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DENIAL OF BAIL: IS IT A VIOLATION OF THE RIGHT TO PERSONAL LIBERTY?

SCHOOL OF LAW



BY

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A PAPER SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN PARTIAL
FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF A
BACHELOR OF LAWS DEGREE (LL.B)

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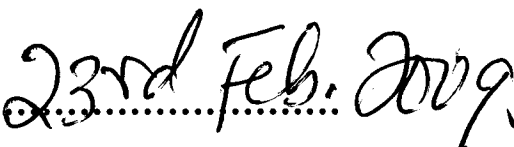
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DEDICATION

To my beloved children; Malama, Chanda and Stacey, for their endurance and untold hardships they may have gone through during the periods we shared the house but in essence lived apart on account of long hours of study due to my academic pursuits. I fondly owe you love and promise to make up for your lost fatherly presence in the near future. Continue being as patient and intelligent as you have always been so far.

My salutations and praises go to my wife, Priscilla, who will soon be my LEARNED COLLEAGUE, for having single handedly filled up my gaps as I fully concentrated on my studies, provided encouragement when I felt like quitting along the way and also for having acted more or less as a single parent. You are surely a firm woman, and indeed my God given love of my life. Continue being the way you are.

Then, lastly but not least, I give my dedications to remandees who have had to spend time in custody unjustly due to our bad bail laws.

ABSTRACT

Crime is a very undesirable vice in all societies of the world, Zambia inclusive. Capital crime is even worse. It is because of crime that: innocent people get murdered or maimed unjustly on account of properties or assets which they have laboured throughout their lives to possess; democratically elected governments are taken over by force; drugs are peddled that have inflicted very drastic effects to the lives and health of well meaning members of society including children and women; to mention but a few negative effects of crime. It is for this reason that many legislatures have come up with statutory provisions that are primarily aimed at deterring crime. One such being the enactment of statutory provisions that preclude bail to crime suspects of certain crimes, e.g., murder, treason, misprision of treason, aggravated robbery, drug trafficking, etc.

In as much as it is important to come up with efforts to stamp out capital crime completely from the society or to deter it, it is important to do so in line with the supreme law of the land – the Constitution. The Zambian Constitution, for instance, provides for the presumption of innocence for any person accused of committing any crime until being pronounced guilty by the court of law. This provision must at all times be adhered to even in the face of dealing with a capital crime suspect. The Constitution at the same time provides for the availability of bail to suspects of all types of crimes, capital offences inclusive, except that it is not given out as a matter of right, but that it is at all times in the court's discretion. There is no provision in the Constitution where the discretion of the grant or denial of bail is taken away from the courts to the Legislature as is the case with the subordinate legislations that deny bail. In view of the foregoing, the following questions need answers: Does it mean that capital crimes can only be deterred by statutorily precluding bail from a suspect? What about stiffening penalties to people convicted of capital crimes by courts of law: is that not going to serve as effective deterrence? The Constitution in Article 94(1) provides for original and unlimited, inter alia, criminal jurisdiction of the High Court. The question to pose here is that of whether statutory provisions that preclude bail do not contravene the Constitution by taking away the discretion to hear and determine criminal matters, from the High Court to the

Legislature, hence tampering with the spirit of separation of powers, among other things.

The answers to the foregoing queries were found after the research was conducted.

TABLE OF LEGISLATION AND DRAFT LEGISLATION

Constitution (1996)

Constitution (1991)

Constitution (1973)

Constitution (1964)

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

Draft Constitutional of Zambia (2005)

Interim Report of the Constitutional Review Commission (2005)

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

Penal Code Act, Chapter 87 of the Laws of Zambia

Public Order Act of the Laws of Zambia

TABLE OF CASES

Attorney General of The Gambia V. Momodou Jobe [1984] AC 689

Mulundika and Others V. The People (SCZ Judgment No.25 of 1995)

Ngui V. Republic of Kenya [1986] LRC (Const) 547

Parekh V. The People [1995-1997] ZR 78 (SC)

Thomas Mumba V. The People [1984] ZR 38

Woolmington V. DPP. [1935] A.C. 462

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First and foremost, praise be to God for keeping me healthy throughout my three years of my legal studies, undisturbed by any serious illness. I have henceforth been able to soldier on with my studies despite the so many numerous discouraging factors.

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I am indeed indebted to my fellow intellectual who appreciates the value of research, the Prison Secretary, Mr. Chilukutu, who by-passed the tedious and frustrating bureaucracy at the Commission of Prisons by urgently preparing me a letter that gave me access to Chimbokaila Prison and hence managed to interview the various capital crime inmates there, for the purposes of this research. In addition, I am indebted to the learned legal personalities from different institutions relevant to my research project, for creating time out of their very busy schedules, and accepted to have interviews with me. They thus deserve special mention as follows: Mr. Justice Sandson Silomba of the Supreme Court of Zambia, Mr. Justice Tamula Kakusa of the High Court, Mr. Palan Mulonda-the Deputy Chairperson of the Human Rights Commission, Mr. Linus Eyotia Eyaa-the Deputy Director of the Legal Aid Board, Mr. Kelvin Muzenga-the Senior Legal Aid Counsel for Ndola, Mr. Emmanuel Simukoko- the Zambia Police Service Director of Legal, and last but not the least, are Counsels from Legal Resources Chambers such as Siakamwi Chikuba and Hastings Pasi.

Finally, I am indebted to my family, in particular my wife and children for enduring my seclusion from them due to long hours of study and duration of my LLB programme.

ABBREVIATIONS

A.C.	–	Appeal Cases
Art	–	Article
BOR	–	Bill of Rights
CAP	–	Chapter
C.P.C	–	Criminal Procedure Code
DPP	–	Director of Public Prosecutions
HRC	–	Human Rights Commission
NCC	–	National Constitutional Conference
NDPS	–	Narcotic Drugs and Psychotropic Substances
NGO	–	Non Governmental Organisation
SCZ	–	Supreme Court of Zambia
UNZA	–	University of Zambia
ZAWA	–	Zambia Wildlife Authority
ZR	–	Zambia Law Report

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CHAPTER ONE

1.0 INTRODUCTION

According to Cross and Jones: “A crime is a legal wrong for which the offender is liable to be prosecuted and if convicted, punished by the state.”¹ Punishment by the state varies from a simple fine to incarceration (imprisonment), but our emphasis in this research is on crimes that result into incarceration as they are the ones that can lead an accused to lose liberty and hence apply for bail.

