

**AN ANALYSIS OF CIRCUMSTANTIAL EVIDENCE IN DISCHARGING  
THE BURDEN OF PROOF: A CRITICAL REVIEW OF THE ZAMBIAN  
JURISPRUDENCE**

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**BY**

**MERCY CHABU**

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**BY**

**MERCY CHABU**

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An obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelors of Laws (L.L.B)

**UNZA**

**2012**

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**AN ANALYSIS OF CIRCUMSTANTIAL EVIDENCE IN DISCHARGING THE**

**BURDEN OF PROOF: A CRITICAL REVIEW OF THE ZAMBIAN JURISPRUDENCE**

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DATE *11<sup>th</sup> May, 2012*.....

MISS MISOZI LWATULA

## ABSTRACT

This dissertation consists of the law relating to circumstantial evidence in discharging the burden of proof and has sought to criticize the Zambian jurisprudence in that regard. In order to come up with the contents herein I sought help from the institutions themselves such as the police and the courts and the roles of the aforementioned were established. The law enforcement mechanism such as the police and the courts have a big role to play to avoid convicting innocent people and must work hard in ensuring that justice is seen to be done, because in serious crimes such as murder of which the research is about, it is important to ensure that the right people are brought to justice. The paper is further seized with the task of analyzing circumstantial evidence because owing to the technicalities of the rules relating to circumstantial evidence innocent people are frequently convicted. The court must therefore ensure that they take extra attention in the evidence that is brought before them before they can convict. The police and the courts must work hand in hand with the courts to establish the truth.

It has been stated in this research that convicting someone based on circumstantial evidence alone leads to irreparable damages to the people so convicted because, it is not really established that they committed the offence that they have been charged with, and may face going away to prison for a crime they did not commit. The fact is that circumstantial evidence does not discharge the burden of proof, and since there are no equipments to use to establish the truth in Zambia it is therefore the task of the court to avoid using it to convict a person, especially in murder cases where the punishment is severe and a person may face the death penalty.

The research was qualitative and bases on both primary and secondary sources, the former consisted of interviews with the law enforcement officers such as the police and the courts while the latter consisted of the use of books, internet sources and the Constitution of Zambia.

In conclusion the study has recommended that with Government's financial assistance adequate and effective measures should be put in place to allow a conviction on circumstantial evidence in Zambia such as is the case in the American and British context as mentioned herein, otherwise until we develop our system to such an extent circumstantial evidence should not be used.

## ACKNOWLEDGEMENTS

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## **DEDICATION**

This dissertation is especially IN LOVING MEMORY of my dad Mr. Augustine Chabu whom I miss so much. Not a day goes by that I don't think of you dad, our life together was shortened by your untimely death and it is really sad that I have grown up without you but I know you are watching me from Heaven above. I just hope I have done enough to make you proud of me. I will always love you.

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## **LIST OF ABBREVIATIONS**

USA United States of America

UK United Kingdom

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## 1.0 GENERAL INTRODUCTION

Criminal law provides a framework for the state punishment of wrongdoers and thereby to preserve an acceptable degree of social order. Without criminal laws and their enforcement, each individual's person, property and family would be substantially less safe from deliberate violation by others<sup>1</sup>. Every state thus uses penal or criminal laws as a necessity in order to ensure that rights are not violated by others. However the complexity and nature of a crime requires that the criminal justice system is active, well informed and fully in place to analyze and enforce criminal laws. To enforce such criminal laws, there has to be a system of norms, set to describe standards and rules of behavior which should be followed,<sup>2</sup> so that those who depart from the prescribed or accepted standards of behavior attract a sanction. That being the case, criminal law is one branch of law which is aimed at reducing socially undesirable conduct and its purpose is to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interest.<sup>3</sup> This is achieved mainly through punishment of criminals who have gone through due process and have been found criminally liable.

Sanctions will differ from crime to crime. More serious crimes attract severe punishment compared to less serious crimes. As such causing another person's death in a culpable way is generally regarded as the most serious of the criminal offences; death is the most serious harm which may be inflicted upon another person.<sup>4</sup> Once murder is proved the person who committed it will receive capital punishment including death. It follows thus if a person is to be convicted of murder, the burden of proof has to be so high in order to ensure that only those who are guilty

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<sup>1</sup>Michael J. Allen and Simon Cooper, *Elliott and Wood's Cases and Materials on Criminal Law*, 9<sup>th</sup> edition (London: Sweet and Maxwell, 2006), 5.

<sup>2</sup>Carlton Anyangwe, *An Outline of Jurisprudence* (Lusaka: UNZA Press, 2005), 16.

<sup>3</sup>John Smith and Brian Hogan, *Criminal Law*, 11<sup>th</sup> edition (London: Sweet and Maxwell, 2005), 3.

<sup>4</sup>Michael J. Allen and Simon Cooper, *Cases and Materials*, 503.

receive the highest punishment of death. Moreover every criminal sanction reveals a harsh reality of the criminal justice system. One would assume, and correctly so, that it is because of the foregoing that in order for the court to find that the person charged with the crime is criminally culpable, great care must be adhered to. Such care includes the exclusion of some pieces of evidence such as hearsay, character evidence and circumstantial evidence.<sup>5</sup> This is so because if care is not taken innocent people may be punished by relying on falsehood, bias, mistake and or erroneous inference on the part of a witness.<sup>6</sup>

Thus unlike in civil cases where the standard of proof is on a balance of probabilities, in criminal law the standard of proof is far much higher and cases must be proved beyond reasonable doubt. This is the position in Zambia as well. Thus a court of law has to conduct its proceedings, and make its determinations, in the light of the admissible evidence which is laid before it. There are various types of evidence in a criminal trial which include direct evidence and circumstantial evidence. Circumstantial evidence is presented to the court by the prosecution and defense in an attempt to prove their version of the facts in question.<sup>7</sup> For the defendant to be convicted of the charges against him, the prosecution must present cogent and relevant evidence to the court and must prove beyond all reasonable doubt each element of the crime in question. Thus in order to establish criminal liability certain elements of the crime alleged to have been committed must be identified. The first is the conduct which is prohibited, which is the 'actus reus' which means 'the guilty act' or 'the forbidden conduct'. Secondly, the other element is known as 'mens rea'

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<sup>5</sup> David Zulu v The People (1977) Z.R 151 (SC)

<sup>6</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials* (Lusaka: Multimedia Publications, 1991), 4.

<sup>7</sup> <http://www.wikipedia.org/wiki/circum.evi.27/10/2011>

which is 'the state of mind' or 'fault' which is required in the definition of the crime in question. Mens rea is defined as 'the guilty mind'.<sup>8</sup>

Because most criminals are careful not to generate any direct evidence during the commission of a crime, courts often rely on circumstantial evidence to determine the facts of the case. Circumstantial evidence depends on the facts of the particular case and will come in separately because it is a fact that can be used to infer another fact.

In this light it is important to analyze circumstantial evidence in order to ascertain its bearing on the discharging of the burden of proof. Circumstantial evidence is defined as evidence of relevant facts (facts from which the existence or non existence of fact in issue may be inferred) and contrasted with 'direct evidence', a term which is used to mean testimony relating to facts in issue of which a witness has or claims to have first- hand knowledge. Circumstantial evidence is problematic and convicting on it creates a lot of confusion because of the potential for proving a variety of different relevant facts all of which point to the same conclusion.<sup>9</sup> Circumstantial evidence has a lot of disadvantages in that it can fail to prove the fact in issue because the inferences from the proven circumstances to the fact in issue are too speculative or too remote.<sup>10</sup> The use of circumstantial evidence requires particular attention. The possible defects of circumstantial evidence may include not only those which may occur in direct evidence such as falsehood, bias or mistake on the part of the witnesses, but also the effect of erroneous inference. The practice in Zambia has been that the incumbent trial judge should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to

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<sup>8</sup> Simon E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2006), 33

<sup>9</sup> <http://www.wikipedia.org/wiki/circum.evi.27/10/2011>

<sup>10</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials* (Lusaka: Multimedia Publications, 1991), 4.

convict, that is be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.<sup>11</sup>

In Zambia the Constitution, which is the supreme law of the land guarantees protection of the fundamental rights and freedoms of the individual.<sup>12</sup>The burden of proof lies on the prosecution in all criminal cases whose standard of proof must be beyond reasonable doubt, because once convicted a person can lose his personal liberty as guaranteed.<sup>13</sup>

It is in the view of the researcher that there is a danger in convicting on circumstantial evidence because it is very possible to have a wrong inference or conclusion and it is therefore important to note that circumstantial evidence requires special attention in order to make correct inferences. It is necessary to bear in mind that once convicted a person's right to liberty is lost, so it is only fair that all the facts are carefully considered before convicting. The purpose of evidence in courts is to prove or disprove the existence of a fact. The level of proof or evidence presented must be solid enough to convince the court that such fact is true beyond a reasonable doubt, especially in criminal trials. It is the aim of this research to analyze the effectiveness of the Zambian machinery in convicting on circumstantial evidence. The concern raised is whether the courts have addressed the law relating to circumstantial evidence with great emphasis. The fact that murder is a very serious offence calls for extra attention in ensuring that the circumstances leading to the commission of the crime are each proven beyond reasonable doubt.

