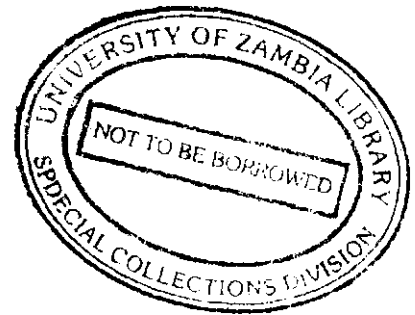


FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE IN ZAMBIA

By



CHATORA SHUBAYI

Being a paper submitted in partial fulfillment of the Examination requirement for the award of the Degree of Bachelor of Laws of the University of Zambia.

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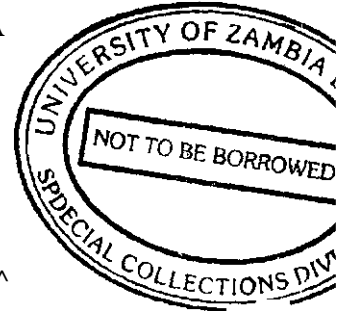
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Heartfelt thanks to my God for always being my God and giving me a privilege of studying law. And also for assuring that "**I can do all things through Christ who strengthens me, for my flesh and my heart may fail but God is the strength of my heart and portion forever**". I remain highly indebted.

Philippians 4: 13 & Psalms 73:26

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The Police and Criminal Evidence Act of England (1984) The

Legal Aid Act, Chapter 34 of the Laws of Zambia. The Juvenile

Act, Chapter 53 of the Laws of Zambia.

INTERNATIONAL INSTRUMENTS

The Universal Declaration of Human Rights (1948)

The International Covenant on Civil and Political rights (1966)

The Convention against Torture and other cruel inhuman or degrading
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people (HC) (1972)

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High Court, England (1947). Phiri and Another v The People
(1973) ZR 47.

Resident Doctors' Association of Zambia and 51 others V The Attorney General.

Appeal No. 39/2002: SCZ No. 12/2003

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The people v siamwaba (1979) ZR 61

R v Fulling (1987) QB 246

Findley v United Kingdom (1997) QB 217

LIST OF ABBREVIATIONS

UDHR	Universal Declaration of Human Rights (1948)
ICCPR	International Covenant on Civil and Political Rights (1966)
CAT	Convention against Torture (1984)
CEDAW	Convention Against all forms of Discrimination against Women (1979)
CPC	Criminal Procedure Code chapter 88 of the laws of Zambia
U S A	United States of America
U K	United Kingdom
U N	United Nations

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ABSTRACT

The disregard of the principles of fair trial and the presumption of innocence in Zambia by administrators of criminal justice has led to various Infringements and violations of fundamental human rights of suspects, which, due to their inherent nature, ought to be respected and promoted. Hence, where there is such violation of human rights, there is proof that the principles of the constitution, which is the *grund norm* of the land are not being upheld by those who hold power to administer criminal justice such as the courts and the police, the result being that the innocent suffer as they are, among other things, wrongly convicted.

It is against the foregoing that this study evolves. Zambia, like many other countries has taken positive steps to secure the rights of suspects by becoming a party to several international instruments, such as the International Covenant on Civil and Political Rights (1966), the Convention Against Torture (1984) and so on.

Hence the tenet of this study is focused mainly on identifying the weaknesses if any, of the law in Zambia relating to the right to fair trial and the presumption of innocence, identifying ways in which miscarriages of justice can be avoided by those vested with power to administer and ensure criminal justice and generally that the rights of suspects are respected.

CHAPTER 1

1.0 INTRODUCTION

The most respectable and widely esteemed of men and women may become victims of the law. By what conceivable strokes of fate could you be mistaken for a doubtful character, let alone a criminal? Such strokes of fate do occur, however, and there is a name for them; miscarriages of justice." It has been realized that in every modern society, crime is an inevitable. Hence, there are those who hold power to administer justice, and such administrators hold power with potential to abuse it. It is because the law has provided certain safeguards giving a prescriptive pattern of administration of criminal justice that, the right to a fair trial and the presumption of innocence which are the main focus of this study, are among such safeguards designed to defend the status and dignity of victims that go through the process of criminal administration. Efficiency alone is not the hallmark of proper administration of justice, but rather, the basic rule is the kind of conviction and acquittal processes most fitting to a democratic society.

Hence, the law would not achieve its purpose as an instrument of justice if its prescriptions that are intended to meet the ends of justice were not upheld by the people it seeks to govern.

¹ Floriot, R. When Justice Falters. London, Western Printing Ltd, (1972).

1.1 PROBLEM STATEMENT

The disparities existing between the presumption of innocence and fair trial, as outlined by the law, and the reality surrounding these principles have led to a number of undesirable consequences. Among these is that a lot of injustices have occurred due to disregard of these principles such as where there is gross negligence of the police in overlooking or even suppressing evidence of innocence, which has led to the innocent being convicted of crimes they did not commit. In addition, this has led to infringement and violation of fundamental human rights of such persons, which due to their inherent nature, ought to be respected and observed. Hence, where there is such violation of human rights, it provides proof that the principles of the constitution, which is the *grund norm* of the land, are not being upheld by those holding power to administer criminal justice such as the courts and the police, the result being that the innocent suffer as they are, among other things, wrongly convicted.

1.2 STUDY OBJECTIVES

The main objective of this study is to identify both the causes for and the disparities existing between law as set out and the practice with specific regard to the right to fair trial and the presumption of innocence. Thereby, suggesting ways in which miscarriages of justice can be avoided by those vested with power to administer and ensure criminal justice through ensuring that specific elements underlying these two principles of the law are adhered to and put into consideration whenever a person is charged with a criminal offence.

1.3 RESEARCH QUESTIONS

1. What is the relationship between the right to fair trial and the presumption of innocence?
2. What is the position of the international community as set out in international instruments, on the principles of the right to fair trial and the presumption of innocence with particular regard to those instruments to which Zambia is at least signatory?
3. What is the role of the police and the courts in ensuring the observance and upholding of the right to fair trial and the presumption of innocence?
4. Are the police and the courts upholding the right to fair trial and the presumption of innocence? If not how can the principle of fair trial and the presumption of innocence be adhered to by the courts and the police?
5. When compared with another commonwealth country such as the United Kingdom, is there a disparity between the practice and the law in the United Kingdom, as is the case in Zambia with regard to the principle of fair trial and the presumption of innocence?
6. Upon a brief analysis of the criminal administration system of another jurisdiction outside the commonwealth such as the United States of America, is there need to recommend changes in the administration of criminal justice system in the two commonwealth countries in light of the law and practice in the United States of America?

1.4 METHODOLOGY

In this study, the main method of data collection relied on is desk research. This data was sourced from the constitution of Zambia, statutes (both local and foreign), cases and international instruments to which Zambia is at least signatory, and the internet. In addition, interviews were conducted during site visits to kanyama and central police stations with the aim of observing the conduct of the administration of criminal justice by the officers of the law.

1.5 A BRIEF HISTORICAL BACKGROUND OF THE RIGHT TO FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE.

Prior to the arrival of the white settlers, the Zambian indigenous population enforced customary laws through their own system of courts. ^ Regarding matters of proof, the use of ordeals was common to determine the guilt of the accused. An ordeal is a very unpleasant and difficult experience.^ There were two ordeals which were widely practiced. Among these was the *Mwavi*, a fatal poison unless vomiting occurred whose basis was that a suspect was made to take the *Mwavi* and if no vomiting occurred and death ensued, this was considered a clear indication of guilt. The second ordeal, commonly practiced by the *Bisa* and *Ilia*, was the boiling water test where the suspect was made to place

~ Hatchard J and Ndulo, M. Readings in Criminal Law and Criminology in Zambia, Lusaka, Multimedia Publications (1994). Miranda Steel Oxford Word power Dictionary. Oxford. Oxford press (2001)

a hand in a container of boiling water and take a stone from the bottom. And if this hand was found to be blistered, this was a clear indication of guilt.* The right to a fair trial and the presumption of innocence are human rights. The idea of human worth and dignity has always existed in all human societies. In the comparative recent past,[^] man's struggle for the recognition and protection of human rights was spurred by certain philosophical and religious ideas traceable to European thinkers. However, Europe, of course, did not invent human rights, but may be legitimately credited with having formulated human rights into a presentable form and having instituted systems of implementation being, the united nations (UN) which is a global organization with the main purpose of achieving international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Human rights can be said to have received a fresh impetus as measurements of human dignity and worth following the creation of the UN Organizations after the initial resistance by European rulers. The post World War II era was the period in which human rights movements developed.[^] The quest for peace, self determination, non discrimination and freedom by nations pioneered the development of human rights law and consequently the right to fair trial and that to be presumed innocent until proved guilty.[^]

The arrival of white settlers brought about a new legal system in Zambia. In 1931, a penal code was adopted and this has remained in force ever since

* Hatchard .1 and Ndulo, M. Readings in Criminal Law and Criminology in Zambia, pg 4

' Anyangwe, C. Introduction Human Rights and International Humanitarian Law, pg 67 " Ibid pg xi
Ibid pg xi

although there have been amendments recently. The code has formed the basis of criminal law in Zambia ever since. ^ In addition the criminal procedure code (CPC) ^ was set in place to qualify a prescriptive pattern of administering criminal justice. These two pieces of legislation brought about a change in the administration of criminal justice in Zambia to the effect that all criminal proceedings and administration had to conform to the new legislation. The effect of this on customary practice that existed prior to the enactment of the penal code and the CPC is that the customary practices remained the same to the extent that they were not repugnant to natural justice or any written law for the time being in force in Zambia. The importance of both the penal code and the CPC lies in the fact that the two derive their authenticity from the constitution of Zambia which is the *grund* norm of the land containing the bill of rights which is the main source of the right to a fair trial and the Presumption of Innocence.^ The Constitution of Zambia plays a major role in the administration of criminal justice aside from the penal code because it embodies most guidelines. The Bill of rights entrenched in the Zambian constitution since independence in 1964, emanates from the British one.^ A Bill of rights is a statement of basic human rights that can either be incorporated or annexed to some other legislation. This 1964 Bill of rights provided for guarantees giving legal protection to fundamental human rights. It is important to note that the normative range of Zambia's Bill of rights is narrow, being confined to civil and political rights. Hence, relevant to this

¹ Ibid pg 6

² Chapter 88 of the Laws of Zambia

Section 16 of the Subordinate Court Act Chapter 28 of the Laws of Zambia "Article 18(1) and (2) (a).

