidence presented. In his capacity of representing the community in criminal trials, the Prosecutor needs to ensure that the interests of victims and witnesses are promoted without negating their obligation to act in a balanced and honest manner. The Prosecutor's role is identifiable before, during and after trial.

STEP I: BEFORE TRIAL

What is it that moves a Prosecutor to act? He is almost always alerted of a crime by the Police, who in their daily routine functions receive incident reports. There are basically two ways in which a Prosecutor is moved to act. Firstly, when a Police Investigator or Detective receives a complaint, he investigates the matter by recording statements from the complainant/ victim and other witnesses. He also collects exhibits from the scene of crime to help him connect the suspect to the offence. All documentary evidence forms part of the case record or docket which he submits to the Prosecutor when all relevant statements and other documents have been collected. When the Prosecutor receives the said docket, he checks it thoroughly to ensure sufficiency of evidence against the suspect to justify taking the matter to court.

The second way in which the Prosecutor is moved into action is when the Police make an arrest without a warrant as in cases where a suspect is found in the act of committing an offence or where failure to arrest will result in the suspect escaping

or tampering with evidence. When the Police arrest in this way and charge a suspect they are obligated to bring him before court within 48 hours. The Prosecutor will then be given the Police docket which will not have much in terms of evidence except for the arresting Officer's statement and some eyewitnesses. Thus the suspect will appear in court for the first time and here the role of the Prosecutor will be to oppose bail and persuade the court using the evidence available to deny granting of bail to the suspect. When the Prosecutor receives and studies the docket, what follows is any of the following things:

- a. **Returning the docket:** The Prosecutor may return the docket to the Investigator asking him to investigate the case further especially in intricate and high profile cases so that there are no loose ends. To have a successful case i.e. to secure a conviction on the alleged charge, the Prosecutor has to prove all constituent elements of a crime beyond reasonable doubt.
- b. It may be decided that the evidence in the Police docket is enough to warrant instituting of a prosecution on the alleged offender. What helps the Prosecutor to **make a decision** to prosecute? He must be satisfied that the investigation was thorough and that securing a conviction is certain. This is of utmost importance because if a case is prosecuted and the suspect is acquitted, he will not normally be prosecuted for the same offence even if more and fresh evidence against him were to surface, *autre vous acquit*⁶.

There is a general test therefore used by Prosecutors in making this very important decision and that test is asking the question "*is there sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution?*" Further

⁶ Criminal Procedure Code Cap 88, S.138

questions to help arrive at a decision include how strong the case for the State is, whether the available evidence is reliable and admissible, and how strong is the case for the defence is. These apparently simple questions may not be so easy to answer especially if the accused has refused to give a statement to the Police because the Prosecution will then not be aware of what defence he may put across at trial. Another difficulty may be that Prosecution witnesses are often not credible or honest in the witness box as may appear from their written statements or prior interviews.

- c. Using his **discretion**, the Prosecutor may **decline** to proceed to prosecution and instead opt for an alternative way of resolving the problem. Such scenarios as where a first juvenile offender accused of committing a minor crime admits his wrongdoing may be required to perform some community service or make some restitution⁷ or compensate their victims. It should be emphasised that trial may again be resorted to if the offender does not keep his side of the bargain. At times the complainant may request the Prosecutor not to proceed to trial as the parties have reconciled; the Prosecutor though has to exercise caution in withdrawing cases where the victim or complainant is related to the offender especially in cases of domestic violence against women or minors.
- d. Following (c) above, the Prosecutor may not proceed with the case even though provable is where in his discretion, it may be cheaper in terms of cost and time not to go ahead. An example is where a man drives his motor vehicle carelessly and manages to overturn his motor vehicle getting badly injured in the process. The Prosecution may not go ahead with the case as

⁷ As Provided for in the United Nations Standard Rules for the Administration of Juvenile Justice (Beijing Rules) (1980) art. 11; The Declaration of Basic Principles of Justice for victims of crime and abuse of power (1985) art 8-13

this driver has somehow received enough punishment through injury and it is unlikely that he would repeat a similar offence or be a danger to society again as he may not be able to drive again. An appropriate sentence will also be difficult to determine upon his conviction. Another case where Prosecution may not be in public interest and costly is where a rogue or vagabond trespasses on state land and sets up camp, though he can be prosecuted successfully for trespass, it may not be ideal to go ahead because he cannot afford the fine when convicted and the alternative of sending him to prison is just a cost the government would not want to incur. The Prosecutor before declining to prosecute a case should take the following into consideration:

- The nature and seriousness of the offence
- The effect of the crime on the victim
- The manner in which the crime was committed
- The motivation for the criminal act
- The relationship between the crime and the victim
- The interests of the victim and the community at large
- Circumstances of the offender

In Zambia, the absence of a National Prosecution Policy and a specific statute providing for detailed steps, procedures and methods of carrying on prosecution, the discretion usually follows practice as known by long serving Senior Prosecutors. This is a major flaw in the system. Had there been an Act of Parliament, it could have given Prosecutors guidelines on how to exercise that discretion, as discretion is not absolute. It is also not possible to prosecute each and every offence since at times issues of public policy come into play and the Prosecutor has to satisfy himself

whether it would be in the Public interest and in the interest of justice to prosecute a particular case.

STEP II: DURING TRIAL

Before trial begins the Prosecution must formulate a formal charge against the accused person using the prescribed form detailing particulars of the offender and the offence. The accused and his Legal representative if any should be given copies of statements and other documents if they ask for them. Trial begins with the Prosecutor putting the charge to the accused; he may provide details of circumstances surrounding the commission of the offence. The accused then takes his plea; if the plea is one of not guilty the matter proceeds and the accused give his defence. He may also choose not to give any defence and remain silent. He may also dispute all or some of the details in the charge sheet. The burden is on the Prosecution to prove all the elements of the offence beyond reasonable doubt against the offender. The Prosecution will do this by presenting evidence to the court through documents, photographs and testimony of Prosecution Witnesses. Witnesses usually include the victim or complainant, eye witnesses, arresting officer, forensic experts and medical doctors. The Prosecutor guides witnesses through their testimony to ensure that they do not omit anything crucial to the state's case in trying to prove the guilt of the accused.

After examination-in-chief, each witness is cross examined by the accused through his legal representative- the purpose is of course to destroy or attack the credibility and reliability of the witness. Once all Prosecution witnesses have been thus examined, the state formally closes its case and cannot normally call more witnesses or present new evidence to the court. It is then the accused and his legal representative to present their evidence by calling their witnesses to try and show that

the accused is innocent and the allegations against him are not true. The Prosecution is also free to cross examine defence witnesses. When the defence closes its case, the Prosecution summarises by highlighting the main points brought out in the examination in chief by the Prosecution Witnesses in order to persuade the court to accept their version of events. One general rule that runs throughout common law jurisdictions is that in criminal cases the onus of proof lies on the Prosecution to prove a case beyond reasonable doubt- existence of reasonable doubt therefore is to the benefit of the accused person; As was stated in the case of Woolmington v. DPP⁸, it is not for the prisoner to establish his innocence but for the Prosecution to establish his guilt. The defence also has a similar opportunity as the Prosecution in that at this stage they may also summarise their case by creating doubt in the mind of the court so that the accused may be acquitted.

STEP III: AT SENTENCING

If the accused is subsequently found guilty and convicted, both the Prosecution and the defence may address the court on the kind of sentence each wants the accused to receive giving reasons for their suggestions but the court is under no obligation to take either position. The Prosecution however has an added responsibility to show the impact of the crime on the victim and the community and to show statistics regarding the frequency and relative seriousness of the offence and any relevant previous convictions the accused has had.

