

**THE BURDEN OF PROOF AND THE STANDARD OF PROOF: A CRITICAL  
ANALYSIS OF THE DEFENCE OF INSANITY**

**BY**

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**An Obligatory Essay submitted to the school of Law of the University of Zambia in  
partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws  
(LLB).**

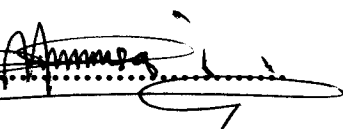
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## DECLARATION

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**THE BURDEN OF PROOF AND THE STANDARD OF PROOF: A CRITICAL  
ANALYSIS OF THE DEFENCE OF INSANITY**

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## **Abstract**

The dissertation critically analyses the insanity defence in relation to the burden of proof and the standard of proof and examines the effect of the shift in the burden of proof on the presumption of innocence.

The dissertation starts by outlining the philosophical foundations behind the insanity defence and explains the reasoning and the rationale behind the same. The dissertation further examines the insanity defence and its implications on the criminal law principle of presumption of innocence. The paper goes on to expose the various problematic areas that arise out of the defence of insanity and the inherent problems inherent in the adoption and application of the defence in its current form in a society like Zambia.

The dissertation, through research and analysis found that shifting the burden of proof on the accused when the defence is raised is in contravention of the presumption of innocence as guaranteed by the Constitution, Cap 1 of the laws of Zambia. The dissertation further found that the standard of proof placed on the accused person is actually a much higher standard that just on a balance of probabilities (though it is still lower than beyond all reasonable doubt. The paper argues that the accused may still be convicted even if they prove on a balance of probability that they laboured under disease of mind.

The dissertation further found that it is not in the interest of justice in a society like Zambia to apply the defence in its raw common law form. Thus the various problems inherent in the defence have been discussed including the lack of a legal code (in form of an Act of Parliament) regulating the detention, care, treatment and the custody of persons detained during the pleasure of the president. The problem shortage of trained personnel and specialised facilities has been raised as being among the main challenges that arise as a result of the defence.

As such the paper makes recommendations to the effect that there must a total remodelling of the law so as to harmonize the defence with the current constitutional arrangement in Zambia. The dissertation has called for a tailor made legal code to reflect the particular needs of the Zambian. Public awareness on the subject has been called for.

## ACKNOWLEDGEMENTS

It goes without saying that first and foremost, I would like to thank the almighty God my loving creator and Father for being the guiding light throughout the journey and for being gracious enough to allow me to finish this work even with the hundreds of obstacles along the way. Without your love, your guidance and your grace, I would not have reached this far.

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Many thanks also go to Tasha Shamane, my cousin and friend for his patience and support during the long nights I worked on this paper, Joshua Mwamulima, and Modrine Siansumo, my friends without whose help in the supply of research material this work would not have been possible and to Yosa Grandson Yosa, a friend and colleague who provided a critique to my work and supplied one of the leading authorities that made this work possible.

Finally, I would like to thank all those who, though not expressly mentioned above, contributed in one way or another in making this research a reality, and its successful completion imminent.

## **DEDICATION**

To my aunt, Mildred Nkulukusa and to my mother Eunice Mbewe, the two women who I feel ever so obliged to thank. Thank you ever so much for instilling the values of hard work in me even though it was not easy. I could never thank you enough even if I tried, but I wish the almighty God will bless you abundantly

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Introduction

This chapter is an introductory chapter which basically gives the general sentiments of this research paper. The chapter will generally introduce the research paper and give an outline of the most important aspect of the research. These will include the statement of the problem, the significance of the study, and the scope of the study and also a review of the literature on the subject. The chapter will be designed in such a way as to give a broad outlook on the study and to pave way for the main elements to be discussed in the research paper.

### 1.2 General introduction:

The defense of insanity is probably the most controversial defense strategies, and also ironically, one of the least used. The defense basically asserts that the accused is not guilty of the offence in question by reason of insanity, that because he did not have the required intention to commit the offence. In *R v. M'Naghten*<sup>1</sup> the M'Naghten rules were formulated and have since governed the law in the defence of insanity the court lucidly put it when they said that every defendant is presumed to be sane until proven otherwise, and...to establish a defence on the ground of insanity;

“it must be proved that at the time of committing the act, the party accused was under defective reasoning, from disease of mind, as not to know the nature and quality of the acts he was doing; or, if he did know it, that he did not know he was doing what was wrong.”

The accused may still be convicted even if they are insane if at the time of committing the act, they were not afflicted by such disease.<sup>2</sup> It is therefore a question of right and wrong in respect of the act with which he is charged. The question of the burden of proof and the standard of proof in the defence of insanity has been a source of great controversies. The controversies are based on the fact that the accused person ought to bear the burden of proof in proving that at the time of committing the act which is called in question, he/she was suffering from disease of the mind. Moreover, it can be argued that the standard is too high in

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<sup>1</sup> (1843) 10 Cl & Fin 200

<sup>2</sup> J Hatchard and M Ndulo, A Case Book on Criminal Law, University of Zambia Press: Lusaka, 1983. page 60

light of the fact that at the time of committing the act, the accused might not have appreciated what they were doing.

In light of this, this author would like to critically analyse the pool of knowledge on this topic and find out whether the law as it is today is favourable for both the prosecution and the defence. In essence, this author would like to participate in some way in the resolution of some of the controversies surrounding the burden of proof and standard of proof vis-à-vis the defense of insanity.

### **1.3 Statement of the problem:**

The defence of insanity is only available as a defence for murder. Section 200 of the Penal Code<sup>3</sup> makes provision to the effect that *any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder*. Malice aforethought is defined in section 204 of Cap 87 as follows;

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not; (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; (c) an intent to commit a felony; (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

Furthermore, Section 12 of the Penal Code provides that

“a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind, incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

The fundamentals or the core concepts of criminal law are grounded in Article 18 (2) of the Constitution.<sup>4</sup> This Article simply provides thus;

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<sup>3</sup>Chapter 87 of the laws of Zambia

<sup>4</sup>Chapter 1 of the Laws of Zambia

“Every person who is charged with a criminal offence (a) shall be presumed to be innocent until he is proved or has pleaded guilty”.

This is what is known as the presumption of innocence. This is backed by the Latin maxim, “*ei incumbit probatio qui dicit, non qui negat*” which simply means that “the proof lies upon him who affirms not upon him who denies.”<sup>5</sup> Thus it is the duty of the prosecution to prove beyond all reasonable doubt that the accused did commit the offence for certain reasons, that is to say, to prove that there was an *actus reus* and that this was accompanied by the necessary *mens rea*. The defence of insanity however, it can be argued circumvents the presumption of innocence.

#### **1.4 The scope of the study:**

Under the English legal system, the law relating to mental abnormality and its effect upon criminal liability developed in three branches. It is to be found in cases relating to acts of automatism, diminished responsibility under the Homicide Act of 1957 (which is non-applicable to Zambia) and also in relation to special findings of guilty but insane under the M’Naghten rules<sup>6</sup>

The study will only concentrate on areas of insanity with special regard to special findings of guilty but insane under the M’Naghten rules and also as regards provisions under the Penal Code.<sup>7</sup> It will not be in the realm of this research paper to examine such defences as automatism and diminished responsibility. The research paper will be concerned with the burden of proof; who bears it when and also why they bear it. It will also be concerned with the standard of proof-whether it is too high on the accused to prove the defence that he alleges. The paper will try and explore the nexus between the defence of insanity and the presumption of innocence. In order to provide a comprehensive analysis of this topic, the research paper will not be confined to any one legal system. Thus such jurisdictions as the Zambian jurisdiction, the American jurisdiction, the English jurisdiction and also many other commonwealth countries jurisdictions will be well within the scope of the study.

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<sup>5</sup> [www.insightlawmagazine.com/evidence](http://www.insightlawmagazine.com/evidence)

<sup>6</sup> D W Elliot and J C Wood, *A Casebook on Criminal law*, Sweet and Maxwell: London, 1963. page 134

<sup>7</sup> Section 12 of the Penal Code, Chapter 87 of the laws of Zambia.

### **1.5 The significance of the study:**

The research is not only timely, but has been long overdue. It will not only seek to identify the fact that the defence of insanity places a much higher burden of proof on the accused person in that he is required to prove facts that he himself may not be aware of but also to bring out the fact that the defence of insanity is in fact a circumvention of the presumption of insanity as laid down in Article 18 (2) of the Constitution.<sup>8</sup> To this extent this research is a modern tribute to an old age desire of trying to provide each and every party in a criminal trial equal treatment and above all, a fair hearing as envisioned by Article 18 (1), which provides that

“if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”<sup>9</sup>

### **1.6 The objectives of the study:**

The main objective of this research will be firstly to establish the inherent fallacy in the defence of insanity, that is to say, to show that the defence of insanity is unfair on the accused person in the following ways;

- (a) that it defeats the whole notion of presumption of innocence;
- (b) that the burden of proof placed on the accused is higher than the law has anticipated in that the person has to prove facts which he or she may not even be aware of.

Secondly, the research aims at showing that there are no laid down rules and regulations for hospitalisation of the persons detained at the pleasure of the president (that is, given the guilty but insane verdict). As such one fails to see the whole point of the said detention.

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<sup>8</sup>Chapter 1 of the Laws of Zambia

<sup>9</sup>The Constitution of Zambia, Chapter 1 of the Laws of Zambia

## **1.7 Hypothesis:**

At the end of the research paper, the paper aims at proving the hypothesis that it is against the presumption of innocence to shift the burden of proof on the accused person in a criminal trial.

## **1.8 Utility of the study:**

The utility of this research cannot be over-emphasised. The research paper's utility is far reaching in that it is beneficial to both the prosecution and the defence. It is also beneficial to the defence (accused) in that it seeks to restore the position of presumption of innocence of the accused. Furthermore, it is beneficial to the prosecution in that all the unnecessary procedures will be done away with, that is to say, the procedure will be shortened in that this will be a defence like any other.

## **1.9 Outline of chapters**

### CHAPTER ONE

#### INTRODUCTION

Chapter one is an introductory chapter which generally introduces the research paper and give an outline of the most important aspect of the research. These include the statement of the problem, the significance of the study, and the scope of the study. The chapter is designed in such a way as to give a broad outlook on the study and to pave way for the main elements to be discussed in the research paper.

