

THE UNIVERSITY OF ZAMBIA

FACULTY OF LAW

Obligatory Essay

2003

OBLIGATORY ESSAY:
THE INCONSISTENCY OF THE ZAMBIAN BAIL LAW: A CRITIQUE

BY

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A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF ZAMBIA IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF
BACHELOR OF LAWS (LL.B) DEGREE.

LUSAKA, NOVEMBER 2003

THE UNIVERSITY OF ZAMBIA

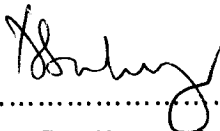
FACULTY OF LAW

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Entitled:

THE INCONSISTENCY OF THE ZAMBIAN BAIL LAW: A CRITIQUE

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



.....
Mr. Geoffrey Mulenga
(SUPERVISOR)

Date 5/12/04
.....

DEDICATION

To Mum and Dad, from whom I draw my greatest source of inspiration.

Thank you for all the faith you have in me and all the love
and support which has been given and that which
is yet to come.

ACKNOWLEDGEMENTS

Firstly, and foremost to my dear and wonderful God for letting me reach this far. Thank you for all the many blessings that you have continuously over the years blessed me with and for the courage you have given me to overcome the mini huddles that have come my way.

To my supervisor, Mr. Geoffrey Mulenga, I express my sincere gratitude and appreciation for your comments, direction, encouragement, and above all, your time during my research. May God richly bless you.

To Dr. M. Munalula for the supervision on what structure the essay would take and the timely reminders of the due date. Thank you very much.

I extend my profound gratitude to Mr. Archie Mactribouy Malie and Mr. Xavier Chungu for granting me the opportunity to interview them both and the assistance they rendered so as to make this research a reality.

My special thanks go to Mr. Elton Thawe for the support, encouragement and for the many times I would call on you for assistance. To you I am highly indebted.

To Bertha Musonda Chileshe, someone I have come to know and call a real friend. I thank God for having met you. You are not a friend anymore, you have become family.

To my siblings, Sara, Sungwe, Joseph and Dorothy. Thank you for the love and teasing. I could not ask for better set of siblings. I love you.

I further wish to salute my workmates at Co-operative League of the United States of America (CLUSA) for the assistance that was rendered to me particularly for the transport to and fro the places I was conducting interviews and for the material support. I particularly thank, my boss, Mr. Michael D. Mailloux, Mr. Stanford Lukonga and Miss Sharon Marie Chilanga.

I also like to thank all the people who were kind enough to let me interview them, and thus helped me broaden my knowledge in this area of research. Special mention of Mr. Justice Phillip Musonda and Magistrate Douglas Zulu is inevitable.

To the numerous friends whom I have failed to mention.

PREFACE

It has been said that laws have been drawn up to ensure that members of the society may live and work together in an orderly and peaceable manner, it has been argued that laws must be consistent and not be changed over so often to suit a political climate.

As outlined by C.F. Padfield in his Law Made Simple (Pg 7. 1979), one of the characteristics of the English law is that of consistency. English law is one of the world's greatest legal systems and one which Zambia has adopted; therefore it is only sensible that our laws must emulate at all times, the law that we have adopted. From the legal perspective, the bottom line is that a law must be predictable and consistent so as to stand the test of time and for it to have continuity; all this in the quest to prevent chaos and anarchy as the lack of consistency may lead to the drawing up of draconian law. The Zambian law has over the years last twelve years seen some inconsistency with regard to the law relating to The Public Order Act and the law relating to bail and the rights of the accused person.

This essay shall endeavour to show how the Zambian law regarding bail and ultimately the rights of the accused has been inconsistent and what should be done to preserve its form, age and continuity, taking into account the inherent characteristic of consistency. This under taking shall make recourse to the provisions of both the new and old laws relating to bail. In this regard decisions of the courts shall be visited.

TABLE OF STATUTES

The Constitution of Zambia, Chapter 1 of the Laws of Zambia

The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

The Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia

The Penal Code, Chapter 89 Of the Laws of Zambia

The Preservation of Public Security Act, Chapter 112 of the Laws of Zambia.

TABLE OF CASES

- Duport Steel Ltd V Sirs [1980] ICR 161
- Feliya Kachasu V The Attorney General (1967) ZR 167
- Oliver John Irwin V The People (1993/1994) ZR 7
- Re Robinson (1854) 23 L.J.Q.B 286
- The People V Xavier Chungu (Unreported)
- The People V Archie Mactribouy (Unreported)
- The People V Torkoph (Unreported)
- The People V Joyce Mananga (Unreported)
- Woolmington V DPP [1935] All E.R. 1

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CHAPTER ONE

INTRODUCTION

Criminal law is a branch of law that defines crimes and fixes punishments for them. Also included in criminal law are rules and procedures for preventing and investigating crimes and prosecuting criminals, as well as the regulations governing the constitution of courts, the conduct of trials, the organisation of the police service, and the administration of penal institutions. In general, the criminal law of most nations classifies crimes as offences against safety of the state; offences against property and offenses threatening the lives of safety of persons.

The Zambian criminal law has a number of unique features. In determining the criminal law, the governmental bodies like the police and the courts are sovereign within the limits of their authority as defined by the Zambian constitution. Underlying this principle is an identity of standpoint and tradition derived from English law, which is the origin of nearly all Zambian law. As in English law, Zambian law also classifies a crime with respect to its gravity, such as treason, into felony and misdemeanor.

In Zambia, the more serious crimes, the felonies are non bailable. These crimes include, murder, treason and other offences carrying a possible or mandatory capital penalty. In many particulars, the criminal law in Zambia is not predictable. This can be seen from the different decided cases on bail.

1.1 PROBLEM STATEMENT

On the 23rd of December 2000, Act number 23 of 2000 was assented. It became an Act that amended the Criminal Procedure Code. This Act made theft of motor vehicle non-bailable. This essay explores the reasons why the law relating to bail is inconsistent and why the new bail law was enacted. It will also show that this law is unfair and that it should be done away with. Why was this law enacted, is it a just law and does it really serve the purpose for which it was created? These and other questions will be dealt with in the essay.

1.2 AIM

The aim of this essay is to show how and why the law relating to bail is inconsistent, to show why Act 23 of 2000 was enacted and to show that bail is necessary.

1.3 HYPOTHESIS

- I. The enactment of act number 23 of 2000 was politically motivated
- II. All offences should be bailable except for those that have the mandatory death penalty.

