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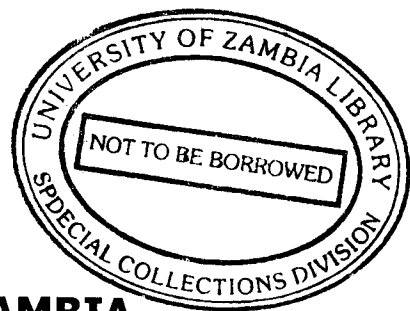
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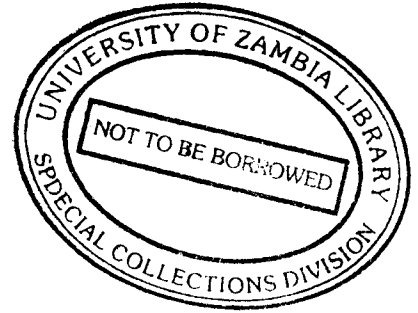
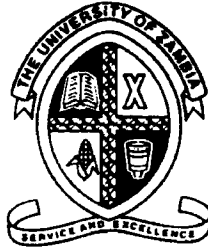
**CONFESSIONS; A GUISE OF TORTURE? ITS LEGAL  
ADMINISTRATION AND REVIEW OF THE CASE LAW.**

**By  
ZIMBA GAMALIEL.**

Being a paper in partial fulfillment of the examination requirements  
for the Degree of Bachelor of Laws (LL.B) of the University of  
Zambia.

NOVEMBER 2005 UNZA.

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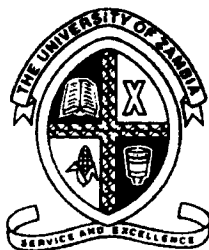
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## **DEDICATION.**

To my parents (***Mabvuto Zimba & Mary.B. Zimba***) and the family members,

Mum and Dad, for the love of God and love of mankind you always believed in me even in times I thought I was unable to perform- I remain indebted to you. You are the best parents in the world and I am scared to mention all the things you have done to me because I will not be able to pay back in my life time, thus I ask God Almighty to bless you abundantly.

To my Brothers and Sisters, ***Happy, Edward, Benjamin, Aaron, Jennet, Gift, Elizabeth and Misozi***, I owe you a myriad of appreciation for the sacrifices and motivation you accorded me to ensure my blissful and successful academic stint in the University of Zambia. I will always be there for you so that you enjoy the accolades of your unprecedented alacrity.

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## **ACKNOWLEDGEMENTS.**

I am obliged to express my gratitude to a number of individuals for their assistance and support, both direct and otherwise, which finally culminated into this document. Although it is not possible for me to enlist all these persons who offered their help and encouragement, I feel obliged to thank the following. My foremost and sincere gratitude is due to my supervisor, Justice Kabazo Chanda for his patience, guidance, suggestions as well as criticisms when he took time to read through the manuscripts.

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To these individuals and many others too numerous to mention, I owe you a hearty thank you for your support.

As for all errors and shortcomings in this essay, I bear the responsibility.

Zimba Gamaliel.  
University of Zambia  
School of Law  
Lusaka

## CASES.

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Kuruman v. R (1955) AC 197  
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The Zambia Police Act, CAP 107 of the Laws of Zambia.

The Prisons Act, CAP 97 of the Laws of Zambia.

The Convention Against Torture (CAT), U.N, 1984.

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## CHAPTER ONE.

### Abstract.

*Human rights are under attack every day in countries in Southern and Eastern Africa. Under pressure to deal harshly with the rising levels of the crime wave, police inflict torture and ill-treat criminal suspects in order to obtain a confession from them.*

### 1.0. Introduction

In criminal proceedings, the prosecution alleges certain facts in the indictment and the defendant is called upon to plead to the indictment. If he pleads guilty, he admits that he is guilty of the offence as charged in the indictment, but not necessarily that all facts related in the dispositions or statements tendered in support of the charge are true<sup>1</sup>. On the other hand, if he pleads the general issue (that is, not guilty), he denies all the facts and thus raises the issue whether or not the facts alleged in the indictment are true. Accordingly, a defendant who pleads not guilty casts upon the prosecution the burden of proving that the material facts alleged in the indictment are true- **Woolmington v. DPP.**<sup>2</sup> In general, as long as the evidence sought to be tendered is relevant, the court is not concerned with how it was obtained- **Kuruman v. R.**<sup>3</sup> This position of the law was restated in the Zambian case of **Liswaniso v. The People.**<sup>4</sup> This practice has given the police and other law enforcement officers an incentive to continue torturing suspects because they know that even if the court will throw out an involuntary confession, any evidence obtained as a result of the said confession will be admissible. This becomes

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<sup>1</sup> Halsbury's Laws of England, vol. 11, para. 353.p. 193

<sup>2</sup> (1935) AC 462, 475

<sup>3</sup> (1955) AC 197

<sup>4</sup> Supreme Court Judgment # 58 of 1976

apparent especially when the police have arrested a suspect whom they strongly believe is guilty and there is an enormous temptation on their part to solve the crime by forcing a confession. This is exacerbated by the deep-rooted practice of conducting investigations in secrecy, thereby exposing the accused to excessive pressure from the police.

The abhorrence of society to the use of involuntary confessions does not only turn on their inherent untrustworthiness but also on the deep-rooted feelings that the police must obey the law while enforcing it so that in the end life and liberty can not be as such endangered from illegal methods used to convict those thought to be criminal as from actual criminals themselves.<sup>5</sup>

### **1.1. The Mwavi Ordeal and the Boiling Water test.**

This conflict has been dwelling in the society from pre-colonial times up to the modern era. In pre-colonial times, the use of ordeals to determine the guilt of the accused was a system of administration of justice which permitted the prosecution to trust habitually compulsory self-disclosure as a source of proof.

Under the mwavi ordeal, mwavi was obtained from the bark of a tree and was a fatal poison unless vomiting occurred. The suspect was made to take the mwavi, and, more often than not, death followed. In the boiling water test, the suspect was made to place his hand in a container of boiling water, and to take a stone from the bottom. If his hand was found blistered, (a common phenomenon) this was a clear indication of his guilt.

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<sup>5</sup> Rita Nachula (1981/1982) Analysis of the Law Relating to Confessions.

In all these instances, the aim was to procure a prior statement from the accused which comprehended an admission or declaration by the accused of the facts pertinent to the issue which, in connection with other facts tended to prove his guilt. Thus, through these ordeals, torture and inhuman treatment was administered by the prosecution in order to secure an acknowledgment by the accused of his guilt.

### **1.2. Contemporary times.**

In contemporary times, an experience in the interrogation rooms reveals torture and ill-treatment of the accused, which acts are at variance with the law. Today, law enforcement officers routinely torture suspects, family members and witnesses not only to solve crime but also for the unknown motive of assuring the public of police effectiveness- whether the person charged is guilty or not.

### **1.3. The Zambia Police Service.**

In Zambia, the Zambia Police Service is established by the Zambia Police Service Act.<sup>6</sup> It is mandated, in and through out Zambia, to preserve peace, prevent and detect crime, and to apprehend offenders against the peace.<sup>7</sup> From that provision, it can be discerned that the intention of parliament was to create a society devoid of injustice, a society in which incidents of brutality, whatever the source could be non-existent. As such there is a duty incumbent upon the police officers in the performance of their duties to respect and protect human dignity, and to maintain and uphold the human rights of all persons.

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<sup>6</sup> CAP 107 of the Laws of Zambia.

<sup>7</sup> Ibid, Section 5

However, it is an open secret that torture, inhuman and degrading treatment of the accused are common and unfettered. Torture appears to be the favourite tool used by the police officers and other security organs to extract information from the accused<sup>8</sup>. This is despite the express prohibition of torture by the Zambian Constitution, statutes, and international instruments.

Few people will deny that the extent to which human rights are respected and protected within the context of criminal proceedings is an important measure of a society's civilization. The goal of the criminal procedure is to protect the criminal defendant against police misconduct and prosecutor abuses. It cannot be denied that the police officers are entitled to question any person in order to determine whether there is reasonable ground to suspect any person or persons of complicity. But the persons questioned are under no duty to answer, still less to attend at a police station.

In spite of all these safeguards, contempt for human rights remains embedded in the Zambia Police Service whose police officers routinely torture ordinary citizens as part of crime investigations.<sup>9</sup> Both regional Non-governmental Organisations and Zambian human rights groups confirm that the police use torture. One such case was reported by the Legal Resources Foundation (LRF) and it revealed the following...

*“...the police officers then raided the house and beat up everyone in it including children and threatened to shoot them. One police officer pointed a gun to my head while the other pointed another gun on my chest. The two police officers loaded the guns with bullets in my presence. They asked me*

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<sup>8</sup> The Role of Lower Courts in the Domestic Implementation of Human Rights, by Prof. A.W. Chanda.

<sup>9</sup> Report by Amnesty International: Zambia: Policing on Zambia, sometimes fatal, seldom fair, 25<sup>th</sup> May, 1999.

*to tell them where the alleged illegal weapons were and the whereabouts of the accused (husband) failure to which they would shoot me. One of the police officers undressed me, alleging that I could have hidden the gun in my buttocks...”*

This is a clear indication of the gravity and extent to which the police officers can go in order to procure a confession, and this cannot be denied the nomenclature of torture or degrading treatment which the Zambian Constitution prohibits. The treaty on the Convention Against Torture (CAT) to which Zambia is a signatory defines torture as;

*“ Any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...when such pain or suffering is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person in an official capacity.”<sup>10</sup>*

Although the tenor of the various and respective statutory provisions are succinctly elaborate and of non-compromise, torture has continued to be widely practiced by state agents. The police, in so far as they have powers to interrogate are prone to use this practice on suspects. This becomes especially apparent when the police have arrested a suspect whom they strongly believe is guilty. This is compounded by the fact that most of the interrogations are done in secrecy thereby exposing the accused to excessive pressure from the police. In fact, freedom from torture is the only right in the Zambian Constitution which has no exceptions. Suggesting otherwise points to a serious gap in the understanding of both the local and international law and it only indicates that human rights are privileges that can be granted, and therefore taken away by the state.

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<sup>10</sup> Article 1 of the Convention Against Torture (CAT), 1984.

In order to prevent the police from violating the very rights that they are supposed to protect, through illegal and excessive use of violence and force, it is imperative to remove the incentive to commit violations of human rights. In the light of the legacy of the accusatorial system of criminal justice which has subtly obliterated the difference, and successfully substituted rule by law for rule by caprice, it becomes apparent why the subject is particularly worrisome and worthy investigating into.

In the light of this, Chapter One of this work will be dedicated to giving the basic tenets of the criminal justice system.

Then Chapter Two will bring to light the various cases that have been adjudicated upon by the courts as well as those reported by other human rights groups.

Against this background, Chapter Three will give a succinct explanation of the legal administration of confessions.

In order to give this piece of work realism, Chapter Four will be founded on analyzing the data collected from police officers and detainees.

Finally, Chapter Five will give practical recommendations, suggestions and solutions to the problem at hand.

## **CHAPTER TWO.**

### **2.0. Introduction.**

This chapter of the dissertation is especially dedicated to exposing the torturous activities perpetrated by the law enforcement officers in their egoistic pursuit of obtaining self-incriminating statements from the accused. Such a statement or plea of guilty at the trial is an express and conclusive admission of the offence in respect of which the plea is made, for the purposes of that trial, and dispenses with the necessity of proving the facts alleged, in the count of the indictment. Although it will be appreciated that torture is prohibited not only under the Zambian Constitution but also in International law, and that there is no situation under which torture is justified, whether in war or under a state of emergency, a case study reveals that the vice is nevertheless the favorite tool used by the police to extract information from suspects.<sup>11</sup>

Zambia's democratic dispensation has, at the heart of it, a constitution and a bill of rights. But making that a reality on the ground is, in more ways than one, more difficulty.<sup>12</sup> Balancing human rights implementation and balancing access to human rights is a challenge, which confronts the government on a daily basis, particularly where the right to security of a person is involved. The right to security of a person includes the right to the following;<sup>13</sup>

- (i) to be free from all forms of violence from either public or private sources,*
- (ii) not to be tortured in any way, and*

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<sup>11</sup> Zambia law journal, vol.13, 2001: The Role of Lower Courts in the Domestic Implementation of Human Rights. By Prof. A.W. Chanda

<sup>12</sup> The Human Rights Observer, vol.3, 2000: Failure to Respect Rights of Suspects and Accused. By Laura Pollecut

<sup>13</sup> Ibid. 9

*(iii) Not to be treated or punished in any cruel, inhuman or degrading way.*

These rights apply equally to all citizens-even those who are suspected of crimes. However, under pressure to deal harshly with the rising levels of crime, suspects are ill-treated everyday, thus negating the very essence of human rights. Few people will deny that the extent to which human rights are respected and protected within the context of criminal proceedings is an important measure of a society's civilization.