### CHAPTER TWO

#### THE PHILOSOPHICAL FOUNDATIONS OF THE DEFENCE OF INSANITY

Chapter two explores the philosophical foundations of the defence of insanity in order to decode the reasoning behind the defence. The chapter aims at providing a comprehensive understanding of both the historical and the philosophical reasoning of the defence. The Chapter provides a critical analysis of some of the issues that are raised by the reasoning behind the defence, including the burden of proof, the standard of proof and the presumption of innocence.

### CHAPTER THREE

#### THE INSANITY DEFENCE AND THE PRESUMPTION OF INNOCENCE-THE EFFECT OF SHIFTING THE BURDEN OF PROOF.

This chapter focuses on this shift in the burden of proof and its impact on the presumption of innocence. The chapter will expose the defective reasoning behind the shifting of the burden of proof in its quest to prove the hypothesis raised by this research paper. The chapter goes further and examine whether the shift in the burden of proof in the defence of insanity is potentially raises the standard of proof.

### CHAPTER FOUR

#### THE INHERENT PROBLEMS ASSOCIATED WITH RAISING THE DEFENCE OF INSANITY.

Chapter discusses the inherent problems that are associated with the defence of insanity.

### CHAPTER FIVE

#### CONCLUSION AND RECOMMENDATIONS

This chapter provides a conclusive summary of the whole discussion and makes recommendations on what necessary changes ought to be put in place.

## **1.10 Conclusion:**

This chapter has given a general overview of the study. It has illustrated that the defence of insanity is potentially injurious to the presumption of innocence. The essay has further illustrated that there is vast amounts of literature on the topic but that this study is unique in that it looks at the picture from the accused person's point of view and tries to see if the nature of proving the defence in any way prejudices the accused person's inherent right to be presumed innocent until proven guilty. This chapter has also explained the timely nature of the study in view of the fact that there has been boiling controversies relation to the defence of insanity.

## CHAPTER TWO

### THE PHILOSOPHICAL FOUNDATIONS OF THE DEFENCE OF INSANITY.

#### **2.1 Introduction**

The following chapter explores the philosophical foundations of the defence of insanity. The paper will endeavour to decode the reasoning behind the defence. The Concept of legally insane will be critically discussed in order to expose the reasoning behind the defence. The aim of this chapter will be to provide a comprehensive understanding of both the historical and the philosophical reasoning of the defence. This will enable this author to provide a critical analysis of some of the issues that are raised by the reasoning behind the defence. This will include the burden of proof, the standard of proof and the presumption of innocence which will be discussed in depth in the proceeding chapter of this research paper. Thereafter, a conclusive summary based on the discussion will then be drawn.

#### **2.2 Insanity in law: What does it really mean?**

Generally speaking, insanity refers to a situation where a person lacks the necessary mental faculties to fully understand the nature of their actions. In law, the defence of insanity is an old age defence which has been a subject of various interpretations. Over the course of the centuries, several explanations and interpretations have been propounded by various scholars to try and explain and rationalise the reasoning behind the defence of insanity as well as to try and dispel the reasoning. There are different tests that have since been adopted by scholars all over the world to try and explain why an accused person claiming insanity should not be punished for the crimes they have committed.

In order to fully understand and have a full grasp of the reasoning behind the defence of insanity, it will be prudent for this author to trace the historical development of the defence. Early on, tests such as the complete madness had become acceptable as a defence to a criminal charge by the reign of Edward I (1272-1307).<sup>10</sup> Early writers however did not treat

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<sup>10</sup> The American University Law Review, Charles m. Lamb: Warren burger and the insanity defence-judicial philosophy and voting behaviour on a US Court of Appeals; Vol. 24:91, p. 93

insanity in a criminal context. The first recorded attempt to distinguish between degrees of insanity that would excuse criminal culpability, yet not amount to total lunacy, was made by Sir Matthew Hale in the seventeenth century. 'Hale would have held those with a mental capacity as great as that of a nine- or ten-year-old child criminally responsible for their actions.'<sup>11</sup> The test was further refined a century later, with the introduction by Hawkins of the concept that insane persons must be incapable "of distinguishing between good and evil" in an abstract sense."<sup>12</sup> Despite these early attempts at formulating a rule for the insanity defence falling short of complete madness, with but one exception the case law followed a generally strict line known as the "wild beast test."<sup>13</sup> Stressing the same point, Simon<sup>14</sup> has written that historically, in order for the accused to avail himself the defence of insanity, must be totally deprived of his understanding and memory, so as not to know what he is doing, no more than in infant, a brute or a wild beast.<sup>15</sup>

From the foregoing, it is clear that in order for an accused to establish the defence of insanity, they had to show that they were completely devoid of all the mental faculties that would be needed for one to discern between morally right and morally wrong. This suggests to this author that the person had to be totally devoid any sense of morality, which distinction at the very core of humanity. Thus he had to be like a wild beast such that though his actions are guilty; his mind does not even come into question because he is incapable of forming any sort of intention whatsoever. The "wild beast test" simply put meant that the accused person had become a beast and therefore did not know what they were doing or that they could not distinguish between right and wrong, between good and evil. And since the whole criminal law mainly rests on fault and intention of the accused person, the reasoning was that if the accused could show that they were totally devoid of any mental faculties to be able form such kind of intention, they could not be held liable for the death of the deceased.

Examining what the accused person had to establish, it does indicate that in medieval times, the accused person had a mammoth task. In the following years therefore, in response to this

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<sup>11</sup>The American University Law Review, Charles m. Lamb: Warren burger and the insanity defence, p. 94

<sup>12</sup>The American University Law Review, Charles m. Lamb: Warren burger and the insanity defence, p. 94

<sup>13</sup>The American University Law Review, Charles m. Lamb: Warren burger and the insanity defence, p. 94

<sup>14</sup>R J Simon, The Jury and the Defence of Insanity, Little, Brown and Company: Toronto, 1967. page 17

<sup>15</sup>Mr. Justice Tracy's Instructions in the trial of Edward Arnold, 16 State Trials 695 (1723), at 764-65

rapidly developing procrustean theory of criminal responsibility the Queen's Bench handed down its famous ruling in the case of *R v. Daniel M'Naghten*.<sup>16</sup> The M'Naghten rule became the first major modern test of criminal insanity. The brief facts of the case are as follows; Daniel M'Naghten in 1843, a Scotsman suffering from paranoid delusions believing the British Prime Minister, Sir Robert Peel, to be conspiring against him shot at the prime minister but instead shot his secretary who died as a result of the shooting. At the trial the defence of insanity was raised and he was ruled insane and spent 20 years in a mental asylum until his death. The case caused uproar in England as the public felt that the accused had got off with a much lighter sentence that he deserved. This culminated into the formulation of standard rules upon which the defence would be based. These rules became known as the M'Naghten rules.

According to these rules, in order to establish a defence on the grounds of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that what he was doing was wrong.<sup>17</sup> Tindall CJ delivered judgement on behalf of the Queen's Bench and these rules are now considered as the working definition for the defence of insanity. Up until this case, legal insanity had never really been defined.

These rules can be seen as an improvement from the complete madness test and the "wild beast test" that the criminal law scholars were obsessed with. Under the M'Naghten rules it was necessary for the accused person to prove that they were totally devoid of the moral conscious to distinguish between right and wrong, between good and evil. All the accused person had to prove was that at the material time, they were under such influence of disease of mind as not to know that what they were doing or that if they did know what they were doing, they did not know that what they were doing was wrong. Examining case law however, one soon learns that the legal dynamics of the defence make the moral fabrics of the situation irrelevant. Thus in *R v Windle*<sup>18</sup>, it was succinctly put when the Queen's Bench held the view that in the defence of insanity, doing wrong means legally, not morally wrong. The

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<sup>16</sup> (1843) 10 Cl & Fin 200

<sup>17</sup> (1843) 10 Cl & Fin 200

<sup>18</sup> (1952) 2QB 826

brief facts of the case were that the accused person killed his insane wife who was always threatening suicide by making her take 100 aspirin tablets. When he was arrested, he asserted thus; “I suppose they will hang me for this?” indicating he knew it was legally wrong, whereas he thought it was morally right. In its holding, the court was of the view that knowledge that an act is ‘wrong’ means legally not morally wrong. Killing terminally ill spouse may be morally justified but is a criminal offence. He claimed he had communicative insanity but the court upheld the guilty sentence based on the fact that the accused person knew (in the legal sense) that what he was doing was wrong.

Although this was an improvement from both the complete madness test and the wild beast test, it was still, in the considered view of this author, a mammoth task for the accused person. This will however be discussed in detail in the next chapter.

The M’Naghten rules have become the most widely accepted rules as regards the defence of insanity in most of the commonwealth jurisdictions including Zambia. In Zambia, the Penal Code Act<sup>19</sup> can be said to have codified the M’Naghten rules with very little modifications. Section 12 of the provides that

“a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind, incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission...” The Act goes further to provide thus;

“...But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

The whole defence therefore stands or falls depending on whether at the time of the act or the omission that results into the death in question; the person was labouring under such disease of mind. It can be argued therefore that this is the difference between medical insanity and legal insanity, that is, medical insanity looks at whether the person generally has sound mental faculties while legal insanity concerns itself with whether at the time of committing the act of the at the time of the material omission, the person was so materially affected by such disease of mind. Thus it does not matter that the accused has a history of mental illness.

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<sup>19</sup> Chapter 87 of the laws of Zambia

If at the material time, he was not so affected by such disease, the defence fails in its entirety. It can be argued therefore that the test in the defence of insanity is whether at the material time, the disease of mind was in control of the accused person such that he was not aware of what he was doing or that what he was doing was wrong. This view was held by the High Court in *The People v Kufekisa*<sup>20</sup> in which it was held that “insanity, even though temporary is an answer”. This was simply recognition on the part of the Court that insanity in legal terms means being afflicted by disease of mind at the time of the commission or omission leading to the offence in question. This has been reiterated in a number of cases by the courts both in England and in Zambia. This was well elucidated by the High Court in the case of *Joseph Mutapa Tobo v The People*<sup>21</sup> where it was stated thus;

“This exception expressed in the last part of the section is of tremendous significance to the success or failure of this defence. It does not follow that just because an accused suffers from a disease of the mind, his actions should be dismissed as those of a lunatic. The kind of disease of mind which is relevant to this defence is that which produced that kind of act or omission complained against. It therefore becomes necessary to show, on the part of the accused, systematic course of conduct, propensitively leading to the act or omission in question.”