1.4 LITERATURE REVIEW

There has been much written about the law of bail. Some of the articles that were helpful to this research were:

Anonymous. 1960 – 61. Bail - An Ancient Practice Re examined. Yale Journal

Banda Chalapuka Hilary. 1984. General Principles and Practice of the law of bail in Zambia. Student obligatory essay. Lusaka: Zambia.

Kabonga V.A.L. 1987. A Critique of Justice According to Law in the Zambian Legal System. Student obligatory essay. Lusaka: Zambia.

Mukelebai Nganda Richard. 1982. Problems of Sentencing in the Zambian Legal System. Student obligatory essay. Lusaka: Zambia.

Muluti John K. 1980. Why People Obey the Law. Student obligatory essay. Lusaka: Zambia.

Nsokolo F. 1989. An Analysis of the Principles of Sentencing Criminal Offenders in Zambia. Student obligatory essay. Lusaka: Zambia.

1.5 OBJECTIVES OF STUDY

- i. To find out the extent to which the new bail law is unjust.
- ii. To find out the nature of bail law in Zambia.

- iii. To find out the extent to which bail law is inconsistent in the Zambian Legal system.
- iv. To find out why the Act number 23 of 2000 was enacted
- v. To examine legal implications of the denial of bail
- vi. To show the inadequacy of the Zambian bail law
- vii. To make recommendations and conclusions on what should be done to improve the Zambian bail law.

1.6 METHODOLOGY

- i. The study has been conducted through interviews to be self-administered. Interviews were conducted with Police officers, Judges, Magistrates and members of the public
- ii. Books, law journals and other publications have been used
- iii. Reported case concerning bail both in Zambia and other jurisdictions

1.7 STRUCTURE OF STUDY

The essay is to have six chapters to be arranged as follows:

Chapter 1: This chapter will define the problem of study, the aim of the essay and set out what will be achieved.

- Chapter 2: This chapter will show the general principles of the law relating to bail. It will define what bail is and show the special conditions on which bail can be granted. It will also discuss the presumption of innocence.
- Chapter 3: This chapter will look at the principles of jurisprudence so that an articulate criticism may be achieved.
- Chapter 4: The law governing Bail.
- Chapter 5: This chapter will look at how bail was given to offences that were non bailable. It will try to give reasons why this was done and give a criticism to this.
- Chapter 6: This chapter will analyse Act number 23 of 2000. It will show how this law is unjust and look at some of the cases that have been affected by this new law.
- Chapter 7: The last chapter will conclude the study and give recommendations.

CHAPTER TWO

2.0 WHAT IS BAIL?

The granting of bail is considered one of the reliefs of the law. It is granted to persons who have been detained by the Police, the Drug Enforcement Commission, the Anti-Corruption Commission, the Immigration and Zambia Revenue Authority official and indeed agents of the executive wing of government. Further, it is cardinal to appreciate that private citizens, like public officials can also assume powers to detain, where there is reasonable cause to do so. Be that as it may, it is an indisputable fact that, in a majority of cases, the actual and note worthy cases of detentions end up with the Police.

The concept of bail can be defined as:

‘The process in criminal proceedings whereby a person is released from pre-trial detention by the police (after arrest without a warrant) or by the magistrates’ court or High Court on condition that he presents himself at an appointed time and place for the court hearing’,¹

Microsoft Encarta Encyclopedia defines bail as

‘The obtaining of the release from custody of a prisoner by depositing a security to guarantee the prisoner’s surrender to proper legal authorities at a given time. The security itself is termed bail or bail bond monies’

¹Curzon L.B. Pg 245. Dictionary of Law. (4th ed..1997) London: Pitman Publishing.

The accused is not by law, required to enter into recognizance, undertaking to forfeit a sum of money if he fails to appear and recognizances may also be demanded of one or more other persons, known as sureties. Technically what this means is that he is not set free but instead released from the custody of the law to that of his sureties. These sureties may, if they wish, return him before the appointed time.

Bail as already defined are sureties taken by a person duly authorized, for the appearance of an accused person at a certain day and place, to answer and be justified by law². The most frequent question asked is, who may be bail? The answer is that the bail must be of ability sufficient to answer for the sum in which they are bound.

2.1 THE PURPOSE OF BAIL

The aim of the bail law is to grant someone liberty while pending trial. This in Zambia is taken to serve two purposes. The first is that it helps decongest the prisons and secondly it gives hope and protection to the accused from what could possibly be unjustifiable or wrongful detention. It may also be granted where there is a prima facie likelihood of success or the risk that the sentence will have been served by the time the appeal is heard (in the case of an appeal to the High Court).³

²Butler and Garsia .Archbold Pleading, Evidence & Practice in Criminal Cases. Pg 534 (35th Ed. 1962).

³ Jones, Barry. A level Law. Pg 18 (2nd Ed. 1981) London: The Chaucer Press

2.2 CRITERIA AND SPECIAL CONDITIONS FOR GRANTING BAIL

The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial, as was stated in *Re Robinson*⁴ at page 286. There are certain conditions that need to be satisfied before the magistrate grants bail. The test should be applied by reference to the following considerations, these are the nature of the accusation, the nature of the evidence in support of the accusation, the severity of the punishment which the conviction will entail and lastly the whether the sureties are independent, or indemnified by the accused person⁵.

2.2.1 The Nature of the Crime

This is also known as the nature of the accusation and it refers to the gravity of the crime. This was established in the case of *R V Barronet and Allain*⁶. As shown from the foregoing discussion, it has been seen that crimes under the Zambian criminal law are divided into two categories these being felonies and misdemeanors. The court is more likely to grant bail to a person accused of a misdemeanor than the one accused of a felony. Though this is so it is still the magistrate's discretion to grant bail even in serious crimes like attempted murder, as was the case in a 1983 case recorded in the Ndola High Court. Although attempted murder is a serious crime a Police officer charged with

⁴ (1854) 23 L.J.Q.B 286

⁵ Butler and Garsia .Archbold Pleading, Evidence & Practice in Criminal Cases. Pg 475 (35th Ed. 1962)

⁶ (1852) 20 L.T. (o.s.) 50

this offence was released on bail and magistrate Lungu justified the release by saying:

'I have looked at Section 33(1) of the Criminal Procedure Code and this case is not punishable by death and therefore it is bailable. I have not lost sight that it is a serious offence and that the court should not freely grant bail to persons charged with such offences as we have been urged by the Registrar of the High Court. However, each case should be treated on its own merits and the question is whether the accused will be a danger to society if he is left at large. I'm sure if he was going to be, his two senior officers who are not his relatives can not stand as sureties. I have also looked at the accused; he does not seem to possess a vicious disposition. I have therefore exercised my discretion and granted the accused bail in the sum of K1, 000 in his recognizance plus two sureties in the like sum'⁷.