³ Anyangwe, C. Introduction to Human Rights And International Humanitarian Law. pg78

study, among the various rights it seeks to protect is the legal integrity of the person which includes; the right to be recognized before the law, to equality before the law, to fair trial, and the right of appeal. The Zambian Bill of rights as retained by the 1964 constitution has remained unchanged in Zambia's subsequent constitutions mainly because it is entrenched in the constitution. This means that the rights contained therein cannot be amended or modified except by way of a referendum as provided for by article 79(3) of the constitution known as the entrenchment clause.

1.6 THE MEANING AND ESSENCE OF THE RIGHT TO A FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE AS OUTLINED BY THE LAW.

As earlier stated, the main objective of this study is to analyze the principles of fair trial and that of the presumption of innocence by comparing them as they are outlined by the law, both local and international, with the disparities which exist in reality focusing in particular on institutions that administer and enforce criminal justice to establish as to whether or not they embrace the two principles of the law. Thereby, identifying and recommending ways in which the law can be upheld. However, it is important to note that this chapter mainly focuses on creating an understanding of the two concepts in view of the law as set out.

1.61 According to the Zambian Constitution

The rights to a fair trial and to be presumed innocent until proved guilty are fundamental human rights. Human rights mean rights of humans. Since all

human beings have the same basic nature and have it equally, the rights based on this nature, that is, human rights, are necessarily universal and held equally by all. Therefore, human rights are rights one has by virtue of being human. ""^ Human rights are fundamental because of their centrality to the dignity and worth of the human being. They are fundamental in the sense that they are important, that life, dignity and other important human values depend on them. However, that is not to say that they are absolute but rather that they cannot be lightly sacrificed even for the general good or public ,and that is why permissible limitations are themselves strictly limited especially to situations where there is a state of emergency.

The right to a fair trial is a basic human right. It entails that if any person is charged with an offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.""* This position of the law is reinforced by article 18 (9) of the constitution which emphasizes the fundamental nature of the defendant's right to trial. Accordingly, no person shall be convicted of a crime unless upon evidence produced at trial in an independent and impartial court. A trial is defined as a hearing of a civil or criminal case before a court of competent jurisdiction, which must with rare exceptions be held in public and at which all outstanding issues of law and fact arising in the case will be determined."^ A conviction refers to a finding in criminal proceedings that a person has committed an offence or

Anyangwe c. Introduction to human rights and international humanitarian law. Lusaka, UNZA press.2004.
Article 18 (1) of the constitution, chapter 1 of the laws of Zambia. ^Martin.E. Oxford dictionary of law. Oxford, Oxford University press, (2006).

carried out the act for which he was charged."[^] An act (or sometimes failure to act) that is deemed by statute or common law to be a public wrong and is therefore punishable by the state in criminal proceedings is called a crime."^{'''} In the case of *Findley y United Kingdom*,^{''^} an independent court was defined to mean that the judicial body must not be formally subordinated or effectively subjected to directions from other state organs"[^]. A court must thus be independent from the executive, the legislative organs and also from the political parties. Impartial means that the judges have to stand above the parties, to decide without personal influence and objectively, only according to the best knowledge and conscience.^{^°} Also it means lack of subjective prejudice or bias. The defendant has the right to be present throughout the trial although may waive this right to trial by pleading guilty to the charge as long as such waiver is voluntary, intelligent and with full understanding of the consequences. This means that where an accused confesses guilt, such a confession ought to be made voluntarily. Hence, in the case of *Ciilleshe v. Tlie people*,^{^^} the High Court held that even though a court is satisfied that a statement was made voluntarily, it nevertheless has discretion to exclude such statement if it were obtained in a manner unfair to the accused^{^^}.

^{'''} Ibid pg 547 ^{''} Ibid pg 540 ^{''} (1997) QB 217 **!**

Ibid

Kolb, R.H human rights law journal. The jurisprudence of the European court of human rights on detention and fair trial in criminal matters. Vol. 21 (1992 -1998). (HC) (1972) Ibid

The presumption of innocence is among the most important elements of a fair trial.¹¹ According to the Constitution,¹² this presumption entails that a person charged with a criminal offence should be presumed innocent until he is proved guilty or has pleaded guilty. This right applies not only to treatment in court and the evaluation of evidence but also to treatment before trial. It applies to suspects before criminal charges are filed prior to trial and carries through until a conviction is confirmed following a final appeal. The right not to be compelled to testify against oneself or confess guilt and the related rights of silence are rooted in the presumption of innocence. Consistent with this, the court in *Thomas Mumba v The people*¹³ declared section 53 (1) of the corrupt practices Act null and void because it violated the right to silence as it compelled the accused to give evidence if he elected to say something in his defense.¹⁴ This right requires that Judges refrain from prejudging any case. It also applies to public authorities, particularly prosecutors and the police that they should not start with the preconceived idea that the accused is guilty by treating the accused in such a way to imply guilt for instance by refusing to grant bail or torturing the suspects. However, in the case of *Liswaniso v the people*, the Supreme Court held that illegally obtained evidence was admissible so long

Chanda, A Zambia Law Journal. The Role of the Lower Courts in Domestic implementation of Human Rights. Vol. 33 (2001) Article 18 (2) (a)
Anyangwe, C. Introduction to Human Rights and Humanitarian Law. Pg 33
Hnr/438(1984)
Ibid
Anyangwe, C. Introduction to Human Rights And Humanitarian Law. Pg 45 SCZ
Judgment No. 58 of (1876)

as it was relevant to the issues before the court which shows that the courts give incentives to commit such violations of human rights like torture. It should also be noted that the right to be presumed innocent in a trial which meets all guarantees of fairness entails that the prosecution has to prove an accused's guilt beyond reasonable doubt. This is the Standard of proof required in a criminal case, meaning, it is the degree of cogency required in a criminal case before an accused person is found guilty. In the case of *Miller v Minister of pensions*,¹¹ the court held that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt¹². The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. In the case of *Briginshaw v Briginshaw*,¹³ the court pointed out that the reason why the standard of proof in criminal cases differs from that in civil cases is because the nature and gravity of an issue necessarily determined the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account¹⁴.

1.62 ACCORDING TO INTERNATIONAL INSTRUMENTS

Aside from the fact that the right to a fair trial and to be presumed innocent until proved guilty are set out in the Zambian Constitution, the international community has set a standard to which states should aspire. Together, the following provisions in various international human rights instruments to some of which

Ibid

High Court, England (1947).

Ibid

"(1938) 60 CLR 336

Ibid

Zambia is at least signatory, constitute part of the international framework of fundamental safeguards against unfair trial. These provisions were provided for with the aim of establishing as a common standard of achievement for all peoples and all nations. Among these is the Universal Declaration of human rights (UDHR) of 1948, which has provided a framework for the development of human rights. ¹⁰ It is important to note that Zambia need not be signatory to this instrument because it is an international agreement; strictly, it is a political and not a legal document; a document of persuasive moral character. In its article 10, it declares that the right to a fair trial is deeply rooted in the history of human rights and the presumption of innocence follows immediately in the first paragraph of article 11.

Another international Human Rights instrument that recognizes the right to fair trial and the presumption of innocence is the international covenant on civil and political rights (ICCPR) of 1966 in its article 14. ¹¹It is important to note that unlike the UDHR, this convention imposes an absolute and immediate obligation on each state party to respect and ensure these rights to all individuals within its territory and subject to its jurisdiction. Other specific human rights instruments include the Convention against Torture (CAT) 1984, the convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, and so forth.

Anyangwe, C A source Book on Human Rights Law In Zambia. Documents, cases and Readings. Volume 2. Lusaka, (University of Zambia press) (2007).

Anyangwe, C. Introduction to Human Rights and International Humanitarian Law, pg 32.

Ibid pg. 32.

"Ibid pg33.