The particulars of the case were that the accused was charged with murder for killing a woman after raping her. The defendant raised the defence of insanity and was taken to Chainama Hospital for psychiatric evaluation. One of the questions that the high Court was faced with was whether every disease of the mind can sustain a defence of insanity. The Court based its reasoning on Section 11 of the penal code,<sup>22</sup> also known as the “presumption of sanity clause,” which provided that

“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

The philosophical reasoning behind the defence of insanity is rooted on the very foundations of the criminal law, that is to say the general principle of the criminal law that a person cannot be convicted of a crime unless the prosecution can prove that the accused has caused the act or that he is responsible for a certain state of affairs that are prohibited by the criminal law and that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs.<sup>23</sup> This general principle is expressed in the Latin maxim *actus non facit*

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<sup>20</sup> (1975) Z.R. 188 (H.C.)

<sup>21</sup> (1985) Z.R 158 (H.C)

<sup>22</sup> Chapter 87 of the laws of Zambia which was at the time of Judgment Chapter 146 of the laws of Zambia

<sup>23</sup> J C Smith and B Hogan, *Criminal Law*, 6<sup>th</sup> edition, Butterworths: London, 1988. Page 31

*reum mens sit rea* which means there cannot be such a thing as legal guilt where there is no moral guilt.<sup>24</sup> This simply means that generally speaking, a guilty act does not make a person guilty of a crime unless the mind is guilty. Lord Simon in *DPP v. Majewski*<sup>25</sup> is thus instructive when he defines the *mens rea* as the state of mind stigmatized as wrongful by the criminal law when compounded with the relevant prohibited conduct, constitutes an offence.” Smith and Hogan on the other hand defined the *mens rea* as “intention, knowledge, and recklessness with respect to all elements of the offence.”<sup>26</sup>

Adopting the same line of thinking, Perlin<sup>27</sup> writes;

“the ordinary test of criminal responsibility is whether the defendant can tell right from wrong.... The application of this test to a borderline case can be nothing more than a moral judgment that it is just or unjust to blame the defendant for what he did. Legal tests of criminal insanity are not and cannot be the result of scientific analysis of objective judgment.... the ordinary sense of justice still operates in terms of punishment.... A man who cannot reason cannot be subject to blame.”

The *mens rea* in this author’s view therefore seems to be a positive cognitive process on the part of the accused person to commit the crime that they are being accused of. This entails a process of planning on the part of the accused to cause death to the deceased or at the very least to cause as grievous bodily harm as to results in the death of the accused. The implication therefore is that the accused must have intent to commit an unlawful Act. That being the case therefore, a question may be posed as to whether a person labouring under disease of mind has the legal capacity to commit a crime. This question forms the crust of the defence of insanity, and is one that the whole of this research paper will attempt to answer.

As already alluded to in Chapter One, the *mens rea* for murder is provided for in Section 200 of the Penal Code.<sup>28</sup> The relevant Section provides

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<sup>24</sup> S E Kulusika, Text, Cases and Materials on criminal law in Zambia, Lusaka: UNZA Press, 2006. Page 34

<sup>25</sup> (1977) AC 443

<sup>26</sup> J C Smith and B Hogan, Criminal Law. Page 31

<sup>27</sup> M L Perlin, The Insanity Defence in English-Speaking African Countries, 1969. page 73

<sup>28</sup> Chapter 87 of the laws of Zambia

“any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

The Section simply provides that the crime of murder cannot be proved unless the mens rea called malice aforethought has been proved. At common parlance, malice aforethought may be said to be a situation where the accused person had ill intentions of killing the deceased person before the actual killing took place. The Penal Code does provide a legal definition for the *mens rea* of the offence of murder. Section 204 of Chapter Eighty-Seven defines malice aforethought as follows;

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not; (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; (c) an intent to commit a felony; (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

Without the necessary *mens rea* therefore, there is no murder to talk about. Lord Diplock is thus instructive in explaining the philosophical reasoning behind the defence of insanity. *In R v Sullivan*,<sup>29</sup> his lordship reasoned that the M’Naghten Rules had defined *the concept of mental disorder as negative responsibility for crimes*. This view was also adopted by their lordship in *Attorney-General’s Reference No 3 of 1998*<sup>30</sup> where it was stated that in modern language the relevant direction to the jury might more aptly be summarised as: “*he did not know what he was doing.*”

The views held by the courts in the foregoing cases have become widely accepted and have thus been codified in the Zambia statutes. This is evident in Section 167 (1) of the Criminal Procedure Code<sup>31</sup> which has made provision to the effect that

“where an act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible for his actions at the time when the act was done or omission made, then, if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did

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<sup>29</sup> (1984) AC 156

<sup>30</sup> (1999) EWCA Crim 835

<sup>31</sup> Chapter 87 of the Laws of Zambia

or made the same, the court shall make a special finding to the effect that the accused was not guilty by reason of insanity.”

The foregoing provision is clearly made in view of the fact that the defence of insanity comes into effect only when the *mens rea* of the accused is in question, that is to say, the accused pleads the defence of insanity to show that even though they committed a guilty act, their mind was not guilty. This is clearly a recognition that if successful, the accused will have proved that they did not have the necessary *mens rea* to commit the murder in question, without which the court cannot and should not convict. Simply put therefore, the defence of insanity raises the issue of *actus non facit reum mens sit rea*, and as Perlin<sup>32</sup> puts it, “a man who cannot reason cannot be subject to blame”.

The implications of the not guilty by reason of insanity verdict as provided for by Section 167 (1) of the Criminal Procedure Code<sup>33</sup> are far reaching for the accused person in a murder trial. The verdict gives the Court power to detain the accused at the pleasure of the defendant. The effect in terms of the criminal law is that the accused person is not offered much of a chance in that it is either incarceration in prison or being held at the pleasure of the president at Chainama Hospital. This flies through the teeth of the purpose for which the accused should be detained. *Devlin J in R v Kemp*<sup>34</sup> offers a clue as the reasoning behind the detention at the pleasure of the Queen (or the President in the case of Zambia). His Lordship was of the view that

“The purpose of the legislation relating to the defence of insanity, ever since its origin..., has been to protect society against recurrence of the dangerous conduct”.

The suggestion is that the accused is detained because there is a realisation that they could go into a state of temporal insanity any time and cause death again. Thus in order to prevent a situation where the accused person lapses into insanity and cause death to another person, they ought to be detained. It is important to note that that His Lordship does not say that the

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<sup>32</sup> M L Perlin, *The Insanity Defence in English-Speaking African Countries*. page 73

<sup>33</sup> Chapter 87 of the Laws of Zambia

<sup>34</sup> (1957) 1 QB 399, 407

purpose is to make sure that the insane person is treated so as to prevent the recurrence of the offence for which they have been accused.

Another important aspect that the “not guilty by reason of insanity” verdict does not take into consideration that the definition of insanity requires that the person must at the time of committing the crime have been under such disease of mind as to render him insane. What comes to the mind of this author is that the fact that the whole defence stands or falls based on the fact that the disease of mind is only relevant to establish the insanity defence if at the material time it was the cause seem to negative the reasoning behind the detention as envisioned by Lord Devlin in the case of *R v Kemp*.<sup>35</sup> The reasoning by his Lordship is, in this author’s view, based on medical insanity which is in a totally different realm from legal insanity. It is important to remember that Section 11 of the Penal Code<sup>36</sup> makes provision for the presumption of sanity. Flowing from this is the idea that any person may suffer from temporal insanity and as such the detention should not be automatic, that is to say, the reasoning behind the detention should **not** be based on the fact that the accused person caused the death of another but rather on the fact that the accused person ought to be detained in order to rehabilitate them, which reasoning in this author’s view has not been employed up to date.

In terms of the infrastructure in Zambia, Chainama Hospital is the only specially equipped Hospital to handle mentally disturbed persons. Questions of funding and the facilities lead one to question whether such detention of a person who at law has not committed a crime is justified. One is left to wonder whether the real purpose of the law is being served or the detention is merely used as another form of incarceration for a person who has taken the life of another but has used a “special” defence, in which case the whole purpose of the law, to do substantial justice is defeated.

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<sup>35</sup> (1957) 1 QB 399, 407

<sup>36</sup> Chapter 87 of the laws of Zambia which was at the time of Judgment Chapter 146 of the laws of Zambia

### 2.3 Conclusion:

From the foregoing, this chapter will conclude by saying that the defence of insanity is an old age defence, although rarely used. There have been several tests used for the defence over the centuries but up until *R v. Daniel M'Naghten*<sup>37</sup>, there was no true definition of insanity. The Queen's Bench therefore provided the first widely accepted definition of insanity. The defence is based on the fact that the accused must at the time of committing the offence been under such disease of mind as to render him or her insane. This chapter has also shown that the reasoning behind the defence is that the accused person did not have the necessary *mens rea* to commit the crime and therefore they should not be punished. The common law has been enacted into the Zambia statutes. The Chapter has also opined that the verdict does not reflect the reasoning behind the defence of insanity in that the reason for the detention is not reflective of definition of insanity as per the M'Naghten case. The detention seems to be based on the fact the accused killed and so they should be detained, a view which goes against the fact that a person is not guilty if their mind is not guilty.

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<sup>37</sup> (1843) 10 Cl & Fin 200

## CHAPTER THREE

### THE INSANITY DEFENCE AND THE PRESUMPTION OF INNOCENCE-THE EFFECT OF SHIFTING THE BURDEN OF PROOF.

#### 3.1 Introduction

A surface perusal of the case law on the defence of insanity both in Zambia and the rest of the world will reveal that the onus of proving insanity is on the accused person, who must satisfy the Court that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that what he was doing was wrong, as was held by Tindall CJ in *R v. Daniel M'Naghten*.<sup>38</sup> The following chapter will focus on this shift in the burden of proof and its impact on the sanctity of the presumption of innocence. The chapter will expose the defective reasoning behind the shifting of the burden of proof in its quest to prove the hypothesis raised by this research paper. The paper will go further and examine whether the shift in the burden of proof in the defence of insanity is potentially injurious to the standard of proof as it was intended on the accused person. An informed opinion will be given by way of conclusion as to the effect of the shift in the burden of proof on the presumption of innocence as well as the standard of proof.

The very fabric, and I dare say, the very foundations of the criminal law is based upon the presumption of innocence. The presumption is in criminal law what freedom of contract is in the law of contract. Suffice to say therefore that generally speaking, it is unheard of to speak of a criminal trial without the presumption of innocence. The importance of this presumption is expressed in the highest law of the land, that is to say the Constitution.<sup>39</sup> It is therefore important to understand the meaning of the presumption of innocence. An analysis of the burden of proof will be in order before a discussion on the presumption of innocence is attempted.

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<sup>38</sup> (1843) 10 Cl & Fin 200

<sup>39</sup> Chapter 1 of the laws of Zambia.