In criminal proceedings, if the defence pleads guilty, he admits that he is guilty of the offence as charged in the indictment, but not necessarily that all facts related in the depositions or statements tendered in support of the charge are true.<sup>14</sup> Where a defendant pleads not guilty in a criminal trial, the general principle of the common law is that the prosecution must prove his guilt beyond reasonable doubt-**R v Podola**.<sup>15</sup> Accordingly, a defendant who pleads not guilty casts upon the prosecution the burden of proving that the material facts alleged in the indictment are true. In **Woolmington v DPP**,<sup>16</sup> it was stated:

*“If, when the judge has heard and considered the totality of the evidence, and he is not satisfied beyond reasonable doubt as to the guilt of the defendant, he is entitled to be acquitted, for the prosecution will have failed to discharge the burden which lies upon it”.*

In general, as long as the evidence sought to be tendered is relevant, the court is not concerned with how it was obtained-**Kuruman v. R**.<sup>17</sup> This position of the law was

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<sup>14</sup> Halsbury's Laws of England, vol.11, para 353,p193

<sup>15</sup> (1960) 1 Q.B. 325

<sup>16</sup> (1935) AC 462,475

<sup>17</sup> (1955) AC 197

restated in the *Zambian case of Liswaniso v. The People*<sup>18</sup> in which the Supreme Court held that illegally obtained evidence is admissible as long as it was relevant to the issues before the court. This practice has given the police and other law enforcement officers an incentive to continue torturing suspects because they know that even if the court will throw out an involuntary confession, any evidence obtained as a result of the said confession will be admissible.

This is exacerbated by the deep-rooted practice of conducting investigations in secrecy, thereby exposing the accused to excessive pressure from the police. Though a judge will not admit involuntary confessions, this comes up late in the system when the suspect has already been severely tortured.<sup>19</sup> This practice, which is well engrained in the criminal justice system, gives the police wide latitude to commit all sorts of improprieties and irregularities with no independent person to check on them. Even though the *Zambian Constitution* prohibits torture<sup>20</sup>, it is apparent that members of the police regularly use excessive force when apprehending, interrogating, and holding criminal suspects. Both regional non-governmental organizations and the *Zambian human rights groups* confirm that the police use torture. Allegations include the police pouring a highly corrosive substance on to the genitals of a detainee, stripping a woman naked and lashing a woman with a hosepipe.<sup>21</sup> In the absence of justice for those who torture, and

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<sup>18</sup> Supreme Court Judgment #58 of 1976

<sup>19</sup> Chilombo Bridget Mwaka (1988) *Police Powers and its Impact on Human Rights*.

<sup>20</sup> Article 15 of CAP1 of The Laws of Zambia (The Constitution of Zambia)

<sup>21</sup> Amnesty International: Zambia: *Policing in Zambia: Sometimes Fatal, Seldom Fair*. 25<sup>th</sup> May, 1999.

without the political will for change, suspects will remain terrorized by the very people put in place to protect them.

### **2.1. Some Cases Reported by Human Rights Groups.**

Cases of law enforcement officers torturing suspects are not only rampant and prevalent in Zambia but in other nations too. Amnesty International had this report;

*“As evidence of torture and wide spread cruel, inhuman and degrading treatment mounts, it is more urgent than ever that the United States of America government brings the Guantanamo Bay detention camp and any other facilities it is operating outside the USA into full compliance with the international law standards.”<sup>22</sup>*

In one case, the air conditioning had been turned down so far and the temperature was so cold in the room that the barefooted detainee was shaking with cold. On another occasion, an FBI agent wrote;

*“I entered in to an interview room to find a detainee chained hand to foot in a fatal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves and had been left there for hours.”<sup>23</sup>*

Such and other heinous, torturous, inhuman, cruel and degrading treatment of suspects have flouted the criminal justice system as techniques of extorting confessions from the accused. It is a common practice for law enforcement officers, in their efforts to gather evidence, to use all means of force on the accused to obtain a confession that she or he committed the alleged crime. This is done, notwithstanding that the practice has been outlawed by international and domestic legislation. Zambia, through its law enforcement officers, has neither been an exception nor an inactive participant in the unbridled abrogation of the fundamental and non-derogable right not to torture.

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<sup>22</sup> <http://amnesty.org>.

<sup>23</sup> Ibid

Hartman notes, “when the police misuse and abuse their power over others to become the criminals they are sworn to arrest, the rule of law is reduced to the rule of terror and violence.”<sup>24</sup> The Jesuit Center for Theological Research (JCTR) observed that in November 1999 the United Nations Committee Against Torture expressed concerns at allegations of continuing, widespread use of torture and apparent impunity for perpetrators. The Committee noted that the government had agreed at a prior Committee meeting to incorporate the crime of torture in the criminal code. Yet police officers routinely tortured suspects in criminal cases, family members and witnesses.<sup>25</sup> One of the cases reported by the JCTR is that of Cairo Daka who was accused of stealing from his employer. He was tortured to death by police officers who allegedly used a long iron bar to beat him during interrogations in order for them to extract a confession from him. His wife alleged that in two separate incidents, the police abducted her, undressed her, and beat her with a whip and then tied her to an electric pole and further threatened to shoot

her.<sup>26</sup> All this was aimed at obtaining a statement from her implicating the husband. Another case is that reported by the Legal Resources Foundation. The case revealed this...

*“...The police officers then raided the house and beat up everyone in it including children and threatened to shoot them. The police officers asked for some information on the whereabouts of the accused (the husband). The victim (the wife) said one police officer pointed a gun to her chest while another was pointed to her head. The police officers loaded the guns with bullets in her presence. They asked her to tell them where the alleged illegal weapons were, failure to which they would*

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<sup>24</sup> Hartman, M.E. (1977) Protection of Human Rights Through the Criminal Justice System.p.166

<sup>25</sup> <http://www.jctr.org.zm>: Torture in Zambia Police Cells (1<sup>st</sup> Quarter of 2000)

<sup>26</sup> Ibid

*shoot her. One of the police officers even undressed her alleging that she could have hidden the gun in her buttocks... ”<sup>27</sup>*

Thus, it is apparent that although the law enforcement officers are charged with the responsibility of maintaining law and order as well as protecting life and property, a back load of inquiries reveals that the police officers often abrogate this statutory obligation by subjecting the citizens to unlawful and extra-judicial torture.<sup>28</sup> Another report by AFRONET revealed... “In the early mornings of January 1,1997, a group of some 15 police officers begun to torture the Zambia Democratic Congress (ZDC) leader, Dean Mun’gomba. Among the torture methods alleged to have been used are electrical shocks to his handcuffs and the application of burning cigarettes to his arms and legs, to make him implicate Dr.Kenneth Kaunda in the failed coup of 1997.A medical doctor later confirmed bruising and burn wounds which Amnesty International had judged to be consistent with the torture described.<sup>18</sup>

The same report alleges that Corporal Robert Chiulo died in the week of December 7 at Maina Soko Military Hospital. Another person who deposed to having been tortured is Major Bilex Mutale.<sup>29</sup> He told the court that police officers threatened to report him as BID (Brought-In-Dead) to the authorities if he did not co-operate. Other victims who gave accounts of the torturous activities by the police officers include Captain Jackson Chiti, Major Musonda Kangwa and Captain Steven

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<sup>27</sup> Legal Resources Foundation (LRF) news #32, October 2001; Police Torture Suspect’s Wife to Death. By Madube Pasi Siyauya.

<sup>28</sup> [www.kubatana.net/htm](http://www.kubatana.net/htm)

<sup>29</sup> <http://afronet.org.za>: Torture under the system of emergency.

Lungu.<sup>30</sup> Despite a public call on December 7, 1997 by the Human Rights Commission for the prosecution of the police officers who allegedly committed torture, and who had been publicly named by their alleged victims, no apparent steps had been made by the authorities to bring to justice those responsible. This seriously negates the duty to protect and respect human dignity. The preamble to the Universal Declaration of Human Rights (UDHR) to which Zambia is party states, “recognition of the inherent dignity and of the equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world.” Thus there are no circumstances, which justify the police, or any state agent hurting or humiliating anyone using such methods as;

- (i) *torturing prisoners or subjecting them to beatings or other pain in order to make them confess, or*
- (ii) *beating suspected criminals after their arrest, though it is acknowledged however that reasonable force may be used to detain such a suspected criminal who resists arrest.*

The Criminal Procedure Code provides, “if a person forcibly resists the endeavor to arrest him or attempts to evade the arrest, such police officer or other person may use all means reasonably necessary to effect the arrest.”<sup>31</sup> Notwithstanding such and other procedural safeguards, today members of the police and security forces regularly use excessive force when apprehending, interrogating and holding criminal suspects. Beatings and other mistreatment by the police officers are in most instances not subject to serious investigation, and offenders are rarely disciplined or prosecuted. In another Zambian case of January 1994, two police officers repeatedly beat the suspect to death, but there were no reports that the

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<sup>30</sup> Ibid

<sup>31</sup> The Criminal Procedure Code, CAP 88 The Laws of Zambia, section 18 (2).

alleged offenders were prosecuted.<sup>32</sup> Thus the legally and authorized use of reasonable and necessary force in criminal proceedings has transcended into regular and excessive torture of the accused as well as suspects by the law enforcement officers.

It is because of such and other abuses that the court stated, in **Zondo v. R**<sup>33</sup> that the basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice. That danger has been aptly pointed out by **Professor Wigmore**, “the real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer thereby morally.”<sup>34</sup>

*Ramsay Clarke cites a case where two young girls were brutally murdered and dismembered. Having been tortured severely, the accused made a full confession, pleading guilty to the crime. Less than a year later, the man who had pleaded guilty and was sentenced to life imprisonment was set free. Evidence disclosed that it was physically impossible for him to have been present. Instead, another man, arrested on another charge was shown to be the murderer.*<sup>25</sup>

This demonstrates clearly that the question of confessions is a serious one, which should not be treated lightly by both the magistrates and other law enforcers because a confession which is wrongly admitted could bring about such unfair

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<sup>32</sup> Op cit <http://amnesty.org>

<sup>33</sup> (1964) Supreme Court Judgment of Northern Rhodesia.p.102

<sup>34</sup> Wigmore on Evidence, vol.4, section 2250

<sup>25</sup> Clarke, R. Crime In America.p293

results that it could hinge on the very foundation of justice. **Professor Muna Ndulo** observed, “confessions are condemned from the point of view that the techniques (torturous activities) of eliciting confessions inevitably leads to unfairness and abuse of other rights and that the rise of confessions encourages the police officers to carry out shoddy investigations.”<sup>36</sup> Many confessions are challenged on the basis that they were obtained as a result of the accused being tortured or beaten by the police. This is not a new subject, for the history of confessions is full of torture, lies and treachery.<sup>37</sup>

## **2.2. Cases Adjudicated upon by the Courts.**

In **Miranda v. Arizona**,<sup>38</sup> the supreme court of the United States dealt with more than one such case. In Zambia, the most notorious ground for the challenge of most confessions is that the appellant was forced to make a statement as a result of police beatings. In **Chigowe v. The People**<sup>39</sup>, the accused alleged that he was beaten and as a result sustained injuries to the ear. In **Imusho v. The People**,<sup>40</sup> the confession alleged to have been made by the appellant was objected to on the ground that the appellant had been forced by beatings to thumb print the statements. In fact, there is a plethora of case law which deal with this problem, but as **Judge Kabazo Chanda** indicated, the best illustration of police brutality and torture on the pretext of extracting a confession is to be found in **Chimba v. The Attorney General**.<sup>41</sup>

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<sup>36</sup> Zambia Law Journal, vol.5 (1973) Confessions: Tainted Evidence? By Prof. Muna Ndulo. p 102

<sup>37</sup> Ibid p115

<sup>38</sup> 384 US 436

<sup>39</sup> Supreme Court of Zambia Judgment # 10 of 1977

<sup>40</sup> (1972) ZR p77

<sup>41</sup> (1973) High Court Judgment # 5 HP 1154 of 1972

*In that case, each of the plaintiffs was removed from a lawful place of detention and taken in a closed van to an unknown place where for periods varying between 7-10 days they were each held in separate, very small, empty, completely dark and dirty cells with an earth latrine on the floor. Their clothing was completely removed; they were half starved and given little or no food to drink and none to wash with. They were each interrogated in a dark office on a number of occasions; under three bright lights, threatened with death or mutilation and slapped, punched, and kicked. They were photographed naked, and subjected to electrical shocks. The plaintiffs had at one time held ministerial or other high office in the government but later broke away from the ruling party to join the opposition party, and the interrogation was designed principally to ascertain the source of the new party's funds.*

That torture and brutality in criminal investigations are perpetrated does not admit of any doubt in the light of the preceding cases. The victim is always alone at the mercy of the police and in such cases, no corroboration can then be made to the claim of torture. In the Botswana case of **Mosotho Masina v. Rex**<sup>42</sup>, the court described the victim's ordeal by nothing that he had been taken to,

*"[A] Place at the entrance to their toilets and there made to undress, was handcuffed behind his back and made to sit on the bare floor, a piece of plastic bag being held over his nose and mouth which was removed whenever he was near suffocation..."<sup>43</sup>*

Thus the expectation is obviously that organs of the state will be exemplary in their respect for these rights. A further expectation would be that any violation of the rights enshrined in the constitution should attract heightened judicial scrutiny.<sup>44</sup>

An article by Duma Boko<sup>45</sup> reports a murder case of **State v. Lebohang Khama** in which the accused stated that he was severely tortured by the police in an attempt to extract a confession from him. He recounted how his private parts were squeezed

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<sup>42</sup> Police Brutality in Southern Africa- A Human Rights Perspective. Ed. By N'gande Mwanajiti and Pamela Mhlanga.