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<sup>11</sup> John Hatchard and Muna Ndulo, *The Law of Evidence*...4

<sup>12</sup> Article 11 of the Constitution, Chapter 1 of The Laws of Zambia

<sup>13</sup> Article 13 of the Constitution, Chapter 1 of The Laws of Zambia

## 1.1 STATEMENT OF PROBLEM

The most pressing problem in convicting on circumstantial evidence is that on its own a conviction cannot stand without corroborated evidence. Inference from one piece of circumstantial evidence may not guarantee accuracy. Circumstantial evidence is not usually as good as direct evidence because it is easy to make the wrong inference. All the points involved in circumstantial evidence ought to be examined in order to form a correct opinion.<sup>14</sup> In every court of law judges are required to consider all available evidence before making a decision. The prosecution must generally prove their case beyond reasonable doubt and the point for this emphasis is that in a case for murder where there is severe punishment, the evidence must be so overbearing that there is no room for doubt. Circumstantial evidence must be carefully gathered and corroborated so that the evidence paints a clear and obvious picture.<sup>15</sup>

The fact is that presentation of circumstantial evidence is a skill that legal professionals must use effectively in order to successfully convince the court of their argument. If it is presented unlawfully or illogically, the prosecutor may fail in convincing the judge of the facts of the case. Circumstantial evidence must be proved beyond reasonable doubt in order to achieve a conviction. There should be a balance between the presumption of innocence, the right to personal liberty and a conviction on circumstantial evidence. Circumstantial evidence is one such evidence that should not be used without such corroboration. Practice has shown that there are no effective tools used in order to convict on circumstantial evidence, and yet the courts in certain cases convict on circumstantial evidence. It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can

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<sup>14</sup> <http://www.crimeshots.com/forums/showthread.27/10/2011>

<sup>15</sup> [http://www.wisegEEK.com/what-is-circ...l\\_evidence\\_.htm.27/10/2011](http://www.wisegEEK.com/what-is-circ...l_evidence_.htm.27/10/2011)

feel safe to convict. There is a need to look for something more than just an assumption that the person committed the offence.

## **1.2 PURPOSE OF THE STUDY**

There is need to highlight the law relating to circumstantial evidence in that because of the technicalities of the rules relating to circumstantial evidence the wrong person may be convicted. In some instances innocent people are punished for offences they did not commit due to erroneous inferences of instances. The research will evaluate whether the law relating to circumstantial evidence as applied by the *Zambian courts* is good law to serve the needs of the *Zambian society*. The need for the study is that if circumstantial evidence plays a big role on convicting a suspect in most cases, then due care should be taken to ensure that the standard of proof is safeguarded by making sure that the prosecution fully proves cases beyond reasonable doubt.

In order to convict on circumstantial evidence, the evidence must be so strong and extremely overbearing so that the circumstances relied on are only capable of one answer. The purpose of the research is therefore to examine the effectiveness of convicting on circumstantial evidence, with due regard to the *Zambian practice*. Circumstantial evidence as stated requires special and extra attention. Thus given the weight that circumstantial evidence plays in the criminal justice system, it's the objective of the research to highlight the importance of the roles that both the courts and lawyers play in ensuring that justice is served by convicting the real perpetrators of the crimes. Adequate and effective measures should be put in place to allow a conviction on circumstantial evidence in the *Zambian context*, because it is already difficult enough to establish the truth relying on circumstantial evidence alone. Thus my point is that you can convict on it but

extra special attention is required in Zambia for there are no proper equipments to be used like in other jurisdictions such as the United States of America and the United Kingdom which have equipments to help in establishing the truth of what might have occurred.

The following are some of the questions that will be considered in the research;

- (a) What is the structure of the Zambian jurisdiction with regard to the burden of proof?
- (b) Is there any relationship between the burden of proof and the need to admit circumstantial evidence by the Zambian courts?
- (c) Does the use of circumstantial evidence help in achieving the standard required to establish the truth in the Zambian criminal justice system?
- (d) How does the Zambian criminal jurisdiction treat and apply circumstantial evidence?
- (e) What deficiencies if any does circumstantial evidence have in discharging proof in the Zambian criminal cases?
- (f) What improvements if any should be made to the process of applying circumstantial evidence in discharging the burden of proof in the Zambian criminal cases?
- (g) How has circumstantial evidence been applied in other jurisdictions?
- (h) What are the inherent dangers of convicting on circumstantial evidence?

### **1.3 RATIONALE FOR THE RESEARCH**

The researcher chose to make an analysis of circumstantial evidence in discharging the burden of proof because of the nature of circumstantial evidence and its potential to resulting to serious errors. Not that the researcher is against circumstantial evidence as a whole, but only highlighting the dangers of convicting on it without really taking into account all the disadvantages that it brings with it against who may wrongfully be convicted for a crime that

they did not commit, and it is only fair that the correct offenders are brought to justice. Everyone who stands trial is innocent till proven guilty. Thus it is the duty of the prosecution to prove beyond reasonable doubt and there should be no room for doubt, in that circumstantial evidence has the potential to produce errors which may be irreparable.

#### **1.4 DEFINITION OF TERMS**

**“Actus reus”** is the element of an offence excluding those which concern the mind of the accused. It refers to the action or omission by the accused that led to the offence.

**“Burden of proof”** this is evidence which satisfies the court as to the truth of a fact. The burden to prove the facts of the case in all criminal cases lies with the prosecution.

**“Circumstantial evidence”** is a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. Circumstantial evidence is defined as evidence of relevant facts (facts from which the existence or non existence of a fact in issue may be inferred) and contrasted with ‘direct evidence’, a term which is used to mean testimony relating to facts in issue of which a witness has or claims to have first- hand knowledge.

**“Corroboration”** is independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particular not that the crime has been committed, but also that the accused committed it.

**“Inference”** is to form an opinion by reasoning. It is something that you can find out indirectly from what you already know.

**“Malice aforethought”** is an intention to kill or an intention to commit grievous bodily harm.

**“Murder”** is the unlawful and deliberate killing of a person



**“Presumption of innocence”** is a concept that underlies the law on the burden of proof. The person is presumed innocent till proven guilty.

## **1.5 SIGNIFICANCE OF THE STUDY**

In every criminal trial the law is that the suspect must be given a fair hearing, and must be presumed innocent till proven guilty. However the research has given a comprehensive historical background on how the Zambian courts treat circumstantial evidence. The significance of this study thereof is that it shall give a historical background on how the Zambian criminal jurisprudence approaches and treats the subject of circumstantial evidence. The research has highlighted and placed great emphasis on the inherent dangers of convicting on circumstantial evidence. The dangers of convicting on circumstantial evidence cannot be over emphasized. And as such this research has endeavored to highlight that great care must be taken by the court when circumstantial evidence is sought to be relied upon as the basis for procuring a conviction, for example a witness who asserts that he saw a particular person leaving a room in which the victim was brutally murdered and the witness is credible, the court infers that that particular person killed the victim when he could just be an innocent bystander. The point is that better tools such as forensic evidence must be adhered to and examined with greatness beyond reasonable doubt, because once convicted the suspect loses his liberty in all criminal cases.

## **1.6 RESEARCH METHODOLOGY**

The study will be based on both primary and secondary information. It will be qualitative and will consist of a combination of both field and desk research.

Primary will consist of interviews with the relevant authority such as the courts, the law enforcement officers at the criminal investigation. Secondary work will include the constitution,

judicial decisions, textbooks, internet sources, newspaper articles and any other relevant materials.

The research will also consider the following; what are the elements of an effective criminal justice system? What is the status and practice of the courts in relation to convicting on circumstantial evidence? Since circumstantial evidence is a form of corroboration, why convict on uncorroborated evidence in certain cases which are very serious in nature?

## **CONCLUSION**

Chapter one of the study has given a general introduction to the subject of murder and the dangers of convicting on circumstantial evidence in instances where there is no direct evidence. In this regard the chapter has given a comprehensive account on the inherent dangers of convicting on circumstantial evidence alone without being corroborated on. The chapters highlighted the statement of the problem, significance of the study, rationale and methodology of the study.

