

**A CRITIQUE OF THE STANDARD OF PROOF IN CRIMINAL CASES: THE  
PEOPLE V HENRY KAPOKO AND OTHERS SSP/B/52/2009 (UNREPORTED)**

**BY**

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**A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA FOR  
PARTIAL FULFILLMENT OF THE REQUIREMENTS OF BACHELOR OF LAWS**

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## **DEDICATION**

To my late mother Ms Sanana Lubunga who was my guiding light and imparted in me the virtues of hard work; to her I shall forever remain indebted for I am what I am because of her. Mum, your love, kindness and humility were a wonder to behold and will not be an easy feat for me to trail.

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## ABSTRACT

This research has critically analysed the application of the standard of proof in criminal cases. The application of the standard of proof was analysed to ascertain its effects on criminal justice. The standard of proof requires that evidence in a criminal trial be so conclusive that all reasonable doubts are removed from the mind of the ordinary person. However, it has been seen from case law that this need for evidence to be so conclusive in a criminal trial sometimes leads to acquittal even when the guilt of the accused, based on the evidence, is more probable than his or her innocence. This makes it difficult to convict any but the most obviously guilty. The research was therefore conducted to determine whether the standard of proof promotes criminal justice, or hinders the purpose of criminal law to curb crime and thus helps pervert the course of justice. The research was conducted with a view of determining the effect of the standard of proof on the purpose of the criminal law to curb crime and the delivery of justice. This was achieved by analysing the case of *The People v Henry Kapoko and Others*<sup>1</sup> as a case study.

The research sought to analyse the effect of the standard of proof on the delivery of criminal justice and to determine the desirability of the criminal law standard of proof in the criminal justice system. It further sought to determine whether the strict application of the standard of proof should depend on the circumstances of each case. The investigations conducted show that the standard of proof has both positive and negative implications on criminal justice. The standard of proof ensures the protection of an accused person's rights to liberty and to be presumed innocent and therefore ensures that the dispensation of criminal justice pays regard to the due process of law. However, the standard of proof in certain cases prevents the criminal justice from achieving its aims of crime prevention and punishment of those that indulge in criminal activity. The standard of proof sets the bar for conviction high such that in certain cases, like *The People v Henry Kapok and Others*, even when the evidence suggests that the accused is probably guilty, he or she is acquitted. Thus, the standard of proof at times makes it impossible to curb crime.

This research was qualitative which involved analysis of both primary and secondary data. Primary data consulted were statutory provisions and case law. Secondary data consulted included published works and where necessary unpublished works relevant to the research area were consulted.

There is need for a standard of proof that promotes the dispensation of criminal justice by safeguarding a defendant's rights, but also one that helps foster the aims of the criminal justice system. The research has made recommendations for the need to have a different standard of proof for serious crimes and the less serious crimes. The same standard of proof should not be used for all crimes.

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<sup>1</sup> SSP/B/52/2009 (unreported)

## **TABLE OF STATUTES**

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The Prisons Act, Chapter 97 of the Laws of Zambia.

The Local Courts Act, Chapter 29 of the Laws of Zambia.

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- Kalaluka Musole v The People* (1963-1964) Z and NRLR 173 (CA)
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- Major Isaac Masonga v The People* SCZ Judgment No.24 of 2009
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- Mwewa Muroso v The People* (2004) ZR 207 (SC)
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## CHAPTER ONE

### INTRODUCTION

#### 1.1 INTRODUCTION

This research critically analyses the application of the standard of proof in the case of *The People v Henry Kapoko and Others*.<sup>1</sup> This is with a view of determining the effect of the said standard on the purpose of the criminal law to curb crime and the delivery of justice. This aim will be achieved by analysing case law in which the degree of proof required can be argued to have undermined the purpose of criminal law to curb crime and protect the public from those that would inflict harm on others. Further, this research will also look at the importance of the standard of proof in criminal cases in order to reach an unbiased determination of the effect of the standard on the criminal justice system.

#### 1.2 BACKGROUND

The standard of proof is the degree or level of proof demanded in a specific case. Either party in any case may have the duty to convince the court to view the facts in a way that favours that party. In essence, standard of proof is the amount or extent of proof by which the party with the burden of persuasion must present, in order to establish or refute a disputed factual issue.<sup>2</sup> There are different standards for different cases. In civil cases, the plaintiff's standard is "by preponderance of the evidence," while in criminal cases the prosecution's standard is "beyond reasonable doubt."

Lord Denning in *Miller v Minister of Pensions*<sup>3</sup> set out the standard of proof in criminal cases. According to Lord Denning, 'if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is

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<sup>1</sup> SSP/B/52/2009 (unreported)

<sup>2</sup> Bryan A Garner, eds, *Black's Law Dictionary 8<sup>th</sup> edition* (St. Paul: Thomson West, 2004)

<sup>3</sup> [1947] 2 ALL ER

possible, but not in the least probable,” the case is proved beyond reasonable doubt’<sup>4</sup>. Nothing short of this will suffice. Therefore, if there is more than a remote possibility of an accused’s innocence the accused should be acquitted.

The need to evaluate the standard of proof in criminal cases and its effects on criminal justice stems from the case of *The People v Henry Kapoko and Others*<sup>5</sup>. In that case 11 accused persons were charged with 21 counts of the offences of theft by public servant contrary to sections 272 and 277 of the Penal Code, Chapter 87 of the Laws of Zambia. They were also charged with theft contrary to section 272 of the Penal Code. They were further charged with money laundering contrary to section 7 of the Prohibition and Prevention of Money Laundering Act No. 14 of 2001 of the Laws of Zambia. Of the eleven accused persons eight were found not guilty and acquitted of the charges, two were found guilty and convicted.

This research particularly focuses on Henry Kapoko who was one of the 8 that were acquitted of the charges against them. Evidence was adduced by the prosecution showing that Henry Kapoko had acted without lawful authority when he issued instructions for the processing of a payment. However, Kapoko was acquitted on the reasoning that the prosecution had failed to satisfy the criminal law standard and did not prove his guilt beyond a reasonable doubt. This was despite the Court actually stating that Kapoko had unlawfully issued instructions directing the Chief Accountant to process the payment for the training, when the training had not been recommended and approved by the appropriate authorities<sup>6</sup>. Following the decision of the Court, it seems necessary to determine how the criminal standard of proof may in certain cases negatively affect the dispensation of criminal justice.

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<sup>4</sup> [1947] 2 ALL ER 372

<sup>5</sup> SSP/B/52/2009 (unreported)

<sup>6</sup> *The People v Henry Kapoko and Others* SSP/B/52/2009 (Unreported), J203

### **1.3 STATEMENT OF THE PROBLEM**

The standard of proof in criminal cases requires judicial officers to be satisfied “to a moral certainty” that every element of the crime has been proven by the prosecution. It does not require the state to establish absolute certainty by eliminating all doubt, but it requires that evidence be so conclusive that all reasonable doubts are removed from the mind of the ordinary person<sup>7</sup>. This need for evidence to be so conclusive sometimes leads to acquittal even when the guilt of the accused, based on the evidence, is more probable than his or her innocence. As such, it can be argued that the strict application of the standard of proof in certain cases does not foster the purpose of criminal law to curb crime but instead helps pervert the course of justice. However, because of the important role that the standard of proof plays it is necessary that the standard be critically evaluated to determine whether it is a greater good than harm to the justice system.

### **1.4 OBJECTIVES OF THE STUDY**

1. To analyse the effect of the standard of proof on the delivery of criminal justice.
2. To determine the desirability of the criminal law standard of proof in the criminal justice system.
3. To determine whether the strict application of the standard of proof should depend on the circumstances of each case.

### **1.5 RESEARCH QUESTIONS**

1. Does the standard of proof as it is applied affect the delivery of criminal justice in a positive or negative way?
2. Considering both the negative and positive effects should the standard be lowered or should its application vary in certain cases so as to promote criminal justice?

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<sup>7</sup> George P. Fletcher, “Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases,” *The Yale Law Journal* Volume 77, no. 5 (1968): 880

### 3. Should all trials for all crimes use the same standard of proof?

#### 1.6 SIGNIFICANCE OF THE STUDY

The need for evidence to be so conclusive in criminal trials sometimes leads to erroneous acquittals. As such, it is entirely fitting to ask whether the rules of proof such as the reasonable doubt rule, which govern and encumber a criminal trial, enhance or thwart the delivery of criminal justice. This research will investigate the effects of the criminal law standard of proof and its application on criminal justice. The research will further find out whether existing rules could be changed in order to enhance the delivery of criminal justice, that is, whether the strict application of the standard of proof should not be extended to each and every case. This research is therefore significant as it endeavours to help resolve the question ‘does the reasonable doubt rule enhance or hinder the delivery of criminal justice?’

#### LITERATURE REVIEW

Though a central feature of all systems of adjudication, the standard of proof has been subject to little normative analysis.

It is common knowledge that the state’s invocation of criminal sanctions demands a high degree of proof that the accused has committed the offense charged. This was recognised by the Supreme Court in the case of *Mwewa Muroño v The People*<sup>8</sup>, in which the Court stated that the standard of proof in criminal matters is indeed high. This high degree of proof required has generated conflicting views that are for and against it.

Arguments in support of this high threshold try to justify it by arguing that convicting an innocent person is more costly and less beneficial than letting a guilty person go free. In *Re Winship*<sup>9</sup> the United States Supreme Court recognized that the beyond reasonable doubt standard protects three fundamental interests. First, it protects the defendant’s interest in

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<sup>8</sup> (2004) Z.R. 207 (SC), 209

<sup>9</sup> (1970) 397 US 358, 364

liberty, second, it protects an innocent person charged with a crime from the stigma of conviction, and third, it engenders public confidence in criminal law by giving concrete substance to the constitutional presumption of innocence. The Court noted the vital role that the beyond reasonable doubt rule has played in the criminal justice system and concluded that it would be fundamentally unfair to convict a person on the basis of a lower burden of persuasion.<sup>10</sup>

William Twining and Alex Stein<sup>11</sup> write that the beyond reasonable doubt standard has been explained to mean proof of such a convincing character that a reasonable person would not hesitate to act upon it in the most important of his/her own affairs. The justification for this high standard is that a criminal conviction imposes a variety of hardships on a defendant and thus, the court must be almost certain of the defendant's guilt before imposing such hardships.