In Zambia, the majority of crimes are bailable, but there are a few that statute denies bail and most of these are capital in nature, for instance; murder, aggravated robbery, treason, misprision of treason and drug trafficking. In this chapter, the research, for a start, highlights the following aspects: statement of the problem and objectives; research questions; and methodology. Thereafter, after giving a brief account of what bail is all about as well as a brief historical account of Bail Law in England and Wales, the research sought to show that the right to bail is actually guaranteed by the Constitution in the Bill of Rights (BOR). Further, it was shown that despite the Constitutional guarantees of the rights to liberty (and bail), the same Constitution has provided for specific situations through which the right to personal liberty may be denied. The conclusion closed the chapter.

1.1 STATEMENT OF THE PROBLEM AND OBJECTIVES

Statement of the Problem

In Zambia, as much as it is appreciated that denial of bail for the above capital crimes is aimed at deterring people from committing them given the rising crime levels, and many other reasons, it is also important to respect our supreme law – the Constitution, and as such the Bill of Rights (Part III of the Constitution). Article 18(2) (a) of the Constitution provides for the presumption of innocence as follows: “Every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty (by the court of law) or has pleaded guilty.” This provision, among other provisions, is in itself crucial in determining as to whether or not the incarceration of any accused person without bail is in line with the Constitution or not.

R. Cross and P.A. Jones, An Introduction to Criminal Law (7th ed.), Butterworths, London, 1972, p.9

The other issue central is that of finding out as to whether there are some provisions in the Constitution that support the denial of bail for the commissions of Capital crimes as provided for by subordinate statutes, e.g., Criminal Procedure Code Act and the Narcotic Drug and Psychotropic Substances Act. In addition, the research would find out as to whether the foregoing subordinate legislations' provisions that preclude bail contravene Article 94(1) of the Constitution which grants the High Court (and the Supreme Court on appeal) unlimited criminal jurisdiction.

In view of the above, the Research would thus confirm as to whether any legislation that denies bail for any crime in Zambia must be declared invalid in line with Article 1(3) of the Constitution which provides that the Constitution is the supreme law of Zambia and if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void;² or not.

Research Objectives

This research generally seeks to give a critical analysis as to whether the denial of bail for certain crimes by statute is a violation of the right to personal liberty or not.

In order to provide answers to the above question, the research went on with the tasks of undertaking the following specific objectives:

- Explained briefly what bail is all about, the law behind it and its brief history in England and Wales, since the Zambian criminal justice system has British roots.
- Highlighted the Constitutional provisions that guarantee the right to bail, as well as speedy trial.
- Highlighted the Constitutional provisions that deny bail or personal liberty for the commission of certain crimes.
- Explained the concept of a crime and criminal liability generally.
- Elucidated about the standard of proof as well as the burden of proof in any criminal trial.

Constitution (CAP 1), p.7

- Brought to the fore and analysed the Constitutional provision of the presumption of innocence.
- Briefly but effectively illustrated the deterrence theory of punishment since the most likely motive of the Legislature in enacting bail precluding statutory provisions was to deter capital crime.
- Critically analyzed, compared and harmonized the law on bail/ denial of bail so that the research could take only one position.
- Clearly brought to the fore the fact that an individual's right to personal liberty is guaranteed by the Constitution and also that the same right is not absolute because of the constitutional derogations which have allowed its denial in certain situations.
- Compared Zambian statutory bail law with that of Kenya and The Gambia with the objective of backing the position taken by the research.
- Interviewed prominent legal personalities from selected institutions of relevance to the research topic with the view of getting their opinions over the research subject.
- Visited one the Prisons based in Lusaka where capital crime inmates are kept for the purposes of conducting on the spot interviews with the accused, incarcerated without bail before trial, so as to highlight the cruelty of the laws that preclude bail and hence post a stronger message on the need to urgently amend or invalidate them.

1.2 RESEARCH QUESTIONS

This research was conducted so as to provide answers to a few questions which have for a long time now been numbing the minds of: the author himself, the judges, magistrates, common men (laypersons), and many other people. The following thus are the questions:

- Why should the Constitution provide for the presumption of innocence for any person accused of committing any crime until proven guilty by the court of law and yet some subordinate legislations have come up with provisions that deny bail to persons accused of committing crimes prescribed by them, even before the courts could find them guilty?

- Since the Constitution (supreme law of Zambia) has provided for unlimited, inter alia, criminal jurisdiction of the High Court in Article 94(1), why should subordinate statutes come up with provisions that take away the jurisdiction of hearing and determining certain criminal matters from the court to the Legislature by means of statutory non bailable crimes?
- Since Article 1(3) provides for the Constitution as being the supreme law of the land and any other law that contradicts as being invalid to the extent of the inconsistency, why is it that the statutory provisions that preclude bail from the accused for the commission of crimes prescribed by them have still not been declared void for being inconsistent with the Constitution?
- Assuming that the Legislature came up with statutory provisions that preclude bail from the capital crime suspects for the purposes of deterring crime from the would be offenders, does it mean that allowing capital crime court trials to proceed up to their finality upon which stiffer sentences would be passed (and thereby being in line with the Constitution) would not serve as enough deterrence?
- Is there any provision in the Constitution that contains non bailable crimes or that emphasizes about the non availability of bail to suspects of particular crimes?
- What are the views of the different learned legal personalities representing the various institutions of relevance to the research, on the subject under study?
- How has the current law on statutorily non bailable crimes impacted negatively upon the Zambian society?
- Has the Mung'omba Draft Constitutional come up with any provisions to bring about significant changes to bail law?

