



JAIL BEFORE TRIAL AND THE USE OF DISCRETION
BY MAGISTRATES VIS A VIS THE QUESTION OF
FUNDAMENTAL RIGHTS

by

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DEDICATION

This obligatory essay is dedicated entirely to my family, without whose attention, love and guidance I would never have come this far.

ABSTRACT

Courage, love and patience lift us above the simple
beasts and define humanity.....

Relevance and Importance

In the year nineteen hundred eighty-eight, the United Nations celebrates forty years of its commitment to human rights. Human rights is indeed a much debated issue for it concerns our very existence upon this earth and is the foundation upon which man can truly enhance his well being, and live a normal and decent life. However, after forty years of conscious reflection upon the various violations of fundamental rights, one wonders how far the United Nations or any other international institution for that matter has created an awareness of the problem and how effective this has been.

The foundation of the fundamental rights structure has been eroded by the entity of the state which wields the ultimate power in the control of any human rights violations, and in many cases has itself been the perpetrator. Since it is in the authority of a state to curb human rights abuses, situations in which it turns a blind eye to such abuses or potential abuses, mean it is not playing an honourable role in preserving and enhancing the dignity of human kind.

Zambia, a member of the United Nations and various regional organisations recognises the need to preserve human dignity and in seeking to share in the achievements

of human rights awareness campaigns by the United Nations and other organs set up to study human rights abuses, must herself be absolved from the stigma of having a bad human rights record.

Naturally, various aspects of a countrys' political, social or economic life require consideration when analysing the human rights question. For the purpose of this study however, I have confined myself to the question of human rights in relation to criminal justice, and more specifically to the aspects of jail before trial and the question of bail.

It is a notorious fact that crime in any given country can be attributed, a great extent to the economic situation prevailing in a country at any given time. As the economy worsens - as in the case in Zambia - correlatively, the crime wave surges and goes crashing against the very core of the social structure, leaving misery, destruction and insecurity in its wake. This in turn forces the state to take a firmer stance against arrestees and in the process increases the potential for abuse of human rights. This abuse may be a gradual but continuing process whose effects may not be felt by much of the public, but by a small percentage of people who are totally unaware of their rights and are subjected to the tortuously slow process of the justice administration in a developing country.

What must be remembered is that human rights abuses do not always affect a large sector of people, and in such cases, it is often easy for the law to turn a blind eye to the sufferings of a few individuals. This is the case with pre-trial detainees, especially those committed to custody for crimes which are in fact bailable.

I feel therefore that this dissertation is important because it will analyse the issue of human rights in relation to crime in Zambia and the institution of bail. The issue is indeed one of current concern as the jails become increasingly overcrowded and the judicial process becomes bogged down because of lack of adequate manpower and sufficient infrastructure to handle trials speedily. All these factors, to the sceptical human rights observer are seen as constituting a recipe for disaster.

Despite all the pretrial procedures and delays, in current Zambian law, bail still remains a privilege and not a right. Surely the time has come for this situation to be redressed, and for the efforts of the United Nations to be given full effect.

INTRODUCTION : A Recipe for Disaster

The problems associated with the question of bail are many and varied. This situation is exacerbated by inevitable problems inherent in any developing country. Criminal justice in particular, which comprises the bulk of cases that pass through Zambian courts, is left wanting in many respects, but of great concern is the inefficiency of the judicial system to handle cases in an expedient fashion. The blame is not to be placed squarely on the judicial system itself, and various extra - judicial factors can be identified as being deserving of a large measure of the blame. The problem perhaps stems in part from the overcrowding of the jails, and the lack of adequate manpower and infrastructure to handle cases within a reasonable period of time, in order to avoid a situation where an accused may spend up to two years in custody before he is availed of a judgement.

There is clearly a problem here, at least to the extent that a person who is not granted bail, or at least given the opportunity to apply for bail, may effectively serve his sentence before he is convicted - assuming he is found guilty at the end of the trial. It may of course be suggested that a tentative solution would be to advocate for quick trials, but in a developing country such a solution would be best described as a Utopia.

Further, there is inherent in the problem, the question of fundamental rights. A question could well be

asked, 'how are the bail laws in Zambia to be construed with regard to the individuals fundamental rights and the presumption of innocence?' There are indeed arguments for and against the granting of bail despite the issue of fundamental rights and perhaps these were most succinctly summed up by Judge Rehnquist in an opinion for the court in the case of UNITED STATES v. SALERNO¹ when he stated that:

"The mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. We have repeatedly held that the government's interest in community safety can, in appropriate circumstance, outweigh an individuals liberty interest. {The} governments interest is heightened when the government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest. On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimise the importance and fundamental nature of this right. But {this} right may, in circumstances where the governments interest is sufficiently weighty, be subordinated to the greater needs of society.

When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to the community, we believe that, ... a court may disable an arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The bone of contention arises however when this argument is imported into the developing world, and in particular Zambia, where the administration of justice is not able to accommodate the growing demands placed upon it by the ever increasing crime rate.

It is this and various other issues related to it, which will be the central theme in my dissertation, coupled with issues relating to discretion in granting bail. How is a magistrate to determine who is allowed bail? Is there a well defined criteria? If not, what protection is there against abuse?

FOOTNOTE

1. (1987) US NO. 482.

METHODOLOGY

In order to set about the task of writing this dissertation it will be important to look first at the concept of crime. A broad outlook of the concept will be necessary to put the aspects of crime and fundamental rights in Zambia in perspective. The first chapter will therefore deal with the issues of crime and fundamental rights.

The second chapter will be devoted entirely to the concept of bail. This too must be looked at in perspective and in this regard it is intended to analyse the various definitions of bail, its history and its interpretation in English, American and Zambian laws, in an effort to interpret the philosophy behind the law of bails.

In the third chapter, bail and fundamental rights will be looked at and analysed side by side. The main thrust of argument will centre on Magistrates' use of discretion, taking into account certain factors that can and do cause a hinderance to the fulfilment of human rights.

The last chapter will be a summary and conclusion with proposals for law reform. Each other chapter will begin with an introduction and end with a summary in order to prepare the reader and to help him/her to recap.

CHAPTER I

1. INTRODUCTION

This chapter is rather a circuitous way of introducing the concept of bail, but since bail arises out of criminal circumstances, it is relevant to look at the concept of crime to which the institution of bail is intimately connected. Within these two concepts and struggling for recognition is the question of fundamental rights. Failure to grant bail to a particular arrestee encroaches in some way on that individual's human rights. In this vein, the issue of fundamental rights will be looked at with the ultimate object of contrasting it with the discretion to grant or not to grant bail.

2. CRIME IN GENERAL

A crime is defined as any act of commission or omission believed to be socially harmful to a group and thus forbidden by the designated authority of that group under threat of punishment.¹ Stated another way crime is a specific element or act of human behaviour which, varying in time and place is considered repugnant or harmful enough to be forbidden by the group and thus subject to a penalty. An act may be considered a crime in one generation or in one place and later it may not be considered as such.²

Crimes generally fall into three categories; namely offences against (a) the state; (b) morality; and (c) the person. It is considered that any act will not be labelled criminal unless done with guilty mind or wilful intent, and thus motive is often essential in the commission of a crime.

2.1. Crime and Punishment in History

Nowadays crimes are covered by written codes which cover almost every aspect of social interaction and it is a well founded rule that a person can only be punished for a specific offence laid down in a recognised code or statute passed by the lawmakers in any given country. In primitive societies, no written law existed but there were other means of social control. Primitive group members were in constant fear of the unknown and the supernatural. "Nothing stood between them and the powers of darkness except the well beaten path of custom. To deviate from it was to court disaster".³

With no written law, many offences were considered a matter of private vengeance on the part of the individual or his tribesmen. Punishments were retaliatory and were influenced by and through the tribe. Eventually it became exhausting and wasteful to the group to carry on tribal feuds with victims being slaughtered on both sides, and it became necessary to invoke some kind of compensation or restitution. This led to the development of concepts

such as wergild⁴ which was a form of compensation during the Anglo Saxon era.