2.1 DISCRETION IN THE DECISION TO PROSECUTE

The decision to prosecute is among the most important decisions the Prosecutor has to make. He should therefore exercise great caution to ensure a right

⁸ (1935) ALL ER 1

decision is reached. If he makes a wrong decision to prosecute or a wrong decision not to prosecute, either decision has potential to undermine public confidence in the criminal justice system. In the exercise of his discretion, a Prosecutor is as independent as a Judge; his interest at all times being to assist the court arrive at the truth. A fair trial is one in which all the evidence is presented, tested and adjudicated upon according to law. As the representative of the Public interest, the Prosecutor must guard against conviction of the innocent and should not personalise issues.

The Prosecutor must consider some two fundamental issues in making a decision whether to prosecute a case; firstly, he should ask himself whether the evidence is sufficient to justify the institution or continuation of proceedings; secondly if it is then does the Public interest require a prosecution to be pursued. These points are so basic that they are observed in all common law jurisdictions. Even if there is evidence that tends to prove the necessary ingredients of an offence, a bare prima facie case is generally speaking, not enough to warrant a prosecution. There must be a reasonable prospect of securing a conviction because it is not in the interest of public justice or economy that weak or borderline cases should be prosecuted. These two criteria need further discussion.

2.11 SUFFICIENCY OF EVIDENCE

When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the Prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. It is submitted that a bare prima facie case is not enough to justify a decision to prosecute. An all-encompassing test is whether there is a reasonable prospect of a conviction. The decision will consequently

require an evaluation of how strong the case is likely to be when presented at trial. When reaching this decision the Prosecutor needs to be satisfied that there is no reasonable expectation of an ordered acquittal or a successful submission of no case to answer.

A proper assessment of the evidence will take into account such matters as availability, competence and credibility of witnesses and their likely impression on the court as well as an evaluation of the admissibility of evidence implicating the accused. The Prosecutor should also consider any defences which are plainly open to the accused or that have been indicated by him including any other factors which could affect the prospect of a conviction. The need to exercise extreme caution in making this decision is because it hinges on the liberty of the accused so the Prosecutor cannot afford to make careless decisions.

As he evaluates the sufficiency of the evidence, he ought to be guided by the following factors:

a. JUDGES RULES

These give general guidelines to the Police or other persons charged with the responsibility of questioning of suspects and recording of ordinary and warn and caution statements. If there are some matters that indicate that confession statements were not given freely and voluntarily or that it was obtained in circumstances that would affect its admissibility or its value, the Prosecutor should determine if the case can proceed without that particular evidence.

b. RELIABILITY OF WITNESSES

The Prosecutor should be able to determine whether the witnesses are exaggerating, if their memories are as good as appears from the statements, whether

they are hostile or friendly to the accused, whether they have any other motives for hiding the truth.

c. PRE-TRIAL BRIEFS

Are all necessary witnesses available and competent to testify. Witnesses should be met before trial day to discuss the case and let them refresh their memories by reading through their statements and posing questions to them in a court room simulation exercise. This will take the edge off the court experience especially if they are going into court for the first time. At these pre trial meetings, witnesses should be prepared for the court room experience by asking them questions that the defence is likely going to ask them at cross examination so that they are not taken by surprise. If child witnesses are involved are they likely to give credible unsworn evidence. If identity is in issue was the procedure on identification followed and how reliable is the evidence of those who purport to identify the accused. Any other substantial matters that the defence may use to attack the credibility of the Prosecution witnesses should be discussed. Where there are many perpetrators of a crime the Prosecutor should evaluate the evidence against each accused separately to see if a separate trial can stand against each accused if the court so orders. Whether there is anything that suggests that the charges may have been concocted or trumped up.

By relying on these factors and his own knowledge of the law the prosecutor is required to assess these and other factors to determine whether or not there is a reasonable prospect of conviction on the evidence that is available to the prosecution. Each case must be considered on its own facts and merit. The Prosecutor must apply judgement, experience and common sense in the determination of what is just course to follow.

2.12 PUBLIC INTEREST

Once the Prosecutor is satisfied that the available evidence can justify proceedings, he must then consider whether the public interest requires a prosecution. He must take into account any other alternatives that may be available to prosecution like reference to counselling, restitution or caution by the Police.

Public interest is not well defined and may be given a variety of interpretations but suffice to state that the following may help him in assessing what falls within the ambit of Public interest:

- the surrounding circumstances of the offence
- how serious the alleged offence was
- what were its practical effects
- what were the extenuating circumstances
- what was the attitude of the suspect
- how would a decision to launch formal proceedings affect other people
- how serious a view would a court take of the offence if there were a conviction.
- would the consequences of prosecution be out of all proportion to the seriousness of the offence or to the penalty a court would be likely to impose.

The answers to these questions may be sufficient to assist the Prosecutor in deciding whether to prosecute or not; ultimately his decision depends on a broad view of the interests of justice. Resources like manpower, time and economy do not allow that all offences for which there is sufficient evidence must be prosecuted.

The Prosecutor must be fair, independent and objective. Recognised prosecutorial criteria must be applied at each stage of the decision making process. Instilled in the mind of the Prosecutor is that it is important to observe that in a just society, the conviction of the guilty and the acquittal of the innocent are both in the

public interest. He should not apologise for making a decision to prosecute since his duty is to assist the court achieve justice. That decision should **not be influenced** by:

- a. The Prosecutor's personal feelings concerning the offence, the suspect or the victim.
- b. The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct.
- c. The race, religion, sex, creed, national origin or political inclinations, beliefs or activities of the suspect or any other persons involved.
- d. Likely political advantage or disadvantage to the government or any political party, group or individual.

ETHICS OF THE PROFESSION

The Prosecutor must follow the ethics⁹ of the profession by:

- (i) Ensuring that the Prosecution case is firmly and fairly put forward.
- (ii) Testing the defence case vigorously but with courtesy and temperance.
- (iii) Avoiding submissions of fact or law which do not have a sound basis.
- (iv) Eschewing prejudice or emotion in the conduct of the case.
- (v) Revealing the existence of material that may assist the accused.
- (vi) Inviting the court to stop proceedings if a point is reached at which he concludes that there is no longer a reasonable prospect of conviction.
- (vii) Using all legitimate means to achieve a just disposal of the issues in contention.

⁹ The United Nations Guidelines on the Role of Prosecutors' (1990)

CHAPTER 3

3.0 MAJOR FLAWS OF PROSECUTION IN ZAMBIA

A public prosecutor carries out his functions on behalf of the state. In doing this he represents the public interest. He helps the state by assisting in maintenance of law and order by performing his duties with an even hand. He is supposed to be an impartial Officer whose overriding concern is to do justice according to the law. To ensure fair, effective, impartial and efficient prosecution of criminal offences, a Prosecutor should uphold standards and principles which are recognised internationally as proper for him to remain independent. These standards and principles are contained in a number of international instruments.¹⁰ It is appalling that almost all the Prosecutors interviewed have never heard of these international instruments. How are they expected to exhibit professional conduct if they are not aware of the values enunciated in these vital documents? The most readily identifiable weaknesses in the Zambian Prosecution system are: the absence of proper guidelines, the absence of a National Prosecution policy, the Quality of Police work, Poor witness management, Low academic qualifications, No guiding Act of Parliament, Lack of Basic resources and Political interference. This list is not exhaustive.