1.3 RESEARCH METHODOLOGY

The major method of data collection employed was desk research. This was supplemented by interviews with various personnel in the relevant institutions like the High and the Supreme Courts, the Zambia Prison Service, the Zambia Police Service, the Human Rights Commission, Non Governmental Organisations (NGOs) like the Legal Resources Chambers, and Government bodies like the Legal Aid Board (LAB).

The data for this research was also sourced from books, statutes, draft legislations, case law, journal articles, paper presentations, student obligatory essays, reports and journals from relevant institutions, newspaper articles and the internet.

The Research paper utilized qualitative data and went on for the duration of one year.

1.4 WHAT BAIL IS

*“Bail is when a man taken or arrested for a felony, suspicion of a felony, or any such case, so that he is restrained of his liberty, and being by lawailable, offers sureties to those who have authority to bail him, which sureties are bound for him to the King’s use in a certain sum of money or body for body, that he shall appear before the justices of goal delivery at the next sessions; then upon the bounds of these sureties as is aforesaid he is bailed.”*³ Bail is described in the Zambian Criminal Procedure Code Act⁴ in section 123 (1) as follows: *“When any person is arrested or detained, or appears or is brought before a subordinate court, the High Court or Supreme Court, he may at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his own recognizance if such officer or court thinks fit.....”*

If the suspect appears in court at the proper time, the court refunds the bail. But if the suspect does not show up, the court keeps the bail and issues a warrant for his arrest.

Bail can be granted by the courts or the police. Where bail is granted, the suspect is released from custody until the next date on which he would be required to attend court or the police station. The grant of bail is usually in the discretion of either the Court or Police, unless a relevant statute precludes bail for the crime a suspect has been accused of having committed.

Breach of Bail

If a suspect does not stick to bail conditions, or fails to attend court on the set date, he is in breach of bail. He is likely to be arrested and have his bail withdrawn. He may be

³ R. Borrows (1946) Words and Phrases Judiciary Defined, Vol. 1 Para 717

⁴ Chapter 88 of the Laws of Zambia

remanded in custody and might not get bail in the future. Failing to appear at court as required is a criminal offence and as such, a suspect could also be prosecuted for this offence.

1.5 TYPES OF BAIL/CATEGORIES

In England (just as in Zambia), there are three types of bail, and these are: **Police Bail**; where a suspect is released without being charged but must return to the police station at a given time, **Police to Court**; where having been charged, a suspect is given bail but must attend his first court hearing at the time and Court given and **Court bail**; where having already been in court, a suspect is granted bail pending further investigation or while the case continues. The foregoing types of bail apply to Zambia as well since, being a former colony of Britain, many laws were extended to Zambia, including the criminal justice system in general, and the same continue to be applicable even to date. Amendments that have occurred since independence have not been material enough to change the outlook of the statutes that have roots from the colonial era.

There are generally two categories of Bail, these are:

Conditional Bail

The police and courts can impose any requirement necessary to make sure that suspects attend court and do not commit offences or interfere with witnesses whilst on bail. Conditions can also be imposed for the suspect's own protection or welfare (where he is a child or young person). Common conditions include not going within a certain distance of a witness's house, or being subject to a curfew. If a suspect is reported or believed to have breached (gone against) a bail condition, then he can be arrested and brought before a magistrates' court which may then place the person in custody.

Unconditional Bail

If the police or court think that the suspect is unlikely to commit further offences, will attend court when required and will not interfere with the justice process, he will usually be released on unconditional bail.

1.6 BRIEF HISTORY OF BAIL LAW IN ENGLAND AND WALES

Understanding a brief history of bail law in England and Wales is important in that Zambia is a former colony with the legal system having been extended during

colonialism. In fact most of our current statutes, criminal justice system, as well as our administrative system have a British outlook and form.

In mediaeval England, the sheriffs originally possessed sovereign authority to release or hold suspected criminals. Some sheriffs would exploit the bail for their own gain. The **Statute of Westminster (1275)** limited the discretion of sheriffs with respect to the bail. Although sheriffs still had the authority to fix the amount of bail required, the statute stipulated which crimes were bailable and the ones which were not.

In the early 17th century, King Charles I ordered noblemen to issue him loans. Those who refused were imprisoned. Five of the prisoners filed a habeas corpus petition arguing that they should not be held indefinitely without trial or without bail. In the **petition of Right (1628)** Parliament argued that the King had flouted the Magna Carta by imprisoning people without just cause.

The **Habeas Corpus Act 1679** stated: “A Magistrate shall discharge prisoners from their imprisonment taking their recognizance, with one or more Surety or Sureties, in any sum according to the Magistrate’s discretion, unless it shall appear that the Party is committed for such matter or offences for which by law the prisoner is not bailable.”

1.7 GUARANTEE OF THE RIGHT TO BAIL IN THE ZAMBIAN CONSTITUTION

According to Article 1(3) of the **Zambian Constitution**⁵ (1996), the Constitution is our supreme law, and any other law inconsistent with it, that other law shall be declared void to the extent of the inconsistency. In **Thomas Mumba V. The People**⁶, the applicant was charged with an offence under the Corrupt Practices Act. Section 53(1) of the Act allowed testimony only on Oath. The defence argued that this section was contrary to Article 20(7) of the 1973 Constitution. The Subordinate Court referred the issue to the High Court for determination where it was held, in countries like Zambia where there is a written Constitution and is the supreme law, other laws are inferior to it and as such void