### 3.2 The burden of proof in the defence of insanity:

Perhaps one of the most significant elements of the defence of insanity is that of the onus of proof. One of the most celebrated cases on the subject is the case of *Woolmington v. Director of Public Prosecutions*.<sup>40</sup> The brief facts of the case were that the accused Reginald Woolmington, a 21 year old farm labourer was charged with the murder of his 17 year old wife Violet Woolmington. The particulars were that the deceased, after two months of marriage, left the accused and returned to her mother. In an attempt to get her to go back with him, the accused took a gun and went to his mother-in-law's house. He threatened to kill himself if the deceased did not come home with him. The gun accidentally went off and killed his wife. He contended that he did not intend to kill her, his only intention being that of scaring her into going back home with him. The lower court convicted the accused of murder and sentenced him to death on the basis that the onus of proving whether he intended to kill the deceased was on him and he had failed to so discharge this burden. The House of Lords quashed the conviction of murder, and through Viscount Sankey LC, laid down the law on who bears the burden of proof in a criminal case in what has come to be known as the golden 'thread thread' speech:

Viscount Sankey LC elucidated thus;

“Throughout the web of English criminal law, one golden thread has always been seen, that it is the duty of the prosecution to prove the prisoner's guilt.... If at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. On what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained. When dealing with a murder case, the crown must prove (a) death as a result of a voluntary act of the accused and (b) malice of the accused.”

The background of the case is that before 1935, the law placed the burden of proof on the accused to prove that he was innocent. This means that one was presumed guilty until proven otherwise. In this case the learned judge in the lower Court had misled the jury at the trial

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<sup>40</sup> (1935) AC 462 H.L

court by directing them that the defendant needed to prove that his shooting of his wife was purely an accident.

Put in simple terms therefore, Viscount Sankey LC is of the view that the prosecution in a criminal case bears the burden of proof. This position has been well settled and may be seen as the core of both the criminal law and the law of evidence. The Zambian Courts have embraced this view and have consistently upheld the decision in *Woolmington v. Director of Public Prosecutions*.<sup>41</sup> As far back as the 1960s the Zambian Courts have been upholding this decision. In *Chisha v The People*<sup>42</sup>, Whelan, J., Succinctly put it when he stated thus; “*the burden of proving all the elements of theft remains on the prosecution.*” Blagden, C.J in *The People v Njovu*<sup>43</sup> reiterates this point when he holds that

“the burden of proof is on the prosecution to establish that charge against the accused, and the standard of proof which must be attained before there can be a conviction is such a standard as satisfies me of the accused's guilt beyond all reasonable doubt, so that I can be sure that he did murder Tilabilenji Njovu.”

In the recent case of *Mwewa Muroho v The People*,<sup>44</sup> Munthali, Ag. JS, upon delivering Judgment of the court stated thus “*in criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution.*” In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The *onus* is on the Crown to prove all averments necessary to establish his guilt.

Viscount Sankey, LC., however held the view that the burden of the prosecution bears the burden of proof in all cases “*subject to... the defence of insanity and subject also to any statutory exceptions.*” This position to has been widely accepted and has been consistently upheld by the Zambian Courts. This can be seen in the case of *Joseph Mutapa Tobo v The People*<sup>45</sup> where it was reiterated that once the defence is raised, it then becomes the accused

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<sup>41</sup> (1935) AC 462 H.L

<sup>42</sup> (1968) Z.R. 26 (H.C.)

<sup>43</sup> (1968) Z.R. 132 (H.C.)

<sup>44</sup> SCZ JUDGMENT NO. 23 OF 2004

<sup>45</sup> (1985) Z.R 158 (H.C)

person's burden to prove that he was insane at the time he committed the offence in order for him to rebut the presumption of intention. the Court went further and stated that in order to prove the contrary, the accused must show, on the balance of probability, that he was labouring under such a defect of reason, due to disease of the mind, as either not to know the nature and quality of his act, or if he did know this, not to know that he was doing wrong. Cullinan, J.S in *Tony Manganda Kwiimbe v The People*<sup>46</sup> agreed with the learned Magistrate in the Court below and held that the burden of proving insanity on a balance of probabilities lies upon the accused. His Lordship cited the case of *Bratty v Attorney General for Northern Ireland*<sup>47</sup> in which Lord Denning, MR, elucidated thus;

“In order to displace the presumption of mental capacity the defence must give sufficient evidence front which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a black-out"; for "Black-out" as Stable, J. said . . . "is one of the first refuges of a guilty conscience, and popular excuse.”

The whole point that the Courts have sought to preserve is the idea that the defence of insanity shifts the burden of proof onto the accused person so that it is now the accused person who has to adduce evidence to show that he or she was labouring under such defect of mind as not to be aware of what they were doing or if they did, so as not to know that what they were doing was wrong, and as Lord Denning MR, has noted,

“the evidence will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity.”<sup>48</sup>

This reasoning behind this shift in the burden of proof is, in this author’s considered view, in direct contravention of the very foundations, the very basis of both the criminal law and the law of evidence. It may be seen as a usurpation of the principles upon which the criminal law and the law of evidence is premised. In order to properly argue out this point, it is prudent that the meaning of the presumption of innocence is decoded and elaborated.

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<sup>46</sup> (1982) Z.R. 32 (S.C.)

<sup>47</sup> (1961) 3 All E.R. 523 (HL) at p. 535

<sup>48</sup> *Bratty v Attorney General for Northern Ireland* (1961) 3 All E.R. 523 (HL) at p. 535

### 3.3 What then is the presumption of innocence?

The presumption of innocence, properly so called, means that a person is legally perceived to be innocent until the contrary is proved.<sup>49</sup> This simply means that the law requires that the accused person will walk to freedom if it has not been shown that the allegations being levelled against him are proved. The legal definition of the presumption is that it is a legal presumption that benefits the accused person in a criminal case and which results in acquittal in the event that the prosecution does not prove guilt beyond reasonable doubt.<sup>50</sup>

The United States of America Supreme Court decision of *Coffin v. United States*<sup>51</sup> is instructive in the quest of deciphering the presumption of innocence. The court stated thus;

“the presumption of innocence is a conclusion drawn by the law in favour of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless proven to be guilty.”

Speaking on behalf of the Court, Mr. Justice White referred to the historical background of the presumption based on the Roman law. He stated thus

“Numerius, the governor of Narbonensis, was on trial before the emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contended himself with denying his guilt, and there was no sufficient proof against him. His adversary, Delphidius, a passionate man, seeing that failure of the accusation was inevitable, could not restrain himself, and exclaimed, “Oh illustrious Ceaser! If it is sufficient to deny, what thereafter will become of the guilt?” to which Ceaser replied “if it suffices to accuse, what will become of the innocent?”...”

In trying to emphasise the importance of the presumption of innocence Blackstone<sup>52</sup> hold the opinion that “... *the law holds that ten guilty persons escape than that one innocent suffer.*”

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<sup>49</sup> [www.lectlaw.com/def/i047.htm](http://www.lectlaw.com/def/i047.htm)

<sup>50</sup> [www.lectlaw.com/def/i047.htm](http://www.lectlaw.com/def/i047.htm)

<sup>51</sup> 156 US 432

<sup>52</sup> [www.duhaime.org/LegalDictionary/presumptionofinnocence](http://www.duhaime.org/LegalDictionary/presumptionofinnocence)

In Zambia, Ngulube, D.C.J., as he then was, is instructive in illustrating the importance of the presumption of innocence in criminal law. His Lordship stated in the case of *Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People*<sup>53</sup> that

“the presumption of innocence and the rule against an accused being compelled to incriminate himself have resulted in the requirement that the prosecution must prove beyond reasonable doubt that a confession was made freely and voluntarily.”

It has to be noted that the value of this case is that this view holds not only for cases concerning confessions but has wider application covering the whole of the criminal law. This position is solidified by the fact the presumption of innocence has even attained Constitutional status. Article 18 (1) makes the following provision;

“if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”<sup>54</sup>

One of the ways in which a person can be accorded a fair hearing within a reasonable time by an independent and impartial court established by law is provided for in Article 18 (2) (a) which makes provision to the effect that

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty”

From the foregoing therefore, it can be the presumption of innocence, properly so called, emanates from the Constitution.

### **3.4 The shift in the burden of proof vis-à-vis the presumption of innocence.**

Simply stated the shift in the burden of proof is a contravention of the presumption of innocence. The argument is based on the fallacious reasoning behind the Zambian judicial system adopting the whole common law on the defence of insanity in its entirety. The Constitutional make-up of the British judicial system is that it is an unwritten Constitution, that is to say the British Judicial system has no single written Constitution. The constitution is thus comprised of several pieces of legislation that are enacted by Parliament. The residual effect of such constitutional arrangement is that the Britain judicial system is based on

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<sup>53</sup> (1988 - 1989) Z.R. 163 (S.C.)

<sup>54</sup> Chapter One of the laws of Zambia.

Parliamentary Supremacy as opposed to Constitutional Supremacy which the Zambian judicial system has adopted. This judicial arrangement makes the British Parliament the supreme legal authority in the Britain, which can enact or repeal any law.<sup>55</sup> The result is that generally, the courts cannot overrule the legislation that Parliament enacts and no Parliament can pass laws that Parliaments cannot change.

In the United Kingdom therefore, whatever law that parliament has enacted is not subject to any review by the courts of law. To this effect, the common law position as regards the defence of insanity has been codified into statute and has thus attained supreme status and has acquired immunity to review by the courts of law.

Constitutional supremacy in Zambia, on the other hand, is based on the premise that the constitution is the author of all institutions of Government, which includes the Court system. For the avoidance of doubt, the Constitution has a superfluous clause which solidifies its supremacy above all other legal norms. Article 1 (3) of the Constitution<sup>56</sup> makes provision to the effect that the Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall be void to the extent of the inconsistency.