## CHAPTER TWO

### THE OFFENCE OF MURDER AND THE LAW RELATING TO CIRCUMSTANTIAL EVIDENCE

#### 2.0. INTRODUCTION

This present chapter will include a general view of the law of murder in consideration with the actus reus and the mens rea of the offence and the responses of the criminal law to conduct which causes the death of someone or contributes to the causing of death. In addition to this, it shall consist of the principle and nature of circumstantial evidence in general and also the burden and standard of proof in criminal law.

#### 2.1. THE DEFINITION OF MURDER

The law creating the offence of murder in Zambia is the Penal Code. However it does not provide a definition for murder. It just provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.<sup>16</sup> Thus it is important to rely on the definitions provided by the courts or commentators in the field of criminal law, and one such classic definition of murder is that of Coke:

“Murder is when a man of sound memory, and of the age discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king’s peace, with malice aforethought, either expressed by the party or implied by the law, (so as the party wounded, or hurt, die of the wound or hurt within a year and a day after the same).”<sup>17</sup>

Important features to note from this definition of murder by Coke may include the following;

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<sup>16</sup>Section 200 of the Penal Code, Chapter 87 of The Laws of Zambia

<sup>17</sup> John C. Smith and Brian Hogan, *Criminal law*, 9<sup>th</sup> edition (London: Butterworths, 1999), 331

- (a) By any reasonable creature to be understood as to refer to a human being and the phrase of sound memory and the age of discretion to exclude insane persons.
- (b) In rerum natura to be translated as in being
- (c) Under the King's Peace or the protection of a sovereign state, exempts from liability those who kill active enemy aliens in the heat of war and,
- (d) The killing must be unlawful.<sup>18</sup>

The law indicates in section 200 of the penal code that a person commits murder when he commits the *actus reus* of homicide with malice aforethought. It can be stated in a simple way that murder is committed when a human being kills another human being 'with the most blameworthy state of mind'.<sup>19</sup>

## 2.2 THE ACTUS REUS OF THE OFFENCE OF MURDER

It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution has proved beyond reasonable doubt both (a) that he has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. The event, or state of affairs, is called the *actus reus* and the state of mind the *mens rea* of the crime.<sup>20</sup> The *actus reus* in all murder charges must first be proved in order to establish that the crime of murder has been committed.

The *actus reus* of murder is the causing of death of another person by 'an unlawful act or omission' with malice aforethought, and can only amount to a crime when it is accompanied by the appropriate *mens rea*. The only concept known to the law is the crime; and the crime exists only when *actus reus* and *mens rea* coincide. Under the Penal Code<sup>21</sup> any person would be held guilty of murder, if that person caused the death of another person by 'an unlawful act or

<sup>18</sup> Simon E. Kulusika, *Text, Cases and Materials on Criminal Law* (Lusaka: UNZA Press, 2006), 449

<sup>19</sup> Simon E. Kulusika, *Text, Cases and Materials On Criminal Law...*450

<sup>20</sup> John C. Smith and Brian Hogan, *Criminal Law*, 9<sup>th</sup> edition (London: Butterworth publishers, 1999), 27

<sup>21</sup> Section 200 of The Penal Code, Chapter 87 of The Laws of Zambia

omission' with malice aforethought.<sup>22</sup> It is defined as the element of an offence excluding those which concern the mind of the accused.<sup>23</sup> The phrase derives from the Latin aphorism *Actus non facit reum nisi mens sit rea*. Properly translated this means 'an act does not make a man guilty of a crime unless his mind be also guilty.' It is thus not the *actus* which is *reus* but the man and his mind respectively.<sup>24</sup>

It is important at this point to state that the accused must have caused the death of the victim by his own act or omission (conduct). Usually, it must be proved that the conduct had a particular result. The *actus reus* of murder is the unlawful killing of the victim. It has to be proved that the accused caused the death of the victim. It is made up generally not invariably of conduct and sometimes its consequences and also of the circumstances in which the conduct takes place (or which constitute the state of affairs) in so far as they are relevant. Circumstances, like consequences, are relevant if they are included in the definition of the crime.<sup>25</sup>

### **2.3 THE MENS REA OF THE OFFENCE OF MURDER**

This is the state of mind expressly or impliedly required by the definition of the offence charged.<sup>26</sup> The requisite mental element of murder or "malice aforethought" is satisfied where it is proved that the accused intended to cause the death of, or grievous bodily harm to,<sup>27</sup> any person, whether such person is the person actually killed or not.<sup>28</sup> If this mental element is present, and the *actus reus* of homicide is proved, then the offence will be murder.

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<sup>22</sup> Simon E. Kulusika, *Text, Cases and Materials on Criminal Law* (Lusaka: UNZA Press, 2006), 451

<sup>23</sup> Sheila Bone, 9<sup>th</sup> ed., *Osborn's Concise Law Dictionary* (London: Sweet and Maxwell, 2001), 14

<sup>24</sup> *Haughton v. Smith* [1973] 3 All E.R. 1109

<sup>25</sup> John C. Smith and Brian Hogan, *Criminal Law* ...30

<sup>26</sup> Sheila Bone, *Osborn's Concise Law Dictionary*...250

<sup>27</sup> *R v. Vickers* [1957] 2 Q.B. 664

<sup>28</sup> Simon E. Kulusika, *Text, Cases and Materials on Criminal Law* (Lusaka: UNZA Press, 2006), 451

The doctrine of *mens rea* can be said to superimpose itself upon the *actus reus* by laying down the particular mental state, vis-à-vis each element of the *actus reus*, that the accused must have had at the time of the alleged commission of the offence.

Therefore in order for an offence to amount to murder, both the *actus reus* and the *mens rea* must coincide. Thus there must be some conduct (whether act or omission) on the part of the accused, and it must be proved that; the conduct was voluntary, in the case of acts, the accused knew that he was doing that act and in the case of omissions the accused didn't believe that he was doing what he was under duty to do. The doctrine of *mens rea* also imports an intention, knowledge, or recklessness. Where certain consequences form part of the *actus reus*, the accused must have foreseen those consequences as likely to result from his conduct. If he had the necessary foresight then it will not affect his criminal responsibility that he either (i) desired the consequences, or (ii) was indifferent as to whether they occurred or not, or (iii) did not want them.

It is also important to note that where some state of being; forms part of the *actus reus* of the offence it must be proved that the accused was voluntarily in that state, or that he was indifferent as to whether he was in that state or not.

Because it is difficult to investigate the state of a man's mind and because, wherever *mens rea* is necessary, it must be proved that the accused had a particular state of mind (such as knowledge or foresight) it follows that courts must be able to draw inferences from a person's conduct. If A shoots B from a yard away and kills him, it is reasonable to infer that A foresaw that his conduct would be likely to result in B's death. So if the prosecution proves the shooting in these circumstances, *mens rea* may be inferred and, if there is no evidence, given by the accused or

otherwise, to rebut this inference then the accused could be convicted. The facts plus inference are sufficient to either convict or acquit the accused.<sup>29</sup>

When dealing with a murder case the court must prove (a) death as a result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication, for malice may be implied where death occurs as the result of a voluntary act of the accused which is intentional and unprovoked.<sup>30</sup>

## **2.4 THE BURDEN AND STANDARD OF PROOF IN CRIMINAL LAW**

### **2.4.1 THE BURDEN OF PROOF**

The presumption of innocence is the concept that underlies law on the burden of proof. A person is presumed innocent till proven guilty.<sup>31</sup> Thus where the accused pleads “not guilty” to a charge, the prosecution is obliged to prove at the trial every fact or circumstances stated in the charge which is material and necessary to establish the offence alleged.<sup>32</sup> The presumption of innocence reflects moral and political values which are regarded as sufficiently importantly important in liberal states to elevate the rule about the burden of proof to the status of a fundamental human right. The values involved are those of the liberty, dignity and privacy of the individual. An individual’s interest in the maintenance of these of these values is invaded by a criminal prosecution, with its associated risks of the adverse publicity and degradation of the trial, the stigma of conviction and the various forms of punishment. From this standpoint the state should

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<sup>29</sup> Ian Mclean and Peter Morrish, *Harris’s Criminal Law*, 22<sup>nd</sup> edition (London: Universal Law Publishing, 2000), 51

<sup>30</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials* (Lusaka: Multimedia Publications, 1999), 27

<sup>31</sup> Article 20(2)(a) of the Constitution, Chapter 1 of The Laws of Zambia

<sup>32</sup> Ian Mclean and Peter Morrish, *Harris’s Criminal Law*...592



justify fully its invasion of the individual's interest by proof that the individual has committed an offence, thereby abusing the freedom of action accorded to him or her by the liberal state.<sup>33</sup>

The expression "burden of proof" is used in two senses in a criminal trial.