1.7 THE RELATIONSHIP BETWEEN THE RIGHT TO A FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE

It is important to note that since both the principles of fair trial and the presumption of innocence are fundamental human rights, they must be promoted and respected by every member of society. The mere fact that a person has been charged with a criminal offence does not mean that they are guilty of the crime charged. Professor Chanda notes that no guilt can be presumed until the charge has been proved beyond reasonable doubt. And that on account of this presumption, the burden of proof of the charge is on the prosecution, and the accused has the benefit of doubt but this standard of proof need not be beyond a shadow of doubt. The presumption of innocence is so fundamental to the protection of human rights that there are various rights which have been guaranteed to the accused aiming at ensuring that an innocent person is not imprisoned.

There are two aspects of the presumption of innocence. Firstly, it is concerned with the treatment of the accused and specifically the conclusions which may be drawn from the authorities' behaviour towards an accused, and secondly, it is concerned with the domestic court and foundations of a criminal conviction. As the accused is presumed innocent until proven guilty, it follows therefore that the courts and the police have to ensure that the various rights granted to the

Zambia Law Journal, The Role of the Lower Courts in Domestic Implementation of Human Rights pg. 6

■*" Ibid pg

6. " Ibid pg7.

Muna, W. The Presumption of Innocence in Zambian Criminal Justice Administration. A myth or reality? Obligatory Essay (2005).

accused are protected, because failure to observe them may result in an unfair trial.

Hence to understand how the principle of fair trial and the presumption of innocence operate in relation to one another it is imperative to discuss how the administrators of criminal justice ought to embrace the two principles by attaching some peculiar attributes which must uphold them. "^^ Meaning, a democratic state like Zambia has to put in place safeguards which ensure that both the courts and the police are well attuned to the basic principles of human rights in the way they handle the suspects and accused persons that appear before them. Firstly there must be impartiality and independence in the way the judiciary performs its responsibilities which should be without bias and with courage. To determine this, it is necessary to examine the manner of appointment of its members and duration of their terms of office and also the existence of guarantees against outside pressures such as bribes and political interference. Secondly, there is need for the accused to have access to the courts by provision of legal Aid where one cannot afford. It is also fundamental that judgment must be pronounced within a reasonable time'^'^ as the principle that justice delayed is justice denied cannot be over emphasized. This makes it imperative for the administrators of justice to demonstrate and act positively to be expeditious in the dispensation of justice. It is also the right of an accused to have a fair and public hearing hence promoting the principle of public hearing and pronouncement of judgments.

'-Ibid. Pg. 4.

" Article 18(1) of the Constitution. Chapter one.

Failure to release suspects on police bond and, or bail, where bail is justifiable, coupled with the delay in disposal of criminal cases adversely affects the rights of the suspects who in fact are supposed to be presumed innocent from the outset. Hence, an infringement of both the right to be presumed innocent and that of fair trial.

1.8 CHAPTER OUTLINE

Considering the above named issues, this study tackles the problem in the following manner: Chapter one as already noted introduces the topic and explains the meaning, historical background and gives an outline of the principles of fair trial and the presumption of innocence as set out by both local and international law. Chapter two analyses police operations in the administration of criminal justice and their role in upholding the principle of fair trial and that of the presumption of innocence . Chapter three looks at the courts and their role, and whether or not they have consistently upheld the law relating to fair trial and the presumption of innocence , chapter four tackles the comparative study between Zambia and United Kingdom and also between the United States of America and then chapter five provides conclusions and recommendations of the study.

CHAPTER 2

2.0 POLICE OPERATIONS

The Police Force is a state institution that is mainly responsible for ensuring that the law as set out in the country's legislation is enforced accordingly. The Zambia Police Force is a creature of the Constitution. Meaning, it should not be arbitrary or subject to any manipulation such as political for instance. As alluded to earlier, this chapter focuses particular attention on police operations in Zambia in order to ascertain whether or not as law enforcers the force has upheld the presumption of innocence in the day to day administration of justice.

Another important feature of this chapter is that it provides an insight of the conditions under which the inmates in some police stations are being subjected to as a result of the site visits that were conducted at the Kanyama and Central Police Stations. In addition, this chapter also looks at some of the rights that are recognized by the law as being those of a suspect, while at the same time, analyzing from the situations at the said cells, if these rights are promoted and respected by the police.

The police force is vested with various functions which are incidental to its overall duty of administering criminal justice as enforcers of the law including protecting life and property; preserving law and order and detecting and preventing crime.

Article 103 (1) of the Constitution of Zambia Chapter One of the Laws. " On the 30" August 2007 under the authority of the office of the Inspector General of Police in Zambia. ^ Article 104 of the Zambian Constitution.

The case of *Resident Doctors Association of Zambia V the Attorney-General* emphasizes the importance of the role of the police by pointing out that in their conduct, the police need not be oppressive. The Supreme Court further emphasized that oppressive conduct attracts exemplary or aggravated damages to be awarded to the victims to express indignation by the court at the police and that it calls for a more generous, rather than a moderate award to provide an adequate solatium.¹ Similarly, the case of *Christine Mulundika and 7 others V the Attorney general*² upheld the position that the police have a duty to uphold the principles of the law in their operations and not to carry out their duties according to their whims and caprices³. Since the force deals with an area of the law which is very sensitive and which requires that the right and deserving offenders are punished, the *grund norm* of the land emphasizes the need for the police force to have certain attributes. Among these attributes are that the force should be professional, disciplined, competent and productive and that its members should be citizens of Zambia and of good character.⁴ Various pieces of legislation in Zambia vest certain powers in the police which are vital for the facilitation of their operations. Among these is the CPC⁵ which gives the officer in charge of a police station discretionary power over granting of a police bond, where a person has been taken into custody without a warrant for an offence other than one punishable by death. In addition, international human

(SCZ Judgment No. 12 of 2003) Ibid
"SCZ No.25 of (1995) Ib.d
Article 104, Chapter 1 of the laws of Zambia. ^
Chapter 88 of the Laws of Zambia.

rights instruments also emphasize the importance of the role of the police in upholding the principle of fair trial and the presumption of innocence. The ICCPR emphasizes the role of public authorities like the police in protecting the dignity and the physical and mental integrity of the individual¹¹. The UDHR also preempts the police from use of torture or cruel, inhuman or degrading treatment or punishment during the conduct of their duties¹². Consistent with this, is the CAT¹³. However, an overview of the current situation in Zambia shows that certain powers granted to the police have been abused and not properly used for their required purpose with regard to suspects. This in turn has demonstrated that on the overall the police have a negative attitude towards suspects generally which leaves us with the question of whether or not the presumption of innocence has any place in our police force as they administer criminal justice in Zambia.

2.1 THE RIGHTS OF A SUSPECT

Because there are people who are vested with the power to administer justice and such administrators hold power with potential to abuse it, international and regional human rights instruments well as national constitutions in their Bill of Rights provide both substantive and procedural safeguards which, particularly in this study pertain to the presumption of innocence and fair trial, designed to defend the status and dignity of victims that go through the process of criminal

Article 7 (1966) Article
5 (1948) (1984)

administration.^{^^} The Zambian constitution in its article 18(2) a) specifically provides for the right to be presumed innocent until proved guilty. In addition the constitution provides for rights incidental to this right as follows:

The right to be protected from torture or cruel, inhuman and degrading treatment.^{^^}

Protection from torture, cruel inhuman and degrading treatment^{^^} which entails that the police must not misuse and abuse their power over others to become the criminals they are sworn to arrest by using torture or inhuman treatment to facilitate their investigations. This right also implies that suspects must not be subjected to treatment which is degrading to a human being such as life threatening conditions like poor sanitation and health facilities which are important for the survival of a human being. The right to be presumed innocent until proved guilty^{^^}

A suspect ought to be presumed innocent until he or she is proved or has pleaded guilty. Hence, this entails that he or she must not except in rare cases, be placed in remand.

The right to appear before an independent and impartial court within reasonable time.^{^^}

This right entails that an accused ought to be brought as soon as is reasonably possible but not later than twenty-four hours, before an independent and

Chanda, A. Zambia Law Journal. The Role of the Lower Courts in Domestic Implementation of Human Rights. Pg7
Article 15 of the Constitution, chapter 1 of the laws of Zambia.
Chanda, A. Zambia law Journal. The Role of the Lower Courts in Domestic Implementation of Human Rights pg. 6.
Article 18(2) (a) of the constitution, "ibid
Article 18(1)

impartial court of law and to be charged or to be informed of the reason for his or her further detention, failure to which he/she shall be released. The right of minors to be protected from adults during detention¹¹ The Juvenile Act specifically provides for prevention of Juveniles associating with adults during detention.¹² This right entails that minors, while subject to criminal proceedings, shall be separate from adults and brought before specialized courts, as speedily as possible, so that they may be treated in accordance with their status as minors. However, in Zambia this is not necessarily the case. In one of the female cells, although not congested, the youngest, who was sixteen years old¹³, admitted that in the previous cells she had been at Kamwala Police Station before being transferred to Central Police, both female adults and juveniles were all placed in the same cell and the juveniles did suffer physical abuse from the adults in form of beatings. It is important to note here that this was a minor sharing a police cell with three adults at Central Police, and according to her, she had been in the cell for almost two weeks without appearing before any court of law. The right to personal liberty.¹⁴

Accordingly, this right entails that one must not be deprived of his or her personal liberty except as may be authorized by law. The right not to be unreasonably detained¹⁵

¹¹] Ibid. pg. 6.