⁵ Chapter 1 of the Laws of Zambia

⁶ [1984] ZR 38

when in conflict with it. Therefore, section 53(1) of the Corrupt Practices Act was declared void by the High Court. The preceding case thus enunciates the fact that our Constitution is sacrosanct and more supreme than any other law. Furthermore, all other laws and administrative institutions derive their existence from the Constitution as has been further provided for in Article 1(4) which states: “This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.” The above therefore means that any law or institution that contradicts the Constitutional provisions shall be declared void and would have no place amongst our laws or institutions. This now leads us to the **Constitutional provision of the Right to Bail in Article 13(3)** which states: *“Any person who is arrested or detained for the purpose of bringing him before a court in execution of an order of a court; or upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia; and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained.....is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”* The foregoing right to bail in Zambia is a **fundamental human right** since it is located in the Bill of Rights or Part III of the Constitution. This part of the Constitution is sacrosanct because it is guaranteed and protected from easy amendment and alteration by means of **Article 79(3)** which states: *“A bill for the alteration of Part III of this Constitution or of this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National referendum with or without amendment by not less than fifty per cent of persons entitled to be registered as voters for the purposes of the Presidential and Parliamentary elections.”* The rigorous procedure involved in the alterations of the BOR as well as Article 79(3) is testimony enough of the sanctity of both. All the people of Zambia must vote through a referendum and the majority rule must apply as a measure of consent to the alteration of the BOR as has already been enunciated by Article 79(3). This implies that it is not easy to alter the BOR as well as the provision above. **The fact**

that the right to bail (as well as other fundamental human rights) is provided for in this particular Part of the Constitution (Part III) is testimony enough of how fundamental it is. Again, by means of Article 1(3) of the Constitution, any other law that denies Bail to a suspect is supposed to be declared invalid, given that the right to Bail is as provided for in the Constitution in Article 13(3), unless the Constitution itself has some provisions where the right to bail or personal liberty may be denied.

1.8 CONSTITUTIONAL PROVISIONS THAT DENY PERSONAL LIBERTY (OR BAIL)

According to Sinyangwe, the provisions relating to personal liberty of an individual in Zambia are entrenched in the Bill of Rights of the Constitution to underscore the importance of the rights of an individual and the need for these rights to be jealously guarded against the might of the state and its propensity and ability to violate them.⁷

Even if the Constitution in Article 13(3) has guaranteed the right to personal liberty of a suspect through Bail, as well as in Article 13 (1) to all people in general (inclusive of suspects) it has at the same time come up with specific exceptions through which personal liberty may be denied to a person (again, inclusive of a suspect).

Article 13(1) provides that a person shall not be deprived of his personal liberty, but in Article 13(1) paragraphs (a),(b),(c),(d),(e),(f),(g),(h),(i) and (j), it gives exceptions through which personal liberty (Bail inclusive) may be denied and they are as follows:

- (a) in execution of a sentence or order of a court, whether established for Zambia or some other country, in respect of a criminal offence of which he has been convicted;
- (b) in execution of an order of a court of record punishing him for contempt of that court or of a court inferior to it;
- (c) in execution of an order of a court made to secure the fulfillment of any obligation imposed on him by law;
- (d) for the purpose of bringing him before a court in execution of an order of a court;
- (e) upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law in force in Zambia;

⁷ W. Sinyangwe, Bail: Is it a Right?, UNZA Obligatory Essay (2004), p.9

- (f) under an order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;
- (g) for the purpose of preventing the spread of an infectious or contagious disease;
- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community;
- (i) for the purpose of preventing the unlawful entry of that person into Zambia , or for the purpose of effecting the expulsion, extradition or other lawful removal of that person while he is being conveyed through Zambia in the course of his extradition or removal as a convicted prisoner from one country to another; or
- (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Zambia or prohibiting him from being within such area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Zambia in which, in consequence of any such order, his presence would otherwise be unlawful.

Therefore, the above are the provisions in which the Constitution has authorized the denial of liberty to a person, implying that even the BOR permits the denial of the right to personal liberty in certain specified circumstances. In other words, **the Constitution has made great strides in specifying the circumstances in which personal liberty may be denied.** Any statute, administrative institution etc., which denies personal liberty in a manner not specified by the Constitution, must be declared invalid in line with Articles 1(3) and 1(4) of the Constitution.

1.9 CONCLUSION

The law pertaining to bail was first extended to Zambia (Northern Rhodesia by then) during the colonial era by our colonial masters, the British. Even the Bills of Right of our 1964 Constitution (Independence Constitution) through to the present Constitution (1996), which contain, inter alia, the right to bail, have a colonial legacy. It is for the

preceding reasons that the author commenced the research by giving a brief history of Bail Law as well as its taxonomy, as it was in England and Wales.

The research went on to show the Constitutional guarantees of the right to bail as well as some specific circumstances through which the liberty of a person (including bail) may be denied and also that any other law or institution that precludes personal liberty in a manner not specifically prescribed by the Constitution in Article 13(1) must be declared invalid in the same lines as provided for in Article 1(3).

In Chapter two, the research endeavours to show the concept of a crime, inclusive of the elements that make up a crime before proceeding to the aspect of the standard of proof/burden of proof in a criminal trial. This is important in determining as to whether the common law position of placing the burden of proof in a criminal trial on the prosecution at all times is in line with Articles 18(7) and 18(2)(a) of the Constitution. Next, the statutory provisions that deny bail will be highlighted, together with the analysis of their possible impacts on the Constitution as well as the common law positions. Then finally, before concluding, a brief analysis of the deterrence theory of punishment, together with other possibly justifiable reasons for the denial of Bail by the courts would be discussed.

CHAPTER TWO

2.0 INTRODUCTION

The research in this chapter, by first of all commencing on the study of the concept of a crime and criminal liability, showed that the denial of bail is a violation of the common law principle which puts the burden of proof of the interaction of *mens rea* and *actus reus* always on the prosecution and the standard of proof as being on the basis of beyond reasonable doubt, and on the other hand, the research came up with justifiable reasons that could have compelled the Legislature to come up with such bail precluding provisions, by giving out a brief account and analysis of the deterrent theory of punishment. Further, before concluding, the research yet again gave out more justifiable reasons that usually compel courts to deny bail to the accused.

The Bill of Rights (BOR) guarantees in Articles: 18(2) (a) - presumption of innocence Constitutional provision, 18(7)-non compulsion to give evidence by the accused in a criminal trial, 13(3)-the right to bail as well as a speedy trial; are also violated by the statutory denial of bail due to the fact that an accused is denied a fair opportunity to present his case to the Court of law and be heard. In other words, the discretion is taken away from the courts by statute.