- (a) The obligation on the prosecution to prove all the facts necessary to establish the guilt of the accused. This is known as the 'persuasive' or 'legal' burden meaning the duty of persuading the court on the overall case. The legal burden is defined as the obligation imposed on a party by a rule of law to prove a fact in issue. A party who fails to discharge a legal burden borne by him on the required standard of proof will lose on the issue in question.<sup>34</sup>
- (b) The obligation of the prosecution or defense to establish the facts upon a particular issue within the overall case. In this sense it is called the evidential burden, meaning the burden of adducing evidence.<sup>35</sup> This may be defined as the obligation of a party to adduce sufficient evidence of a fact to justify a finding on that fact in favour of the party so obliged.

In criminal trials the prosecution always bears the legal burden and thus it is for the prosecution to establish the guilt of the accused to the satisfaction of the court. While the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise doubt as to his guilt; he is not bound to satisfy the jury of his innocence.<sup>36</sup> The court must be sure of the guilt of the accused.

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<sup>33</sup> Ian H. Dennis, *The Law of Evidence* (London: Sweet and Maxwell, 2002), 374-375

<sup>34</sup> A. Keane, *The Modern Law of Evidence*, 5<sup>th</sup> edition (London: Butterworths, 2000) 73

<sup>35</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials...* 22

<sup>36</sup> *Woolmington v DPP* [1935] A.C. 462

The head note of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental.<sup>37</sup> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to the defence of insanity and also to any statutory exception.<sup>38</sup>

#### **2.4.2 THE STANDARD OF PROOF**

This refers to the degree to which the burden of proof is discharged. In criminal cases the standard of proof is higher than in civil cases because sanctions under criminal law are heavier than those under civil cases. Whosoever bears the legal burden of proof in respect of a given issue must adduce evidence which attains a degree of cogency in order to succeed in that issue.

The degree of cogency required in a criminal case before an accused person is found guilty...is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted imaginary possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible, but not in least probable,' the case is proved beyond reasonable doubt, but nothing short of this will suffice.<sup>39</sup> After some initial doubt, it is well established that some standard of proof in all criminal cases is beyond reasonable

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<sup>37</sup> R v Davies [1975] Q.B. 691

<sup>38</sup> Woolmington v DPP [1935]

<sup>39</sup> Miller v. Minister of Pensions [1947] 3 All E.R 372

doubt. However when the legal burden is placed on the accused to prove any matter, he must discharge it on a balance of probabilities.<sup>40</sup>

The English law expressed in the case of *Woolmington* the right of the accused to the presumption of innocence and the imposition of a legal burden of proof on the accused was in no way derogation from the prosecutor's onus "of proving every element of the offence charged."

## **2.5 THE NATURE OF CIRCUMSTANTIAL EVIDENCE**

### **2.5.1 Definition**

This is evidence of relevant facts (facts from which the existence or non existence of a fact in issue may be inferred) and contrasted with 'direct evidence', a term which is used to mean testimony relating to facts in issue of which a witness has or claims to have personal or first-hand knowledge. Circumstantial evidence may take the form of oral or documentary evidence (including admissible hearsay) or real evidence.<sup>41</sup>

### **2.5.2 Nature of circumstantial evidence**

Both direct and circumstantial evidence are equally admissible, but it is impossible to make any absolute comparison of their cogency. If the evidence is circumstantial there is an uncertainty as to what is the correct inference. The weight of circumstantial evidence therefore, depends largely upon the number of independent facts which support the same inference, and where there are many such facts it will be as cogent as the testimony of one or two witnesses giving direct evidence.<sup>42</sup>

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<sup>40</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials*....44

<sup>41</sup> A. Keane, *The Modern Law of Evidence*...12

<sup>42</sup> Ian Mclean and Peter Morrish, *Harris's Criminal Law*, 22<sup>nd</sup> edition (London: Universal Law Publishing, 2000), .591

Circumstantial evidence is evidence of some fact not actually in issue, but relevant to the fact in issue, from which a fact may be inferred. It is evidence which requires mental process on the part of the jury or where there is no jury the judge to accept the fact and draw an inference sought by the proponent of the evidence. It is not inferior to direct evidence if the inference required is so obvious and compelling. Its weaknesses include the possibility of the witness lying or mistaken as to the facts; or if the witness tells the truth the inference drawn may be an incorrect one.

### **2.5.3 The cumulative effect of circumstantial evidence**

Circumstantial evidence, it has been said, works by cumulatively in geometrical progression eliminating other possibilities<sup>43</sup> and has been likened to a rope comprised of several cords:

One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence—there may be a combination of circumstances, no one of which may raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.<sup>44</sup>

Circumstantial evidence requires particular attention in order to make correct inferences. In *David Zulu v The People*<sup>45</sup> the accused was convicted of murder of a woman in the course of a sexual assault; the injuries found on the body suggested that she had struggled with her assailant. The evidence established that the appellant and the deceased had been drinking beer together at a bar and were seen leaving the bar together. When arrested the accused was found to have scratches on his neck and chest. He explained in evidence that the scratches were caused by flying pieces of iron at his work place, an explanation which was not rebutted. There was nothing bringing the case into the realm of conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt.

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<sup>43</sup> Per Lord Simon in *DPP v Kilbourne* [1973] A.C. 729

<sup>44</sup> Per Pollock CB in *R v Exall* [1866] 4 F & F 922

<sup>45</sup> (1977) Z.R 151

There is a general agreement that causing another person's death in a culpable way is the most serious of criminal offences. This reflects a high value society puts on each individual's life and the fact that to kill someone is the most permanent of the injuries. However this equally calls upon the need to improve on the Zambian justice system to ensure that justice is not only done but seen to be done by making sure that all the circumstances are taken into account in ensuring that the real perpetrators of crime are brought to justice. Circumstantial evidence though it may sometimes be evidence it must be narrowly examined, if only because it may be manufactured to cast suspicion on another.<sup>46</sup>

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<sup>46</sup> Colin Tapper, *Cross and Tapper on Evidence*, 8<sup>th</sup> edition (London: Butterworths, 1995), 23

## **CONCLUSION**

This chapter has examined a general view of the law relating to murder and has addressed both the mens rea and the actus reus of the offence of murder. It has also looked at the definition and nature of circumstantial evidence. The chapter has also included factors such as to who bears the burden and standard of proof in all criminal cases.

## **CHAPTER THREE**

### **THE ZAMBIAN JURISPRUDENCE ON CIRCUMSTANTIAL EVIDENCE AND THE ROLE OF THE LAW ENFORCEMENT MECHANISM**

#### **3.0 INTRODUCTION**

This chapter reviews the Zambian jurisprudence in relation to circumstantial evidence. It seeks to show that the life of someone is very important and need not be taken lightly. It places much emphasis on why it is very important that the law enforcement mechanisms in Zambia should not be too eager to convict on circumstantial evidence because of its inherent dangers, in that it creates irreparable damage. The chapter looks at the Zambian cases on circumstantial evidence in relation to murder and the weaknesses that may be detected. This will involve the defects that have been found in the decided cases upon review and will look at the roles of the law enforcement mechanism in Zambia, as to how they have treated circumstantial evidence in discharging the burden of proof.

#### **3.1 THE ZAMBIAN POSITION AND PRACTICE REGARDING CIRCUMSTANTIAL EVIDENCE**

The position in Zambia is that it is not whether there is strong circumstantial evidence, but whether the inference of guilt is the only one reasonably possible.<sup>47</sup>

‘Facts in issue’ includes any fact from which either by itself or in connection with other facts the existence, non existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceedings necessarily follows.

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<sup>47</sup> Naweji v The People (1981) ZR SCZ Judgment

Facts in issue may be proved by direct evidence or circumstantial evidence. Direct evidence is evidence which requires no mental process on the part of the trier of fact in order to draw the conclusion sought by the proponent of the evidence. In some cases it is not possible to prove certain facts in issue by direct evidence, so it may be necessary to use circumstantial evidence, that is to say evidence in which a fact in issue may be inferred. For example where a witness asserts that they saw a suspect carrying a knife with blood on it leaving a room in which the victim was found fatally stabbed. Assuming the witness is credible; a court may infer that it was the suspect who killed the victim. The weight of circumstantial evidence will vary considerably depending on each particular fact.<sup>48</sup>

### **3.1.1 THE ROLE OF THE ZAMBIAN LAW ENFORCEMENT MECHANISM**

There is little prospect of solving the fundamental causes of crime, it becomes necessary to control crime through such methods as can be worked out, and one such method is the control of crime through punishment. Punishment is simply the infliction of some form of pain or deprivation on the person of another, in this instance, by the criminal justice system.<sup>49</sup> It is important however to state that the use of punishment in society must be justified.