¹² Article 58 Chapter 53 of the Laws of Zambia ¹³ Ibid.

¹⁴ Site visit to Central police station, Lusaka 30th August 2007 ¹⁵ Ibid.

¹⁶ Article 13 (1) chapter 1 of the laws of Zambia ¹⁷ Article 13 (2)

The accused has the right to be released from detention, with or without bail unless the interests of justice require otherwise. The right to legal representation[^]

To be represented by a legal practitioner of his or her choice and where it is required in the interests of justice, to be provided with legal representation at the expense of the state, and to be informed of these rights."^o

2.2 TREATMENT OF SUSPECTS

Hartman notes, "When the police misuse and abuse their power over others to become criminals they are sworn to arrest, the rule of law is reduced to the rule of terror and violence. The rule of law is an essential element of any democratic society. "[^] The importance of this statement lies in the fact that it emphasizes that the police must not carry out their duties according to their whims and caprices but rather, according to the law as set out. Hence, Zambia being a democratic society makes it mandatory that the principles of fair trial and the presumption of innocence be upheld by the police. However, this chapter focuses more on the aspect of the presumption of innocence that concerns the treatment of the accused and specifically the conclusions which may be drawn from the authorities' (the Police) behavior towards him/her. The second aspect of the presumption of innocence which is concerned with the domestic court and the foundations of a criminal conviction shall be dealt with in the next chapter

^oArticle 18(2) (d)

[^] Chanda, A. Zambia Law Journal. The Role of the Lower Courts in Domestic Implementation of Human Rights. Pg. 6.

^o As cited by Chanda, A. Zambia Law Journal The Role of the Lower Courts in the Domestic Implementation of Human Rights. Pg7

which shall focus more on fair trial when analyzing court operations in relation to conduct of criminal trial. ""^

The Zambian constitution prohibits the use of torture or any form of inhuman and degrading treatment of suspects. However, Professor Chanda notes that Torture appears to be the favorite tool used by the police and other security organs to extract information from suspects.

In Zambia, the case of *Liswaniso v Tlie People*^^, the Supreme Court held that illegally obtained evidence is admissible as long as it was relevant to issues before the court""^". This position of the law has remained the same to date."" Hence, this gives the police an incentive to continue torturing suspects because they know that even if the court will throw out an involuntary confession, any evidence obtained as a result of the said confession will be admissible. However, this can be contrasted with the American position which does not permit in its courts, admission of illegally obtained evidence. This principle of the law was celebrated in *Mapp v Ollio*. ""^

Courts, as final arbiters when interpreting the constitution and laws there under which confer freedoms, determine the content and parameters of these rights.

Robertson and Merrils, Human Rights in Europe. Manchester. Manchester University Press. (1993). Article 15 of the Constitution of Zambia. Chapter 1. See Afroiit, Zambia Human Rights Report 38 - 13 (Lusaka 1999), " SCZ ludge ment No, 58 of 1976 Ibid '

"Chanda, A, Zambia Law Journal. The Role of the Lower Courts in Domestic Implementation of Human Rights. Pg. 8.

"" 367 US. 643 (1961),

Therefore, there is need for the court, when interpreting provisions conferring fundamental rights, to adopt an interpretation which does not negate the rights".

Another prohibited treatment by the Constitution is that which is degrading to a human being. Meaning, the police ought to ensure that suspects are accorded similar essential conditions that unsuspected people are given. An example of this is proper sanitation and health facilities in the cells. It was evident even before confirmation from the inmates that sanitation in the cells of some of the Zambian police stations was a problem because of the unpleasant stench to which the inmates appeared to have gotten used to. Each cell has a small provision which is used both for bathing and as a toilet. This health hazard is reinforced by the fact that these so-called showers or toilets do not have running water hence the inmates have to improvise with small containers they get from their kitchen. In addition, food is not provided as such is not an obligation of the government unless in the prisons.

Suspects need not be neglected on this aspect by virtue of being suspects because that in itself is degrading to a human being thus in turn, proving an infringement on the right to fair trial and to be presumed innocent until proved guilty .

Resident Doctors Association of Zambia V The Attorney General (SCZ Judgment No. 12 of 2003) Site visit to the Central Police station in Lusaka on 30 August 2007. Ibid .According to the interview with the station inspector.

The law also prohibits detention of suspects where it is unnecessary. However, rarely are suspects taken before a court of law within twenty-four hours or a reasonable time after being charged. In addition, suspects in Zambia are rarely provided with legal aid within reasonable time upon being charged and while being investigated, which should not be the case as this contradicts with the right to fair trial and to be presumed innocent until proved guilty. However, on the overall in the Zambian police cells^{^^}, the major complaint among the inmates was that since their detention, none of them had appeared before any court of law. Some have spent more than six weeks in the cells yet none of their arresting officers have made any attempt to attend to their cases. When asked to account for such long detentions, the officers^{^^} pointed out that among the various factors that determine the length of one's detention is the ability, intelligence and competence of the investigating officer. Another factor alluded to was that most inmates did not qualify for the conditions placed on the granting of bonds because most of them had no sureties. It is the contented view that the source of this problem is the wide discretion given to police officers by the law with regard to determining additional conditions for granting a bail bond^{^^} and the power to determine the sum of such bail^{^^}. Hence, because of lack of specific and detailed guidelines, such power remains too subjective and thereby susceptible to abuse by the police.

^{^^} Site visits to Kanyama and central police stations in Lusaka on 30th August 2007.

^{^^} Ibid. According to station inspectors at both police stations. Section 124, the Criminal Procedure code, Chapter 88 of the Laws of Zambia Ibid Section 123(2)

Another admission made by the officers was that transport is an impediment to police operations in general, as there are only a limited number of vehicles at their disposal.

As Robertson notes^{^^}, one of the most important aspects of the presumption of innocence concerns the treatment of the accused and specifically the conclusions which may be drawn from the authorities' behavior towards the suspect. It is evident from the above discussion that there is a disparity between the rights of a suspect and the treatment given by the police. The situation in the Zambian police cells is devastating despite the increase in the budgetary allocation of funds by the 2007 Budget to the prisons and police operations amounting to K58.5 Billion.^{^^} The various rights guaranteed to a suspect are aimed at upholding the rights one has by virtue of being human and in order to ensure that an innocent person is not convicted. The most fundamental human rights of these people are not upheld such as those to health, sanitation, and the right not to be deprived of personal liberty except as may be authorized law. Hence, from this critical analysis of the law as set out in the constitution and the prevailing situation in the cells, it is conclusive that the principle of the presumption of innocence has not been upheld by the police in their administration of criminal justice due to the various violations already mentioned. These miscarriages in turn, defeat the norms of justice.

Robertson and Merrills. Human Rights In Europe 3rd edition. Manchester. Manchester University Press. (1993). Refer to appendix

Article 13(1) of the Constitution. Chapter 1 of the Laws of Zambia.

The next Chapter focuses on the operations of the courts in their dispensation of justice to ascertain whether or not the principles of the presumption of innocence and fair trial are being upheld.

CHAPTER 3

3.0 THE CRIMINAL COURTS IN ZAMBIA

The judiciary of Zambia interprets and administers the law. Basically the judiciary is made up of a hierarchy of four levels of courts beginning with local courts at the bottom of the ladder, through the subordinate and High court to the Supreme Court^{^^}. The constitution^{^^} recognizes the creation of the supreme court of Zambia, the High for Zambia, Subordinate courts, local courts and any other courts set up by law. However, the main focus of this chapter is to analyze court operations with regard to trials in criminal cases and ultimately, to assess whether the applicable provisions of both domestic and international law guaranteeing a fair trial have been implemented and if so, to what extent. In addition, this chapter shall achieve this by further identifying the main constraints on the smooth running of criminal justice in Zambia as well as a brief analysis of the site visits that were undertaken to the aforesaid courts in Zambia.

The Supreme Court is the highest of the four tier court system. The court exercises both original and appellate jurisdiction. In the Supreme Court as regards to criminal matters, there are two types of appeals. First is appeal as of right which lies against sentences not fixed by law as was established in the case of *Alubisho v The People*^{^^}. Another type of appeal is that with leave. Where a case was being heard by the High court in exercise of its appellate or revisory

Munalula, m. Legal Process: Zambian Cases, Legislation And Commentaries. Lusaka, UNZA Press, (2004)
Part VI of the Constitution Chapter 1 of the Laws of Zambia. Article
92 (1) of the Constitution of Zambia. (1976) ZR 11.

jurisdiction, one can only appeal to the Supreme Court with leave from the High court or if it is refused, with leave from the Supreme Court itself. In the case of *Phiri and Another v The People*¹¹ the court held that the Supreme Court must allow the appeal if it considers the conviction to be unsafe or unsatisfactory because of insufficient evidence before the trial court or if the main ingredients of a particular offence were not proven, or if it was wrong in law.¹²

The second highest court is the High court which is vested with unlimited and original jurisdiction to hear and determine any criminal or civil proceedings. Additionally, in terms of its supervisory jurisdiction, the High court has powers under the High court Act itself, subordinate courts Act and the CPC, ¹³ to call for and review the record of any proceedings determined by any subordinate court and if it considers necessary, to revise any judgment or order contained in any such record.

