OBLIG. ESSAY
1990/1991

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the Obligatory Essay prepared under my supervision by J.K. SINKENDE, entitled:

THE ORIGINS OF THE RULE OF EVIDENCE IN ZAMBIA: A CRITIQUE ON SPOUSE EVIDENCE AND THE POSSIBILITY OF LEGISLATING IT.

be accepted for examinations. I have checked it carefully and Iam satisfied that it fulfills the requirements relating for format as laid down in the regulations governing the preparation of obligatory essays.

19.9.91
DATE

SUPERVISOR

TITLE:

THE ORIGINS OF THE RULES OF EVIDENCE IN ZAMBIA: A CRITIQUE ON SPOUSE EVIDENCE AND A POSSIBILITY OF LEGISLATING IT.

by

JEREMIAH KINGSLEY SINKENDE

An Obligatory Essay submitted to the University of Zambia in partial fulfillment of the requirements for the degree of Bachelor of Laws (LLB) 1991

University of Zambia
School of Law
LUSAKA.

September 1991

ABSTRACT

This obligatory essay identifies the sources of the rules of evidence in Zambia. It examines whether these sources of the rules of evidence are adequate and suitable to the Zambian setting. In this respect, the essay picks out on the spouse evidence and provides an analysis to show, in certain circumstances, how inadequate these rules have been unfair to the ordinary Zambian

The essay also attempts briefly, in chapters six and seven, to examine ways in which legal rules of evidence could be brought into force which would be representative of community aspiration. It suggests in this regard one way: i.e. a parliamentary enactment; either by codification or consolidation.

ACKNOWLEDGEMENTS

In my research and the preparation of this obligatory essay I received encouragement and assistance from a number persons and institutions. I am greatly indebted to all of them. But specifically, I wish to record my sincere appreciation to MRS M.N. MUNALULA my supervisor without whose guidance, patience and stimulation this work might not have been completed.

Other gratitudes go to the staff, lecturers and tutors in the school of law. It is because of their knowledge and guidance that I have been able to produce this paper. The discussions I had with them and the materials they provided were an eye opener, they proved extremely relevant and useful.

Lastly but not the least, I wish to dedicate this work to my wife DOROTH and my children without whose understanding and tolerance, it would just have been a dream.

May God bless them.

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION (1)

1. At the time Britain withdrew from this country in 1964, this territory was left with a dual system of laws. The indigenous customs co-existed with the English laws in our courts. By passing the Northern Rhodesia Order In Council on 17th August 1911, the British South African Company (B.S.A. Co.). made all British Laws as practised in the United Kingdom (U.K) law applicable to the territory. At the same time the Chiefs in the area were permitted to administer the indigenous customs in their areas on less serious offences.[1]

However, this plural legal system was not easily adaptable to the emergent Zambia, making the two systems of law still administered in the courts today only converging in the supreme court in an appellate jurisdiction.[2] Where the two systems of laws conflicted, the courts ruled that the English law prevailed; the yard stick being the British judges, who condemned the local institutions like witchcraft.

This brought a lot of problems in the administration of justice in courts; the society wondering whether the courts decisions in conformity with these laws upheld the popular view of the people. Even

Even today, for example, on say a charge of murder, it is not clear whether the accused's spouse can be allowed to testify for the prosecution or co-accused if the marriage was not a christian marriage.[3] Or indeed, to what extent section 151 of the Criminal procedure Code (C.P.C) protects the accused from the evidence of his wife and whether under these circumstances the spouse is a compellable witness.

Thus, the rules of Evidence, neither customary nor the imported English Laws, will fully meet the needs the Zambian today. We can argue for instance that the English law both common law and statutory, are unsuited for this country due to their background which is non-Zambian. While the Zambian bred statutes are basically English in their structure and nature. Indeed, the unwritten customary laws of Zambia, lag behind an average Zambian man of today.

Hence, some system must evolve which will satisfy the demands of the Zambian citizenry at large - the majority of who are the indigneous Zambians, especially in the laws of evidence and court determinations.Indeed, to remedy this situation, it is suggested in this paper that a mixture of these laws must be sought, i.e creating a need for a local legislation with the current local colour in the laws of evidence.

All the relevant statutes both English and Zambian, not merely cosumetic to English statutes but have utility and of general applicability to the present Zambian society; the common law and Zambian customs which are relevant must be codified into a single statute. All these rules must be transformed and make a completely new law of evidence suited to the Zambians. At any rate where codification is not possible the rules of evidence must be collected and bound into a consolidating statute for easy of reference and identification. Either way will help the courts and councils alike to trace the sources of the rules of evidence in Zambia as in East African Countries of Kenya, Uganda and Tanzania.

Another aspect of importance is the role of assessors.[4] This must be redefined from that of opinion givers ie. where they are held as expert witnesses to that of being part of the court and mandated with power of passing a verdict of guilty or not guilty in certain situation, expecially where a matter is intermingled with customary practices. This we may argue will be helpful because assessors are part of the community from which the accused is drawn. They can better judge the wrong and damage done to that community as a result of the accused's misdeed and action. These can be an important tool of the judicial system in determining whether sufficient evidence has been adduced as to seclude the accused from the rest of the community or not. The decision of a judge or magistrate sitting alone will surely be subjective sometimes and this position of assessors may be a remedy.

FOOTNOTES

1. MUUNGA M.P "Land Law and Policy in Zambia" (1982) University of Zambia. Zambia Papers No. 17 LUSAKA. Chap 2 pp 9-18
   Colonial attitudes also chap 6 pp 63-81
   The Colonial Heritage.
2. KANGANJA L.J. "Courts and Judges in Zambia
   The evolution of the modern judicial systems.
   PH.D THESIS (1980) Vol. 1
3. CAP 160 - Criminal Procedure Code (C.P.C)
   Sec - 2
   C/W Sec.151 (1) & (2) which includes a customary marriage in those specific cases.
4. ibid.3 Secs. 197 & 198 The trial in Subordinate courts and the use of assessors and that their role is confined to giving opinion only.

CHAPTER TWO

THE ORIGINS OF EVIDENCE IN ZAMBIA (2)

In this country, a person accused of a crime can only be properly convicted of a crime in a competent court of law[1] upon evidence which is largely admissible and adduced at his trial in a legal manner, form and procedure[2]. Thus while the rules of procedure regulate the general conduct of litigation; evidence ascertains for the guidance of the parties and court, all the material facts in issue in each particular case. It sees to it that, the establishment of these facts are by proper legal means and to the satisfication of the court.

Basically, evidence is heavily intermingled with procedures which makes it impossible to get a conviction without a proper combination of these two aspects. But the two are distinct subjects and braches of the law, each with distinct rules to be observed. Hence, although the many rules of evidence, are traced back to the middle ages, the story of their development really begins with the decisions of the common law judges around the 17th and 18th centuries. They were these decisions which were really responsible for the complex and now almost defunct body of the law of evidence concerning the competence of witnesses together with other far from defunct rules; such as the numerous exceptions, e.g the rule excluding evidence of opinion and the rudements of the modern laws of character evidence.

In England, the 19th and 20th centuries have witnessed a number of statutory reforms. Various Acts of parliament have been passed on the law of evidence; but all these Acts were superceded in 1889 by the Criminal Evidence Act which made the accused person and his or her spouse a competent witness for the defence in all criminal cases.[3] This Act presumed the right of the accused to make an unsworn statement. Perhaps it derives its validity from the fact that the accused is innocent until he is proven guilty[4]. We may argue presently that; this was an unfortunate situation because instances have arisen when the accused must really say something[5]. However, in England, the older decisions of common law still dictate much of the form in which the law of evidence must be stated to a larger extent to this date.

Three facets have influenced and modelled the English rules of evidence in its exclusionary nature and have been identified as:

1. The jury trial -

   This jury trial can be contrasted with the role assessors in Zambia under section 197 of the criminal procedure code. But one notices that the two bodies are completely different as we will see later under chapter 6.

2. The Oath -

   We may be pursuaded to argue that, in Zambia, where society has no strong religious background, affirmations

would do better than Oaths. However, section 36 of the High Court (H.C.) Act, Cap 50 provides for both Oaths and affirmations.

3. The adversary system -

This assumes the innocence of the accused until he is proved guilty. This fact is enshrined in the Zambian Constitution article 20 of cap 1.

The reason behind the insistance on these three factors seem to be the deep-seated fear that rules of evidence will easily be manufactured by and on behalf of the parties; plus the fact that the law of evidence changes piecemeal and without any consideration to their repercusions on the other branches of the subject, making it difficult to know when a new rule of evidence or judicial pronouncement came into being and contrary to the other. Thus Zambia in its venture for rules of evidence adopted the three asepcts to a larger extent.

