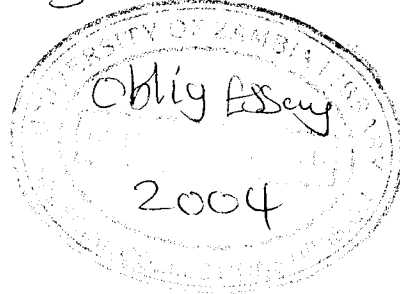


BAIL: IS IT A RIGHT?

School of law



BY

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**A PAPER SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN
PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE
AWARD OF A BACHELOR IN LAW LL.B**

THE UNIVERISITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the obligatory essay prepared under my supervision by Willie Sinyangwe entitled:

BAIL: IS IT A RIGHT?

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing directed research.

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DATE: 23/12/2004

DECLARATION

I, Willie Sinyangwe, Computer Number 20011067 do solemnly declare that this work represents my own ideas and is not a production of any other work produced or submitted by any person to the University of Zambia or to any other institution.

**DEDICATED TO: REMANDIES WHO HAVE HAD TO SPEND TIME IN
CUSTODY UNJUSTLY.**

PREFACE

As we are in the **Human Rights Era**, we as a country need to live as such and this can be seen from our laws, as its law that regulates conduct of people in society. Looking at our **Criminal Procedure Code** which regulates law regarding bail, its age coupled with the practice in our courts I was moved to write this paper entitled; *Bail: is it a right?* It opens with an introduction in the first chapter where the definition is given.

The second chapter discusses critically the provisions of the Zambia Constitution as regards the secure protection of the law and the protection of the right to liberty.

Chapter three discusses the rise of crime in Zambia, its investigation and bail discretionary power and possible interference by the executive.

Chapter four provides a comparative study of bail laws in Zambia on the one hand and its colonial master, Britain and the United States of America on the other hand.

Chapter five finally presents a summary of the whole paper and gives recommendations together with the conclusion.

It is hoped that this will provide the readers with food for thought on the subject and help the powers that be directed their minds to this subject so that one day the necessary action will be taken.

ABSTRACT

An accused is only a suspect in the commission of a criminal offence and is only fit for custody when he is pronounced guilty by a court of competent jurisdiction and is sentenced to a term of imprisonment – Right to liberty is fundamental.

ACKNOWLEDGEMENTS

Mostly importantly I give praise and honor to the Almighty God who has allowed me to do law albeit late in life and so all that I have been able to do in the compilation of this work and all that had a hand it were merely fulfilling God's plan for me and for them. May they be richly blessed for bringing glory and honour to God through this, my work to which they made a contribution in one way or the other. I may not put down all their names but the Almighty God knows them all as he misses nothing and will accordingly bless them.

Being a fallible man I may have made mistakes inadvertently, I therefore state that whatever mistakes that remain in this work are mine alone.

To my supervisor Judge K.C. Chanda, I pour out gratitude from the bottom of my heart for his encouraging words each time I met him. He would spur me to write on and something I thought was very difficult to do become manageable and enjoyable. May the good Lord continue to bless you so that you help many more students.

To my wife and betterhalf Theresa Chola Sinyangwe I thank her for being understating and encouraging me to go through this programme and bring honour to the family. She faithfully kept the family intact single handedly while I was here. I also thank my children Kalasa, Chongo, Mangala, Chimpape, Namukale and Island who spurred me to work even harder as they looked at me expectantly.

To Mrs Maboshe I. Mubanga who is a sister in the Lord for her help in typing this work so professionally and without murmuring despite her busy schedule attending to many bosses in Gender Department of the School of Humanities I say the Almighty has taken note. Be assured of the blessings from Him.

Indebted to the many friends in my class and UNZA fraternity generally and more so the to the friends in the Forum who gave me spiritual strength to go on even when the chips were down.

Lastly but not the least my friends in our study group Cheelo Mwiinga who is also my roomy papa G and John Mbuzi with whom I had discussions since second year and which contributed greatly to my continued stay at UNZA

Lusaka

December 06, 2004

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Penal Code Chapter 87 of the laws for Zambia

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Police and Criminal Evidence Act 1984

Criminal Justice Act

Magistrate Court Act

American constitution

Federal Criminal Codes and Rules

INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights

International Convention on Civil and Political Rights

African Charter of the Organization of African Unity

The American Convention

The American Declaration

The European Convention

ABBREVIATIONS

All ER	-	All England Law Reports
BA	-	Bail Act
BOR	-	Bill Of Rights
CAP	-	Chapter
CJA	-	Criminal Justice Act
CPC	-	Criminal Procedure Code
ICCPR	-	International Charter on Civil and Political Rights
MCA	-	Magistrate Court Act
MMD	-	Movement for Multi-Party Democracy
OAU	-	Organization of African Unity
PACE	-	Police and Criminal Evidence Act
UN	-	United Nations

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METHODOLOGY

The primary source used in this research was the researchers personal experience and interviews conducted with some Lusaka based magistrates and their clerks who handle the biggest number of criminal cases. The secondary sources relied upon included books, statutes, reported cases, cases still undergoing trial, international instruments, unpublished papers and local newspapers.

These were analysed and accordingly applied to help in the achievement of the research objectives.

CHAPTER ONE

1.1 INTRODUCTION

This directed research paper attempts to discuss the topical issue of bail in criminal cases and whether it is a right especially with the escalating crime levels in the country in view of the deteriorating economy and mass job losses.

I have decided to write about this topic because whereas there has been a marked development in the investigation of crime in the country through the introduction of more investigative wings in the Zambian criminal justice system like the Anti Corruption Commission, the Drug Enforcement Commission, the famous Task Force apart from the usual police Force now transformed Police Service, there has been no corresponding development in the prisons service and the law relating to bail.

1.2 DEFINITION

Bail is when a man is taken or arrested for felony, suspicion of felony, or any such case, so that he is restrained of his liberty, and being by lawailable, offers sureties to those who have authority to bail him, which sureties are bound for him to the Kings use in a certain sum of money or body for body, that he shall appear before the justices of goal delivery at the next sessions; then upon the bounds of these sureties as is aforesaid he is bailed.”¹

“The bail in criminal cases is given to secure the due attendance upon the justice of the person bailed.”²

¹ Borrows, R (1946) words & Phrases Judiciary Defined Vol. 1 Para 717

² Nottingham Corporation (1897) 2 QB 502 at 510.

In short sureties make a promise to the court to ensure that the person accused of a criminal case attends court. The court or the police will attach conditions to the bail such as the forfeiture of a specified amount of money that the accused and his sureties pays to the state. Where the bail is in accused's recognizance as well as the surety's recognizance the surety is made to pay the amounts and if he fails he is instead remanded in custody until the money is paid.

This allows the accused to attend trial at court from his or her home until the matter is disposed off and if at the end of the trial the accused is convicted and sentenced to a prison term or in other words given a custodial sentence, he can appeal to a higher court as a matter of right³ against either conviction or sentence or both and thereupon apply for bail pending the hearing of the appeal. This is allowed because should the appellant succeed in his appeal while at the same time he is in prison or has already served the sentence by the time the appeal is heard this can render the whole appeal as a mere academic exercise⁴.

1.3 HUMAN RIGHTS

All human beings are born free and equal because God created them with the same human rights which are a constituent part of every human being and so they are inalienable and universal. They cannot be taken away by anybody or indeed by a government, even a government that does not recognize and respect them. That is why

³ Section 321 of the CPC

⁴ Section 322 of the CPC

every human being is entitled to the right to life, liberty, freedom of movement, expression, among many other human rights. One person's rights begin where another's end and so in order that every one enjoys their rights, there are rules that regulate the enjoyment of these rights by all human beings in relation to the entire society. Fortunately most people obey these rules though there are a number that do not but fortunately this number is relatively low but if left unchecked these people can upset the social equilibrium. There is therefore a need for sanctions against such people so that they are deterred from this kind of behavior while at the same time they operate as a guarantee for law abiding citizens.

Most rules that are disobeyed by some elements in society are connected to property acquisition mainly of the basic requirements need to support human life as some people don't want to use orthodox means of acquiring resources to supply their needs. The state, in trying to ensure security of law abiding citizens has put in place laws that allow the state to confiscate the freedom of movement or the right to liberty of the individuals who decide to break the law so as to ensure enjoyment of the rights of the greater majority in society. In view of the people's inalienable rights, any detention is permissible only if carried out in accordance with the provisions of the law. Therefore people that are charged with criminal offences should not normally be held in detention pending trial.⁵ these people should be released on bail except of course in exceptional circumstance which should be for the benefit of the accused himself of the larger society.