The subordinate courts are third in rank and are established by the subordinate court Act. They are courts of record with both original and appellate jurisdiction. They have powers to conform, vary, amend or quash any decision or order from a local court, in local court appeals. It is important to note that they can state a case for consideration before the High court and although have both civil and criminal jurisdiction; the extent of the powers depends on the class of the presiding magistrate. It is also imperative to note that most of the criminal

¹¹(1973)ZR 47. ¶

Ibid

Section 10 and 11 of Chapter 88 of the Laws of Zambia.
Chapter 28 of the Laws of Zambia.

cases are in fact first instituted in the subordinate courts which may subsequently commit to the High court for summary trial in respect of any person charged with an offence triable by the High court. At the bottom of the judiciary hierarchy in the criminal administration system in Zambia are the local courts. These are found in all communities around the country and are charged with the responsibility of applying customary law.

3.1 AN ANALYSIS OF COURT OPERATIONS IN RELATION TO CONDUCT OF TRIAL, WITH A VIEW TO ASCERTAIN HOW THE COURTS AS INTERPRETERS OF THE LAW ADMINISTER THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA.

It is imperative to note that this aspect of the chapter concentrates on the court's role in upholding the various elements of a fair trial consequently, dealing with the second aspect of the presumption of innocence which concerns the domestic court and the foundations of a criminal conviction.

Courts, being interpreters of the law, have an important role to play in their administration of criminal justice which can only be effective if they uphold the principles of human rights and the rule of law. It is imperative for the courts to uphold the principle of fair trial and the presumption of innocence in their daily operations for justice to prevail in the Zambian society.

Chapter 88 of the Laws of Zambia Section II
Abel-Smith, B. and Stevens, R. In Search of Justice Society and the Legal System. London. The Penguin Press, 1968.
pg. 236.

Among the various roles the courts have to play in criminal proceedings, it is important for a magistrate as an officer of the court, to look at the date and manner of arrest and satisfy himself or herself that the accused has been brought before the court within a reasonable time. This provides a check against abuse of criminal justice by police who are found to be over detaining suspects.

The criminal justice system operates on the premise that justice delayed is justice denied. The constitution requires that any person arrested or charged with an offence should be tried by a court without undue delay. This entails that the courts should uphold the right to a speedy and public trial. In addition, it entails that the courts also play a role in ensuring that no person is deprived of his liberty except on such grounds and in accordance with such procedure as established by the law. Hence this means that a person must not be placed in remand except in rare cases. Therefore, since an accused is presumed innocent until proven guilty, it follows that an accused should be released on bail unless they have no fixed abode, and are likely to escape or are likely to interfere with witnesses or are a danger to the public. And so as an officer of the court, a magistrate has to balance the value of presuming an accused as innocent and the value of protecting the victims and the public at large by recognizing the danger to the public in allowing a violent criminal to remain free to threaten witnesses and other citizens.

"" Article 13 (3). Chapter 1 of the Laws of Zambia.

"" Chanda, A. Zambia Law Journal The Role of the Lower Courts in the Domestic Implementation of Human Rights. Pk 6 Ibid pg7.

Zambia is a democratic society and so the rule of law is an essential element of its law. Hence, it is the duty of the courts as interpreters to prosecute any violations of human rights such as torture and inhuman treatment of the accused persons. This can only be possible by preventing the police from violating such freedoms and by removing the incentive to commit such violations of human rights by means of prosecution. ""^

Another duty imposed on judges and magistrates is that they should perform their responsibilities with courage and without bias, by resisting external pressures and bribes. This ensures the upholding of the principles of fair trial and the presumption of innocence in the sense that the accused's right to a fair hearing by an impartial and independent court is respected. *^ The rationale behind the requirement of a competent independent and impartial tribunal established by law is to avoid the arbitrariness and or bias that would potentially arise if criminal charges were to be decided on by a political or administrative agency.

It is important to note that as a basic component of the right to a fair trial, the presumption of innocence means that the burden of proof in a criminal case lies on the prosecution and that the accused has the benefit of a doubt. Hence, in the administration of criminal justice, the law requires the prosecution to prove their case without recourse to the accused who may not be obliged to answer

Ibid pg. 8.

""Ibidpg. 9.

questions. Therefore, the courts have a duty to ensure that no person charged with a criminal offence is compelled to give evidence at the trial. This position of the law was also upheld in the case of *Thomas Mumba v The People*¹ where the court declared Section 53(1) of the corrupt practices Act null and void as it compelled the accused, if he elected to say something in his defense, to give evidence².

In our adversary system of Justice, any accused person, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. It is important to note that the courts ought to ensure that a lawyer was provided when a suspect was being questioned because if this is not the case then the principle of equality before the law would not be said to have been upheld. This is mainly because the absence of a lawyer at the interrogation of the accused encourages mistreatment of the accused by the police and also leads to frequent unnecessary adjournments by the prosecutor, in turn, delaying and denying justice to the accused. Also the courts have a duty to inform the accused of his rights of appeal if he is not satisfied by the judgment of the lower court to ensure that any error that may have been made by the court may be corrected by a higher court.

Article 18 (7).

"HNR/488/1984. Ibid

18 (2) (d).

Abe - Smith, Stevens, R. In Search of Justice Pg. 237.

3.2 CONSTRAINTS ON THE SMOOTH RUNNING OF CRIMINAL JUSTICE IN THE ZAMBIAN COURTS.

It is well known that while the constitution, statutes and international instruments generally provide for some measure of fairness in criminal proceedings as already noted, implementation by the courts is often not adequate. Hence the focus of this section of the chapter is to identify the main constraints on the smooth running of criminal justice in the Zambian courts which in turn, lead to infringements on the right to fair trial and to be presumed innocent until proved guilty.

Both judges of the supreme court and those of the High court are appointed by the president using documents called letters patents, upon his satisfaction that the person so recommended are worthy, capable and suitable. Although this appointment is subject to recommendation by the Judicial Service Commission and ratification by National Assembly, there is still a high degree of subjectivity involved on the part of the president because ratification by the National Assembly does not make the appointment of constitutional office holders the joint responsibility of the president and the National Assembly. This still remains an act of the president and also a voluntary act because it does not divest him of his discretion to appoint as he remains free to nominate another person. When determining whether a court is independent and impartial, there is need to ascertain the manner of appointment of its members. ¹⁰⁰⁰ Hence, the fact that the president has so much discretion in the appointment of judicial officers is a

Article 95(1).

¹⁰⁰⁰Robertson and Merrills. The European Convention on Human Rights. 3rd Ed. Manchester. Manchester University Press (1993).

constraint to the administration of criminal justice because it compels the Judges to perform their responsibilities without courage and with bias as they feel they owe allegiance to their appointing authority.

Another constraint to the smooth administration of justice in Zambia lies in the fact that, illegally obtained evidence is admissible in the Zambian courts. This was enunciated in the case of *Liswaniso v The People*^{^^} where the courts held such evidence to be admissible so long as it was relevant to the issues before the court^{^^}. This is a constraint in that it presents an inconsistency in the law because despite the law providing that illegally obtained evidence should be inadmissible, the relevance of such evidence to issues before the court leads to a qualifying of the law. Hence, this does not promote the principle of fair trial which presupposes consistency and certainty in the law. Therefore, such incentives to torture suspects tend to cast a doubt on the courts in Zambia as to whether or not they are performing their role in reducing or curbing torture and inhuman treatment by the police.

Another constraint is seen in the wide discretion given to magistrates or officers in the grant of bail to the accused. Firstly, this can be seen in the power given to them to include additional conditions of bail bond as may seem reasonable and necessary in any particular case.^{^^} Such power is too wide mainly because of the likelihood of a high degree of subjectivity which would in turn lead to abuse of

^{^^}SCZ Judgment No. 58 of 1976. ^{^^}Ibid
Section 124, of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.

the power. In addition the courts are vested with the power to fix the sum of bail as they may think sufficient". It should be noted here that although the CPC stipulates that the amount of bail shall not be excessive, there is still a high possibility of abuse of such power because it means that whoever is granting the bail has been vested with the power to determine the amount hence, making such power too subjective because of lack of detailed and specific guidelines on its use. Professor Chanda, in his article noted that in practice many accused persons are denied bail through the court fixing bail at a figure which is beyond the resources available to the defendant; or on the pretext that it is not in society's interest to release the defendant. In the case of *The People vs. General Wilford Fungika*, the court held that bail could not be granted to the accused because it was not a right but a privilege that was given at the discretion of the court. Hence this has led to congestion in the Zambian courts as well as unnecessary adjournments. And as the principle that justice delayed is justice denied cannot be over emphasized, such congestion proves to be a hindrance to an expeditious dispensation of justice which consequently infringes on the right to a fair and speedy trial.

Another constraint is that of lack of legal aid. Unlike in the USA where an attorney is provided at the time of interrogation, the practice in Zambia is that the

"■* Iiid section 123(2)
Section 126.

' ""Zambia Law .Journal. The Role of the Lower courts m the domestic implementation of Human Rights. Pg8
IK/289/2005.

"Mbid

'Site visit to the magistrates courts in Lusaka, 19* August, 2007.