Evidence In Zambia

What is the basis of evidence in Zambia? Various answers emerge to this question. Basically the Zambian legal systems and traditions are inherited from Britain, i.e; the English rules of evidence either statutory or common law have, modelled the rules of evidence in Zambia. But we can argue also that, there are some home grown rules of evidence in the Zambian statutes and the indigenous Zambian customary laws. Thus, we can state that, the sources of the rules of evidence in Zambia today are four.

(a) The rules of evidence found in Common Law and equity.

Here the terms common law and equity may be understood to carry the same meaning. Cap 4 of the Laws of Zambia gives effect by which the laws of England will apply to this country[6]. It is clear that, the larger part of the Zambian Laws of evidence are actually the principles of the English Common Law and doctrines of equity.

The Interpretations and General Provisions Act[7] reveals that common law enjoys much recognition than equity such that, while there is an enadequate definition of the term common law; there is even no mention of the doctrines of equity at all. But in Zambia, Common Law and equity are administered concurrently and in the event of a conflict, the doctrines of equity shall prevail over the principles of Common Law[8]. However, in Zambia, there does not appear to be any justifiable reason for the superiority. But in England, evolution shows that the common law having come first on the scene, received some refinements from equity which came later.

Again we may ask; what are those principles of common law and the doctrines of equity which seem so important to our legal systems? Various meanings can be attributed to the two terms. But for our purpose in this paper, and as a source of law; a meaning which combines the two terms is what is suitable. Indeed, and in the context of cap.4,[9] common law and equity refer to law that has come about as a result of an enactment of parliament. For example the

the law which has come from cumulative wisdom of judges through their judicial decisions. Thus common law here includes that part of the English law properly called the doctrines of equity since both are made by judges.[10]

Hence as a source of the Zambian rules of evidence, the common law applicable here is that which is in use in England today and not that which obtained on 17th August 1911 on the date of reception. This literally means that as the common law rules are caused to change through judicial interpretations either in Zambia or England, those changes are followed here. But where there is a conflict between the Zambian Interpretation and the English, on the judicial decisions the Zambian Interpretation prevails; the assumption being that, knowing the English precedent[11] and taking in account the Zambian climate and social plane, the Zambian courts are satisfied that there must be a divergence from the law of England.

However, the principles of common law are very involving. They require a determination of the authority of the court passing particular decisions with higher court's decision binding the lower courts. In Zambia such authority starts at the High Court level. A magistrates court has no binding authority, but is bound by all High Court and Supreme Court decisions. We may argue however that being able to exercise appellate jurisdiction on matters from the local courts, a decision of the magistrate's court on such

matters ought to bind the local courts: or what would be the juristic implication and effect of such an appeal decision if it cannot bind a court below? To the contrary, this may not be possible perhaps because not being a court of record, the procedures and reception of evidence the local courts would not even know what law binds it and what does not. We may argue further that, because of this, even the binding decision of a High court has no, or very little effect on the outcome of a local court matter.

(b) Some rules of evidence found in the English Statutes

English statutes play a significant role in our laws of evidence. Again cap 4[12]. will show that the application of the English statutes in Zambia is conditional. Many statutes[13] spell out situations when the Btitish Acts will be applicable to this country e.g. Cap 2 provides for judicial notice of the British Acts or Applied Acts[14]. Ofcourse this refers to those British Acts which have been extended and applied to Zambia since others are not recognised in Zambia. Thus, two situations are identifiable here:

(i) Under cap 4, section 2 (c) all English statutes in force on the date of reception are applicable to Zambia except where they are specifically excluded; and

(ii) As to English statutes passed in England after the date of reception, they are not applicable to Zambia except where they are specifically extended to Zambia by an Act of Parliament.

An example of (i) above, is found in the C.P.C where although the English Criminal Evidence Act of 1898 is on an earlier enactment than the reception date; i.e enacted before 17th August 1911; the Zambian Act[15] excludes this Act. What is interesting however is that, most of the provisions of this English Criminal Evidence Act of 1898 are more or less re-enacted in the Zambian Act[16], making the 1898 English Act a very significat law in Zambia's rules of evidence.

As regards (ii) above, in criminal matters, even if a British Act passed after the reception date has exactly the same wording and provisions as the Zambian Act, that English Act can never be cited as an authority in the Zambian courts on those provisions which are the same as the Zambian Act, unless such an Act has been extended to Zambia. In the same breath, Acts which were extended to this country may also be excluded by passing an Act of parliament excluding them; eg:

> Before 1967, the English Evidence Act of 1938 was law extended and applicable to Zambia by virtue of Cap 5 of the laws of Zambia[17]; which provided for extentions and applications of British Acts to Zambia, passed after the reception date. But in 1967, the Zambian Evidence Act[18] was passed and with it the English Act of 1938 ceased to apply to Zambia.

However, a closer look at the provisions of the 1967 Zambian Evidence Act reveals that the repeal of the English Act was merely cosumatic in effect, since, the Zambian Act is similar to its English predicessor, but

for a few insignificant changes. As a matter of fact, we see here that the power to bring in force an English Act and eventually to repeal it, entail that parliament has power also for the amendment of certain British Acts so that the same can apply squarely on a Zambian situation to redress similar aspects which may not be on-all-fours with the English environment in their application to Zambia.

Similarly, the effect of the 1965 English Evidence Act is only understood when we read the Zambia Evidence (Amendment) Act[19] whose effect was to amend the English Act and to incorporate the provisions of the English Criminal Evidence Act of 1965 which had not itself been -----previously extended to Zambia.

Thus, as a working basis, we can say that, all British Acts which were, inforce at the reception date were by the 1911 Proclaimation Order in council law in this territory, unless they were specifically excluded by a later Act of parliament of this territory. As regards those British Acts passed after that date, these are not applicable to the territory unless they were extended by a later Act of this territory. Indeed that these applications and extensions are subject to amendments to suit the Zambian situation.

(c) The rules of Evidence found in Zambian statutes.

Topping the list are the two Zambian Evidence Acts[20] as amended, which are a very important source of the rules of evidence in Zambia. Suffice to say that Cap 170 is a consolidation of the English Evidence Act 1938; and the

English Criminal Evidence Act of 1965 in essence the Zambian Evidence Acts No. 8/1967 and 3/1968 already referred to above. However, although the Evidence Act cap 170 is much like and akin to its predicessors i.e, the English statutes, it is argued nonetheless that, it contains changes which it is hoped are supposed to suit the Zambian invironment.

Apart from these Acts, there are many other provisions of rules of evidence in various substantive statutes[21]. There is for example Appendix 8 of the Laws of Zambia whose significance though slight read, enhences the African customary law of evidence. Thus from this we can state that the rules of evidence are actually scattered over board in legislations both principal and subsidiary. What is difficult perhaps is reaching and getting them quickly and with expedience when we need them. This demonstrates outright that, it is not only legislation that needs to be done; but also that, these legislations be in a compact code which can provide a distinct and easy reach when required i.e. a need for all these rules to come under a single legislation either by codefication or consolidation.

(d) <u>The African customary law included to the extent that it is not excluded under the terms of statutory law</u>.

Is there anything like the rules of evidence, under African Customary Laws? A reading of the Evidence Appendix 8 of the Laws of Zambia will show clearly that since African customary laws are unwritten; it follows that the rules of evidence in this area are similarly without codification.

This is that group of unwritten rules which regulates the rights and liabilities of the African customary courts when presiding over a civil suit in a native court.

For example in marriage, divorce, inheritance or land matters involving the indegenous people, there is a way the evidence in each case is received and the parties are expected to accept the court decision that way. The adjudicators must reach a determination which must resolve the problem one way or another. Indeed since the local courts administer the African Customary Law, we can infer from this that, a method of receiving evidence does exist and hence the presence of the rules of evidence in an unwritten customary law.

We note also that, in Zambia, local courts operate within certain defined limits. It follows from this that, customary rules of evidence do not apply willy-nilly. They ought to be applied within those limits which the written law will permit! and we can conceed that because the customary laws are not written, it becomes even more difficult to state that the rules of evidence are 'these' or 'those'. However, even under these circumstances, if more attention is pad, it is still possible to identify things as taboos and other sacred activities as possessing evidentially values taking the form of judicial notices etc.

Importance of Legislation.

The survey of the sources of the rules of evidence above have revealed that, they include the English Laws,

i.e. statutory, common and case law; and local legislations, both principle and delegated and the customary rules of evidence, basically implied and to the extent that they are not excluded under the terms of the written law.

That legislation is the most important source of our rules of evidence is evident from the provisions of the constitution[22]. This legislative power vests in parliament i.e. the National Assembly and the president in this country - who can make law on any matter whatsever especially on matters which affect society a great deal. But we note to the contrary that the position of parliament is limited by the constitution. Thus although parliament can make any law, such law must be in conformity with the republican constituion.