The criminal justice system includes the court who adjudicate and the police who not only maintain law and order but detect and prosecute violations against the criminal law set out in the laws of any given society.<sup>50</sup> The subject of crime cannot be viewed adequately without considering the position of the Zambian police force and the court. The complex and nature of a

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<sup>48</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials* (Lusaka: Multimedia Publications, 1991), 4

<sup>49</sup> John Hatchard and Muna Ndulo, *Readings in Criminal Law and Criminology in Zambia* (Lusaka: Multimedia Publications, 1994), 68

<sup>50</sup> Carlton Anyangwe, *An Outline of Jurisprudence* (Lusaka: UNZA Press, 2005), 75



crime requires that the criminal justice system should have a system in place to analyze and solve crime.

When a crime is committed it is the duty of the police to ensure that they capture the offender and bring him to the formal criminal justice system. The police play a very important role because they represent the start point of the whole criminal procedure against the suspect and it is thus important to note that it is for this reason that the police are expected to take all the necessary precaution to ensure that they have gathered all the evidence against the accused and that they have brought the right person to face the music.

Being preservers of peace and protection of life and property that they are it is only acceptable that we expect nothing less than seeing that justice is done. The police service is charged with the general responsibility of preservation of peace and the protection of life and property, the detection of crime and apprehension of offenders throughout the republic.

The role of the court on the other hand is to adjudicate, and upon the evidence given before it shall convict or acquit the accused. The court will then pass the sentence in accordance with the evidence that has been brought before it, and shall take all matters around it into account such as the seriousness of the offence committed.

This paper has endeavored to show that the police upon conducting their investigations do not pay much attention on the evidence found at the scene of the crime, in that they do not preserve the crime scene in order to avoid the evidence being tampered with, and they do not collect all necessary evidence because there are no equipments to use to investigate a case, and therefore cannot identify pieces of evidence found at the scene. And normally when a body is found the police themselves contaminate the evidence by touching the body before calling the authorities at

the homicide department and the pathologist cannot find anything due to lack of use of forensic science because of not being well equipped in Zambia.<sup>51</sup>

### 3.2 THE ZAMBIAN JURISPRUDENCE

The concern raised at this point is to whether the Zambian jurisprudence has addressed the law relating to circumstantial evidence with great emphasis. The rationale is to critically analyze the effectiveness of the courts' role in convicting on circumstantial evidence in murder cases considering the seriousness of the offence. This part of the evaluation thereof will consist of the defects found in the Zambian cases that the researcher has noted after carefully reviewing most of the decided cases to date, including the recent case of *Inonge Anayawe and Lubinda Sinjambi v The People*,<sup>52</sup> which caught the researcher's attention as to the dangerous effect circumstantial evidence has. There was nothing linking the co-accused to the murder of young Inonge who was the son of the accused. This has just shown that circumstantial evidence should not be relied upon without corroboration in that innocent people are convicted everyday based on circumstantial evidence and it is not fair because a person's liberty is lost every moment they are found guilty of an offence. The circumstantial evidence that was available in this case did not discharge the burden of proof beyond reasonable doubt. The only evidence available against the co-accused was that of the accused's son and the accused himself. The court must always warn itself against the dangers of convicting on corroborated evidence of an accomplice and a child.

The trial judge erred both in law and in fact when he decided to convict without further evidence to corroborate the testimony of father and son. The son testified that he had seen his father in the company of the co-accused on the day that his brother went missing. These are the circumstances

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<sup>51</sup> Interview with Mr. Chewe, at the Homicide Department at Central Police, conducted on 15<sup>th</sup> February, 2012

<sup>52</sup> HCZ Judgment 2010

that led the police to charge Mr. Lubinda Sinjambi with the murder. Knowing how high the penalty for murder is the court nonetheless decided to convict him based on this information. It is very possible that the child could have testified because he wanted to save his father.

The research has found that the court as well as the police would rather look at concrete evidence and only rely on circumstantial evidence if it is corroborated on by some other evidence. There is not much circumstantial evidence in our *Zambian* courts and thus there are a few decided cases regarding the subject matter. But with that being said the court still do convict on circumstantial evidence so long as it feels safe to convict on it. This is not right because as already noted it is not safe to convict on circumstantial evidence because it has inherent dangers that are irreparable and to make matters worse our forensic science is not developed to help in solving a case effectively. The following include the decided cases that have been reviewed by the researcher:

In *David Zulu v The People*,<sup>53</sup> the accused was convicted of murder of a woman in the course of a sexual assault. The injuries found on her body suggested a struggle with her assailant. She and the accused where sported drinking beer and seen leaving the bar together when arrested the accused had scratches on his neck and chest, and he claimed they were caused by pieces of iron at his work place, an explanation not rebutted.

The trial court without any evidence to support the finding, said that the appellant had protective clothing at work and thus pieces of iron could not penetrate such clothing; and consequently inferred that the scratches were sustained during the struggle with the deceased. It was held that it is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict.

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<sup>53</sup> SCZ Judgment (1977) Z.R 151

It is important to state however that wrong inferences are drawn from the circumstantial evidence that may be available to the court during trial due to the fact that the Zambian officers do not carry out thorough investigations regarding a particular matter and depend mostly on the testimony of the witness who can easily have a vendetta against the accused. The police being the key players of the law are expected to really pay attention in making sure that every case is investigated properly so that there are no mistakes, this is so because in everyday life people pay a high price by being convicted for a capital offence they did not commit all in the name of circumstantial evidence where the prosecution do not discharge the burden of proof beyond reasonable doubt.

Even though on appeal it was held that the circumstantial evidence received at the trial did not succeed in taking this case out of the realm of conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt, the first trial is where all the evidence relating to the commission of a particular offence must be properly gathered, and the trial judge erred in law by just assuming the accused was guilty without demanding for further evidence connecting the accused to the murder such as following up the accused's claim by interviewing all the workers as to whether it was possible to have such type of injuries in their line of work.<sup>54</sup>

In *Jack Chanda & Kennedy Chanda v The People*,<sup>55</sup> it was held that lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for the death of the deceased.

It has been noticed upon reviewing most of the Zambian cases that it has often been held that it is not necessary in all cases for medical evidence to be called to support a conviction for causing

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<sup>54</sup> David Zulu v The People (1977) (SC)

<sup>55</sup> SCZ Judgment 29 of 2002

death, it was stated further that except in borderline cases laymen are capable of knowing that a person has died and therefore able to give evidence of such death.<sup>56</sup> But how is that helpful in cases of circumstantial evidence? Such cases require proper attention in ensuring that the truth be reached. It is very important to always have expert help in determining what led to the death of the victim because this is the only way one would tell as to whether it was indeed the accused's action that caused such death. Before a person can be convicted of murder it is indeed the prosecutor's duty to ensure that they have proved both the *actus reus* and the *mens rea* of the accused at that particular moment beyond reasonable doubt, now how would that be done if it is not a necessity to call such medical evidence to support a conviction for causing death.

In *Mbomena Moola v The People*<sup>57</sup> the accused was linked to the offence due to a public report in that there was no direct evidence. It was held that there was circumstantial evidence on record to point to the appellant's guilt as being the only inference that it is he who had killed his father. This case clearly shows the reason why circumstantial evidence should not be used unless there is proper corroborated evidence and this has proved to be fatal because we do not have effective means to prove whether or not the accused is the culprit.

Basically the question is to why the Zambian courts use circumstantial evidence when we do not have equipments to show what really might have happened in a particular case, there is need to say that mere suspicion is not enough in such cases. There is no way such cases can prove a fact beyond reasonable doubt. How can one come to a correct inference if care is not confidently taken by investigating a crime due to the seriousness of its nature?

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<sup>56</sup> Njunga & Others v The People (1988-1989) Z.R 1

<sup>57</sup> SCZ Judgment No35 of 2000

The practice is that where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one that is more favorable or less favorable to an accused if there is nothing to exclude that inference and where there are lingering doubts, the court is required to resolve such doubts in favor of the accused.<sup>58</sup> In this case there was no evidence whatsoever directly connecting the persons who were allegedly assaulted at the market and the victim. It was argued that the findings by the court hinged on the fact that the gap between the people assaulted at the market and the body eventually discovered was filled not by direct evidence but by inferences made by the court. The accused were not found guilty because the evidence was found unsatisfactory to convict on and the inferences drawn was not supported by any further evidence. It was stated that the person to provide the linkage should have been the deceased's companion or any marketer who would have identified the body, but he was reluctant to testify and the judge rejected the marketer's evidence who claimed to have gone to see the body.

Thus the way the law enforcement in the case of *Dorothy and Richard Phiri v The People*<sup>59</sup> handled the case is how circumstantial evidence in Zambia should be handled. The court should continue being reluctant to convict on it. It has been noted however that even though the court must warn itself on convicting on circumstantial evidence they still convict even where there are gaps to be filled without asking investigators to investigate the cases carefully and examining all the evidence before bringing the matter to court.