3.1 LACK OF PROPER GUIDELINES

This is in relation to the fact that most Prosecutors are not aware of their rights and duties as spelt out in some International documents. Some of these are discussed below:

¹⁰ United Nations Guidelines on the Role of Prosecutors (E/A.C.57/1990/A/Add.5); The Management of Criminal Justice and the Development of Sentencing Policies (E/A.C.57/1990/5/Add.3); United Nations Guidelines for the Prevention of Juvenile Delinquency (E/A.G57/1990/Add.4)

a. DUTIES OF THE PROSECUTOR

According to the Statement of Essential Duties and Rights of Prosecutors,

Prosecutors are expected to:

- Carry out their functions impartially
- Remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest
- act with objectivity at all times
- have regard to all relevant circumstances, irrespective of whether they are to the advantage of the suspect
- Assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness
- In the institution of criminal proceedings they will proceed only when a case is well founded upon evidence reasonably believed to be reliable and admissible and will not continue with a prosecution in the absence of such evidence.

b. RIGHTS OF PROSECUTORS

In order to ensure that Prosecutors are able to carry out their professional responsibilities independently and in accordance with acceptable standards, Prosecutors shall be protected against arbitrary action by government. Their other entitlements include:

- In the performance of their duties, they shall be free from intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

- When personal safety is threatened as a consequence of their prosecution functions, they shall have a right to be protected with their families by the authorities.
- Reasonable conditions of service and adequate remuneration commensurate with the crucial role they perform.

Because of lack of proper guidelines, Prosecutors are found in an awkward position where they receive instructions from Senior Police Officers to take a matter to court even when they are not ready.

3.2 LACK OF PROSECUTION POLICY

One of the fundamental challenges that face the office of Director of Public Prosecutions is the development of a policy framework for the prosecution function that will guide prosecutors in the proper day to day operations of their offices. The proper exercise of this discretion requires a balance to be struck between enforcement of the criminal law and the rights of suspects and accused persons to fair process.

It should be taken into consideration that it is actually in the public interest that there is uniform prosecution policy and standards and guidelines which apply through out the nine (9) provinces. The policy should serve to inform the members of the public of the basis upon which prosecutors exercise their discretion and make their decisions and should enhance public confidence in the criminal justice process. The DPP should be charged with the responsibility of determining a prosecution policy for the authority or service in consultation with the Minister of Legal Affairs and the Attorney General.

What the DPP ought to seek in the policy guidelines is to promote the exercise of authority by prosecutors and contribute to the fair and even handed administration of criminal law by prosecutors. A central purpose of the prosecution policy is to

enhance public confidence in the prosecution system as it is of paramount importance to have a prosecution policy which can be applied uniformly throughout the country and which will espouse the aspirations of the *Zambian* people. The Policy should set out the way in which the prosecuting authority and individual prosecutors should exercise their discretion. It should also guide the prosecutors in the way they perform their functions, exercise their powers and carry out their duties in order to make the prosecution process more fair, transparent, consistent and predictable. This is important as prosecutors have the discretion to make decisions which affect the criminal justice process and the rights of accused persons and victims alike. This discretion can be exercised at different stages of the criminal justice process such as the following:

- or not to institute criminal proceedings against an accused.
- Whether or not to withdraw charges or stop the prosecution against an accused
- Whether or not to oppose an application for bail, or to release an accused who is in custody following an arrest.
- What sort of crimes to charge an accused and in which court trial should take place
- Whether or not to accept a plea of guilty tendered by an accused
- What kind of evidence to present during a trial.

3.3 QUALITY OF POLICE WORK

The success of a prosecution is largely determined by the way a crime is investigated by the Police. A poorly investigated case where either no statements are

taken from potential witnesses or incomplete and inaccurate statements or where evidence is obtained in an irregular manner¹¹, is likely to result in the acquittal of a guilty accused. Even a good prosecutor or one with much experience will find it difficult to salvage a case where crucial aspects of its investigation are flawed. An experienced Prosecutor will detect such flaws in most cases before the badly investigated case goes to court for trial. However, even under such circumstances, it is time consuming for a prosecutor consistently to have to double check the investigations of the Police. Shoddy Police work and rushing to court can bring undesired results as can be seen from the case discussed below.

3.4 POOR WITNESS MANAGEMENT

A witness is any person who is called to give evidence either by the court or at the instance of one of the parties regardless of whether not he actually gives evidence. As such a witness is very essential to the administration of justice as without him, the Prosecution cannot prove a charge against a suspect. Though witnesses play this vital role, Prosecutors have neglected them in that they do not provide for their welfare. Often times witnesses travel to court at their own expense¹², leaving their work and after spending hours at court are told to return another day due to an unexplained adjournment. The stay at court is also not comfortable¹³ as there is usually no court official to direct them which court to go to and they have to find the right court without help. They normally suffer intimidation and or harassment from the accused if he is on bail and from his relatives and friends. This leads to potentially good witnesses suddenly becoming hostile. When trial finally commences usually after a

¹¹ The Law of evidence in Britain is that irregularly obtained evidence is admissible if relevant but in this context what is meant are confession statements obtained through duress.

¹² Allowances to witnesses are provided for in S. 31 of the High Court Act Cap 27 and in S. 46 of the Subordinate Courts Act Cap 28

number of adjournments, witnesses are called to the witness box in most cases without any pre-trial meeting.

The importance of a pre-trial meeting cannot be over emphasised; it is at such meetings that a witness will be availed his earlier statements to peruse so that he refreshes his memory. Court experience, especially for the first time is quite unnerving for most people and they need some coaching so that they have confidence in what they say. They should be prepared for cross examination especially where the case is defended because cross examination may break a good witness by making him appear unreliable.

Some appreciation of witnesses is necessary and it is hereby submitted that as a long term measure courts should provide reception areas for witnesses to wait but in the short term, Prosecutors could use their offices to hold pre trial meetings so that witnesses are ready as they come to court. Only one of the respondents confirmed conducting pre trial meetings and him too, it was not always. Prosecutors themselves need a change of attitude regarding their treatment of witnesses; they should be informed of trial date well in advance, should be reimbursed travel expenses especially if they are from outside town, apologise and explain to them in case of adjournments, thank them for making an appearance etc as these are the people who are behind the success of the prosecutor. In short witnesses must be managed in such a way that they do not waste their resources in terms of time, money and energy in going to court not knowing whether they will testify. There is a serious break down of communication between the Prosecutor and his witnesses to the extent that witnesses do not look forward to perform their public duty. With the advent of HIV/Aids, by the time a case is heard. some witnesses would have succumbed to the disease and died.

¹³ At the Boma and Chikwa Courts, witnesses have to stand under trees or in corridors as there is nowhere to wait.

3.5. LOW ACADEMIC QUALIFICATIONS

Public Prosecutors in Zambia are mainly trained at the National Institute of Public Administration (NIPA). The training is divided into two parts. There is a Basic Prosecutions Program that runs for four months and offers 6 courses namely Criminal Procedure, Criminal Law, Interpretation of Statutes, general Principles of Law, the Law of Evidence and Communication Skills. After the basic Course, a Prosecutor undergoes an Advanced program whose duration is nine (9) months. The general qualification needed to pursue these NIPA programs is Grade XII or Form V certificate and its equivalents, but in earlier years even Form III Certificate holders were allowed. The ideal situation is that one is trained in one of these courses but in practice it was found that Police Officers who actually prosecute are in three categories:

i. Officers Trained at NIPA

The first category is that of trained Officers sponsored by the Police; Some have undergone both the Basic and the Advanced Training and upon completion are transferred to Prosecutions where they are promoted to Sub- Inspector. In this category some have only done the Basic program but have worked for years without attending the Advanced course.

ii. Officers on Private study

The second category is that of Officers who use their initiative to study privately with different institutions for a Certificate in Law, Legal Studies or Criminal Investigations/ Detective courses. When awarded these Certificates, they present them to Police Command who transfer them to Prosecutions where they undergo job on training and thereafter start prosecuting.

iii. Untrained Officers

The third category is of Officers who are untrained but because they are identified to be sharp, are transferred to Prosecutions and are couched by the Senior Officers till they become efficient.