The result of the foregoing is that all legal norms in Zambia derive their validity from the Constitution, Cap 1 of the Laws of Zambia. Thus if the Constitution expressly provides for the presumption of innocence, it will not suffice to say there are exceptions when the Constitution itself has not provided for these exceptions. One of the most important authorities on this particular proposition is *Re Thomas Mumba*<sup>57</sup> which stated that the Constitution has provided for its own amendments and therefore one cannot purport to amend

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<sup>55</sup> [www.parliament.uk/sovereignty](http://www.parliament.uk/sovereignty)

<sup>56</sup> Chapter 1 of the laws of Zambia

<sup>57</sup> The full citation of the case is In the Matter of Section 53 (i) of the Corrupt Practices Act, No. 10 of 1980 and in the Matter of Articles 20 (7) and 29 of the Constitution and in the Matter between: Thomas Mumba - Applicant and the People - Respondent (1984) Z.R. 38 (H.C.)

the constitution by way of implication. Thus the Constitution cannot be amended by simply incorporating the common law in Acts of Parliament like the Penal Code and the Criminal Procedure Code and also the numerous decisions by the Courts of law. This point is best illustrated in *Christine Mulundika and Seven others v. The People*<sup>58</sup>, where the appellants, including the former republican President, Kenneth Kaunda challenged the constitutionality of certain provisions of the Public Order Act Cap 104, especially section 5(4) which made provision to the effect that any person who wishes to convene a public meeting must obtain a permit and the police can impose restrictions on the permit<sup>59</sup>, which contravened the fundamental freedoms and rights, guaranteed by Articles 20 and 21 of the Constitution which provides that no person shall be hindered with his right to assembly freely and associate with other persons<sup>60</sup>.

The Supreme Court held *inter alia* that (i) *Section 5(4) of the Public Order Act Cap 104 contravenes arts 20 and 21 of the Constitution and is null and void*. Thus the Supreme Court reasoned that if the provision of an Act of Parliament contravenes the provisions of the Constitution, then the Act ought to be nullified to the extent of the inconstancy as per Article 1 (3) of the Constitution<sup>61</sup>.

From the foregoing, is the opinion of this paper that notwithstanding the fact that the defence of insanity has been adopted and applied in its common law form for a long time, the defence is founded on the wrong basis as it seems to overlook the direct provisions of the Constitution, notably Article 18 (2) (a) and Article 1 (3) (above). It is without any doubt offending the very principles of both the law of evidence and the criminal law. It is also in contravention of the Constitution, which is the Grundnorm from which all legal norms in Zambia derive validity and therefore it is argued that any provision relating to shifting of the burden of proof, including any judicial decisions affirming this shift in the onus of proof ought to be nullified for contravention of the Constitution.

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<sup>58</sup> S.C.Z. APPEAL No. 95 of 1995

<sup>59</sup> The Public Order Act section 5(4), Chapter 104 of the laws of Zambia.

<sup>60</sup> Chapter 1 of the Laws of Zambia

<sup>61</sup> Chapter 1 of the Laws of Zambia

Furthermore, it can also be argued that the not only is the defence offence to the presumption of innocence, it actually promotes the presumption of guilt. The defence of insanity is premised on the fact that when raised at trial, the only question for determination becomes one of whether the accused had the necessary mens rea to commit the crime in question. That is to say, there is at that point no dispute as to whether the accused caused the death of the deceased or not. The causing of death is not in question anymore. The law as it stands however renders the accused person prima facie “guilty” upon raising the defence until such a time when they are able to show the court that they were labouring under such “*disease of mind*” as not to know what they were doing, or that if they did, that they were not aware that what they were doing was wrong. As regards disease of the mind, Clarkson<sup>62</sup> writes thus;

*“disease of mind is not a medical term. It instead means that that the defendant must show that he was suffering from a disease which affected the functioning of the mind, which does not necessarily have to be disease of the Brain.”*

This position was confirmed in R v. Kemp<sup>63</sup> where the accused person’s arteriosclerosis led him to assaulting his wife while unconscious.

Proceeding in this manner is, in the opinion of this author defeating the whole purpose of the trial, The argument being premised of the fact that the accused person ought to be on trial for murder and therefore the prosecution ought to bear the burden of proving whether or not the accused had the *mens rea* to commit the offence of murder. The law as it is however is such that the moment the accused raises the defence, it stops being a murder trial, it instead becomes a trial on insanity, the result of which is to place the accused person in a situation where they disadvantaged whatever the outcome. That is to say, the accused person is limited to either of the following outcomes;

- (a) Detention at the pleasure of the president; or
- (b) Conviction and subsequent incarceration.

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<sup>62</sup> C M V Clarkson, H M Keating and S R Cunningham, Clarkson and Keating Criminal law: Texts and Materials, 6<sup>th</sup> edition. Sweet & Maxwell: London, 2007. Page 385

<sup>63</sup> (1957) 1 Q.B. 399

Based on this, it is strongly argued that the defence of insanity in its current form is extremely disadvantageous to the principle and fundamentals of the criminal law. It places the accused in a “lose-lose” situation which goes against one of the most important fundamental human rights which provides for secure protection of law.<sup>64</sup>

Furthermore, it can be argued that the fact the only incarceration and detention at the pleasure of the President are available to the accused means that the basis of the criminal law to regulate conduct of persons in society is defeated. Kulusika<sup>65</sup> has argued as regards the role of the criminal law that

“the clarity of the...law is also critical in ensuring that the coercive powers of the Police and the ordinary courts of law are based on behaviour defined as criminal by... criminal law.”

This clarity extends to such element as the nature of the offence and as well as the minimum sentence that the offence attracts. This argument becomes clearer when read in line with Article 18 (8) of the Constitution<sup>66</sup>, which makes provision to the effect that

“A person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law.”

It is the opinion of this author that detention at the pleasure of the President is hardly a defined penalty. The sentence is thus simply too vague and this goes against one of the most fundamental tenets of the law, that it must show the attribute of certainty. In trying to interpret the meaning *detention at the pleasure of the President*, the case of *Anderson Mazoka, LT General Christon Sifapitembo, Godfrey Miyanda v. Levy Mwanawasa, the Electoral Commission of Zambia, the Attorney General*<sup>67</sup> is instructive. The Court reiterated that

“it is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.”

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<sup>64</sup> Article 18 of the Constitution, Chapter 1 of the Laws of Zambia

<sup>65</sup> S.E. Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 6

<sup>66</sup> Chapter 1 of the Laws of Zambia

<sup>67</sup> SCZ/EP/01/03/220

In view of this case, the ordinary meaning of detention at the pleasure of the president is too vague and can be said to be in contravention of the provisions of Article 18 (8) of the Cap 1 of the Laws of Zambia. It can further be argued that the shift in the burden of proof also offset the rules of evidence as provided for in Article 18 (7) which provides that a person who is tried for a criminal offence shall not be compelled to give evidence at the trial. It is the opinion of this author that the effect of the defence is to place the accused person under an obligation to adduce evidence at the trial, the alternative of which would be conviction for failure to show that at the time of committing the offence, he or she was under such disease of mind as not to be in touch with what was happening. The learned authors, Cross and Wilkins<sup>68</sup> reiterating this point have argued that the “burden of proof” includes the *burden of disproof*.

The foregoing argument was comprehensively discussed in the case of *R v Chaulk*.<sup>69</sup> The brief facts of the case were that the accused were convicted of first degree murder. The only defence raised at trial was insanity, but this defence was rejected by the jury. One of the main issues for determination on appeal was the determination of whether section 16(4) of the Canadian Criminal Code, which provides that “*every one shall, until the contrary is proved, be presumed to be and to have been sane*”, infringes the presumption of innocence guaranteed in section 11(d) of the Canadian Charter of Rights and Freedoms (an equivalent of Part III of the Constitution of Zambia, the Bill of Rights).

Elaborating on the nexus between the defence of insanity and the presumption of innocence, the court was of the view that the insanity defence under section 16 of the Canadian Criminal Code should be characterized as an exemption from criminal liability which is based on an incapacity for criminal intent. The court was of the view that this claim for an exemption will usually be manifested under section 16 either as a denial of *mens rea* in the particular case or as an excuse for what would otherwise be a criminal offence. Simply put, the court was of the view that Section 16 of the Canadian Criminal Code was based on the very foundations of the criminal law, that no man should be punished for a crime unless their mind is also guilty. The conviction of the appellant was upheld the conviction on a majority of 5 to 3 who dissented.

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<sup>68</sup> Cross and Wilkins, *Outline of the law of Evidence*. 5<sup>th</sup> edition, Butterworths: London, 1980. Page 26

<sup>69</sup> [1990] 3 S.C.R. 1303

Addressing the issue of the defence of insanity and how it affected the presumption of innocence, the court stated, in the words of Dickson C.J. and Lamer C.J. and La Forest, Sopinka and Cory JJ.: that;

“Section 16(4) of the Code infringes the presumption of innocence guaranteed in s. 11(d) of the Charter. The real concern under section 11(d) is not whether the accused must disprove an element or prove an excuse, but whether an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. Accordingly, it is the final effect of the impugned provision on the verdict that is decisive. Whether the claim of insanity is characterized as a denial of *mens rea*, an excusing defence or, more generally, an exemption based on criminal incapacity, section 16(4) allows a factor which is essential for guilt to be presumed, rather than proved by the Crown beyond a reasonable doubt. Moreover, the section requires an accused to disprove sanity (or prove insanity) on a balance of probabilities. Section 16(4) therefore violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. Finally, while the verdict under section 16 is "not guilty by reason of insanity", the accused raising the section 16 defence is seeking a "true acquittal" vis-à-vis the attachment of criminal culpability and is entitled to the presumption of innocence.”

Their Lordships were however of the view that this came under exceptions under section 1 of the Charter. They held that Section 16(4) of the Canadian Criminal Code represents a compromise of three important societal interests: avoiding a virtually impossible burden on the Crown; convicting the guilty; and acquitting those who truly lack the capacity for criminal intent. The alternatives to this compromise raise their own Charter problems and give no guarantee as to whether they will achieve the objective. Thus according to their Lordships, it was not disputed that section 16 (4) infringed the presumption of innocence but the said section was 16(4) was justifiable under section 1 of Charter.

Wilson, J.: also held a similar view. His Lordship held the view that Section 16(4) of the Canadian Criminal Code infringes section 11(d) of the Charter. He reasoned that the presumption of sanity requires the accused to establish his insanity on a balance of probabilities. However one conceives the plea of insanity, whether as an exemption, a defence, a justification or an excuse, the persuasive burden imposed on the accused by section 16(4) permits him to be convicted of a crime notwithstanding a reasonable doubt as to his guilt.

As to whether Section 16(4) of the Criminal Code would be justifiable under Section 1 of the Canadian Charter of Rights and Freedoms, his Lordship concluded that Section 16(4) does not constitute a reasonable and demonstrably justified limit on the presumption of innocence under section 1 of the Charter. His lordship stated thus;

“the objective of section 16(4) is to prevent perfectly sane persons who have committed crimes to escape criminal liability on tenuous insanity pleas. But nothing indicates that successfully fabricated insanity pleas have given rise to an existing pressing and substantial concern. While the legislature may not necessarily wait until such a concern has arisen, the Crown has not succeeded in establishing even a likelihood of its arising. The American experience does not support the contention that a lower standard of proof would result in more people being acquitted by reason of insanity. Further, several reports from Canada and other countries propose that the burden of proving insanity should be made an evidential one. This burden on the accused is seen as a sufficiently high threshold to prevent insanity pleas in cases where there is only tenuous support for such a plea.”