With the growth of the conception of crime as an offence against public welfare and as society became more and more integrated, there was a gradual decline in the principle of compensation which ultimately became practically obsolete. Principles of deterrence and expiation developed and formed the modern bases of punishment.⁵

Prior to imprisonment, physical punishment was meted out as a deterrent against crime, but by the middle of the 18th Century the concept of imprisonment for convicted felons began to develop as a substitute for physical punishment. However, even today, the problem of crime is still a major concern to society as it is seen that imprisonment has failed to reduce criminality.

2.2 The Problem of Crime in Zambia

Countless people have been killed, maimed, impoverished and mentally crippled by criminals in Zambia. People from all walks of life live in constant fear of being robbed or killed, and criminal statistics from the police give a very frightening picture. The crime-rate has more than doubled since independence⁶ and has reached such a critical level that it now threatens our existence as a people and a nation.

The effect is that our trust in each other is inhibited and this has led to the common sight of security walls around individual properties in residential areas, capped with the familiar broken bottles. The causes of crime can be economic, social, political and sometimes mental, but there is no denying the fact that economic conditions are the major cause of crime.

As the crime wave surges, so too does the pressure which is brought to bear upon the law enforcement agencies, whose activities are already hampered inter alia by lack of adequate manpower. More and more criminals are being arrested and more and more the jails are becoming unbearably overcrowded.⁷ Because of this and the shortfall in legal officers to assist in providing aid to defenceless criminals, who may in many cases be unaware of their rights, persons charged with countless offences very often become victims of delayed justice. One law maxim points out quite correctly that justice delayed is justice denied. If a judicial system is slow, for whatever reason, an accused person should not as a general rule be made to suffer because of it by being kept in jail before his trial.

This issue centres on the question of fundamental rights and this is the question which must now be addressed.

3. EVOLUTION OF THOUGHT ON FUNDAMENTAL RIGHTS

Human rights can be seen as having its historical roots in Ancient Greece; Roman legal theories; ecclesiastical teachings of the Orthodox Church and through the Middle Ages.

Hugo Grotius (1583-1645) who is considered to be the founder of the modern theory of Natural Law asserted that all doctrines of natural law could still be viable and convincing even if they were applied without reference to God. As a result of the popularisation of this view by Grotius' followers, the whole concept of natural law underwent a change from an emphasis on natural law to an insistence on natural rights, which are nowadays invoked as human rights or fundamental rights and freedoms. Traditionally and historically, fundamental rights and freedom were known as natural rights.

The historic evolution of human rights was fortified and given momentum partly by a series of English Acts which started with the magna carter which granted certain individual rights and limited the power of the state.

The magna carter proposed to assert rights and liberties which were well established already and sought to redress grievances which for the most part arose from novel interpretations of the ancient liberties of the people.

Individual liberty is primarily freedom from arrest, seizure, imprisonment, in other words it is the right to come and go, to be at home and to be at large. Clause 39 and 40 of the Charter were to ensure this:

(39) No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgement of his peers, or by the laws of the land.

(40) To none will we sell, to none will we deny, to none will we delay right or justice.

The last few words of clause 39 stress that there be limits to ones liberties where this is necessary, and there is an implication here that the liberties of individuals should be balanced with the greater needs of the society as a whole. No sane nation so limits the power to make arrests as to encourage crime and criminals. The law of the land balances the right of each person to liberty and the right of all to order and security. This is what the Magna Carter proposed by its simple and direct language.⁸

Certain fundamental rights became objects of international action in the 19th Centuries. After the Second World War, the concept of Human Rights as rights of the individual gained a broader recognition due to a large extent to the activities of the United Nations, when they produced a basic statement forming part of the international bill of Human Rights codified and contained in 30 Articles.

The nature of the specific rights and freedoms which the Universal Declaration embodied, was in no significant way different from the traditional natural rights which had already been achieved in Englad, America and France. However, the Declaration constituted a radical departure from the traditional conception of Human Rights because it deals not only with basic political and legal rights, but also with economic, social and cultural rights.⁹

There is no doubt that since its adoption in 1948, the Universal Declaration of Human Rights has had a remarkable impact on many countries of the world, and the amount of influence which the Universal Declaration has had on the many national constitutions and municipal legislation throughout the world was given recognition by the then Secretary General of the United Nations, U Thant in 1968 at an international conference on Human Rights in man. He estimated that there were no less than forty-three constitutions adopted which were clearly inspired by the Universal Declaration, and that examples of legislation expressly quoting or preliminary provisions of the Declaration could be found in all continents.¹⁰

The Universal Declaration also exercised a powerful influence in the production of many international treaties, conventions and declarations of a world-wide or regional character alike, whose aims have been the promotion and implementation of certain rights stated in the documents.¹¹

3.1 Fundamental Rights Under the Zambian Constitution

Freedom and independence for Zambia was achieved on October 24th 1964. She had shed her protectorate status, but kept intact most of the laws and constitutional provisions that existed prior to independence, including a Bill of Rights. Although the Zambian Independence Act, 1964; the Zambian Independence Order, 1964 and the schedule thereto were repealed by the Constitution of Zambia Act, 25th

August 1973, which introduced the One-Party system of Government, the Bill of Rights enshrined in the former independence constitution remains almost wholly unaltered save that freedom to form a political party of ones choice is prohibited.¹²

When the leaders of the Nationalist parties of Northern Rhodesia and the representatives of the British Government were engaged in negotiations for various provisions that would be included in the independence constitution of Zambia, it was agreed that provisions of the independence constitution relating to Human Rights should be in the same form as those of the previous self government constitution.¹³

Similarly in 1972 when Zambia was contemplating the introduction of a one-party state, President Kaunda specifically directed the National Commission charged with the task of working out a one-party constitution that fundamental rights and freedoms be protected, as provided under Chapter III of the constitution.¹⁴

3.2 Form and Content of the Zambian Bill of Rights

The Zambian Bill of Rights contains what is referred to as a declaratory section which is in effect a preamble to the substantive sections which guarantee rights and freedoms. Article 13 of the Constitution of Zambia sets out the preliminary sections as follows:

"It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the rights, whatever his race, place of origin, political opinions, colour, creed or sex, namely

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, expression, assembly and association; and
- (c) protection for the privacy of his name and other property and from deprivation of property without compensation."

There are in all, twelve rights and freedoms which are protected under the Zambian Bill of Rights.¹⁵

3.3 Fundamental Rights as Regards Personal Liberties

Artical 15 of the constitution deals with the protection of the right to personal liberty. Clause (1) states that:

"No person shall be deprived of his personal liberty save as may be authorised by laws in any of the following cases...."

It then goes on to list ten sub-clauses. It is interesting to note at this point that the right itself comprises three lines while the exceptions take up a staggering forty three!

Clause (3) states in part that any person who is arrested or detained upon reasonable suspicion of his having committed ... a criminal offence under the law in force in Zambia, and who is not released, shall be brought without undue delay before a court and if any such person is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Clearly this clause is extremely forceful as it minimises or is supposed to minimise the effects suffered by an innocent person lawfully arrested under the suspicion of having committed a crime.

Five articles always, but adjacent in spirit is Article 20 which deals with provisions to secure the protection of law:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."¹⁶

These words echo those of the Magna Carter¹⁷ and merely make it a constitutional right of every citizen to be granted a fair hearing within a reasonable time.