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<sup>58</sup> Dorothy Mutale & Richard Phiri v The People (1997) SCZ Judgment

<sup>59</sup> (1997) SCZ Judgment

In *Edward Sinyama v The People*<sup>60</sup> where the appellant was sentenced to death for the murder of his wife. The judge did not allude to the warn and caution statement but referred to the rest of the evidence which was outlined and came to the conclusion that the appellant had deliberately poured kerosene on his wife and set her on fire. It was suggested that there was time and opportunity to fabricate a statement to the disadvantage of the estranged husband. This case had a lot of unanswered questions but held that there was a cogent circumstantial case when the appellant collected the deceased who rushed back shortly afterwards in a terrible state.

It has come to the attention of the researcher that circumstantial evidence being evidence not of facts in issue but that which is relevant to the facts in issue is very dangerous and simply very disadvantageous to the accused person in such a way that it is highly recommended that it should not be taken lightly. In most cases the court should not be accepting evidence of a child especially in serious offences such as murder.

In *Green Musheke Kuyewa v The People*<sup>61</sup> it was argued that the court should not have accepted evidence of a child particularly because she was present with her aunt at the time of seeing the deceased and appellant together and her aunt had not been called as a witness. It was held that there was strong circumstantial evidence in that the appellant was last seen with the deceased, that he attempted to flee from the police when asked to accompany the officer and his part played in taking the police to the body. And also that circumstantial evidence had attained such a degree of cogency the inference could not be resisted that the appellant was guilty of murder.

The question to be asked in this situation is whether the evidence in this case was a satisfactory foundation on which to rely for an inference of guilt on such a serious charge? The answer is no

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<sup>60</sup> (1993-1994) Z.R 16 (SC)

<sup>61</sup> (1996) SCZ Judgment No 8

because the evidence of a child should always be corroborated and preferably in this case with that of the aunt because she was the adult present factor at the time the child met up with the accused. The accused person has rights that are inherent to him such as right to liberty which should not be taken away from him without such justification. In another case of *David Dimuna v The People*<sup>62</sup> where the appellant was convicted of murder, evidence was adduced by the prosecution that the appellant was the last person seen with the deceased, a young child before death. When the accused was arrested he led the police to the body, a blood stained knife was found near the body but the knife was not sent for fingerprint analysis. It was unfairly held that there was circumstantial evidence and that there is no rule of law which calls for corroboration of one police witness even though the first witness is challenged and that in any event the rest of the evidence adduced by the prosecution was ample corroboration of the police witness.

This case was not fairly decided in that even though the accused was found guilty based on circumstantial evidence the fingerprints were not examined to determine whether they were that of the accused or not because just a fact that the child was last seen with the accused does not determine someone's guilt. How does one prove circumstantial evidence beyond reasonable doubt if fingerprints are not examined? It was stated that failure to lift fingerprints from the scene is a dereliction of duty by police which raises a presumption that such fingerprints as there were did not belong to the accused, presumption is rebuttable by overwhelming evidence of identification.<sup>63</sup>

For a defendant to be convicted of the charges against him or her, the prosecution must present the circumstantial evidence to the court proving beyond a reasonable doubt each element of the

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<sup>62</sup> (1988-1989) Z.R 199 (SC)

<sup>63</sup> *David Dimuna v The People* (1988-1989) Z.R 199 (SC)



crime in question. This criterion is not met with the Zambian jurisprudence in that the investigators in Zambia do not follow up on a case efficiently and just get comfortable with the evidence given by testimony of witnesses instead of investigating a case taking into consideration all the evidence found at the scene.

In *Mhango v The People*<sup>64</sup> there was no corroboration evidence but the court was apparently satisfied that the appellants were speaking the truth. It was stated that if an identification parade is not held in circumstances in which the failure to hold it is a dereliction of duty, then the court will be bound to infer that had it been held the witness would not have been able to identify the suspects but it goes too far to say that the court should draw an inference that the witness was in fact called and was able to say that the accused was not the culprit. It is the function of the prosecution to place all material evidence before the court.

Circumstantial evidence is after all any indirect evidence of a fact that helps to establish the guilt or innocence of a defendant through reasoning. In cases involving circumstantial evidence, it is up to the prosecutors to show through a set of circumstances that their theory of what happened is the only logical deduction and that the circumstances can be proved by no other theory, but this is not only unfair it is very dangerous and cruel especially when the evidence is not properly considered. Innocent people are convicted everyday all in the name of circumstantial evidence. If other jurisdictions have made mistakes by convicting the wrong people and yet they have equipments that help in investigating a matter thoroughly why should a country such as Zambia with no equipments be any better in convicting on circumstantial evidence? Circumstantial evidence has indeed the potential to produce errors which may be irreparable. Great care in most

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<sup>64</sup> (1975) Z.R 275 (SC)

cases is not taken by the court when circumstantial evidence is to be relied upon on the basis for procuring a conviction.

Circumstantial evidence normally requires a witness, such as the police officer who found the evidence, or an expert who examined it, to lay the foundation for its admission. This witness, sometimes known as the authenticating witness, is giving direct testimony, and could present credibility problems in the same way that any eye witness does.<sup>65</sup> Thus in the case of *John Nyambe Lubinda v The People*<sup>66</sup> it was stated that where a doctor is not available to produce a postmortem report it should be produced in court under the provisions of section 19(1) of the Criminal Procedure Code which makes it mandatory to admit such evidence in court. There was no such evidence whatsoever as to the cause of the death and albeit that when the body was found buried in the field suspicions arose, it is surprising that in a capital case the prosecution took no further steps to support the charge fully against the appellant. It was held that there should have been an identification parade at which witnesses should have had an opportunity to identify the person whom she saw with the deceased.

An important point to note about medical reports is that they require explanations not only of the terms used but also the conclusions to be drawn but from the facts and opinion stated in the report. It is therefore highly desirable for the person who carried out the exam in question and prepared the report to give verbal evidence.<sup>67</sup>

In *Patrick Sakala v The People*<sup>68</sup> there was no specific medical finding as to the cause of death, rather intriguing that the doctor who performed the postmortem was unable to form an opinion as

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<sup>65</sup> <http://www.wikipedia.org/wiki/c.e.27.10.2011>

<sup>66</sup> (1988-1989) Z.R 110 (SC)

<sup>67</sup> Sipalo Chibozo v The People (1981) Z.R 28 (SC)

<sup>68</sup> (1980) Z.R (SC)

to the cause of death. It is very possible that the child could have died of natural causes. The fact that the doctor who had done the postmortem was not called upon to give his expert opinion in such an important charge as murder was rather hard. It was held that the circumstantial evidence was overwhelming in that he had an opportunity and the motive. This was however not sufficient enough to allow a conviction and the courts should not have convicted the accused.

In Zambia we should not be too quick to convict a suspect based on mere circumstantial evidence provided by the witness. In *Yudah Nchepeshi v The People*<sup>69</sup> when a dismembered body was dug up it was submitted that the two witnesses had a possible interest of their own to serve and that in any event even if their evidence could be accepted without corroboration the whole of the evidence was circumstantial evidence and was not sufficient to support a conviction. It was held however that the evidence was overwhelming and displaces the presumption raised by the failure to test the axe handle for fingerprints, and it fully meets the stringent test laid in the case of *Phiri v The People*,<sup>70</sup> where it was stated that any court reasonably concluding from the disputed facts and any findings of the facts properly made by the trial court would properly certainly would have arrived at the same conclusion.

This research has found that the Zambian position and practice would also rather look at concrete evidence and that the prosecution do not frequently use it and normally reluctant to look at such cases without other evidence supporting it because of the implications of circumstantial evidence. With this it has been discovered that circumstantial evidence does not sufficiently help establish the truth in the Zambian criminal justice system because the evidence is not properly

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<sup>69</sup> (1979) Z.R 202 (SC)

<sup>70</sup> SCZ Judgment No 1 of 1978

gathered at the scene of action and even if found it is not followed up, mostly because we lack in equipments to use to investigate and thus the evidence is usually ignored.<sup>71</sup>

There are a lot of deficiencies in discharging the burden of proof because you cannot prove a matter beyond reasonable doubt if the current evidence is not paid attention to and the court usually do not go about hearing a matter on circumstantial evidence. Thus standard of proof is not good enough to rely on circumstantial evidence. The Zambian Jurisprudence has failed to look at circumstantial evidence because it is difficult to prove beyond reasonable doubt. Zambian courts are not keen to take cases on circumstantial evidence and often cases are not proved when brought to court. And the police mostly are reluctant to take the matter to court because it is difficult to prove a case.<sup>72</sup> Thus circumstantial evidence is not usually admissible in court and is usually thrown out and thus should be corroborated at all time, relying on it is not much emphasized. But in most cases the procedure regarding circumstantial evidence is usually ignored and the courts still do admit it.<sup>73</sup>

The court in Zambia even though they can convict on circumstantial evidence, they should be reluctant to do so especially in criminal cases particularly Murder cases in that the wrong person will be convicted for a murder they did not commit. The sad part is that the person who was convicted loses his liberty and the state do not even compensate for the time served in prison if new evidence surfaces proving that the accused did not commit the offence.