The decision in this case therefore was that while s. 16(4) of the Canadian Criminal Code, which places the burden of proof on the accused in the defence of insanity, *does infringe* section 11(d) of the Canadian Charter of Rights and Freedoms, it constitutes a reasonable limit under section 1 of the Charter and, therefore, is not inconsistent with the Constitution Act, 1982.

### **3.5 The Effect of the Shift in the burden of proof on the standard of proof:**

Blagden, C.J., *in Katundu v The People*<sup>70</sup> held that

“when the accused raises the defence of insanity... he bears the burden of showing by a balance of probabilities that, at the time of the offence, he was (1) suffering from a disease ejecting the mind, which (2) rendered him incapable of understanding what he was doing or alternatively of knowing that he ought not to do it.”

Generally speaking, the standard of proof on the accused to prove insanity is on a balance of probabilities. However it is argued by this author that the standard being placed on the accused in the defence of insanity is much higher than the ordinary burden that the accused

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<sup>70</sup> (1967) Z.R. 181 (C.A.)

has for instance in the defence of provocation. This person is made in light of the fact that the implication of defect of reason is that the disease of mind has deprived the accused from exercising the power of ordinary reason. It makes the accused incapable of exercising the power of reasoning in a rational manner.<sup>71</sup> Kulusika further argues that the main concern is whether or not the accused appreciated what he was physically doing and the physical results of what he was doing. He argues that the accused is simply out of touch with reality.<sup>72</sup>

Flowing from the foregoing is the argument that the standard of proving something one was aware is much lower than proving facts that one is not aware of. Thus proving provocation is on a much lower standard because the accused is aware that at the time of committing the act in question, they were so enraged as not to have the necessary self control to prevent the commission of the offence. In proving the defence of insanity however, the accused will have to adduce medical evidence to show that at the time of committing the offence, they were under such disease of mind. This becomes especially problematic if there is no history of mental illness. This stems from the fact that the insanity that the law prescribes is not the medical insanity but the legal insanity. This means that the only element needed is that at the time of the offence, such disease of mind must have been present and must have caused the accused to have conducted himself in such manner as to have caused the death of the deceased. Thus if the accused is not aware of what happened at the material time and at the time of medical examinations, he is not labouring under such disease of mind, the standard of proof requires a much higher threshold than the ordinary balance of probability. Jonathan<sup>73</sup> has argued that the defence of insanity requires proof that the accused did not know what he was doing; that he had no awareness of what was happening, that he was unaware of the consequences of his acts or that he knew what he was doing but was deluded as to the circumstances.

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<sup>71</sup> S.E. Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 202

<sup>72</sup> S.E. Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 203

<sup>73</sup> H Jonathan, Criminal Law: Texts, Cases and Materials, 3<sup>rd</sup> edition. Oxford University Press: Oxford, 2008.

To argue that the standard of proof of such an accused is the same as that of an accused raising the defence of provocation would be fallacious. Clearly the accused has a much higher standard in view of the fact that they have to prove facts that they may not even be aware of.

### **3.6 Conclusion:**

The starting point for every law in Zambia is the Constitution, Cap 1 of the laws of Zambia. The Constitution is the supreme law of the land and, having made provision for the presumption of innocence; it can be argued that the defence of insanity is in direct contravention of the Constitution. As such the applicability of the defence in its common law form becomes highly questionable. Furthermore, the shift in the burden of proof also goes against the rules of evidence on the compellability of the accused in a criminal trial as provided for by Article 18 (7) of Cap 1. The chapter has further argued that the standard of proof is of a higher threshold than the law has anticipated and provided for.

## CHAPTER FOUR.

### THE INHERENT PROBLEMS ASSOCIATED WITH RAISING THE DEFENCE OF INSANITY.

#### 4.1 Introduction

The preceding chapter has discussed the defence of insanity in relation to the presumption of proof. In this chapter, the author will focus on the numerous problems that are inherent in the law governing the defence of insanity as it exists in its form today. The paper will focus on how the defence has been adopted in the Zambian judicial system and the resultant problems that have and that may arise as a result of adopting the defence in its form.

#### 4.2 Legal or medical insanity: medical solution to a legal problem?

The law on the defence of insanity as has already elucidated in chapter one has been marred by severe criticism. Thus reiterating Goulett,<sup>74</sup> criticisms of the M’Naghten rules began almost immediately after the decision of the case was rendered. In the intervening years, not just the rules but all aspect of the insanity defence have become the subject of seemingly endless comment and controversy. One of the most outstanding issues has been the fact that it is not clear where the line is to be drawn between legal and medical insanity. Emphasis is placed by the M’Naghten rules that the test must be one of legal insanity and this has been defined by Tindall CJ who succinctly put in when he stated thus;

“it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that what he was doing was wrong.”<sup>75</sup>

legal insanity therefore is confined to the temporal insanity. That is to say the defence is not concerned with whether the accused has suffered from the disease for the duration of their lives. In fact the accused may even be convicted of murder even if all their life they have

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<sup>74</sup>H M Goulett, *The Insanity Defence in Criminal Trials*. West Publishing Company: Minneapolis, 1965. Page v

<sup>75</sup> (1843) 10 Cl & Fin 200

been afflicted by disease of mind. The test is that the accused must have been labouring under such disease of mind “*at the time of committing the act.*” This however is negative by the fact that the accused may still be detained at the pleasure of the president upon the finding of *not guilty by reason of insanity*. The irony of this scenario would be to detain a perfectly sane individual, who having been afflicted by disease of mind caused the death of the deceased, to a mental institution.

The result of the fact that there is no distinct line between legal and medical insanity is that the defence has presented difficulties in that the courts have been at a loss in that there is no set out standard. The following cases are instructive in illustrating this point;

The first case is *R v. Quick and R v. Paddison*.<sup>76</sup> The particulars were that the accused, a nurse in a mental health institution was accused with assaulting a patient. He claimed he had been acting involuntarily as a result of diabetic hypoglycaemia induced by an over-generous insulin dose. On appeal it was stated by the court held that diabetic hypoglycaemia was induced by external factors and therefore did not give rise to insanity as the court below had reasoned. This position however is betrayed by a later decision of *R v. Hennessey*<sup>77</sup> it was held that a crime committed while the accused was suffering from hyperglycaemia, an internal condition in which there is an excessive amount of blood sugar in the body triggered by diabetes, did constitute insanity.

The result is that the resulting law allows some diabetics to be convicted while others are declared insane. As such, it is very difficult to know where exactly the line is drawn. The trickledown effect is that the law on the defence of insanity is ambiguous, a situation which results in uncertainty, which uncertainty arises from the fact that the whole law is grounded on the idea of using a medical solution to a legal problem. Lord Lane CJ in *R v. Hennessey*<sup>78</sup> somewhat shares these sentiments. His Lordship cited the learned authors of Smith and

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<sup>76</sup> (1973) QB 910

<sup>77</sup> (1989) 2 All E.R. 9

<sup>78</sup> (1989) 2 All E.R. 9

Hogan Criminal Law<sup>79</sup> who stated that when a defendant (or the accused) puts his state of mind in issue, the question whether he has raised the defence of insanity is one of law for the judge. Whether the Defendant (or the accused), or indeed his medical witnesses, would call the condition on which he relies “insanity”, is immaterial. The expert witnesses may testify as to the factual nature of the condition but it is for the judge to say whether that is evidence of “*a defect of reason, from disease of the mind*”, because, as will appear, these are legal, not medical, concepts.

Furthermore, some critics have professed “unease” at the power of the courts to confine people found not guilty by reason of insanity to mental hospitals, arguing that the discussion of mental health should be limited to the *mens rea* of the crime. The argument is that if the mental condition of the accused voided the offence’s *mens rea*, he should be acquitted.<sup>80</sup> The argument is really simple to appreciate. The learned author Kulusika<sup>81</sup> has asserted that in order to establish criminal liability, certain elements of the crime alleged to have been committed must be identified. Stephen<sup>82</sup> has echoed the old age Latin maxim *actus non facit reum mens sit rea* which, as has already been alluded to in the foregoing, simply means that *there cannot be such a thing as legal guilt where there is no moral guilt*. Simply stated, one cannot be punished if they do not have a guilty mind, with the exception of strict liabilities cases. It is important to note however that the defence of insanity does not fall within these strict liability cases.

Coupled with the foregoing is the unrelenting resistance to reforming the law on the defence of insanity. In *R v. Sullivan*,<sup>83</sup> the House of Lords ruled inter alia that “*it does not lie within the power of the courts to alter the insanity test.*” The learned authors of Clarkson and

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<sup>79</sup> J C Smith and B Hogan, Criminal Law. Page 186

<sup>80</sup> C M V Clarkson, H M Keating and S R Cunningham, Clarkson and Keating Criminal law: Texts and Materials. Page 398

<sup>81</sup> S E Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 33

<sup>82</sup> J F Stephen, History of the Criminal Law of England (vol. 11), Oxford University Press: Oxford, 1883. page 94

<sup>83</sup> (1984) AC 156

Keating Criminal Law<sup>84</sup> commenting on the courts and the lawmakers' resistance to reformation of the law on insanity have stated that the

'Butler Committees Report of 1975 submitted the law of insanity to intense criticism saying that it is based on "too limited a concept of the nature of mental disorder" noting the "outmoded language" of the M'Naghten rules adding that the rule is "based on the now obsolete belief in the permanent role of reason in controlling social behaviour." The report came to the conclusion that "the rules are not a satisfactory test of criminal responsibility."