<sup>43</sup> Ibid p 5

<sup>44</sup> Ibid p 9

<sup>45</sup> Ibid p 9

*and pricked. He was strangled and severely tortured. Further, the same article gives a case of Elvis Makgathe who recounted that the police fastened a thin, tough and humanly unbreakable rope at his wrists. His trousers were used to tie his legs together. He was repeatedly kicked and punched and continuously hit on the testicles with an elastic band. While in the dark room, they told him they were military intelligence trained not to waste time by asking a suspect idle question. As such, they were going to shoot and kill him and have him buried in the mountainous area where no person would ever find out. Consequently, the accused figured out that to save his life he had to admit to having committed the alleged offence, thus he confessed.*<sup>46</sup>

In the Tanzanian case of **DPP v. Ephrata Lama and 5 Others**<sup>47</sup>, an employee was arrested and charged with theft. When interrogated by the police, electric shock cables wrapped around his body maimed him. He later died at the Muhimbili Medical Hospital in Dar es Salaam.

**Judge Kabazo Chanda** reports of a Zambian case of 1980 when the most serious attempted coup d' etat took place in the country, led by the late prominent lawyer, Edward Shamwana. It led to the accused being convicted for treason and sentenced to death. During the interrogation of the treason suspects, more brutalizing acts were committed by police, causing the deaths in prison of two of the treason suspects. Those who survived the torture are today not in the same physical and mental condition in which they were before arrest and trial.<sup>48</sup> Many other relatives of the suspects were also taken hostage and tormented in order to induce them to reveal the whereabouts of their relatives who were being sought by the police.

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<sup>46</sup> Ibid p12

<sup>47</sup> High Court of Tanzania, Criminal Appeal # 142 of 1989

<sup>48</sup> Police Brutality in Southern Africa-A Human rights Perspective (Zambia) Article by Judge Kabazo Chanda p.193

The Zimbabwean case of **Mark Chavunduka and Raymond Choto v. The Commissioner of Police & the Attorney General**<sup>49</sup> carries the point further. *In that case, the accused were striped naked and their heads were plunged into water. They were handcuffed and electric shock treatment was applied all over their bodies and threatened with death. They were beaten on the sole of their feet, and in other instances, their heads were stamped upon. Choto was slapped across the ears for a long time so that one of his eardrums was perforated.*

These practices have been perpetrated with impunity because one of the most important forms of evidence in criminal trials is a confession. Indeed, this was observed as far back as 1852, “when a confession is well proved, it is the best evidence that can be produced.”<sup>50</sup> It is this importance of a confession that induces the police to torture suspects at all costs for the sole purpose of extracting the same. This is done at the expense, and notwithstanding that torture is an extreme violation of the security and liberty of the human person and may directly lead to the death of the victim as illustrated above. The uneducated persons are the most vulnerable to abuse and brutality. For a lot of them what may amount to brutality may seem like normal police business and goes unreported and undetected.<sup>51</sup>

Though practical experience has vitiated the enforcement of the laws prohibiting torture, it is well understood that police all over the world are institutions created as vanguards against any physical harm to members of a given society. Thus in a democratic state, the police are expected to blend firmness with conformity to rules of natural justice and fair play. Paradoxically, the term “police” denotes a civil force to whom the community or society has entrusted the duty of maintaining public order, enforcement of the good conduct regulations, protection of life and property,

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<sup>49</sup> Judgment # Sc 20/2000, Civil Appeal # 227/99

<sup>50</sup> Police Brutality in Southern Africa-A Human Rights Perspective p 5

<sup>51</sup> Ibid.p.88

preservation of law and order and the prevention and detection of crime.<sup>52</sup> Therefore, the role of the police service in the society is to administer to it and not to lord it over it.

On the other hand, in countries where the executive wing of government has placed the police force in its firm grip, as a tool for oppression and repressing the citizenry, as the Zambian successive governments have done, massive human rights violations take place.<sup>53</sup> Respective societies have conferred on the police forces far-reaching statutory powers to enable them effectively carry out the afore-reaching statutory and conventional duties. But this has given birth to torture as a result of individual misconduct, encouraged by the institutionalized failure to hold police officers accountable. This is further compounded with inadequate systems to control or an outright refusal to recognize or respect both the municipal and the international standards for human rights protection. The police, and ultimately, the governments in Southern Africa, have failed to prevent repeated violations of basic rights by the police. The right to freedom against torture and other cruel, inhuman or degrading treatment and the right to personal integrity have all been eroded seriously and rendered redundant.

Numerous cases in all countries in the sub-region show that police officers are in constant breach of their own laws and guidelines as well as the international standards which their governments are party to.<sup>54</sup> Cases show that the authorities have failed to take the necessary action to punish and prevent these abuses and that

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<sup>52</sup> Nick Blake (1981) The Police, the Law and the People. Society of Socialist Lawyers, London.

<sup>53</sup> Op cit, Police Brutality in Southern Africa. p 183

<sup>54</sup> Ibid p ii

although they have good written policies on how police officers should conduct themselves, practices by government officials frequently ignore or fall far short of the minimum standards required by the international community. Many people have been tortured, dehumanized, beaten or given electric shock treatment or choked with impunity. All this takes place in an endeavor to extract confessions from the accused or the suspect. The excuse usually used is that the police work under difficulty conditions and do not have enough policing equipment for crime detection. It will be discerned that the central thread that runs through police work is that which consists of coping with problems in which force may have to be used. While the police should avoid unnecessary force wherever possible, force inevitably has to be used in some situations where it is necessary and reasonable for members of the police to use in order for them to carry out their responsibilities, and such force is not unlawful.<sup>55</sup> In many cases where the accused has bruises or injuries it is common for the police to claim that these were sustained as a result of the victim having resisted arrest, and as a result of the police having to forcibly restrain him or her. In such cases, it is frequently not possible to ascertain who is actually telling the truth with a reasonable degree of certainty. The problem is aggravated not only because there are two accounts conflicting frequently of what happened, but also because the victims making the allegations are often of low social status, and might in general have difficulty in presenting their version of events in a manner that is more credible than that presented by the police officer(s). In the light of all these heinous, atrocious, torturous and inhuman practices by the law enforcement officers, does this have to be left to the family members of the victims, who often

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<sup>55</sup> Ibid, p. 103.

times do not have the means to pursue the course of elusive and costly justice? Ultimately, if a society fails to care what happens to some of its people, believes that certain human beings have forfeited their human rights because of their actions, real or suspected-or fails to hold officials to account for their misdeeds, then it creates a fertile environment for the silent and subtle human rights violation under the guise of extracting confessions, and in this particular case police brutality to thrive

This discussion did not portend to cover all allegations but simply to provide a synopsis of the events as monitored within the institutions as a means of interrogating the socio-political contract between the citizenry and the state. Protection of human rights is thus a question of values and attitudes to those values. Thus it was imperative that the discussion be illuminated by means of concrete instances of abuse and brutality. This snap survey of some judicial decisions on torture proffers an insight into the several of police cases in which victims walk away in their silent pain, away from the help of the law. Simply putting the values on paper does not ensure the fairness of the system of criminal justice. Instead, it is ensured by acceptance of those values and a commitment to protect them by all concerned in the criminal justice process. Thus the police, prosecutors, defense counsel, magistrates and judges carry the final responsibility for ensuring the observance of human rights. In the final analysis, the search for truth and justice is the responsibility of those who at various stages of the procedure have to make decisions.

In Zambia, the court is concerned not with how evidence is obtained but with merely how it is used by the prosecution at the trial. In such a system of criminal justice, the judge has no discretion to exclude relevant and admissible evidence merely because it was obtained by improper or unfair means (**the case of Liswaniso**). This, with no doubt, encourages the police to use unfair means in obtaining evidence.

### **2.3. Conclusion.**

In conclusion, it can be said that procedural due process is the heart, the conscience and soul of our adversarial or accusatorial system of criminal justice. It is procedure that spells much the difference between rule by law and rule by whim or caprice. Consequently, steadfast adherence to strict procedural safeguards is our mainstream assurance that there will be equal justice under the law. With the continued effort of the International Community and national NGOs fighting brutal or excessive police actions against the civil society head on, the scourge can be greatly minimized or eradicated altogether.

It was the intention of the author of this dissertation to give an understanding of the phenomenon of the torturous activities frequently practiced by the law enforcement officers on the pretext of extorting confessions from the accused and suspects. Thus information has been documented on the factors contributing to it, the form or nature and extent and the institutional responses to the problem. Having done that, the next Chapter (3) will expound and examine the legal administration of confessions.

## **CHAPTER 3**

### **The Administration of Confessions.**

#### **3.0. Introduction.**

At common law, an adverse admission relevant to the issue of guilt in a criminal case is known as a confession.<sup>56</sup> Confessions represent the most important and most frequently encountered exception to the rule against hearsay in criminal cases. Therefore, it is necessary to understand the principles of administration and admissibility developed at common law. Hence, this Chapter of the dissertation will cover an elaborate exposition of the most important aspects of the common law rules.