⁵ Amnesty International, Fair Trials Manual P 23

The prisons where arrested people are detained that our country boasts of were all built during the reign of our colonial masters when the population of the country was not anywhere near what is today let alone the prison population. The problem of congestion of inmates in Zambian prisons also dates back to colonial times.⁶

Today the remedies (detained suspects awaiting trial) by far out number convicted prisoners in most Zambian prisons. An example is Lusaka Central Prison where as of 27th June 2003, the prison with a capacity of 360 inmates had 1,384 prisoners of whom 1,023 were remandees.⁷

According to Home Affairs Minister who visited the prison, he found the situation deplorable and assured the nation that government was doing everything possible to improve the situation⁸ but up to now nothing has been done to improve the situation. In the same vein Lusaka Central Prison Officer-in-charge Gerald Chibuye expressed concern at the congestion in prisons and that the problem needed to be addressed⁹. This is one year after the promise to improve the situation was made.

1.4 CONDITIONS OF SERVICE IN THE CRIMINAL JUSTICE SYSTEM

The economy of this country took a nose dive several years ago and this has adversely affected the equipping of the police service and the judiciary because of the drastically reduced funding to the institutions. The conditions of service therefore are not worth

⁶ Mwanandiwa, B, UNZA School of Law Obligatory Essay on **The Rights of a Prisoner** P 10

⁷ Supra note 6.

⁸ The Post, No. 2367, Thursday, April 10, 2003

⁹ The Post, No. 2728, Tuesday, April 6, 2004

writing home about. This has demotivated the officers terribly and obviously the demotivated officers cannot be expected to carry out their investigations in a manner envisaged by the criminal justice system at inception. They lack transport and many other resources required to do their work properly.

Home affairs permanent secretary Peter Mumba came out in the open and said that a lot has to be done to improve police officer's living conditions in the country for them to work effectively¹⁰. He also declared "cops' working conditions a national disaster"¹¹.

The result has been that even suspects who did not actually commit criminal offences have been victims of circumstances and have found themselves in overcrowded prisons only to be reprieved by courts which are manned by an equally demotivated workforce after lengthy and delayed trials when they have been pronounced "**Not guilty.**" A situation that could have been avoided had a more serious investigation been conducted by the police.

From the above it is clear that bail is a necessary procedure in the criminal justice system not only in Zambia but the world over because a person charged of any criminal offence is merely a suspect in as far as the commission of the offence is concerned. Unless and until evidence is led and produced in court to prove that not only was the offence committed, but that it was committed by the accused person the accused cannot be

¹⁰ The Post No. 2749, Tuesday April 27, 2004

¹¹ The Post No. 2721, Tuesday March 30, 2004

convicted and imprisoned. The standard of proof is very high¹² as conviction may culminate in the confiscation of the right to liberty and even life.

So to refuse bail to an accused might involve depriving liberty to someone who is subsequently found not guilty or convicted but given a non-custodial sentence¹³.

The statute which regulates procedure in criminal proceedings in Zambia under which bail is provided is called The **Criminal Procedure Code**¹⁴ and is popularly referred to as **The CPC**. This pieces of legislation was enacted by our colonial masters on 1st April 1934 and the relevant sections says:

“When any person is arrested or detained, or appears before or is brought before a subordinate court, The High Court or Supreme Court he may at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court to secure his appearance, or be released upon his own recognizance if such officer or court thinks fit:

Provided that any person charged with –

- (i) murder, treason or any other offence carrying a possible or mandatory capital penalty;*
- (ii) misprision of treason or treason – felony or*

¹² Wooming tone DPP (1935) A.C. 462

¹³ Slapper, G & Kelly D, (2000) English Law P 782.

¹⁴ Cap 88 of the Laws of Zambia

(iii) *aggravated robbery;*

Shall not be granted bail by either a subordinate court, the High Court or Supreme Court or be released by any police officer.”

From the construction of the provision it is clear that the court or the police have a discretion to grant or not to grant bail where an accused is charged with a bailable offence. No wonder today police can detain even a relative of an accused person even if they know he has not committed the offence together with the accused as it happened in Livingstone where police detained the husband and the mother in-law of the suspect and two other relatives of the teller who was alleged to have disappeared with K70million from Zambia National Commercial Bank Livingstone Branch. In a statement to the press the Human Rights Commission John Sakulanda stated that:

“The police have no right to hold people that are not connected to any crime unless the contrary is proven following thorough and professional investigations”¹⁵

It is also not uncommon for newspapers to report of people being held by the police for the reason that they are helping the police with investigations. These people are detained for long periods by the police and it is very difficult if not impossible for ordinary Zambians to challenge this kind of arbitrariness on the part of the police. This is because even the law relating to bail is not properly regulated and no time frame is given by which detained persons should be released on bail or taken before courts of law.

¹⁵ Supra Note 14

In the same Post it was reported that:

“Police have released ten workers of self-confessed cannabis grower and trafficker Sidney Chileshe who were detained along with him a week ago.¹⁶”

Here people were detained for one week by the police for no reason at all. This wouldn't have happened had a thorough investigation taken place. This police action seriously interfered with the right to liberty of the concerned and no compensation was paid to them. Surely this can be avoided by amending the law so that police, do not have free reign in matters that have to do with peoples rights.

The only amendment to the bail provisions¹⁷ in the CPC was made in December 2002, and was not made to improve the situation but made it worse by expressly denying bail to a suspect of a motor vehicle theft.

From the scenario given above it is beyond all reasonable doubt that in this **Human Rights era** something needs to be done to improve the position of the suspect vis-à-vis granting of bail especially that, “the right to liberty is too sacred to be tramped upon without justification” as the Human Rights Commissioner Mr. John Sakulanda put it. After all, the accused is presumed innocent until proven guilty.

¹⁶ Supra Note 14

¹⁷ Amendment Act No. 23 of 2000

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¹⁶ Supra Note 14

¹⁷ Amendment Act No. 23 of 2000

CHAPTER 2

2.1 INTRODUCTION

This chapter will critically look at the provisions of the *Zambian Constitution* as regards the secure protection of the law and the protection of the right to personal liberty vis-à-vis bail and other statutory provisions as well as the actual practice in cases related to this subject.

2.2 THE BILL OF RIGHTS

The provisions reacting to personal liberty of an individual in Zambia are entrenched in the **Bill of Rights** in the constitution to underscore the importance of the rights of an individual and the need for these rights to be jealously guarded as against the might of the state and its propensity and ability to violate them. The Bill of rights is part three of the constitution which can not be easily altered by parliament like any other part of the constitution. As we saw in the recent past, prior to 1996 elections, the Zambia constitution was almost entirely altered¹⁸ by the ruling party, the Movement for Multiparty Democracy (MMD) using its superior numerical advantage in parliament to suit its needs but could not touch the bill of rights because of the protection this part of the constitution enjoys and which states:

“A bill for the alteration of part III of this constitution or of this article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a national referendum with or without amendment by not less than fifty percent of persons entitled to be

¹⁸ Amendment Act No. 18 of 1996

registered as voters for the purposes of Presidential and parliamentary elections¹⁹.”

It is in this section of the constitution where we find provisions relating to the protection of the fundamental rights and freedoms of the individual. I will proceed to look at the relevant parts which are connected with the subject matter under discussion.

2.3 PROTECTION OF RIGHT TO PERSONAL LIBERTY²⁰

Personal liberty means the right to personal freedom (which includes the freedom of movement which a person cannot enjoy if he is incarcerated) in the sense that a person may not be punished or rather imprisoned except for breach of the law proved in an ordinary court which is also established by law enacted by ordinary parliament.

Apart from our constitution, the Magna Carta, International Instruments on protection of human rights also confirm the importance of this right. The word confirm is used to indicate that these documents are not the ones that confer this right as it is an inalienable birth right received from God as he created man. Therefore no government can take this right away even a government that does not recognize this right will only trample on it but never take it away as it forms part of a human being. It is an integral part of a human being. As for courts, their duty is to ensure protection of this right as some politicians especially in African countries have the tendency to use state machinery to silence their political opponents by “safely keeping them away” in custody.

¹⁹ Article 79 (3) of the Zambian Constitution, Cap 1

²⁰ Article 13

The right to liberty however is by no means absolute because there are certain elements in society who do not want to live according to the rules that regulate human conduct in society. To ensure that all human beings enjoy their rights the state maintains law and order and in the process some of these people have to be deprived of their liberty. Thus “a person shall not be deprived of this personal liberty except as may be authorized by law ... upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law in force in Zambia²¹.”

The limitation to this right is designed to ensure that the enjoyment of this right by any individual does not prejudice the rights of others or the public interest at large.