The report, which proposed to the law governing the defence of insanity, was repeatedly ignored by successive British Governments.<sup>85</sup>

In Zambia, there has been no notable attempt to try and reform the law governing the defence in order to harmonise it with the provision of the Constitution. Like many other laws, the law governing the defence of insanity has been adopted in its raw form. The result has been that application of the law in its form goes against the very fabric upon which the law in Zambia, is based, that is to say the presumption of innocence and the rules of evidence as provided under Article 18 of the Constitution.<sup>86</sup>

#### **4.3 The problem of infrastructure and facilities.**

It would be hoped that the only reason an accused person would be detained at the president's pleasure would be to facilitate their rehabilitation. The verdict itself is recognition that the accused is not guilty, that they committed the offence owing to some disease of mind which rendered them incapable of forming the intent to commit the offence of murder. This rehabilitation however can only be achieved if there are adequate facilities to cater for the needs. As has been shown in the foregoing, there are no specific rules and regulation and no specific legislation to cater for the special needs of such a detainee under the laws of Zambia, as will be shown below. The law in its current form is quite general and does not cater for the specific needs of these detainees. Coupled with this is the fact that there is limited infrastructure and man-power to ensure that these detainees are rehabilitated into

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<sup>84</sup> C M V Clarkson, H M Keating and S R Cunningham, Clarkson and Keating Criminal law: Texts and Materials. Page 394

<sup>85</sup> C M V Clarkson, H M Keating and S R Cunningham, Clarkson and Keating Criminal law: Texts and Materials. Page 396

<sup>86</sup> Chapter 1 of the Laws of Zambia.

functioning members of society in view of the fact that it is recognised that they are not guilty and as such have not been convicted.

According to an Article carried by the Voice of America news<sup>87</sup> on 7<sup>th</sup> June 2007, Chainama Hills College Hospital is Zambia's only mental hospital offering long term treatment with medications for several mentally ill patients. The Article went to report that there are close to 560 beds for psychiatric patients across the country and that only a small force of trained personnel attends to them. Commenting on the same subject in the year 2004, the International Review of Psychiatry<sup>88</sup> reported that overtime, the number of frontline mental health workers and professional staff has been declining. This is due to the brain drain, retirement, death and also the low output from training institutions. The review went on to state that for practicing psychiatrists, only one was available for the whole country. The review further stated that other key mental health workers such as psychologists, social workers and occupational therapists are also in short supply. The conclusion was couched in the following terms;

“all in all, the mental health services situation in Zambia could be described as critical, requiring urgent attention.”

From the foregoing, one is left at pains as to the rationale behind the detention at the pleasure of the president. This argument, it is reiterated is made in view of the fact that the whole essence of the detention must be to make sure that the detainee acquires some form of rehabilitation or treatment. Legal insanity may loosely be termed as temporal insanity for purposes of this argument and as such, it does not do any good to send a person, who is not legally guilty, to an institution where they will not get the kind of help they need. Moreover, there are instances where the accused at the material time “snapped” and were suddenly under the control of disease of mind but at the time of trial they are fine. It would in the opinion of this author be unjustified to detain such accused at the pleasure of the president, which, as was the case with Daniel M’Naghten, may be long time.

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<sup>87</sup> Lack of financing, trained personnel challenge mental health care in Zambia. Accessed from VOANews.com.

<sup>88</sup> John Mayeya et al. Zambia Mental Country Profile: International Review of Psychiatry.2004. Vol.16. No. 1-2. pp 63-72

#### **4.4 Detention at the pleasure of the president in relation to theories of punishment.**

The learned author Kulusika<sup>89</sup> has asserted that punishment is a response of the criminal law, on behalf of society to a defendant's wrongful behaviour. Kulusika,<sup>90</sup> quoting Feinberg and Gross<sup>91</sup> goes on to state that a genuine legal punishment must be capable of meeting the requirements of being justifiable on philosophical and practical grounds. It must exhibit a characteristic of possessing the "conventional reprobative symbolism." The main theories of punishment include the retributive theory, the preventative and deterrent and the reformatory or rehabilitative theory.

The retributive theory of punishment is punitive in nature and is aimed as vengeance. It involves giving the offender his just deserts.<sup>92</sup> The justification under this theory is that the person has committed an offence should suffer in proportion to his wrongdoing. The prevention or deterrence theory on the other hand is of the view that punishment as an imposition of punitive sanctions and the infliction of suffering, is unjustifiable unless it can be shown that more good is likely to result from the imposition of punitive sanctions than the imposition of such sanctions.<sup>93</sup> The deterrent theory of punishment aims at preventing the further commission of the offence both from the offender and from the general public. Lastly, the reformation or rehabilitative theory of punishment avers that punishment ought to be used as an instrument of rehabilitation of the offender so as to make them a functioning member of the society.

From the foregoing, it is hard to find which theory of punishment best describes the detention during the President's pleasure. This proposition is made in light of the fact that, as has been shown, the not guilty by reason of insanity verdict is recognition by the Courts that the accused is not legally guilty because one of the key components of the offence of murder, the

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<sup>89</sup> S E Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 795

<sup>90</sup> S E Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 799

<sup>91</sup> J Feinberg and H Goss, Philosophy of Law, 3<sup>rd</sup> edition, Wadsworth Publishing Company: Belmont 1986. Page 587

<sup>92</sup> S E Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 800

<sup>93</sup> S E Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 801

malice aforethought, is not present. Silungwe, C.J.: in *Edward Sankalimba v. The People*<sup>94</sup> succinctly put it when he stated thus;

“The appellant quite clearly intended in the least to do grievous harm to his victim. Owing to his mental illness, however, he believed his victim to be an animal. We are satisfied; therefore, that he was not criminally responsible for his actions because at the time, due to his mental illness, he was incapable of understanding what he was doing.... In the circumstances, the appellant is not guilty by reason of insanity. The conviction for murder and the attendant sentence are set aside...”

If therefore the accused is not guilty, then the retribution theory of punishment should not apply to them. In fact, it is the submission of this author that the theories of punishment ought to not even come into play because the accused has, in legal terms, been acquitted. As such, they are not susceptible to punishment.

In practice however, it will be seen that the only way out for the accused is either conviction or detention. As such one is left to wonder as to what purpose the detention is meant to serve. The only justifiable solution would therefore be that of reformation of the detainee so that they can get back into society as functioning members. However as has been argued above, this can only be possible if there is sufficient facilities and also the adequate trained personnel to cater for the specific needs of the detained persons. As it stands however, the detention is in the opinion of this author, *purely retributory* in nature and does not serve any other purpose but that of providing some form of “*revenge*” for the deceased person’s family as well as letting the state get away without really addressing its mind to the problems that have arisen out of the offenders disease of mind, that is to say, striking a balance between giving the deceased person’s family justice and providing the much needed treatment for the accused person. Scholars have gone as far as arguing for the incarceration instead of detention. For instance, in his submission of the Obligatory Essay to the University of Zambia, Chirwa<sup>95</sup> argues that the defence of insanity renders no practical justice to the victims of the alleged mental illness patients. He holds that the defence of insanity is used as a cushion to avoid normal prosecution. He argues that the defence of insanity favours the one

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<sup>94</sup> (1981) Z.R 258

<sup>95</sup> E D Chirwa, *Insanity as a defence under Zambian Criminal Law. Obligatory essay, 1982. Page 40*

adducing it in terms of length of confinement as compared to an accused sentence as normal in cases like murder.<sup>96</sup>

#### **4.5 Inadequacy of laws on the regulations for detention.**

Examining the Zambian law on the defence of insanity, one soon discovers that it is quite inadequate to address the peculiar needs of the Zambian society. The old age principle that was enunciated in the case of *Nyali v. The Attorney General*<sup>97</sup> holds true. The court was of the view that the English law cannot be applied in its raw form in Africa. Lord Denning stated thus;

“just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications...”

Simply put therefore, the English law ought to be applied only subject to such modifications as will be necessary to cater for the particular needs of that particular society.

The Zambian judicial system however has not embraced this view and as such has adopted the English common law on the defence of insanity without regard to the special needs of the Zambian society; that is to say, the economic, social and also the judicial peculiarity of the country. Apart from the common law, only the Penal Code, Cap 87 and the Criminal Procedure Clause make reference to the defence of insanity. These Acts do not make provisions as to the care and the custody of the detainees during the President’s pleasure. The closest piece of legislation is the Mental Disorders Act<sup>98</sup>. The preamble of the Act of the states that it is an Act to provide for the care of persons suffering from mental disorder or mental defect; to provide for the custody of their persons and the administration of their

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<sup>96</sup> E D Chirwa, *Insanity as a defence under Zambian Criminal Law*. Page 39

<sup>97</sup> (1955) 1 All ER 666

<sup>98</sup> Chapter 305 of the laws of Zambia

estates; and to provide for matters incidental to or connected with the foregoing. Section 2 of the Act provides that “mentally disordered or defective person” means any person who, in consequence of mental disorder or disease or permanent defect of reason or mind, congenital or acquired (a) is incapable of managing himself or his affairs; or (b) is a danger to himself or others; or (c) is unable to conform to the ordinary usages of the society in which he moves; or (d) requires supervision, treatment or control.

Examining this definition, it is evident that the insanity as defined by Tindall, C.J.: in *R v. Daniel M'Naghten*<sup>99</sup> is quite different. It is the view of this author that the Mental Disorders Act is of limited application and that the drafters intended the Act to be application mainly to medical insanity. This is because the accused who has raised the defence of insanity may not even exhibit the tendencies that have been defined above. The test is “*at the time of committing the offence.*” If therefore at the time of trial the accused is not suffering from disease of mind, then the Act will not apply to them. That being the case therefore, the law providing for the care and custody of persons who have been detained during the pleasure of the president is quite inadequate to carter for their specific, and I dare add, quite unfortunate situations.

In terms of release, there is no provision making it mandatory for the accused to be removed from detention. That is to say, the medical practitioner or psychiatrist is not legally bound, first of all to conduct regular tests to ensure that the detainee is mentally sound and therefore fit for release, and secondly to release the patient. As such the detainee can stay for years without release and without any opportunity to appeal. With the Bureaucracy that is in place, in Zambia, the detainee is at a loss either way.

#### **4.6 Conclusion**

In conclusion therefore, the adoption of the English common law in its raw form has had disastrous effects on the resultant law on the defence of insanity. The Zambia society is vastly

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<sup>99</sup> (1843) 10 Cl & Fin 200

different from the British and as such application of the Common law on the defence must have been in substantial conformity with the specific needs of the Zambia society, the result of which would have been the harmonisation of the both social needs and the common law and also the Constitutional provisions and the Common law.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

So far the discussion of the nature of the defence of insanity and the problems that are associated with the application of the defence in its current form Zambia have been identified, examined and analysed. It is however the view of this author that this study would be in vain if nothing is done to address the inherent problems that come with raising the defence in its current form. This Chapter therefore formulated a conclusive summary of the discussion and then makes recommendations on what needs to be done if the defence of insanity is to uphold the very foundations upon which the criminal law is based.