2.1 CRIMINAL LIABILITY

It is important to note that for a crime to be committed there should be proof of an interaction between the *actus reus* and *mens rea*. This simply means that in all criminal trials it is imperative for the courts to prove the existence of an interaction between the elements of *mens rea* and *actus reus* so as to determine the existence of a crime. Denial of bail to the accused by the court before trial simply because of having been accused of committing a non bailable crime is clearly a violation of the presumption of innocence Constitutional provision in Article 18(2) (a). In addition, the statutory denial of bail denies the Court a chance to determine the evidence of an interaction between the *actus reus* and *mens rea* in a criminal trial for the purposes of determining criminal liability of the accused due to 'statutory interference'. The common law position is clearly affirmed by the presumption of innocence Constitutional provision in Article 18(2) (a).

2.2 STANDARD/BURDEN OF PROOF IN A CRIMINAL TRIAL

Subject to the exceptional case of the defence of insanity, and to certain statutory exceptions, the onus of proving beyond reasonable doubt that the accused not only committed the guilty act, but also did so with the guilty mind requisite to constitute the crime charged, rests upon the prosecution throughout a criminal trial, and never shifts to the defence (or accused); in particular, the crime will not be inferred or presumed from an act which has an absence of a guilty mind. In **Woolmington V. Director of Public Prosecution (DPP)**⁸, Woolmington was charged with the murder of his wife. He did not deny that he had shot her, but stated that the gun had gone off accidentally while he was endeavouring to induce her to return to live with him by threatening to shoot himself.

Viscount Sankey, L.C in the process of allowing the appeal and quashing the conviction went on to say: “...*But 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.....*”

Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to.....the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

From the **Woolmington Case**, it is discernible, inter alia, that the onus of proving the guilt in a criminal trial always rests upon the prosecution (except when the accused pleads insanity), and never at any time is it ever shifted to the accused. **This common law position is affirmed by the Constitutional provision in Article 18(7) which states:** “*A person who is tried for a criminal offence shall not be compelled to give evidence at*

⁸ [1935] A.C 462

the trial.” Further affirmation of the above common law position is given by the presumption of innocence Constitutional provision [Article 18(2) (a)] which states: “Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.”

The **Woolmington case** further discerns that the standard of proof in any criminal trial is on the basis of beyond reasonable doubt except again in a defence of insanity which has to be determined by the Court on the balance of probabilities. The above implies that **any little doubt created by the defence in a trial, in relation to criminal liability of an accused is enough to bring about an acquittal, hence the standard being on the basis of ‘beyond reasonable doubt’.**

Drawing further inspiration from the case, the Courts in Zambia must always direct their minds to the fact that the burden of proof in any criminal trial is always on the prosecution and never at any time does it ever shift to the accused. Denying bail to an accused before the Court determines a case is tantamount to convicting an accused before trial as well as a violation of the presumption of innocence Bill of Rights or Constitutional provision. Lord Sankey was very clear on the aspect of capital crimes when he said: “.....*No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common law of England and no attempt to whittle it down can be entertained.*” From the preceding statement, it can be discerned that even in an event of a person being accused of having committed any of the capital offences such as murder, treason etc., the onus must always be on the prosecution to prove an accused’s guilt and therefore no bail must be denied by any Court on account of being accused of a capital offence as it goes against the basic principles of common law as well as the Bill of Rights of the Constitution.

2.3 CRIMES WITH BAILS DENIED BY STATUTE

In Zambia, some crimes are notailable simply because some statutes preclude bail to the persons accused of committing crimes prescribed by them. For instance, the Criminal Procedure Code Act⁹ provides in section 123 (1): “*When any person is arrested or detained, or appears or is brought before a subordinate court, the High Court or Supreme Court, he may at any time while he is in custody, or at any stage of the*

⁹ Chapter 88 of the Laws of Zambia

proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his own recognizance if such officer or court thinks fit:

Provided that any person charged with –

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

Shall not be granted bail by either the subordinate court, the High Court or Supreme Court or be released by any Police Officer.”

Section 43 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act¹⁰ provides:

“Whenever any person is arrested or detained upon reasonable suspicion of his having committed a cognisable offence under this Act, no bail shall be granted when he appears or is brought before any Court.” Section 23(1) of the same Act describes a cognisable offence as follows: *“Every drug trafficking and drug manufacturing offence shall be cognizable offence for the purposes of the Criminal Procedure Code (C.P.C).”*

The cognisable offence so defined is one whose commission bail is precluded in line with section 43 of the NDPS Act.

The above statutes are just two out of others that deny bail, but for the purposes of this research and for ease of analysis, the author would restrict himself to them. The above statutory provisions mean that bail is not available to any person accused of having committed the crimes such as treason, misprision of treason, aggravated robbery, murder; as well as drug trafficking and manufacture of drugs, respectively. The above provisions simply mean that courts have no discretion to grant bail in the event of a person being accused of any of the above crimes. In other words, the discretion of the court is set aside and the statutory provisions prevail. This goes against the presumption of innocence Constitutional provision in Article 18(2) (a). Other things that get set aside as a result of the above statutory denials of bail are the criminal law principles that require proof of the

¹⁰ Chapter 96 of the Laws of Zambia

interaction of the *mens rea* and *actus reus* by the court as a measure of determining criminal liability, because an accused's liberty (bail) is denied by statute and not the court which is supposed to be more competent in determining the interaction of *mens rea* and *actus reus* in any criminal offence. The idea of denying bail to an accused is thus a clear violation of his liberty. Furthermore, the common law prescription where the burden of proof concerning the interaction of *actus reus* and *mens rea* as being at all times on the prosecution (as already enunciated by the Woolmington Case) is completely set aside.