3.4 Presumption of Innocence

Also important as regards the question of personal liberties is the presumption of innocence. Sub-clause (2)(a) of Article 20 provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. This is the famous presumption of innocence clause entrenched in most constitutions both written and unwritten around the world.¹⁸ This means that whether or not a person has committed a crime, until he has been brought before a court established by law and competent to dispose of the matter before it, and convicted of the offence with which he is charged, he is innocent as far as the law is concerned.

4. SUMMARY

Initially the question of fundamental rights was not so much considered with regard to criminal offences and abuse of state authority but evolved out of the philosophical urge to define the relationship between the individual and the political community in which he lived. As man and society developed however, the criteria shifted slightly and fundamental rights were not only understood with regard to the relationship between man and the state but also included the issue of abuse of power by the state or authoritative rulers and the individuals rights as regards this abuse. The Magna Carter for example clearly sought

to protect every individual in the free enjoyment of his life liberty and property unless declared to be forfeited by the law of the land. As society developed even further, there was the growing view that it needed to be protected as a whole against the machinations of individual criminals. The question of personal liberties was therefore brought into the arena of fundamental rights. Now the presumption of innocence and other fundamental rights are clearly understood and provided for in many constitutions around the world, written and unwritten, and the Zambian constitution is no exception. The worldwide recognition of these fundamental rights has been due to a large extent to the enormous effort by the United Nations to bring about a unified goal towards ending human rights abuses.

FOOTNOTES FOR CHAPTER I

1. Colliers Encyclopedia, 1967 at page 437.
2. Ibid.
3. Ibid at p. 438
4. This concept has been proposed by one theorist as the origin of the Modern Bail System; for a full explanation see Chapter II of this paper.
5. Op. Cit. Note 3.
6. Figures are available for up to 1984: In 1964 the total crime recorded was 64, 733; in 1984 the figure stood at 145, 411: see Police Annual Reports.
7. An example is the Remand Prison at Kabwata which was designed to hold just over 200 inmates, but currently holds over 1000.
8. R. Stringham, Magna Carter: Fountainhead of Freedom, Aqueduct Books, New York, 1966, p. 63.
9. Zimba L., Zambian Bill of Rights, East African Publishing House, Nairobi, 1984, p. 15.
10. Ibid, quoting "Final Act of the Teheran Conference (A/Conf. 32/41)" p. 37.
11. Op. Cit. Zimba.
12. Ndulo M., and Turner K., Civil Liberties Cases in Zambia, (Forward by Rodger Chongwe) The African Law Reports, 1984 p. xi.

13. Op. Cit. Zimba quoting a Report of the Northern Rhodesia Independence Conference, 1964.
14. Report of the National Commission on the Establishment of a One-Party Participatory Democracy.
15. All these rights and freedoms are covered by several articles ranging from Article 14 to Article 25.
16. Article 20(1).
17. Clause 40 of the Magna Carter.
18. Eg. Britain has an unwritten constitution but the case of Woolmington V.D.P.P., firmly established that there is a (constitutional) right to remain silent on the part of the accused because he is presumed by law to be innocent until proven guilty.

CHAPTER II

1. INTRODUCTION

The aim of this Chapter is to put the question of bail in Zambia in perspective and to lend some credence to the philosophy behind the law of bails. In order to analyse the effectiveness of bail in the Zambian context, one must look not only at Zambian law, but also at the source from which it derives its existence and the progress that has been made over the years in view of changing circumstances that have prevailed with regard to personal freedoms and liberties of the individual. This Chapter will therefore examine the various definitions of bail, analyse the source and history of the law of bails which have influenced bail in Zambia; and lastly examine the philosophy behind the law of bails.

It is relevant that the English History on bails be considered, because as Zambia was a protectorate of Britain for roughly seventy years, the laws it inherited on the eve of independence in 1964 were English laws and had their roots deeply embedded in British history and the colonial experience. The Criminal Procedure Code of Zambia¹ which deals with the issue of bail is, even as it stands today, a document passed on from the colonial rulers, deriving its source directly from English statutes passed at various stages throughout British history.

2. DEFINITIONS OF BAIL

2.1 General and Dictionary Meaning

In law when a person is charged with an offence he may be released on security given by one or more persons that he will appear at the trial. He is then on bail or in the bail - i.e. custody - of the persons giving bail or security. If he fails to appear, the bail is forfeited.²

According to Chambers 20th Century Dictionary, the term bail is both a noun and a transitive verb. In the former connotation it means one who procures the release of an accused person by becoming security for his appearing in court, or it can be security given. As a verb it means to set a person free by giving security for him, or to release (someone) on the security of another.

2.2 Law Lexicon

According to Osborns law dictionary, an accused is admitted to bail when he is released from the custody of officers of the law and is entrusted to the custody of persons known as his sureties, who are then bound to produce him to answer, at a specified time and place,

the charges laid against him, and who, in default of so doing, are liable to forfeit such sum as is specified when bail is granted.

A bail is a security for the accused, i.e. a person who enters into recognisance for his appearance, and at the same time the accused enters into a similar recognisance. Bail therefore means the contract whereby the accused is released to his sureties, and also the sureties themselves.³

Simply defined and in laymans terms, bail is the security given in order that an accused will appear before a court on a specified date and time. The security is usually in the form of money.

2.3 English and American Law

'Bail' in English common law is the freeing or setting at liberty of one arrested or imprisoned upon any action, on surety taken for his appearance on a certain day and at a named place. The surety is termed 'bail' because the person arrested or imprisoned is placed in the custody of those who bind themselves or become bail for his due appearance when required; so he may be re-seized by them (if they suspect that he is about to escape) and be surrendered to the court, where the sureties would be discharged from further liability.

The sureties must be sufficient in the opinion of the court to answer for the sum for which they are bound and, as a rule, only householders are accepted.⁴ Bail is obligatory in all summary cases. It is also obligatory in all misdemeanours, except such as have been placed on the level of felonies.⁵

Under American law, an accused charged with a non-capital offence in the Federal courts has the traditional right to be released on bail or recognisance during the pendency of his trial. Rule 46(a)(1) of the Federal Rules of Criminal Procedure lays down that a person arrested for an offence not punishable by death shall be admitted to bail, and that a person arrested for an offence punishable by death may be admitted to bail by any court or judge authorised by law to do so in the exercise of his discretion, giving due weight to the evidence and to the nature and circumstances of the offence.⁶

2.4 Zambian Law

Unfortunately, the Criminal Procedure Code (C.P.C.),⁷ which deals with various issues concerning bail, and the Penal Code⁸ are both found wanting of an explicit definition of the term bail. Nevertheless, the meaning of bail in the Zambian context can be read

from the various sections in the C.P.C. in which bail is mentioned. For example, Section 123(1) states

"when any person, other than a person accused of murder or treason is arrested or detained.. ... he may, at any time while he is in the custody of such officer, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient... to secure his appearance, or released upon his own recognisance if such court or officer thinks fit."

Subsection two of the same section further states that:

"before any person is... released... a bond (bail bond), for such sum as the court or officer, as the case may be, thinks sufficient, shall be executed by such person and by the surety or sureties, or by such person alone, as the case may be conditioned that such person shall attend at the time and place mentioned in such bond...."

Even further, Section 125(1) provides that as soon as bail bond has been executed, the person for whose appearance it has been executed shall be released, and, where he is in prison, the court admitting him to bail

shall issue an order of release to the officer in charge of the prison, and such officer, on receipt of the order, shall release him.

Clearly these two sections (three subsections) provide some semblance of a definition of bail in the Zambian context. Bail under the CPC is to be granted for offences other than murder or treason and involves the release of a person in custody charged with any other offence⁹ on condition that he provides a surety or sureties sufficient to secure his appearance in court on a specified date and time.