It is also argued that, although the Zambian parliament can make law, it is more on the receiving end than law making. For example, the English laws especially statutes still go to model our statutes making most Zambian statutes British Origin. As such, they lack originality and play an injustice to the indigenous people who do not benefit from Acts, which although locally made are alien in nature. In many areas, these statutes have totally proved inadequate to the Zambian; even causing him untold hardship e.g in dealing with competence and compellability of a spouse witness the law is very unclear as to who may benefit.

CHAPTER THREE

COMPETENCE OF WITNESS

When talking of the testmony of a witness what comes in mind is whether such witness will be competent and compellable witness to give evidence. Competence and compellability are distinct topics, but what is interesting is that, a person who is fully conversant with the relevant facts and competent to give evidence about it from the layman's point of view, may nevertheless be incompetent to give that evidence as a witness in law[1]. Similarly, a person legally competent cannot always be compelled to give evidence if he is unwilling to do so. But when a person is not competent, it automatically follows that, he is not compellable. Conversely, when a person is competent, he is usually compellable[2].

This situation is further complicated when one considers the distinction between competence to give evidence generally and competence to give a particular type of evidence, such as expert evidence. Under these circumstances court has to discover that it is a matter distinct from the general subject of competence[3]. Equally important is the distinction between non-compellability and privilege against disclosure. Thus a witness who is competent and therefore compellable to give evidence, may nonetheless be entitled to privilege in respect to certain

answers. And we note that such privilege does not affect his obligation to give evidence on other subjects. In any event he must obey the compulsory process and take his objection from the witness box on the ground of privilege[4]. But this is not the subject here.

However, we can state as a general rule that, primafacie, every person who can understand the questions put to him and give rational answers to those questions, is competent to testify[5]. But, we note here the various situations rendering such persons incompetent depending on:

1. Incompetence from defective intellect;[6]

In this area of incompetence, we have persons of unsound mind, drunkards and children of tender years. Here incompetence involves and depends on intellect and understanding. Persons of unsound mind can testify during lucid moments; drunkards when they are sober, while children of tender years when it has been established that the child has a sufficient appriciation of the solomnity of the occasion.[7]

2. The accused

3. The spouse of the accused

When can she or he be allowed to give evidence for the prosecution[8] and a person charged with the spouse?

4. The effect of the accused and co-accused's evidence

However, in this paper I will survery the spouse evidence and how it affects the accused[9] and co-accused[10] under these provisions of the criminal procedure code. In dealing with this topic, I shall first take a look of section151 (1) & (2) to see whether it provides a meaningfull purpose for the indigenous Zambian. Then section 2 and 157; survey the utility of such a marriage in Zambia and the frequency of such marriage. In the event that such a marriage does not meet these requirement; what protection has the accused got against the evidence of his spouse in criminal proceeding?

1. CROSS R. & WILKINS N. "An Outline of the law of Evidence"
5th Ed. (1980) Butterworth LONDON. pp.60-72.

2. NOKES G.B. "An Introduction to Evidence". 3rd Ed. (1962) Butterworth LONDON. Part IV Chap.16 p.p. 375 to 395

3. CROSS R. (D.C.L.) "Evidence" 3rd ed. (1967) Butterworth LONDON. pp. 138-155

4. ibid 2. p.385

5. ibid 3 pp

6. ibid 3 pp.

7. ibid 2

8. HATCHARD J. & MUNA NDULO "The law of evidence in Zambia" cases and materials, (1990) Multimedia Publications Lusaka - Zambia. pp.88-91

9. CAP. 160, Criminal Procedure Code. (C.P.C.) Sections 2, interpretation of marriage. i.e Christian marriage under the general law in criminal law, 151 cases where wife or husband may be called without consent of accused'n and 157 competence of accused and husband or wife as witnesses, own application, no comment from prosecution if not called as witness, spouses etc.

10. ibid 9. above.

CHAPTER FOUR

EVIDENCE OF A SPOUSE 1 - (S-151 OF C.P.C) (4)

Under the common law there is sufficient authority dealing with the provisions of section 151 of our C.P.C arising from the English courts and other common wealth courts. Mostof these cases, have attempted to provide an interpretation to the English statute which has been a predecessor[1] to the Zambian law on this aspect. However, in zambia, apart from one case[2], which also has no direct bearing, but merely came before the court for an advisory opinion, there has been no other case that has come before courts on this provision of the law.

Above we have already stated that the English criminal evidence Act of 1898 is not applicable to zambia[3]; but it is also true that nearly all the provisions of this act, have been reproduced under the criminal procedure code (C.P.C.)[4]. Nevertheless, this is not saying that the provisions of the C.P.C. are exactly the same as those under the English statute. There are deletions and inclusion which have been made in the Zambian provision to make the sections suit the zambian situations! e.g under s-151 (2) (a) & (b) there is an inclusion of customary marriage which is not so under the English criminal evidence Act. It is this provision which we want to analyse in this paper in relation to spouse evidence.

Section 151 ... of the C.P.C. reads:

1. In any inquiry or trial the wife or husband of the person charged, shall be a competent witness for the prosecution or defence without the consent of such person -

(a) in any case where the husband or wife of a person charged may under the law in force[5] for the time being, be called as a witness without the consent of such person;

(b) in any case where such a person is charged with an offence under chap. xv of the penal code (PC) or bigamy.

(c) in any case where such person is charged in respect of any act or omission affecting the person or property of the wife or husband of such person or children of either of them.

2. For the purpose of this section -

(a) wife and husband include parties to customary marriage;

(b) customary marriage includes a union which is regarded as a marriage by the community in which the parties live.

According to s-151 a spouse of the accused is a competent witness for both the prosectuin and defence except where a law inforce does not so provide, or where the offence affects such a wife or husband. But the use of the words:" without the consent of such person" under

subsection 1 and 1 (a) is obsecure.

While it is easy to deduce that this phrase refers to the accused it is possible for the same words to refer to the "wife or husband", or "the person charged". However, if the phrase refers to husband or wife under sub section 1 (a) then it means that the husband or wife of the person charged is not only competent but also compellable, where any law for the time being calls on a spouse as a witness. It may be argued that, this could have been the rationale behind the compulsion of the spouse witness under the evidence act 1877, in addition to the fact that being an offence of light obligation and under civil jurisdiction and therefore carrying light penalt, compulsion would have a slight effect on the accused.

But if the phrase, "without the consent of such person" under subsection (1) (a) refers to the accused, then the meaning of section 151 (1) (a) would mean that, although there is competence, there is no compellability. Indeed this, it can be argued, would mean that, even where the prosecution may call on the accused's spouse to testify, the spouse can still exercise her or his objection to testify and the accused has no right to compel the witness under these circumstances to testify either for the accused or for the prosecution.

As to paragraph (b) and (c) it is clear that the section only provides for competence without compellability: but again leaving the exercise of objection and option in the spouse witness. We can however contrast this view with the court of Appeal's decision in R.V. LAPWORTH.[6] In this case, the accused was charged with attempted murder of his wife by strangling her and with doing her grievous bodily harm. On appeal, the council contended that there was no direct authority that she was a compellable witness. The sad thing was that, even in the light of the 1898 Act,[7] the court of Appeal (CA) ruled that, the wife was not only competent but also compellable. They went on to state that; this has always been the rule at common law, as otherwise when an assault was committed in secret by one spouse upon the other, there would be no means of proving it.

But is that true interpretation of the section? By way of commentary two observations can be made here :-

1. The provision which is a bone of contention is written and from its reading; "...shall be a competent witness" does not import compellability. It simply allows that the woman be competent. Once competent, the issue of compellability, being distinct from competence, must still be decided upon. Thus, in this country, giving an advisory opinion on cases even when the case did not fall under section 151, Justice SILUNGWE - as he then was,, after finding competence, failed to find any words in the section

importing compellability under s-151 (1) (b) & (c)[8]. And he quoted at length various common law authorities which the court of Appeal in R.V. LAPworth did not consider.

2. We can argue that although the court of Appeal used the phrase; "..this has always been the rule at common law.." it is not clear how the court arrived at that because many of the common law decisions interpreting similar provisions have ruled that although competent, a spouse was not compellable. This has been the trend starting with a House of Lords (H.L) decision in LEACH v. R[9]. This was a case where on a charge of Incest, the prosecution called the wife of the accused as a witness against her husband; despite her objecting to giving evidence. The House of Lords allowing the appeal held that when a husband is prosecuted for alleged incest his wife though competent witness for the prosecution was not compellable.

From this case emerges the rule that, it is desirable for the trial judge to ascertain whether the spouse objects to giving evidence or not against the accused spouse. Indeed this seems to be the basis of SILUNGWE J's (Now Chief Justice), pronouncements, that under these offences the spouse ought to be warned by the judge or magistrate that he or she has the right to refuse to give evidence and failure to

do so is a serious irregularity that must, on appeal, result in the exclusion of his or her evidence[10].