Hock Lai Ho<sup>12</sup> states that the standard of proof may be understood, first, as referring to the caution that must be exercised in making positive findings. A variant interpretation of the standard is proposed. The evidence must justify a strong enough belief in the truth of the disputed allegation where what is strong enough depends on the seriousness of the allegation and the consequences of accepting it as true. Ho argues that the need for caution is ethically motivated by concern and respect for the person to whom the finding is adverse. Secondly, the standard of proof is also about the distribution of caution. Ho states that "the criminal standard requires the fact-finder to take a protective attitude towards the accused and this is

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<sup>10</sup> (1970) 397 US 358, 363

<sup>11</sup> William Twining and Alex Stein, eds, *Evidence and Proof* (New York: New York University Press, 1992)

<sup>12</sup> Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008), 173

grounded in the demand for accountability by the state for the harm that it seeks to inflict on citizens.”<sup>13</sup>

However, there are other writers such as Larry Laudan who are not keen supporters of the criminal law standard of proof. Laudan argues that the benefit of the doubt insists that, if the verdict is at all a close call, jurors must err on the side of the defendant.<sup>14</sup> A demanding standard of proof such as “beyond a reasonable doubt” “enjoins jurors” to acquit the defendant even if they think the defendant is probably guilty, since only a firm, settled belief in that guilt justifies a conviction. The fact is that such principles function to make it harder to convict any defendant, whether innocent or guilty. Each amounts to putting gentle (and sometimes not-so-gentle) pressure on the scales of justice to skew the verdict in the defendant’s favour.<sup>15</sup> Laudan further argues that the problem is that the concept of proving guilt beyond a reasonable doubt – the only accepted, explicit yardstick for reaching a just verdict in a criminal trial – is obscure, incoherent, and muddled.<sup>16</sup>

There are others who do not agree with having proof beyond reasonable doubt as the fixed standard of proof for all crimes. These are supporters of a variable standard of proof. For instance, Judge LB Sand has proposed that for cases where there is a risk of the death penalty the required standard of proof should be raised to ‘beyond all possible doubt’ due to the severity of the punishment. To meet such a standard the quality of evidence would have to be of the highest degree. Judge Sand argues that the standard beyond reasonable doubt has too much room for error. He asserts that the standard of proof required should be in accordance

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<sup>13</sup> Hock Lai Ho, *A Philosophy of Evidence Law*, 173

<sup>14</sup> Larry Laudan, *Truth, Error, and Criminal Law* (New York: Cambridge University Press, 2006), 30

<sup>15</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 30

<sup>16</sup> Larry Laudan, *Truth, Error and Criminal Law*, 31



with the severity of a guilty verdict's implications. The quality of evidence required to prove these standards would also vary.<sup>17</sup>

Another proponent of a variable standard of proof, John Dewey, suggests looking at the implications of a guilty verdict before setting the standard of proof. Dewey suggests that the "infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need."<sup>18</sup> His motivation for this comes from recognition that rules which are "hardened into absolute and fixed antecedent premises" can become "harmful and socially obstructive." Thus, in order to have social advancement there is a requirement for getting over the chief obstacle which is "the sanctification of ready-made antecedent principles as methods of thinking."<sup>19</sup>

There are other writers who do not oppose the standard of proof but merely try to give the courts a guide when applying the concept of beyond reasonable doubt. One such writer is A.P Dawid<sup>20</sup> who argues that where there is overwhelming evidence, the decision of a person's guilt should be made according to the principle of maximising expected utility. On this basis one should take into account the benefits to society of convicting criminals and the costs of acquitting them, as well as the benefits and costs of acquitting and convicting innocent people. Dawid further states that using this principle, the benefits of locking up criminals might be considered to outweigh the costs of convicting innocent people.

## 1.7 METHODOLOGY

This research was qualitative research which involved analysis of both primary and secondary data. Primary data consulted were statutory provisions and case law. Secondary data consulted included published works and where necessary unpublished works relevant to

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<sup>17</sup> Thomas Christopher Rider, "What is the Most Useful Standard of Proof in Criminal Law?" 5

<sup>18</sup> John Dewey, "Logical Method and Law," *The Philosophical Review* Vol. 33, no. 6 (1924): 562

<sup>19</sup> John Dewey, "Logical Method and Law," *The Philosophical Review* Vol. 33, no. 6 (1924): 564

<sup>20</sup> A. P Dawid, "Bayes's Theorem and Weighing Evidence by Juries," *Proc. Brit.Acad.* 113 (2002): 75

the research area were consulted. The gathering of information encompassed literature reviews through books, journals, judgments, and other relevant publications.

### **1.8 OUTLINE OF CHAPTERS**

Chapter two will discuss what the concept of criminal justice entails and its functions. Chapter three will discuss the standard of proof in criminal matters and what it entails. This chapter will further look at the importance of the need to have such a high threshold of proof in criminal matters. That is, it will give arguments for the standard of proof and how it promotes the delivery of justice. Chapter four will focus on how the strict application of the standard of proof at times negatively affects the dispensation of criminal justice. The chapter will achieve this by examining the case of *The People v Henry Kapoko and Others* as a case study. Lastly, having looked at the effects of the standard of proof both positive and negative, on the delivery of criminal justice, chapter five will give a conclusion as to whether the standard of proof is a greater good than harm to the delivery of criminal justice. The chapter will also advance the necessary recommendations based on the findings of the research.

### **1.9 CONCLUSION**

This chapter has generally given the outline of the research and given a prelude to the research which will determine the effect of the standard of proof in criminal cases on the dispensation of criminal justice. It has dealt with the basic aspects of the research which include the statement of the problem, objectives, methodology and the literature review. The chapter has also highlighted the salient features of the subsequent chapters.

## **CHAPTER TWO**

### **CRIMINAL JUSTICE IN ZAMBIA**

#### **2.1 INTRODUCTION**

This chapter will discuss what the concept of criminal justice entails and its functions. The chapter will further highlight the three components of the criminal justice system which include the police, the courts and corrections. A criminal justice system is a set of legal and social institutions for enforcing the criminal law in accordance with a defined set of procedural rules and limitations.<sup>1</sup> It is the set of agencies and processes established by governments to control crime and impose penalties on those who violate laws.<sup>2</sup>

The essence of any criminal justice system is the protection of property and persons against malicious damage and injury from persons purported to indulge in criminal behaviour thus causing harm to society. The system is the state's reaction to crime commission in fulfilment of its duty to protect its citizens.<sup>3</sup> It includes the operation of the police, courts and prisons with regard to the offender or individual suspected of an offence. The system starts with the way criminal proceedings are instituted which may be either by arrest or summons,<sup>4</sup> the trial proceedings of a criminally accused person and the prison conditions in which the accused is held.

#### **2.2 THE AIMS AND FUNCTIONS OF CRIMINAL LAW**

One primary aim of criminal justice is crime control. Crime control focuses on the state's power to enforce the criminal law. The criminal justice system should therefore strive to ensure that the criminal law is properly enforced and its aims are achieved.

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<sup>1</sup> Richard S. Frase, Robert R. Weidner, "Criminal Justice System – Structural and Theoretical Components of Criminal Justice Systems," <http://www.law.org/pages/858/Criminal-Justice-System.html>

<sup>2</sup> The National Center for Victims of Crime, "The Criminal Justice System," <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system>

<sup>3</sup> Iduma Ikechukwu, "Zambia's Criminal Justice System and its Impact on Human Rights" (LLB Thesis, University of Zambia, 2004), 25

<sup>4</sup> Section 90 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia

Criminal law concerns the consideration or study and analysis of the substantive law dealing with criminal liability. It considers general principles of criminal liability. It examines and analyses some criminal conduct in order to determine the extent of the harm inflicted as a result of the prohibited offence. It also examines the rationale of prohibiting or declaring certain conduct as criminal to warrant the imposition of punitive measures. It determines the amount and severity of sanctions that must be inflicted on an accused person who has been convicted.<sup>5</sup> Most importantly, criminal law defines the limits and authority of the criminal justice system by informing it of what is criminal conduct and the consequences that may follow on the commission of the criminal conduct.<sup>6</sup>

There are several aims of the criminal law, but it may be claimed that the main aim is; the protection of human persons (against intentional or reckless violence, cruelty, molestation), the protection of property (against theft, fraud or criminal damage), and the prevention (and deterrence of criminal behaviour). The proposition may be expanded to include other fundamental reasons for states having criminal law. It is that those who commit offences must be punished because they deserve punishment (retribution) for the offences they have committed. That it is right for the state to impose punitive sanctions because harm criminally caused should be confronted by appropriate punishment.<sup>7</sup>

The function of the criminal law is to state what conduct or behaviour is criminal, based on a set of rules specifying different kinds of sanctions deemed necessary for controlling anti-social behaviour. The rules of criminal law are not only intended to control criminal conduct, but also to warn would-be offenders that its non-observance will result in the curtailment of their liberty, or the imposition of other sanctions. A fundamental reason for having a criminal law backed by sanctions is deterrence or prevention: so long as its provisions are enforced

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<sup>5</sup> S E Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2004), 14.

<sup>6</sup> S E Kulusika, *Text, Cases and Materials on Criminal Law in Zambia*, 14.

<sup>7</sup> S E Kulusika, *Text, Cases and Materials on Criminal Law in Zambia*, 14

with some regularity, it constitutes a standing disincentive to crime and reinforces those social conventions and other inhibitions which are already in place.<sup>8</sup>

In addition, criminal law protects civil liberties, that is, it safeguards individual rights. The function of criminal law is to ensure the right of litigants to a fair hearing and an impartial well-reasoned judgment. It advocates that justice should be guaranteed in unequivocal terms.<sup>9</sup>

### **2.3 COMPONENTS OF THE CRIMINAL JUSTICE SYSTEM**

The criminal justice system consists of the police, the courts and corrections. The major tasks of the police include selectively enforcing the law, protecting the public, apprehending offenders, and prevention and detection of crime.<sup>10</sup> The courts are responsible for assuring that suspected criminals receive fair trials and for determining the guilt or innocence of the accused. The goal of the correctional component is to rehabilitate offenders or to alter their behaviour so that they are socially acceptable and law abiding.<sup>11</sup> The goal of all three components is the reduction of crime in the community.<sup>12</sup>

### **2.4 THE ZAMBIA POLICE SERVICE**

The institution of the Police is one that is established by law. Article 103 (1) of the Constitution of Zambia (hereinafter referred to as “the Constitution”) provides for the establishment of a Police service whose functions include the protection of life and property, preservation of law and order, detection and prevention of crime.<sup>13</sup> Furthermore, the police are mandated to co-operate with the civilian authority and other security organs established

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<sup>8</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 1999), 18

<sup>9</sup> Joyce Shezongo-Macmillan, “Zambia: Justice Sector and the Rule of Law,” *Open Foundation Society 1*, (2013): 12

<sup>10</sup> Section 5 of the Zambia Police Act, Chapter 107 of the Laws of Zambia

<sup>11</sup> The Prisons Act, Chapter 97 of the Laws of Zambia

<sup>12</sup> Dae H Chang, *Fundamentals of Criminal Justice – A Syllabus and Workbook*, 2<sup>nd</sup> edition (USA: Paladin House Publishers, 1977), 24

<sup>13</sup> Article 104 of the Constitution of Zambia.

under the Constitution and with the Zambian population generally.<sup>14</sup> The Police simply are individuals mandated and entrusted with the responsibility of maintaining public order and enforcement of the law, and hence are commonly referred to as the law enforcement agents.