2.4 PROVISIONS TO SECURE PROTECTION OF THE LAW²²

Under this provision the constitution guarantees a fair hearing within a reasonable time to an accused person by an independent court. Fair trial includes not sending an accused person to await trial in prison because at this stage he is still presumed innocent and if he is innocent, it is undeserved hardship for him to be sent to prison to await trial²³.

If an accused person is remanded in custody to await trial in prison, this will definitely affect him psychologically and consequently not only affect his preparation of his defence but also his means to pay a fine if he is convicted and sentenced to a fine because he will have lost his job if he was working since some of the trials take as long as three years or more.

²² Article 18

²³ Article 18 (i)

It is reported that:

“A remand in custody can of course affect the defendants ability to prepare his defence. For example, the defendant on bail will be able to contact possible witnesses, particularly if he needs to find people who saw him on the day in question. In a recent case a man claimed that he had been in a public house during part of the time that he was alleged to have been involved in committing a crime. He did not know the identity of potential witnesses. He alone knew whom he had seen and talked to and the only way to contact these people was for him to visit the pub himself²⁴. ”

Accused in the situation above can be able to organize his defence effectively if he is on bail as he will be able to trace his witnesses and be able to convince them to give evidence in court which is favourable to him and may end up getting an acquittal which would not have been possible had he been in custody where he would have been disillusioned in view of the unknown identity of his witnesses and the high probability of being imprisoned for something he did not do. Then as he appears in court he will be affected and most likely will not be able to show that he did not commit the offence alleged. Since the court will obviously not have been present on the alleged scene of crime, it will depend on the evidence adduced and may end up unjustly convicting the accused. This illustration has clearly demonstrated that to achieve justice, we need to justly administer rules in our courts and wherever injustice rears its ugly head, it must be crushed.

²⁴ Lewis, David & Hughmn, Peter (1975) Just How Just P. 62

2.5 PRESUMPTION OF INNOCENCE²⁵

The grandnorm in this country has declared innocence upon any person charged with a criminal offence. Not only is the presumption just but it is also fair in that a person who is charged with a criminal offence is so charged by the police who generally base their charge on an information received from a third party which is not even on oath and so should not be taken as the gospel truth. This is because offences are not usually committed in the presence of the police or indeed other investigative wings of government.

It is also not uncommon for people to lie against others for various reasons. The law recognizes the existence of this state of affairs that is why it has provided for this kind of offence and punishment²⁶. In fact a lot of lies have been laid bare during cross-examination as trials proceed. In view of most people economizing on the truth of what they say the law has deemed it fit that an allegation of a criminal nature made against any person must be proved beyond all reasonable doubt²⁷. It follows therefore that if any person accused of a criminal act is presumed innocent by the constitution he should not be detained in custody and so it is clear that our constitution framers were on *terra firma* when they enacted this provision. This is because conviction may result in the confiscation of the right to liberty and so it's a very serious matter.

²⁵ Article 18 (2) (a)

²⁶ Section 104 (i) of the penal Code Cap 87 of the Laws of Zambia

²⁷ *Miller V Minister of Pensions* (1947) 2 All ER 372

2.6 GRANTING OF BAIL

In view of the presumption of innocence therefore, at the stage an accused appears before a court and has not been released on police bond by the police the role of the court, as a fountain of justice becomes critical in relation to bail. This is because very few people are familiar with their right as to bail application,. Therefore the court should take it upon itself to address the issue of bail especially if the charge is bailable.

This is because the constitution says:

“Any person who is arrested or detained –

- a) for purpose of bringing him before a court in execution of an order of a court; or
- b) upon reasonable suspicion of his having committed or being about to commit, 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 person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceeding that may be brought against him; **he shall be released either uncondiatonally 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 proceedings preliminary to trial²⁸.

It is clear that the import of this provision is that an accused person arrested for a criminal offence should be given a police bond wherever possible, where not possible police

²⁸ Article 13 (3) (a) (b)

should without delay take such person before court where the issue of bail pending trial can be expeditiously considered and granted either unconditionally or on reasonable conditions that will ensure accused attends court for trial.

Another provision concerned with the subjects says:

“where the trial of **any person for any offence** prescribed by or under the law has been adjourned and the accused, having pleaded to the charge, **fails to appear at the time fixed by the court for the resumption of his trial after the adjournment**, the proceedings may continue notwithstanding the absence of the accused if the court, being satisfied that, having regard to the circumstances of the case, it is just and reasonable so to do ...²⁹ “

This provision unambiguously declares that **any person facing any criminal offence** (without exception) can be admitted to bail and this provision is in the same tenor as article 13.

These provisions are there to ensure personal liberty of citizens. They are also in line with the provisions enshrined in the **Universal declaration**³⁰, the **ICCPR**³¹, the **African Charter of the OAU**³² now AU, the **American Declaration**³³, the **American**

²⁹ Article 18 (12) (d)

³⁰ Article 3

³¹ Article 9 (i)

³² Article 6

³³ Article 1

Convention³⁴ and the **European Convention**³⁵. All these international documents guarantee the **Right to Liberty**. Quoting the ICCRP, it says:

“Everyone has the right to liberty and security of person.” No one shall be subject to **arbitrary arrest or detention**. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law.”

According to our law a person charged with a criminal offence should be afforded a fair hearing in a court of law also established by law. The procedure is very elaborate on how the hearing is to be conducted, of course with the rules of national justice being judiciously applied otherwise the decision of the court can be quashed by a higher court. So its only when a court of competent jurisdiction convicts an accused person that such a person should loose his right to liberty and consequently the freedom of movement is accordingly lost as such a person can no longer decide to go anywhere as he will then be said to be lawfully detained.

The Human Rights Committee of the United Nations (UN) has explained that the term “arbitrary” in article 9 (i) of the **International Convention on Civil and Political Rights (ICCPR)** is not only equated with detention which is “**against the law**,” but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability³⁶.

³⁴ Article 7

³⁵ Article 5

³⁶ Albert Wonnah Mukong V Cameroon, (458/1991), 21 July 1994 UNDOC CCPR/C/51/458/1991, P 12.

The practice in courts has however been very dicey in that experience has shown that some accused persons have committed more crimes whilst on bail and others temper with witnesses and thereby obstruct justice.

This therefore has led courts to become reluctant in granting bail to some accused person and in certain instances bail applications brings into play fundamental and conflicting public policy questions. The court has to decide between protection of the rights of an individual as against the possibility of an accused committing more offences and thereby endangering public safety. Usually the police officers oppose bail applications citing these reasons.

It is without doubt that remanding someone in custody pending trial is clearly contrary to the constitutional provisions relating to the presumption of innocence³⁷ and also article 13 (3) which provides that the accused who is detained as a result of a criminal offence should be released conditionally or unconditionally. This action is however without prejudice to any other proceedings that may be brought against him. I believe this includes jumping bail or interfering with the course of justice³⁸ and the accused who commits such offences can be charged with those fresh offences and in this case it can be justifiable for the court to remand the accused pending trial of all other offences. The other instance in which it is justifiable to remand an accused is when the court believes that the defendant ought to stay in custody for his or her own safety.³⁹ For instance there was a criminal case before Mr. Gona at Chingola Subordinate Court in which a step

³⁷ Supra note 24

³⁸ Section 112 Cap 87, Section 116 Cap 87

³⁹ Slapper, G & Kelly, D English Law (2000) Cavendish publishing, London P 784

mother had assaulted a child of about two years occasioning the boy actual body harm on the buttock and penis. When word went around town people gathered at court and wanted to administer instant justice. This is a perfect example in which the court would have been justified to remand the accused in custody pending trial.

On the other hand it is clearly an injustice to remand an accused in custody just because the police suspect he will interfere with the course of justice without any tangible evidence, just because he is facing a very serious offence he is therefore a probable bail defaulter.

Quoting Dicey's doctrine of the rule of law

“No man is punishable except for a distinct breach of law, established in the ordinary manner before the ordinary courts.”⁴⁰

To refuse bail to an accused involves depriving him of liberty for no distinct breach of any law as at the time he is merely a suspect who is presumed to be innocent and may not be convicted at the end of trial or even where convicted, his sentence is suspended or simply fined .

Not to grant bail to an accused person without proper evidence to support the decision is as Lord Hailsham L.C. said:

“... is to deprive them of something to which they are as it were in the sight of God who foreseeth all things, absolutely entitled.”⁴¹

⁴⁰ Phillips, O.H. & Jackson, P (1978) Constitutional and Administrative law London: Sweet & Maxwell Page 36

⁴¹ Law Guardian November 1971 P 9

Where police suspect that an accused if released on bail is likely to interfere with the course of justice they should watch such a one so that, when he indeed does that they can quickly arrest him for a fresh offence since I believe that its not every accused who is likely to do so and the issue of policeman power being outstripped by the number of accused persons on bail does not arise. Even if it were, the answer would lie in increasing the number of officers as the police service does when they receive information that UNZA students are likely to become violent. They send numerous policemen to surround the campus.