Section 33 of the CPC must also be considered. This section provides that where a person is taken into custody without a warrant for an offence other than that which is punishable by death, he must be brought before a competent court within twenty-four hours after being taken into custody, and if that is not practicable, the person must be released on his executing a bond, with or without sureties, for a reasonable amount.

At first sight, the section seems to imply that every person who is arrested must be brought before a competent court within twenty-four hours or else he must be released on bail. This however is not a true interpretation. If a person is taken to a police station and held in a cell after his arrest, section 33 applies.

If on the other hand a person is arrested, charged with an offence and taken to prison, he forfeits the right to bail till he appears before a court to answer any charges laid against him.

Lastly, it must be pointed out that in Zambia, the laws that regulate the granting of bail do not make it mandatory for a presiding magistrate or judge to grant bail. A person not informed of his right to request bail, and unaware of such a right, may lawfully be committed to prison pending his trial, even for a minor offence, because there is unfettered discretion given to the judge or magistrate.¹⁰

3. THEORIES RELATING TO THE ORIGIN OF BAIL

There are two theories relating to the origin of bail; hostageship and the primitive concept of wergild. The former was a tribal war tactic in which the hostage was held until the promise of a certain person was fulfilled or a certain consequence achieved. The basis of the hostage relationship is similar to that of a modern bail system, namely the assumption of responsibility by one person for another. In the hostage relationship, the surety pledged his body, while in the modern bail system he pledges his material wealth.¹¹

The second theory suggests that modern bail laws have their roots in the primitive concept of wergild.¹² Wergild was the Anglo-Saxon method of compensating for personal injury. Before the 10th century and during Anglo-Saxon times, a mans actions were considered not as extensions of his individual will but as acts of his kinship group. Personal protection and revenge, oaths, marriage and succession were all regulated by the law of kinship.¹³

Prior to the system of wergild, an injured party in one community could himself or his next of kin exact personal vengeance upon the wrongdoer. This type of justice was later abolished and replaced by the ancient Germanic concept of wergild, which at first was informal then became regulated by law.¹⁴ Under the system of wergild, the accused was required to provide a guarantee that he would compensate the victim if found guilty. Somebody was then assigned to assure that the debtor would pay his wergild in order to redress the victim of an injury. Thus we see the classic condition of suretyship; the difference being that instead of assuring the payment of compensation, the surety in the modern bail system guarantees the presence of the accused at his trial.¹⁵

3.1 History of the Law of Bails and its Evolution

The question of bail as we understand it in the modern sense has been recognised from even the earliest of times. Plato, who died in 347 BC spent the last decade of his life composing his last work, the 'Laws'. In book IX of the Laws, when talking about aggravated and wilful homicide, he states:

"He that enters the case for prosecution shall also at the same time demand security from the accused, who shall produce his sureties, men whom the court of judges constituted for these cases shall pronounce sufficient, three sureties pledged to surrender him for his trial. In the case of refusal or inability to find such surety, the court shall arrest the accused, keep him prisoner, and produce him at the trial."¹⁶

However, the history of bail is obscure and uncertain, and the right to be bailed in certain cases is as old as the law of England itself.¹⁷

When the idea of administering justice was just being hatched, arrest inevitably implied imprisonment without preliminary enquiry till the sheriff held his tourn at least, and in more serious cases, till the

arrival of circuit judges, whose appearance might be delayed for years. It was therefore extremely important to be able to obtain a provisional release from custody.

The sheriff was the crown's representative and was the head of the executive part of criminal justice. In that capacity, he arrested and imprisoned suspected persons, and, if he thought it proper, admitted them to bail. This discretionary power was ill-defined and led to great abuses which were first dealt with by an Act of Parliament during King Edwards reign.¹⁸

The "Statute of Westminster the First"¹⁹ was for five and half centuries the main foundation of the law of bail giving explicit crimes for which bail could and could not be granted. Persons not to be bailed were grouped into twelve categories.²⁰ The list ranged from outlawed prisoners to those that were accused of treason and included serious crimes like felonies and extended to "thieves openly defamed and known."²¹

A final statute which regulated the sheriffs power of bailing was one passed under the reign of King Henry VI, in A.D. 1444. This statute required the sheriff to grant bail in certain cases and was framed in such a way that implied that their refusal to do so had become a well known abuse.²²

Various other statutes were later passed, but worth mentioning are those passed in the Victorian era, which repealed all previous statutes.²³ There now existed provision for the committing justice to apply his discretion in various cases. In certain other cases however, bail could not be refused. In cases of treason no bail could be taken except by order of a secretary of state or by the high court.

It must be observed here that while there were various statutes that related to bail, they provided guidance and laid down provisions that affected lesser or subordinate courts. The power of superior courts to bail in all cases whatsoever, even those involving high treason, has no history. As Stephen puts it in his analysis of the Criminal Law of England, this issue has never been disrupted or modified. "It exists in the present day precisely as it has always existed from the earliest times."²⁴

Some reference must at this point be made to the Habeas Corpus Act of 1679 passed by Parliament during the reign of King Charles II. This Act provides that any person committed to prison "for any crime unless for treason or felony plainly expressed in the warrant of commitment" may obtain a writ of habeas corpus from the Lord Chancellor or any judge of the Common Law Courts.

The Victorian statutes took no notice of this Act and it seems that though bail could be refused by a magistrate, a judge who knew nothing of the case would be absolutely required to bail any misdemeanant who took out a writ of habeas corpus. This aspect has tied the issue of habeas corpus to that of bail and this is currently witnessed by judicial testimony in the case of MAINZA and OTHERS VS THE PEOPLE.²⁵

In this case, Mr. Justice Sakala said of the Habeas Corpus Act of 1679 that it is an Act which was in force in England on August 17th, 1911, and that by Section 2(c) of the English Law (Extension of Application) Act²⁶ the Habeas Corpus Act of 1679 is still applicable to Zambia.²⁷

3.2 History of Bail in Zambia

Since the Criminal Procedure Code is the main architect of the law of bails in Zambia, the history of the bail system in Zambia owes its origin to the inception of the CPC in Zambia. Like all common law English speaking countries in Africa, Zambia has retained the colonial legacy whose ancestry is found in the Indian codes of St. Lucia 1889 and the Queensland Criminal Code of 1889. The Queensland Codes on which

the Penal Code and the CPC are modelled were first introduced by the British Colonial authorities in Northern Nigeria in 1904 and consequently they became the models for the African dependencies. These Queensland codes have been the basis of the Penal and Criminal Procedure Codes in Tanzania, Uganda, Kenya, Zambia, Malawi and Gambia.

Ever since the inception of the C.P.C. on 1st April 1934, no major revisions have been done, and when one analyses the philosophy behind the law of bails one finds it hard to dispute the argument that the laws regulating bail must necessarily change in accordance with the prevailing social and economic situation.

4. PHILOSOPHY BEHIND THE LAW OF BAILS

The law of bails is an important branch of the law of criminal procedure and as has been seen in the history of the bail system, is the result of a dilemma which has occupied the minds of men for centuries. Societies all over the world expect to be protected from the hazards of being exposed to the misadventures of one who is alleged to have committed a crime.

Persons responsible for the arrest of suspected criminals approach the courts presumably in the interest of society when arguing against the release of suspected persons before trial; but as against this natural request, there is the accepted rule of criminal jurisprudence that even a felon is presumed to be innocent till he is found guilty, regardless of whether he has committed the crime or not. It is this conflict of principles which has to be resolved and one resolution to the problem has been found in the concept of bail. Bail however should not be a static law and should change in accordance with the prevailing social and economic (which in turn influence the social) conditions. In times of war and economic or social crisis, it ought to lean in favour of the wish of the society at large and those of public institutions and governments; in times of calm and peace it ought to lean in favour of the individual.