In order to effectively carry out their functions, the police have been given powers under the Zambia Police Act<sup>15</sup> which include *inter alia* powers of arrest, detention and interrogation. An arrest has been defined as the deprivation of an individual's liberty by some lawful authority, for the purpose of compelling his/her appearance to answer a criminal charge, or as a method of execution.<sup>16</sup> This entails that the police being an authority mandated to detect and prevent crime can deprive an individual of his/her liberty, in order to compel that person to appear before the courts of law to answer a criminal charge that might have been made against that person. The police also have the power to detain. Detention is the keeping or remand of a person who is suspected or has committed a cognisable offence in police custody before being charged.<sup>17</sup> The police also have the power to interrogate a person arrested for an offence and under their custody. The essence of interrogation is basically to obtain information that would enable the police prefer an appropriate charge against a person suspected of committing a criminal offence, or to obtain information that would assist them have sufficient evidence necessary to have the accused person convicted.<sup>18</sup>

## **2.5 THE JUDICIARY**

The courts through their interpretive role play a pivotal role in any criminal justice system. In Zambia like many other countries, the judiciary has been bestowed with an enormous responsibility of interpreting the law and with this task comes the duty of trying both civil

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<sup>14</sup> Article 104 of the Constitution of Zambia

<sup>15</sup> Chapter 107 of the Laws of Zambia

<sup>16</sup> Bryan A Garner, eds, *Black's Law Dictionary 8<sup>th</sup> edition* (St. Paul: Thomson West, 2004), 116

<sup>17</sup> Bryan A Garner, eds, *Black's Law Dictionary 8<sup>th</sup> edition* (St. Paul: Thomson West, 2004), 480.

<sup>18</sup> Iduma Ikechukwu, "Zambia's Criminal Justice System and its Impact on Human Rights" (LLB Thesis, University of Zambia, 2004), 13

and criminal cases. Article 91 of the Constitution establishes the judicature and provides that the judicature of the Republic shall consist of:

- i. the Supreme Court of Zambia;
- ii. the High Court for Zambia;
- iii. the Industrial Relations Court;
- iv. the Subordinate Courts;
- v. the Local Courts; and
- vi. such lower Courts as may be prescribed by an Act of Parliament.<sup>19</sup>

A Local court may exercise jurisdiction over any criminal charge or matter in which the accused is charged with having wholly or in part within the area of jurisdiction of such court, committed, or been an accessory to the commission of an offence.<sup>20</sup> Local courts adjudicate upon disputes between individuals or groups of individuals especially in the area of African customary law.<sup>21</sup> They exercise whatever limited jurisdiction is granted to them over numerous minor but quite significant criminal offences. That is, Local courts do not have jurisdiction to try any case in which a person is charged with an offence in which death is alleged to have occurred, or which is punishable by death.<sup>22</sup> The Subordinate court handles the bulk of criminal trials. However, most serious criminal cases such as homicide, treason, armed robbery and infanticide are referred to the High court.<sup>23</sup> These cases are however handled by the magistrates in their preliminary stages before reference to the High court. The Subordinate courts have jurisdiction to try any offence under any written law in Zambia. The High court is both a court of first instance and an appellate court, which has original and

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<sup>19</sup> The Constitution, Chapter 1 of the Laws of Zambia.

<sup>20</sup> Section 9 of the Local Courts Act, Chapter 29 of the Laws of Zambia

<sup>21</sup> Julius Sakala, "Role of the Judiciary in the Enforcement of Human Rights in Zambia" (PhD Thesis, University of Pretoria, 2000), 464

<sup>22</sup> Section 11 of the Local Courts Act, Chapter 29 of the Laws of Zambia

<sup>23</sup> Section 11(2) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia

unlimited jurisdiction<sup>24</sup> to deal with serious criminal matters. The Industrial Relations court is confined only to matters involving industrial relations such as trade union issues.<sup>25</sup> The Supreme Court on the other hand is Zambia's final court of appeal and so a superior court of record which has appellate jurisdiction.<sup>26</sup>

## **2.6 THE ZAMBIA PRISONS SERVICE**

The Zambia Prisons Service was established in terms of Article 106 of the Constitution<sup>27</sup> and is governed by the Prisons Act.<sup>28</sup> One core function of the Zambia Prisons Service is to provide custodial services to inmates. The Prisons Service ensures that inmates are humanely kept and maintained in all prisons until they are lawfully discharged in order to safeguard the interests of the public. The Prisons Service also provides correctional services to inmates. This is done through skills training of inmates, psycho-social and spiritual counselling and educational programmes. Further, the Zambia Prisons Service cooperates with other security agencies in the dispensation of criminal justice.<sup>29</sup>

## **2.7 CONCLUSION**

This chapter has looked at the Zambian criminal justice system and the institutions that make up the criminal justice system. It has further elaborated on the functions of the criminal law. A good criminal justice system should see to it that the criminal law lives up to its intended purpose. The proceeding chapters will discuss the standard of proof in criminal cases and its impact on criminal justice and the purpose of the criminal law.

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<sup>24</sup> Article 94 (1) of the Constitution, Chapter 1 of the Laws of Zambia.

<sup>25</sup> The Industrial Relations Act, Chapter 269 of the Laws of Zambia.

<sup>26</sup> The Constitution, Chapter 1 of the Laws of Zambia.

<sup>27</sup> The Constitution, Chapter 1 of the Laws of Zambia.

<sup>28</sup> Chapter 97 of the Laws of Zambia.

<sup>29</sup> Ministry of Home Affairs, "Zambia Prisons Service," [http://www.homeaffairs.gov.zm/zambia\\_prisons\\_service](http://www.homeaffairs.gov.zm/zambia_prisons_service)



## **CHAPTER THREE**

### **THE STANDARD OF PROOF IN CRIMINAL MATTERS**

#### **3.1 INTRODUCTION**

This chapter discusses the standard of proof in criminal matters and what it entails. In so doing, it will begin by highlighting the burden of proof in criminal matters, which will be followed by a discussion on the standard of proof. The chapter will further look at the justification or importance of the need to have such a high threshold of proof in criminal matters. That is, it will give arguments for the standard of proof and how it promotes the delivery of justice. The chapter will also highlight a brief discussion of the arguments that have been raised against the standard of proof.

#### **3.2 BURDEN AND STANDARD OF PROOF**

No person can be convicted of a crime unless there is a high degree of certainty about his/her guilt.<sup>1</sup> That is the theory, at least. If the accused does not willingly plead guilty, all essential elements of guilt must be proven to a judge or magistrate, and they must be proven “beyond reasonable doubt.”<sup>2</sup> To be sure, the phrase “reasonable doubt” does not actually appear anywhere in the Constitution. Nevertheless, the courts read the familiar standard of proof into our constitutional law. The courts have insisted unwaveringly on the fundamental importance of the requirement of proof beyond reasonable doubt, even at the cost of throwing sentencing law into far reaching and disturbing confusion.<sup>3</sup>

##### **3.2.1 BURDEN OF PROOF**

The burden of proof or onus of proof refers to the obligation on a party to prove a disputed assertion or charge.<sup>4</sup> The phrase ‘burden of proof’ consists of two inter-related but quite

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<sup>1</sup> James Q Whitman, “The Origins of “Reasonable Doubt,” *Yale Law School Legal Scholarship Repository* 3, no. 1 (2005): 2

<sup>2</sup> *In Re Winship* (1970) 397 US 358, 374

<sup>3</sup> *Blakely v Washington* (2004) 524 US 296

<sup>4</sup> Bryan A Garner, eds, *Black’s Law Dictionary 8<sup>th</sup> edition* (St. Paul: Thomson West, 2004)

distinguishable responsibilities. One of these responsibilities or burdens obliges the party who desires the court to give judgment as to any legal right or liability dependent upon the existence of facts which he or she asserts, to produce evidence. This evidence must be sufficient to persuade the court that the existence or non-existence of particular facts in issue is established to the requisite standard of proof. Here the party is said to have the legal, probative, or persuasive burden of proof. The other responsibility obliges a party to produce some evidence to enable the court acting reasonably to find the existence or non-existence of particular facts in issue. Here the party is said to have the evidential burden, the burden of adducing evidence, or the burden of going forward.<sup>5</sup>

The general rule is that the burden lies on the party who asserts in the affirmative. As was stated in *Robins v National Trust Co.*<sup>6</sup>, in the nature of things, the negative is more difficult to prove than the positive. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reason. In criminal cases as the prosecution asserts in the affirmative, the burden of proof rests entirely with the prosecution subject to the defence of insanity and to any statutory exception. In *Woolmington v Director of Public Prosecutions*<sup>7</sup>, the appellant was convicted of murder. His defence was accident. At the end of his summing up, the trial judge said:

The Crown has got to satisfy you that the victim died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident.

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<sup>5</sup> John Hatchard and Muna Ndulo, *The Law of Evidence in Zambia: Cases and Materials*, (Lusaka: Southern African Institute for Policy and Research, 2013), 22

<sup>6</sup> [1927] AC 515

<sup>7</sup> [1935] UKHL 1

The appellant appealed against his conviction arguing the summing up was wrong. The House of Lords regarded the summing up of the trial judge as a wrong position of law.

Viscount Sankey LC stated that:

If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law. It is for the prosecution to establish the prisoner's guilt, and the prisoner is entitled to the benefit of the doubt. While the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.<sup>8</sup>

The House of Lords made it clear that the burden of proof lies entirely on the prosecution and placing that burden on the accused would be asserting that the accused be presumed guilty unless he/she discharges the burden. The Supreme Court in the case of *Mwewa Murogo v The People*<sup>9</sup> reiterated the principle that the burden of proof in criminal cases rests with the prosecution. The Court held that in criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution.

### **3.2.2 STANDARD OF PROOF**

The standard of proof is the extent to which a party discharges the burden of proof. That is, it is the amount of proof by which the party with the burden of persuasion must present evidence, in order to establish or refute a disputed factual issue.<sup>10</sup> There are different standards of proof for different cases. In civil cases, the plaintiff's standard is "by preponderance of the evidence," while in criminal cases the prosecution's standard is "beyond reasonable doubt."