Such low qualifications pose a serious weakness in the criminal justice system as reliance is placed on personnel who are either ill trained or untrained to conduct such a grave task of prosecuting on which depends people's basic freedoms. The properly trained Prosecutors (those that have attended both basic and Advanced) are not many and are mostly too senior to prosecute although they do prosecute. It is not fair to the Prosecutors themselves who have such humble education to be expected to carry out their functions professionally especially that defence counsel on the other side is legally trained. How can they adequately argue matters of law? It is also not fair to the system itself as the scales are not balanced. We follow the adversarial system where the court room is like a battle ground with the Judge as an umpire and serious competition going on so clearly the playing field is not levelled. Initially Magistrates were resisting the appearance before them of untrained Prosecutors but due to their increased numbers they just had to allow them.

3.6 NO GUIDING ACT OF PARLIAMENT

It has already been mentioned that anybody can apply¹⁴ to the DPP to prosecute a matter; it is therefore not surprising that so many other institutions other than the Police are constantly seeking DPP's approval to prosecute matters. This is indeed a good thing as it removes the burden off the already over taxed Police; It also enables some matters to be prosecuted by experts. However, this advantage may be swallowed by the increased numbers of Prosecutors empowered by various statutes to carry out this function. Hence the need for an Act of Parliament which should spell

out the detail and methodology of conducting a Prosecution and the establishment of an autonomous National Prosecutions Authority or Service which will give guidelines to all Prosecutors whether those operating under the Drug Enforcement Commission (DEC), Anti-Corruption Commission (ACC), Zambia Wildlife Authority (ZAWA), National Pension Scheme Authority (NAPSA) or any other Act.

Another facet of this is that there is no specialisation especially for the prosecutors in the Police Service because a single prosecutor handles Rape cases, Aggravated Robbery cases, Frauds. In other jurisdictions¹⁵ where the Prosecution function is divorced from the Police function, Prosecutors get some specialisation so as to optimise efficiency and thereby achieve a higher degree of convictions. There is a unit or section of Prosecutors specialised in Rape, Child defilement and domestic violence; a section for Theft and related offences; a section for Fraud and other more serious organised crimes etc. When the Act of Parliament is enacted, it will establish a Prosecutions Authority or Service which should ideally absorb all Prosecutors in the country whether from the Police, Anti- Corruption Commission and other investigative wings. The idea is to let those institutions concentrate on crime detection and investigations and let the professionals prosecute.

3.7 LACK OF BASIC RESOURCES

Public Prosecutors being Civil Servants have not been spared from the general economic hardship the country is going through; they face a number of problems in carrying out their day to day work. They do not have the basic materials required like Law reports and statute books as they are not supplied by the government in whose name prosecution is done. Generally Prosecutors all over the country encounter

¹⁴ DPP has power to appoint Public Prosecutors by ss. 86-89 of the Criminal Procedure Code Cap 88

¹⁵ Like in South Africa where the National Prosecuting authority has specialised departments.

BRIEF OVERVIEW OF THE CASE

The accused was indicted for Theft of two (2) Motor vehicles contrary to s. 281 (1) (a) and (b) of the Penal code. The prosecution alleged that the accused did steal one Motor vehicle Hyundai sonata¹⁸, metallic green in colour, at K15,850,000 property of the government. On the second count he was alleged to have stolen a Toyota Land-cruiser¹⁹ white in colour at K40 million. The prosecution presented a total of fourteen (14) witnesses to court.

First Witness

This was the Permanent Secretary Ministry of Works and Supply who testified that he had written to the Inspector General of Police for assistance in retrieving the motor vehicles from Mr. Sata as he had not surrendered them after leaving government. He stated that he was not aware of any guidelines to be followed for handing over vehicles when a person left government and that he had not contacted the accused to ask him to return the vehicles he did not think the accused had stolen the motor vehicles

Second Witness

This was the Controller of Government Transport who testified that the accused moved with the Hyundai when he was transferred from Ministry of Health to Ministry without Portfolio. The master register he produced only a record of the Hyundai and not the belonged to Office of President.

Third Witness

This was the Transport Officer at Ministry of Health who testified that the Hyundai was purchased by that Ministry in 1994 for the Permanent Secretary who gave it to the accused when he was Minister of Health and that he went with it when

¹⁸ Registration No. ACD 2068 GRZ 320 BK

¹⁹ Land Cruiser GX registration No. AAV 946

similar problems but for Choma District Officers specifically, they type their own work with an outdated Olympia Manual type writer as they have no Typist to help them in that area. There is only one court room shared by three magistrates. In the area of transport, there is only one motor vehicle used by the Officer Commanding, the Officer in Charge and shared by the other units of the station including Criminal Investigations Division (CID). So when the motor vehicle is out on patrol or for investigations, Prosecutors have to turn to other government departments to borrow vehicles to transport prisoners to and from court. Office space is also inadequate as one office is shared by five Officers.

3.8. POLITICAL INTERFERENCE

Apart from the above weaknesses another major reason for failures especially in high profile cases is political interference which is a blatant disregard of the constitutional provision¹⁶ that DPP is not subject to control or directions from anyone. A number of respondents explained that decisions to prosecute are not made by them but by their superiors who just order that a case should go to court. In these circumstances, these poor Officers find themselves obliging even when they know they should not but such is the nature of superior orders. This also explains why there are so many acquittals and nolle prosequi entered, at times to the embarrassment of the State. To confirm this point, the case of The People v. Michael C. Sata¹⁷ will be discussed; this case clearly showed that a Minister who left government had fallen out of favour with the ruling party and somebody in the echelons of power was desirous of either embarrassing him or making him regret his decision. The case confirms that the decision to prosecute was made by someone else other than the Prosecutor and that.

¹⁶ Article 56 (7) of the Republican Constitution

¹⁷ Unreported, SSP/53/2002

he was transferred to Ministry without portfolio and according to him the vehicle was not stolen.

Fourth Witness

This was a retired Director from Zambia Security Intelligence Service (ZSIS) who testified that he facilitated the registration of the Land-cruiser which may have been registered in his name as trustee. He gave the motor vehicle and its white book to the Director General of ZSIS and further stated that he did not complain of Theft of the Motor vehicle because it was not stolen.

Fifth Witness

This was the Senior Inspector of Government Transport who stated that in November 2001 he was assigned by Permanent Secretary- Ministry of Works and Supply to check at Ministry without portfolio if all motor vehicles used by the former Minister had been surrendered. He was informed that all vehicles had been surrendered except one Hyundai which the accused wanted to repair before surrendering it as it had been in an accident. This information was given to the Permanent Secretary (PW 1).

Sixth Witness

This was the Sales Clerk at Yeti Motors who testified that on 28th March, 2002 the accused took Hyundai to his company for repairs and that even earlier in about October and November 2001, the Motor vehicle had been there for a while.