It is submitted that the magistrate had too wide a discretion to have decided to grant bail to the police officer. This is because the police officer clearly had a vicious disposition a consideration, which may suggest that he could still be a danger to society. The nature of the crime is that of a felony according to section 215 of the Penal Code ⁸ and therefore the police officer was not eligible to be granted bail.

2.2.2 Previous Conviction and Likelihood to Repeat Offence

Persons who have had previous convictions may not be granted bail. This is because governments usually want to make a tough regime against hardened recidivist criminals.

⁷ The People V Mumba (unreported) 19 83

⁸ Chapter 87 of the laws of Zambia

In New Zealand, parliament passed a new bail law that targets hard-core offenders who have had 14 or more previous custodial sentences. The statistics show that such offenders have an 80% to 90% chance of re offending while on bail⁹.

The past law in that country saw Police having to persuade the court that these hardened criminals should not be bailed. The new bail law reverses the onus of proof, where the alleged offenders will have to prove the courts that they are safe to be released back into the community. The essence of this law is to create a safer society and a stronger more effective Police force in New Zealand.

2.2.3 Punishment likely to be Imposed

If for example the punishment likely to be imposed on the offender is that of death or life imprisonment, the courts may not grant bail to the accused. People who have been accused of serious crimes can be denied bail even if they are not considered a continuing threat to public safety and are not likely to flee before trial, a badly split Supreme court of Canada ruled¹⁰.

⁹ www.scoop.co.za: New bail law continues to crack down on criminals

¹⁰ www.fact.on.ca: Supreme Court of Canada upholds bail law. David Hall Case of 1999

The judgment grew out of a brutal 1999 slaying in Sault Marie, Ontario that sparked intense media coverage and public concern. David Hall, a 29 year old supermarket meat cutter, was eventually convicted of second degree murder and sentenced to life in prison in the death of his cousin's wife, Peggy Jo Barkley-Dube.

Hall's conviction was not at issue before the Supreme Court. The case centered on the way he was denied bail while waiting trial, a decision with potential ramifications for others accused of serious offences.

Chief Justice Beverly McLachlin, writing for the majority, noted Hall's crime was 'heinous and unexplained'; there was strong preliminary evidence against him and 'people in the community were afraid'¹¹. She upheld the broad power of judges to deny bail in such circumstances to maintain public confidence in the justice system and 'prevent unrest and vigilantism'.

Justice Frank Lacobucci, writing for the minority, said Hall could have been detained on other less controversial legal grounds. He condemned the Criminal Code provisions that the bail judge relied on, saying it is overly broad, open to abuse and undermines the basic right to be presumed innocent until proven guilty.

This judgment seems to be fair because of the nature of the crime. Bail should not be granted in cases that are felonies.

¹¹ Ibid

2.2.4 Other Conditions

These conditions may (but not must) be refused bail if they have previously failed to surrender to bail in criminal proceedings and the court believes that they would again do so and also if having been released on bail, they have been arrested for absconding or breaking conditions. The accused can be denied bail if the court is satisfied that he should be kept in custody of their own protection.

2.3 BAIL: RIGHT OR PRIVILEGE?

Presumptions of law consist of these rules, which in certain cases forbid or dispense with further inquiry¹². These fall into two classes – disputable and conclusive presumptions. The former are presumptions that can be rebutted by evidence sufficient to displace them and the latter are presumptions that are absolute, and cannot be rebutted by any evidence. It is the disputable presumption that this paper is concerned with. Included in these presumptions are the presumptions that a person intends the natural and probable consequences of his act, that a child between the ages of eight and fourteen cannot commit crime, *Omnia praesumuntur rite esse acta*, *Ignorantia juris non excusat* and the presumption of innocence¹³.

¹² Butler and Garsia .Archbold Pleading, Evidence & Practice in Criminal Cases. Pg 475 (35th Ed. 1962). Sweet and Maxwell.

¹³ Ibid

The presumption of innocence is the most important of the disputable presumptions and is the maxim '*semper praesumitur pro negante*' or that the burden of proof lies on the person who affirms a fact. Though this is so the presumption is easily rebutted by proof of acts tending to show guilt, and when these acts are wrongful and not accidental a presumption of malice or criminal intent arises.

There is a general right to bail and if it is refused, reasons must be given. This is because there is the presumption of innocence.

Article 18 (2)(a) of the constitution of Zambia states that every person who is charged with a criminal offence is presumed innocent until he is proved or he has pleaded guilty.

'(2) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proven or has pleaded guilty¹⁴.

This presumption is rebuttable only by the accused's unequivocal admission of his guilt or by the prosecutor proving his guilt beyond all reasonable doubt as per *The Woolmington*¹⁵ case. This case illustrates the principle of burden of proof resting on the prosecution. Viscount Sankey L.C. stated that:

'In every charge of murder, the fact of killing having first proven, all the circumstances of the accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have founded in malice until the

¹⁴ Chapter 1 of the Laws of Zambia

¹⁵ *Woolmington V DPP* [1935] All E.R. 1

contrary appeareth. And very right it is, that the law should not presume. The defendant in this instance standeth upon just the same foot that every other defendant doth; the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them'

The presumption of innocence is an aspect of human rights and is basic in any good system of criminal justice. One is innocent until he can be proved guilty before a competent court. The seriousness of the matter surfaces in the event that bail is denied to the accused, because it means confinement of a person before his conviction. This ultimately means that there is no justice as sentence is passed before a trial is held.

It has however been argued that denial of bail to an accused is necessary because it upholds the State's interest which is to preserve life and property by ensuring that the accused will appear to stand trial. Some people further that confinement of the accused is the only guarantee that he will face his trial. Those that activate for the abolition of the presumption of innocence, advocate that the presumption should not be given full effect but should be subject to the overriding interest of the State.

'if the presumption of innocence is given full effect, all persons ought to be unconditionally released before trial. But countervailing consideration has limited the scope accorded to the presumption. The state must make sure that the accused will appear for trial'¹⁶.

But on the other hand, we may argue that, on the basis of the presumption of innocence, the accused should not be subjected to punishment by being deprived of his right to personal liberty before he is convicted, and therefore ought to be

¹⁶Anonymous. 1960. Bail – An Ancient Practice Reexamined. Yale journal.

released, otherwise the presumption is of little or no meaning to the attainment of justice.