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<sup>8</sup> [1935] UKHL 1

<sup>9</sup> (2004) ZR 207 (SC)

<sup>10</sup> Bryan A Garner, eds, *Black's Law Dictionary 8<sup>th</sup> edition* (St. Paul: Thomson West, 2004)

Beyond reasonable doubt has been explained to mean proof of such a convincing character that a reasonable person would not hesitate to act upon it in the most important of his or her own affairs.<sup>11</sup> Lord Denning in *Miller v Minister of Pensions*<sup>12</sup> set out the standard of proof in criminal cases. According to Lord Denning, the degree of cogency required in a criminal case before an accused person is found guilty must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. ‘If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt, but nothing short of that will suffice.’<sup>13</sup>

Proof beyond reasonable doubt therefore means that if the accused’s case is ‘reasonably possible,’ although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof. This was the holding of the Court of Appeal in *Saluwema v The People*.<sup>14</sup> In that case the prosecution alleged that the appellant caused the death of the deceased by kicking him in the head at a dance and beer drink. The learned trial judge expressed himself as satisfied beyond reasonable doubt that it was the kick which the appellant administered to the deceased on his head which fractured his skull and caused his death. The trial judge had not given consideration to the possibility of the fatal injury having been inflicted during the course of the first fight and the accused was convicted of murder. It was clear that the deceased received at least two fist blows and one or both of them was of sufficient force to knock him down. Evidence given by a doctor was that it was unlikely that the fatal blow would be caused by a fist. The Court of Appeal was of the view that the observation did not rule out the reasonable possibility that this was how the fatal blow was inflicted. It may not be probable, but if it is only reasonably possible, then there must be a

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<sup>11</sup> William Twining and Alex Stein, eds, *Evidence and Proof* (New York: New York University Press, 1992)

<sup>12</sup> [1947] 2 ALL ER

<sup>13</sup> *Miller v Minister of Pensions* [1947] 2 ALL ER 372

<sup>14</sup> (1965) ZR 4 (CA)

reasonable doubt as to whether it was the kick administered by the appellant which caused the deceased's death. In these circumstances the prosecution cannot be said to have discharged the burden of proof upon it of proving the accused's guilt beyond reasonable doubt.<sup>15</sup>

It is clear that in criminal cases the onus remains on the prosecution throughout, to prove beyond reasonable doubt, all the ingredients of the offence charged.<sup>16</sup> The courts have thus established that the reasonable doubt standard consists of two parts: the burden of production and the burden of persuasion. The first part imposes a burden on the prosecution to produce sufficient evidence to put a fact in issue. For example, this burden demands that the prosecution establish every element of the offence charged. If the prosecution fails to satisfy this burden, the judge may direct a verdict of acquittal. The second part of the standard of proof requires the prosecution to persuade the jury or a judge that a fact in issue, such as the element of a crime, must be decided in a certain way. This part imposes on the prosecution the burden of persuading the jury or judge that it has established every element of the offence charged beyond a reasonable doubt and this burden very rarely ever shifts to a criminal defendant.<sup>17</sup>

### **3.3 JUSTIFICATION FOR THE CRIMINAL STANDARD OF PROOF**

The imposition of the reasonable doubt standard on criminal trials has been justified on the ground that convicting an innocent person is more costly and less beneficial than letting a guilty person go free. The justification for the high threshold of proof required in criminal

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<sup>15</sup> *Saluwema v The People* (1965) ZR 4 (CA)

<sup>16</sup> *Kalaluka Musole v The People* (1963-1964) Z and NRLR 173 (CA)

<sup>17</sup> Georgetown Law Journal, "Preliminary Proceedings," *Annual Review of Criminal Procedure* 37, no.3 (2008): 651

cases is that a criminal conviction imposes a variety of hardships on a defendant and thus, the court must be almost certain of the defendant's guilt before imposing such hardships.<sup>18</sup>

Those that argue for the high standard of proof state that it must be understood, first, as referring to the caution that must be exercised in making positive findings. The evidence must justify a strong enough belief in the truth of the disputed allegation where what is strong enough depends on the seriousness of the allegation and the consequences of accepting it as true. The need for caution is ethically motivated by concern and respect for the person to whom the finding is adverse. Secondly, the standard of proof is also about the distribution of caution. The criminal standard requires the fact-finder to take a protective attitude towards the accused and this is grounded in the demand for accountability by the state for the harm that it seeks to inflict on citizens.<sup>19</sup>

Justice Frankfurter stated that it is the duty of the government to establish guilt beyond a reasonable doubt. This notion according to him, "basic in our law and rightly one of the boasts of a free society" is a requirement and safeguard of due process of law.<sup>20</sup> It has been observed that guilt in a criminal case must be proved beyond a reasonable doubt. This must be done by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights in our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.<sup>21</sup>

Supporters of the beyond reasonable doubt standard argue that the high degree of proof required for a conviction is not only necessary, but important as it ensures that the criminal

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<sup>18</sup> William Twining and Alex Stein, eds, *Evidence and Proof* (New York: New York University Press, 1992)

<sup>19</sup> Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008), 173

<sup>20</sup> *Leland v Oregon* (1952) 343 US 790, 802-03

<sup>21</sup> *Brinegar v United States* (1959) 388 US 160, 174

justice system adheres to the due process of law, and safeguards the fundamental constitutional right to a fair trial. The right to a fair trial is designed to protect individuals from undue interference or compromising of the legal process in court, which may result in the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms such as liberty and the right to be presumed innocent.<sup>22</sup>

### **3.4 ARGUMENTS AGAINST THE STANDARD OF PROOF**

There are writers such as Larry Laudan who are not keen supporters of the criminal law standard of proof. Laudan argues that the benefit of the doubt insists that, if the verdict is at all a close call, jurors must err on the side of the defendant.<sup>23</sup> A demanding standard of proof such as “beyond a reasonable doubt” “enjoins jurors” to acquit the defendant even if they think the defendant is probably guilty, since only a firm, settled belief in that guilt justifies a conviction. The fact is that such principles function to make it harder to convict any defendant, whether innocent or guilty. Each amounts to putting gentle (and sometimes not-so-gentle) pressure on the scales of justice to skew the verdict in the defendant’s favour.<sup>24</sup> Laudan further argues that the problem is that the concept of proving guilt beyond a reasonable doubt – the only accepted, explicit yardstick for reaching a just verdict in a criminal trial – is obscure, incoherent, and muddled.<sup>25</sup>

### **3.5 PRESUMPTION OF INNOCENCE**

The basic tenet of criminal law is that the indictment or formal charge against any person is not the evidence of guilt. The rights of the accused are generally based on the maxim of “innocent until proven guilty” which is in other words the presumption of innocence and are

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<sup>22</sup> Charles Joseph Mmbando, “Towards the Realisation of the Right of Access to Justice: A Comparative Analysis of the Legal Aid Schemes in Tanzania and Ghana” (LLM thesis, University of Pretoria, South Africa, 2008), 12.

<sup>23</sup> Larry Laudan, *Truth, Error, and Criminal Law* (New York: Cambridge University Press, 2006), 30

<sup>24</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 30

<sup>25</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 31

embodied in the due process of the law. In Zambia, the presumption of innocence is a constitutional right provided for under Article 18 (2) (a) of the Zambian Constitution.<sup>26</sup>

The presumption of innocence is not a determination of innocence, but rather it places the burden of proof entirely upon the prosecution who are tasked to convince the court, whether only a judge, judges or a magistrate, that the accused is guilty beyond reasonable doubt.

### **3.6 HISTORY OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE**

The principle of presumption of innocence has been traced by some scholars to the Biblical book of Deuteronomy and the Qur'an<sup>27</sup> with some looking as far back as the laws of Athens and Sparta in ancient Greece. Certainly, by the time of the Roman Empire, the principle had become an integral part of legal practice. Book 4 of the Roman Code declares, "let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day."<sup>28</sup> Even in medieval Europe, the maxim "innocent until proven guilty" was set out as a priority, and has always been respected. The thirteenth-century *Ius Commune* provided that no individual could be coerced into giving self-incriminating testimony, and that no defendant, under any conditions, could be denied his/her right to trial and a thorough, vigorous defence the foundation of what we today recognize as the presumption of innocence.<sup>29</sup>

Since history has moved forward, the presumption of innocence has endured. In the mid 1700s, Blackstone, writing in England, could observe that "the law holds that it is better that

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<sup>26</sup> The Constitution, Chapter 1 of the Laws of Zambia

<sup>27</sup> Sheila Mwansa Kalobwe, "The Application of the Constitutional Right of Presumption of Innocence in the Bail Proceedings in Zambia. An Analysis" (LLB thesis, University of Zambia, Zambia, 2010), 24

<sup>28</sup> Code L IV, T, XX, 1, 1.25

<sup>29</sup> Sheila Mwansa Kalobwe, "The Application of the Constitutional Right of Presumption of Innocence in the Bail Proceedings in Zambia. An Analysis" (LLB thesis, University of Zambia, Zambia, 2010), 25



ten guilty persons escape than that one innocent suffer.”<sup>30</sup> A few decades later, during the French Revolution, Article 9 of the Declaration of the Rights of Man and of the Citizen held that as all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner’s person shall be severely repressed by law.<sup>31</sup> Similar phrases are found in abundance in the chronicles of legal history.

### **3.7 THE RIGHT TO BE PRESUMED INNOCENT**

The presumption of innocence is supported by a long legal tradition, modern international law ensures adherence to this principle through a number of conventions. The presumption of innocence is a fundamental human right guaranteed under Article 18 (2) (a) of the Zambian Constitution. Further, Article 11 of the Universal Declaration of Human Rights (UDHR) declares that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial, at which he has had all the guarantees necessary for his defence.<sup>32</sup> The International Covenant on Civil and Political Rights (ICCPR) under Article 14 similarly provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.<sup>33</sup>

*In Re Winship*<sup>34</sup> the United States Supreme Court recognized that the beyond reasonable doubt standard protects three fundamental interests. First, it protects the defendant’s interest in liberty, second, it protects an innocent person charged with a crime from the stigma of conviction, and third, it engenders public confidence in criminal law by giving concrete substance to the constitutional presumption of innocence. The Court noted the vital role that the beyond reasonable doubt rule has played in the criminal justice system and concluded that

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<sup>30</sup> Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69)

<sup>31</sup> Declaration of the Rights of Man and of the Citizen (1789)

<sup>32</sup> Universal Declaration of Human Rights (1948)

<sup>33</sup> International Covenant on Civil and Political Rights (1966)

<sup>34</sup> (1970) 397 US 358, 364

it would be fundamentally unfair to convict a person on the basis of a lower burden of persuasion.<sup>35</sup> Further, in the case of *Major Isaac Masonga v The People*,<sup>36</sup> the Supreme Court stated that it is trite law and a constitutional duty for the prosecution to guarantee a fair trial and a fair trial is one that does not prejudice the accused person's right to be presumed innocent.

The Presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge. It guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. It ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. The proof beyond reasonable doubt standard ensures that the criminal justice system safeguards the right to be presumed innocent by placing the burden on the prosecution, to produce evidence that is almost certain of the accused's guilt before a conviction is secured.

### **3.8 JUSTIFICATION FOR THE APPLICATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE**

There is a real danger that any system of criminal law will degenerate into a mockery and criminal trials will become little more than a formality if, on any account, the principle of presumption of innocence is abandoned.<sup>37</sup> It is important that the law, especially criminal law should be consistent and fair. This is a pragmatic approach to a civilized democratic society. The principle of presumption of innocence prevents the arbitrary application of justice and gives every accused person the opportunity to refute the charges against him/her. *Audi alteram partem* which means hear the other side is inherent in the administration of justice. It

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<sup>35</sup> (1970) 397 US 358, 363

<sup>36</sup> SCZ Judgment No.24 of 2009

<sup>37</sup> Sheila Mwansa Kalobwe, "The Application of the Constitutional Right of Presumption of Innocence in the Bail Proceedings in Zambia. An Analysis" (LLB thesis, University of Zambia, Zambia, 2010), 28.

would be absurd to argue that every accused person must be guilty.<sup>38</sup> Even in the fairest and most transparent systems of law, innocent people can and do get entangled in criminal cases.