Even supposing that courts agree to remand all those accused who are suspected to be probable bail defaulters and possible interferers of the course of justice what would they do as regardless those prisoners who are likely to escape even from remand prisons?

“For the judge, in punishing, takes the rule as his guide and the breach of the rule is his reason and justification for punishing the offender.⁴²”

The judge should not therefore punish someone who has not been proved beyond all reasonable doubt to have breached any law. The expense of keeping remandees is another issue that can also work for the granting of bail because the cost is astronomic especially now that the economy of the country is very weak and the government is really struggling to fund the necessary areas in the administration of government.

⁴² Hact, H.L. A (1998) The Concept of Law, Oxford University Press, Oxford

2.7 OTHER STATUTORY PROVISIONS

The only statute that deals with bail is the **Criminal Procedure Code** popularly referred to as the **CPC**. This is a statute that provides for the procedure to be followed in criminal cases.

As regards bail it provides as follows

“where any person is arrested or detained, or appears or is brought before a Subordinate Court, the High Court or Supreme Court he may, at any time while he is custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient in the opinion of the police officer concerned or court to secure his appearance, or be released upon his own recognizance if such officer or court thinks fit:

Provided that any person charged with

- i) murder, treason or any other offence carrying a possible or mandatory capital penalty;
- ii) misprision of treason or treason-felony; or
- iii) aggravated robbery;
- iv) theft of a motor vehicle

Shall not be granted bail by either a Subordinate Court, the High Court or Supreme Court is to be released by any police officer.⁴³”

Another provision of importance in this regard is sub section four which provides:

⁴³ S 123 (i)

“Notwithstanding anything in this section contained, no person charged with an offence under the State Security Act ⁴⁴shall be admitted to bail ...”

From my understanding of the law these provisions have their source in the constitution under article 13 and 18 as explained above and I can therefore call the constitution as an enabling Act of the CPC which statute should for all intents and purposes be in conformity with the enabling Act. More so that it is the grand norm.

2.8 UNBAILABLE OFFENCES

From the construction of S123 it is clear that the provision has actually created unbailable offences under sub section 1 paragraph (i) – (iv) and also sub section 4. As for sub section 4 there is an added requirement of the DPP’s certification that it is likely that the safety or interests of the Republic would be prejudiced if the accused is released on bail.

These provisions are quite contrary to the provisions of the grand norm in articles 13 and 18 of the Bill of Rights which uses the words “a criminal offence” in sub-article 3 and “where the trial of any person for any offence ...” in sub-article (12) (d) (i). These provisions of the constitution do not discriminate as to what offence is bailable and which is not.

It is therefore my considered view that the **CPC** is inconstant with the constitution, particularly the Bill of Rights in as far as the provisions relating to bail are concerned.

⁴⁴ Cap 1 of the Laws of Zambia

This issue of bailable and unbailable offences was extensively discussed in the Case of **Oliver John Irwin V The people**⁴⁵ particularly section 123 which has created them. The Supreme Court held that the High Court has power to admit to bail in all cases including unbailable offences as long as bail applications are made in the High Court because the Subordinate Court has not power to grant bail in such cases while the Supreme Court only enjoys appellate jurisdiction. It is unfortunate that the provisions in the bill of rights were not even referred to. In fact the provisions in the BOR do not discriminate between courts and its trite law that subordinate legislation should be framed in the spirit of the enabling statute and where the two conflict the enabling statute should prevail.

2.9 GUILTY UNTIL PROVED INNOCENT

Only courts are in a position to balance between the liberty of an individual and the public interest of an accused, of course on the basis of the circumstances of each case such that it is not possible to declare in advance that this particular accused is not entitled to bail before the circumstances are known as that is tantamount to declaring such a one guilty until he proves his innocence which is unlikely and so he might as well be incarcerated. This is obviously contrary to the provisions of the BOR and the presumption of innocence.

What then should happen when there is glaring contradiction between the constitution and particularly the provisions of the **sacred** BOR?

⁴⁵ (1993 – 94) ZR 7

2.10 MULUNDIKA AND 7 OTHERS V THE PEOPLE⁴⁶

In this landmark case the Supreme Court made an unprecedented decision which states that a subordinate legislation which contravenes the constitution is null and void for unconstitutionality.

The court agreed with the argument that a piece of legislation cannot reasonably be justifiable in a democratic society when it reduced the fundamental freedoms to the level of a mere licence to be granted or denied on the subjective satisfaction of a regulating officer. The court got counsel from a Tanzania Case⁴⁷ which held that discretion must be subject to adequate guidelines and effective control and further that:

“... a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by article 30(2) of the constitution only if it satisfies two essential requirements. First, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective control against arbitrary decisions and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is necessary to achieve the legitimate object ... If the law which infringes a basic right does not meet both requirements such as law ... **is null and void**. And any law that seeks to limit fundamental rights of an individual must be **construed strictly** to make sure that it conforms with requirements otherwise the guaranteed rights under the constitution may easily

⁴⁶ (1995) ZR 20

⁴⁷ Pumbun and Another V A.G. and Another (1993) 2 L.R.C. 317

be rendered meaningless by the use of the derogative or claw back clauses of that very same constitution.”

What makes the Zambian situation worse is that the claw back is in an inferior legislation i.e. the CPC.

When we look at the provisions of article 13 (3) and (b)⁴⁸ it guarantees bail to an arrested or detained person and where conditions are attached they should be reasonably necessary to ensure that accused appears at a later date for trial. So the legitimate object of bail is that accused should appear for trial on any date he may be required by the court. The provision to S123 actually denies bail to certain accused persons so much so that the court, especially subordinate court cannot even start to entertain a bail application in these instances. Even the high court in the so called unbailable offences does not grant bail unless the trial has unreasonably delayed and the supreme court calls this “constitutional bail.”⁴⁹ This is contrary to what the proviso of S123 says and I quote

“shall not be granted bail by either a Subordinate Court , the High Court of Supreme Court ...”

From the illustrations and explanations above it is clear that S123 of the CPC contradicts the BOR and does not make adequate safeguards against arbitrary decisions because while it provides the procedure it does not provide the criteria upon which courts should base their decision whether to grant bail or not apart from the “unbailable list.”

⁴⁸ Surpa note 27

⁴⁹ Parek V The People (1993/1997) ZR 78

Arbitrariness according to the Human rights committee of the United Nations in article 9 (i) of the ICCPR, which international instrument Zambia acceded, to on 10 April 1984, is not only equated with detention which is **against the law** but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability⁵⁰.

Today, its impossible for any lawyer to predict that his client, who is in fact facing a bailable offence will be granted bail, no to mention the “unbailable.” One needs to look at newspapers to see how courts are making very diverse rulings pertaining to bail applications in criminal cases of similar circumstances.

In the case of **The People V Lt General Wilford Joseph Funjika**,⁵¹ Lusaka PRM Jones Chinyama on 20th May 2004 said he could not grant bail to the accused because **bail was not a right but a privilege that was given at the discretion of the court**. The accused had been on bail before another court and had not jumped bail. Clearly this ruling lacked reasoning or criteria not to mention the analysis of personal circumstances of the accused and the balancing of the accused’s against public interest which is very critical.

On May 25, 2004 the same PRM rejected an application for bail in another case of **The People V Lt General Sande Langeni Kayumba and Another**⁵² because the matter was transferred to another magistrate and could not follow up bail conditions. In both cases the accused were charged with bailable offences.

⁵⁰ Supra note 35

⁵¹ SSP/87/04 (still undergoing trial)

⁵² SSP/96/04 (“ “ “)

On 31st May the accused made an application before the trial magistrate (Kabwe PRM) but he also denied the accused bail without reasons. The following day he appealed to the High Court where judge Kakusa rejected the appeal without a reason relevant to the accused who had been on bail facing the same charges with Anuj Kumar Rathi who jumped bail which necessitated the state to enter a nolle prosequi so that the state could proceed with him alone. Although he rightly pointed out that “denying an accused bail is a grave decision in any civilized nation ...” he went ahead to reject the application but said the accused was at liberty to reapply. This indicates that he was convinced that the accused was entitled to bail but why he could not grant the application forthwith is still unknown.

On Thursday June 3, 2004⁵³ renown lawyer Vincent Malambo was reported as having said that:

“The right to liberty is the presumption of innocence. Bail can only be denied when there is sufficient proof that the accused will not present themselves in court. The right to liberty should presume the right to bail.”