Statutory denial of bail finally means that whenever a person is accused of drug trafficking, murder, treason or misprision of treason even on trumped up charges, then that person will have his bail denied as per statutory requirement, even before the rules of evidence are invoked. The court shall have no discretion in any way except in the case of unreasonable delay through no fault of the accused, then the arrested person could be released by the High Court or the Supreme Court on appeal, on Constitutional Bail as was attempted by the accused but denied by the High Court and later on by the Supreme Court on appeal, in the case, Parekh V. The People¹¹

2.4 PRESUMPTION OF INNOCENCE

Article 18(2) (a) of the Constitution provides: "*Every person who is charged with a criminal offence shall be presumed to be innocent until proved or has pleaded guilty.*" Again, going by the statutes that deny bail (CAP 88 and 96), it is discernible that whenever a person is accused of the crimes as prescribed by the provisions of the two statutes, then the presumption of innocence guaranteed by the Constitution (or Bill of Rights) would have to be set aside as well in a manner tantamount to 'presuming an accused guilty until proven innocent!' The act of denying bail to an accused through statute takes away all the discretion from the court in the giving or denial of bail and as such, an accused is denied a chance to natural justice in that statute has denied him bail even before he could be present his case to the court of law to be heard.

¹¹ [1995-1997] ZR 78 (SC)

2.5 THE DETERRENCE THEORY OF PUNISHMENT

However, the Legislature could have had some good intentions for it to come up with those statutory provisions (that deny bail for the commission of certain capital crimes). The fact that the denial was only on capital offences means that the Legislature intended to deter or prevent people from committing them. Increased and frequent occurrences of capital offences have very negative impacts on maintaining law and order in society as well as on society's well being, peace and harmony, hence the efforts by the Legislature in coming up with the provisions at hand. **Deterrence theory is one of the theories of punishment** (the other two being retributive and reformative). "The preventive or deterrence theory of punishment's premise is that punishment as an imposition of punitive sanctions and the infliction of suffering is unjustifiable unless it can be shown that more good is likely to result from the imposition of punitive sanctions than the absence of such sanctions. The good that is seen to result from the infliction of suffering and pain on the offenders is the prevention and reduction of crime. The deterrence (preventive) theory of punishment asserts that punishment is desirable if it leads to:

- (i) the treatment of the offender,
- (ii) the protection of the people against other offences, and
- (iii) act as a deterrence to the other would-be offenders."¹²

Deterrent theories of punishment contain a number of notions, two of which being: the inhibition of the person to be punished, referred to as special deterrence or individual deterrence, and the other one being referred to as, general deterrence, where it is said that the threat of punishment deters people from wrong doing, i.e. inhibition in advance.

It appears Zambian Courts and the Legislature have pursued the general deterrence for among other things, denial of bail to the offenders of capital crimes and persistent offenders. General deterrence is considered useful as it makes the threat of punishment real, thereby leading to the reduction in the general crime rate in the nation.

¹² S.E. Kulusika, Text, Cases and Materials on Criminal Law in Zambia, p.801

2.6 POSSIBLE AND JUSTIFIABLE REASONS FOR DENIAL OF BAIL BY THE COURTS OF LAW

Generally, there are a number of justifiable and inexhaustible reasons (apart from deterring crime) why at times courts refuse to grant bail to the accused. They are as follows: Where a person is accused of an imprisonable offence and there are substantial grounds for believing that the accused will abscond, commit further offences whilst on bail or will interfere with witnesses, courts may have the discretion to deny bail under such circumstances. It is further submitted that the court may refuse bail for the following reasons: for the accused's own protection; where the accused is already serving a custodial sentence for another offence; where the Court is satisfied that it has not been practicable to obtain sufficient information; where the accused has already absconded before in the present proceedings; where the accused has been convicted by the Court and is awaiting a pre-sentence report, other report or inquiry and it would be impracticable to complete the inquiries or make the report without keeping the accused in custody; and finally, where the accused is charged with a bailable offence, has already been arrested for absconding or breaching bail. It is finally submitted that legal theory determines that where the accused has previous convictions for certain homicide or sexual offences, the burden of proof is on the accused to rebut a presumption against bail. Also that, conditions may be applied to the grant of bail, such as living at a particular address or having someone act as surety, if the Court considers that necessary.

2.7 CONCLUSION

The research in this chapter had endeavoured to show that in many respects, the statutory denial of bail as a result of the commission of certain capital offences is a violation of the right to liberty of a suspect, reason being that it contradicts the Constitutional guarantees of the fundamental rights in the Bill of Rights, particularly the presumption of innocence [Art.18(2) (a)], the right to Bail [Art.13(3)], the right to personal liberty [Art.13(1)] and the right under which the accused is not compelled to give evidence in the Court of Law [Art.18(7)]. Statutory denial of bail is, inter alia, tantamount to 'presuming an accused guilty until proven innocent'. Even the common law principles where the burden of proof is at all times on the prosecution [affirmed by the Bill of Rights provision in Art. 18(7)-no compulsion to give evidence in a criminal trial as well as Art. 18(2) (a)-presumption

of innocence] are set aside by statutes that deny bail in that the court's discretion of trying a suspect in relation to the qualification or non qualification for bail is taken away by the Legislature. The courts are better placed to determine the interaction of *mens rea* and *actus reus* in any definition of a crime charged.

However, the research highlighted a justifiable reason that the Legislature could have had in mind when coming up with such statutory provisions that deny bail, and it has got something to do with the prevention or deterrence of would be offenders from committing capital crimes hence maintaining law and order. There are other reasons that the research highlighted as justifiable for the denial of bail by the courts, before the conclusion.

In Chapter Three, the research endeavoured to critically analyse, compare and harmonise the following: Deterrence theory of punishment plus other justifiable reasons courts rely upon to deny bail; the Constitutional provisions that emphasise the right to bail as well as speedy trial; the Constitutional provisions that deny personal liberty (or bail) for the commission of certain crimes; and the presumption of innocence Constitutional provision. After the foregoing analysis, efforts were made to find out as to whether the statutes that preclude bail are consistent with the Constitution or not and consequently the way forward for them, before concluding.