This lack of scruitiny and intensive search of what the law was by the C.A in R.V. LAPworth has handcapped the development of law on the issue of competence and compellability at least for a number of years. But the correct law was already there. Later on the C.A. in NOBLE v R[11].; a case which concerned the prosecution of a wife for alleged forgery of her husband's signature the court of appeal held conforming a lower court's decision that the husband was a competent witness to give evidence for the prosecution to the effect that he had not authorised the wife to sign his name on certain documents.

However and interesting in this case; is the fact that the issue of compellability was not raised. We can ask here who should have raised this issue if at all it was to be raised? The wife or the husband, or the court? Obviously the court. But it would appear the court having become aware of the conflict in the law that had been made in R.V. Laptworth they decided to "let sleeping dogs lay". The wife did not raise this issue, but even if she did, she was not the one who could exercise the objection, it was the husband who had that right a view which Nokes[12] advances in this area of evidence

At the time of the decision in the case of R.V. Laptworth, the common law was sufficiently full

of authorities on this subject. Thus in Australia there was already a decisive ruling in the case of R v PHILIPH[13]; where the Supreme Court (S.C) sitting as a criminal Court of Appeal held that where a wife was charged with having wounded her husband with intent to murdering him; the husband was competent but not compellable witness to give evidence against his wife.

In R v. ACASTER[14], the court of Appeal, held that as decided in Leach's case, when the defendant is called under these circumstances, a wife or husband was competent but he or she was not compellable. In this case the husband was charged with having carnal knowledge of a girl under the age of 16 years and his wife was called as a witness to give evidence for the prosecution; but later expressed a wish not to give evidence against her husband. In addition to the decision, the court went on to state that the judge should always inform the spouse witness that he or she might object to give evidence, and in the words of DARLING J:

> "I would warn a wife that she could not be obliged to give evidence when called as a witness by either the prosecution or her husband in any case in which she is not compellable witness.... "

Again in GUZA v R[15] Cram J. said at p.142:

> "...further the appellent's wife although a competent witness was not compellable..., failure to inform a witness of her right could and did not result in damning the evidence being given. No warning was given to this woman. This was a serious irregularity and of course it is impossible to say what choice this woman might have made had her legal rights been put to her..."

Thus, even as it can be said that the C.A. in Lapworth had no earlier authority, we can trace common law authorities before it which had set up ground work in as well as after it, which are applying the law set out by other courts. In Zambia there is very little authority on this subject especially when we consider that Zambia is a country with a different background of custom, as well as other social aspects, would not allow the common law position to be accepted wilfully.

Be that as it may the decision in P v MUSHAKWA plays a very important role in the law of spouse witness. The court said that, this case did not fall under s.151 of the C.P.C. because it was a murder case of a brother. This might give a feeling that in all murder cases, a spouse is not competent. That is not true. If the one killed is a child of the family, NOKES[16] states that under these circumstances the provisions of s-151 would be invoked upon. But the court in Mushaikwa did not comment on this aspect and we can not be sure of the exact position apart from going by the common law which is the situation NOKES is clarifying.

What is of interest about this case though is to learn that even when there was a common law confusion on the issue of competence and compellability, His Lord Ship Chief Justice Silungwe (now) was able to set a law which was different to that of the C.A. in Lapworth. But what is not certain however is whether, this decision, having come in as an advisory opinion, has as much binding

authority as others. Indeed being a high court decision, it only binds courts below it and there are very few of these. Perhaps cases which stand in such controversal areas should find a line by which they can climb to the supreme court for review and if confirmed get a much more binding power.

Our only consolation however, comes up later in 1978 in the House of Lords which gave an authoritatue decision over ruling Lapworth on the interpretation of the provision of s-151. In HOSKYN v METROPOLITAN POLICE COMMRS [17], the appellant was charged with causing grievous bodily harm with intent, to the girl he married two days before the trial began. She was an unwilling witness for the prosecution, but Hoskyn was nonetheless convicted. His appeal to the court of Appeal was dismissed, possibly on the Lapworth authority. He appealled to the House of Lords and succeeded. It was held over-ruling Lapworth that a wife or husband though competent cannot be compellable to give evidence against the other spouse in a trial for those offence under a similar provision to section 4 of the criminal Evidence Act of 1898.

This decision has been land mark because it settles some uncertainty at common law: More so to us, because it is decided according to Mushaikwa, and re-affirms what His Lordship C/J. SILUNGWE lied down as law in his decision as early as 1973. However we note that, although the H.L. in Hoskyn settled a situation where the accused's spouse was held to be compellable on a charge of forcible

abduction followed by marriage the court in Mushaikwa did not look at this aspect to address itself to the Zambian situation of eloping as an accepted method of marrying in some corners of Zambia. Hence there are still borderline cases which would need a decisive ruling.

In SIBANDE v P[18] for example a situation like this arose. In that case, the appellent was charged with defilement of a girl of 12 years. In answer to a charge he said

> "I admit the charge. It was an arrangement for marriage. She told me she was 15 years..."

There upon a plea of not guilty was entered and the court proceeded. The girl was the first prosecution witness. And the court held among other things that, it cannot be called upon to consider as being possibly customary law on a particular issue, purely speculative suggestions completely un supported by evidence. i.e BARON A.C.J at page 104:

> 'If there is evidence fit to be left to the jury that the parties were married according to customary law, the onus would be on the prosecution.... But it is not enough... simply to say "we are married" "we are married according to customary law"; he must at least say, "we are married according to customary law because we did this and this and this...'

This casts the burden on the accused and the laws of evidence forbid this.

All in all, defilement is an offence falling under s-151 or at least an offence under Chapter XV of the

Penal Code. And assuming there was a customary marriage as under s-151 (2) (a) & (b) ie - where a husband and wife includes parties to a customary marriage, then the 15 year old wife should not have been allowed to testify against her husband. But if she wanted to exercise her right of rejection, then the court before allowing her to do so should have warned her that she might object to give evidence if she does not want to, or, her evidence should not have been received. Interesting enough, her evidence was rejected by the supreme court, not because of lack of warning, but because the voir dire ~~which~~ was not properly conducted. It would however have been interesting to see what the court would have come up with had the voir dire been properly conducted.

Another aspect which the court avoided was the marriage which their Lordships rejects, that there was no marriage between the accused and the girl. Although the question of age and marriage was settled in R v CHINJAMBA[19] where the court ruled that under customary law the marriage does not significantly hinge on age but other factors, the supreme court seems to have been swayed by the age of the girl - that 12 years was too young an age and that parental consent even under customary law marriage was an important ingredient especially when the girl was below age.

We may ask here; who can know whether there was marriage between the accused and the girl? The parents of the girl are one group, and those of the accused another. They would know whether all the requirements were fulfilled. But the parents of the girl were the accusers. Well, the court is yet another group! But surely in a court of 3 all whites judges; these would not know what a customary marriage is, and at any rate they would have no interest to know whether some formalities of such a seeming barbaric marriage have been observed. This was reflected in Baron A.D.C's judgement[20] when he talks of evidence being fit to be left to the Jury to determine that the parties are married according to customary law. But juries have no place in zambian courts.

One thing is demonstrated here that, although the roles of a judge and jury are lamped up into one person here in zambia i.e in the judge or magistrate; there arise situations when the role of a judge must be performed by a different man from a man playing the role of a jury. Our laws call for assessors[21], but all we can say here is that perhaps their Lordships in this case were advocating for assessors to wear and assume the role of the jury to determine whether there was marriage between the accused and the girl. However, they did not call for assessors ~~even~~ to assist under these circumstances.

In some quarters in this country eloping with a

girl qualifies a marriage so long there is an agreement between the eloper and the girl, with parents being pursuaded into ratifying the marriage after. At any rate a failure to ratify the marriage by the parents should not be so harsh as to amount to defilement. The decision that the accused be guilty of defilement deprives the accused and the community a fair judgement and justice which is acceptable by the community around.

We can now ask: How then shall court know that there was no valid marriage between the accused and the spouse witness, to give the witness a right to object to give evidence for the prosecution e.g to enable the witness refuse without being compelled? Could the witness be compelled to submit to medical examination to determine that there was defilement? Even more complicated, was the marriage at hand is a customary marriage?

Surely, a magistrate or judge sitting alone may not know and appreciate all the customs. One of the answers lies in the assessors who, in this country have no power to determine the outcome of the case but are merely advisors - leaving the power of final say with the magistrate or judge. Perhaps an increased power of the assessors will make our Zambian law more realistic and uphold the views of the community. On role of judge, Jury and assessors see chapter 6 & 7.