Even though bail is granted at the discretion of the court, the court should be judicious in assessing the circumstances of the accused persons.

On June 5, 2004 Judge Phiri granted K30m bail to Lt General Snade Kayumba with four working sureties in the like sum in their own recognizance apart from other very stringent

⁵³ The Post No. 2786

conditions. In the case of **The People V Samuel Bwalya Musonda**⁵⁴, who was also charged with bailable offences, the state demanded that stiff conditions including the sum of K10 bn with 3 working sureties in their own recognizance be imposed. The Post newspaper⁵⁵ reported that Defence counsel Kapumpa said:

“The court should not make the people who have the right to bail under the constitution to suffer by imposing stiff conditionalities which do not find solace in any written law anywhere in the commonwealth.”

Lusaka PRM, Jones Chinyama again rejected the application citing the reason that some other accused persons had jumped bail. Although he did not state the reason for rejecting the application he was reported to have said Chungu had taught the court a lesson when he jumped bail. This was after Arton Shansonga had also jumped bail.

The following day Judge Thomas Ndhlovu granted Musonda K20m cash bail with three working sureties in their own recognizance in the same sum and accused to surrender his passport to the police and to be reporting to the police once every fortnight .

Judge Ndhlovu further stated:

“for the guidance of the lower court Shansonga’s case should not be the test to be applied, rather the test under normal circumstances should be whether the accused will submit to jurisdiction of the court.”

⁵⁴ SSP/99/04 (Still undergoing trial)

⁵⁵ No 2792, Wednesday June 9, 2004

This was a very important statement to the lower bench. However according to some magistrates whom I interviewed and whom I cant disclose for fear of victimization said that some High court judges grant bail in cases that are before magistrates without even entertaining the case records. Magistrates just see accused whose bail application was rejected coming from the gallery brandishing a bail form from the High Court. This does not help the lower bench as they are likely to do what they did in earlier cases as they do not understand where they went wrong. The cases in point are the **People V Bangu Kasenge** a matter which was before magistrate at Boma Subordinate Court and the **People V Ackim Daka** Case record No. SSP/110/02. This may be attributed to the fact that the provisions on bail do not provide the criteria for bail consideration.

The very following day Judge Kakusa who had on June 2 denied General Funjika bail granted him K10m cash bail with 4 working sureties in the like sum in their own recognizance. The variances in the ruling pertaining to bail applications is too wide even between High Court judges as this indicates that there is a problem regarding this area of the law.

No wonder Honourable Mr. Justice Peter Chitengi, Supreme Court Judge said:

“The ruling should not be a vacillating, it should not be a “but, if however” ruling.

The ruling must deal with the grounds for refusing bail squarely. Of late, one reads in the press rulings, granting or refusing bail, which do not give reasons reflecting the principles under which bail may be refused. The reason that bail is not granted as a

right but at the discretion of the court is not reason at all. What the accused, the prosecution and indeed the public who follow court cases, especially high profile cases, want to know is why the discretion has not been exercised in favour of the accused or the prosecution. The granting of bail should not depend on personal hunches, whims and prejudices of the adjudicators⁵⁶.

The issue of bail is very critical in the Zambian criminal justice system because of the inadequacy of logistics in the system which consequently has impacted negatively on the citizens especially the accused persons who are increasing by the day and this will take me to the next chapter which discusses the rise in crime in Zambia vis-à-vis bail.

⁵⁶ A paper presented to the Induction course for newly appointed judges and magistrates held at Siavonga, July 22 – 25, 2004. Page 6 and 10.

CHAPTER 3

3.1 Introduction

This chapter discusses the rise of crime in Zambia, the investigation of crime and the exercise of judicial discretionary power regarding bail including possible interference by the executive.

3.2 Cause of Rising Crime

Apart from the well known major cause of rural urban migration, there has been a steady rise in population which has now trebled from 1964 when the population of the country was only 3,650,000⁵⁸ to more than 10,300,000⁵⁹.

While the population has been rising the country's resources on the other hand have been dwindling. This has resulted in fewer jobs as there has not been much investment in terms of industries which in turn create jobs.

The coming of Movement for Multi Party Democracy (MMD) into power brought wholesale privatization of almost all state companies that were created by the UNIP government and most of the "investors" that bought these companies ended up closing them up and shipped all the machinery out of the country leaving many a Zambian family without a bread winner.

⁵⁸ Appendix "A" (Reported Crime in Zambia, 1963-80)

⁵⁹ Appendix "B". Demographic characteristics

After liquidating the companies and retrenching many workers a lot of people were left without sources of basic necessities of life like food, clothes and shelter . Since some of the companies opted to sell even the housing units these companies had and because the retrenched workers had not received their terminal benefits they could not buy the houses they were living in. Most workers died without getting their dues leaving their children, who also had been chucked out of school for non payment of fees without their fathers and any form of livelihood.

Aids also has made its most significant contribution taking in most cases both parents (those that were spared by depression of retrenchment) leaving children to look after fellow children who themselves had no hope of getting any jobs since they lack the required academic qualifications.

“There are no official unemployment figures but there can be no doubt that the numbers are growing. For example, in 1974 there were 367,930 persons with jobs in the formal employment sector. By 1987 this figure had actually fallen to 362,326.”⁶⁰ when we take into account mass job losses that followed after privatization, no one can be left in doubt as to how many people have no jobs.

One way or the other these people have to find a way of surviving as man by his very nature is endowed with survival instincts. So some people found themselves on streets vending while, others took to crime especially that there are no benefits available for the unemployed as it is in the west.

⁶⁰ Hatchard, J. & Ndulo, M Readings in Criminal Law and Criminology in Zambia P 78.

To make matters worse even government joined the bandwagon of retrenching workers. The reason was that government would better remunerate a lean civil service and thereby increase efficiency in the civil service as the civil servants would be motivated. After retrenchments the retrenched workers did not receive the dues as promptly as the retrenchment letters. As for the lean civil service, instead of receiving salary increments what they got was a wage freeze. The union took the matter to court where the court ordered that they be paid what was agreed upon between the union and the government. The then Minister of Finance, late Ronald Penza condemned the judgement and described it as irresponsible. Not only did he end there but actually refused to pay the civil servants and had to be cited for contempt of court and was convicted.⁶¹ This also did not help matters. This is because almost every worker in Zambia if not all workers have to support their extended family members financially. So retrenching one worker actually has a spiral effect. Less money in a workers pocket has the same effect as many people are affected. These are some of the major reasons that have led to the rise in crime in Zambia.

3.3 CRIME STATISTICS

When you look at Appendix A,⁶² the statistics, though they do not give a complete account of all crimes committed, as we all know that many offences are never reported, the figures indicate a serious increase in crime from 46967 cases to 122921 in 1980.

⁶¹ AGV Civil Servants Union of Zambia & the National union of Public Service Workers

⁶² Supra Note 56

Though the researcher was not able to obtain similar statistics for the latest years, the statistics he got which do not reflect all offences committed during the period 1999 to date from Police Service headquarters, of the offences reflected those that are to do with property also indicate an upward swing.

Although the report⁶³ does not have theft figures, generally figures relating to property are quite high for the period 1999-2004. Of the 9 offences reported rape and defilement have the least figures. This can be explained by the fact that there is no material gain in these offences whereas in murder, annually people murder others in the process of relieving them of their property. As for aggravated robbery theft of motor vehicles and stock theft this goes without saying.

3.4 INVESTIGATION OF CRIME

This is entirely undertaken by the police who usually receive a report by the complainant. The procedure takes the form of the suspect being summoned to the police station through a call-out issued by an officer who questions the suspect and if he denies he is threatened with being locked up. It is not unusual for a suspect to be told “chosa nspato” meaning take off your shoes even before being interviewed. The interview takes place the following day. Even where an investigation is conducted, this is done while the suspect is already in police custody. The researcher got this information by interviewing some people who had the misfortune of being summoned to a police station as a suspect as well as some police officers since the researcher is a magistrate and is usually in

⁶³ National Crime Statistics reported to the police for the period January 99 – August 2004 – Appendix C

contact with police officers in day to day conduct of his work especially when he signs the accused persons property book popularly known as the APP Book.

In this book, the researcher has come across cases whereby police lock up a suspect for as long as 7 days or even more and when asked why they can't bring the suspect or accused before court they say they are still investigating. At the end of it all sometimes they release him with a comment "charge refused by the police." When they are the same ones who preferred the charge in the first place. Usually in their hurry to lock up they alert the big fish behind certain crime syndicates and they end up with someone who knows very little about the crime. Its not also unusual for police to beat up suspects and even locking up their relatives on the pretext that they are "helping the police with their investigations." Such reports are all over the media every day. On 7th May 2004 there was an article in the paper "police lock up maid over Chungu's sureties"⁶⁴ Police in fact slapped her before locking her up. The poor maid did not have the slightest idea about being a surity let alone signing a bail bond for anyone. In fact some accused persons have died in police hands.