The presumption of innocence is essential to the criminal process. The apparatus and administration of criminal law is a very powerful tool in the hands of the state against individual members of society, which can be used to deprive them of liberty or life, two of the most fundamental rights of any human being. Almost all democratic states guarantee through their constitutions, the protection of the rights to life and liberty and such fundamental rights must not be taken away without due process of law.<sup>39</sup> This actually forms the basis of the “innocent until proven guilty” principle of criminal jurisprudence.

The mere mention of the phrase presumed innocent keeps the magistrates and judges focused on the ultimate issue at hand in a criminal case: whether the prosecution has proven beyond a reasonable doubt that the defendant committed the alleged acts. It is important to consider why this principle is guaranteed. It can be argued firstly, that in some cases it might be impossible to prove a case in law, however loudly the facts might speak for themselves.<sup>40</sup> Secondly, that it is equally unjust that a clearly guilty man may be set free because of lack of evidence. Ultimately the best consideration is that when it comes to a choice of evils, it is better that on occasion the injustice that some guilty people be allowed to go free is preferred, in order to prevent the injustice of an innocent person being deprived of liberty, reputation and life.<sup>41</sup> It is therefore, a duty for the criminal justice system to ensure that the outcome of a trial is not prejudged. Rules of evidence like the beyond reasonable doubt rule enable the

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<sup>38</sup> Sheila Mwansa Kalobwe, “The Application of the Constitutional Right of Presumption of Innocence in the Bail Proceedings in Zambia. An Analysis”, 28.

<sup>39</sup> Articles 12 and 13 of the Constitution of Zambia, Section 1 of the 14<sup>th</sup> Amendment of the American Constitution.

<sup>40</sup> Charles Joseph Mmbando, “Towards the Realisation of the Right of Access to Justice: A Comparative Analysis of the Legal Aid Schemes in Tanzania and Ghana” (LLM thesis, University of Pretoria, South Africa, 2008), 14

<sup>41</sup> Charles Joseph Mmbando, “Towards the Realisation of the Right of Access to Justice: A Comparative Analysis of the Legal Aid Schemes in Tanzania and Ghana”, 14

criminal justice system fulfil this duty. This guarantee is very essential because an accused person cannot obtain justice if the court and all public authorities have already prejudged the case. Such an act will result in unfair treatment of the accused person.<sup>42</sup>

### **3.9 PERSONAL LIBERTY**

The right to personal liberty is an important individual right that is highly protected by the Constitution of Zambia. Part III of the Constitution requires that no one person should be deprived of his personal liberty unless the deprivation be authorized by law.<sup>43</sup> Article 9 (1) of the International Covenant on Civil and Political Rights ICCPR<sup>44</sup> similarly provides that everyone has the right to liberty and security of person. It states that “no one shall be subjected to arbitrary arrest or detention.” It further provides that no one shall be deprived of his/her liberty except on such grounds and in accordance with such procedures as are established by law.<sup>45</sup> Suffice to note however that this is one of the rights that has proved to be at the most risk of abuse and any criminal justice system must endeavour to safeguard this right at all cost. In the case of *Chipango v Attorney-General*,<sup>46</sup> the High Court in passing judgment stated that the individual’s right to personal liberty is one of the pillars of the fundamental rights and freedoms under the Constitution. The right to personal liberty is so fundamental that it should not be allowed to pass through their fingers like quick silver, it should be jealously guarded against any illegal encroachment from any source no matter how great or powerful. Any illegal violation of the individual’s right to personal liberty is a serious matter that should be taken seriously. This is desirable to ensure respect for and sanctity of our constitutional principles.

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<sup>42</sup> Charles Joseph Mbanda, “Towards the Realisation of the Right of Access to Justice: A Comparative Analysis of the Legal Aid Schemes in Tanzania and Ghana”, 14

<sup>43</sup> Article 13 of the Constitution, Chapter 1 of the Laws of Zambia.

<sup>44</sup> International Covenant on Civil and Political Rights (1966)

<sup>45</sup> International Covenant on Civil and Political Rights

<sup>46</sup> (1972) ZR 168 (HC)

In another case *Kawimbe v Attorney-General*,<sup>47</sup> the Supreme Court reiterated the concept of respecting an individual's right to personal liberty. The Court stated that the right to liberty is a fundamental human right and must not be taken from a person without lawful cause.

Further, in *Joyce Banda v Attorney-General*<sup>48</sup> the Supreme Court held inter alia, that the obligation to justify a deprivation of personal liberty is a common law obligation which is not affected by statutory inroads into the right to liberty; if properly invoked the statutory inroads constitute the justification. Thus, the requirement for a higher burden of proof regarding the elements of a crime ensures against unjust convictions and therefore promotes the right to personal liberty.<sup>49</sup>

From the holdings of the Court, it is clear that the right to personal liberty must be respected and protected. The law allows for this liberty to be taken away in certain circumstances. For instance, where there is reasonable suspicion of a person having committed, or being about to commit a criminal offence.<sup>50</sup> However, the criminal justice system even in performing its functions must ensure that this right is not taken away without lawful cause. Therefore, it can be argued that the criminal standard of proof is a tool that enables the criminal justice system to protect an individual's personal liberty. Proof beyond reasonable doubt ensures that an accused person is not permanently deprived of his/her liberty unless the prosecution adduces sufficient evidence proving the offence charged.

### **3.10 CONCLUSION**

This chapter has looked at the standard of proof in criminal matters and its justification. Crime control is the underlying purpose of the criminal justice system, but it should be qualified out of respect to due process. The criminal standard of proof, i.e, proof beyond

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<sup>47</sup> (1974) ZR 244 (SC)

<sup>48</sup> (1978) ZR 233 (SC)

<sup>49</sup> *Lego v Twomey* (1972) 404 US 477

<sup>50</sup> Article 13(1)(e) of the Constitution, Chapter 1 of the Laws of Zambia

reasonable doubt, ensures that the criminal justice system in performing its functions or achieving its goal of curbing or preventing crime pays due regard to the due process of law. That is, the standard of proof in criminal cases helps protect fundamental human rights, like the rights to liberty and to be presumed innocent which are embodied in the due process of law. The standard of proof can therefore not be argued to be too high and thus defeating the purpose of criminal law to protect society. Such an argument would be implying that the need to secure more convictions is more important than the need to safeguard fundamental rights and liberties, which is not the case.

The beyond reasonable doubt rule clearly helps in the dispensation of criminal justice. It protects individuals against gratuitous or oppressive punishment. The effects of an erroneous conviction on an individual are potentially overwhelming. Indeed, the consequences of any conviction include damage to reputation and some form of official supervision. Incarceration, which is imposed for some offenses, is a dreadful hardship, even in the best prisons.

The next chapter assesses the justification for the standard of proof in criminal cases using the case of *The People v Henry Kapoko and Others* as a case study.

## CHAPTER FOUR

### THE NEGATIVE IMPLICATIONS OF THE STANDARD OF PROOF IN CRIMINAL PROCEEDINGS ON THE CRIMINAL JUSTICE SYSTEM: THE PEOPLE V HENRY KAPOKO AND OTHERS <sup>1</sup>

#### 4.1 INTRODUCTION

The preceding chapter has shown that the ‘beyond reasonable doubt’ rule plays an important role in the dispensation of criminal justice as it ensures that an accused person’s rights are not unjustly curtailed or taken away. This chapter explores how the strict application of the standard of proof at times may negatively affect the dispensation of criminal justice. As such, the chapter will look at the arguments raised against the beyond reasonable doubt standard. On the basis of the arguments raised, the case of *The People v Henry Kapoko and Others* will be analysed as a case study. It will particularly look at the case against Henry Kapoko (A1) as he was acquitted on the ground that the standard of proof had not been satisfied, despite the evidence showing that he unlawfully issued instructions for the processing of a payment. In so doing, both the evidence given by the prosecution against A1 and A1’s defence will be highlighted. The chapter will further look at the arguments in favour of a variable standard of proof.

#### 4.2 ARGUMENTS AGAINST THE STANDARD OF PROOF

No system can be perfect but an ideal criminal justice system would be one which has the highest accuracy in convicting the guilty and acquitting the innocent. It is argued that the beyond reasonable doubt standard makes this ideal criminal justice system difficult to attain.<sup>2</sup> It is undisputed that the standard of proof in criminal cases does to a certain extent; promote the delivery of criminal justice as it safeguards certain individual rights. However, the

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<sup>1</sup> SSP/B/52/2009 (unreported)

<sup>2</sup> Raphael M Goldman and Alvin I Goldman, “Review of Truth, Error, and Criminal Law: An Essay in Legal Epistemology, by Larry Laudan,” *Legal Theory 1*, no. 15 (2009): 56

standard of proof at times detracts from the criminal justice system's goal of crime prevention and punishment of law breakers. It is argued that concepts such as beyond reasonable doubt are explicitly "designed to safeguard the fate of the defendant by making it hard to convict any but the most obviously guilty." The standard of proof therefore enables the criminal justice system to unfairly benefit the defendant.<sup>3</sup>

According to Larry Laudan's view, defendants have a huge advantage in the litigation of criminal cases. He disputes the notion that prodefendant rules are required to "level the playing field" between well-funded prosecutors and individual defendants. Rather, he asserts, "the playing field already begins tilted heavily toward the defendant by virtue of the enormous advantage" embodied in the standard of proof. Indeed, Laudan avers that "the actual handicapping in a criminal trial is precisely the opposite of what the distributionists would want believed. From the outset of a criminal proceeding, the average guilty defendant is assured that, though guilty, he/she is unlikely to be convicted of a crime."<sup>4</sup> Thus, the criminal standard of proof tilts the scales of justice in favour of the defendant by making it difficult for the criminal justice system to achieve its purpose.