Law in any given situation is used to regulate the conduct of individuals in society; this means in any given situation the law should cater for that particular condition which a society finds itself faced with. The concept of bail in many countries has indeed changed according to the changes of the centuries. As one author points out; in ages past it hardly existed, today it can hardly be questioned. Its progress and refinement merely reflects the evolution of man and

civilisation. In a barbaric society one could hardly ask for bail as it is known today. In a civilised society, one can hardly refuse it.²⁸

5. SUMMARY

The law regulating bail in Zambia has been undoubtedly static, and the provisions existing in contemporary Zambian law are somewhat reminiscent of the traditional laws on bail existing in early English criminal law. By sharp contrast, the law regulating bail in England and America - both of which derived their initial laws on bail from the same source as Zambia, namely English criminal history - are unquestionably dynamic, recognising the importance of individual liberties and freedoms and leaning consequently in a liberal direction and in favour of the arrestee on the issue of jail before trial. If Zambian law is to satisfy the jurisprudential aspect behind bail, contemporary updates on the law regulating bail are necessary.

FOOTNOTES FOR CHAPTER II {THE CONCEPT OF BAIL}

1. Cap 160 of the Laws of Zambia.
2. The New World Encyclopedia, Volume 1, 20th Century Distributions, Johannesburg, 1956, page 742.
3. Burke John, Osborns Law Dictionary, 6th Edition, London, Sweet & Maxwell, 1976, page 42.
4. Encyclopedia Britannica, Volume One, 1975, page 736.
5. Ibid.
6. Varon Joseph, A., "Searches, Siezures and Immunities" Volume II, Florida, 1961, page 900.
7. Cap 160 of the Laws of Zambia.
8. Cap 146 of the Laws of Zambia.
9. However under S. 123(4) of Cap 60, "no person charged with an offence under the state security Act shall be admitted to bail if the D.P.P. certifies so".
10. The question of discretion is dealt with in detail in Chapter III.
11. Goldfarb, R., Ransom, A. Critique of the American Bail System, New York, John Wiley & Sons, 1967 at page 22.
12. Ibid at page 23.
13. Encyclopedia Britannia.
14. Ibid.

15. Hanamwinga, H.M., Bail Reform in Victoria, LLM Thesis, 1982, at page 6.
16. Taylor, A.E.? (Translator), Plato: The Laws, Book IX, 1960, Every Mans Library, page 263.
17. Stephen Sir James F., A History of the Criminal Law of England, Volume 1, Burt Franklin, New York, 1883, at page 233.
18. 1272-1307 (King Edward IV).
19. 3 Edw. 1 c. 12 (1275).
20. This was in addition to four classes.
21. Op. cit. Stephen at page 235, Quoting Statute of Westminster the First (3 Edw. 1. c. 12, A.D. 1275).
22. Ibid.
23. 11 & 12 Vic. c. 42 s. 23.
24. Ibid Stephen at page 235.
25. (1980) ZR.
26. Cap 4 of the Laws of Zambia.
27. As per Sakala, J. at page
28. Soonavala, R.K., A Treatise on the Law of Bails, N.M. Tripathi P.V.T. Ltd., Bombay, 1968, at page 1.

CHAPTER III

1. Introduction

It is proposed in this chapter to lay down factors, both legal and extra legal, that influence the course or the outcome of the bail proceedings in Zambian courts. It is also proposed to point out the amount of consideration that the magistrates give to the various factors for granting bail and to ascertain the impact on fundamental rights of these aspects of bail. This chapter will therefore examine the right to bail, and aspects relating to the question of discretion. Under each of these aspects, the question of fundamental rights will be brought in.

If laws are to have any effect at all, there must be a minimum degree of certainty as to their application, their limits and perhaps even their purpose. When laws give an unfettered discretion as regards their application, whatever area of law is considered, subjective forces come into play and if these are given full reign, the very core of fundamental rights is endangered and likely to be eroded away, with, as it were, the silent blessing of the law. This chapter is intended to bring out the uncertainty that shrouds the law of bail and how this uncertainty has allowed magistrates to flout various constitutional provisions that relate to the individuals fundamental rights.

2. The Right to Bail

A starting point as regards the problems with bail laws in Zambia is perhaps the fact that bail is not a right, but a privilege. The constitution of Zambia points out that a person shall not be deprived of his freedom except in certain circumstances, two of these situations being: in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law,¹ or for the purpose of bringing him before a court in execution of the order of a court.² These sub-clauses are qualified by the wording in the C.P.C. which does not point out that bail shall be granted, but that it may be granted.³

From the foregoing, it can be seen that bail is indeed a privilege and an arrestee cannot demand bail as a right, and he can be denied bail even for a minor offence. The fact that bail is not a constitutional right is inconsistent with the philosophy behind the law of bails which recognises the criminal jurisprudence that even a felon is presumed innocent until proven guilty. The law ought therefore to provide a blanket right to bail with exception in certain cases like murder and treason, or crimes punishable by death.

The rule as regards capital offences being non-bailable was based on the premise that an accused would rather have his property forfeited than reappear only to be sentenced to death if he was found guilty. As Blackstone wrote:

"... what is there that a man may not be induced to forfeit to save his own life and what satisfaction or indemnity is it to the public to sieze the effects of them who have bailed a murderer if the murderer himself be suffered to escape with impunity."⁴

Indeed this kind of realisation has been carried through and incorporated in Zambian law, but there nevertheless remains the stigma of ancient times which sometimes denies bail for various other non-capital crimes.

3. FACTORS THAT INFLUENCE THE GRANTING OF BAIL

The Magistrates Handbook sets out five criteria which are to be used in determining whether or not to grant bail in each particular case. (i) the nature of the charge; (ii) the nature of the evidence in support of the charge; (iii) the punishment likely to be imposed if convicted; (iv) the liklehood of the repetition of the offence; (v) the independence and reliability of sureties.

The handbook also sets out the crucial test that courts must apply when determining any bail application, and that is whether or not the arrestee will appear for the resumed hearing. The factors given above are to be used as the criteria for arriving at an answer to this question.

It is interesting at this point to note that some magistrates are not absolutely certain as to the legal force of these criteria, and often they do not even refer to the Handbook as they don't even possess copies.⁵ Some magistrates point out quite bluntly that the Handbook does not lay down any criteria at all as regards the issue of bail determination.⁶

This is clearly strong evidence in support of the fact that how well a bail system works in effectuating the policy of releasing defendants prior to conviction cannot be ascertained from reading constitutions, statutes and cases. As one authority points out, a future historian who had only such sources available to him in trying to ascertain what was actually going on today would be completely misled, for although our paper rights cast us in a very liberal light, our practice is in fact quite repressive.⁷

3.1 Safety of the Accused

There are also other considerations which the judge of magistrate may take into account when considering a bail application. First, there is the criterion that relates to the accuseds own safety. In practice, magistrates in Zambia sometimes refuse to grant bail to certain accused persons in order to avert acts of violence calculated to do injury or worse to the accused. In certain cases, the

public may be so enraged about a particular crime committed by the accused and may decide to exact personal vengeance as was the custom in pre-legal eras. This type of action is normally expected from irate members of a family whose relative has been a victim of the accuseds criminal act.

3.2 Police Objections to Bail

The second set of considerations that magistrates take into account when considering a bail application, outside those found in the Magistrates Handbook, are the objections raised by police to the granting of bail. One author states the major premise on which police object to bail in the following terms.

"A major concern of the police in pre-trial handling of arrested suspects centres around their perception of the broader police task of crime detection and crime prevention; according to this perception, when a person has been arrested on suspicion of having committed an offence, the police feel that it is their job to keep him in custody before trial if this helps to protect the community from the risk of further crimes and enable the police to complete their investigations as quickly and efficiently as possible..."⁸

The main objections raised by police are:

- (i) Previous convictions;
- (ii) No fixed abode;
- (iii) Further inquiries;
- (iv) Likely to commit further offences;
- (v) Interference with key witnesses or with evidence.