The wording in section 123 of the Criminal Procedure Code seems to suggest that bail is a privilege. This to many seems right and they conclude that it is only a right if it is constitutional bail that is being sought. Constitutional bail is provided for by Article 13 (2) (b) of the Constitution¹⁷ which provides that if a person is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released unconditionally.

This chapter has outlined the principles of bail, giving the basic grounds on which it may be granted or denied and the purpose of bail. It has also looked at the doctrine of presumption of innocence and that unlike what is commonly perceived by many, namely that bail is a privilege, there exists a right to bail provided for the accused. It has also been shown that if bail is denied by the magistrate's court, the accused should be informed of his right to appeal for bail in the High Court. The next chapter will proceed to show the principles of jurisprudence so that an articulate criticism of the bail law may be achieved.

¹⁷ Chapter 1 of the Laws of Zambia.

CHAPTER THREE

To understand the reasons and the way bail law operates, it is imperative to know what law generally is. It is for this reason that this chapter will look at what law is and the purpose it serves. This will help in understanding why bail exists and what it sets out to do.

3.0 WHAT IS LAW?

The answer to this question will consist of the meaning or meanings of law, that is, an account of its essential or basic characteristics, as conceived by many of the jurists.

Holland defines law as:

‘A law is a general rule of external human action enforced by a sovereign authority’¹⁸

This means that law is any general rule that controls human action enforced by a sovereign political authority.

On the other hand Aristotle as quoted in Patterson’s Jurisprudence¹⁹ defines law as reason without desire but this is not reversible as it does not imply that anything that has reason without desire is law.

¹⁸ Holland T. Jurisprudence. Pg 40 (10th Ed. 1906) London: Oxford University Press

¹⁹ Patterson, E. Jurisprudence. Pg 69. (2nd Ed. 1953) Brooklyn: The foundation Press

Curzon²⁰ defines law as the written and unwritten body of rules that are largely obtained from custom and formal enactment which are recognized as binding among the people who make up a community or a state, so that they will be imposed upon and enforced among those people by appropriate sanctions.

Lord Scarman²¹ in the case of *Duport Steel Ltd V Sirs*²² stated that law is a body of rules that and guidelines within which society requires its judges to administer justice. The concept of justice will be dealt with in the next part of this chapter. However it is important to mention that an ideal concept of law is one which defines or characterizes law by requiring that it conform to certain ideal standards in order to be qualified for admission to the law. One who adopts this conception does not merely say that every law ought to be just or good but he asserts that any rule or enactment which does not so conform is unworthy to be deemed law and therefore is not law²³.

3.1 THE PURPOSES OF LAW

3.1.1 The fulfillment of interest

The American jurist Roscoe Pound (1870 – 1964) viewed law as a form of social engineering, whose function it is to maximize the fulfillment of the interest of the community. He defined an interest as:

²⁰ Curzon L.B. Pg 219. Dictionary of Law. (4th ed., 1997) London: Pitman Publishing.

²¹ Ibid

²² [1980] ICR 161

²³ Holland T. Jurisprudence. Pg 68 (10th Ed. 1906) London: Oxford University Press

'Any demand or desire or expectation which human beings, either individual or in groups seek to satisfy'²⁴

Pound divided these interests into three categories. These interests were individual, public and social interests.

The individual interest involves claims related to an individual's life and comprises interests of personality for example the protection of physical integrity; freedom of will, honour and reputation, privacy, belief and expression; freedom from deception; free choice of location, domestic relation and subsistence- livelihood, property and freedom to carry out enterprises and make contracts.

Public interest involves claims related to the necessities of public life and comprises interest of the state considered by the juristic person for example the freedom of action and as 'guardian of social interest'²⁵.

Social interests involve claims of the social group constituting the community and comprises first general security which encompasses security of peace and order, health and safety, transactions and acquisition; secondly security of social institutions which comprises domestic, religious, political and economic; thirdly general morals and fourthly general progress which emphasizes the self assertion of the social group towards higher and more complete development of human powers. Other social interests are that of individual life and the conservation of social and human resources.

²⁴ Jones, Barry. A level Law. Pg 2 (2nd Ed. 1981) London: The Chaucer Press

²⁵ Holland T. Jurisprudence. Pg 64 (10th Ed. 1906) London: Oxford University Press

It is the category of individual interests that the law of bail belongs as it strives to grant the accused liberty.

Pound believed that interests should exist independently of the law that they seek recognition and security and the law satisfies as many as it can. However, not all interests are fully recognized by Zambian law. An example of this is the right to bail, which is seen as a privilege.

3.1.2 THE MAINTENANCE OF SOCIAL ORDER

Bail as part of law, helps to maintain social order. Confining an accused in incarceration attains this order. This means that he or she is unable to threaten the victim and his family; and that he is not a threat to society, in that the likelihood of the accused committing a crime is minimal.

Every society constitutes a set of human arrangements whereby life is ordered and sustained. In different societies such arrangements are not identical, as they manifest a wide, and often contradictory, range of cultural values. In relatively small groups social control is exercised with minimal resort to formal agencies. The desires to achieve acceptance by one's peers and to avoid ostracism, ridicule or gossip can be coercive mechanisms—with the resultant paradox that the individual may be most effectively controlled in that group in which he feels most free. Growth in population size creates the need for authority (i.e. legitimate power attached to office, invoking respect, submission or reverence accorded to those who represent the office) and

also law. The latter still remains only one technique of social control and, in addition to the resolution of conflict, it has dual functions:

3.1.2.1 The control of harmful activities.

Bail is one of the expedients by which the law attempts to restrain any accused person from engaging in activities detrimental to societal interest. As a marker of boundaries of "acceptable conduct" the law provides sanctions for breaches thereof and the purpose of these may be deterrent, reformatory or preventative (i.e. precluding the commission of further offences). The legal control of activities defined as "harmful" embraces: offences against the person, offences against property and offences against the state.²⁶

3.1.2.2 The protection of freedom.

The maintenance of social order must be reconciled with the preservation of individual freedom, an objective sought by most people and consequently deserving of legal protection. It is, however, difficult to interpret as it is a normative word and valuatinal in concept - since preference for one particular system, as offering greater freedom than others, stems from the fact that it is free in those things which the observer values most. This concept includes bail law which sets the accused 'free' until the trial date. So if the aim of the bail law, then it is only logical that a bail law be just and one that is consistent so as to stand the test of time. There is a tension between

²⁶ Jones, Barry. A level Law. Pg 13 (2nd Ed. 1981) London: The Chaucer Press

the demands of individual freedom on the one hand and that of social interest in ensuring that society is rid of dangerous elements on the other. Bail is a right and therefore must be given to the accused no matter how heinous the crime he has been accused of. This is because the accused is innocent until he has been proven guilty as per Article 18 (2) (a) which provides that every person who is charged with a criminal offence shall be presumed to be innocent until proven guilty.