Not only does the standard of proof sometimes prevent the criminal justice system from achieving its goal, others also argue that the concept of proving guilt beyond reasonable doubt makes criminal justice obscure, incoherent and muddled.<sup>5</sup> Larry Laudan argues that jurors and judges themselves have only the "haziest notion" of what "reasonable doubt" is. Laudan concludes that not even the keenest minds in the criminal justice system have been able to hammer out a shared understanding about the level of proof appropriate to convict someone of a crime. In sum, the muddle is not only in the minds of jurors but in the written

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<sup>3</sup> Raphael M Goldman and Alvin I Goldman, "Review of Truth, Error, and Criminal Law: An Essay in Legal Epistemology, by Larry Laudan," *Legal Theory 1*, no. 15 (2009): 56

<sup>4</sup> Raphael M Goldman and Alvin I Goldman, "Review of Truth, Error, and Criminal Law: An Essay in Legal Epistemology, by Larry Laudan," 57

<sup>5</sup> Larry Laudan, *Truth, Error, and Criminal Law* (New York: Cambridge University Press, 2006), 30



opinions of judges, jurists, and attorneys as well, and at every level from the trial bench to the Supreme Court.<sup>6</sup>

The confusion and lack of clarity surrounding the beyond reasonable doubt rule immediately implies that in any given criminal trial, both the accused and the prosecution, unable to predict what level of proof will be necessary, face a crapshoot. The most earnest jury desirous of doing the right thing and eager to see that justice is done are “left dangling.” This is with respect to how powerful a case is required before they are entitled to affirm that they believe the guilt of the defendant beyond reasonable doubt.<sup>7</sup> Clearly, justice in the sense of fairness and due process cannot be assured, nor is it even likely, in a system where different judges recommend and different juries use, discrepant standards for guilt and innocence. With the height of the bar for conviction left indeterminate, there is no assurance that any one case at trial will be decided by a jury according to the same standard that a rival jury, handling the identical case, would use. The system, in short, lacks reliability in the sense of uniformity and predictability. It is thus inherently unjust.<sup>8</sup>

Another argument raised against the standard of proof is that it makes criminal justice subjective rather than objective. That is, the interpretation of the beyond reasonable doubt standard is subjective as an accused’s conviction or acquittal is dependent on what one person or a group of people thinks. Laudan critiques the notion that the beyond reasonable doubt standard of proof should be interpreted in terms of purely subjective probabilities, or degrees of credence. Laudan finds three objective interpretations more interesting and promising. The first formulates beyond reasonable doubt in terms of credibility. There is credible inculpatory evidence or testimony that would be very hard to explain if the defendant were innocent, and no credible exculpatory evidence or testimony that would be difficult to explain if the

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<sup>6</sup> Larry Laudan, *Truth, Error, and Criminal Law* (New York: Cambridge University Press, 2006), 31

<sup>7</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 31

<sup>8</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 31

defendant were guilty. The second formulates beyond reasonable doubt in terms of plausibility. The prosecutor's story about the crime is plausible, and one cannot conceive of any plausible story that leaves the defendant innocent. The third formulates beyond reasonable doubt in terms of reasonability. The facts rule out every reasonable hypothesis that can be thought of that would leave the defendant innocent.<sup>9</sup>

Although Laudan accepts none of these proposals, he clearly leans toward interpretations that invoke what would be credible, plausible, or reasonable to believe; that is, worthy of belief as opposed to what a juror actually believes. In other words, objective norms of thought need to make an appearance in the standard, not simply what jurors happen to think.<sup>10</sup>

### **4.3 THE PEOPLE V HENRY KAPOKO AND OTHERS**

Henry Kapoko (A1), on two counts, was charged with the offence of theft by public servant contrary to sections 272 and 277 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of one offence were that between 1<sup>st</sup> February 2008 and 1<sup>st</sup> April 2008, A1 jointly and whilst acting together with other persons unknown did steal KR350, 750.00 cash which came into their possession by virtue of their employment. The particulars of the other offence charged were that between 1<sup>st</sup> November 2008 and 30<sup>th</sup> December 2008, other accused persons jointly and whilst acting together with A1 did steal KR756, 655.90 cash which came into their possession by virtue of their employment.<sup>11</sup>

The Magistrate stated at the outset that the onus was upon the prosecution to prove the case beyond all reasonable doubt. The Magistrate further said that "if after considering all the evidence in this matter there is any doubt in my mind as to the guilt of the accused persons,

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<sup>9</sup> Raphael M Goldman and Alvin I Goldman, "Review of Truth, Error, and Criminal Law: An Essay in Legal Epistemology, by Larry Laudan," *Legal Theory 1*, no. 15 (2009): 65

<sup>10</sup> Raphael M Goldman and Alvin I Goldman, "Review of Truth, Error, and Criminal Law: An Essay in Legal Epistemology, by Larry Laudan," 65

<sup>11</sup> SSP/B/52/2009 (unreported), J4, J5

then the accused persons must be given the benefit of that doubt.”<sup>12</sup> The prosecution called thirty witnesses to prove the allegations against the accused persons.

Friday Mumba the Senior Procurement Officer at Ministry of Health was PW7. PW7 testified that he was visited by the Anti Corruption Commission (ACC) who wanted to find out the procedure followed by the Ministry of Health when procuring goods, works and services which include in service training. PW7 stated that the first step involves identification of the services, goods or works sought by the User Department. After that identification is done, the User Department would then write to the Permanent Secretary (PS) for authority to procure the same. When the PS approved the request, it was then sent to Procurement sometimes by the PS, or by the User Department. It was PW7’s testimony that the approval by the PS was by way of endorsement on an internal memorandum. He further explained that the total of the estimated budget would determine what procurement method would be used. He stated that the PS could approve amounts up to KR50, 000.00 and anything above was approved by the Ministerial Tender Committee (MTC).<sup>13</sup>

Danstan Mwansa who was PW9, was a Cashier at the Ministry of Health. It was his evidence that A1 had taken a payment voucher for a workshop to his office to sign, and that A1 was alone. PW9 stated that attached to the payment voucher was a letter to the PS from Royal College, which was already compiled, and there was a signature of the compiler. It was signed by the Senior Accountant and the Chief Accountant had signed on top of it. PW9 further testified that he cashed a cheque which was given to him by A1 for the workshop. He stated that he gave the balance of the money to A1, who was one of the Coordinators of the workshop. He however, testified that the workshop had not been held.<sup>14</sup>

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<sup>12</sup> SSP/B/52/2009 (unreported), J11

<sup>13</sup> SSP/B/52/2009 (unreported), J27

<sup>14</sup> SSP/B/52/2009 (unreported), J41

Margaret Kaphiya was PW10. She was at the time Director of Human Resources and Administration at Ministry of Health. The officers from ACC wanted to know if the workshops for which payment was made had taken place. It was PW10's evidence that the workshops were not held as firstly she did not receive any advice from the Chief Human Resources Development Officer (A1) or the Assistant Director Human Resources and Administration that need had been identified to hold the training workshops. Secondly, she did not seek authority from the PS to undertake the training workshops and thirdly, there were no reports that were submitted to her office by the said officers to show that the workshops had been held.<sup>15</sup>

As regards what happened when an officer was transferred from the Ministry to another, PW10 explained that such an officer had to hand over the office to the new officer that had come in. If such an officer was not available, to an officer above or below the level of the officer transferred. When the handover was done, the officer was said to have relinquished office. On the payment of over KR756, 000.00, PW10 noted that although the payment was referred to the Chief Accountant and the Director Policy and planning, there was no indication that either of them had issued any further instructions on the letter from Royal College. Therefore, the payment should not have been processed. She further observed that the instructions on the payment for KR350, 750.00 came from A1, and therefore payment should not have been processed, as A1 had no authority to issue instructions to pay. Further, there was no authority from the PS to undertake the training workshops.<sup>16</sup>

In cross examination PW10 confirmed that A1 had no authority to move money. She testified that A1 was transferred from the Ministry of Health between April and May 2008, and he could therefore not sign anything after he was transferred. She also stated that no reports were

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<sup>15</sup> SSP/B/52/2009 (unreported), J45

<sup>16</sup> SSP/B/52/2009 (unreported), J46

written to indicate that the workshops for which Royal College was paid took place.<sup>17</sup> A handwriting expert also confirmed that A1 wrote the instructions to process the payment.

Further, PW22, an Investigations Officer at the ACC noted that the list of participants for the workshop had twenty three names and the participation fee for each participant was KR3, 050.00. However, when this amount was multiplied by the number of participants, the answer was KR70, 100.00, but the payment voucher attached to A1's instructions was for KR350, 750.00.<sup>18</sup>

It was PW27's evidence, an Investigations Officer at the ACC, that A1 initiated the theft by requesting for the letters from Valenta Nkhata (A9). After the money was paid to Royal College, A1 would inform A9 that the workshops had been cancelled or postponed, and he would call her and ask her to withdraw the money in cash and give it to him so that he could take it back to the Ministry. This is despite the fact that the money was never returned to the Ministry. A1's involvement in the payments was supported by the payment vouchers being found at his home as well as the evidence of two prosecution witnesses, and the report of the handwriting expert. PW27 also concluded that there was a clear intention to defraud as what was paid was beyond the budget, and A1 had issued instructions to the Chief Accountant when he had no authority to instruct the Chief Accountant to pay.<sup>19</sup>

A1 was thus arrested as a payment of voucher for KR756, 655.90 was retrieved from his home in April 2009 by officers from the ACC after a search was conducted. PW29 established that this payment voucher was processed in November 2008 when A1 had already left the Ministry of Health. PW29 also found that the said amount of money had been credited to the Royal College account in November 2008. He further stated that A1 had been charged for the theft of KR350, 750.00 as he gave instructions to the Chief Accountant to pay

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<sup>17</sup> SSP/B/52/2009 (unreported), J46

<sup>18</sup> SSP/B/52/2009 (unreported), J60

<sup>19</sup> SSP/B/52/2009 (unreported), J116

Royal College, when he was not in a position to instruct the Chief Accountant to pay. The money moved illegally arising from those transactions. A1 was further charged because payments above KR50, 000.00 were supposed to go to the MTC for approval, but in this case they did not.<sup>20</sup>

A1 denied all the charges against him. With regard to the assertion that training services did not go to the MTC, A1 testified that this was reinforced by the fact that some training institutions offer unique services and there was no need to advertise. For instance, Evelyn Hone College being the only institution that offers a diploma in Pharmacy, in order to send an officer to train there, there is no need to advertise as it is the only institution that offers that service. Thus, Royal College which is an institution that offers specific training that is unique did not need competitors.<sup>21</sup>

As regards the payment of KR350, 750.00, A1 stated that the payment catered for 115 participants who were divided into five groups of twenty three participants each. A1 told the court that he had coordinated the workshop, and the four other groups to be trained had conveniently not been brought to court by the prosecution. In cross examination, A1 admitted having instructed the Chief Accountant to pay as per attached budget, but that he did so after the Director of Human Resources and Administration (PW10) had signed the commitment requisition. He further stated that his instructing the Chief Accountant to pay without endorsements was not irregular. A1 admitted that a file belonging to the Ministry of Health was found at his house when he was no longer working for the Ministry of Health. He insisted that he was doing the hand over notes when the file was found at his house.<sup>22</sup>

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<sup>20</sup> SSP/B/52/2009 (unreported), J130

<sup>21</sup> SSP/B/52/2009 (unreported), J142

<sup>22</sup> SSP/B/52/2009 (unreported), J142

Having considered the evidence adduced, the Magistrate stated that the defence did not rebut the prosecution evidence that the PS did not approve that the workshop takes place. A1 just asserted that he had conveyed the instructions of the PS. When A1 instructed the Chief Accountant to process the payment, he did so when the training had not been recommended and approved by the PS. The Magistrate further noted that A1's argument that his endorsement to pay was part of his duties could not stand, as the procedure to pay was not followed. A1 therefore, did issue instructions to pay without authority. The Magistrate also acknowledged the fact that the workshop had not taken place. Despite the overwhelming evidence against A1, he was acquitted on the ground that the prosecution had failed to prove his guilt beyond all reasonable doubt.<sup>23</sup>

Looking at the evidence adduced and the holding of the Court, this case is a clear example of an instance when the standard of proof negatively affected criminal justice. Even in light of all the evidence brought forward by the prosecution which suggests that Henry Kapoko is probably guilty, he was acquitted. This is the result of the high burden placed on the prosecution to prove the guilt of an accused person. The standard of proof required in criminal matters is indeed high.<sup>24</sup> In the Henry Kapoko case, the Court found that A1 did issue instructions to the Chief Accountant to process payment for a workshop when he clearly lacked the authority to do so.<sup>25</sup> Not only did he instruct payment without authority, but he also endorsed payment for a workshop that was not approved. Further, he was found with a payment voucher when he had no business having it as he no longer worked for the Ministry of Health. A1 was also found with letters from Royal College to the PS at the Ministry of Health when A1 was at the Ministry of Local Government. Even though A1 insisted that the

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<sup>23</sup> SSP/B/52/2009 (unreported), J203

<sup>24</sup> Mwewa Murono v The People (2004) ZR 207 (SC)

<sup>25</sup> SSP/B/52/2009 (unreported), J203

workshop took place, the amount of money paid for the workshop did not tally with the list of participants that were meant to attend the alleged workshop.