CHAPTER THREE

3.0 INTRODUCTION

This chapter seeks to critically analyze, compare and harmonize the varying positions concerning the effects of the denial of bail to the right of personal liberty as guaranteed by the Bill of Rights of the Constitution. In Chapter 2.4, this research endeavoured to show that the statutory denial of bail is tantamount to presuming a suspect guilty until proven innocent. In Chapter 2.2, the research highlighted that the statutory denial of bail violates the common law principle that places the burden of proof in a criminal trial on the prosecution at all times and also on the basis of ‘beyond reasonable doubt.’

In contrast to the above scenario, the research on the other hand dealt with justifiable reasons that could have prompted the legislature to come up with bail precluding provisions. For instance, in Chapter 2.5, it was highlighted that the bail precluding statutory provisions as enacted by the Legislature are for the purposes of deterring capital crimes in the nation, making the threat of punishment real thereby leading to the reduction in the general crime level in the nation.

The research resolved and harmonized the differing positions by means of relying on and critically analyzing our supreme law, the Constitution. The Constitution is our *Grundnorm* in Zambia in that all other laws derive their validity from it and any law that contradicts it is supposed to be declared invalid to the extent of its invalidity as enunciated by Article 1 (3) of the Constitution (1996)¹³.

3.1 CRITICAL ANALYSIS OF THE LAW ON BAIL/DENIAL OF BAIL

In as much as it was shown in Chapter 2.5 that statutes that deny bail for the commission of their respective crimes are important in that they deter capital crimes thereby leading to national crime level reduction, it is imperative to note that the law as prescribed by our *Grundnorm*, the Constitution, is followed without contradiction.

The Constitution in Article 13(3) provides for the right to bail as has already been discussed in Chapter 1.4. which thus states: “*Any person who is arrested or detained for*

¹³ CAP 1 of the Laws of Zambia

the purpose of bringing him before a court in execution of an order of a court; or upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law in force in Zambia; and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained..... is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.” A critical analysis and interpretation of the foregoing right to bail reveal that the discretion over the grant or denial of bail is entirely placed in the hands of the courts and nowhere in the Constitution has it been placed in the hands of statute or Legislature. This simply means that any statute, institution, etc. that takes away the discretion of the grant or denial of bail from the court must be declared invalid in line with Article 1(3) of the Constitution. **In fact, the Constitution in Article 94(1) specifically gives the High Court unlimited and original jurisdiction to hear and determine criminal and civil matters-this includes the grant or denial of bail. No subordinate legislation must subtract from this unlimited criminal jurisdiction since it was granted by the supreme law-the Constitution.**

3.2 PERSONAL LIBERTY AS PROVIDED BY THE CONSTITUTION

As already discussed in Chapter 1.8 of the research, Articles 13(3) and 13(1) of the Constitution have guaranteed the right of personal liberty to all people (suspects inclusive). However, in Article 13 (1), paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j), exceptions through which personal liberty (bail inclusive) may be denied have been given. This means that the denial of personal liberty in a manner outside the above paragraphs is unconstitutional. Any statute, institution etc that denies personal liberty in a manner not provided for under Article 13(1) must be declared invalid in line with Article 1(3) of the Constitution.

This research places more emphasis on paragraphs (a) to (e) of Article 13 (1) as provisions through which the Constitution allows personal liberty to be denied. Therefore, Article 13(1) provides that a person shall not be deprived of his personal liberty except as may be authorized by the law in any of the following cases:

- (a) in execution of a sentence or order of a Court, whether established for Zambia or some other country, in respect of a criminal offence of which he has been convicted;
- (b) in execution of an order of a court of record punishing him for contempt of that court or of a court inferior to it;
- (c) in execution of an order of a court made to secure the fulfillment of any obligation imposed on him by law;
- (d) for the purpose of bringing him before a court in execution of an order of a court;
- (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia.

There are other instances given by Article 13 (1) in paragraphs (f), (g), (h), (i) and (j), through which personal liberty may be denied, but this research did not dwell on them due to lack of relevance to the subject at hand.

In the case **Parekh V. The people**¹⁴, an applicant for bail who had committed a crime whose bail was precluded by statute was denied bail by the High Court, and later on by the Supreme Court on appeal, citing Article 13(1) (e) of the Constitution as the basis by which the Supreme Court's refusal to declare a bail precluding provision (section 43) of the Narcotic Drug and Psychotropic Substances (NDPS) Act as unconstitutional.

The ground of appeal was to the effect that it is unconstitutional for any Act of Parliament subordinate to the Constitution to prohibit or restrict the granting of bail pending trial, given that the Constitution provides in Article 18(2) (a) that every suspect is presumed innocent until proven guilty. The defence for the accused submitted that all statutes that bar bail go against the Constitutional provision of the presumption of innocence and as such, must be declared invalid in line with Article 1(3) of the Constitution.

¹⁴ [1995-1997] ZR 78 (SC)

The Supreme Court refused to declare the statutory provisions on non-bailable crimes as inconsistent with the Constitution citing as authority, Article 13(1) (e) which provides that no person shall be deprived of his personal liberty except as may be authorized by law, inter alia, upon reasonable suspicion of his having committed a crime or being about to commit a criminal offence under the law in force in Zambia.

The author is of the view that the Supreme Court decision denying bail to the applicant in the Parekh case was out of order due to the following reasons: **The Constitution in Article 13(1) (e) has not taken away the discretion of the grant or denial of bail from the court to the Legislature. In addition, the Constitution in the provision has not in any way specifically picked on specific crimes whose bail is precluded. The fact that our supreme law has not specifically mentioned any crime whose bail may be precluded means that the discretion for the grant or denial of bail has been placed in the hands of the Court, and not the Legislature or statute as is the case for non-bailable crimes. This further means that any statute that denies bail for any specific crime must be declared unconstitutional in line with Article 1(3) of the Constitution due to inconsistency with the Bill of Rights. There should be no statute to deny bail for any crime. The denial or grant of bail must always be in the discretion of the court or as has been provided for by Article 94(1) of the Constitution which, inter alia, places original and unlimited jurisdiction to hear and determine criminal matters in the High Court, and not the Legislature. This thus includes the denial or grant of bail.**

The Constitution has also placed the discretion in the hands of the court concerning the grant or denial of bail (personal liberty) in Article 13(1) paragraphs (a), (b), (c) and (d) because courts are better placed to properly determine the interaction of the *mens rea* and *actus reus* of the accused in the definition of every crime charged. In addition, the court is competent enough to determine the compelling reasons for the denial or grant of bail such as previous attempts to escape, tampering with evidence, suicide attempts, safety of the suspect from mob justice, etc.