Seventh Witness

This was the After Sales Manager at Toyota Zambia. He stated that on 18th March, 2002 the accused took the Land-cruiser to Toyota Zambia for a 70,000 km service. He paid for the service and shortly after on 28th March, 2003, he took the same vehicle this time for a full service and said the bill would be settled by Office of the President which is also known as Zambia Security Intelligence (ZSIS); the full

service was not done as there was no requisite Local Purchase Order from that office and a Mr. Todd Mulyata collected the vehicle.

Eighth Witness

This witness was an Officer from Toyota Zambia and he confirmed that the accused took the Land cruiser to his company on 18th and 28th March, 2002.

Ninth Witness

This was the Intelligence Officer from ZSIS who confirmed picking the Land cruiser from Toyota Zambia on 2nd April, 2002.

Tenth Witness

This was the Permanent Secretary at Cabinet Office who informed the court that the accused resigned from government on 20th September, 2001 and the then President accepted his resignation the following day.

Eleventh Witness

This was the Transport Officer at State House who testified that the Toyota Land cruiser did not appear on State House inventory and because of that, they had nothing to do with that motor vehicle.

Twelfth Witness

This was the Transport Officer from ZSIS. He testified that he kept a Motor register and according to that register the Land-cruiser in dispute was marked 'State House' with no other details and that it was the Director General who better about it.

Thirteenth Witness

This was the Deputy Director at ZSIS and according to him, he read from the print media in April, 2002 that Toyota Land-cruiser belonging to that office had been stolen. He carried out investigations at Toyota Zambia and at Global Logistics which revealed that Toyota Zambia ordered the vehicle for his office in the year 2000. He

further explained that only Mr. Chungu (DG) could explain whether the accused had a right to use the vehicle; he said that the vehicle belonged to his office and was not stolen.

Fourteenth Witness

This was the Arresting Officer. He investigated the matter, charged and arrested the accused for the offence of theft of motor vehicle. He interviewed witnesses, recorded statements and collected exhibits. According to him the complainant was the Permanent Secretary of Ministry of Works and Supply (PW 1). He stated that the accused had stolen the two vehicles after resigning as minister without portfolio. The vehicles were later reported to be at Yeti Motors and Toyota Zambia respectively which he visited. He later summoned the accused and warned and cautioned him; in his 'warn and caution' statement, the accused denied the charges and stated that the Hyundai was surrendered to the Ministry of Health and the Toyota Land-cruiser to the Director General of ZSIS.

The Arresting Officer further explained that the two institutions did not complain about any Theft of Motor vehicle and that the accused was never written to, to surrender the motor vehicles. In his investigations the Officer did not bother to talk to the Permanent Secretary at Ministry of Health or Xavier Chungu the former Director General at ZSIS. He also was not aware of any government regulations that provided for return of government vehicles by ex- ministers.

The court summarised by saying that the accused had been given the Hyundai sonanta by the Permanent Secretary of Ministry of Health and the Land-cruiser by the Director General ZSIS so the taking or asportation in the offence of Theft was not fraudulent. It could however be Theft to convert property within the five provisions of Section 265(2) of the Penal code. The Prosecution sought to rely on:

(a) *that the accused had intent to deprive the owner permanently and*

(d)to deal with the vehicles in such a manner that they could not be returned in a condition in which they were.

The Magistrate, after evaluating the evidence could not find the two intents in (a) and (d). There was even a letter on record from Permanent Secretary Ministry of Health to the accused thanking him for putting the Hyundai in Yeti Motors where they could collect it. The evidence was quite clear that the accused took the vehicles to garages with the intention of returning them in a good condition and this fact was not hidden by the accused.

Conclusion

Investigations carried out by the Police Investigator were half baked and incomplete. His failure to interview and record statements from Xavier Chungu was fatal to the case as witnesses from ZSIS stated that Chungu knew better about the Land-cruiser. Also the first Prosecution witness stated that he had not complained of Theft, then who did? It is clear that the matter was began politically and had the Prosecutor acted professionally, he would have sent the docket back for a thorough investigation before proceeding further.

CHAPTER 4

4.0 BRIEF HISTORY OF PROSECUTION SYSTEM IN ZAMBIA

Like many other laws, the prosecution system in Zambia is modelled on an English Act, the Prosecution of Offences Act, 1879 of England and Wales which created the Office of the Director of Public Prosecutions (DPP). So when Zambia attained independence from the British government in 1964, she did not have much choice but to inherit the English system of prosecuting criminal offences. However, the British themselves have since repealed the original Act and replaced it with the 1985 Act. This new Act has brought about two significant changes:

- i. The establishment of an independent National Prosecution Service.
- ii. The de-linking of the prosecution function from the Police to the Service.

Before this reforming piece of legislation, the situation obtaining in England and Wales was just like in Zambia today where the bulk of the prosecution was done by Police Officers. It is necessary to know the background that led to the enactment of this piece of legislation in England. Under the common law, the prosecution of criminal offences was left to the initiative of the people injured or other private citizens representing them. It was not until 1879 that the State undertook that duty in a systematic way. There was criticism against the fact that Police Officers who conducted investigations were also responsible for prosecuting offenders. A number of committees²⁰ were commissioned to examine the problem further and come up with recommendations; the most recent one being the Royal Commission on Criminal Procedure²¹ which reported *inter alia* that:

²⁰ The Roche department Committee on Justices' Clerks (1944) and the Royal Commission on the Police (1962)

²¹ 1981 – headed by Sir Cyril Philips

“It can also be argued.....that it is in theory unsatisfactory that the person who has investigated the case- the Police Officer- should be the person responsible for the decision to prosecute. Inevitably, the Police Officer forms a view as to the guilt of the suspect, and without any improper motive, may be inclined to shut his mind to the evidence pointing the other way.”

The Commission went further in its recommendations and said that the system did not measure up to the required minimum standards of fairness, openness, accountability and efficiency. It therefore recommended the establishment of an Independent Prosecuting Service and pointed out that the conduct of prosecution should be done by a person who was legally qualified and who was independent from the Police investigators. Hence we see the birth of the Crown Prosecution Service in 1985 established under the Prosecution of Offences Act of the same year, headed by the Director of Public Prosecutions. It has administrative and operational autonomy as it does not fall under any government Ministry.

On the Zambian scene, the prosecution system still operates on the basis of the 1879 Prosecution of Offenders Act of England and Wales. The office of the Director of Public Prosecutions is still a government department under the Ministry of Legal Affairs. It has no power to recruit its own staff and therefore finds itself dependant on the Ministry of Legal Affairs for the necessary resources needed to run the office. It is therefore difficult to see how independent the Director of Public Prosecutions can be in such circumstances and the provisions of the constitution regarding his independence can be taken with a pinch of salt. Indeed what independence does he have when State Advocates in his office are recruited by Ministry of Legal Affairs and are subject to transfer to other departments within the Ministry without his knowledge or approval. The Director of Public Prosecutions needs administrative autonomy and the only way this can be achieved is through safeguarding his

independence by enacting an Act of Parliament that will give him power *inter alia* to be in charge of his own resources.

In the recent past in Zambia, we have seen that citizens are voicing their concerns on the inefficiency of the criminal justice system and are generally dissatisfied with the numerous acquittals, *nolle prosqui*²², overcrowding in remand prisons and delays in disposal of cases. This is attributed to the Prosecution and the Judiciary in general.