#### **3.1. Confessions at Common Law.**

Although a confession has defied a concrete and feasible definition, it suffices, for the purpose of this literature, to define it as an adverse admission of guilt by the accused relevant to the issue of guilt in a criminal case, and this includes any statement wholly or partly adverse to the person who made it whether made in words or otherwise.<sup>57</sup> While the common law recognizes that a confession might be both reliable and cogent as evidence of guilt, and indeed sees no objection to a conviction in cases where a confession is the only evidence against the accused,<sup>58</sup> the law also recognizes that a confession can be regarded as reliable only when

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<sup>56</sup> Murphy, P (2000) *Murphy On Evidence*, 2<sup>nd</sup> ed. p. 219

<sup>57</sup> Murphy & Barnard, *Evidence and Advocacy*, 4<sup>th</sup> ed. p.88

<sup>58</sup> *Chileshe v. The People*, (High Court of Zambia, 1972)

given freely and voluntarily.<sup>59</sup> If forced or coerced, the reliability of the confession might be fatally compromised, and the integrity of the system of administration of justice itself made to suffer. The exclusion of evidence obtained by torture, force or other coercive methods is the means of protection of the accused developed by the judges during the eighteenth and nineteenth centuries, when the memory of an age when such methods were commonplace still lingered. But as evidenced in the previous Chapter, this coercive method of obtaining evidence from the accused has percolated into the modern era. The significance of excluding such evidence may be gauged by the fact that in English law, the rule that a confession obtained by oppression or in circumstances likely to render it unreliable must be excluded, is the only instance of the mandatory exclusion of illegally or unfairly obtained evidence—**R v Sang**.<sup>60</sup> In the United States, the ‘exclusionary rule’ applies to any evidence illegally obtained. There, the fruits of involuntary confessions cannot be used in the prosecution of any crime against the defendant.<sup>61</sup> In effect, this serves as a deterrence to police misconduct. This contrasts sharply with the position in Zambia which embraces the view that evidence obtained illegally, if relevant is admissible — **Liswaniso v The People**.<sup>62</sup> As noted in the preceding Chapter, this has given the police an incentive to continue torturing suspects because they know that even if the court will throw out an involuntary confession, any evidence obtained as a result of the said confession will be admissible. The classic statement of the common law

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<sup>59</sup> Op cit, Murphy On Evidence. p. 220

<sup>60</sup> (1980) AC 402

<sup>61</sup> <http://www.zamlii.ac.zm>

<sup>62</sup> Supreme Court Judgment # 52 of 1976

rule as to the admissibility of confessions was that of Lord Sumner in **Ibrahim v. R**<sup>63</sup>,

*“It has long been established...that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.”*

In common parlance, ‘voluntary’ simply means ‘of one’s own free will’-**R v Rennie**<sup>64</sup>, per Lord Lane. Lord Parker CJ, in **Cullis v. Gunn**<sup>65</sup> supplemented the test of voluntariness, as defined by Lord Sumner when he added the requirement that a confession must not have been obtained in an ‘oppressive manner’. The suggestion of some deliberate act in the words ‘threat’ and ‘inducement’ for a time led the courts to concentrate on the mind of the questioner, rather than on the mind of the suspect. In **R v. Isequilla**,<sup>66</sup> the Court of Appeal concluded that:

*“...Under the existing law the exclusion of a confession as a matter of law because it is not voluntary is always related to some conduct on the part of authority which is improper or unjustified.”*

‘Improper’ or ‘unjustified’, in the phrase, of course must be the offering of an inducement, because it is improper for those in authority to try to induce a suspect to make a confession. This view of the law would have left the accused without recourse in a case where, without any improper intent and perhaps even without realizing it, the questioner created some fear of prejudice or hope of advantage in

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<sup>63</sup> (1914) AC 599 at 609

<sup>64</sup> (1982) 1 WLR, 64 at 70

<sup>65</sup> (1964) 1 QB 495 at 501

<sup>66</sup> (1975) 1WLR 716 at 721

the mind of the suspect. In such a case, the resulting confession might well be voluntary, but under the *Isequilla rule*, would nevertheless be admissible.<sup>67</sup>

In **DPP v. Ping Ling**<sup>68</sup>, the House of Lords was called upon to decide whether it was the state of mind of the questioner or that of the suspect which was to control the test of voluntariness. The House firmly held that it was the latter that govern the question whether or not the confession was voluntary, and that should also control the question of admissibility. From this, it can be deduced that the intention of the person in authority who makes a threat or promise or offers any inducement prior to an accused making a confession or statement is irrelevant. So is the fact that the threat is gentle or the promise or inducement slight save in so far as this may throw any light on the vital question- was the question or statement procured by the express or implicit threat, promise or inducement? At common law, the rules of admissibility apply only where the fear of prejudice or hope of advantage was excited or held out, or the oppression created by a 'person in authority'.<sup>69</sup> There is much case law bearing on the question of what persons are or are not persons in authority, but this is a subject of later discussion.

It is, however, settled that a person in authority must have, or reasonably be thought by the suspect to have, some influence over his arrest, detention or prosecution, or in other words, be a person from whom a threat or inducement might appear credible-**Deokinanan v. R.**<sup>70</sup> Thus, it remains germane to consider in the light of

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<sup>67</sup> Op Cit, Murphy On Evidence.p.211

<sup>68</sup> (1976) AC 574

<sup>69</sup> Op Cit, Murphy On Evidence.p.222

<sup>70</sup> (1969) AC 20

the common law rule that the fear of prejudice or hope of advantage must have been generated by a person in authority, with the consequence that self-generated fears and hopes would not destroy the voluntariness of a confession. In addition to the rules governing admissibility, at common law the trial judge has power to exclude a confession, in the exercise of his discretion, where it has been obtained by means of or following a breach of the Judges' Rules. The Judges' Rules are rules of conduct and procedure for the guidance of police officers and others concerned in the arrest, detention and interrogation of suspects.<sup>71</sup> They were first promulgated by the Judges of the Kings' Bench Division in 1912, and subsequently revised from time to time. However, the Zambian judiciary still applies the pre-1964 version of the Judges Rules. In the case of **Zondo and Others v. The Queen**<sup>72</sup>, Conroy CJ stated that the new rules, that is, the 1964 version of the Judges' Rules had not been applied to this country. He went on,

*“when I speak of the Judges' Rules, I, therefore, refer to the rules set out at paragraph 1118 at the 35<sup>th</sup> edition of Archbold...I am now informed by the learned State Advocate that the pre-1964 rules are still applicable here”.*

The rules are not rules of law, and do not affect the legal principles of admissibility of confessions. But a judge might refuse to admit a statement if a breach of the rules occurred, per Lord Goddard CJ in **R v. May**.<sup>73</sup> But the main importance of the rules always, is the fact that a breach of the rules might provide evidence that the resulting confession was not voluntary. For this reason, a confession in criminal cases cannot be separated from the rules of its admissibility since a confession is

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<sup>71</sup> Ibid, p.31

<sup>72</sup> SCZ No. 36 of 1974

<sup>73</sup> (1952) 36 Cr App. 91, 93

not to be considered as having evidential value when it is made involuntarily, and such a confession is not admissible.

### 3.2 . Person in Authority.

A person in authority is anyone who the prisoner might reasonably suppose will influence the course of prosecution.<sup>74</sup> In **R v. Upchurch**<sup>75</sup>, a servant charged with arson of his employers' house and the employers' wife exhortation to confess because it might serve the prisoners' neck led to the confession. In that case, the wife of the employer was held to be a person in authority because she was in a position to influence the prosecutor-the husband. The question whether an employer is a person in authority was debated in **R v. Moore**.<sup>76</sup> In that case, Parke, B. said,

*"it is only when the offence concerns the master or mistress that their holding out or the threat or promise renders the confession inadmissible."*

On the other hand, if an improper inducement is held out by someone not in authority but in the presence of someone in authority then the ensuing confession will be inadmissible unless the person in authority disassociates himself from the inducement. This was clearly laid down in **R v. Clearly**<sup>77</sup>. Hence, the admissibility of a confession is determined not so much by the person to whom it was made but by the manner and circumstances under which it was procured. Logically, it follows that a confession, otherwise voluntary-that is, uninfluenced by fear or hope of benefit- is not rendered involuntary by virtue of the character of the person to whom

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<sup>74</sup> Mwaka, B (1998) Police Powers and its Impact on Human Rights.p.161.

<sup>75</sup> (1936) 1 Mood cc.465

<sup>76</sup> (1952) 2 Den 522

<sup>77</sup> (1963) 48 Cr App.116

it was made, whether or not he is one in authority. Clearly, however, a confession obtained by improper inducements held out by a person in authority or by another under such circumstances as to justify the accused in assuming that they were held out by sanction of one in authority is inadmissible in evidence.<sup>78</sup> This rule is based on the ground that the accused would hardly be influenced sufficiently by persons having no authority over him or over the prosecution to make his statements of questionable credibility.<sup>79</sup> For this reason, although confessions are hearsay, and are to be received with great caution, they are considered reliable because the law presumes that no rational persons would make admissions against his interests unless urged to do so by the promptings of his conscience to tell the truth. This invests them with such a high degree of reliability that they can be taken out of the classification of unreliable hearsay-**Damas v. People**<sup>80</sup>. But if such admissions are not understandingly made, are not voluntary, or are induced by fear or hope of benefit, they do not rest upon the honest and repentant conscience, and the element which raises the presumption of reliability is not present.

### **3.3 . Voluntariness as test of Admissibility.**

It is universally recognized that a confession of a person accused of crime may be admissible in evidence against the accused only if it was freely and voluntarily made, without duress, fear or compulsion in its inducement and with full knowledge of the nature and consequences of the confession.<sup>81</sup> A confession of the accused

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<sup>78</sup> Ibid, p. 276

<sup>79</sup> Ibid. 88

<sup>80</sup> 62 Colo. 418, 168 at268

<sup>81</sup> Ibid.p. 321

shown not to have been freely and voluntarily made, but induced by fear or hope or promise of benefit, reward, or immunity, or by force, violence, fear or threats, is not admissible in evidence against him. The tendency of modern authorities is to exclude involuntary confessions for the reason that only a voluntary confession can be relied upon as true and testimonial unworthiness and unreliability are said to constitute the underlying and fundamental principle upon which confessions are excluded in evidence. This safeguard takes into consideration the fact that persons influenced by hope of benefit, or by fear induced by violence or threats of violence, may confess to alleged crimes that they did not in fact commit. In the generally accepted sense of the term, as used in criminal law, a “*voluntary confession*” is taken to mean a confession made of the free will and accord of the defendant without coercion induced by fear or the threat of harm or holding out hope of reward or immunity.<sup>82</sup> These safeguards are applicable whether the confession is a product of physical intimidations or psychological pressure; coercion in obtaining a confession from an accused can be mental as well as physical. That is to say, the confession must be the product of the defendant’s own judgment, and the operation of his own mind, uninfluenced by methods and devices which are denounced by the law or by any extraneous disturbing cause which deprives him of his own free will and volition.<sup>83</sup>

A confession obtained under the influence of fear, especially that induced by threats of bodily harm, torture, personal violence or abuse, or by holding out a promise or

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<sup>82</sup> Ibid, p.594

<sup>83</sup> Ibid, p595

hope of a reward or immunity-in short, a confession which is forced or extorted in any manner by over persuasion, promise or threats- is an involuntary confession within the rule excluding the use of such confessions as evidence. Thus, if an individual's will is overborne or if his confession is not the product of a rational intellect and a free will, his confession is inadmissible because of coercion. Thus, Hayes, J stated in **R v. Johnston**,<sup>84</sup>

*"The word voluntary is to be understood in a wide sense, as requiring not only that the prisoner should have free will and power to speak, or refrain from speaking, as he may think right, but also that his will should not be warped by unfair, dishonesty or fraudulent practices to induce a confession...upon this principle... a confession will be rejected if it appears to have been extracted...by pestering interrogatories, or if it appears to have been made by the party to rid himself of impunity..."*

The foundation underlying the privilege is the respect a government must accord to the dignity and integrity of its citizens and the fact that confessions are often unreliable. It is desirable that a government seeking to punish an individual produces the evidence against him by its own independent labors, rather than the accused's own mouth. This is premised on the fact that the right to a fair trial is a basic human right.<sup>85</sup> When violated, people innocent of any crime face conviction, imprisonment or even execution- the justice system itself loses credibility. In the **People v. Habwacha**<sup>86</sup>, the court pointed that the courts cannot, on the basis of expediency such as this admit confessions that may have been induced, lest the whole system of criminal justice and law enforcement degenerate and the whole structure of justice- indeed of justice itself- be imperiled.