""Munalula, m. Legal Process: Zambian Cases, Legislation And Commentaries pg143

accused usually has no legal representation even at trial stage mostly. The legal Aid department is not very effective because of being under funded and understaffed. And usually legal aid is offered too late after the accused has been in custody for several months. Hence, this leads to unnecessary adjournments by the prosecutor, in turn, delaying and denying justice which, according to the case of *The people v Siamwaba*,¹¹¹ defeats the very best intentions of the Legal Aid Act¹¹², namely a fair and speedy trial.¹¹³

Among other constraints as Kunda ¹¹⁴notes is the shortage of magistrates to handle cases. This could be attributed to the poor conditions of service that magistrates have such as lack of accommodation. In addition, the fact that the Judiciary receives a meager and erratic funding from the government also contributes because insufficient funds pre-empt the expedient disposal of cases as magistrates need to be remunerated for their work. Therefore, as alluded to above, leading to a delay and denial of justice.

In conclusion, although the law generally provides for some measure of fairness in criminal proceedings as already noted, implementation by the courts has not been adequate. Hence this demonstrates that although the law in Zambia

(1972) ZR 148.

Chapter 34 of the Laws of Zambia. *The people v Siamwaba*, Ibid pg 61. ¹¹¹ Zambia Law Journal. The Zambian Judiciary. The 21st Century. Vol. 30, (2002).

attempts to seriously redress the imbalance between the accused and the state, suspects are still subjected to the rule by whim or caprice.

The next chapter shall focus on a comparative analysis of the criminal justice system of Zambia with that of the U.K as well as the U.S.A, as a country outside the commonwealth.

CHAPTER 4

4.0 A comparative Study of Zambia and the United Kingdom

This chapter focuses on comparing the administration of criminal justice in Zambia with that of the United Kingdom as a fellow Commonwealth country. In addition, the criminal administrative system of the United States of America, as a country outside the commonwealth will also be briefly looked at vis a vis the right to fair trial and the presumption of Innocence with a view to ascertain whether there is need to recommend changes in the administration of criminal justice system in the two commonwealth countries in light of the law and practice in the United States of America. This comparative analysis has been done from the realization that one can gauge the direction of the Zambian criminal administrative system from the experiences of other well established jurisdictions.

4.1 The Outline of Criminal Justice in the United Kingdom

The British system of government being a parliamentary democracy in nature is a system of government by the whole people of a country especially through representatives whom they elect. The responsibility of administering criminal justice in any country falls on both the courts and the police force. In the U.K, the administration of the legal system, in the sense of the mechanisms for the provision of legal services, the courts established for resolution of legal disputes and the process for effecting the law is almost entirely a matter for central government.^{^^^}

^{^^^} Baily and Gunn. Smith and Bailey on the Modern English Legal System 2nd Ed. London, Sweet and Maxwell (1991)

However, with regard to sources of the law the label "English legal system" is convenient but has to be treated with a little care. For one thing, it extends to both England and Wales, for another, it is not as systematically organized as a system perhaps should be. *^ⓂAmong the main sources are common law, a term denoting rules derived from decisions of the superior courts In contrast to those derived from statute, also laws enacted by the Queen in parliament and equity. Baily notes that apart from the police, the courts of law are perhaps the most visible feature of the English legal system because they have the power to impose punishment in criminal cases and also to report on these. ""The particular courts relevant to this study include the magistrates' courts, which are the lower criminal courts. Appeals there from lie either as of right to the crown court, where proceedings take the form of a complete rehearing or to the High court by a procedure whereby the magistrates state a case for the opinion of the High court on a point of law. Any further appeal from the high court lies to the House of Lords in criminal cases. As is the case in Zambia, the adversary system of justice is one of the important Pillars of the English legal system regulating practice and procedure. The fundamental right that criminal proceedings should be adversarial means that in such proceedings, both the prosecution and the defense must be given the opportunity to have knowledge of and comment on the observations filed and the

Ibid Pg 30

Ibid Pg 30

Shoolbred, C.F. The Administration of Criminal Justice in England and Wales, London, Pergamon Press (1996)

evidence adduced by the other party. ^Although Zambia is also a democratic country, it differs with the U.K in that its democracy is constitutional whilst that of the latter is parliamentary. The U.K being a parliamentary democratic jurisdiction entails that it is a system of government by the whole people of a country, especially through representatives whom they elect. Such a system of government contrasts favorably with a principle of government based on one man rule, absolutism or an oligarchy.^°

The main factor that underlies the viability of effective administration of justice lies in building a state which respects the rule of law. Among the essential ingredients of the rule of law are that the state is subject to law, genuine democratic representation, and recognition of fundamental rights by the constitution and the existence of an independent judiciary."^" The administration of criminal justice, including law enforcement and prosecutorial agencies and especially an independent judiciary and legal profession in full conformity with applicable standards contained in international Human Rights instruments, is essential to the full and non discriminatory realization of human rights indispensable to the process of democracy."^^

The criminal courts of England are the inheritors of a great tradition that persons accused in these courts are entitled to a fair trial. This tradition is that no one should be convicted of a criminal offence unless the court or jury is sure that the offence has been proved by the evidence beyond reasonable doubt. Hence, it is

TM Kolb R. tinman Rights Law Journal. The Jurisprudence of the European court of Human Rights on Detention and Fair Trial in Criminal Matters. (1992 - 1998) Vol 21

Ibid Pg 133

Ibidpg 135

"Ibidpg 135

on this tradition, enshrined in the English law that the liberties of Englishmen depend."^^Hence, the rights to a fair trial and to be presumed innocent until proved guilty are considered in close relation to the concepts of the state law, of a democratic society and of the rule of law in the UK

4.2. **Police Administration, operations and their accountability against abuse in the United Kingdom.**

The responsibility of administering justice in any country and the duty of ensuring that the law is enforced accordingly falls both on the courts and the police force. To facilitate their operations, the English legal system provides its police with a series of powers to interfere with the legal rights of members of the public."^* However, the English law also established a framework for controlling the exercise of such powers by setting conditions as to who may exercise the power and the circumstances under which it may be exercised in the Police and Criminal Evidence Act 1984."^^ However, many of the controls are not found in the Act itself but in codes of practice made by the Secretary to the State which includes codes on powers of stop and search, detention, and so on. ^^^ Consistent with this, the government of the U.K does not give the English police direct instructions to intervene during the performance of their duties. Also the police have no special sovereign power to fulfill their tasks. Such decisions to intervene by the police have to be made by the chief constable. Meaning if the

Shoolbred, C.F. The administration of criminal justice in England and Wales. Pg vii. Bailey and Gunn.
Smith and Bailey on the Modern English Legal System 2nd Ed. Pg 574 Ibid Pg 597 Ibid Pg 597
Fleigner, T. What are Human Rights?^ Melbourne, The Federation Press, (1999)

chief constable does not accept the government's instructions, the instructions will not be binding on the police unless they are upheld by a court. ""^^This means that the police force is less subject to manipulations such as political for instance. The English police in this sense can be said to be independent of the government but subject to the rule of law therefore placing them in a better position and likelihood of upholding the principle of fair trial and the presumption of innocence. On the contrary in Zambia, although the constitution provides that parliament shall regulate police conduct,^^ several supreme court decisions especially those dealing with the public order Act such as the cases of *Christine Mulundiio and 7 others V The people* ^^^and that of the *Resident Doctors' Association of Zambia and 51 others V The Attorney General*""^", it can be observed that the police by infringing on Plaintiff's freedoms of Associations and assembly were acting in furtherance of the then incumbent government to oppress the opposing parties and associations. Hence the declaration in both cases of some sections like 5(4) in the Act to be null and void as it infringed the rights to freedom of assembly and association. In such circumstances, it is therefore inevitable to question the police force's conduct with regard to being independent of government particularly, executive intervention . Consequently, one can safely conclude on this point that Zambian police in their operations are guided not by the principle of the rule of law but rather by that of whim and caprice. Meaning, it leaves one to wonder whether the principles of

""IbidPg53 Article
105(d).
SCZ Judgment No. 25 of 1995 Appeal No.
39/2002: SCZ No. 12/2003

the law such as the right to fair trial and to be presumed innocent until proved guilty are a reality or illusion.

In the U.K, the police just as in Zambia are prohibited from torturing of suspects in order to facilitate their investigations. This in the U.K means that confessions obtained through such means as torture are not admissible in the courts of law. Torture is inhuman and degrading treatment which is not befitting to a democratic society where the principles of the law such as the right to fair trial and the presumption of innocence are upheld. However, it is important to note that in the U.K, a confession made by an accused is admissible in so far as is relevant to any matter in issue before court and in so far as it is not excluded on grounds that it is obtained by means of oppression, which according to *R v Fulling* includes torture. The main distinction here between the U.K and Zambia is that in the former, if the police have acted in bad faith, the court will have little difficulty in ruling any confession inadmissible despite the relevance to the issues before court. Hence in such a case, there is a check against torture. In Zambia although torture is prohibited, there are less safeguards against torture by the police and the courts because as it was celebrated in the case *Liswaniso v The people* the cardinal issue is whether such illegally obtained evidence is relevant to the issues before court and not whether it was acquired by means of oppression or in bad faith. This is a constraint in

Bailey and Gunn. *Smidi and Bailey on the Modern English legal System 2nd Ed.* Pg 611 Section 78 (1), the police and criminal evidence Act 1984. Ibid section 76(1) 1987 QB 246. Ibid. SCZ Judgment No. 58 of (1976).

that such a decision does not uphold the principle of reducing or curbing torture and inhuman treatment by the police hence, leading to principles of the law particularly the right to a fair trial and to be presumed innocent until proved guilty to remain a fallacy in Zambia. The presumption of innocence entails that a suspect must not be placed in remand except in rare cases. In the United Kingdom a detention by the police without charge which extends beyond a thirty-six hour period ought to be authorized by a warrant of further detention granted by a magistrate's court.^{^^^}This can be seen as yet another check on the police. In addition, the English system acknowledges that a suspect cannot be assured of a fair trial unless counsel is provided for him from the time of arrest. It has been noted that by far the largest number of cases in which confessions have been excluded have to do with situations where the police neglected to advise the suspect of his or her right to counsel.^{**^} On the other hand, site visits to the two Zambian Police stations earlier referred to, revealed a contrary situation. In addition, suspects in Zambia are not provided with legal aid within reasonable time upon being charged and while being investigated. Also Professor Chanda notes that legal Aid is mandated for all offences triable in the High Court such as murder and Treason. This should not be the case and is a clear indication of how much of an illusion the rights to fair trial and to be presumed innocent until proved guilty are.