3.5 POLICE POWERS

The police have no inherent power to detain any person in order to question him or help them in their inquiries.

In the case of **RICE V CONNOLLY**⁶⁵, lord Parker said,

⁶⁴ The post No. 2759, Friday May 7, 2004

⁶⁵ (1963) 3 WLR 17 at 21

“It is in my judgement clear that it is part of the obligations and duties of a constable for keeping the peace, for preventing the crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they would at least include the duty to detect crime and bring an offender to justice ... Accordingly , the sole question here is whether the defendant had a lawful excuse for refusing to answer the questions put to him. In my judgement he had. It seems to me quite clear that though every citizen has a moral duty or if you like a social duty to assist the police, there is no legal duty to that effect and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by a person in authority and refuse to accompany those in authority to any particular place short of course of arrest.”

In the case of **MUSHINGO V THE PEOPLE**⁶⁶ the appellant was convicted of assaulting two police officers in the execution of their duty. The case proceeded on the basis that the officers had asked him to come to the police station to answer questions that he refused, that they tried to take him physically and he resisted. The Supreme Court held inter alia, that a police officer had no right to take any person to a police station against his will especially so when such a person is not arrested.

The court went on to say that however, a police officer can only take a person to the station if he decides to arrest him on a cognizable offence which does not require a warrant of arrest signed by a magistrate.

⁶⁶ (1976) ZR 214

As regards executing his duties it was held that an officer cannot be said to be executing his duty if he was exceeding his authority.

It is therefore important that the decision to arrest be effected cautiously and only when it is necessary. To this effect police should when making an arrest act in accordance with the law and should not use their discretionary powers vested in them arbitrarily and to the detriment of a citizen.

However, it is common knowledge that police who are themselves demotivated abuse suspects. It is not entirely their fault because they don't understand the rights of suspects due to lack of proper training which in turn is attributable to lack of funding.

In view of the problems an accused is subjected to while in police hands, the court which is more learned and understands the rights of an accused person should expeditiously *consider the issue of bail and relieve the accused's suffering.*

3.6 DISCRETIONARY POWER OF COURTS AND POSSIBLE EXECUTIVE INTERFERENCE VIS-A-VIZ BAIL

As already explained in the previous chapter courts have no statutory criteria to guide them exercise their discretion when deciding whether to grant bail or not. As courts try to do what they can using their knowledge, politicians also apply pressure on them so that they can toe government line. This pressure came to the fore when former vice president

openingly directed the judiciary to co-operate with government in the fight against corruption⁶⁷

This was a naked threat to the judiciary from the executive which funds it. This is clearly contrary to the doctrine of the independence of the judiciary and the doctrine of separation of powers and indeed the rule of law.

In the case of **THE PEOPLE V SAMUEL BWALYA MUSONDA**⁶⁸ Task force prosecutor Dennis Simwinga in replying to the bail application told the court that:

“my instructions were that the state was apprehensive with the attitude of some accused persons who were granted bail”

He however continued and said that:

“This is not ground enough to deny an accused bail and that he did not object to the bail application.”⁶⁹

He then asked the court for stiff bail conditions. The setting of bail conditions which the prisoner and or his sureties could not possibly meet is effectively meant to frustrate the application.

⁶⁷ The Post March 29, 2004

⁶⁸ Supra Note 52

⁶⁹ Ibid

From the conduct of the prosecutor it is clear that he was not in agreement with his client (government) but because he was under pressure from above he had to do or say what he was instructed although he knew that it was not correct.

On 3rd April 2002, the then Registrar of High Court wrote a circular directing all principal Resident Magistrates, Senior Resident Magistrates, Resident Magistrates and Magistrates in charge to decongest our overflowing prisons as there had been several articles in the local newspapers on the plight of prisoners and those in remand.⁷⁰

In the same circular she directed the addressees to ensure that magistrates in their provinces visit prisons and where possible for those in remand the issue of bail should be seriously considered..

She further said:

“Please also bear in mind the presumption of innocence. Everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law.”

This was very sound law that she propounded here as it is in conformity with the constitution. The question however is; does the Registrar have to wait for newspaper reports about the plight of remandees when every month each court through out the country submits criminal returns which is supposed to also indicate which accused persons are on bail or in custody pending bail?

⁷⁰ Circular No. 2/2002

This sounds like she was reacting to some pressure because she had the information at her disposal concerning remandies pending trial all over the country and the situation could have been administratively dealt with as and when criminal returns are received. Having looked at the criminal returns during research at the High Court, the researcher found that although these returns have a column for indicating whether accused pending trial is in custody or on bail, this column was in most cases not filled. This was applicable to most courts including courts based in Lusaka. The researcher found very few criminal returns that were properly filled by providing all the required information and that nothing has been done about it by the administration. This is an indication that these returns are never looked at.

This therefore proves that the Registrar did not rely on her source of information when she came up with the circular. With the vice president threat as indicated above and the Task force prosecutor's revelation in court I can therefore safely conclude that she was reacting to some pressure. Therefore interference by the executive in judicial functions cannot be overruled.

3.7 CONCLUSION

It is clear from this chapter that while population is on the increase, crime correspondingly is rising in the country. The investigation of crime is inhibited due to lack of logistics and other resources within the investigative wings and the kind of investigations that are carried out are not the best. Therefore the likelihood of charging a wrong person is quite high and looking at the length of trials, it is desirable that the issue of bail in our courts should be expedited in order to relieve the negative impact on innocent people.

CHAPTER FOUR

4.1 INTRODUCTION

This chapter provides a comparative study of bail laws in Zambia on the one hand and its colonial master, Britain and the United States of America whose system of democracy Zambia has taken after, on the other hand.

4.2 THE ZAMBIAN LEGAL FRAMEWORK

As already discussed in Chapter two, apart from the provisions of the constitution⁷¹ and eleven Sections⁷² in criminal procedure code which is a statute of 360 sections excluding subsidiary legislation, there is no other legislation on the subject which is a very important subject in the Zambian Criminal justice system and indeed in any other country's.

4.3 THE ZAMBIA POLICE ACT⁷³

The police who usually are the first in the criminal justice system to get into contact with suspects have no statutory direction as how to go about the issue of granting bail to an accused once charged.

The Police Act is the one that regulates the police force, its functions, and duties and the rights of the police. The researcher was surprised to find that there is no direction on the issue of bail to the police officers in the Act and was left wondering as to how police

⁷¹ Articles 13 & 18 Cap 1 of the Laws of Zambia

⁷² Section 123 – 1333 of the CPC Cap 88 of the Laws of Zambia

⁷³ Cap 107 of the Laws of Zambia

officers are expected to deal with this very important issue of bail in a coordinated and uniform manner.

The only mention of bail in the entire Police Act is that: “Notwithstanding any other law for the time being in force, no fee or duty shall be chargeable upon bail for criminal cases, recognizances to prosecute or give evidence or recognizances for personal appearances or evidence issued or taken by a police officer.⁷⁴”

4.4 THE BRITISH LEGAL FRAMEWORK

As we all know, the British legal system has no written constitution as we do here In Zambia where our systems of government is that based on the supremacy of the constitution. However the British have very strong legal framework through its statutes which ensure that peoples rights are adequately protected.

4.5 THE POLICE AND CRIMINAL EVIDENCE ACT (PACE) 1984

Since police are usually the first to come across a suspect in their criminal justice system just like ours, British police have an elaborate statute that regulates police conduct vis-avis bail popularly known as PACE. Under this Act⁷⁵, very clear directions are given. One example is as follows:

“After a person has been charged⁷⁶, a person must be released unless:

- a) his name and address are not known; or

⁷⁴ Section 19 , Cap 107 of the Laws of Zambia

⁷⁵ PACE 1984

⁷⁶ Section 38 (1) (a) of PACE 1984

- b) the custody officer reasonably thinks that his detention is necessary for his own protection; or
- c) to prevent him from injuring someone or damaging property or because he might abscond or interfere with the course of justice.

Another important provision from which we can learn is as follows:

“If bailed the condition of bail will be to return to the station on a specified future date. Similarly if the officer conducting a review of detention as required by Section 40 of the 1984 Act concludes that detention without charge can no longer be justified then he must release the detainee with or without bail⁷⁷. A similar decision must be taken at the end of 24 hours detention without charge unless the detainee is suspected of a serious arrestable offence and a senior officer authorizes his detention for up to 36 hours⁷⁸. Our Zambia Police Act does not have these important provisions and so we really cannot entirely blame a constable for detaining someone under the guise of “helping the police with investigations” for many days.