FOOT NOTES

1. The English Criminal Evidence Act, 1898 s-4. Section 151 is based on this E.C.A. However Sec. 151 has been changed and adapted to Zambian conditions. Furthermore Sec. 151 was itself amended by Act 20/1969 and comparison with the English Law is further complicated by a reference to customary law marriages. However, authorities on sec 4 of the ECA may still be of some help in interpreting sec 151 in appropriate cases.
2. P.V. MUSHAIKWA (1973) Z.R. 161 (H.C.)
3. Cap 160 Criminal Procedure Code (C.P.C) S-360
   In view of the above comments many authorities on the ECA 1898 are still authorities on corresponding parts of the CPC here. In addition textbook comments will also be useful if read with care in understanding the C.P.C
4. ibid 1 and 3 ss.151, 157, 158 and 159
5. Evidence Act 1877. Sec-1 is an example of a situation when a law in force calls a witness without consent of such a person.
6. R V LAPWORTH (1931) 1 K.B. 117 (C.A)
7. ibid. 1
8. ibid 2 p 164
9. LEACH V R (1912) AC 305 (H.L.)
10. ibid 2 at p 167
11. NOBLE V R (1974) 2 ALL E.R. 811 (CA)

12. NOKES G.D. " An introduction to evidence" 3rd ed. (1962) Butterworth. Part IV Chap[ll] 16 p[ll] 385.

13. R V PHILIP (1922) S.A S.R 257 (SC)

14. R V A CASTER (1922) No.2 76 J.p. 269 or 106 L.T. 384 CA - See Darling J's words at p[ll] 389.

15. GUZA V R (1962) A.L.R MAL 136. ALSO RV KWALIRA AND ANOTHER (1962) ALR MAL 2 (1961-63 also ibid 9 above

16. ibid 12 at pp 3[illegible]5-387

17. HOSKYN V METROPOLITAN POLICE COMMISSIONER (1978) A.C. 477 (H.L)

18. SIBANDE V.P (1975) Z.R. 101 (SC)

19. CHINJAMBA 5 N RLR. 384.

20. ibid 18 at p 101 heads of ruling.

21. ibid 3. Secs - 197 and 198. Trial in subordinate court with assessors. See also cap 50, High Court Act Secs - 34 and 35, on evidence of customary law and assessors thereof and Record of evidence respectively.

CHAPTER FIVE

SPOUSE EVIDENCE II - SEC. 2 & 151 OF C.P.C. (5)

The question of spouse evidence may be best examined by beginning with a hypothetical case, for instance:

Mutinta who lives in a village in a rural area while standing outside his house is approached by his neighbour Michelo who wants his axe which Mutinta had borrowed some weeks ago. Infact Mutinta had broken the axe leaving the handle. Being embarrased to tell Michelo, he makes excuses. Nevertheless Michelo insists, becoming angry and demands for his axe. Mutinta retreats into his hut and later comes out with the broken axe, and using the handle, hits Michelo over the head very hard. Michelo drops dead on the spot.

Although the villagers in the area hear the quarrel, nobody actually sees Mutinta strike Michelo except Mary, Mutinta's second wife who was sitting by the door of their hut at the time of the incident, Mutinta's first wife is away visiting relatives. On charge of murder of Michelo, can the prosecution call Mutinta's second wife Mary as a state witness against her husband?

The answer can be 'Yes' or 'No': and, intend to proceed by dealing with the nagative aspect first and then the 'yes' asepct:

1. The spouse of the accused not competent witness.

Nokes on evidence states that, where the relationship of husband and wife existed at the time of the crime,

or trial, a wife is not a competent witness, and therefore not a compellable witness for the prosecution against her husband, or the husband against his wife.[1] This was the general rule set out also in P v. MUSHAIKWA[2] where the High court of Zambia affirmed the law in this area and said that at common law the wife of an accused person is not a competent witness for the prosecution save in cases of forci ble marriage and possibly treason. The judge said that, in both of these occasions the spouse is competent and compellable. But the judge did not state situations when a marriage could be a forcible marriage nor whether pursuation would amount to forcible marriage.

The strict interpretation of the law would however mean and include a marriage where a man elopes with a girl; or where marriage is arranged as between parents; and the parties are only informed one morning that "today you are married" and many others. But of course we are aware that in Zambia and in many African countries and societies, the direct issue of voluntariness is often ignored as between the parties to a marriage; especially the girl. She often comes to learn of the impending marriage only a few days before and usually to a person of whom she would not even have contemplated marrying at all. All the same the general law still stands.

In the case above Mushaikwa was charged with murder of his brother. The prosecution sought a ruling from the court as to whether the accused's wife who was the only eye witness was a competent witness

for the prosecution. The prosecution alleged further that the accused had consented to his wife giving evidence for the prosecution. To this the High court said no, the wife of the accused was not a competent witness and hence not compellable.

In our hypothetical problem there is the issue of whether or not, Mary, the accused's spouse, being the only eye witness, is a competent and compellable witness for the prosecution regard being had to the provisions of section 2 of the C.P.C. as to what amounts to husband and wife on those offences which do not fall under sec - 151 (1) (a-c) of the criminal procedure code.

In the last chapter we saw the position of the spouse witness when the offence facing the accused comes under those offences mentioned under the provisions to sec - 151 of the C.P.C. and the difficulties which arise out of the general rule to that section. Similarly, here, although we could out rightly say Mutinta's wife cannot be called as a witness this is dependant upon the type of marriage. But assuming the marriage was a statutory marriage or a christian marriage then Mutinta's wife could not be a competent and compellable witness for the prosecution. But now that this marriagea is customary the situation is different. It is difficult to say that Mary is incopetent because sec-2 of C.P.C. does not accept a customary marriage as marriage at all.

2. The spouse witness competent and compellable

The problem of a spouse witness raises two issues in our hypothetical case, both emerging from the extent to which a customary marriage takes recoginisance in our laws.

(a) the type of marriage.

Can Mutinta's marriages to both women be deemed christian marriages as to afford him some protection by the law in criminal proceedings?

All criminal cases in this country, the procedure thereto and evidence are governed and received in court according to the C.P.C and under the interpretation section, it is that unless the context otherwise requires, "a husband or wife means a husband and wife of a christian marriage." A christian marriage is said to be a marriage which is recognised by the law of the place where it is contracted as the voluntary union for life, of one man and one woman to the exclusion of all other[3].

> We are here interested in the phrases : "recognised by the law of the place where it was contracted"; "as a voluntary union for life" and "of one man and one woman to the exclusion of all others".

Assuming Mutinta's marriages to both wives were recognised by the customary laws of the place where they were contracted; would they qualify as marriages?

Against that background we may ask further, Is customary law marriage accepted by courts, as marriage other than for offences coming under sec-151. We note that, under this provision, the context otherwise

requires to extend the meaning of husband and wife to include a customary marriage.[4] But the offence under inquiry is marder[5] of a brother.

Hence even assuming these marriages were recognised and accepted as customary marriages the second and third phrases would still inhibit the acceptance of a customary marriage for court purposes. In criminal cases and especially under the criminal procedures a customary marriage ordinarily does not constitute husband and wife to influence the proceedings in favour of the accused. The marriage must be something in the true christian marriage circles.

Thus, the marriage must have been a voluntary union: But under customs, marriages are usually coerced by parental influence leaving the parties with no choice in the matter. One party may be so influenced to see/no voluntariness nor life union. Parties show voluntariness usually, by looking and finding a partner and bring him before the parents as the partner he or she would like to mary.

Even more strengent is the last part of the phrase - "of one woman and one man to the exclusion of all others." Mutinta is married to two women. But the provisions under section 2 of this Act require a union of one man and one woman. Can we therefore call Mutinta's marriages husband and wife when it is one man and two women? For all we know they may

not even have any christian inclinations or morals.

It may be argued to the contrary however that, in the case of Mushaikwa[6], the accused may have been married to only one wife and the family may have had some christian moral stigma. In essence, since the customary law of the place where it was contracted recognised it; and assuming the union was voluntary and meant to be life long; and assuming she was only alone; would the requirements under section 2 be met? Would Mushaikwa's wife be incompetent as a witness for the prosecution as a result of being married alone? We can argue that, practically a situation like this is supposed to meet the requirement and Mushaikwa and his wife are supposed to qualify as husband and wife hence making Mushaikwa's wife incompetent to testify against her husband for the prosecution. However, in strict law, theoratically and in real academic interpretations since all customary marriages are potentially polygamous in this country, it follows that, it is not possible to argue that she was his wife within the provisions of s-2 of the C.P.C. Thus the earlier argument falls out because although he might have been married only to one woman, he is still at liberty to marry as many women as he wishes; defeating the proposition of "union for life of one man and one woman to the exclusion of all others."

Thus it can be further argued that the marriage which subsited between the accused and his wife in Mushaikwa is

poligamous such that in law they are not wife and husband. Now this is an absurd view, because all the people around and the community at large may have held that, Mushaikwa was married. And to say that she was not his wife would surprise everyone else in the area. But it would still have been interesting to imagine what view the court would have advanced had his Lordship C/J SILUNGWE[7] addressed himself to that theoretical aspect.