3.1.2.3 The concept of justice

Justice, the ultimate goals towards which the law should strive, is but one segment of morality because, although unjust acts such as unjustifiably punishing a one child more severely than another, may be considered immoral, the converse is not true and immoral act such as cruelty to children, can not be described as unjust²⁷. "Fairness" is the closest synonym to justice, a vital function of which is the attainment of equality. Lawyers who subscribe to the doctrine of positivism are concerned only with the fairness of the legal process and whether a law derives from a valid source for example statute and precedent; but not whether it is just or unjust²⁸.

Laymen, however, are more prone to examining the outcome of the case and its accordance with a subjective common sense view of fair play. Thus it is necessary to distinguish between:

²⁷ Patterson, E. Jurisprudence. Pg 109. (2nd Ed. 1953) Brooklyn: The foundation Press

²⁸ Jones, Barry. A level Law. Pg 7 (2nd Ed. 1981) London: The Chaucer Press

a) The concept of formal justice which implies fairness in the application of the law and in the conduct of trials, whereby like cases are treated alike under existing rules which are impartially and generally applied. There must be equality of treatment to the parties – but this does not mean that all person should be treated similarly, regardless of individual differences – because, where necessary, allowance must be made for mental incapacity or minority, etc²⁹. It means that rather that everyone classified as belonging to the same category for justice does not prescribe how such classification should be made. This principle will be applied in the next chapters that will look at the cases regarding bail law.

b) The concept of substantive justice fairness in the substance of the law and in the outcome of trials, but it is simply an observer's subjective impression. As suggested by lord Lloyd, there are possibly two ways in which a legal system might aspire to attain substantive, as well as formal, justice:

1) The infusion of flexibility. A basic problem in law is the need to reconcile two opposing requirements—uniformity and flexibility. The former is necessary to provide certainty and predictability, whereas the latter is desirable because no rule can provide for every possible case. Sentencing is only one area where totally rigid rules would be wholly inappropriate. For example, formal

²⁹ Ibid

justice may prescribe that everyone convicted for a particular offence shall be fined, but substantive justice might lead to a variation of fines, dependent upon the wealth of the offender, so that the legal sanction has an equal effect on all. Flexibility also enables the law to adapt itself to social change; as a society alters, so do its needs and the legal system should take account of new social, economic and political requirements.

- 2) The embodiment of value-judgments in a constitution. States which are newly established, or which lack a reasonably homogeneous population with generally accepted values, may need the incorporation of certain principals (relating, for example, to essential human rights) in a formal constitution³⁰.

“The value of this approach is not only that it makes explicit some of the underlying assumptions of the legal system, but also that it may render these into obligatory and overriding legal norms capable of being enforced by legal process”³¹

From this chapter it has been shown that the law aims at fulfilling of interests which include individual, public and social interests. It also aims at maintaining social order and tries to achieve justice. It has been seen that the law in its quest to achieve justice must be flexible but also must be consistent so as to stand the taste of time.

³⁰ Jones, Barry. A level Law. Pg 3 (2nd Ed. 1981) London: The Chaucer Press

³¹ Patterson, E. Jurisprudence. Pg 69. (2nd Ed. 1953) Brooklyn: The foundation Press.

CHAPTER FOUR

Having gone through the basic principle of granting bail, the justification of having bail and also having seen what the law aims at achieving, this chapter will now look at the law that regulates bail. By so doing, it is important to look at the other aspects of the law that go hand in hand with the bail law. These relate to the detention of the accused and the statutory provisions in the Zambian law. The chapter will look at the Criminal Procedure Code and other provisions.

4.0 The Criminal Procedure Code

The Criminal Procedure Code is chapter 88 of the Laws of Zambia and like the name suggests, it provides for the procedure to be followed in criminal proceedings be it in or outside court. However, for the purposes of discussion we will look at it from two angles viz. arrest and bail.

The concept of arrest can be defined in so many ways but perhaps Black's definition provides the best definition when he states that to arrest is to:

'deprive a person of his liberty by legal authority. Taking under real or assumed custody of another for the purpose of holding him to answer a criminal charge'³².

³² Black, H C. Black's Law Dictionary. Pg 307. (4th Ed. 1983) Minnesota: West publishing Company

The arrest, it must be further noted is accomplished by placing such arrested person under actual restraint or control of the person making the arrest, or by the person voluntarily submitting himself to the custody of a person making the arrest.³³ However, it is imperative that the arresting authority communicate to the arrested person the fact that he is being arrested. Thus in order for the arrest to be completed, it is crucial that the person knows that he is actually under arrest. It, therefore becomes fundamental and necessary for the police officer making the arrest to actually inform the person of his intention to arrest. This is provided for in the Criminal Procedure Code.³⁴

It is evident from the definition of arrest that once it has been effected, it impinges on a person's liberty. Owing to this fact, the law relating to arrest is predominantly statutory. It follows therefore, that whenever a police officer arrests someone there has to be some authority or basis backed by the law. Accordingly, for any arrest to be lawful, it must be done in accordance with the law and anything falling short of the requirements will be an unlawful arrest and hence a clear infringement of the individual's rights to liberty. Article 13 (4) of the Constitution provides that in effect any wanton disregard of the law on arrest may lead to litigation and punitive compensation if proved.

³³ As was the case in which Fred Mmembe and Bright Mwape surrendered themselves to the authorities after a bench warrant was issued by the then Speaker of the National Assembly Dr. Robinson Nabulyato

³⁴ Section 19 of the Criminal Procedure Code

To this effect, Raymond and Dahl write that:

‘ It is therefore important that the arrest be effected cautiously and only when it is necessary. To this effect, the police should when making the arrest act in accordance with the law and should not use their discretionary powers vested in them arbitrarily to the detriment of the individual.’³⁵

Further, it is imperative and paramount to appreciate that in so far as the police are given powers to arrest, they have powers to detain the person so arrested. Detention for the purposes of our discussion, occurs when a person is remanded in custody or at the police station before being charged.