4.6 THE BAIL ACT 1976

This is the main act that regulates bail generally. It is quite an elaborate piece of legislation covering the subject. It actually declares a general right to bail of accused persons and other⁷⁹, supplementary provisions about decisions on bail, incidents of bail in criminal proceedings, conditions of bail in case of police bail, which we call police bond in Zambia. Other provisions related to reconsideration of decisions granting bail, how to

⁷⁷ Section 40 (8) a

⁷⁸ Section 4 (7) a

⁷⁹ Section 4 of the Bail Act 1976

deal with the offence of absconding by a person released on bail, liability to arrest for absconding or breaking conditions of bail. It outlines the exceptions to right to bail and actually places a duty on the court to inform the accused of right of appeal whenever bail is denied. Generally speaking the researcher found that bail is denied for example to persons who commit other offences whilst on bail and those that interfere with the course of justice and when considering the issue of bail, the court or the police have criteria in the Act to be followed as they exercise the discretion. One provision that also caught the researcher's eye is one which gives police power to arrest anyone on conditional bail whom they reasonably suspect is likely to break the conditions or that he has already done so. Anyone arrested in these circumstances must be brought before a magistrate within 24 hours. The magistrate may then reconsider the question of bail⁸⁰.

The rules which govern how someone who has been refused bail might re-apply and appeal have also been framed with a view to balancing the interests of the accused with those of the public and justice. The original refusal should not be absolute and final, but on the other hand, it is seen as necessary that the refusals are not revised too easily⁸¹.

4.7 OTHER LEGISLATION

Although the main Act covers bail proceedings in the magistrates court, **The Magistrate Court Act** also covers the subject giving powers to magistrates to remand accused in custody or on bail.⁸² Of course there are other provisions relating to the subject, **The Bail Amendment Act 1993** and the **Criminal Justice and Public Order Act 1994**

⁸⁰ Section 7 of BA 1976

⁸¹ Supra Note 12 P 786

⁸² Section 5 (1), 10 (1) & 18 (4) of MCA

(CJPOA)⁸³ were both passed in order to restrict the grant of bail in certain situations like involving people that had committed offences while on bail for other offences and others who had been bailed 10 to 15 times during the year⁸⁴.

The Criminal Justice Act (CJA) 1988 is another statute that has a stake in bail proceedings. It provides that “it is the court’s duty to consider whether the defendant ought to be granted bail at each subsequent hearing. At the first hearing after the one at which bail was first refused, he or she may support an application for bail with any arguments but at subsequent hearings the court need not hear arguments as to fact or law which it has heard before ...”⁸⁵

4.8 AMERICAN LEGAL FRAMEWORK

One of the first 10 amendments to the constitution of the United States deals with bail and it states:

“Excessive bail shall not be required, nor excessive fines ...”⁸⁶ In the United States a person accused of a crime is presumed innocent until proven guilty by judicial process. Thus, the accused must be brought before the proper officials for arraignment and in non-capital cases be permitted his freedom prior to being convicted ...⁸⁷ This was the ratio in the case of **STACK V BOYLE**⁸⁸ in which it was held: “This traditional right to freedom

⁸³ SS 25 – 30 CJPOA

⁸⁴ Supra Note 75 P 783

⁸⁵ Emerson Thomas, I. Haber David and Dorsen Norman 91967) Political and Civil Rights In The United States. P. 1794. id

⁸⁶ 342 U.S. 1, (1951), 83 Supra Note 81.

⁸⁷ Section 154 of the CJA

⁸⁸ Article VIII of the First Ten Amendments

before conviction permits the unhampered preparation of a defence, and serves to prevent the infliction of punishment prior to conviction ...”

“Most state constitutions also provide for the right to bail⁸⁹. Since the United States is a federal type of government otherwise the USA Constitution has a right to bail. According to the Federal Criminal Code and Rules, a judicial officer authorized to order the arrest of a person under section under section 3041 of this title before whom an arrested person is brought shall order that such person be released, pending judicial proceedings under this chapter⁹⁰.

Even a convicted person who has even been sentenced but has appealed is entitled to bail⁹¹. Where a person is arrested and straight away charged the rules provide for release pending trial. The provision is as follows:

“Upon the appearance before a judicial officer of a person charged with an offence, the judicial officer shall issue an order that, pending trial, the person be:

1. released on personal recognizance or upon execution or an unsecured appearance bond, under sub section (b) of this section;
2. released on condition or combination of conditions under subsection (e) of this section;

⁸⁹ Hermson Thomas, I. Haber, David and Dorsen, Norman (1967) Political and Civil Rights in the United States P. 1794

⁹⁰ Section 3141 (a) Cap 207

⁹¹ Section 3141 (b0) Cap 207

3. temporary detained to permit revocation of conditional release, deportation, or exclusion under subsection (a) of this section; or
4. detained under subsection (e) of this section⁹².

Release on condition is under sub-section (c) and factors to be considered are listed under sub section.

When an accused is released on conditions a release order is issued under subsection (b) or (c) of this section, the judicial officer shall:

1. include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and
2. advise the person of:
 - a. The penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
 - b. The consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and
 - c. Section 1503 of this title relating to intimidation of witnesses, jurors and officers of the court ...⁹³

⁹² Section 3142

⁹³ Section 3142 (h) Cap 207

The statute is so elaborate that the researcher couldn't find space to write about all the provisions relating to bail in the Federal Criminal Code and Rulers relating to bail.

4.9 CONCLUSION

From all statutory provision that have been cited in this chapter it has come out clearly and prominently that bail is a necessity in criminal proceeding due to the presumption of innocence which effectually declares an accused person not guilty until proven. This is therefore a very important procedure in criminal justice system and that is why apart from Zambia, Britain and America have very substantial and elaborate legislation covering the subject.

This has shown that Zambia as a country lacks sufficient legislative direction on the matter and thus the confusion that surrounds this procedure in our courts.

CHAPTER FIVE

5.1 RECOMMENDATIONS AND CONCLUSION

This chapter presents the summary of the whole paper and gives recommendations on the need to have our legislature revisit the law regarding our criminal justice system generally and bail laws in particular.

Finally it justifies why bail should be regarded as a human right.

5.2 RECOMMENDATIONS

Apart from the constitutional provisions relating to bail the only statutory provision that throw light on the procedure to be adopted when considering the subject are the eleven provisions in the criminal procedure code which were enacted fourteen years prior to the Universal Declaration of Human Rights in 1948 by our colonial masters on April 1, 1934. The only amendment that we have had to these provisions is not one which was meant to enhance human rights protection but was actually meant to take away the right to liberty of a suspect of a motor vehicle theft. History has shown that this provision is used to “keep away certain “undesirable” characters.” In 1934 we were a colony of Britain and the bail laws enacted then were meant to serve the interests of the colonial masters which were to suppress the native. With a bill of rights entrenched in our constitution which ensures protection of the fundamental rights and freedoms of

the individual we can't continue with a legal legacy of the oppressor in this era unless we also want to oppress our own people.

The constitution being a grand norm is not expected to provide details of how its provisions are to be enforced but these details are expected in Acts of Parliament which can be easily amended in order to match them up with the prevailing circumstances so long as these enactments and amendments are done in the spirit of the constitution as any inconsistency renders the provisions null and void to the extent of inconsistency.

Since Zambia is a party to the Universal Declaration of Human Rights and International Convention on civil and Political Rights, we should as a country enact laws with these international instruments in mind especially that our constitution is already consistent with them. We cannot continue relying on the Criminal Procedure Code bail provisions that are seventy years old in this Human Rights era

We urgently need bail legislation that should give our criminal justice system investigative wings directions on how to deal with suspects who are in their hands, how long they should be kept in police custody before they are charged and how they are supposed to deal with the issue of bail.

The various courts also need to be given guidelines in terms of criteria to use as they exercise their discretion whether to grant bail or not as leaving this to the whims and caprices of each judge and magistrate has produced unpredictability and this is contrary to the attributes of law.

5.3 CONCLUSION

The source of our bail provisions in our laws has been traced to the constitution in articles thirteen and eighteen of the Zambian Constitution in part III which is popularly referred to as the **Bill of Rights** under the title “Protection of the Fundamental Rights and Freedoms of the Individual”. The constitution says “... limitations of that protection are as contained in this part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

If an individual is not prejudicing the rights of another he is free to enjoy them.

The language used in this part is like that used in the ICCPR which is a human rights instrument.

Withdrawal of the right to liberty affects all other individual rights except the right to life which is also seriously jeopardized and may eventually end up with loss of right to life also as all human rights are interrelated.