Bailey and Gunn. Smith and Bailv on the Modem English Legal Svstem 2 ed. Pg 614 Ibid Pg 615

^{oo} Chanda, Zambia Law Joumai. The Role of the Lower Courts in the domestic implementation of Human Rights pg 11

The treatment of persons in custody in the United Kingdom is guided and provided for by the Police and Criminal Evidence Act¹⁹⁸⁴ and the code of practice on Detention. The code sets out the requirements as to the physical conditions in which detainees are kept, the handling of complaints about treatment in custody and medical treatment, the welfare of detainees being the basic responsibility of the custody officer. As a safeguard, complaints about treatment in custody are dealt with by an officer of at least the rank of inspector not connected with the investigation¹⁹⁸⁴. On the contrary in Zambia¹⁹⁸⁴, the suspects in the cells disputed having any medical attention apart from pain killers and also, they did not at all have a forum for instigating complaints.

Therefore, such treatment of suspects does not emulate the law as set out, partly because the Zambian Police are not as accountable as the English Police in their operations. For instance the English police are in a way put in check by provision for supervision or periodic reviews of their actions.¹⁹⁸⁴ The police are also subject to disciplinary regulations which may be contravened even where no tort or crime is committed.¹⁹⁸⁴ This is a mechanism for ensuring that the police operate according to the rule of law and not according to whims and caprice.

1984 Part V

Bailey and Gunn. Smith and Bailey on the Modern Legal System 2nd ed. Pg. 596 Site visit to the Central police station, 30th August 2007. Ibid 606 Ibid 607

4.3 Judicial Establishment and Administration in the United Kingdom

The judiciary of the United Kingdom with regard to administration of criminal justice comprises the magistrates' courts, which are the lower criminal courts. Appeals there from lie either as of right to the crown court or to the high court by a procedure whereby the magistrates state a case for the opinion of the High Court on a point of law. Any further appeal from the High Court lies to the House of Lords in criminal cases."¹¹¹

Before 1688, judges like other crown servants were appointed and dismissed at the crown's pleasure.¹¹² Today, the position depends on whether the Judge is a superior court Judge or an inferior court Judge. Superior court judges have more security of tenure.

The courts, as interpreters of the law, have an important role to play in their administration of criminal justice which can only be effective if they uphold the principle of the rule of law. In the English system, courts have the duty of prosecuting violations of human rights such as the right to be protected from torture. This is possible because the English courts are able to prevent the police from violating such freedoms through removal of incentives to commit such violations, such as declaring evidence obtained through torture of suspects to be inadmissible."¹¹³ However, this position, as earlier noted, is contrary to that

¹¹¹ Shoolbred, C.F. The Administration of Criminal Justice in England and Wales. Pg 7 ¹¹² Kunda G. Zambia Law Journal. The Zambian Judiciary in the 21st Century Pg 35. ¹¹³Section 78 (1) the Police and criminal Evidence Act 1984.

in Zambia hence showing that the courts in Zambia are not playing a role in removing the incentive to violate human rights through torture.

Officers of the courts in the English legal system are obligated to perform their duties without bias and with courage, by resisting external pressures and bribes. Kunda notes^{^^}that judicial salaries of High Court Judges in the English system of Justice are charged directly on the consolidated fund and are secured by statute. He notes that their salaries are made substantial with the aim of reducing any temptation to corruption. However in Zambia^{*®}judicial officers of equal position cannot be said to have substantial salaries. This has given rise to bias, impartiality and bribes in our criminal justice system hence proving an impediment to the realization of such rights as that of fair trial and the presumption of innocence.

In the English system, the magistrate when granting bail must have regard to the Bail Act which acts as a guide. This is a means of checking the magistrates' powers when considering whether or not to grant bail, conditions attached to bail the sum of bail, and so on. However, in Zambia as already noted, the courts and police have too much discretion which enables them to determine the amount of bail^{**^^} and also in determining additional conditions to be attached to bail^{P^^}. It is the contended view that Supreme Court Act on its provisions relating to the grant

^{^^}Kunda G. Zambia Law Journal The Zambian Judiciary in the 21st Century. Pg. 37. ^{""}Ibid Pg, 38 1976 "
Section 123(2), the criminal procedure code, Chapter 88 of the laws of Zambia. Ibid section 124

of bail is equally insufficient as it also has no detailed guidelines."¹* The English system considers Bail a right except in certain circumstances where it is not favorable to release the suspect on Bail. The usual trend in Zambia² is that the accused are denied Bail through the court fixing Bail at figures beyond resources available to defendants. In addition, on some instance, the Zambian courts have held, as was the case in *The People V General Wilford Fungika*³ that bail was not a right but a privilege that was given at the discretion of the courts⁴. This has led to congestion in the Zambian courts with trials, in turn hindering an expeditious dispensation of Justice as well as violating the right to fair trial and to be presumed innocent until proved guilty.

In the U.K, just as is the case in Zambia, the magistrate has the duty of ensuring that an accused knows of his or her right to have legal counsel. This right has been upheld in most circumstances due to the reason that its legal Aid department is better funded. On the contrary, in Zambia, this right is usually recognized in the High Court as stated earlier due to the legal aid department being under funded hence under staffed. This in turn has led to suspects being mistreated during police interrogations and also to frequent unnecessary adjournments by prosecutors hence delaying justice and consequently denying it.

Section 22, Chapter 25 of the laws of Zambia.

Chanda, A Zambia Law journal [The Role of the Lower Courts in the Domestic Implementation of Human Rights](#). Pg 7

1 K/289/2005 (unreported)

Ibid

4.4 A brief Outline of the Administration of Criminal Justice in the United States of America as Compared to Zambia and the United Kingdom in Light of Fair Trial and the Presumption of Innocence.

This section of the study does not aim at analyzing the criminal justice system of The United States of America in detail but rather focus on comparing certain aspects of the said system with that of Zambia and the United Kingdom Vis a Vis the two principles of the law as stated above.

Generally speaking, its system is more advanced and developed as compared to Zambia's in its administration of criminal justice. However, on this basis, the criminal justice system in the United States is at par with that of the United Kingdom in the sense that both systems can be seen to be more efficient in their prosecutions than the Zambian system most likely because both systems are found in countries considered being the oldest democracies of the world. The efficiency of a prosecuting system is not to be judged solely in terms of the efficient use of resources. Delays in preparation causing adjournments and inadequate preparation causing the collapse of cases certainly cost money, but could also cause injustice, inconvenience and frustration to all those concerned in the process.

In the American system judicial impartially and non bias is encouraged by providing high salaries for judicial officers although, as Kunda notes, such salaries are usually less than the income of successful private practitioners. This

Bailey and Gunn. Smith and Bailey on The Modern English Legal System. Pg 622 Ibid Pg 622
Kunda G. Zambia Law Journal The Zambia Judiciary in the 21st Century. Pg. 40

is a different position from that in Zambia where he also notes that there is need for improvement of conditions of service of magistrates; justices and so on because, a level has been reached where magistrates and local courts justices even go on strike.*^* Hence since in Zambia, unlike in the United States of America and the United Kingdom, the judiciary has not been well funded nor given priority, it will always remain a wonder as to whether impartiality in the courts can be a reality.

To prevent the police from using torture and other illegal means of obtaining evidence, the supreme court of the United States in *Mapp V Ohio* *^^ held that such illegally obtained evidence shall not be admissible in any court of law*^^. This position is different from that in the English courts although the U.K admits confessions so long as are relevant to the issues before court and are not obtained by means of oppression. However in Zambia as already noted what is most important is the relevance of such illegally obtained evidence. It is imperative to note that although there have been debates in the U.S.A as to whether evidence illegally obtained should be admissible in order to curb the problem of terrorist attacks, the fact that freedom from torture is a fundamental human right has pre-empted the U.S.A from altering its position. In addition, legal Aid in the U.S.A just as in the United Kingdom is made mandatory for any suspect who requests it from the time of interrogation unlike in Zambia. Hence, in Zambia this exposes suspects to possible abuse by the police

Ibid
"-USA (1961) Ibid

hence leading to disregard of the rule of law, and consequently the right to fair trial and to be presumed innocence until proven guilty.