It is in this area that potential for fundamental rights abuse is strongest. Any magistrate who seriously considers extra-legal factors in granting bail may do so with the genuine belief that he is assisting the community, but more often than not, he ends up supplementing police inefficiency.

Felons and misdemeanants brought before the court, who live in compounds or shanty townships may be difficult to track down if they fail to turn up on the day of the trial. Further, the police are not so well equipped or staffed as to be able to go from compound to compound searching for bail-jumpers. Transportation and manpower deficiency therefore has forced them to rely on the courts to deny the accused persons of their right to liberty. Police will also use the excuse of conducting further enquiries as a reason for opposing bail, even where it is unlikely that there is a chance of mustering any more evidence. A further reason why police oppose bail is the

likelihood of the accused to commit further offences. Again this presupposes the accused's guilt and acts as anticipatory punishment in that it deprives him of his freedom on the suspicion that he will commit another offence, even before he has been convicted of the one for which he is presently demanding bail.

Lastly, police claim that if an accused is released he may interfere with key witnesses or with evidence. Again, an accused's fundamental rights are denied on the belief that the accused is already guilty, and will do all he can to prevent a successful conviction. It may on the other hand be argued that though the accused be not guilty, he may fear a conviction so much that he attempts to distort the evidence, or influence the testimony of key witnesses. Either way, the magistrate cannot possibly make an objective opinion and hold that in one case the accused is likely to interfere with witnesses, while in another he is not. If law is to be applied, it must be applied equally and objectively and unless there is "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or community",⁹ an individual ought not to be denied his right to liberty.

The constitution protects a person's right to liberty save as may be authorised by law for the purpose of bringing him before a court in execution of a court order; or upon reasonable suspicion of his having committed, or

being about to commit, a criminal offence under the law in force in Zambia.¹⁰ Clearly this article envisaged the potential abuse of any provision to deny a person his right to liberty and points out that in order to derogate from the constitutional protection, there must be 'reasonable suspicion' of a crime or an impending crime. This provision is not satisfied by the mere raising of the objection that the arrestee has no fixed abode, or that the police are conducting further enquiries, or that the accused is likely to commit further offences and interfere with key witnesses.

Prior to the court appearance of the accused, the presiding magistrate has probably had no dealings with the accused and his discretion is therefore influenced wholly by the objections raised by the police. Their objections must therefore be substantiated, and it is alleged by some magistrates that police often concoct lies to ensure that the arrestee will not be granted bail.¹¹

In practice, it appears that magistrates will not grant bail for an accused who gives a vague address. It must be pointed out here that very often, people who live in compounds with no street names do not have registered addresses of where they live. Clearly the problem of locating such a person should he fail to turn up for his trial would be difficult. Nevertheless, such a person has a fixed abode - it may not be easy to locate, but it is nevertheless

fixed - and government efforts to provide some form of identification of individual households in compounds has meant that the police can now rely on magistrates to supplement their difficult task of routing out bail jumpers who live in compounds. As one magistrate pointed out, he would rather grant bail to a resident of Kabulonga,¹² than to a person who lives in Kalingalinga where there aren't even any streets with names.¹³

Clearly, though the magistrates have a discretion as to whom to grant bail to, this discretion is often exercised in favour of the well-to-do and against the financially weak. Such action is prima facie in contravention of Article 25(2) of the constitution which provides that:

"no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority."

While it may be argued that such action would be qualified by Clause 4(e) which allows for discrimination as long as it is reasonably justified in a democratic society, and is provided for by the law. The argument centering on "No fixed abode" is still flimsy because in cases where a person does have a fixed abode, he may still be refused bail, and often is just because his abode would be hard to find.¹⁴

Bail in Zambia may indeed be a privilege and not a right, but it seems that the poor would in serious cases not be availed of that privilege. As one Magistrate points out, magistrates look at police resources, and they sympathise with police and supplement their inefficiency.¹⁵

3.3 The Nature of the Offence

In practice it seems that Magistrates attach a lot of importance to the nature of the offence. In few cases, if any, do the police muster any evidence that can be used by them to support the charge and increase the likelihood that the arrestee committed the offence and should not therefore be released on bail. The police are again encouraged to practice inefficiency by the rather conservative approach of the Magistrates. Generally Magistrates feel that once an accused is given a chance to escape, he will, and this decision is reached merely by looking at the nature of the offence, and not from the evidence the police present before the court.¹⁶

Coupled with the nature of the offence, the magistrates will usually observe the demeanour of the accused, observing such features as scars and lack of teeth.¹⁷ In doing this, the magistrate takes into account subjective factors and when that happens, discrimination is not absent.

3.4 Sureties Qualifications

The Criminal Procedure Code (C.P.C.) provides that a person may be released on bail as long as he provides a surety or sureties sufficient to secure his appearance.¹⁸ Clearly, what constitutes a sufficient surety lies in the discretion of the court.

It is clear from the views of certain Magistrates that courts will not grant bail to a person who produces non-working sureties, or certain sureties of the female sex.¹⁹ While with some stretch of the imagination, it can be conceived that to demand for a working surety would be a legitimate exercise of discretion, to deny a woman the right to act as a surety, merely because she is a woman, is in no uncertain terms, discrimination. There is no provision for such discrimination anywhere in the C.P.C. and it is the writers view that as a result of chauvinist tendencies and the predominance of male adjudicators, such a practice will continue unless there is an amendment in the law.

Magistrates argue in defence of such action that they tend to discriminate against women, especially mothers because they fear the consequences that a particular woman might face should the accused, for whom she is acting as surety, jump bail. It is submitted that this should be all the more reason to allow mothers to act as sureties for their children arrested for criminal acts, because it can be conceived in most cases that an accused will not jump bail if he feels that his mother is likely to suffer hardships.

The C.P.C. provides that when a person jumps bail, not only does he forfeit his recognisance, but the court may also issue a warrant of distress for the amount mentioned in such recognisance or imprison the accused and his surety or sureties for any term not exceeding six months, unless the amount in the recognizance is sooner paid or levied.²⁰ It is this provision in the C.P.C. which magistrates feel they would not be inclined to enforce in certain cases involving women sureties, especially elderly women and mothers. Magistrates would therefore much prefer to deny such persons their right to act as sureties.

It is submitted that such an approach is nevertheless discriminatory and ought not to be adopted. One plausible solution would be to severely warn such elderly woman or mother of the consequences of acting as surety and the legal implications. It is further submitted that in the case of very elderly persons, perhaps discrimination would be condoned, and at least this would constitute discrimination as regards age and not as regards sex.

As far as working sureties are concerned, again, the rich-poor distinction arises. Magistrates will normally demand two working sureties who are normally relatives of the accused in order to give them the task of retrieving the accused should he jump bail. It must be pointed out here that there is nothing in written law or in case law to this effect, but such conditions have arisen as a result of practice.

This criteria was used in the colonial days in order to achieve the white oriented aims, notably that of trying to keep the indigenous people in custody because of the fear that as most of them were migrant workers, it would be difficult to trace them once they jumped bail.²¹

Where an accused's surety is not acceptable, that accused could be detained for that reason alone and not for any reason relating to his likelihood of appearing for his trial. Surely when the Constitution provides that a person is not to be deprived of his liberty save in the execution of the order of a court made to secure the obligation of any fulfilment imposed on him by the law,²² it does not envisage that a person be committed to pre-trial detention merely because he can't provide adequate sureties. This requirement must be coupled with other factors.