Once the person is charged, the difficulty is substantially reduced in that such a person may be entitled to apply for bail when he is brought before court. It must, however, be borne in mind that the decision of bailing or remanding an arrested person in custody for bailable offences is discretionary. This discretion, as has been shown in the second Chapter, though, in the absence of extenuating factors, is exceedingly limited – suffice to say that the proper course for the courts to take is to grant bail.

Section 18 of the Criminal Procedure Code provides for the detention of persons reasonably suspected of committing or about to commit or having committed an offence. It is prudent to note that the Act uses the term ‘reasonable’ so that the basis is made objective as opposed to being subjective. This is crucial for reasons

³⁵ Raymond and Dahl. Procedure and the Law of Arrest, Search and Seizure. Pg 28 (2nd Ed, 1961) Milwaukee: Hammersmith Karl Meyer and Company.

already given above that is to say that the liberty of the individual and one's freedom of movement must not be curtailed without justifiable reason.

The law that governs bail is found in section 123 of the Criminal Procedure Code³⁶. Subsection one of this section states that when a person is arrested or detained, or appears before or is brought before a subordinate court, the High Court or Supreme court he may, at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his own recognisance if such officer or court thinks fit. It then goes on to outline the circumstances in which bail may not be granted.

These circumstances are those of murder, treason or any other offence carrying a possible or mandatory capital punishment³⁷; misprision of treason or treason felony; or aggravated robbery. These offences are not bailable. It can be seen from this that the crimes that have been outlined in subsection one are felonies. This seems logical because of the seriousness of the crimes. It seems to please most people that serious offences should not be bailable because people are afraid of such offenders being left at large, as they are genuinely believed to be a danger to society.

In the same vein the general public may not be ready to welcome the offender back into society when trial has not taken place; this aims at protecting the offender from an angry society particularly in murder and attempted murder cases.

³⁶ Chapter 88 of the Laws of Zambia

³⁷ Ibid

4.1 THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT

The problem of drug trafficking has become acute in Zambia. The country has been dubbed the regional money laundering center and one of the leading trans-shipment points for illicit drugs such as cocaine, heroine and mathqualone, bound for southern Africa and Europe. Sadly , Zambia is no longer a transit point for drugs, but it is increasingly becoming a consumer of dangerous drugs as well. To this end, the Drug Enforcement Commission is the institute that has been established to combat drug trafficking. It is created under the Narcotic Drugs and Psychotropic Substances Act.³⁸

Under this Act, every drug trafficking and drug manufacturing offence is by section 23 regarded as a cognizable offence for the purposes of the Criminal Procedure Code so that a police officer or any person empowered may arrest a person suspected without a warrant. Furthermore, any person arrested pursuant to this Act is not entitled to bail.³⁹

4.2 OTHER LAWS AND REGULATIONS

The other laws providing for detained persons in Zambia are found in the Emergency Powers Act. The preservation of Public Security Act and the Preservation of Public Security Regulations. These pieces of legislation relate to political offences.

³⁸ Chapter 96 of the Laws of Zambia.

³⁹ Section 43 of Chapter 96 of the Laws of Zambia

Subsection four of section 123 provides that persons charged with an offence under the states Securities Act is not eligible for bail application.

We have already noted in this paper that the constitution guarantees various rights and freedoms to an individual, certain rights and freedoms are not absolute and hence can be derogated from under certain circumstances ⁴⁰especially where the life of the nation is threatened. Evidently under such circumstances, the state must of necessity arm itself with adequate power to preserve itself. In this regard, it has been widely argued and contended that it is only when the safety of the state is assured that individual rights can be realized.

This clearly goes against the doctrine of human rights for all including criminals. The fact that the accused's freedoms or liberties are taken away, leaves him or her at the mercy of the police. The police force in any country cannot be trusted with ensuring that an individual's rights are respected. There is always a possibility of abuse by the police officers by their acting maliciously. This is evidenced in the way the often arrest without warrant for a very spurious allegation and detaining a suspect knowing there is no recourse to bail.

To this effect, most of the African states that became independent from British rule had in their constitutions after independence designed to preserve the safety of the new nations from either an actual public emergency or indeed a threatened one which might befall a nation. This , in fact was the argument fortified by the Attorney

⁴⁰ Article 25 of the constitution of Zambia provides for derogation from provisions of the Bill of Rights in times of public emergency.

General for Zambia in the celebrated case of *Feliya Kachasu V The Attorney*

*General*⁴¹ in which it was stated that:

“ The rights of the individual depend for their very existence and implementation upon the continuance of the organized political society, that is to say, the organized society established by the constitution. The continuance of that society itself depends upon national security for without security any society is in danger of collapse or overthrow. National security is thus paramount not only in the interest of the state but also in the interest of every individual member of the state and measures designed to achieve and maintain that security must come first and subject to the provisions of the constitution, must override, if need be, the interests of the individuals and of which they conflict”⁴²

In light of the foregoing, it should not be strange to the reader that bail in such serious cases have been denied.

On December 23 2000, Act number 23 was assented to by the president. This Act amended section 123 of the Criminal Procedure Code. This made the offence of motor vehicle theft non bailable. Many people have criticized this law in that it has been said in many circles of the Zambian society that it was politically motivated.

It has also been criticized on the basis that it is a law that seems to protect that which men value the most, property. It is ironic that the legislature has enacted such a law that denies an accused person liberty for the theft of a motor vehicle yet perpetrators of more serious crimes like defilement and rape can be granted bail.

⁴¹ (1967) ZR 167

⁴² Ibid 169

This piece of legislation will be the most abused because it has already been seen that the law seems to punish the wrong person. More often than not the accused is not the person who actually stole the vehicle but since he is found in possession of the stolen vehicle, he is taken to be the perpetrator of the crime. Laws like these are likely to aggravate the already worsening problem of congested prisons.

On 22nd October 2002, the then Minister of Home Affairs, late Luckson Mapushi, of the Act that the law on motor vehicle theft which denies the accused bail, is one of the country's most evil and archaic laws that will be reviewed by parliament.⁴³

⁴³ The late Mapushi in an interview with the Monitor Newspaper for Human Rights and Development. October 18 to 21, 2002.

CHAPTER FIVE

This chapter looks at the cases in respect of which bail has been granted for offences that are not bailable. The cases to be discussed will both illustrate the fact that the Zambian law is not consistent and help criticise the bail law. This chapter will only look at the bail law before the amendment was done. This means that the cases to be dealt with will be the ones that do not concern the new bail law.