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<sup>84</sup> (1964) CLR 60

<sup>85</sup> Article 18 of CAP 1 (The Constitution of Zambia)

<sup>86</sup> High Court of Zambia, Judgment # 77 of 1970

Confessions are introduced as evidence of truth of that which was asserted. They are held to be an exception to the exclusionary rule against hearsay because, as Erle, J. put it in **R v. Baldry**,<sup>87</sup> “*when a confession is well proved, it is the best evidence that can be produced*”. If violations of the rule against involuntary confessions were tolerated, all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities; and the most compelling evidence of guilt, a confession, would already have been obtained at the unsupervised pleasure of the police. In assessing whether the evidence was obtained in an oppressive manner, by force or against the will of the defendant, it must be judged in the light of all the surrounding circumstances and material facts and findings because ‘unfairness’ is not susceptible to close definition. However, it is universally agreed that a defendant may make statements before proceedings commence which amount to confessions or admissions of his guilt and such statements, if proved to have been made voluntarily, are evidence against him in the committal proceedings, or at his trial- **R v. Mallory**.<sup>88</sup> The defendant may be convicted on his own confession without any corroborating evidence. In **R v. Smith**,<sup>89</sup> a soldier had been stabbed in a fight and soon after a Sergeant Major put his men on parade saying that he would keep them there until he had learned who had been involved in the fighting. A confession made shortly afterwards by the accused was held to be inadmissible. The underlying principle being that it is a fundamental pre-condition of the admissibility in evidence against any person, equally of an oral answer given by that person to a question put by a

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<sup>87</sup> (1952) 2 Den 422

<sup>88</sup> (1884) 3 QB 33

<sup>89</sup> (1959) 2 QB 35

police officer and of any statement made by that person, that it shall have been voluntary. That is to say, it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression-

**Customs and Excise Commissioner v. Harz.**<sup>90</sup>

In **R v. Sparks**<sup>91</sup>, a confession of guilt of an indecent assault was held to be inadmissible because it might have been in consequence of suggestions by the Bermuda Police that if the accused made a statement, he might be tried by a military court and thereby spare his family the embarrassment of publicity. Observations by police officers such as *“speak the truth it will be better for you”* or *“the time has come when you had better make a statement”* are likely to render a confession inadmissible in that they imply that if the accused is guilty, he may be treated leniently if he confesses, and this amounts to an inducement.<sup>92</sup> In **R v. Lloyds**,<sup>93</sup> a confession made after the police had told the accused that he could see his wife if he disclosed the whereabouts of certain property was held inadmissible. In order to render such extra-judicial confessions or admissions admissible, the prosecution must prove affirmatively to the satisfaction of the trial judge that they were not induced by any promise of favor or advantage, or by the use of fear, threats or pressure by a person in authority- **R v. Thompson**.<sup>94</sup> It was stated in **R v. Roberts**<sup>95</sup> that to establish that the statement was made voluntarily, stronger

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<sup>90</sup> (1967) 1 AC 760 at 818

<sup>91</sup> (1964) AC 964

<sup>92</sup> Muna Ndulo (1973) Confessions- Tainted Evidence? vol.5. p.105

<sup>93</sup> (1843) 6 C & P 393

<sup>94</sup> (1893) 2 QB 12

<sup>95</sup> (1970) as reported in 114 Sol Jol 413 CA

evidence is needed in the case of a statement made by a child than one made by an adult. What is necessary is to show, as a matter of fact, that the statement in question had not been obtained in consequence of something said or done by him, which amounted to an express or implicit threat or promise to the defendant- **DPP v. Ping Ling**<sup>96</sup>. In **Chibozu v. The People**<sup>97</sup>, the accused made incriminating statements to a village headman. It was held that he was a person in authority and thus a warn and caution was supposed to be administered before the obtaining of the statements. If the inducement is made by a person not in authority in the presence of a person in authority and the latter acquiesces in it, a confession made in consequence of that inducement is inadmissible- **R v. Laugher**<sup>98</sup>.

In **R v. Smith**<sup>99</sup>, it was stated that any threat or inducement, however slight or mild, uttered or held out by a person in authority makes a resulting confession inadmissible and that there is no exception even for trivial inducements. Even an inducement made to a person other than the alleged offender, with the expectation that it will be communicated to him, might have the effect of rendering the resultant confession inadmissible. In **R v. Thompson**<sup>100</sup>, the prosecutor stated that at the time of the confession no threat was used and no promise as regards the prosecution of the prisoner, but admitted that, before receiving it, he had said to the prisoners' brother, "*it will be the right thing for your brother to make a statement*" and the court drew the inference of involuntariness on the part of the prisoner. In the same

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<sup>96</sup> (1975) 3 ALL ER 175

<sup>97</sup> (1981) ZR 28

<sup>98</sup> (1846) 2 Car & Kir 225

<sup>99</sup> (1959) 2 QB 35 at 39

<sup>100</sup> (1893) QB 12

vein, a statement otherwise admissible may not be received if it is influenced by an inducement made to obtain a previous statement. That is to say, if the threat or promise under which the first statement was made still persists when the second is made, then the second statement will be inadmissible. In **Nalishwa v. The People**<sup>101</sup>, it was held that where two statements are made, and the first is held not to have freely and voluntarily been made, the second will equally be inadmissible, even though there has been no fresh inducement. Unless it is shown that the previous inducement has ceased to operate on the accuseds' mind. In **R v. Doherty**,<sup>102</sup> a constable told a prisoner in the morning that it could be better to tell the truth and a confession made the same evening to another constable after a proper caution was held inadmissible. In cases where a number of confessions have been made by an accused, it was held, in **The People v. Muwowo**,<sup>103</sup> that it is essential for the prosecution to introduce the statements in the strict chronological order in which they were made.

It is however recognized that at some point in time, a threat or inducement may become ineffect, through a lapse of a reasonable time or any other intervening event or cause and any ensuing confession will be admissible. A lot of Commonwealth authorities support the view that a confession will be inadmissible if obtained at a time when the accused's state of mind was so unbalanced as to render it unsafe to act upon it.<sup>104</sup>

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<sup>101</sup> (1972) ZR 26

<sup>102</sup> (1887) 16 Cox cc.306

<sup>103</sup> (1965) ZR 91

<sup>104</sup> Nokes, G.D, Introduction to the law of Evidence.p.302

### **3.4. Written and Unsigned Confessions.**

Generally speaking, a voluntary confession that has been reduced to writing is admissible in evidence, provided the defendant has signed it, or, if unsigned, provided it was written by the defendant or its correctness otherwise stated by him.<sup>105</sup> The fact that a written confession is not verbatim as related by the defendant does not render it inadmissible, provided the transcription is substantially as related and affirmed by the defendant as correct. Moreover, it has been held that where a voluntary confession is made orally by the accused and then taken down and transcribed, it is admissible in evidence even though not signed by him, at least in so far as such confession is acknowledged by the accused to be correct when he reads or hears it and in so far as the accused has been deprived of no constitutional rights during custodial interrogations.<sup>106</sup> When a confession is admissible, the whole of what the accused said upon the subject matter at the time of making the confession is admissible and should be taken together; and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy.<sup>107</sup> To be admissible, however, it must clearly appear that exculpatory statements were made in the same confession or conversation sought to be introduced in evidence, and not upon other or separate occasions. Where the admission into evidence of a confession is objected to on the ground that it was involuntarily made, the true test of the admissibility of the confession is whether there is a causal nexus between it

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<sup>105</sup> Halsburys' Laws of England.p.584

<sup>106</sup> Ibid.p.589

<sup>107</sup> Ibid.p586

and any inducement, threat or promise, with regard to the crime charged or the prosecution thereof.<sup>108</sup> If there is such a causal relation, the confession must, at least where it was made to or under the sanction of a person in authority, be excluded. It is uniformly recognized that a confession is not rendered inadmissible in evidence merely because it was elicited by inquiries and questions addressed to the accused, at least where the accused, during custodial interrogation, has been warned and not deprived of his constitutional rights to counsel and to remain silent. But the questions may be of such character and prolonged under such circumstances and in such a manner as to render the confession inadmissible on the ground of coercion.<sup>109</sup> The hints in any case depend upon the weighing of the circumstances of pressure against the power of resistance of the person confessing. Obviously, a process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of an involuntary confession that is not admissible in evidence.

Although, as indicated above, the general principles governing the voluntariness of a confession and indicating the character of inducements which will render a confession involuntary have been laid down by the courts, it is difficult to lay down any precise rule by which it may be determined whether the inducements in any particular case were sufficient to render a confession involuntary. This depends necessarily upon the character and attributes of the accused and upon the special circumstances connected with the making of the particular confession that is the

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<sup>108</sup> Ibid, p.596

<sup>109</sup> Ibid, p.605

subject of the inquiry.<sup>110</sup> The sufficiency of the inducements must rest upon the facts in each case and is not to be pre-determined by abstract rules of law. Manifestly, age, intelligence and mental or physical condition of the accused in the particular case must be taken into consideration, in as much as what might be sufficient to induce one person to confess might be insufficient to induce another person to confess.<sup>111</sup>

### 3.5 . A Voir Dire or a Trial-Within-a-Trial.

A voir dire or a trial-within-a-trial is a preliminary examination by the judge in which the accused is required to “*speak the truth*” with respect to questions put to him...<sup>112</sup> In the case of **Kunda v. The People**<sup>113</sup> it was stated by Doyle, C.J.: “*Where an accused is alleged to have made a confession, the trial magistrate should ask him does he object and then proceed in accordance with his reply.*” Thus in **Mwelwa v. The People**<sup>114</sup> the appellant was not consulted on the question whether or not he had any objection to the admissibility of the purported confessions. It was stated that, “*in my judgment and for the reason stated in the Kunda case (afore cited), the confession here was improperly admitted and therefore the magistrate should not have relied upon it*” In **Chinyama v. The People**,<sup>115</sup> the learned judge said that a court would first satisfy itself that a statement was freely and voluntarily made and then, if so satisfied, a court in a

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<sup>110</sup> Ibid, p596

<sup>111</sup> Ibid, p.596

<sup>112</sup> Rutherford, Leslie (2001) Osborne’s Concise Dictionary. 8<sup>th</sup> ed. p.344

<sup>113</sup> (1971) SCZ 204

<sup>114</sup> (1971) SCZ

<sup>115</sup> Supreme Court of Zambia, Judgment # 27 of 1976, Unreported

proper case must then consider whether the confession should, in the exercise of its discretion be excluded, notwithstanding that it was voluntary and therefore, strictly speaking admissible because in all the circumstances the strict application of the rules as to admissibility would operate unfairly against the accused.

It is all because the prejudicial nature of confessions is so great that the court is jealous to guard against injustice to the accused by its unfair admission. Therefore, a custom has grown up over the years; and now constitutes well-settled practice, that where the admissibility of a confession is challenged, the court should hold a trial-within-a-trial.<sup>116</sup> Thus trials within trials are the proper means of establishing whether a statement was made and whether it was made voluntarily.

### **3.6. The Judges' Rules.**

It is settled law that the Judges' Rules are rules of practice only and have no force of law.<sup>117</sup> Consequently, an infringement of them will not automatically exclude a statement made thereafter. The court has, however, a discretion to admit or exclude the statement if there has been an infringement. In confirmation of this legal view, Conroy CJ, in **Mandavu v. R**,<sup>118</sup> said,

*“Even though a court is satisfied that a statement was made voluntarily, it nevertheless has a discretion to exclude such statement if it were obtained in a manner unfair to the accused. In this context, the observance or non-observance of the Judges' Rules is a most relevant factor.”*

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<sup>116</sup> Muna Ndulo (1984) Civil Liberties and Cases in Zambia. African Law Reports.p.407

<sup>117</sup> Muna Ndulo (1989) The Law of Evidence in Zambia: Cases and Materials.p.279

<sup>118</sup> (1962) R & N 298 at 304

The Judges' Rules are rules of practice approved by the judges of the Queens Bench Division, which have been drawn up for the guidance of police officers in conducting their investigations.<sup>120</sup> The Rules are not rules of law- **R v. Wattam**,<sup>121</sup> but failure to conform to them renders answers and statements made to police officers and other professional investigators liable to be excluded from evidence in subsequent proceedings- **R v. Stenning**.<sup>122</sup> The Zambian Courts have adopted the English Judges' Rules for the guidance of the police. Chomba, J pointed out in **Chileshe v. The People**,<sup>123</sup> "*the English Judges Rules were substantially revised in 1964 but the revised rules have not been applied to Zambia; we still operate under the pre- 1964 Rules...*" These, so far as they are material read as follows:

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

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

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

4. *If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the last words 'be given in evidence'.*<sup>124</sup>

### **3.7. Judicial Discretion.**

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<sup>120</sup> Halsburys' Laws of England. 4<sup>th</sup> ed. vol.11. p.238

<sup>121</sup> (1952) 36 Cr App. 72 at 77

<sup>122</sup> (1965) 3 ALL ER 136 at 138

<sup>123</sup> (1972) ZR 48

<sup>124</sup> Op Cit, Muna Ndulo (1989) p.276

In **Chinyama and Others v. The People**<sup>125</sup>, in spite of a finding that confessions made by the appellants were free and voluntary, a question arose whether the trial judge should have exercised his discretion in favor of the appellants and excluded the statements. Baron, CJ delivered the judgment of the court, “*we have said in a ‘proper case’, the position is not, as was argued before us- that the court must automatically in every case make a decision whether or not in the exercise of its discretion to exclude the confession*”. The position of the law was affirmed in **Mbopelleghe v. R**<sup>126</sup> by Clayden FJ,

*“...But where, as here, there is nothing to indicate unfairness, and every circumstance which might be conceivably be regarded as such has been considered in the very decision that the confession was voluntary, and so admissible, there is not in my view valid ground for complaint because there is no discussion by the trial judge of a discretion to reject”.*