Since bail affects all the human rights and for other reasons discussed above, this paper has clearly established that bail is a right which may only be withdrawn by a court of competent jurisdiction after a thorough judicial inquiry which should end up with a reasoned decision.

Krishna Iyer, J, observed:

“Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner’s prejudice, this court’s writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law. Then the parrot cry of discipline will not deter, of security will not scare, of discretion will not dissuade the judicial process.”⁹⁴

The judge here summarized the importance of fundamental rights, righting of wrongs and restoration of the rule of law. As a nation under the ‘rule of law and not of men’ enactment of laws that enhance the rule of law is supposed to be our priority.

⁹⁴ Charles Sobhraj V Supt. Cent. Jail Tiha Air 1978 SC 1514

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APPENDIX A

Reported crime in Zambia, 1963 – 80

YEAR	Population (000s)	Offences recorded	Crime rate	Murder		Robbery		Burglary	
				Total	Rate	Total	Rate	Total	Rate
1964	3650	46967	1286.7	242	6.6	319	8.7	7090	194.2
1965	3780	58712	1553.2	179	4.7	439	11.6	7946	210.2
1966	3894	60670	1559.6	209	5.3	545	14.0	7418	190.6
1967	4016	64220	1601.4	214	5.3	571	14.2	7814	194.8
1968	4030	75766	1880.0	274	6.7	946	23.4	8557	212.3
1969	4057	86306	2131.0	276	6.8	1316	32.4	10475	258.6
1970	4150	86810	2091.8	312	7.5	1330	32.0	10635	256.2
1971	4386	88406	2018.4	306	6.9	1488	33.9	10382	237.0
1972	4530	83321	1839.3	342	7.5	1637	36.1	10306	227.5
1973	4685	89062	1903.0	333	7.1	1754	37.4	10537	225.1
1974	4695	101641	2617.1	330	7.0	1688	35.9	11700	249.4
1975	4980	97069	1949.1	349	7.0	1431	28.7	12909	259.2
1976	5140	100882	1962.6	346	6.7	1315	25.5	15172	295.1
1977	5302	103687	1956.3	449	8.4	1676	31.6	17098	322.6
1978	5472	107785	1970.4	468	8.5	2264	41.3	19215	351.2
1979	5649	128330	2275.3	538	9.5	2250	39.8	20444	362.4
1980	5679	122921	2167.3	583	10.2	2645	46.6	20513	361.7

Source: Zambia Police Annual Reports and Monthly Digest of Statistics.

APPENDIX B

Demographic Characteristics

Selected demographic indicators, Zambia, 1980, 1990 and 2001

Indicator	Census Year		
	1980	1990	2000
Population (millions)	5.7	7.8	10.3
Density (pop./sq. km)	7.5	10.4	13.7
Percent Urban	39.9	38	36
Total fertility rate	7.2	6.7	6.0
Completed family size (Women age 45-49)	6.6	7.1	6.8
Infant Mortality Rate	97	123	110
Life Expectancy at birth			
Male	50.4	46.1	47.5
Female	52.5	47.6	51.7

Adjusted Preliminary estimate from the 2000 National Census.

Sources: Central Statistical Office, 1958a, 1985b, 19995b, and 2000b.

DIVISIONAL CRIME STATISTICS REPORTED TO THE POLICE FOR THE PERIOD JAN 99-AUGUST 04 (SOURCE: DAILY INCIDENT REPORT)

LUSAKA DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (M/V)	THEFT OF M/V	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	27	11	161	221	381				
2000	48	5	175	251	378	2		14	13
2001	30		89	116	250	3	1	6	1
2002	52	1	358	422	281	1		14	2
2003	30		212	184	116	2		8	
2004	14	10	78	42	54	1	2	6	1
TOTAL	201	27	1073	1236	1460	9	3	48	17

COPPERBELT DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (M/V)	THEFT OF M/V	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	45	26	128	18	7	1	25	18	21
2000	56	74	120	20	6		49	23	27
2001	49	12	84	11	7	8	27	16	5
2002	37	7	77	10	4		38	23	2
2003	53	4	81	7	2		60	18	1
2004	25		29	9	1	1	22	7	
TOTAL	265	123	519	75	27	10	221	105	56

CENTRAL DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (M/V)	THEFT OF M/V	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	40	10	74	5	4	30	8	48	20
2000	30	47	58	4	4	60	26	53	65
2001	16	2	60	2	3	47	7	34	7
2002	20	3	35	9	1	61	21	38	10
2003	20	1	33	5	1	35	33	29	1
2004	6		14	2	1	9	13	10	
TOTAL	132	63	274	27	14	242	108	212	103

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (MV)	THEFT OF MV	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	33	2	7			69	7	10	5
2000	28	22	11		2	99	22	28	16
2001	28	1	22		3	82	20	16	9
2002	13	3	17		1	83	26	12	4
2003	22	1	20		1	61	22	14	2
2004	1		6		1	16	12	2	
TOTAL	125	29	83	3	5	410	109	82	36

EASTERN DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (MV)	THEFT OF MV	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	31		8			17	3	3	1
2000	23	1	4		1	1	2	1	
2001	23		6		1	12	4	11	
2002	15		7			11	3	8	
2003	22		10		1	32	23	19	
2004	15		3			12	15	9	
TOTAL	129	1	38	1	2	85	50	51	1

WESTERN DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (MV)	THEFT OF MV	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	35	2	17	0	2	229	3	27	5
2000	46	0	9	0	0	120	4	27	26
2001	36	0	23	0	1	71	8	12	2
2002	25	0	12	0	0	11	5	9	5
2003	19		4	1		49	12	7	
2004	14		7			27	4	4	
TOTAL	175	2	72	1	3	507	36	86	38

NORTHWESTERN DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (M/V)	THEFT OF M/V	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	16	10	6	1	0	6	1	18	2
2000	27	10	67	1	0	17	3	19	66
2001	19	2	15	0	0	14	3	20	2
2002	20	1	7	0	0	14	2	7	2
2003	25	1	4	1	1	7	10	7	1
2004	4		1	1			1	4	
TOTAL	111	24	100	4	0	58	20	75	73

NORTHERN DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (M/V)	THEFT OF M/V	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	28	1	3	0	1	15	8	13	16
2000	38	20	5	0	0	1	4	3	13
2001	32	0	2	0	0	7	5	17	0
2002	25	1	6	0	0	3	10	17	3
2003	29	1	18			3	19	22	
2004	14		4		1	2	8	3	
TOTAL	166	23	38	0	2	31	54	75	32

LUAPULA DIVISION

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (M/V)	THEFT OF M/V	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	29	1	11	0	0	29	12	31	3
2000	25	11	6	0	1	6	13	33	47
2001	27	3	11	0	1	17	5	26	2
2002	11	1	7	0	0	9	2	21	3
2003	29		9		1	4	12	23	1
2004	9					3	7		
TOTAL	130	24	44	0	3	68	51	134	56

NATIONAL CRIME STATISTICS REPORTED TO THE POLICE FOR THE PERIOD JAN 99-AUGUST 04 (SOURCE: DAILY INCIDENT REPORT)

YEAR	MURDER	RAPE	AGG/ROB (PERSONS)	AGG/ROB (M/V)	THEFT OF M/V	S/THEFT	DIFILEMENT	ARSON	ESCAPE
1999	291	63	419	245	395	404	67	174	86
2000	322	191	459	277	392	306	125	204	275
2001	265	20	316	131	265	263	81	160	28
2002	196	18	343	284	185	194	114	142	31
2003	252	8	393	200	121	194	196	149	6
2004	103	10	145	55	58	70	82	46	1
TOTAL	1429	310	2075	1192	1416	1431	665	875	427

APPENDIX D**SAMPLE OF CASES HEARD IN THE FIRST QUARTER OF 2004 AT BOMA
SUBORDINATE COURT, LUSAKA INVOLVING BAILABLE OFFENCES**

NAME OF MAGISTRATE	NO. OF CASES FINISHED	NO. OF ACCUSED ON BAIL	NO. OF ACCUSED REMAINED IN CUSTODY	%
HON. B. SIMANGO	31	9	32	29
HON. HAMPANDE	22	4	18	17
HON. A. KONGWA	13	4	9	33
HON. L. MWANABO	15	3	12	20
HON. M. CHANDA	34	10	24	29
HONN. B. KAONGO	17	5	12	29
HON. J. CHIBALABALA	20	10	10	50
HON. C. LISITA	16	-	16	0
HON. K. LIMBANI	15	6	9	40
HON. R. MUCAHILE	14	4	10	25

N.B. On average 73% of accused await their trial in custody though they are charged with