Indeed from this analytical point of view, both Mushaikwa's wife and Mutinta's wife in our hypothetical case; would be competent and compellable witnesses for the prosecution. In the event that they tried to refuse they would be punished for contempt of court.

(b) Effect of section 2 contracted with sec - 151.

Distinction is drawn between section 2 and section 151. Sec-151 is invoked upon in matters directly or indirectly affecting the spouse witness; and under these circumstances, the spouse is competent but not compallable: While section 2 takes on all other situations where the offence at hand does not fall under sec - 151. Under this section special attention is taken to ensure that the marriage meets three requirements, i.e:

1. voluntary union for life
2. recognised in place where it is contracted
3. of one man and one woman to the exclusion of all others.

Generally the law of evidence does not recognise

a customary marriage except where there is special inclusion of the same.

3. Spouse as witness for the co-accused - Sec-157.

At common law, when two persons were being jointly charged and tried for any offence, the wife of any of the two was incompetent as a witness for the other, whether or not she was willing to testify, and whether or not her husband was willing that she should do so or not.[8] But the effect of the English Criminal Evidence Act. of 1898; and in this country section 157 (iii) of the C.P.C., is that the accused's spouse is always a competent witness for a co-accused with the consent of the accused[9]. This shows that, in essence the wife of the accused is not competent as a witness for a co-accused. She cannot exercise the option or a right, that right is on the accused spouse' i.e except where the accused husband consents, there is no competence[10] on the wife for a co-accused.

Again as regards sec-157, the accused's spouse is always a competent witness for the accused. However such authority, supports the view that he or she is generally not compellable[11] and the section goes on to say the spouse shall not be so called except, upon the application of the person charged[12]. Indeed failure by the accused to give evidence or his wife shall not be made the subject of comment by the prosecution[13].

Nothing is mentioned about whether the marriage should include customary marriage, an indication that to utilise the spouse as a witness the provisions of sec-2 must be invoked; and therefore the marriage must be a christian marriage again. As to a customary marriage these facilities are not affordable and are limited only to situations arising out of section 151 of the C.P.C.

FOOTNOTES

1. NOKE G.D. "An Introduction to Evidence" 3rd Ed. (1962) Butterworth LONDON. Part IV Chap.16 p[1]385-389.
2. P v. MUSHAIKWA (1973) Z.R. 161. (H.C.)
3. Cap.160, Criminal Procedure Code. Section 2 - Being the interpretation section to the meaning of all the words carrying special meanings.
4. ibid 3 s - 151 (2) (a) and (b)
5. Cap. 146 Penal code. (P.C.) s-200 (Murder).
6. ibid 2 above
7. ibid 2 above
8. R v. THOMPSON (1872) L.R. 1 CCR 3771
9. CROSS D.C.L. "Evidence" 3rd Ed. (1967) Butterworth LONDON. pp 138 - 155. Also the ECA 1898 sec - 1 adopted in Zambia by virtue of it having been incorporated into the C.P.C. sec. 157. As there is no significant difference between the CEA sec.1 and the C.P.C sec. 157; the U.K. authorities on sec 1 are of highly persuasive authority and will almost cetainly be followed in Zambia when interpreting sec- 157.
10. ibid 1. at pp. 387 and cap 160 (C.P.C) sec 157 (iii)
11. R v. BOAZ (1965) 16.B U02. Also ibid 10, sec. 157. which deals with competence of the accused and husband or wife as a witness.
12. ibid 3 & 10 - section 157 iii, dealing with spouse
13. ibid 3 & 10, sec 157 (ii) no comment if not called as witness by the prosecution etc.

CHAPTER SIX

The law of evidence depends on the angle from which one views it. To the indigenous Zambian justice was dispensed in a variety of ways from place to place and from community to community. These patterns were accepted as such. The English people have the common law model of reception of evidence and prominent of this system is trial by Jury.

1. Trial by Jury.

One basic feature of the English law of evidence is the trial by Jury.[1] Sir William BLACKSTONE says of it that:

> "Trial by Jury ever has been, and I trust ever will be, looked upon as the glory of the English law....It is the most transcendent privilege which any subject can enjoy or wish for, what he can be affected either in his property, his liberty or his person by the unanimous consent of twelve of his neighbours and equals."[2]

It is argued that, it is favoured because it allows for representation. It has spread to other countries but in some transformed kind. For example, when the British Parliament unwisely sought to tax the American Colonies in the stamp Act of 1766, the Colonists declared that there was not going to be taxation without representation. Thus the jury system amounts to something like, a lamp of freedom among the English. As Lord DEVLIN once put it:

> "...so that trial by jury is more than an instrument of justice and more than one which is of a constitution; it is a lamp that shows that freedom lives."[3]

However, trial by jury has not remained unchanged. It has been altered beyond recognition and has been whistled away. It no longer subsists in civil cases save for libel in England. And although it is still retained in criminal cases of any consequence, it has defects which cause concern.

On its inception its decision had to be unanimous; but in 1967 parliament passed an Act altering it. It now allows a verdict of majority to be valid if it is in the ratio of ten to two men. But its original concept has been that; except in a few instances; matters of law must be decided by the judge, while matters of fact must be decided by the jury.

This is the tradition of common law on evidence which Zambia adopted. But in Zambia Juries have no place. Even where assessors are used, their function in the process of justice is different from that of a jury.[4] However, the many legal rules of evidence in this country are still based on the assumption that, in any trial, there is division of labour; i.e

(a) that certain matters are for the judge to decide, while

(b) other matters are for the peers (jury).

In Zambia, a magistrate or judge sits without peers. He combines the functions of judge and jury. Even though these functions are combined in one person, they remain

seperate functions because the separation into law and fact remain vital importance. A judge or magistrate must always identify and show this distinction. This makes the effect of trial by jury in Zambia an important aspect.

The basic principle of trial by jury is that, while an Appeal Court might readily reverse a magistrate's discretion made in his capacity of magistracy, an Appeal court, would be reluctant to disturb any finding of a jury made on a proper direction. Similarly, in Zambia the appeal court would be reluctant to disturb any finding of a magistrate made in his exercise of the jury functions. Thus, the appelate court will not disturb findings which depend on credibility of witnesses because, the magistrate sitting alone and assuming the jury function, saw the witnesses and observed their demeanour. A typed transcript of the trial, which is all that is available in the appellate court, can be no substitute for the magistrate who actually observed each witness during the course of trial.

However, with questions which do not actually depend purely on credibility, such as an inference to be drawn from disputed facts, an Appeal court may upset a decision of a magistrate if it appears:

(i) to be affected by inconsistances and in accuracies; or

(ii) to be affected by a failure to appreciate the weight, or

(iii) to be affected by the bearing of circumstances admitted or approved, or either,

(iv) to have plainly gone wrong.

From all this we see that, in essence a magistrate has two functions:

(a) to determine the facts of the case, and,

(b) one of applying the law to these facts.

(a) Determining the facts of a case.

This function involves a magistrate into deciding what the true story of the events is. He must choose if necessary and for stated reasons from two or more versions appearing from the evidence. This in essence is a jury function; and it is argue in certain circles that, to do this there is no need for a special training at all. For example to decide from the facts given that one killed or stole, does not demand that one should possess special or professional training. It is enough if one can be rational and be well versed with the practices of the community one lives in. At any rate, law is the wish of the society or community around. Everyone knows what is wrong and contrary to the community, making the people or groups of peers the best judges.

On the contary, some people argue that, a trained eye is better able to distinguish facts from other extrinsic matters. It is not only better placed to

receive facts, but is also cheaper to have only one person to do two functions if he can still do them well. But against this argument, is a view that, this is at the expence of an objective and a fair finding of facts which a group of peers might hold. A trained magistrate's fact finding may be influence by his training and may be tainted with other external and internal issues and problems around him. This cannot be equated with a decision of say 10 neighbours and peers.

(b) Application of the law to the facts

After he has found the facts, the magistrate must apply the law to those facts and decide whether according to those facts, the accused has committed the offence charged. It is argued on this point that, because law and facts are often intermingled, they require a trained man to seperate them. This view supports the call for a combination of the two functions in one professionally trained person. But even under these circumstances it is said that the guidance of a magistrate is more viable in matters of law than matters of fact finding.

As an example, in a society where there are various traditions and customs like Zambia, a law trained man ~~would man~~, would still not know the values, traditions and customs of each community. This means that, here law and fact, can be best dispensed in different hands rather than in one man. In our traditional societies, the accused

was brought before a council of elders, well versed with the traditions and customs and these would determine whether the accused had contravened any custom. It was not one man but many rational men who represented the view of the community around. They knew the customs of the area and how the people took an offence against any of these.

However, even after what has been said of our traditional life now in Zambia a magistrate or judge sits alone except on appeal; and combines these two functions. He must determine the facts of the case, and then apply the law. He sits alone as an arbitor. Even when a trial is conducted with the aid of assessors - which also is not common - it is nonetheless still different from a trial by jury.