5.0 The Irwin Case

The case of *Oliver John Irwin V The People*⁴⁴ is one case that caused a lot of controversy because of the way bail was granted. The facts of the case were that appellant, Oliver John Irwin, was charged with capital offence, the particulars of the charge being that he , on 27 may 1987, murdered one Maria Somers Vine. When he appeared before the principal resident magistrate, Lusaka, counsel on his behalf made three applications one of which was for bail. He was denied bail and committed to trial in the High Court before an inquest was held. The High Court's ruling arose from a referral by the Magistrate's Court in response to the appellant's application for bail, for an order that an inquest be held under the provisions of section 7 of the Inquest Act while the ongoing proceedings were discontinued. The appeal raised some preliminary procedural issues as to whether the matter was properly before the Supreme Court.

⁴⁴ (1993/1994) ZR 7

It was held in this case that the High Court has power to admit to bail in all cases including those relating to persons accused of murder and treason, subject to the rule that such persons are rarely admitted to bail. Such application must be made to the High Court. The Subordinate Court has no power to grant bail in a murder case, and the Supreme Court enjoys only appellate jurisdiction.

Bail in this case was given based on the provision in the Constitution. Article 13 (3) (b) states that a person who has been detained or arrested shall be,

'brought to the without undue delay before a court; and any person arrested or detained under paragraph (b) is not tried within a reasonable time, then without prejudice to any to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial'⁴⁵

It is submitted that this case was not fairly decided because though the constitution, which is the supreme law of the land, was the basis on which the appellant was granted bail it was unfairly decided. This is because of the nature of the crime that was involved. It has already been seen that by virtue of section 123 of the Criminal Procedure Code, felonies include murder. Based on the principles earlier outlined it can be seen that murder can not be bailable. It should be non bailable so that the public can continue to have faith in the criminal justice system.

⁴⁵ Chapter 1 of the laws of Zambia

It is also the belief of the author that it is only for the accused's benefit that he be protected from any danger by keeping him in incarceration. It may seem that the law is unjust but for the accused, though he may be innocent, the nature of the crime may not allow him to freely walk the streets. This is particularly true in cases where an accused is released on bail shortly after a crime has been committed. The danger in this case could be the victim's relatives who may not be pleased with the release. The danger here lies in the fact that the relatives may be dreadfully annoyed with the pain and suffering caused by the accused's actions that they might decide to take vengeance by taking the law into their own hands.

5.1 The Mananga Case

The case of Joyce Mananga was concluded in December 2002 in Mongu. This is an unreported case gleaned substantially from newspaper reports.

The facts of this case are that Joyce Mananga has traveled to Mongu with various types of drugs that she had acquired from a source outside Zambia. The drugs were to be exchanged with diamonds in Shang'ombo. The said drugs had been cleared by a customs official in Lusaka. Mananga was then tipped by an informer that she was going to be visited by officers of the Drug Enforcement Commission. She then transported the said drugs to Lewanika Hospital as a donation. Her house was searched but the drugs were not found. She was then charged with unlawful importation of drugs⁴⁶.

⁴⁶ This information was obtained from Monitor Newspaper for Human Rights and Development. December 23 to 27, 2002

This charge according to the Act is not bailable. Section 7 of The Narcotic Drugs and Psychotropic Drugs Act makes importation of drugs illegal. The section reads:

‘Any person who, without lawful authority, imports or exports any narcotic drug or psychotropic substance listed in the Second Schedule shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding twenty years’⁴⁷.

Furthermore by virtue of section 43 of the same Act, bail is not available. The provision states that:

‘Whenever any person is arrested or detained upon reasonable suspicion of his having committed a cognizable offence under this Act, no bail shall be granted when he appears or is brought before any Court’.

Although the law is clear in that it clearly states that there can never be bail granted in case of crimes committed under this Act, Joyce Mananga was granted bail. There seems to be a lot of inconsistency in the way bail is granted and the major reason seems to be the discretionary powers that are exercised by the magistrates in this country.

Because of this inconsistency the nation will not have faith in the judicial system and this means that one of the aims of the law, which is to be a form of social control can not be achieved. The law is supposed to deter persons from committing crimes both against the state and private individuals. If the law is not consistent and can easily

⁴⁷ Chapter 96 of the laws of Zambia

be manipulated by the rich and influential, citizens, then the law does not serve its purpose and is therefore useless.

5.2 The Torkoph Case

David Torkoph was the chairman of Aero Zambia Airline Company. He was found in possession of twelve tablets of Valium. He was arrested and detained by the Drug Enforcement Commission officers on Thursday 26th January 1999. He was arrested soon after disembarking from an Aero Zambia flight from Johannesburg, South Africa.

Three days later it was reported in the Post Newspaper that Mr. David Torkoph had fled the country and had gone to Zimbabwe on a chartered flight. It is not clear how he had managed to get bail for the offence that he had been charged with.

Section 8 of The Narcotic Drugs and Psychotropic Drugs Act provides that:

‘any person who, without lawful authority, has in his possession or under his control any narcotic drug or psychotropic substance shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding fifteen years’.

It is not clear however how bail was granted to Mr. Torkoph. This is a clear example of how the law is inconsistent. Why should a magistrate grant bail to someone who is likely to escape? It is believed the magistrate is supposed to be in contemplation of the fact that the accused may flee. The essence of bail is to give the accused

liberty so that he may be out of prison but should be able to appear for trial. In ensuring that the accused does appear in court for trial, the magistrate should have taken reasonable steps to prevent this. An example of what could have been done could have been to ask the accused to surrender his passport or to ask him to report to the police station regularly.

The issue of corruption in the Zambian judiciary in this case is a thought that is inevitable. How else can one explain what happened in this case but to think that there was some form of corruption. It is difficult to have access to information about this case because the matter was only reported in the Newspapers and since the accused escaped, the matter has not been pursued further.

Having looked at cases in which the accused persons were granted bail when in fact they were not eligible for it, the essay will now move on to discuss cases that in which the accused were eligible for bail save for the new regulation regarding bail.

CHAPTER SIX

This chapter will look at the cases that were denied bail even though they could have been granted bail had it not been for the bail law. The two notable cases under this heading are the cases of the former Intelligence chief Mr. Xavier Chungu and that of Mr. Malie Mactribouy. These cases were the first to put new bail law to test and people were eagerly waiting to see how the courts would decide these cases.

As has been earlier discussed, the amendment of section 123 of the Criminal Procedure Code gave the bail law a new face. What this amendment did was to make motor vehicle theft non bailable. We shall now proceed to discuss the two cases.