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<sup>71</sup> Interview with Mr. Kabwe at the Scene of Action Department at Central Police, conducted on 22<sup>nd</sup> February, 2012

<sup>72</sup> Interview with Mr. Morgan Chilikwazi at the Homicide Department Office at the Central Police, conducted on 17<sup>th</sup> February, 2012

<sup>73</sup> Interview with Mr. David Banda at the Homicide Department Office at the Central Police, conducted on the 17<sup>th</sup> February, 2012

The research has also discovered that there are a few Pathologists in Zambia who can do a follow up on the body and mostly do not form a conclusion as to how the victim died if the body has decomposed to a great extent. In cases where the police make errors as to evidence against the accused, they are the ones that pay the aggrieved person. One can only imagine spending almost a lifetime in prison for a crime they did not commit and come out after serving years but are nonetheless not compensated for it. One starts to think if there is indeed justice in this world.<sup>74</sup>

It is thus in need to say that whenever the courts admit circumstantial evidence it is important to ensure that there is no room for assumptions due to the nature of it, because it has inherent dangers. The prosecution should always submit overwhelming circumstantial evidence to prove beyond doubt that they have the right person standing trial. Circumstantial evidence is all about assumptions up to the point of holding the accused accountable for the death of the victim if at all they were guilty.

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<sup>74</sup> Interview with Mr. Mwanza at the Scene of Crime Department at Central Police, conducted on 17<sup>th</sup> February 2012

## **CONCLUSION**

This chapter has looked at the *Zambian* cases on circumstantial evidence in relation to murder and the weaknesses that have been found in the decided cases. The chapter has also looked at the roles played by the key players who are the courts and the police in this regard. It has shown that the burden of proof is not discharged in cases involving circumstantial evidence.

## **CHAPTER FOUR**

### **HOW CIRCUMSTANTIAL EVIDENCE HAS BEEN APPLIED IN OTHER JURISDICTIONS: THE DIFFERENCE IN THE APPROACHES TAKEN IN TERMS OF COMPARISON TO OUR ZAMBIAN JURISDICTION**

#### **4.0 INTRODUCTION**

This chapter will show the way other jurisdictions apply and deal with circumstantial evidence. It shall compare the Zambian jurisdiction with other jurisdictions; this is so in that the history has shown that circumstantial evidence in Zambia has not been effectively applied, thus there is need to show how other jurisdictions such as the United States of America and the United Kingdom have applied and considered circumstantial evidence as an effective way of solving a crime. This simply means that circumstantial evidence even though applied in Zambia does not discharge the burden of proof because care is not taken not only due to the fact that Zambia is underdeveloped in comparison to the United States of America and the United Kingdom, but also due to the fact that the law enforcement mechanisms do not appreciate the need to solve a case further than the disputed facts before them. Thus this chapter will look at how other jurisdictions consider and use circumstantial evidence so as to state the reasons why circumstantial evidence should not be used in Zambia as yet.

#### **4.1 THE ZAMBIAN APPROACH REGARDING CIRCUMSTANTIAL EVIDENCE**

The practice in Zambia regarding circumstantial evidence is that, the circumstantial evidence adduced in a matter should attain such a degree of cogency to take out the realm of conjecture so as to permit the inference of guilt. The incumbent judge should therefore guard against drawing

wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict.

The functions of the trial judge in relation to matters involving the law of evidence are concerned with questions of admissibility and the rules governing the production and effect of evidence.<sup>75</sup>

It has been discovered that even though the courts are reluctant to take on a case that has no direct but circumstantial evidence owing to the fact that they fear concluding on the wrong inference, nonetheless still convict on it. This is done upon the calling in of witnesses. The responsibility for proof is a single integral one borne by one party. One of these responsibilities obliges the party who desires the court to give judgment as to any legal right or liability dependent upon the existence of facts that he asserts, to produce evidence sufficient to persuade the trier of fact that the existence or non-existence of particular facts in issue is established to the requisite standard of proof; and the other responsibility obliges a party to produce some evidence to enable the trier of fact to act reasonably to find the existence or non-existence of particular facts in issue.<sup>76</sup>

Thus the prosecution as well as the defence should put forward credible witnesses who do not have a personal vendetta against the accused person. When a fact finder has to determine the weight of the evidence it will examine carefully, amongst other things, the credibility and reliability of the evidence. Credibility is most commonly used in connection with the testimony of a witness and refers to the extent to which the witness can be accepted as giving truthful

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<sup>75</sup> Peter Murphy, *Murphy on Evidence*, 9<sup>th</sup> edition (Oxford : Oxford University Press, 2005), 36

<sup>76</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials* (Lusaka: Multimedia Publications, 1991), 22



evidence in the sense of honest or sincere testimony. In accordance to the learned authors of Archbold:<sup>77</sup>

“The credibility of a witness depends upon: (a) his knowledge of the facts to which he testifies; (b) his disinterestedness; (c) his integrity; (d) his veracity; and (e) his bound being to speak the truth by such an oath as deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath the degree of credit his testimony deserves will be in proportion to the jury’s assessment of these qualities”.

In our Zambian jurisdiction the qualities or factors referred to above will be assessed by the trial judge. In addition, the credibility of a witness also depends on the demeanor during the trial. In *Machobane v The People*<sup>78</sup> it was observed by Baron J.P that:

“...Demeanor is one of the factors that should be taken into account in deciding whether a witness is worth of credit” (others being discrepancies in the witness evidence, a previous inconsistency, bad character etc), and on adverse finding as to credit is in turn one of the considerations in the decision whether to reject the evidence of the witness. But demeanor is as much an item of evidence as anything else observed by the court from which an inference or conclusions are drawn.”

Reliability on the other hand refers most commonly to the truthfulness of testimony in the sense of its accuracy in that honest witnesses may sometimes give evidence that is inaccurate.

The role of the police therefore is so important in that they are the ones that bring a suspect before the court on such evidence that they may have against him. The police must always

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<sup>77</sup> Criminal Pleading, Evidence and Practice, 2010 edition, paragraph 8-137 at 1359

<sup>78</sup> (1972) Z.R 101 at p.103

collect and evaluate the information needed for inquiry. Some procedures such as forensic science investigations require specialist qualifications and experience. Thus the police should properly gather evidence and be convinced without a doubt that they have the correct person in custody. This also means that they should provide credible witnesses and ensure that the witnesses only want to tell the truth of what they saw and not creating false stories. Inferences are dangerous because any one could have committed the offence and in most cases people are framed. This is why circumstantial evidence is not good evidence to be used against the accused especially in criminal law which provide for stiff punishment. Furthermore with circumstantial evidence one cannot be confident to the point of absolute certainty that the evidence gathered is always accurate and complete and that the court have drawn correct inferences from it.

Everyone who is charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law. This right is not only presumed under international and regional human rights instruments,<sup>79</sup> but also under national constitutions including the Zambian Constitution. The presumption of innocence contains three fundamental components; the onus of proof lies with the prosecution; the standard of proof is beyond reasonable doubt; and the method of proof must accord with fairness. Its object is to minimize the risk that the innocent persons may be convicted and imprisoned, thus losing their right to liberty.

#### **4.2 THE APPROACH TAKEN IN CASES INVOLVING CIRCUMSTANTIAL EVIDENCE IN OTHER JURISDICTIONS**

Circumstantial evidence is evidence in which an inference is required to connect it to a conclusion of fact. Inferences made from one piece of evidence (circumstantial) may not

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<sup>79</sup> R v Oakes, Supreme Court of Canada [1987], LRC (Const) p.477

guarantee accuracy. Circumstantial evidence usually accumulates into a collection, so that the pieces then become corroborating evidence. Thus corroborating evidence doesn't always have to be testimonial in that it can also be circumstantial. Together they may strongly support one particular inference over another. It goes without saying that circumstantial evidence should always be corroborated by other evidence. An explanation involving circumstantial evidence becomes more valid as proof of fact when the alternative explanations have been ruled out.

Other jurisdictions such as the United States of America and the United Kingdom use circumstantial evidence and are provided to the court before trial so the court is aware of the evidence against the accused before or during trial. Circumstantial evidence as already noted is often used as a compendious term to describe any evidence of facts relevant to the issue.