We have seen above, that a decision of a jury binds the court. In Zambia assessors do not bind the court. They are not even part of the court. Rather, they may be graded as expert witnesses, testifying only on those issues where a magistrate feels there is very little written law and draws in customary practices. At the end of the trial, court may take the advice of assessors or leave it. As their role is to listen to the evidence and then form an opinion, which a judge later seeks from them, it is not clear whether the accused is allowed to cross examine each of the

assessors to disapprove of their opinion, since they are more witnesses than judges of facts. It is indeed true that, if they are witnesses, then the accused is entitled to cross examine them upon their opinion.

2. Who determines the Evidence in Zambia?

In Zambia a system similar to that a jury in the determination of evidence is greatly needed. Due to various customs a magistrate sitting alone to determine a matter, especially where it borders a customary issue, greatly needs not only the advice but also the verdict of the people in that community if his decisions have to be seen to be fair and just. Hence there emerges a need to use the indigenous people in decision making. This lack of community representation works some hardship at times.

In SIBANDE v P.[5] the accused eloped with a girl of 15 years. He kept her as his wife while her guardians were looking for her. Later the accused was charged for defilement of the girl. For all we know eloping according to Tonga custom is a method of marrying. But the three white judges of the Supreme court, sitting without assessors, failed trace and appreciate such customary marriage and confirmed a conviction of defilement. If Tonga assessors were called in and given power to pass a verdict, then perhaps they would have traced the Tonga custom of eloping and ruled in favour of the accused.

The decision of the supreme court; 'Yes' and 'No' clearly shows that the court lacked definite evidenciary

determination to decide this case fairly. We may speculate that perhaps the court founded its decision on the fact that, if a custom is repugnant and contrary to natural justice and, or, the written law[6], then it must fail. But we must weigh this against the background that customs are acceptable in a community and among the Tonga communities things like betrothal, eloping e.tc. are all rationalised norms and tolerated. Surely had, this case come before a council of elders of that community defilement would not have been the alternative offence.

Another case of interest is R v NDHOLOVU[7], where the accused was charged with the murder of his wife. the prisoner and his wife after having been at one beer party, on their way to another, an argument arose between them. During the course of this argument the deceased made insulting reference to vagina of the accused's mother. The prisoner thereupon, inflicted fatal injuries to the deceased which lead to her death. Although issues of provocation arose, for our purpose it is the issue of evidence and its determination that matters.

The native law and custom of the area allowed a husband to chastise a wife when she was in breach of some confidentialities. Could we say therefore that according to the native law and custom - which is unwritten - the use of the expression in question by

the wife to the husband; it was sufficient insult to warrant the chastisement of a wife by the husband? Was chastisement reasonable and lawful according to the native laws and customs? Again we have a situation where a white judge sitting alone makes a decision. But, doesn't such a case call for customary views i.e. a group of the indigenous persons from the community in which the accused lives to determine:

(a) whether the community allows such chastisements and the native laws and customs gave the husband that right?

(b) what amounts to chastisement in that community? and

(c) in the event of excessive use of such powers what does the native law and custom provide as remedy?

Of course, we may argue that under the circumstances the primary function of the judge would have been to explain to say, the council of elders, or assessors, that if the expression used by the wife could deprive the husband of the required malice aforethought because it was a taboo in the community for such an expression to be used, by a wife, then they would find the accused not guilty of murder. But if it was vice versa, then they may convict of murder. Of course, this would have afforded the community of its customary heritage.

You note however, that in this case, the court was at pains to explain that, in this territory the criminal law administered was the law set out in the High court

ordinance[8] and in part the law of England; that customary criminal law was not administered at all; and that although the High court ordinance provided that in certain circumstances customary laws could be applied to cases coming before the High court, this was expressly referring to civil causes only.

Whatever this might mean, is any one's guess. However it demonstrates one thing: that the court had reached a stalemate and had to resort to its usual yard stick - the English law. Could we then argue that the law of England and the High court Ordinance which was basically curved out of an all English law system would deal squarely with all the problems in this region of Central Africa so far away from England and still provide the best laws to our community?

Surely, the rules of evidence are not about what the law is; they are about the reception and determination of facts to produce a fair and justice decision which will be accepted by the people. Indeed, a fair and just decision can only be reached by a consensus decision of an aggregate cross-section of the ordinary people and the accused's neighbours and equals.

This in essence calls for a re-enactment of our rules of evidence to introduce a trial by an aggregate conviction.

FOOT NOTES

1. LORD DENNING. "What next in the LAW" (1982) Butterworth LONDON Part II pp. 31-82
2. SIR WILLIAM BLACKSTONE "Commentaries III 379". (1758) - Given as lecture Notes at OSFORD. LONDON.
3. LORD DEVLIN. "Trial By Jury" (1956) LONDON at p. 164.
4. The jury's position in UK must be contrasted with cap.160 (C.P.C) secs 197 x 198 - which deals with procedure when subordinate court requires the services of assessors; also with cap 50, High court Act. Sec. 34 which deals with the reception of evidence of African customary law and use of accessors thereof in the High court.
5. SIBANDE v P (1975) Z R 101. Here the supreme court stated that the accused, if he wants to relay on a customary practice he must positives show the existence of that custom. But doesnt this amount to ask the accused to prove his innocence?
6. Cap 45. The subordinates courts Act. Sec 16 - outlines situations when African customary law is applicable; cap 50, High court Act 34 above and Cap 54, the Local courts Act, sec. 12 sets out what laws are to be applied and administered in local courts and the effect of written law in terms of conflict.
7. R v NDHLOVU 5 N.R.L.R p. 298.
8. Cap 3. High court Ordinance Sec. 17 Set out the procedure of reception of evidence in criminal matters during the colonial era and at Independence.

CHAPTER SEVEN

LAW OF EVIDENCE ENACTMENT

1. The Inadequacy of the common law.

The cases above have demonstrated how inadequate the rules of evidence have been applying to this territory[1]. The common law rules of evidence are all very good, but cannot cover and satisfy all situation squarely well. There emerges a need for an own legislation of the law of evidence applied along side with the common law rules. In NYALI Ltd. V.A.G. a case which involved payment of a toll tax in Kenya to a company and there were infringments of the Crown Rights, Lord DENNING said of the application of the common law rules that:

> "...Just as an English Oak, so will the English common law. You cannot transplant it to the African Continent and expect it to remain the tough character which it has in England. It will flourish indeed, but it needs careful tending so with the common law. It has many principles of manifest just and good sense, which can be applied with advantage to peoples of every race and colour all the world over. But it has also many refinements, subtleleties and technicalities which are not suited to other folks. These shoots must be cut away; in those far off lands, the people must have a law which they understand and which they will resepct. The common law cannot fulfil this role except with considerable qualifications....."[2]

All the rules of evidence in Zambia have an English stigma. Can these rules, solve the Zambian problems squarely? The answer is a definite 'no'. Under chapter two we saw essentially that, in Zambia rules of evidence will include:

(a) The English common law and equity;

(b) The English statutes

(c) The Zambian Evidence Acts i.e. cap 170 which incorporate the English Evidence Act of 1938 and the English Criminal Evidence Act of 1965.

(d) The Evidence (Banker's Books) Act cap 171.

(e) The Evidence Appendex 8 of the laws of Zambia - intended to take care of the customary law situations

(f) Sections 151, 157, 158 and 159 of the C.P.C. cap 160 which except for a few modifications is the English Criminal Evidence Act of 1898 sections 1-4. But this Act has been excluded in Zambia by sec. 160 of the C.PC; and

(g) Many other specific provisions in the penal code, Juveniles Act and many other statutes.[3]

The list above demonstrates that all the rules of evidence in Zambia are born from England with English colour. To apply them on the indigenous people without modifications may sometimes play some injustice. This law must receive some refinements without which it is bound to meet various technicalities which will evidently make it not work out as was the case with section two of C.P.C. and the case of MUSHAIKWA above. Various English law suits must be cut away. Thus, in certain circumstances we must come up with all new laws which the ordinary Zambian will understand, respect and appreciate. Clearly the common law cannot fulfil this

role except with considerable qualifications which can be done only by legislating a local law of evidence.

2. Legislating the local rules of Evidence.

Is it possible to legislate an own law of evidence? 'Yes'; the law of evidence is a fit subject for legislation and there are some useful procedents for this. There is the Indian Evidence Act[4] which still forms the basis of a number of evidence Acts in the commonweath. Until quite recently, this Act was itself in force in several East African Countries e.g. in Uganda, Kenya and Tanzania. Although these countries have now enacted their own evidence Acts, these are closely modelled on the Indian Act.