In conclusion, in the *Zambian* system of criminal administration, the two principles of the law are not much of a reality as compared to the situation in the United Kingdom and the United States of America as revealed in the above discussion. Hence the next chapter, which is the concluding chapter, will focus on recommending ways in which the *Zambian* criminal administrative system can be made more receptive to the constitutional requirements of upholding the right to fair trial and to be presumed innocent until proved guilty, especially in light of the more desirable attributes identified in the United Kingdom and the United States of America.

CHAPTER 5

5.0. Recommendations and Conclusions

An overview of the whole study reveals that there are disparities between the law relating to the right to a fair trial and that of the presumption of innocence as set out in the various legislation and the practice in reality with regard to Zambia's administration of criminal justice. Therefore, in order to bring about development in the manner of legislation, interpretation and implementation of the law, a number of issues need to be addressed and adopted by the policy makers, legislators, law enforcers and the public in general. **5.1**

Recommendations The Government

There is need for providing adequate funding to the institutions charged with the responsibility of administering justice such as: The Police force

The police force faces a number of difficulties which constrain them from operating effectively such as shortages of vehicles to transport suspects to court, lack of proper infrastructure such as cells which contain adequate sanitation facilities, lack of medical facilities to inmates when they need it and lack of food. All these harsh pre-trial conditions are not consistent with the upholding of the principles of fair trial and the right to be presumed innocent before proved guilty. Since it has already been noted that the 2007 Budgetary allocation to police operations was increased as compared to the 2006 one^{****}, it is important that

Refer to appendix

the Government put in place stringent measures to ensure that the allocated money is well accounted for by the appropriate officials.

The Courts

As observed from the study, there is need for the government to improve the conditions of service of judicial officers in order to maintain the independence of the judiciary thereby preventing the officers from being vulnerable to bribes and political interference. This will attract more capable people to take up such positions because of improved conditions of service hence ensuring quick disposal of cases. The government also needs to improve the legal aid department through adequately funding it in order to enable suspects to enjoy their right to representation by counsel from the time of interrogation by the police hence preventing the possibility of violation of a suspect's rights by the police. Need for legislation setting high standards for qualification of recruitment into the Zambia police force

Due to the fact that the police force deals with an area of the law which is very sensitive and which requires that the right and deserving offenders be punished, there is need for the government through the legislature to enact legislation which provides more detailed and instructive criteria on the recruitment and the criteria of candidates that should qualify to enter the police force in Zambia and not just any person who is willing to do the work. This is to ensure that only the most diligent law abiding and responsible citizens are vested with such duty of upholding the human rights of suspects.

Need for provision by the government of adequate training in human rights to administrators of justice

There is also need for the government to provide adequate training for agencies vested with the duty to administer criminal justice such as the police officers, the Anti-corruption Commission officers, the drug enforcement commission officers and so forth. This training must aim at vesting such officers with the knowledge and importance of human rights of suspects such as the right to be presumed innocent until proved guilty and the right to fair trial. This could promote respect of such rights by the officers as a result of understanding the importance of such rights.

Enactment of a Bail Act

Instead of amending the different Acts of parliament such as the CPC¹ and the Supreme court Act² which provide some provisions as guidelines on the law relating to bail in Zambia, a specific and all encompassing Act such as the Bail Act in England³ should be enacted which should provide specific and detailed guidelines for the courts and police specially with regard to the determination of the sum and additional conditions to be attached to bail. This would be more favorable as it would be used as a means of checking the use of such powers as well as provide regulations under one piece of legislation thereby making it easier for one to access such law.

Chapter 88 of the laws of Zambia.
Chapter 25 of the Laws of Zambia

The need for consistency between law making, implementation and interpretation.

There is also need for precision and consistency in the law making duty of the government through the legislature. Meaning, the Zambian law must not to contradict itself with respect to case law and the constitution. This is in reference to the issue of torture as in the case of *Liswaniso V the People*,^{^^} where the courts held that illegally obtained evidence was admissible so long as it was relevant to the issues before the court[™]. This is a clear contradiction with the constitution which provides that such evidence should be inadmissible. This shows that the Zambian law is self contradicting as the qualification of the law may lead to suspects being tortured and in turn, disregard of the right to be presumed innocent until proved guilty. Hence in this regard, it is contended that Zambia follows the U.S.A position of not admitting illegally obtained because unlike the U.K which is able to provide against such incentives as torture, Zambia does not.

The need for economic social and cultural rights to become justiciable. As recommended by the Mung'omba Draft constitution economic social and cultural rights must become justiciable. This will lead to government becoming more focused in its funding in order to improve the conditions of the inmates in the cells such as the provision of food, medication and sanitation. This might just lead to a decrease in the harsh pre-trial conditions.

[™] SCZ Judgment No 58 of (1976)

^{^^}Ibid

The Police

The need to produce proof of knowledge of human rights as part of recruitment qualification.

It should be obligatory upon an officer responsible for enforcing the law to possess knowledge through proof of at least a comprehensive certificate of training in human rights in order to prevent subjecting of suspects to ignorant officers.

The need to widen the control power by parliament of presidential appointments. The control power by parliament of presidential appointments must be widened to include other appointments by the president. For example the appointment of the Inspector General of Police must be ratified by parliament to ensure and encourage independence of the Office of the Inspector General of Police and lessen susceptibility to manipulation by the president¹⁴. The need for an independent police force.

Although in Zambia the constitution provides that parliament shall regulate police conduct,¹⁵ the study has shown that on several occasions the police have been used to advance political desires by the executive. Therefore, it is contended that just as is the case in the United Kingdom, governments' instructions to the police should not be binding upon the police unless they are upheld a court of law. This will in turn promote independence of the police force from political interference hence, leading to upholding the presumption of innocence especially where suspects are in the opposition party.

¹⁴ Kupalelwa H. Zambia Law Journal The role of the Zambian parliament in controlling administrative actions Vol. 37 (2005)

¹⁵ Article 105(d) Chapter 1 of the Laws of Zambia.

Need for supervision and periodical review of police conduct. The police in Zambia should be made more accountable for their actions in their operations just as the English police are by establishing a way of supervising or periodically reviewing their actions especially their treatment of detainees and also by subjecting them to stiffer disciplinary regulations which may be contravened even where no tort or crime has been committed.

The Courts

The need for consistency when interpreting the law

As interpreters of the law, the courts must ensure that the law is interpreted according to the constitution to avoid inconsistency. Hence, evidence which is illegally obtained through means such as torture should be declared by the courts as inadmissible no matter how relevant in furtherance of respect for human rights.

Stiffer punishment for breach of utmost good faith on judicial officers. Judicial officers ought to perform their duties with courage, non-bias, impartiality and without corruption especially where their salaries are made reasonably substantial according to the Zambian economy. Hence where they perform their duties in a manner other than this, they should be subjected to stiff punishment because of the fact that they are sworn to carry out their duties diligently and in utmost good faith.

The Public

More calls for public awareness campaigns and civic education There is need for the people of Zambia to play an active part in advocating for respect and observance of human rights such as the right to a fair trial and the right to be presumed innocent until proved guilty by joining membership in Civil Education groups which are among the best means of equipping oneself with such knowledge. This in turn will enable the public to speak out and fight against such human rights abuses.

5.2. Conclusion

Disparities do exist between the law as a safeguard against miscarriages of justice and the law in practice as illustrated by this study. The ends of justice can never be met if the two remain inconsistent. As crime is a part of every modern society, the duty rests upon not only the policy makers, but also on the police, the courts, the legislators and the general public to ensure that values of a democratic society such as the rule of law are met in order for the legal prescriptions of fair trial and the presumption of innocence to meet the desired ends of justice.

APPENDIX

Budget by function		2007 Allocation (K Billion)	2006 Allocation (K Billion)
Public	Order and	451.9	391.7
Safety			
	Police services	344.2	
	(i) Police accommodation	30	
	(ii) Prisons	58.5	
	(iii) Immigration Passport and Registration	45.9	
	(iv) Law courts and fire services	107.7	

Source: BUDGET ADDRESS BY THE HON. NG'ANDU P. MAGANDE, MP MINISTER OF FINANCE AND NATIONAL PLANNING
DELIVERERED TO THE NATIONAL ASSEMBLY ON FRIDAY, 9TH FEBRUARY 2007

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ABSTRACT

The disregard of the principles of fair trial and the presumption of innocence in Zambia by administrators of criminal justice has led to various Infringements and violations of fundamental human rights of suspects, which, due to their inherent nature, ought to be respected and promoted. Hence, where there is such violation of human rights, there is proof that the principles of the constitution, which is the *grund norm* of the land are not being upheld by those who hold power to administer criminal justice such as the courts and the police, the result being that the innocent suffer as they are, among other things, wrongly convicted.

It is against the foregoing that this study evolves. Zambia, like many other countries has taken positive steps to secure the rights of suspects by becoming a party to several international instalments, such as the International Covenant on Civil and Political Rights (1966), the Convention Against Torture (1984) and so on.

Hence the tenet of this study is focused mainly on identifying the weaknesses if any, of the law in Zambia relating to the right to fair trial and the presumption of innocence, identifying ways in which miscarriages of justice can be avoided by those vested with power to administer and ensure criminal justice and generally that the rights of suspects are respected.