In the United Kingdom for instance there is no distinction in principle between direct and circumstantial evidence as a means of proof of facts in issue although it is recognized that circumstantial evidence may present more difficulties of evaluation. Nevertheless it is possible for even the most serious cases to be proved entirely by circumstantial evidence. For example in *McGreevy v DPP*<sup>80</sup> the defendant was convicted of murder despite the absence of a witness to the killing. The House of Lords rejected an attempt to draw a formal distinction between direct and circumstantial evidence of facts in issue. It was held that the trial judge when directing the jury in a case depending entirely on circumstantial evidence need give only the standard direction regarding the burden and standard of proof. He would therefore have to tell the jury that the prosecution had to satisfy them of the accused's guilt beyond reasonable doubt before they could convict, but there was no rule requiring him to add that the evidence not only had to be consistent with guilt but also inconsistent with any other rational conclusion.

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<sup>80</sup> [1973] 1 All E.R. 503, HL

Forensic evidence supplied by an expert witness is usually circumstantial evidence. Thus a forensic scientist who testifies that ballistics proves the defendant's firearm killed the victim gives circumstantial evidence from which the guilt may be inferred. Now the defects of circumstantial evidence are that someone else might have killed the victim using the defendant's gun but the defendant will suffer because it will be concluded that he shot the victim because of the murder weapon being his.

In some American case where *Samuel Sheppard*<sup>81</sup> was convicted for the murder of his wife and had served a ten year sentence in jail and evidence of a 3<sup>rd</sup> man being there was miraculously ignored. The case took 42 years to prove the fact that Sheppard did not kill his wife, it so happened that he died in prison without his name being cleared it was not until years later that the case was investigated further that they discovered there was a 3<sup>rd</sup> party. This case just shows why it is necessary to avoid convicting on circumstantial based evidence because innocent people are convicted and it is not a guarantee that justice is served.

The trial of *Scott Peterson*<sup>82</sup> for the murders of his wife Laci and their unborn child Conner is a classic example of a prosecution based solely on circumstantial evidence, rather than direct evidence. It was stated that circumstantial evidence is evidence which may allow a judge or jury to deduce a certain fact from other facts which can be proven, due to the fact that in certain cases such evidence cannot be proved directly such as with an eye witness. In these cases the prosecution will attempt to provide evidence of the circumstances from which the jury can logically deduct, or reasonably infer, the fact that cannot be proven directly. The prosecutor in

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<sup>81</sup> <http://crimeshots.com.forums/shortthread.23.03.12>

<sup>82</sup> <http://crimeshots.com.23.03.12>

the case of Peterson concluded that the homemade anchors found at the Peterson house were allegedly used to sink the body of his wife and a hair found on his boat was that of his wife Laci.

It is important to mention that the courts as well as the police do successfully convict on circumstantial evidence in both the United States of America and the United Kingdom but requires the circumstantial evidence to be overwhelming and take all matters into account. The judge will normally ask for further evidence from the police before he or she decides to admit such evidence. The judge will normally exercise caution and does not just receive circumstantial evidence without asking for further investigation. It can be stated that even though there is no distinction in principle between direct and circumstantial evidence as a means of proof of facts in issue, neither type is considered superior to the other it is rather recognized that circumstantial evidence may present more difficulties of evaluation. However it nevertheless is possible for even the most serious cases to be proved entirely by circumstantial evidence.<sup>83</sup>

Both the United States of America and the U.K have way developed Judicial Systems than our Zambian one, and their forensic department is very developed in comparison that it is not surprising that they tend to solve cases involving circumstantial evidence efficiently, however even if this is so they still do convict wrong people because of the nature of circumstantial evidence in certain cases. They try to fix their mistake by compensating the accused person who served time for the offence and try to ensure that they clear such a person. Thus unlike the way it is in Zambia were the State does not Compensate, these other jurisdictions ensures that the person who went away for a crime they did not commit is compensated.

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<sup>83</sup> Ian H. Dennis, *The Law of Evidence*, 2<sup>nd</sup> edition (London: Sweet and Maxwell, 2002), 8-9

Convicting someone based on circumstantial evidence without further evidence is very risky because the person convicted loses his liberty and the time spent in prison is lost and can never be replaced, with this being said it is only fair that an innocent person does not go to prison for a crime they did not commit, this is the whole reason why circumstantial evidence should not be used in Zambia because we have no equipments to use to establish the truth. By comparing the Zambian position on circumstantial evidence with other countries such as the American system as well as the United Kingdom it can be seen that in these jurisdictions the police as well as the courts risk their lives by ensuring that they have gathered all the necessary evidence required to reach a conclusion, this is done by gathering all the evidence found at the scene and investigate further without limitations in order to prove someone's innocence or guilt. The courts are reluctant to take a case unless they are sure that the circumstances do indeed implicate the suspect and do not live room for doubt owing to the fact that they have equipments that can be used to help them satisfy their suspicion.

## **CONCLUSION**

This chapter of the research compared the Zambian jurisdiction regarding circumstantial evidence with other jurisdictions such as the United States of America and the United Kingdom. It has been discovered that circumstantial evidence is not effectively applied in Zambia and there is need for an introduction of a more effective means to be put in place so as to allow the use of such evidence because it is very detrimental to the person who is convicted at the end of it all. This part of the paper has shown that circumstantial evidence is treated just the same way direct evidence is treated in these other countries such as the U.S.A and the U.K.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 GENERAL CONCLUSION**

This dissertation has given a compressive review on the law relating to circumstantial evidence and includes such recommendations that may improve the Zambian Law Enforcement Mechanism. The paper consists of the general view to the subject of murder and the dangers of convicting on circumstantial evidence in instances where there is no direct evidence. In this regard the paper has given a comprehensive account on the inherent dangers of convicting on circumstantial evidence. It has been shown that circumstantial evidence creates severe punishment to the person punished for particular offences owing to a fact that wrong conclusions are made.

By comparing with other jurisdictions, the research has shown that the application of circumstantial evidence in Zambia is not effective in that it is very difficult to establish the truth because of lack of equipments. This therefore calls for the urgent establishment of a better system to meet the requirement of a changing society. The Zambian Criminal Justice System is underdeveloped and because of this circumstantial evidence should not be used because it does not discharge the burden of proof of which the standard required is that beyond reasonable doubt, more so in a case of murder.

#### **5.1 RECOMMENDATIONS**

This paper has discussed circumstantial evidence in discharging the burden of proof and upon criticizing the Zambian jurisprudence has realized that there are a lot of defects regarding the



subject owing to the nature of it. It has been noted that even though there is need to protect society by ensuring that offenders as well as would-be offenders are locked away so as to punish them for the offences so committed, there should be a better way of gathering evidence against the accused than using circumstantial evidence against them because it is very unreasonable on the part of the law enforcement mechanism to convict on such evidence.

Use of circumstantial evidence, hearsay and character evidence should thus be abandoned because they do not prove a matter beyond reasonable doubt. It has been discovered that the law in Zambia has not developed and the legal system in Zambia is limited in its ability to address high crime levels because of inherent structural problems and resource constraints. Therefore it is the researcher's recommendation that the following measures are met in order to improve the Zambian Justice System:

- (a) It is highly recommended that use of forensic science is developed, in that even though it is a form of circumstantial evidence it nonetheless will help in proving the particulars of the offence and will ensure that the defendant or accused is cleared of the offence accused of committing
- (b) It has been observed that the current status of forensic science affects the administration of justice system in Zambia. Forensic science involves the application of scientific methods in the investigation of crimes and legal problems. This helps in the determination of whether the crime is what it purports to be. Adequate and effective measures should be put in place to allow a conviction on circumstantial evidence because merely assuming that someone committed a crime is not sufficient enough to convict on such unreliable evidence

- (c) It is recommended that the role of the police is expanded as to ensure that justice is not only done but seen to be done, thus a more effective system to be introduced to match the changing society and the police should not limit themselves to the evidence brought before them in that they should investigate further to discover if there are other suspects and should not be content with what they have in that they should explore their option
- (d) The Government should consider the possibility of financing so as to improve the Judicial System; this will enhance the country's development especially in terms of forensic science. It is envisaged that such financial autonomy would in the long run help to build an effective system which will help in achieving justice
- (e) It is recommended that the Government should help in educating a lot of Pathologists in that there are a few of them in Zambia, there is a need to promote and sponsor a lot of them that will assist in the development of medical expert witnesses who are able to provide the courts with a more detailed opinion on how a person died. These will be sufficient to decide cases especially in the absence of any direct evidence. Thus owing to the development in forensic methods old undecided cases are frequently solved in other jurisdictions. E.g. fingerprints analysis and blood analysis tend to show that the accused was not the killer.
- (f) Effective tools to be supplied to meet with the changing needs of society owing to the development of technology.
- (g) It is very important to recommend that the State should start Compensating the accused person who is convicted for an offence that they did not commit. This is so because such a person serves time for something they did not do and in the process loses their liberty.

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