4.1 THE POWERS OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Article 56 of the Constitution has invested wide ranging powers in the office of the Director of Public Prosecutions as follows:

- a. *To institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed by that person.*
- b. *To take over and continue any such criminal proceedings as have been instituted or undertaken by any other person or authority;*
- c. *To discontinue, at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*

These powers may also be delegated to other persons other than State Advocates. Section 86 of the CPC provides that:

1. *The Director of Public Prosecutions may appoint generally, or in any case, or for any specified class of cases, in any district, one or more Officers to be called Public Prosecutors.*

²² This is one of the ways in which Prosecution can be discontinued but does not operate as a bar or discharge or an acquittal on the merits. A person may be re arrested when more evidence surfaces

2. *The director of public prosecutions may appoint any person employed in the Public service to be a Public Prosecutor for the purposes of any proceedings instituted on behalf of the people.*

This is the provision that makes it possible for Officers from other institutions including Zambia Wildlife Authority (ZAWA), Anti- Corruption Commission (ACC) and Drug Enforcement Commission (DEC) to be appointed. Other than this category of Officers, interested Lawyers in private practice also may apply to prosecute a particular case in the Public interest.

It is interesting to observe that even if the Office of the Director of Public Prosecutions is the supreme Prosecution Authority in Zambia the bulk of prosecutions are not done by his office but by the Police and other specialised institutions.²³ This underlies the problem noted earlier that prosecution in Zambia is characterised by a fragmented and an uncoordinated sectoral approach with the effect of diffusing power and responsibility in a variety of government departments. Inherent in this are the unavoidable jurisdictional overlaps and conflicts that have arisen thereby inhibiting the effective and efficient prosecution of offences. The case of AfricaGraphix v. Attorney General²⁴ is illustrative; in that case, a Ministry of Education official in western province contracted with a Namibian company called Africa Graphix to supply Lozi Textbooks. This was done in blatant disregard of tender procedures; the case was handled by State Police and the Anti- Corruption Commission Officers at the same time each claiming jurisdiction. Each institution expended resources in investigating this case and Officers travelled to the Western Province and to Namibia for investigations. It was only stopped by Office of DPP who ruled that the Zambian

²³ Anti-Corruption Commission, Drug Enforcement Commission and Zambia Wildlife Authority

government was bound by that contract and was going to pay and that it was up to Ministry of Education to deal with its errant officials.

In recent times we have seen the Law Enforcement Agencies coming together to form a task force to investigate the alleged plunder of National Resources. This task force is constituted by Investigators from State Police, Anti- Corruption Commission and Drug Enforcement Commission.

Earlier in 1998 upon the liquidation of Credit Africa Bank, there was established a committee from Zambia Revenue Authority, State Police and Anti-Corruption Commission to investigate the matter. Creation of such 'task forces' is accepting the fact that even the investigation function is un co-ordinated just like the Prosecution function. Had the office of DPP been adequately manned and funded, it would have been able to prosecute adequately.

4.2 RESTRUCTURING THE OFFICE OF DIRECTOR PUBLIC PROSECUTIONS

There is growing public concern that the criminal justice administration is weak and that perhaps de-linking the prosecution function the regular police and other investigative wings could solve the problem. This will mean that Public Prosecutors become part of the establishment of the Director of Public Prosecutions.

To perform this added responsibility restructuring of the office of director of public prosecutions is inevitable This does not mean that there will be no more private prosecution, this will continue as it is has its place in the criminal justice system. Private individuals will continue to enjoy their common law right of instituting criminal proceedings with the usual consent from Director of Public Prosecutions.

²⁴ (1999) Unreported High Court Judgment

The Director of Public Prosecutions remains entitled throughout those proceedings to take over and continue or terminate such proceedings.

The restructuring of this office needs a holistic rather than piece-meal approach. This is because it is a major reform of the criminal law. What is needed is political will by the government of the day to enact legislation that will regulate the operations of this office and create a truly independent National Prosecution Authority or Service. The same legislation should transfer the Police Prosecutors and other Prosecutors in the specialised institutions to this new institution. This should be the end of Police Officers engaging in prosecutions and will mark the beginning of professional prosecutors in the country. Further, to cut down on time spent seeking consent and legal advice from Director of Public Prosecutors, the office shall attach its own Officers to these institutions to deal with the special types of cases; it is indeed a changed role for the Director of Public Prosecutions.

4.3 ROLE AND FUNCTIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS

4.31 MANAGEMENT

The Director of Public Prosecutions ought to provide the required tactical and technical leadership to prosecutors in the country. He should be accountable for the effective service delivery so as to contribute towards an effective criminal justice system. The Director of Public Prosecutions must manage and drive the policy framework regarding prosecutions to ensure a standard and uniform prosecution policy for the country. He should develop polices and ensure their implementation. His office should manage the budget of the prosecution Authority or Service and he should advocate for improved conditions of service for his staff. He should be a

legally trained person, non- partisan and a bold individual who should not be swayed by politics.

4.32 MONITORING

For any policy to work it has to be monitored and evaluated systematically and periodically. The Director of Public Prosecutions should monitor and track adherence to the prosecution policy and the effective functioning of the various departments that make up his office. He needs to put in place systems and procedures that continually track and evaluate the performance of his staff through an appropriate performance appraisal system. Currently performance of prosecutors is gauged through the number of convictions and a recommendation from a Magistrate. Prosecutors should have their own rank structure unlike the case is at present where they are fitted into Police ranks and other ranks of investigations wings they fall under.

4.33 HUMAN RESOURCE MANAGEMENT AND DEVELOPMENT

The office of the Director of Public Prosecutions should manage all the facets of human resource management and development in the prosecution service or Authority. This includes recruitment, remuneration, training, transfers, discipline, promotions and demotions. Through research and exposure to foreign systems the Director of Public Prosecutions will be able to develop the best practice for this country. Training programs aimed at developing and upgrading skills of prosecutors should be planned including refresher courses, local and international conferences and seminars. He should engage in a capacity building programme for his staff to improve their low professional qualification; he should also develop a disciplinary code for his staff.

4.34 INTERVENTION

The Director of Public Prosecutions should have the authority to intervene in the decisions of any of his staff whether the decision is to prosecute or not to prosecute. His authority should be made unequivocally and his involvement in resolving any kind of disputes that may arise between his office and his subordinates should be respected. This is in order to enhance the legitimacy and image of the prosecution Service.

4.35 COMPLAINTS MANAGEMENT

The Office of the Director of Public Prosecutions should be responsible for responding to and dealing with complaints received about any alleged misbehaviour or decision of his staff that brings the name of the office into disrepute. He ought to determine what type of complaints should be dealt with by his office and which he can delegate to heads of departments under him.

4.4 **RELATIONSHIP WITH OTHER DEPARTMENTS**

4.41 THE ATTORNEY GENERAL

In Zambia the Attorney General may be appointed as Public Prosecutor by the DPP while in England and Wales it is the reverse as the DPP is subordinate to the Attorney General and acts under his directions²⁵. The Republican Constitution provides that the Attorney General may assist the DPP in prosecution of cases that have a bearing on the security of the nation. This is in accordance with article 56 (7) which provides:

“ In the exercise of the powers conferred on him by this article the DPP shall not be subject to the direction or control of any other person or authority, provided that

²⁵ S.3 of the Prosecution of Offences Act, 1985

when the exercise of any such power in any case may, in the judgement of the DPP involve the general consideration of public policy, the DPP shall bring the case to the notice of the Attorney General and shall in the exercise of his powers in relation to that case, act in accordance with any directions of the Attorney General."

The proviso in this article is quite clear and should not be used by overzealous Law Enforcement Officers to by-pass the office of the DPP and directly seek the intervention of the Attorney General in criminal cases that require general considerations of public policy. The proper construction of the proviso is that it should be the DPP to decide which matters to refer to the Attorney General and nobody else. This is so in order that his constitutional independence is respected and his functions are not questioned by anyone.