#### 5.2 General Conclusion

The main objectives of this research paper were to explain the philosophical foundations of the defence of insanity so as to understand the reasoning behind the defence. The paper has explained that the reasoning behind the defence of insanity is implicit in the old age maxim, *actus non facit reum mens sit rea* which means there cannot be such a thing as legal guilt where there is no moral guilt.<sup>100</sup> The defence developed based on the criminal law notion that a man should not be made to suffer the wrath of the law if the act which is so called in question was committed not of their own fault, that is to say, there was no intention to commit the offence which is called in question. The paper has shown that section 200 of the Penal Code<sup>101</sup> requires that for the offence of murder to be proved, the prosecution must prove not only that the accused caused the death of the deceased by an unlawful act, but also that the accused did so with malice aforethought (which is the necessary *mens rea*).

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<sup>100</sup>S E Kulusika, Text, Cases and Materials on criminal law in Zambia. Page 34

<sup>101</sup> Chapter 87 of the Laws of Zambia

The paper has further shown that the legal defence of insanity has been slow in developing and has matured over hundreds of years. The decision attained the form in which it exists today after the decision in the case of *R v. Daniel M'Naghten*<sup>102</sup> in which Tindall CJ formulated the M'Naghten rules which have become the cornerstone of the insanity defence. The paper has further argued that the common law position on the defence of insanity has attained statutory status through the codification of the M'Naghten rules (though not in exact words) in Section 12 of the Penal Code<sup>103</sup> which makes provision to the effect that a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he was, through any disease affecting his mind, incapable of understanding what he was doing, or of knowing that he ought not to do the act or make the omission.

The paper has further argued that further argued and ultimately shown that the connection of between the insanity defence and the presumption of innocence is of the utmost significance if one is to embark on a discussion on the burden of proof and the insanity defence. It is the considered view of this author that the shift in the burden of proof in the defence of insanity from the prosecution to the accused is against the presumption of innocence which is at the core of the criminal law. The paper has thus proved the hypothesis which it set out to prove. Various authorities have been relied upon to show that the defence offsets the presumption of innocence, most notably the case of *R v Chaulk*<sup>104</sup> in which the bench of the Canadian Supreme Court all agreed that the defence of insanity as provided under the Canadian Criminal Code contravened the presumption of innocence as provided under the Canadian Charter of Rights and Freedoms.

Flowing from this is the conclusion that the defence of insanity is a direct contravention of the constitution. Reiterating Article 1 (3) of the Constitution<sup>105</sup> which makes provision to the effect that the Constitution of Zambia is the supreme law of the country and that any other law that is inconsistent with the Constitution is null and void. It is the considered view of this author that the effect of Article 1 (3) of the Constitution is to render the defence of insanity as it exists today in its current form null and void for being in contravention of Article 18 (2) of

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<sup>102</sup> (1843) 10 Cl & Fin 200

<sup>103</sup> Chapter 87 of the Laws of Zambia

<sup>104</sup> [1990] 3 S.C.R. 1303

<sup>105</sup> Chapter 1 of the Laws of Zambia

the Constitution. Authorities such as *Christine Mulundika and Seven others v. The People*<sup>106</sup> and *Re Thomas Mumba*<sup>107</sup> have been cited to show the effect of provisions in Acts of Parliament being in contravention of the Constitution.

The paper has further shown that the standard of proof placed on the accused to prove that at the time of committing the act which is so called in question they were under such disease of mind as not to know what they were doing or that if they did know, that they were not aware that what they were doing was wrong is higher than the ordinary standard that is placed on the accused. Reiterating Wilson, J.: in *R v Chaulk*<sup>108</sup>, the persuasive burden imposed on the accused by section 16(4) permits him to be convicted of a crime notwithstanding a reasonable doubt as to his guilt. As such it is argued that it has been shown in this research paper that the standard of proof that the accused bears to prove insanity is much higher than on a balance of probability. This is compounded by the fact that the accused may be called upon to prove facts that they may not even be aware of.

The paper has further shown that there are number inherent problems that arise as a result of application of the defence in its current form in a society like Zambia. The paper has warned of the application of the English common law in its raw form in a society like our own. The case of *Nyali v. The Attorney General*<sup>109</sup> in which Lord Denning succinctly put it when he stated that You cannot transplant it to the African continent and expect it to retain the tough character which it has in England, that the people must have a law which they understand and which they will respect. Blagden, J.: in *Feliya Kachasu v. Attorney General*<sup>110</sup> reiterating the fact that the law must respond to the peculiar needs of a particular society had this to say;

“The criteria of what is justifiable in a democratic society might vary according to whether that society is long established or newly emergent. Zambia is newly emergent. It would be unrealistic to apply the

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<sup>106</sup> S.C.Z. APPEAL No. 95 of 1995

<sup>107</sup> In the Matter of Section 53 (i) of the Corrupt Practices Act, No. 10 of 1980 and in the Matter of Articles 20 (7) and 29 of the Constitution and in the Matter between: Thomas Mumba - Applicant and the People - Respondent (1984) Z.R. 38 (H.C.)

<sup>108</sup> [1990] 3 S.C.R. 1303

<sup>109</sup> (1955) 1 All ER 666

<sup>110</sup> (1967) Z.R. 145

criteria of a long-established democratic society. We should look to the democratic society that exists in Zambia; and having found that these regulations are reasonably required in Zambia I have no hesitation in finding that they are reasonably justifiable in the democratic society that exists here.”

By way of extension therefore, is the considered opinion of this author that the adopting the defence of insanity in its entire form without any modifications to reflect the peculiar needs of the Zambian society has not suited the constitutional and judicial system in society like Zambia. This has been shown by highlighting the inherent problems that have been highlighted in Chapter four of the research paper.

### **5.3 Recommendations**

The foregoing has shown that the web of confusion that arises from raising the defence of insanity is far reaching and questions the very foundations upon which the criminal law is founded. Criminal law notions of *actus reus*, *mens rea* and the presumption of innocence are compromised every time the defence is in question. That has been the basis of this research paper which has set out to show, and has indeed shown that adopting the defence in the form it exists today has been detrimental to fundamental right to be accorded a fair trial.

Accordingly, the following recommendations are made to remedy the situation that is currently obtaining on the ground

#### **5.3.1 Total reform of the law pertaining to the defence of insanity.**

Having seen the complications that the defence of insanity raises in Zambia, this author recommends that there must be a total reform of the law relating to the defence of insanity. The lawmakers, the legislature and the judiciary alike must examine the law formulate the law in such manner as to harmonise the defence of insanity and the constitutional arrangement, always having regard to the particular needs of the Zambian society. The two solutions that emerge are firstly the amendment of Article 18 of the Constitution so as to accommodate the defence of insanity, that is to say, create an exception to the presumption of innocence. However, this goes against the

whole purpose of this research paper as it has been shown that the presumption of innocence is among the most fundamental pillars upon which the criminal law is founded.

The Second solution is to recognise that the defence of insanity as it exists in Zambia today is a contravention of Article 18 (2) and therefore make amendments to the Penal Code and the Criminal Procedure Code so as to harmonise the defence of insanity with the presumption of innocence. It is acknowledged by this author that the dilemma is too great in deciding whether to let the prosecution bear the burden of proving all the element of the offence including the fact that the accused was not labouring under a disease of mind. However, it is argued that the presumption of innocence is a constitutionally guaranteed right and it is submitted that since in is a fundamental pillar of the criminal law, the defence of insanity should not imply any derogations to the same.

It is thus recommended that the accused should still bear the burden of proof from the beginning of the case until the ruling is given even if the defence of insanity is raised.

### **5.3.2 Enactment of an Act to make provisions for the treatment, care and custody of persons who have been detained at the pleasure of the president.**

It has been argued that the situation as it exists today is purely retributory, that is to say it is merely a form of incarceration of a person who did not have the legal capacity to commit the offence of murder. This has been shown by arguing that there is no law that regulate the detention of persons who have been found not guilty by reason of insanity. The paper has argued that there is an unbroken link between the defence and the verdict of not guilty by reason of insanity. The only Act that makes provisions for the mentally unsound persons is the Mental Disorders Act<sup>111</sup> and even this Act does not seem to envision persons detained during the pleasure of f the President. It is thus the recommendations of this author that that an Act to make provisions for the defence f insanity generally and in particular to make provisions for

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<sup>111</sup> Chapter 305 of the laws of Zambia

the treatment, care and custody of such persons should be enacted. This Act should be Taylor made to suit the special need of the Zambia society in line with Lord Denning in *Nyali v. The Attorney General*<sup>112</sup>.

### **5.3.3 Improvement of the infrastructure and facilities problem and also the development of training of caretakers of persons detained during the pleasure of the president.**

The paper has in Chapter four of the research paper shown that common law reasoning for the detention during the pleasure of the Queen (or president as the case may be) is defeated by the fact that there are inadequate facilities to make sure that the persons so detained are expediently treated so that they can once again become productive members of society. The Chapter argued that there are very few trained personnel that can deal with the situation and that that is compounded by the fact that there is critical shortage of facilities to deal with the mental problems in Zambia. As such it is recommended that if justice is to be accorded to persons detained during the pleasure of the president, there is need to improve both the facilities and the personnel in order to ensure expedient treatment of such persons. This calls for encouragement of education in fields like psychology and clinical psychiatry.

### **5.3.4 Improve and encourage public awareness on the subject**

Author further recommends that there is need to encourage prolific public awareness on mental illness generally and on the defence of insanity in particular. This stems of the argument that have been raised in Chapter four that the defence brings with it elements of stigma on the person raising it and so it offers no hope in the true sense of the word. This is because it is ether incarceration or detention during the pleasure of the president, both options coming with stigma attached to them. This hinders the person so detained from becoming a productive member of society because they cannot be given such things as employment based on their detention.

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<sup>112</sup> (1955) 1 All ER 666

## **5.4 Conclusion**

If true justice is to be attained in criminal law matters, it is the considered opinion of this author that the presumption of innocence must be the very basis upon which every case brought before the courts of law is rooted. It is clear that the shift in the burden of proof is in contravention of the presumption of innocence, which is a constitutionally guaranteed right. Furthermore, it is also clear that the standard of proof is also higher than in other cases where the accused bears the burden of proof. It is thus the conclusion of this author that the law on the defence of insanity ought to be harmonised with the constitutional order of this country. This author however hastens to mention that the conclusion arrived at is restricted only to the defence of insanity owing to the peculiar nature of the same and the intricate problems that are raised when the defence is invoked in a society like our own. As to whether the same conclusion should be arrived at as regards other defences in which the accused bears the burden of proof, this author will leave it to other scholar to explore.

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