4. THE TIME FACTOR

We have already seen that the arrestee is not entitled to demand bail as of right, and the court is as a result not obliged to inform the accused that he can be granted bail. Very often, this ignorance is taken advantage of, to the detriment of the accused who may spend his time in prison awaiting the completion of documentation necessary for his trial. Offences which are triable by the High Court have to go through a preliminary inquiry, and if an arrestee is faced with such a dilemma, he may spend time in custody awaiting committal to the High Court for a bailable crime.

The C.P.C. provides for offences to be tried by the High Court.²³ These offences are listed in the subsidiary legislation²⁴ and cover a wide range of offences which include inter alia, 'false statements by company officials'.²⁵

In pericentral areas of Zambia, the time spent awaiting trial may not be too long, and trial dates would presumably be set at the earliest convenience. However, time spent in custody for an arrestee in an outlying rural area can be uncomfortably long. As soon as the accused is arrested or sought by the police, a docket is opened. If the crime is one that is triable by the High Court, the docket must first be sent to either Lusaka or Ndola.²⁶ The average time for the completion of the docket to its arrival in Lusaka is not less than four weeks,²⁷ and this in areas where transportation is easy, i.e. along the line of rail. For cases originating in rural areas, the duration is not less than three months of waiting in custody before being committed to the High Court. In some cases this may take not less than a year.²⁸

The problem does not end there however. In some cases the D.P.P. may not have enough information on which to advise the local constabulary in the outlying areas as to what course of action to take. He may then return the docket with a request for further information,²⁹ and the docket must be returned to him thereafter, upon which time he will send back the docket with the necessary instructions.

This see-saw correspondence means no reprieve for the arrestee who is not granted bail and left to languish in jail until a decision about his future has been reached. In all this time the accused will not be given an opportunity to ask for a conditional release. Until the D.P.P. has given instructions.³⁰ It may well be argued that no constitutional provision is breached in such cases on the premise that delays are contemplated by the constitutional provision which refers to detained persons not released, being brought before a court "without undue delay" and that such persons be tried "within a reasonable time."³¹ It is submitted however that the constitution does not contemplate unnecessary delays of up to one year as being justified and falling within the meaning of "without undue delay" and "within a reasonable time." Such delays therefore constitute a breach of an individual's fundamental rights.

To amplify the point, the following scenario can be considered: A person is accused of attempting to procure an abortion in a village some twenty kilometers from Mbala.³² He is then arrested by police at Mbala Police Station and put in custody. Twenty four hours later he is presented to the Magistrates Court, where it is determined that his crime is to be tried by the High Court, being one of the offences so listed.³³ He will then be returned to the custody of Mbala Police and will appear every fourteen days before the magistrate merely to put forward any complaints he may have.³⁴ In the meantime

Mbala Police have opened a docket and are working to complete it in order to send it to Ndola where a state advocate acting under delegated authority from the D.P.P., will issue a fiat giving further instructions as to what course of action to take. Once received by Mbala Police, this fiat is then handed over to the court, as long as the information required by the state advocate is complete, otherwise the whole process of information gathering and correspondence will start again. When the process is complete, the arrestee will be put on a cause list for a session with the High Court. The arrestee must then be transported to Ndola for trial. Whilst there he will be subjected to delays of one form or another, culminating in numerous adjournments.³⁵

From the foregoing it is clear that there is a crisis. Delays in criminal justice are there, especially when one considers crimes in outlying rural areas. Whether these delays are avoidable or not, an accused is denied his fundamental right to liberty, and in seeking to minimise the effects of pre-trial detention, the law ought to make it mandatory for the competent authorities to grant bail, especially where it is clear that a trial session will not be accorded for a very long time. It is observed that in cases to be committed to the High Court for trial, Magistrates will not grant bail,³⁶ despite provision in the law indicating that they have the power to do so.³⁷

5. SUMMARY - CONSTITUTIONAL CRISIS

As a fundamental document, the Constitution has the function of protecting Human Rights. Laws laid down in a constitution give blanket provisions as regards peoples rights. Where however these rights become subject to numerous reservations, the effectiveness of the rights enshrined in that document becomes otiose. It was seen in Chapter I how the protection of the right to personal liberty is provided for in three lines, but the exceptions take up a staggering forty-three.³⁸

Certain provisions of the constitution of Zambia appear to bow down to various other laws, and these other laws are not identified but only defined as 'other laws'. The protection of an individuals right to personal liberty is for example subject to the execution of the order of a court made to secure the fulfilment of any obligation imposed by law.³⁹ If these obligations are harsh in any way, as has been seen in the denial of bail in certain cases, the law can still claim to be operating within constitutional perimeters.

FOOTNOTES FOR CHAPTER III

1. Article 15(1)(c) of the Constitution of Zambia.
2. Article 15(1)(d) of the Constitution.
3. Section 123 Cap 160.
4. Goldfarb R., Ransom A Critique of the American Bail System, New York, John Wiley & Sons Inc., 1967, p. 28.
5. This was ascertained from interviews with various magistrates studying law at the University of Zambia.
6. Interviews with: Mr. H. Mwaule - Luanshya Magistrate Court Class II
: Mr. P. Musonda - Kitwe Magistrate Court Class III
: M.J. Silavwe - Mufulira Magistrate Court Class III
: Mr. F. Nsokolo - Kasama Magistrate Court Class II
: Mr. E. Zulu - Chipata Magistrate Court Class II
7. Foote Caleb (editor), Studies on Bail, University of Pennsylvania Law Review, 1966, at p. 202.
8. Bottomley, A.K., Decisions in the Penal Process, Martin Robertson, London, 1973, pp 96-97.
9. Rehnquist J. in UNITED STATES v. SALERNO (1987) US
10. Article 15(1)(d) and (e).
11. Interviews with Mwaule, Musonda and Silavwe (see note 6).

12. Kabulonga is a high class residential area in Lusaka.
13. Interview with Philip Musonda.
14. All magistrates interviewed pointed out that they would not grant bail to residents of compounds in serious offences because of the difficulty of tracing out their homes.
15. Interview with Mr. Silavwe.
16. Interview with Mr. Silavwe and Mr. Mwaule.
17. Ibid.
18. Section 123(1) of the C.P.C.
19. Op. Cit. Note 6.
20. Section 131(1); (2) Cap 160.
21. D. Muyatwa: Delays in Criminal Justice, 1983/84 Obligatory Essay. UNZA, Lusaka.
22. Article 15(1)(c).
23. Section 11, Cap 160.
24. Cap 160 at p. 70.
25. An offence under S. 325 of the Penal Code, Cap 146.
26. In the case of Lusaka, to the D.P.P.; in the case of Ndola, to the State Advocate acting on behalf of the D.P.P.
27. Interview with Mr. H. Wankie, Senior Public Prosecutions Officer at Zambia Police Force Headquarters, Lusaka.
28. Ibid.
29. The D.P.P. has the power to do this under S. 242 of the C.P.C.

30. Interviews with all magistrates indicated this.
31. Article 15(3).
32. Mbala is a town in the Northern Province of Zambia and is approximately miles from the decision making centre in Ndola.
33. See C.P.C., Cap 160 at p. 70.
34. Under the law, a person in custody must appear before a Magistrate every fortnight. See S. 229(5) Cap 160.
35. In D. Munyatwa's study, she indicates such factors as lack of transport on the part of both police and counsel for the prosecution, and prior commitments of lawyers for both defence and prosecution. Op. Cit. Note 21.
36. Op. Cit. Note 30.
37. See S. 231 of the C.P.C. Cap 160.
38. at page 9 of this paper.
39. Article 15(1)(c).

CHAPTER IV

CONCLUSION AND PROPOSALS FOR LAW REFORM

This dissertation has attempted to acquaint the reader with the difficulty arising in connection with bail laws in Zambia and the concept of fundamental rights, with specific reference to the use of discretion by Magistrates in granting bail.