Despite all this evidence, A1 was still found not guilty because the prosecution had not proved 'beyond reasonable doubt' that he had the intention to defraud. This shows how the standard of proof hinders criminal law from achieving its aims as it makes it difficult to convict any but the most obviously guilty. The question then begs to be asked, why then did A1 instruct payment for a workshop he knew had not been approved? Also, why then did A1 go to such lengths to endorse payment when he clearly knew that he lacked the authority to do so? Why was A1 found with letters to the PS and a payment voucher for services that should not have concerned him as he was no longer at the Ministry of Health? This all clearly shows some criminal activity and intent on the part of A1 and yet the standard of proof ensured that A1 was set free even though he was probably guilty. The high standard of proof required sometimes defeats the purpose of criminal law to curb and prevent crime.

A fundamental aim of criminal justice is crime control. The criminal justice system strives to ensure that the criminal law is properly enforced and its aims are achieved. Some of the aims of the criminal law are the protection of property against theft, fraud or criminal damage, and the prevention and deterrence of criminal behaviour.<sup>26</sup> The beyond reasonable doubt rule as can be seen from the Henry Kapoko case sometimes makes it impossible for the criminal justice system to achieve its goals even when the guilt of the accused is the most reasonable inference. This case justifies the assertion that the standard of proof is designed to safeguard the fate of the defendant and therefore, enables the criminal justice system to unfairly benefit the defendant.<sup>27</sup>

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<sup>26</sup> S E Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2004), 14

<sup>27</sup> Raphael M Goldman and Alvin I Goldman, "Review of Truth, Error, and Criminal Law: An Essay in Legal Epistemology, by Larry Laudan," *Legal Theory* 1, no. 15 (2009): 56



Further, like Laudan argued, the standard of proof does make criminal justice subjective as an accused's conviction or acquittal depends on what one person or a group of people thinks. In this case, A1's acquittal was based on the view that the Magistrate had not been convinced of A1's guilt and therefore the standard of proof required had not been satisfied. However, adopting Laudan's three objective interpretations of the standard of proof, from the evidence given it would be credible, plausible or reasonable to believe that A1 was guilty.

This case also justifies Laudan's assertion that there is lack of clarity surrounding the beyond reasonable doubt rule with respect to how powerful a case is required, before it is allowed to affirm the guilt of the defendant beyond reasonable doubt. Despite all the evidence brought forward against A1, his guilt was not proved beyond reasonable doubt. This shows that with the beyond reasonable doubt standard it is impossible to predict what level of proof will be necessary for any given criminal trial.

#### **4.4 A VARIABLE STANDARD OF PROOF**

In light of the arguments raised against the standard of proof, it has been asked whether beyond reasonable doubt is the right standard to use for furthering the truth seeking aims of a criminal trial and whether all trials for all crimes should, as the courts insist, use the same standard of proof. Where standards of proof are concerned, some authors like Larry Laudan are not convinced that "one size fits all." Laudan's view is based on the premise that when the beyond reasonable doubt rule came into widespread use, all felonies carried the same punishment, and that punishment was death. One standard made sense because the cost of a mistaken conviction was the same in every trial for every felony offense.<sup>28</sup>

With the abandonment of capital punishment as the customary sentence, the sensible policy emerged of varying the punishment, according to the severity of the crime. Nowadays, the

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<sup>28</sup> Larry Laudan, *Truth, Error, and Criminal Law* (New York: Cambridge University Press, 2006), 55

idea that the punishment should fit the crime is universally accepted. This should give some pause about the beyond reasonable doubt rule for two reasons. First, many crimes and their punishments are so minor that the beyond reasonable doubt standard seems inappropriately exacting. Second, even among serious crimes, beyond reasonable doubt – not admitting of degrees (since one either has a reasonable doubt or one does not) seems a very blunt instrument for determining guilt.<sup>29</sup>

It is common knowledge that a great many crimes now carry punishments that are no more than fines. Others involve nothing more than unsupervised probation or parole or relatively brief times of incarceration. Are the costs of mistaken guilty verdicts in these cases so steep that it is still insisted that ten innocent defendants be acquitted for every false conviction? Hunches about the relative costs of mistakes, perhaps crystal clear in the case of capital crimes, become clouded when much milder punishments are considered. This difference invites the proposal that the standard for conviction, instead of being the same for every crime from homicide to shoplifting, might – like the punishment – vary with the severity of the crime. After all, many crimes now carry punishments less harsh than one’s potential liability in civil cases, where the standard of proof is simply “more probable than not.”<sup>30</sup> In a civil court, a person can be sued for his/her life savings if he/she is shown to be probably liable for harm to some third party. A person can be denied his/her parental rights, committed indefinitely to a mental institution, and deprived of citizenship. Are these outcomes less severe than being found guilty of felony drunk driving and facing a year’s probation? If they are not, what is the sense in holding to such different standards of proof in the two cases?<sup>31</sup>

It is also worth asking whether it is an efficient use of money and other resources to require the state to mount the same sort of proof to send an embezzler to jail for a year as it invests to

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<sup>29</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 55

<sup>30</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 55

<sup>31</sup> Larry Laudan, *Truth, Error, and Criminal Law* (New York: Cambridge University Press, 2006), 56

convict a serial killer. Of course, it is not easy to see how to construct a graded scale of standards of conviction that might be mapped onto a scale of criminal severity. For instance, the United States court system recognises only three standards of proof: proof beyond reasonable doubt, proof by the preponderance of the evidence, and proof by clear and convincing evidence. If courts were disposed to think of standards of proof as probabilities (which they are not), it could be imagined at least in principle having a graded series of probabilities associated with increasingly serious crimes, perhaps reserving proof beyond reasonable doubt for only the most serious.<sup>32</sup>

The “intermediate” standard of proof, proof by clear and convincing evidence, might be used for lesser crimes such as misdemeanours and also the less serious felonies. Proof by clear and convincing evidence, like proof beyond reasonable doubt, is acquittal-friendly in that it requires the state to establish much more than the bare probability of guilt. Likewise, proof by clear and convincing evidence is fully compatible with the presumption of innocence.<sup>33</sup>

Like Laudan, there are others who do not agree with having proof beyond reasonable doubt as the fixed standard of proof for all crimes. These are supporters of a variable standard of proof. Proponents of a variable standard of proof contend that the best standard of proof must account for the differences in quality of evidence, particularly in times where there is evidence which is conflicting. The current, fixed standard of ‘beyond reasonable doubt’ works by being consistent but possibly rules too hard a line. If the evidence is of a low quality then it is reasonable to discount it as being insufficient. A variable standard of proof is therefore better suited to account for differing qualities of evidence. Instead of demanding a set level of proof, one form of the variable standard could judge each case according to the evidence available and set the required standard accordingly. For example, a variable

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<sup>32</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 56

<sup>33</sup> Larry Laudan, *Truth, Error, and Criminal Law*, 56

standard of proof could vary according to the crime; setting a higher standard for some with the knowledge that a greater certainty can be met.<sup>34</sup>

Judge LB Sand has proposed that for cases where there is a risk of the death penalty the required standard of proof should be raised to ‘beyond all possible doubt’ due to the severity of the punishment. To meet such a standard the quality of evidence would have to be of the highest degree. Judge Sand argues that the standard beyond reasonable doubt has too much room for error. He asserts that the standard of proof required should be in accordance with the severity of a guilty verdict’s implications. The quality of evidence required to prove these standards would also vary.<sup>35</sup>

Another proponent of a variable standard of proof, John Dewey, suggests looking at the implications of a guilty verdict before setting the standard of proof. Dewey suggests that the “infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need.”<sup>36</sup> His motivation for this comes from recognition that rules which are “hardened into absolute and fixed antecedent premises” can become “harmful and socially obstructive.” Thus, in order to have social advancement there is a requirement for getting over the chief obstacle which is “the sanctification of ready-made antecedent principles as methods of thinking.”<sup>37</sup>

There are various ways in which a variable standard of proof could be set up. One conception was outlined by Judge Holroyd who claimed that “the greater the crime the stronger the standard of proof required for the purpose of conviction.” So this is setting the standard of proof according to the crime’s severity; it is a context dependent standard. It is possible to justify this by arguing that the consequences for the accused rise in direct correlation to the

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<sup>34</sup> Thomas Christopher Rider, “What is the Most Useful Standard of Proof in Criminal Law?” *Pragmatism Tomorrow Issue 1*, no. 9 (2013): 5

<sup>35</sup> Thomas Christopher Rider, “What is the Most Useful Standard of Proof in Criminal Law?” 5

<sup>36</sup> John Dewey, “Logical Method and Law,” *The Philosophical Review Vol. 33*, no. 6 (1924): 562

<sup>37</sup> John Dewey, “Logical Method and Law,” *The Philosophical Review Vol. 33*, no. 6 (1924): 564

severity of the alleged crime. Thus, one might argue, that we ought to have a greater degree of certainty out of respect of the potential implications the verdict will have on someone's life.<sup>38</sup> Such a line of thinking was seen in the case of *Briginshaw v Briginshaw*<sup>39</sup> where the judge stated that the seriousness of an allegation made and the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question of whether the issue has been proved. This does appear to make sense, after all, shouldn't the degree of certainty required to charge someone of murder be greater than of someone who has shop-lifted?