In **Cullis v. Gunn**,<sup>127</sup> Lord Parker said, “...In every criminal case a judge has a discretion to disallow evidence, even if in law relevant and, therefore, admissible, if admissibility would operate unfairly against the accused”. The precise position of the Judges’ Rules is important. Though their breach does not render evidence, and in particular a confession, automatically inadmissible; they are rules of practice indicating what conduct on the part of the police officers the courts will regard as unfair or improper. The circumstances, then, in which the discretion to exclude a confession made to a police officer falls to be considered are when such confession has been held to have been voluntarily made but there has been a breach of the Judges Rules or other unfair conduct surrounding the making of the confession,

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<sup>125</sup> (1977) ZR

<sup>126</sup> (1962) R & N 507 at 513

<sup>127</sup> (1964) SJNR 65

either on the part of the police officer or of some other person, which might indicate to a judge that there is danger of unfairness. The test as to whether the discretion should be exercised is whether the application of the strict rules of admissibility would operate unfairly against the accused.<sup>128</sup> Whether, in any given case, the application of the strict rules of admissibility would operate unfairly must depend on the facts of that case. The dicta in **R v. Payne**<sup>129</sup> seem to suggest the following as a general principle: that the discretion ought to be exercised in favor of the accused where, but for the unfair or improper conduct complained of, the accused might not voluntarily have provided the evidence in question or the opportunity to obtain it. In **R v. Crockley**,<sup>130</sup> the court of appeal stated that the trial judge has of course a discretion to exclude admissible evidence if in his judgment its prejudicial effect would be disproportionate to its probative value. But such a discretion is to be exercised to promote, not to defeat the course of justice. Thus even when the voluntary nature of the defendant's incriminating assertions has been established or admitted the judges are still invited to exercise their discretion and exclude them on the ground of some breach of the Judges' Rules. The dicta in **R v. Sang**<sup>131</sup> on the Judges' Rules is summarized in the following propositions:

1. *A breach of the Judges' Rules does not by itself confer upon a judge discretion to reject a subsequent confession admissible in law;*
2. *The discretion does, however, arise if the breach has induced the accused to make a confession which he would otherwise not have made, because the breach will be improper if not unfair; and*
3. *If the breach is such that the confession which it induces is not voluntary, the judge has no discretion, and must exclude the confession as inadmissible in law.*

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<sup>128</sup> Op Cit, Muna Ndulo (1989) p.285

<sup>129</sup> (1963) 1 ALL ER 848

<sup>130</sup> (1964) 148 J P 663

<sup>131</sup> (1979) 2 ALL ER 1222

Thus, in **Mutambo v. The People**<sup>132</sup>, it was held that while a judge has a discretion, it should be used when it appears clearly that the evidence in itself, by reason of the circumstances in which it was obtained has an unfair prejudicial tendency against the accused out of all proportion to its probative value. It was held, in **Nalishwa v. The People**<sup>133</sup> that it is a serious misdirection to fail to consider whether the case is a proper one for the exercise of the judicial discretion to exclude the evidence the admission of which would operate unfairly against the accused.

From the preceding discussion, it is apparent that to ensure a non-prejudicial administration of confessions, the courts have laid down stringent conditions that must be satisfied before a confession can be received. Briefly stated, these conditions are that,<sup>134</sup>

- i) *A confession made in a criminal case as a result of an unlawful threat or inducement of a temporal nature or held out by a person in authority is inadmissible. Under this branch, the test of admissibility is voluntariness. That is to say, a confession must be made of the free will and accord of the defendant, without coercion induced by fear or threat of harm and without inducement by promising or holding out hope of reward or immunity. Thus the confession must be the product of the defendants' own judgment and the operation of his mind, uninfluenced by methods and devices which are denounced by law or by any extraneous disturbing cause which deprives him of his free will and volition.*
- ii) *Confessions obtained in contravention of the Judges' Rules by means of other improper questions may be excluded by the judge within his discretion although and even if the conditions in (i) above, are complied with.*

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<sup>132</sup> (1965) ZR 15

<sup>133</sup> (1972) ZR 26

<sup>134</sup> Op Cit, Muna Ndulo (1973) p. 104

### 3.8. Conclusion.

In conclusion, it can be said that the police, during their statutory duty of discovering the author of a crime, can put questions in respect thereof to any person or persons whether suspect or not from whom he thinks that useful information can be obtained. However, in doing so they should not resort to unlawful threats or inducements of a temporal nature (in the case of a threat) or hold out (in the case of an inducement) because the resulting confession will be inadmissible. These practices conflict with the admissibility test- voluntariness. This imposes a danger in confessions that the confessor is doing it for reasons other than remorse. Consequently, in cases where the admissibility of a confession is challenged the courts hold a trial-within-a-trial. As held in **Tapisha v. The People**<sup>135</sup>, a trial-within-a-trial is held only to determine the issue of voluntariness which is the test of admissibility of an accused's statement with the simple desire to avoid prejudice to him. In order that a confession be admissible, it is necessary for the prosecution to establish two things: - **Lukere v. R.**<sup>136</sup>

- i) *that the accused made the confession; and*
- ii) *that he made it voluntarily.*

Notwithstanding that a confession was voluntary, the trial judge still has discretion to exclude admissible evidence if in his judgment its prejudicial effect would be disproportionate to its probative value. In **Njobvu and Another v. The People**<sup>137</sup>, it

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<sup>135</sup> (1973) ZR 222

<sup>136</sup> (1964) SJNR 65

<sup>137</sup> (1978) ZR 373 at 377

was held that where any challenge is made as to the admissibility of evidence of a confession, it is the duty of a judge to hold a trial-within-a-trial or a voir dire in order to determine whether the accused's confession was made freely and voluntarily; if he so determines, he must then consider, in a proper case, whether the confession, notwithstanding that it was voluntary and, therefore, admissible as a matter of law, should in the exercise of his discretion, be excluded on the ground that the strict application of the rules as to admissibility would operate unfairly against the accused.

This clearly indicates that the holding of a trial-within-a-trial can only take place when it becomes necessary to determine the issue of the voluntariness of a confession, or any part of it, on the ground that voluntariness is, as a matter of law, a condition precedent to the admissibility of a confession. On the other hand, the subsequent exercise of judicial discretion to exclude a voluntary confession because it was unfairly obtained is reserved for proper cases, the determinants of which are the circumstances surrounding it.

Having given a synopsis on the legal administration of confessions in this Chapter of the dissertation, the next Chapter (4) will be dedicated to interviews with some police officers and detainees in order to examine how far these rules are complied with by the law enforcement officers during criminal investigations.

## **CHAPTER FOUR**

### **4.0. Introduction.**

This Chapter of the dissertation is dedicated to analyzing the data obtained from some police officers to whom questionnaires were distributed as well as some prisoners with whom direct interviews were conducted by the author.

### **4.1. Analysis of the data collected.**

One fact that came out so clear from the sampled police officers is that that they all acknowledged having engaged in criminal investigations. Further, it was also established that most of these police officers had obtained confessions from the accused and had sought to tender them as evidence in court against the accused. The police officers affirmed that the said confessions were, in most cases, objected to by the accused on the ground that they had been obtained under duress (see Appendix I and II, question 13). “Duress” is defined as, “an unlawful pressure to perform an act”.<sup>138</sup> Such unlawful pressure may take the form of physical violence or psychological nature. It must be noted, on this premise, that the treaty on the Convention Against Torture (CAT) to which Zambia is a signatory defines torture as, “any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession....”<sup>139</sup>

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<sup>138</sup> Rutherford, L (2001) Osborne’s Concise Law Dictionary. 8<sup>th</sup> ed.p.326

<sup>139</sup> Article 15 of the Convention Against Torture (CAT, U.N. 1984)

The police officers unequivocally affirmed that the confessions were in most times objected to by the accused on the ground of duress, that is to say, an unlawful pressure. Whatever the form this unlawful pressure might have taken it suffices to be torture more so because the pain or suffering was intentionally inflicted on the accused for the sole purpose of obtaining a confession from them. As such, it cannot be denied that it falls within what is envisaged by Article 1 of the Convention Against Torture to which Zambia is a signatory.

On further analysis, it was discernible that while some police officers indicated that the accused volunteered their confessions, others affirmed that the impugned confessions were not voluntary. However, it is interesting to note that the police officers expressly acknowledged having used force in the process of investigating into the alleged crimes. When requested to describe the force used, varying degrees such as; reasonable, mild, and slight were given (see Appendix I and II, questions 19 and 21). But the question is, by whose or what standards was the impugned force so described? This is a very difficult question without a universal standard, measure or answer, and as such, each case is to be looked at according to its own peculiar circumstances.

However, the bottom line is that the attending circumstances, or the declarations of those present at the making of the confession should not be calculated to decide the prisoner as to his true position, or to exert improper or undue influence over his mind. Thus, if the individuals will is overborne or if his confession is not the

product of a rational intellect and a free will, then it can affirmatively be stated that the coercion or the torturous activities induced the confession (see Appendix III, part B). That is to say, the accused should have free will and power not only to speak or refrain from speaking as he may think right, but also that his will should not be warped. But as can be seen in appendix I and II, police officers acknowledged that most of the confessions were objected to on the ground of duress. In the same vein, although some police officers stated that the confessions were voluntarily made by the accused, they, in the final analysis, affirmed their use of force which they described by various degrees, i.e., mild, slight or reasonable.

Thus, it cannot be denied that police officers torture suspects in order to obtain confessions from them. This becomes even more apparent when the police have arrested a suspect who they strongly believe is guilty. This is exacerbated by the deep-rooted practice of conducting investigations in secrecy, thereby exposing the accused to the unsupervised and excessive pressure from the police.

In fact, there is a plethora of case law in which confessions were objected to by the accused on the ground of involuntariness. This is succinctly elaborated in Chapter two and three of this dissertation. Upon holding trials-within-trials, the courts established that force was used by the police officers in obtaining confessions from the accused, and thus threw them out. This is a clear indication that police officers use unlawful force and other torturous vices just to secure a confession from the accused. This is confirmed by appendix I and II on the premise that the confessions

sought to be tendered in court as evidence were objected to by the accused. Also, the police officers agreed to having used force during the investigations and they described the said force by varying degrees such as reasonable, mild or slight. But as already seen, the standards by which these varying degrees of force were so described is difficult to ascertain because of the relativity of the terms. In fact what might have been reasonable, mild or slight to one person might not necessarily have been so to another. Thus, in the absence of a standard measure and all the attending circumstances when the confessions were obtained from the accused, it suffices to state that unlawful force was used. In fact, there is always an enormous temptation to use force because police interrogations are often conducted in secrecy, away from the public eye and under no supervision.

On the other hand, most of the prisoners interviewed stated that they were battered, lashed, deprived of food, held incommunicado or locked up in small, dark, filthy, and dump rooms for a day or more until they confessed to having committed or participated in the alleged crime. As a matter of fact, none of the nomenclature of these activities by the police officers falls short by any inch to the use of the word 'torture'.

In the final analysis, one thing becomes clear; there is discernible a congruence and superimposition or a single thread summing up the data collected. Firstly, there is a sufficient plethora not only of case law but also of other cases reported by other institutions (see Chapter two and three), which gave detailed accounts of the various

torturous means used by the police officers to obtain confessions from the accused. Secondly, some police officers among the sample agreed that their endeavor to tender as evidence in court a confession of the accused were objected to on the ground of duress or unlawful pressure. Thirdly, the same police officers agreed to having used force during the investigations, and they described the force so used by varying degrees such as reasonable, mild or slight. Fourthly, the prisoners themselves lamentably indicated that torturous activities were employed by police officers in order to obtain confessions from them (see Appendix III). All this narrows down to a single fact that police officers use unlawful force on the accused in order to obtain confessions from them. This has been confirmed not only by the local NGOs but also by other international human rights groups.

Having attempted to establish that confessions are a guise of torture, the next Chapter (5) will cover suggestions, recommendations and practical solutions, both legislative and administrative, that could be implemented to curtail the scourge of torture.