4.42 THE DPP AND THE POLICE

Article 104 of the Republican constitution confers the power to protect life and property, to preserve law and order and to detect and prevent crime on the Zambia Police service.

More functions of the Police are found in the Police Act²⁶ which lays emphasis on its investigative functions, crime prevention and keeping of the peace. It can be seen that the Constitution does not confer the powers to prosecute offences to the Police but to the DPP who then may appoint Officers including those from the Police as Public Prosecutors. His role is further to offer advice to the Police on sufficiency of evidence in their possession to support charges and to recommend appropriate charges according to the evidence available. Currently, the DPP as a matter of routine allows investigators in the Police and other Law Enforcement Agencies to prosecute offenders.

²⁶ S 5 of the Police Act, Cap 107

4.43 THE DPP AND THE ANTI-CORRUPTION COMMISSION

Zambia has undergone changes since independence in all areas of human endeavour namely social, economic, cultural and political spheres. This is attributed to the industrialisation and urbanisation which has led to significant changes in people's lifestyles and living standards. These socio-economic changes have led to inequalities in accessing resources. Other social problems facing Zambian citizens are the results of liberalisation of the economy which had been hitherto nationalised. These problems have led to high unemployment levels and unbelievable income disparities with the majority having meagre resources. This changed scenario has made it possible for a large number of corrupt practices to flourish. Cases of Corruption were handled by the Police who used the provisions of the Penal code²⁷ but due to the increase in the number of cases dealt with, the government decided to enact specific legislation for offences of this nature; the Corrupt Practices Act of 1980 was enacted which established the Anti- Corruption Commission (ACC). The commission operated as a government department until 1996 when it was repealed and replaced by the Anti- Corruption Commission Act²⁸. This Act created an autonomous body whose functions were primarily to receive and investigate complaints of corrupt practices and, subject to the directions of DPP, to prosecute offenders. Prior to their enactment and under both pieces of legislation, the Officers were required to obtain consent of DPP before instituting any prosecution related to Corrupt practices. The reason for requiring this consent is twofold:

- a. The supreme authority to prosecute is vested in the DPP; ACC is primarily an investigative organ whose power to prosecute is delegated to it.
- b. A danger of an investigation being initiated merely to pursue a political or business rival exists.

²⁷ For instance S. 99 of the Penal Code (Cap 87)

The fact that the Anti Corruption Commission exercises both investigative and prosecutorial functions is intended to ensure efficiency in the fight against corruption. However, good governance dictates that these two functions should remain separate and the consent of DPP is intended to ensure that the decision to prosecute remains an objective one.

4.44 THE DPP AND DRUG ENFORCEMENT COMMISSION

Drug use and trafficking are no longer problems exclusively of the developed countries. Developing countries are increasingly becoming consumers and destinations or routes for the drug lords. The Zambian government recognised that drug related offences cannot be easily investigated by the Police but a special investigative unit of specialists with proper resources and technical expertise to fight all forms of drug related vices. This led to the enactment of the Narcotic Drugs and Psychotropic substances Act which²⁹ established the Drug Enforcement Commission (DEC).

4.45 OTHER ORGANISATIONS

The same rationale used above in creating specialised investigative agencies to deal with special types of problems as they arise has been behind the enactment of other statutes like the Zambia Wildlife Authority Act. In the same vein, other existing institutions not primarily investigative in nature have also had public prosecutors appointed to deal with the special types of problems within their area e.g. National Pension Scheme Authority, Immigration Department and Bank of Zambia.³⁰ These organisations have trained Officers to prosecute offences as they understand them

²⁸ Act No. 42 of 1996, Cap 91

²⁹ Cap 96 of the Laws of Zambia

more readily than the Police, but they too have to obtain the requisite consent from the DPP.

4.5 HARMONISING RELATIONSHIP BETWEEN INVESTIGATIVE WINGS AND DPP

It has been noted that these Officers who prosecute offences in these investigative wings are appointed by the DPP and most importantly cannot institute criminal proceedings without obtaining prior consent of the DPP. Another advantage in specialised agencies investigating certain offences is because of the expertise required which the regular Police may not have. This is advantageous in that it complements the work of the Police. However, separation of the investigative function from the prosecution function is one of the ways in which good governance may be achieved. It therefore follows that it is not only the Police who should stop prosecuting offences as Police Public Prosecutors but also Officers from Anti- Corruption Commission, Drug Enforcement Commission and the rest. What is to happen to them then? There are two alternatives that may solve the problem.

1. The DPP may have offices in all the provinces manned by legally trained personnel where Investigators will be taking dockets after carrying out an investigation.
2. The DPP may second his Officers to these institutions so that time spent on obtaining consent is reduced. If this is the preferred choice, then DPP's office should have specialised units or departments to deal with special types of cases from these investigations wings.

³⁰ Prosecutors under BOZ are to deal with cases against the Banking and Financial Services Act Cap 387 of the Laws of Zambia

CHAPTER 5

SUMMARY AND CONCLUSIONS

It has been noted that the decision to prosecute an individual is a serious step indeed which calls for objective decision making. Equitable and effective prosecution is vital not only to the maintenance of law and order but also to cultivate and win public confidence. Whether a case is 'big' or 'small', it has serious implications and consequences on the lives of all concerned whether victim, witness or accused. The time has come for the office of DPP to be made autonomous in a practical sense and the best way of achieving that end is by enacting specific legislation which will establish a National Prosecuting Authority or Service. The Chief Executive of this body, the DPP, shall be able to develop policy guidelines (which are currently lacking) for his staff.

Having examined the various problems the Prosecution system in general and the Public Prosecutors in particular are beleaguered with, what is the way forward? An obvious answer would be that what is needed is a complete overhaul of the system, starting with recruitment, training, placement of manpower, performance appraisal system, motivation, reasonable conditions of service and everything that goes with management of staff. This is however, not as simple as it appears because first and foremost what is needed is political will to change the current system. This political will does not appear to be there.

The Mwanakatwe Constitution Review Commission³¹ recommended *inter alia* that the government should give reasons for entering a *nolle prosequi* so that

³¹ Government of Zambia (GRZ) (1994)

instances of abuse are minimised; in its response in the white paper³², this most progressive recommendation was turned down by the Government. One can therefore deduce that government is reluctant to change so that it can continue to abuse its people especially those in opposition through the *nolle prosqui* and other ways of discontinuing criminal proceedings.

Another instance that shows lack of political will on the part of government is the fact that in July, 1992, the Law Association of Zambia initiated a special committee³³ to study the problems of delays in the administration of justice and delivering of judgements in Zambia. The committee submitted a detailed report with progressive recommendations which if taken seriously could improve public perception of the criminal justice system in the country. The problems highlighted in that report remain as real now as they were when they were made. The relevant ones to this study are:

- (a) Shortage of court rooms- This has a bearing on the work of Prosecutors as it means witnesses have a longer time to wait at court. Up to three (3) Magistrates share a court room. There are also no reception areas for witnesses to wait but only stand along corridors and under trees.
- (b) Lack of transport leading to accused persons not being taken to court on time and judicial personnel not being taken to the offices on time. This also inconveniences Prosecutors and witnesses who have no choice but to wait for court officials including magistrates.

³² Government of Zambia (GRZ) Government White Paper (1994)

³³ Report of the Special Committee (March 1993) chaired by Supreme Court Judge Justice E L Sakala as he then was

- (c) Lack of facilities and tools like typewriters law books. This is especially true of stations outside Lusaka as they no longer receive latest statutes and law reports.