A second conception of a variable standard of proof is based upon the probability of certain crimes being committed. For example, vandalism occurs far more often than bank robberies making it a more likely crime. On this reasoning, the standard of proof required for vandalism should be adjusted according to the crime's likeliness. It does seem reasonable that for something which is inherently more unlikely that it should require a greater degree of proof to be believable. For instance, the claim 'I saw a dog in the park' seems more likely than the claim 'I saw a wild lion in Essex'. The latter many people would argue would require a greater deal of evidence to convince them due to its inherent unlikelihood. The flexibility offered here could be the most effective way of convicting the maximum number of guilty, while acquitting the greatest number of innocent people. Although no standard of proof, fixed or variable, can be perfect. The ability to adapt between cases has the potential to increase the accuracy of and be a benefit to the judicial system by focusing on the possible consequences first.<sup>40</sup>

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<sup>38</sup> Thomas Christopher Rider, "What is the Most Useful Standard of Proof in Criminal Law?" *Pragmatism Tomorrow Issue 1*, no. 9 (2013): 7

<sup>39</sup> (1938) 60 CLR 336

<sup>40</sup> Thomas Christopher Rider, "What is the Most Useful Standard of Proof in Criminal Law?" *Pragmatism Tomorrow Issue 1*, no. 9 (2013): 8

#### **4.5 ARGUMENTS AGAINST A VARIABLE STANDARD OF PROOF**

The flexibility of the variable standard of proof is not without its problems. First, there is an argument that a judge ought to care equally about all crimes. By lowering the required level of proof for less serious offences it may be feared that carelessness would ensue. Secondly, judging according to the premise that because a crime is commonly committed it should require less proof to be charged for is unjust. It is guilty of marginalising less severe crimes. It risks there being a predisposition to assuming someone did or did not commit a crime based upon their profile. This is bordering on discrimination. A variable standard of proof could also act in conflict to changes in crime rate as it would assume one base level and attempt to judge according to that likeliness. To apply a variable standard of proof based on past case experience is a mistake. The occurrences of crimes vary continually so ironically the variable standard of proof based on this would be too static while a fixed standard of proof would be able to maintain consistent judgments over time. Further, the variable standard's reliance on context leaves the opportunity for inconsistencies and decisions appearing to be unfair. The fixed standard of proof is able to avoid these problems, therefore making it the most useful standard of proof in the criminal justice system.<sup>41</sup>

#### **4.6 CONCLUSION**

This chapter has shown the negative impacts that the beyond reasonable doubt standard has on criminal justice. The beyond reasonable doubt standard does not entirely harm the aims of the criminal justice system but in certain cases, as seen from *The People v Henry Kapoko and Others*, it makes it difficult for the criminal law to achieve its aim of crime control. Though a variable standard of proof might not be the most ideal standard or proof, there is need to

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<sup>41</sup> Thomas Christopher Rider, "What is the Most Useful Standard of Proof in Criminal Law?", 10

consider whether the fixed standard of proof beyond reasonable doubt is the best suited, keeping in mind the need for criminal law to attain its aims and thus be effective.

Having looked at the standard of proof from both the negative and positive light, the following chapter is a conclusion to the entire research and it will make appropriate recommendations in light of the research conducted.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 INTRODUCTION**

This dissertation has critically analysed the application of the standard of proof in criminal matters, by looking at *The People v Henry Kapoko and Others* as a case study. This final chapter draws in all the treads of the foregoing chapters and lays down recommendations aimed at enabling the standard of proof foster the dispensation of criminal justice and not hinder the purpose of criminal law.

#### **5.2 CONCLUSIONS**

Chapter one noted that the need for evidence to be so conclusive in order to prove elements of a crime sometimes leads to acquittal even when the guilt of the accused, based on the evidence, is more probable than his or her innocence. This in effect hinders the criminal law from achieving its goal to curb crime. As such, the chapter identified the need for the standard of proof to be evaluated so as to determine its effects on the criminal justice system. Chapter two looked at the criminal justice system in Zambia and its functions. This chapter discussed the aims of the criminal law and pointed out that one primary aim of criminal justice is crime control, and that crime control focuses on the state's power to enforce the criminal law. It further established that a good criminal justice system ought to see to it that the criminal law lives up to its intended purpose.

The third chapter discussed the burden and standard of proof in criminal matters. This chapter established that the proof beyond reasonable doubt standard plays an important role in criminal justice. It ensures that the criminal justice system, in the dispensation of criminal justice, safeguards certain fundamental rights such as the rights to be presumed innocent and personal liberty. Therefore, though crime control is the underlying purpose of the criminal



justice system, it should be qualified out of respect to due process. Chapter four dealt with the negative effects of the standard of proof on criminal justice. It examined the case of *The People v Henry Kapoko and Others* and showed that despite the evidence that suggested that Henry Kapoko was probably guilty of some criminal activity; he was acquitted as the standard of proof had not been met. This case demonstrates that the standard of proof at times hinders the criminal law from attaining its goals of curbing crime and punishing those that indulge in criminal activity. As such, the chapter raised arguments against the standard of proof and highlighted arguments that suggest that the proof beyond reasonable doubt standard should not be applied to each and every case.

From the findings of the research it can be concluded that the beyond reasonable doubt standard is of great value to the criminal justice system as it safeguards fundamental rights like the rights to liberty and to be presumed innocent. However, this does not imply that the negative implications of the standard of proof on criminal justice are unjustified concerns and thus do not need to be dealt with. The standard of proof makes criminal justice subjective and makes it difficult for criminal law to achieve its primary aims of crime curbing and prevention. For this reason, there is need for a standard of proof that promotes the aims of criminal justice and is objective, directing itself to the structure of the proofs offered by the parties rather than resting on the subjective hunches of the trier of fact.

### **5.3 RECOMMENDATIONS**

Where the standard of proof is concerned, the criminal justice system is blind, not in the traditional and commendable sense of being impartial but in the more literal sense of not knowing what it is doing or where it is going. The “wheels of justice keep grinding”, and triers of fact keep producing verdicts, but the deliberate obscurity and obfuscation

surrounding the standard for conviction does little to inspire confidence in the fairness of the system.<sup>1</sup> As such, there is need to reconsider the application of the current standard of proof.

### **5.3.1 REPLACING A SUBJECTIVE STANDARD OF PROOF WITH AN OBJECTIVE ONE**

The sad fact is that one doctrine has been expected to do multiple tasks. To begin with, it has been seen a way to stress to triers of fact that the burden of proof in criminal proceedings falls on the state, not the defendant. Then it has been expected to make clear that guilty verdicts in criminal trials must depend on much higher levels of proof than those associated with civil actions or practical life. It has been expected to impress on triers of fact just how much is at stake and how somber must be the decision when they decide to send someone to prison, depriving him or her of liberty and blackening his or her good name. Finally, it has been expected to insure – insofar as possible – uniformity of standards, making sure that every criminal verdict conforms to the same bar for conviction. On most of these scores, the beyond reasonable doubt standard is failing.<sup>2</sup>

It is thus time to try to diagnose the causes of that failure. It will probably not have escaped notice that almost all the familiar glosses on ‘beyond reasonable doubt’ define it in terms of the target mental state of the trier of fact. He or she must be “firmly convinced,” “almost certain,” “fully persuaded,” with a “satisfied conscience” about guilt before a vote for conviction is indicated. On several occasions, the court has underscored its belief that the right way to characterize the bar for conviction is in terms of the “subjective state of mind” that jurors should be in if they are to condemn or acquit the accused.<sup>3</sup>

The bar for conviction would be better defined in terms of the features of the case needed to convict rather than in terms of the trier of fact’s inner state of mind, especially since the latter

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<sup>1</sup> Larry Laudan, “Is Reasonable Doubt Reasonable?” *Legal Theory* 1, no. 9 (2003): 317

<sup>2</sup> Larry Laudan, “Is Reasonable Doubt Reasonable?” 317

<sup>3</sup> *Jackson v Virginia* (1979) 443 US 307, 315; *In Re Winship* (1970) 397 US 358, 364

– if not disciplined by certain guidelines about the appropriate logical connections between evidence and verdict – is apt to be ill-founded, prejudicial, and irrational, however powerfully they may lead to a firm belief in guilt.<sup>4</sup> The key point is that the question: how strongly does the evidence support the theory of guilt? Is an objective question about logical relations between events, not merely or primarily a question about the subjective state of the trier of fact’s mind. The issue at trial should not be whether, as a contingent matter of fact, the trier of fact is fully convinced of the guilt of the accused. Instead, it should be: does this evidence strongly support the theory that the defendant is guilty? Putting it differently: would a rational and sober minded person confronted with this evidence find that it made a compelling case for guilt?

### **5.3.2 BEYOND REASONABLE DOUBT SHOULD NOT BE A PROOF FOR ALL SEASONS**

A question that must be faced is whether the beyond reasonable doubt standard should be the appropriate standard to use across the board in criminal cases. When the beyond reasonable doubt standard was introduced, the principal argument for making it such a tough standard to satisfy depended on the very high price associated with the punishments for convictions; and the virtual irreversibility of convictions. Mistakenly convicting someone of a felony in those times extracted a very high price. It was natural under such circumstances to set the bar for conviction extremely high for all crimes. As circumstances have since changed, it is appropriate to ask whether changed circumstances ought not to alter the calculation we do when comparing the relative costs of false acquittals and false convictions. Given that the death penalty is now a rare punishment, and given that guilty verdicts are routinely vetted by higher courts, does it remain plausible that it is better that ten guilty persons go free than that one innocent person is convicted?

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<sup>4</sup> Larry Laudan, “Is Reasonable Doubt Reasonable?” *Legal Theory* 1, no. 9 (2003): 320

The costs of false convictions for most crimes are now a great deal less than they once were. Since there is elaborate appellate machinery for catching and cancelling the sometimes deadly effects of many such convictions, an incorrect conviction is no longer the guarantee of a very nasty fate that it once was.<sup>5</sup> It is common knowledge that a great many crimes now carry punishments that are little more than fines. Others, including felonies, can involve nothing more than probation or relatively brief times of incarceration. This then invites the suggestion that the standard for conviction, instead of being the same for every crime from homicide to shoplifting, should – as the punishment does – vary with the severity of the crime.

The United States court system recognizes three degrees of proof: proof beyond reasonable doubt, proof by a preponderance of the evidence, and proof by clear and convincing evidence. The beyond reasonable doubt standard could be preserved for only the most serious crimes. The intermediate standard of proof by “clear and convincing evidence” could be used for lesser crimes, that is, not only misdemeanours but also the less serious felonies. This standard, like proof beyond reasonable doubt, is defendant-friendly in that it requires the state to establish much more than the bare probability of guilt. It also has the added virtue of presumably being intelligible to juries and familiar to judges, since civil trials already make frequent use of it. It is, moreover fully compatible with the much-prized principle of the presumption of innocence.<sup>6</sup> Such a standard of proof would not only help the criminal justice system achieve its aims, it would also ensure that individual rights like the rights to be presumed innocent and liberty are protected in the dispensation of criminal justice.

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<sup>5</sup> Larry Laudan, “Is Reasonable Doubt Reasonable?” *Legal Theory* 1, no. 9 (2003): 325

<sup>6</sup> Larry Laudan, “Is Reasonable Doubt Reasonable?” *Legal Theory* 1, no. 9 (2003): 326

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