## CHAPTER FIVE

### 5.0. RECOMMENDATIONS AND CONCLUSION.

#### 5.1. Introduction.

It is apparent from the preceding discussion, case law and interviews (See Appendix II) conducted with some police officers that force and/or other inducements are continuously used by the police officers in an egoistic effort to obtain confessions from the accused. The use of such force and other inducements against the accused militates against the right to security of a person which includes the right to the following<sup>140</sup>: -

- i) *to be free from all forms of violence from either public or private sources,*
- ii) *not to be tortured in any way, and*
- iii) *not to be treated or punished in any cruel, inhuman or degrading way.*

In fact, the use of torture, that is to say, the intentional infliction of severe pain or suffering on another in the performance or purported performance of official duties<sup>141</sup>, is proscribed not only by the constitution<sup>142</sup> but also by the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (U.N. 1984) to which Zambia is a signatory.<sup>143</sup> When these torturous activities are routinely employed by the police officers, people innocent of crime face conviction, imprisonment and even execution.

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<sup>140</sup> Ibid.p. 8

<sup>141</sup> Rutherford, L (2001) *Osborne's Concise Law Dictionary*. 8<sup>th</sup> ed .p. 326

<sup>142</sup> Article 15 of the Constitution of Zambia, CAP 1 of the Laws of Zambia

<sup>143</sup> Roy Clarke v. Attorney General 2004/HP/003

Thus, it is incumbent upon the author of this dissertation to make recommendations and give suggestions that may help in finding practical solutions to the problem at hand.

### **Recommendations.**

#### **5.2. Fruits of Illegal Search or Involuntary Confessions.**

The rule of law is an essential element of any democratic society. In order to prevent the police from violating the very rights that they are supposed to protect, through illegal and excessive violence and force, it is imperative to remove both the incentive to commit violations of human rights, and to effectively investigate and prosecute such violations. The Courts have an important role to play in reducing or curbing torture, cruel and inhuman treatment by the police. One way of doing this is to exclude from evidence confessions that are illegally obtained.

However, this approach has failed to curb the scourge of torture because the Court still admit illegally obtained evidence as long as it is relevant to the issues before it: **Liswaniso v. The People.**<sup>145</sup> This has given the police an incentive to continue torturing suspects because they know that even if the Court will throw out an involuntary confession, any evidence obtained as a result of the said confession will be admissible.<sup>146</sup>

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<sup>145</sup> SCZ, Judgment # 58 of 1976

<sup>146</sup> Op Cit, ZLJ .p. 9

This contrasts sharply with the position in the U.S.A where the fruits cannot be used in the prosecution of any crime against the defendant. In **Miranda v. Arizona**,<sup>147</sup> the U.S. Supreme Court held that all illegally obtained evidence is admissible regardless of its relevance to issues before the Court. The aim of this exclusionary rule is to deter police misconduct and to remove the incentive and motive for violating a suspect's rights. The Zambian Courts can take a leaf from the American experience.

### **5.3. Prosecution of Police Officers implicated in Torture.**

In addition, magistrates and judges can help curb the scourge of torture of suspects by recommending the prosecution of police officers implicated in the torture to the Director of Public Prosecutions (DPP). This is possible because when an accused alleges that he or she was tortured, a magistrate conducts a trial-within-a-trial to ascertain the truth of the allegations. Whenever it has been established by the Court that the police officer in issue employed torturous activities to obtain a confession from the accused, the magistrate concerned should compulsorily recommend to the Director of Public Prosecutions the prosecution of such an officer. This would serve as a deterrence to police misconduct.<sup>148</sup>

### **5.4. Magistrates to visit Prisons more often.**

In the same vein, magistrates can help curb torture by visiting prisons more often and talking to the inmates about the conditions under which they are kept. In

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<sup>147</sup> 384 U.S. 436 (1966)

<sup>148</sup> Op Cit, ZLJ, p. 9

Zambia, Part XIX of the Prisons Act, CAP 97 of 1966 makes provision for prison visits by magistrates, among other officers. During such visits, a magistrate may, inter alia, visit every part of the prison and see every prisoner in confinement or may inquire into any complaint or request made by a prisoner. In this way, a myriad of torture would be unveiled, and, if established, the magistrate should, as suggested above, recommend the prosecution of the police officers concerned. Implicitly, magistrates would be ensuring that all the procedural safeguards for a fair trial are observed.

The magistrates should realize that the ordinary citizen looks to the Court for protection given the weakness of the civil society and the dominance of the executive. If the Courts fail to rise to the occasion, the ordinary person has nowhere else to turn to, and the citizens will only respect the judiciary if it demonstrates an unshakable commitment to uphold individual rights.

#### **5.5. Enjoyment of State Protection (ESP).**

In South Africa, as soon as a civil claim is settled and the compensation paid out, the State Attorney has to determine whether the officer whose actions were the subject of the claim should enjoy state prosecution (ESP) or forfeit it (FSP). If it is decided that the officer acted outside the guidelines and standards, she or he forfeits state protection and the state may exercise its right to recover the amount paid out for him or her.<sup>149</sup> Having these as legislative or administrative policies would

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<sup>149</sup> Police Brutality in Southern Africa- a Human Rights Perspective, ed. By N'gande Mwanajiti, Pamela Mhlanga, Monde Sifuniso et al.p. 110

ensure professionalism, civility and courteousness among the police officers in conducting criminal investigations.

#### **5.6. Judges' Rules to be made Rules of Law.**

As already noted, the Judges' rules are not rules of law but rules of practice. As such, a confession obtained contrary to the Judges' rules so long as is voluntary can be admitted. Thus, it is recommended that it should be made a rule of law that the Judges' rules must be complied with. It is hoped that this would lessen the abuse of confessions since all confessions would only be admissible if obtained pursuant to the Judges' rules. In this same regard, a rule should also be set that a confession can only be made to police officers of sufficient rank (i.e., above that of inspector) for very often, it is the junior police officers who employ brutal methods to obtain confessions because they tend to be overzealous (it is they more than anybody else who need recognition from their superiors in order to obtain promotions). A leaf could be obtained from Tanzania where no confession made by any person while he is in the custody of a police officer is admissible unless it is in the immediate presence of a magistrate<sup>150</sup>.

#### **5.7. Inadequate Safeguards Against Torture.**

If one were tortured, the only recourse he would have is the prosecution of the torturer for "assault occasioning grievous bodily harm." Alternatively, the victim of torture may apply for redress to the High Court under Article 28.<sup>151</sup> However, it

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<sup>150</sup> Morris, E, Evidence in East Africa.p.76

<sup>151</sup> The Constitution, CAP 1 of the Laws of Zambia

should be noted that in both cases, the torturer would be sanctioned to pay damages. But this is inadequate in the face of the enormity of the offence of torture. Thus there is an urgent need to have torture as a distinct and separate offence under the Penal Laws of Zambia. The net effect of this would be to prevent and control the wide spread use of torture to extort confessions.

Even if most countries, Zambia inclusive, have adopted the International Convention Against Torture (CAT), they have refused to show its primacy by failing to implement its provisions. Even though Zambia has ratified the Convention Against Torture, the instrument will not be applicable in the Zambian Courts until Parliament enacts a law giving the ratified international convention legal effect.<sup>152</sup>

#### **5.8. Representation of the Accused by Counsel.**

China's top legislature has put the revision on the criminal procedural law to prevent and control the wide spread use of torture to extort confessions. The purpose is to establish the principle of presumption of innocence and to allow lawyers to be present during interrogations. Professor Xie Youping at Fudan University observed, "if police conduct interrogations under the supervision of lawyers, they not dare torture suspects."<sup>153</sup>

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<sup>152</sup> [www.jctr.org.zm](http://www.jctr.org.zm): Torture in Zambia's Police Cells

<sup>153</sup> [www.test.china.cn](http://www.test.china.cn).

In many trials in the Zambian courts, the accused is undefended.<sup>154</sup> Two or three police officers will come to court and state almost as a matter of routine that the accused was warned and cautioned and that the statement was voluntarily made. The police officers will then give evidence to indicate that there was no force used or duress and many other relevant matters to establish the voluntariness. Invariably, the accused is alone when he makes his confession except for the police officers and, therefore, he is not in a position to lead evidence of witnesses to contradict the evidence of police officers. Neither is he in a position to cross examine their evidence as being untrue, in this situation, the magistrate may be left with no alternative but to admit the confession as voluntarily made. It is undoubtedly true that it is the duty of the magistrate to put questions and to satisfy himself as to the voluntariness of the confession, but he would be handicapped in this task, unlike a defense counsel, due to lack of instructions from the accused.<sup>155</sup>

All this is premised on the fact that most of the interrogations are done in secrecy, thereby exposing the accused to excessive pressure from the police. Though a Judge will not admit an involuntary confession in evidence, this comes up late in the system when the suspect has already been severely tortured. This gives the police wide latitude to commit all sorts of improprieties and irregularities with no independent person to check on them. In the light of all this, does this have to be left to the family members of the victims, who often times do not have the means to pursue the course of elusive and costly justice? In the vast majority of cases,

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<sup>154</sup> Article to the Magistrates Association of Zambia: Law Relating to Confessions to Police officers. Is it Satisfactory? Vol. 1 of 1978 by Resident Magistrate Wijesekera.

<sup>155</sup> Ibid, p. 22

lawyers are not present during interrogations and the suspect is left at the complete mercy of the police. Thus the need for legal counsel cannot be over emphasized. The UN special rapporteur on torture, Niggel Rodley noted that torture often takes place within the first hours of detention, and often when the detainee is held incommunicado. He recommended that legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention, embracing this short time frame as a way to protect detainees from torture and ill treatment.<sup>156</sup>

### **5.9. The Use of Assessors or Juries in Trials-within-Trials.**

Although trials-within-trials are the proper means of establishing whether a statement was made and whether it was made voluntarily, the procedure achieves this satisfactorily where issues of fact are decided by a jury or assessors. The trial-within-a-trial procedure is less satisfactory when it has to take place before a magistrate or a Judge who has to act as a Judge of both fact and law.<sup>157</sup> Furthermore, there is the added hazard that the accused's participation, or non-participation in the trial-within-the trial may adversely affect his credit in advance of his evidence. Here again, even if his credit is not so adjudged, the accused may think that it must have been and feel, in consequence, that justice has not been done to him. Thus the need for assessors or a jury to deal with matters of fact is indispensable.

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<sup>156</sup> [www.afronet.org.za](http://www.afronet.org.za): Torture Under the State of Emergency.

<sup>157</sup> Muna Ndulo (1984) civil Liberty Cases in Zambia.p.406

### **5.0.1. Need for an Effective and Reliable Complaint System.**

There should be introduced an effective and reliable complaint system that would allow the victims of torture and other forms of cruel, inhuman and degrading treatment to file complaints. Both legislative and administrative measures should be introduced to safeguard against excessive use of force by the police.

To secure effective investigations into human rights violations, the Human Rights Commission must be independent so its work is not affected by government or party politics. Yet the independence of the Human Rights Commission has not been clearly defined in its founding legislation. Questions remain about its autonomy in relation to government, since the President directly appoints the commissioner, without formal statutory requirement of input from civil society on appointees.<sup>158</sup> Moreover, the Commission can only recommend prosecution, but does not have the power to institute criminal proceedings against perpetrators of human rights violations or to instruct the Director of Public Prosecutions (DPP) to institute such proceedings. Empowering the Human Rights Commission in this regard would ensure the prosecution of police officers who allegedly commit torture and justice would be secured.

Alternatively, government institutions and Non-governmental Organizations (NGOs) concerned with human rights issues could structure a team of experts to spot and investigate into human rights violations and report them to appropriate authorities for redress. Strengthening the capacity of such institutions and the Human Rights Commissioner would ensure the regain of the general public's confidence. This would be achieved by finding these structures adequately and

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<sup>158</sup> Op Cit, [www.afronet.org.za](http://www.afronet.org.za)

enforcing the recommendations. To ensure efficiency, these structures or institutions should be made answerable to Parliament.

#### **5.0.2. The International Community and Non-Governmental Organizations (NGOs).**

The international community must relentlessly continue to provide all kinds of support to the NGOs that are involved in educating the civil society about their basic rights and freedoms. These organisations are the only hope left in the country for the suffering and oppressed masses.<sup>159</sup>

In most cases, be they civil or criminal, where citizens sue the state, the Judges in Zambia have generally behaved in a more executive manner than the executive wing of government itself. Having lost confidence and trust in both the government and the insecure judiciary, the people of Zambia have fallen back on the NGOs for help in the difficult task of securing their basic rights and freedoms. They have succeeded in sensitizing a substantial proportion of a country's population about their inherent civil liberties, and they have fought human rights violations head on, thus greatly minimizing the scourge.