All these observations have a direct impact on Prosecution work and still remain unresolved because of lack of political will. To begin resolving the issues expounded in this research, it is important that the government overcomes its malaise on this most important issue by ensuring existence of a transparent criminal justice system. Public confidence needs to be won and it can only be done by embarking on the following courses of action:

Enacting a statute that will establish an independent National Prosecution Authority or Service should be the first step. It is suggested that a number of benefits will flow from the creation of this independent body. This will enable all Prosecutors from the various Law Enforcement Agencies to have a sense of belonging; they will be effectively supervised with the result that they will begin to apply uniform prosecution standards and policies in the administration of criminal justice. Differences in statutory conditions of service will be a thing of the past because the DPP will be able to formulate a uniform code of conduct for his subordinates and they will also be subjected to uniform disciplinary code. It is further anticipated that Prosecutors will also have one common forum to advance their professional interests.

It is expected that the National Prosecution Service/ Authority will be transparent enough in its dealings and will not allow to be swayed by religious, racial, sexual or political inclinations; Public Prosecutors will not report to Senior Police Officers as is currently the case but to DPP. As members of the Police service they have divided loyalties to their superiors in the Police and to

the DPP in whose name they prosecute. What is advocated for is not rigid separation but enough independence to work without interference while still cooperating as they are all part of the criminal justice system. Close working relations should continue to exist between all investigative wings and the office of DPP; the latter shall continue to provide advice on sufficiency of evidence and on most appropriate charges with which to proceed on and other matters but the final decision to prosecute should be left to the professionals. The only relevant considerations a Prosecutor should have in mind when presented with a matter are:

- i. Evidential test: This is an objective test; if a matter does not have relevant and admissible evidence, it should not be taken to court however serious or important. If it does it will most likely end in an acquittal. There should be a realistic prospect of conviction against the accused person. Whatever available evidence is there should be evaluated thoroughly.
- ii. Public Interest Test- A classic statement on Public interest was made by Lord Shawcross³⁴ in his capacity as Attorney General of England in 1951. He said: "It has never been the rule in this country...I hope it never will be...that suspected criminal offences must automatically be the subject of prosecution."

What was meant was that it is not practicable to subject whatever matter is investigated to prosecution; someone has to take certain matters into consideration in deciding which matters went to court and that someone is the prosecutor. It is only him who shall have the sole responsibility of ensuring that

³⁴ House of Commons Debate, volume 483, Column 681, 29 January, 1951

the right individual is prosecuted for the right offence and to present all relevant evidence to court whether that evidence is to the detriment of the State's case or not.

It is anticipated that the DPP's office will be more efficient as it will have resources at its disposal i.e. manpower and finances voted by Parliament so duplication of the function between DPP's office and the other Law Enforcement Agencies will not be there since all Prosecutors will be under DPP. The donor community may be able to assist with the initial funding as this institution will promote good governance.

With improved funding, the DPP will be able to provide basic necessities for his officers and improve the conditions of service to some extent. A Prosecutor's office should be equipped with Acts of Parliament, latest amendments, statutory instruments, Law reports, Computers or electronic type writers. Ample office space is also needed. Transportation is required mostly for delivering prisoners to court and for delivering witnesses to court if need arises.

Ensuring that the Prosecution function is separated from the Investigation function and consequently, Police Officers should no longer be appointed as Prosecutors. This should apply to full time Prosecutors from DEC, ZAWA, DEC, ACC and other Law enforcement Agencies. These investigating bureaux should be freed to concentrate on investigations and submit dockets to DPP for possible prosecution. This will ensure that they have real independence and objectivity in making prosecutorial decisions as currently they have loyalty to the Investigating Agency

they fall under and at the same time have loyalty also to prosecuting in the public interest.

It will further encourage specialisation in the Prosecution system as Prosecutors shall have specialised areas of operation.³⁵ Those dealing with frauds should be attached to commercial banks for a specified period so that they understand how fraudulent transactions occur. Those dealing with domestic violence, rapes and child defilement cases should undergo some short courses in counselling so that they understand better the position of the victim. This will promote efficiency in the system as it is anticipated that the rate of convictions will increase. However, this specialisation should be left only to special types of offences while a general unit may be left for more or less straight forward cases.

The Office of DPP should have divisions in all provinces headed by a senior Prosecutor to deal with cases as they arise; this will reduce the delays caused by transfers of cases to DPP's office for legal advice or consent to prosecute. This will ensure that prosecutors are promoted on prescribed criteria with a bearing on their performance unlike at present where prosecutors work for several years without promotion and when they are promoted, it may not be because of prosecution work but other criteria in the concerned Law Enforcement Agency.

One of the major problems faced by Prosecution universally is the reluctance on the part of the public generally to come forward and assist in the work of law enforcement. Very few people are willing to complain voluntarily about criminal

conduct and it seems no one wants to play the part of 'accuser' except where the case involves them personally; their property or a family member suffers injury. The reason is that people fear reprisals and personal inconveniences attendant to giving statements to Police and testifying in court. People therefore, tend to side with the wrongdoer and see Law enforcers, including the Prosecutor as the hostile party. Prosecutors as well as the Police can function more efficiently with a large degree of Public co-operation. The Republican constitution apart from guaranteeing fundamental rights³⁵ also places an obligation on citizens to observe certain duties. Article 113 enumerates nine (9) duties of a citizen and the relevant ones are:

- (a) *to be patriotic and loyal to Zambia and to promote its well being*
- (b) *to contribute to the well being of the community where that citizen lives....*
- (d) *to promote democracy and the rule of law*
- (g) *to carry out with discipline and honesty legal public functions*
- (i) *to assist in the enforcement of the law at all times*

These duties should be explained to the general citizenry so that when they are appreciated, people will willingly report crimes that they witness and when called upon to testify in court, they will feel they are performing a public duty.

In the same vein, whilst educating the public through primary and secondary schools, and institutions of higher learning and public media,

³⁵ For instance those attached to DEC shall specialise in prosecuting Drug related offences if the method of attachment of Officers is adopted, if not Dockets from DEC shall be submitted to DPP who will direct it to a specialised unit for detailed study before taking the matter to court

³⁶ Part III, Articles 11-28

workshops for Prosecutors should also be arranged. These would be primarily to explain how the Prosecution Service or Authority will operate and to introduce the policy guidelines. It will also be a forum to standardise operations, exchange ideas and keep abreast with developments in the profession. Later on refresher courses and legal training should be embarked on to improve educational and professional qualifications of staff.

Prosecutors should play their role in ensuring that witnesses are adequately prepared for court and provide them with as much information as possible. They should also help them claim their allowances to defray expenses and appreciate the trouble they took in going to court in accordance with the law.³⁷

Finally, the office of DPP should be more accessible to the public and in that sense adopt an open door policy where citizens can have their concerns addressed. In the course of their duties, Prosecutors ought to always bear in mind that the aim of the Criminal Justice System is to combat, prevent and reduce crime. This objective can best be achieved if record keeping is improved so that Officers may evaluate their work. This may help in identifying and addressing the weaknesses so that the system constantly checks and improves its performance. The DPP's office should be able to respond to public opinion so that in the event that the office is widely condemned in the media, it should respond and state its position instead of remaining silent.

³⁷ S. 46 of the Subordinate Courts Act Cap 28; S. 359 of High Court Cap 27; S 359 (2) of Criminal Procedure Code

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