6.0 THE MACTRIBOUY CASE

Archie Malie Mactribouy was alleged to have been involved in an aggravated robbery of a government Nissan Patrol, registration number AAP 4481 on the 11th of July 2000. The vehicle was recovered at the residence of the governor of Katanga in Lubumbashi in the Democratic Republic of the Congo bearing the registration number AAV 2260.

He was charged and incarcerated at the Lusaka remand prison. The evidence available to the prosecution was so scant that it was difficult to prove that he had

actually committed the crime. As a result, he was kept in incarceration for a long time as the prosecution tried to get its act together by trying to consolidate their case against him. It was clear that the prosecution had no case against him.

The fact that he had been charged with motor vehicle theft meant that he was to be incarcerated and could not be eligible for bail. The magistrate could have used his discretion and granted him bail but he did not. There was no overwhelming evidence that the accused had truly committed the crime, the accused was not a habitual criminal, nor was he likely to jump bail, but all these considerations were not taken into account by the magistrate.

This was because it had been rumored in the tabloid newspapers that Mr. Mactribouy, prior to his arrest, had had an adulterous affair with the former first lady, Mrs. Vera Chiluba. Whether or not there was an affair between the former first lady and Mr. Mactribouy is not the issue in this dissertation. The issue is why Mr. Mactribouy was not granted bail.

The state was clever enough to charge him with aggravated robbery which they knew would keep him in incarceration. This shows that laws can be arbitrarily used to suppress or victimise political opponents.

Law is the will of justice and justice means to judge without to the person, to treat everyone according to the same standard. It therefore follows that if one applauds and orders the murder or incarceration of political opponents and his enemies while

meting out the most cruel, degrading punishments for the same acts committed against those of one's own persuasion, that is neither justice nor law.

Mr. Mactribouy was later released in the 2002. In passing judgment, Judge James Mutale said justice delayed is justice denied. He said that he had received submissions from the defense team and in light of the evidence before him, he saw no need to delay justice.

The judgment was very short and this make the writer wonder as to why Mr. Mactribouy was not granted bail if the prosecution had no clear case against him. It is clear that there other reasons that Mr. Mactribouy was kept in incarceration but that is not the concern of this dissertation.

It is amazing that Mr. Mactribouy was not granted constitutional bail as was the case in the *Irwin case*. The facts in the cases are similar and so Mr. Mactribouy 's case could have been decided in the same way.

6.1 THE XAVIER CHUNGU CASE

Mr. Xavier Chungu, the former Intelligence Chief was arrested and charged with among other charges, motor vehicle theft . This according to Act number 23 of the laws of Zambia is non bailable.

Though he was incarcerated, for a while he was the first to be released on bail from the time the law was enacted that left motor vehicle theft non bailable. Magistrate Douglas Zulu granted him bail of 20 million kwacha based on the fact that the crime that he was charged with was committed before the law was enacted.

There was an appeal against the 20 million-kwacha bail granted by the magistrate to Mr. Xavier Chungu. The prosecution lawyers applied in chambers before High Court Judge Tamula Kakusa that his bail be revoked. They argued that where there are amendments to the substantive law, the amended law could not operate retrospectively, but in Chungu's case the amendment was to the Criminal Procedure Code and was procedural, hence the question of retrospect could not hold.

Nevertheless, bail was not revoked until Mr. Xavier Chungu jumped bail.

Mr. Chungu was later released in September 2003. The fact that he was released says and shows that bail should be granted in cases that are not of a serious nature.

CHAPTER SEVEN

This chapter concludes the essay and gives recommendation as to what should be done with the current bail law. It will show why the bail law is what it is today and show that this law is unjust.

7.0 CONCLUSION

The essay has achieved what it set out to do; that is to show that the bail law is unjust and that because of the way it is decided differently in cases concerning bail, the Zambian law is therefore inconsistent. The hypothesis was proved correct because it has been shown that the enactment of Act number 23 of 2000 was politically motivated. It has also been seen that all offences should be bailable except for those that have the mandatory death penalty or serious crimes. The problem of study was clearly exposed and the aim of the essay was achieved.

From the discussion it has been shown that the magistrate has the discretion to grant *bail in cases of serious crimes and this discretion seems to be too great. Although a magistrate has such a wide discretion, he is required to exercise his discretion.*

It has been seen that if bail is not granted, the implication is that the person is guilty before a court of competent jurisdiction has even tried him. This then is contrary to the presumption of innocence as provided for by the Zambian Constitution. It should

be easily granted because it is a right and not a privilege. It should be granted to help decongest the prisons.

Law's aim is to achieve justice and all laws must strive to attain justice as the ultimate goal. At this point though the positivist point of view has to be taken, meaning that though the law is unjust and unfair, it is nevertheless law and has to be obeyed. A law is valid because it is a law, and it is a law if in the general run of cases it has the power to prevail.

It is the writer's opinion that this view of the nature of a law and of its validity has rendered the people defenseless against laws, however cruel and the laws may be. Surely public benefit, along side justice is the end that men want to see. The law, even unjust laws must have nonetheless the value of safeguarding the law against doubt. And owing to human imperfection, the three values of the law which are public benefit, legal certainty and justice, cannot always be united harmoniously in laws. It remains, then only to consider whether validity is to be granted to unjust laws for the sake of legal certainty or whether they be denied because they are unjust or socially detrimental.

7.1 RECOMMENDATION

It is recommended that since the Zambian system has no legislation as to criteria for bail and magistrates use common law principle when granting bail, a bail Act be enacted for this purpose. This will make it easier for magistrates to grant bail and eliminate the current problems that surround the granting of bail.

It is further recommended that bail be granted only in case that do not have a mandatory death penalty and life imprisonment. This is because in cases that are of such nature, the perpetrators of the crime are a danger to both themselves and the citizens. There is a fear that they may interfere with the investigation or even threaten the witnesses. This is obstruction of justice, which must be attained without any interference.

In the same way, the law that makes theft of motor vehicle be non bailable should be repealed. This is because this law is unjust and there often is no reason to keep an accused incarcerated for motor vehicle theft. It also targets the wrong persons. More often than not it is not the actual perpetrator of the crime that is arrested; as in Mr. Mactribouy case.

It has also been seen that the law regarding bail is unjust because it overrides the fundamental principle of the presumption of innocence. In cases like those of Mr. Xavier Chungu and Mr. Mactribouy, what can be said then of the law when the two

men were proved to have been in prison, after being denied of their liberty for so long.

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