The above recommendations, if implemented, would in a long run, satisfy the concern for adequate safeguards to protect the individual who goes through police interrogation procedures. Ultimately, this would change the behavioural attitude of police officers and thereby lead to a better balance between protection of human rights and criminal justice.

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<sup>159</sup> Ibid

If a society fails to care what happens to some of its people, believes that certain human beings have forfeited their human rights because of their actions, real or suspected – or fails to hold officials to account for their misdeeds, then it creates a fertile environment for human rights violations, and in this particular case, torture by police officers to thrive.

### **5.0.3. Conclusion.**

Having given a synopsis of the nature of confessions, the legal administration and a review of the case law. Can it be said that confessions are a guise of torture? It can be stated affirmatively, as seen in chapter two that contempt for human rights remains embedded in the Zambia Police Service whose officers routinely torture suspects as part of crime investigations. Both regional NGOs and Zambian Human Rights groups confirm that the police use torture.<sup>160</sup> As such, the evidence obtained from confessions is tainted in that it does not represent the usual and true situation of the suspect's mind in relation to the committal of the alleged crime for there are always inducements be they physical or psychological. On this is premised society's abhorrence to the use of confessions in that the police must obey the law while enforcing it so that in the end life and liberty cannot be as such endangered from illegal methods used to convict those though to be criminal as from actual criminals themselves.

It has also been noted that where the voluntariness of a confession is challenged, that goes to its admissibility, and this fact should be determined as a preliminary point by a trial-within-a-trial. However, most of the interrogations by the police

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<sup>160</sup> Amnesty: Zambia: Policing in Zambia: Seldom Fair, Sometimes Fatal.

officers are done in secrecy, thereby exposing the accused to excessive pressure from the police. Although a trial Judge will not admit an involuntary confession in evidence, this comes up late in the system when the suspect has already been severely tortured. This becomes apparent especially when the police have arrested a suspect whom they strongly believe is guilty. As Professor Wigmore noted, "*any system of administration of Justice which permits the prosecution to trust habitually compulsory self disclosure as a source of proof must itself suffer morally thereby... that ultimately the innocent are jeopardized by the encroachment of a bad system.*"<sup>161</sup>

This has been compounded with lack of adequate legislative safeguards and institutional capacity to investigate into and prosecute the torturers. For example, the Human Rights Commission can only recommend prosecution, but does not have the power to institute criminal proceedings against perpetrators of torture. In November 2000, the U.N Committee against torture expressed concern at allegations of continuing, widespread use of torture and apparent impunity for the perpetrators. Although the government agreed to incorporate the crime of torture into the criminal code, that has not been done.

Moreover, the precise position of the Judge's Rules is that their breach does not render evidence inadmissible; they are rules of practice indicating what conduct on the part of police officers the Courts will regard unfair and improper. Hence, the

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<sup>161</sup> Wigmore, W.H. (1940) Wigmore on Evidence. 3<sup>rd</sup> ed.p.123

need to make the observance of these rules mandatory as opposed to directory cannot be overemphasized.

Notwithstanding that, the police officers have power to interrogate suspects so as to obtain some information before preferring a charge. However, this does not imply that the police can or should use all the means to achieve this purpose. Moreover, the person questioned is under no duty to answer, still less to attend at a police station. Therefore, torture of suspects is not allowed under any circumstance, and it is the only right in the constitution which has no exceptions.<sup>162</sup>

In conclusion, it can be said that the rule of law is an essential element of any democratic society. In order to prevent the police from violating the very rights they are supposed to protect, through illegal and excessive violence and force, it is imperative to remove both the incentive to commit violations of human rights and to effectively investigate and prosecute such violations.

However, protection of human rights is a question of values and attitudes to those values. The fairness of a system of criminal justice is not ensured simply by putting those values on paper. It is ensured by acceptance of those values and a commitment to protect them by all concerned in the process. Thus, the police, prosecutors, defense counsel, magistrates and Judges carry the final responsibility for ensuring the observance of human rights.

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<sup>162</sup> Human Rights for Law Enforcement Officers, by Prof. A.W. Chanda

The preceding discussion has demonstrated that the law in Zambia makes a serious attempt to redress the imbalance that exists between the state and the accused. Procedural due process is the heart, the conscience and the soul of our adversary or accusatorial system of criminal justice. It is procedure that spells much the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.

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Appendix 1

(For police officers)

PART A.

1. POLICE STATION KULIMA TOWER
2. NAME OF POLICE OFFICER CHABU MULENGA
3. MAN # B2147
4. RANK CONST.
5. DURATION IN SERVICE 5 years

PART B (where appropriate, answer by ticking)

6. HAVE YOU ENGAGED IN CRIMINAL INVESTIGATIONS? {Yes}  {No}
7. BRIEFLY, WHAT WAS THE NATURE OF ANY OF THE CASES WHICH ULTIMATELY WENT INTO ADJUDICATION?
- MURDER CASE WHERE THE  
DECEASED WAS STABBED ON THE  
CHEST BY A FRIEND USING A  
KNIFE.
8. WAS THE ACCUSED REPRESENTED BY COUNSEL? {Yes}  {No}
9. WHICH WAS THE TRIAL COURT? {Magistrates Court}  {High Court}
10. IN THAT OR ANY OTHER PARTICULAR CASE YOU INVESTIGATED INTO, DID YOU APPEAR IN COURT AS A PROSECUTION WITNESS, PW? {Yes}  {No}  
(if no, proceed to part C)
11. IF YES, DID YOU TENDER, AS EVIDENCE IN COURT, A CONFESSION OBTAINED FROM THE ACCUSED DURING INTERROGATIONS? {Yes}  {No},  
NB. A confession is an acknowledgment by the accused that she or he committed the alleged offence.
12. WAS YOUR EVIDENCE OF THE ACCUSED'S CONFESSION OBJECTED TO BY COUNSEL OR THE ACCUSED, AS CIRCUMSTANCES MIGHT HAVE BEEN?  
 {Yes}  {No}

13. IF YES, WHAT WAS THE GROUND UPON WHICH THE OBJECTION WAS BASED?  
THE CONFESSION WAS OBTAINED UNDER DURESS.

14. DID THE COURT HOLD A PRELIMINARY INQUIRY ON THE OBJECTION BEFORE PROCEEDING WITH THE ADJUDICATION? {Yes}  {No}   
i.e, did the court question you (the prosecutor) on how you obtained the confession from the accused?

PART C

15. IN ENDEAVORING TO DISCOVER THE AUTHOR(S) OF THE CRIME(S) YOU INVESTIGATED INTO, DID YOU CAUTION THE ACCUSED? {Yes}  {No}

16. IF YES, AS PRECISE AND CONCISE AS POSSIBLE, WHAT WAS THE CAUTION?  
IT IS ALLEGED THAT YOU MALE CHITAMBALA ON A DATE KNOWN AT A NAMED PLACE DID KILL CHANDA MULENGA WITH MALICE AFORETHOUGHT.

17. DO YOU THINK THE ACCUSED APPRECIATED THE MEANING OF THE CAUTION? {Yes}  {No}

18. WHAT IS THE REASON FOR YOUR ANSWER?  
HE GAVE HIS OWN REPLY VOLUNTARILY TO THE WARN AND CAUTION.

19. DID THE ACCUSED VOLUNTEER THE STATEMENT (CONFESSION) AS TO HIS OR HER ALLEGED PARTICIPATION IN THE CRIME? {Yes}  {No}

20. IF NO, BY WHAT MEANS DID YOU OBTAIN THE CONFESSION FROM THE ACCUSED?

21. IF AT ALL YOU EMPLOYED ANY FORCE IN THE PROCESS OF INVESTIGATING INTO THE ALLEGED CRIME, HOW DO YOU DESCRIBE IT?  
{slight} {mild} {reasonable}  {proportionate} {excessive} (just tick one)

22. WHY DO YOU DESCRIBE IT SO?

Appendix 2

(For prisoners)

PART A

1. PLACE OF DETENTION... *CHIMBOKATLA*.....  
2. NAME OF DETAINEE... *SAMSON Bwalya*.....  
3. TERM OF DETENTION... *5 years*.....  
4. ALLEGED CRIME... *Theft.*.....  
5. WERE YOU REPRESENTED BY COUNSEL? {Yes}  {No}

PART B

6. BRIEFL Y, HOW DO YOU ACCOUNT FOR YOUR PARTICIPATION OR INVOLVEMENT IN THE ALLEGED CRIME?

*My friend (John Nonda) trusted me with the custody of assorted merchandise to his house was too small. But it turned out that the said goods were allegedly stolen and by then John Nonda was out of the country.*

7. DO YOU ACKNOWLEDGE YOUR PARTICIPATION OR INVOLVEMENT IN THE ALLEGED CRIME? {Yes}  {No}

8. IF NOT, WHAT ARE THE REASONS FOR THAT ANSWER?

*The allegedly stolen goods were just entrusted with me for custody.*

9. IN AN ENDEAVOR TO DISCOVER YOUR PARTICIPATION IN THE ALLEGED CRIME, DID THE INVESTIGATION OFFICER CAUTION YOU BEFORE PREFERRING A CHARGE AGAINST YOU? {Yes}  {No}

10. IF YES, AS FAR AS YOU CAN RECALL, WHAT WAS THE NATURE OF THE CAUTION?

11. WHAT IS YOUR UNDERSTANDING OF A WARN AND CAUTION STATEMENT?

*I really do not understand it, neither do I appreciate its importance.*

12. DID YOU MAKE A STATEMENT (CONFESSION) TO THE INVESTIGATION OFFICER ON YOUR INVOLVEMENT OR PARTICIPATION IN THE ALLEGED CRIME? {Yes} {No}

13. IF SO, WAS YOUR CONFESSION VOLUNTARY? {Yes} {No}

14. IF POSITIVE, WHAT MOTIVATED YOU TO MAKE THE CONFESSION?

15. HAD IT NOT BEEN FOR THE ANSWER GIVEN IN 14 (ABOVE), DO YOU THINK YOU COULD STILL HAVE CONFESSED TO THE INVESTIGATION OFFICER? {Yes} {No}

16. WHETHER POSITIVE OR OTHERWISE, WHAT IS THE REASON FOR YOUR ANSWER? ~~IN 14, ABOVE?~~

*I could not bear the beatings of the police officers which started from arrest at home and continued even at the police station.*

17. WAS YOUR CONFESSION TENDERED IN COURT BY THE PROSECUTION AS EVIDENCE OF YOUR PARTICIPATION OR INVOLVEMENT IN THE ALLEGED CRIME? {Yes} {No}

18. IF SO, DID YOU OR COUNSEL, AS CIRCUMSTANCES MIGHT HAVE BEEN, OBJECT TO THAT EVIDENCE BY THE PROSECUTION? {Yes} {No}

19. IF POSITIVE, WHAT WAS THE GROUND FOR THE OBJECTION?

*That I did not commit the alleged offence, but I could not*

*Just stand the Police beatings which they threatened would continue until I admitted the committal of the alleged crime.*

20. DID THE COURT CONDUCT A PRELIMINARY INQUIRY INTO THIS ISSUE?

{Yes} {No}

21. WERE SUCH INDUCEMENTS AS THREATS, COERCION, PROMISE OF BENEFIT, REWARD OR IMMUNITY USED BY THE INVESTIGATION OFFICER TO OBTAIN A CONFESSION FROM YOU? {Yes} {No}

22. IF YES, DO YOU THINK THEY (INDUCEMENTS) INFLUENCED YOUR DECISION WHETHER OR NOT TO CONFESS? {Yes} {No}

23. HAD THEY NOT BEEN OFFERED, DO YOU THINK YOU COULD STILL HAVE CONFESSED TO THE INVESTIGATION OFFICER? {Yes} {No}

24. IF NEGATIVE, WHAT IS THE REASON?

*Because the Police officers had promised a release if I admitted the alleged crime - that I would be saving their time.*

25. DO YOU THINK INVESTIGATION OFFICERS UNDULY INFLUENCE THE MAKING OF CONFESSIONS? {Yes} {No}

26. IF SO, HOW IS THAT DONE?

*Because most of the time, they beat us severely.*

27. DO YOU THINK IT WOULD BE OTHERWISE IF THERE WERE MANDATORY REPRESENTATION BY COUNSEL? {Yes} {No}

28. WHAT IS THE REASON FOR THE ANSWER GIVEN ABOVE?

*The Police officers would not be beating us because they fear lawyers.*

Thank you for your time, attention and co-operation. Zimba Gamaliel (LLB) UNZ