First, the basic purpose of bail has always been and still is to ensure the accused's reappearance for trial. In Zambia, the discretion to grant bail has been exercised against the accused partly because of the fact that in Zambia bail is not a right but a privilege. Fundamental rights under the Zambian constitution do not give ultimate protection to personal liberties as these are subjected to other laws in force. This has exacerbated the problem of bail.

Second, it is clear that the law in Zambia governing bail is archaic by the mere fact that ever since its inception in the early 1930's it has had not major revisions. The present law does not therefore reflect current trends in Zambian society, especially when one considers that after their inception, the bail laws were tailored to reflect the interests of the colonial rulers.

Third, the history of bail has been seen to be unclear and uncertain. Once it was realised however that man's natural rights were subject to numerous abuses by those empowered to administer justice, from even the earliest times, curbs on the unfettered discretion to keep a person in custody were effected. Zambia still bears the stigma of ancient times in that there are minimum curbs on Magistrates' use of discretion.

Fourth, there is a great potential for abuse as a result of the unfettered discretion, and this has an inevitable effect on an individual's fundamental rights, who if not granted bail may effectively serve his sentence prior to conviction, especially where the accused is arrested in an outlying rural area for a crime triable by the High Court.

Fifth, it is questionable whether Magistrates actually take into account any of the criteria laid down in the Magistrates Handbook concerning the exercise of discretion. When granting bail, there is therefore discrimination outside that permissible by law. Arrestees who live in compounds become victims of circumstance and are often not granted bail on the ground that they have no fixed abode. Such persons do indeed have fixed abodes but the intricacy of streets and roads in these compounds, coupled with the lack of street names makes the task of tracing out bail jumpers extremely difficult. Magistrates therefore end up sympathising with police and pass decisions to supplement police inefficiency.

Sixth, bail being a privilege and not a right, like most privileges is available on the whole more to the rich and works against the economically weak.

Lastly, in considering a bail application, Magistrates practice discrimination as regards sureties in two respects, namely that they normally demand working sureties and will in certain circumstances not allow women to act as sureties by the mere fact that they are women.

Proposals for Reform

As one authority points out, the resolution in criminal procedure of the rights of the individual with the legitimate interests of the state requires the maintenance of a delicate balance, and there is almost universal recognition of the impropriety of punishing - and custody is indeed punishment, no matter what its name - one who is merely accused and who has not been and may not be convicted.

Unfortunately Zambia is an example of a country that cannot raise a banner in support of such a statement. In this light, the writer seeks to put forward various proposals for law reform to bring Zambia closer to the recognised universal order on the issue of jail before trial.

A good starting point is on the question of the right to bail. The constitution recognises the right of an individual to personal liberty, and to the presumption of innocence. This recognition ought to be backed by existing

law. Bail laws in Zambia tend to deny these constitutional rights. It is therefore proposed that there be legislation set out to make it mandatory for magistrates to grant bail in all cases with the exception of such crimes as murder and crimes punishable with life imprisonment. This will have the effect of eradicating the abuse of discriminatory powers.

Further, if there was a constitutional right to be given bail, the factors involved in setting the amount could be considered. As this right does not however exist, the argument of setting a high bail is not of utmost importance to the question of bail in Zambia. If a Magistrate wanted to deny bail, under the existing laws, he need not do it by such subtle means as setting a high amount.

A constitutional provision of mandatory bail will also have the effect of removing to a great extent, the discriminatory effects on the poor and on certain women sureties. Because a magistrate will be compelled to grant bail once it is applied for, it is submitted that he will be reluctant to be so stringent as regards working sureties and in some cases female sureties. Further, the police will no longer feel encouraged to perform poor services to the community by relying on courts to supplement their inefficiency, but will make more concerted efforts to tackle cases efficiently, knowing that a liberated criminal will be a danger to the community. In this respect the

police will be encouraged to complete dockets at the earliest convenience in order to bring an accused to justice. Presently, when it is obvious that police can rely on remand to keep a suspect in jail, they have no spur to prick the sides of their intent.

A constitutional provision would therefore cut across a wide range of abuses and would bring Zambia closer to universal practices in bail applications. Good examples of how such a system could be adopted are to be found in England and America where bail laws are geared in such a way that they clearly recognise the presumption of innocence and the right to personal liberties.

It is further proposed that there be an increased awareness about peoples rights, or alternatively that there be a provision in the law requiring a presiding magistrate to inquire of the accused, whether he wishes to be granted bail or not. Very often, people are unaware of their rights, and this makes it easier for their rights to be blatantly abused. A magistrate being required by law to inquire of an accused whether or not he is desirous of bail, immediately brings to the attention of the accused the fact that he need not languish in jail awaiting his trial. Few people would not take advantage of such a provision.

The first proposal was that there be a constitutional requirement for bail in all criminal cases, with certain exceptions; the exception will now be dealt with.

It is recognised by the writer that despite the presumption of innocence, there are cases where there is clear evidence pointing to the guilt of the accused. Where such evidence is available, it is proposed that bail need not be granted.

It is recognised however that such a system could be open to abuse, and it is proposed that bail in such cases only be denied in relation to serious crimes, or crimes entailing imprisonment terms of more than seven years. Magistrates must also look at other factors, such as the likelihood of the arrestee to turn up on the day of trial and any previous convictions. Where circumstance appear to be in the accused's favour, he must be given the benefit of the doubt.

Such a provision would encourage police efficiency in the following way; if police know that in nearly all cases an arrestee would be granted bail, - one of the exceptions being in cases where they can produce overwhelming evidence as to the likelihood that the arrestee committed the crime, in theory they would endeavor to conduct and complete interviews thoroughly and efficiently in order to convince the court that they have a watertight case. Gone would be an almost total reliance on the court to deny bail on trivial grounds such as 'no fixed abode' which has been shown to have been abused.

Thirdly, it is proposed that the criteria for determining a bail application be constructively laid down in the C.P.C., either within the main body, or annexed to the code. This would of course apply to those cases which would be exceptions to the mandatory granting of bail assuming the first proposal was given effect; if not, then this proposal would apply to all cases. If legislation to direct the use of discretionary power is clear, unambiguous and certain, there would clearly be a minimisation of personal influences, and a very high degree of certainty would be incorporated into the bail application process.

Fourth, it is proposed that in order to eliminate any remnants of discrimination, provisions within the C.P.C. must be included which warn against the discriminatory use of discretion. It was observed that there is discrimination in two forms, namely as regards working sureties, and in connection with women sureties. A provision in the code informing magistrates not to discriminate against women merely because they are women would eradicate to a large extent any discrimination on the grounds of sex. There should also be a provision laying down criteria for determining who is to qualify for suretyship. It is envisaged that even with the introduction of such a system, there could still be discrimination and abuse via the mechanism of setting the amount to be paid as bail

bond. It is therefore further proposed that additional criteria for the establishment of the amount to charge be laid down and this could take the form of analysing a persons salary scale and means.

Where in any situation, both an arrestee and his sureties are unemployed, this is not to be a determining factor in denying an accused bail. It is therefore proposed that there be provision within the C.P.C. directing magistrates to consider certain factors not independently, but in conjunction with other factors, such as the liklehood that the arrestee committed the offence; the circumstances of each case must be taken into consideration. Where the arrestee is unable to find working sureties, he is not to be denied bail on this ground alone.

Ever since their inception, the Penal Code and the C.P.C. have not had any major revisions. In 1974, Aggrevated Robbery with the use of a gun was made a capital offence and is now punishable by death. The Government had clearly identified an increase of violent crimes and as a result created provision in the law to address the situation. It seems however that change is only being made in favour of government interests. There must also be a realisation of the common goal of man in upholding fundamental rights, and updating any archaic laws that constitute a hinderance to the attainment of these rights.

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