Indeed, following this pattern, in 1977, the Zambian Law Development Commission prepared a draft evidence Act[5]; but so far nothing seems to have come of this draft Act. Various reasons are given for the failure which range from the complex nature of the subject matter to the high number and many customs this nation has. The many tribes in Zambia, each with its own customs, has made it difficult to make an evidence Act along the Indian Model. In Zambia, such a law would require a careful tailoring. It is argued however that, because of the many customs in this country, this calls even more for an enactment in this field to rationalise all the many customs in a definite rules of law.

In the absence of a legislation bringing together the customs and the English laws reelvant in this field, there is no way a court will be able to know and determine adequately, how a matter before it, ought to be received. For example, to establish a customary law, all the rules of evidence relevant in this area must be enacted because only this will expressly provide a method of establishing a fact.

A survey carried out with some lawyers, revealed that, some people feel that, Zambia has sufficient written rules of evidence already in the substantive Acts of parliament. For instance, most Acts of parliament will carry a provision of how certain items of evidence must be proved. This group of person contend that so long a counsel is conversant with the laws of the nation, he will always find the law and how to tender and prove the facts thereto.

Against this view it is argued that, this system works hardship; that each time a person wants to give evidence in court, he must comb and search various statutes. Hence a need for a creation of a statute which will collect exhaustively all the various rules of evidence, both statutory and common law and embody them into an Act of parliament. This group of people contend that, this way the work of a council is eased. Any member of the public who wants to know how proof ought to be carried on in any matter either, concerning a juvenile case, spouse evidence, photographs etc would

only have to run to a particular Act of parliament and all this would be there.

However, it is easy to do all this about the law that is already legislated in various statutes because all one can do is to pick up any Act of parliament and identify some evidentiary provisions. But what about customary law which is basically unwritten? This demands much more research work and someone must sacrifice his time and money to rationalise the various customs first and then identify what evidentiary facts will attach thereto.

3. Reception of customary evidentiary Rules.

The High Court Act.[6] establishes that, African Customary law is recognised as law which can be applied in Zambian courts, but this must be within certain defined limits. It impliedly indicates under s-34 (1) (a) - (c) that; it may apply customary law in matters and causes where this law is in issue; provided that each time, it shall call upon a chief or other indigenous persons who are conversant with this law. Here we see a petinent appeal of the use of assessors although their role is merely advisory.

The section further allows court to consult books and authoritative documents where appropriate. This is because often a judge may not even know the nature of the transaction. Even after looking at the customary action, a judge may not still understand why the

parties acted the way they did[7]. Hence the reasons why the court has to use the service of the other persons possessed of expert testmony before they can make a finding on the state of African customary law[8].

Similarly, the local courts Act[9], impliedly allows this court to take judicial notice of some customary practices which may have attained notoriety. In PRESTON JONES V. SANKOMBE[10] it was stated that native courts will take judicial notice of some African customary law; but not the subordinate and High courts. We can conclude from this statement that, in all cases, courts other than local court, must call for proof of the african customary rules of evidence.

Thus in MUNALO V. VENGESAI[11] the judge consulted books on a Shona customary law which was written by KOLLEMAN - who was considered to be an expert on Shona customary law. It is important to emphasize here that an expert on African customary law does not need to be a tribes man of that particular tribe, or even an African. He needs only to be well acquainted with the custom and practice. In SITHOLE[12] for example a judge called an expert witness a Zambian, who was of a tribe other than of the litigants. But such a witness must be conversant with the customs and usages.

It must be stressed also that, when relying on expert witnesses or assessors, it is usually safe to have two or more such witnesses or assessors to get rid of any

misrepresentations. In MWINDA V GWABA[13] three witnesses were called one of who was a local chief in Southern Province. And perhaps we ought to add here that persons called to testify must do so in open court or this may cause a serious breach of the rules of the reception of the African customary evidence. Thus in SHAMA'NE V. CHINZA[14] a magistrate who was hearing evidence on some African customary law disappeared into his chamber with assessors to deliver judgement. The Appeal court held that the magistrate was in a serious breach of delivering customary evidence in open court.

However, relying on books experts and assessors on African customary law has its own problems: eg. an assessor may:

(a) be describing a law of a by-gone era; or

(b) be giving an opinion of a law that doesnt really apply to the majority of people in a particular area[15]

As you will note, even among the Tongas there are divisions. The valley Tongas, the Plateau Tongas, and the Ilas;;all have different customs and hence different rules of administering justice.

4. <u>The conclusion</u>

Taken from this angle, we see a great need to rationalise some of these customs and contemporary situations throughout Zambia. We must re-examine the common law, and equity; and the English statutes which

are still relevant to Zambia; comb and search the Zambian statutes current and those repealed; analyse the rules of evidence there; collect all these rules exhaustively and codify them to make an Act of parliament which will be viable for the Zambian community of today.

A codifying statute purports to state exhaustively the whole of the law on a particular subject[16]; eg. the common law as well as previous statutory provisions. In Zambia, there are very few codifying statutes but perhaps the recent enactments on the laws of Inheritance and succession[17] would be the best example here. Basically under a code all the law relating to a particular law is collected and stated exhaustively both custom and statutory and made into a low tressing no reference to what the law was or how it stood before it is codified.

On the other hand, the law in Zambia on evidence may be consolidated. A consolidating statutes is one which collects all the provisions relating to a particular topic and embodies them into a single Act of parliament. Here only minor amendments and improvements are made from the original provisions[18]. In this country there are many such statutes; eg. the criminal procedure code, cap 160 is a collection of many English procedural statutes and rules which have received minor amendments in this country. When interpreting this kind of statute recourse must be had to the previous law.

Thus, the many rules of evidence in Zambia must be enacted into either a codification Act or a consolidation Act

as either of them will enhence the certainty of the law in this area.

Similarly such a code must give prominance and significance to the use of assessors in the outcome of a case. Assessors must be made judges of facts and be allowed to pass verdicts of guilty or not guilty. Indeed the number of assessors may be increased to give an aggregate cross-section of say ten persons with local morality in all matters of criminal law to decide the guilt of the accused.

At present, the lack of a parliamentary Act to rationalise the law of evidence makes it difficult to know what rules must be followed in the reception of evidence. For example it is not very well known how the rules of evidence ought to be received nor by whom. It is not clear how much weight must be attached to the rules. One judge may sit with assessors, another without. Now a magistrate will receive and accept the opinion of assessors, another time refuse to do so. It is not even known when a judge may consult books and when he cannot[19]. Indeed, this lack of guidelines i.e a code and a systematic pattern, makes the rules of evidence very uncertain in Zambia.

Finally, since the law of evidence is a fit subject for legislation,[20] there is a need to recommend that the Zambian Parliament enacts a code containing all the

relevant rules of evidence and to formalise them either by codifying statute or a consolidating Act. This way both the literate Zambians and the iliterate may benefit from the law with a local colour. Indeed, parliament may even find it easy to repeal and amend any provisions which fall out of use. Zambia needs an evidence Act with complete coverage in common law, equity, English and Zambian statutory provisions and customs of relevance.

FOOT NOTES

1. NDHLOVU V.R. N R L R. 298; and P.V Mushaikwa (1973) Z R 161. In both instances it would appear court was reluctant to fully develop the law of evidence. In the earlier case court used the English Yard stick
2. NYALI Ltd. V. A.G (1955) All Z.R. 646 & 653
3. CAP. 146 sections - 57 & 59, 107, 140 & 141
4. M. MONIR. "The principles and Digest of the law of Evidence" being a commentary on the Indian Evidence Act. No.1 of 1871 (1962) ALLALTUBAD.
5. An interview held with secretary to the Zambian law Development commission on 3/6/91. Revealed that the draft Zambian Evidence Act cannot be published due to various reasons:ie. lack of continuity of officers preparing the bill in the commission etc.
6. CAP 50 High Court Act. sec-34; Cap 54 sec. 12 and cap 45, sec. 16
7. P V. SIBANDE (1975) Z R 101 and ibid 1 above.
8. PRESTON JONES V. SANKOMBE (1968) S.J.Z 158
9. CAP 54 Local Courts Act Sec 12 "The law to be administered in the Zambian local court"
10. ibid.8. above.
11. MUNALO V. Vengesai (1974) Z.R.91
12. SITHOLE V SITHOLE (1969) Z.R. 37
13. MWINDWA V. GWABA (1974) Z.R. 188
14. SHAMAINE V. CHINZA.

15. DR. J.L. KANGANJA. "Courts and Judges in Zambia". The evolution of the modern judicial system. A. Ph.D Thesis (1980)

16. MAXWELL "Interpretation of statutes" 12th ed. 19 pp[1] 202 - 7; 262 - 3

17. Act No.5/1989. "The intestate succession Act 1989" and Act No.6/1989 "The wills and Administration of testate Estate Act 1989"

18. CROSS R. (DCL) "Statutory Interpretations (1976) Butterworth LONDON

19. ibid 6. above. sec. 34 (1) (a-c)

20. ibid 4 above.