3.3 PRESUMPTION OF INNOCENCE

Courts are always mindful of the fact that the burden of proof in every criminal trial is on the prosecution and the standard being on the basis of ‘beyond reasonable doubt’ as has already been enunciated by the Woolmington Case in Chapter 2.2. In this manner, the presumption of innocence Constitutional provision in Article 18(2) (a) as well as the non compulsion to give evidence in a criminal trial by a suspect [in Article 18 (7)] is upheld. These consequently lead to the promotion of the right to personal liberty as provided for in Article 13(1) of the Constitution.

3.4 DETERRENCE OF CAPITAL CRIMES

Deterrence of capital crimes does not need to be done by breaking the law – coming up with provisions within legislations subordinate to the Constitution that contradict the Constitution itself. Such provisions are ultra vires and as such invalid, given that the Constitution is our Supreme Law capable of rendering contradictory provisions of subordinate statutes invalid [Article 1(3)].

The way to deter crimes should be by way of courts coming up with much stiffer penalties for the commission of capital crimes. Deterring crime by means of non bailable legislation is thus clearly a violation of right to personal liberty (Bill of Rights) and consequently of the Constitution.

3.5 WAY FORWARD FOR BAIL DENYING STATUTORY PROVISIONS

As has already been shown and explained above, statutes that deny bail must be declared invalid in line with Article 1(3) of the Constitution. This simply means that Section 123 (1) of the Criminal Procedure Code Act (CPC)¹⁵ in which bail is precluded for the crimes of murder, treason, aggravated robbery, misprision of treason and Section 43 of the Narcotic Drugs and Psychotropic Substances Act¹⁶ in which bail is precluded for drug trafficking and manufacture must be declared invalid to the extent of their inconsistency

¹⁵ CAP 88 of the Laws of Zambia

¹⁶ CAP 96 of the Laws of Zambia

with the Constitution. Almost the same action as has been discussed in the foregoing analysis had happened in the case, Mulundika and 7 Others V The People¹⁷ in which the applicant and 7 others were charged in the Magistrates Court with unlawful assembly contrary to section 5 of the Public Order Act which required anyone who wished to hold a public meeting, procession or demonstration to apply to the police for a permit. The police were entitled to reject the application or if they decided to allow the said event, they could impose conditions. Among these conditions were: the persons who may or may not be permitted to address such an assembly or public meeting; the matters which may not be discussed at such assembly or public meeting etc.

Section 7 made it an offence to contravene section 5, punishable by six months imprisonment or a fine not exceeding 1,500 penalty units or both.

The applicants challenged the constitutionality of sections 5 and 7 of the Act and the magistrate court stayed the criminal proceedings until the Constitutional issue was dealt with by the High Court. When the High Court refused to declare the two sections unconstitutional, the matter was taken to the Supreme Court where the two sections 5 and 7 of the Public Order Act were struck down for being unconstitutional as they infringed upon the freedoms of expression and assembly guaranteed by Articles 20 and 21 of the Constitution, respectively. The Court held that Section 5(4) was not reasonably justifiable in a democratic society for a number of reasons, inter alia: the uncontrolled nature of the discretionary power vested in the regulating authority; the fact that the regulating authority was not obliged when imposing a ban to take into account whether disorder or breach of the peace could be averted by attaching conditions upon the conduct of the procession or meeting such as relating to time, duration and route; although the rights to freedom of expression and assembly are primary and the limitations thereon secondary, section 5(4) reversed the order, in effect denying such rights unless the public meeting or procession was unlikely to cause or lead to a breach of the peace or public disorder; the criminalisation of a procession or meeting held without a permit irrespective of the likelihood of occurrence of any threat to public safety or public order; and the lack of adequate safeguards against arbitrary decisions.

¹⁷ 1995/SCZ/25 (SCZ Judgment No. 25 of 1995)

The above decision by the Supreme Court – declaring sections 5 and 7 of the Public Order Act as unconstitutional culminated into the Public Order (Amendment) Act No. 1 and 36 of 1996 by the Legislature. The author envisions similar occurrences transpiring in the Legislature regarding the research proposed invalidations of the section 123(1) of the CPC, section 43 of the NDPS Act, as well as other crimes whose bail is denied by statute. There is no need for the above foreseen amendments to the statutes to be initiated by court actions as had happened in the Mulundika case. The Legislature itself in collaboration with relevant ministries must undertake the Amendment given that the statutory denial of bail is clearly a violation of the right to personal liberty as has already been shown by this research.

3.6 CONCLUSION

This chapter therefore resolves the differing positions concerning the statutory denial of bail to an accused, finally coming up with one position, that is, it is a violation of the right to personal liberty. The Constitution which is our supreme law has not specifically mentioned offences or any offence whose bail must be precluded even though in Article 13(1) (e), it has allowed courts to at times grant or deny bail to a suspect. It has not in any way taken away the discretion of the grant or denial of bail from the courts to the Legislature. As far as the Constitution is concerned, the courts are better placed to determine the evidence of the interaction between *mens rea* and *actus rea* in the definition of any crime charged, mindful of the fact that the burden of proof is always on the prosecution, thereby being competent enough to grant or deny bail. Further, courts are competent enough to determine the presence of compelling reasons such as previous attempts to escape, tampering with evidence, suicide attempts, suspected mental insanity, etc. that may necessitate the grant or denial of bail. From the foregoing, it is discernible that any statute subordinate to the Constitution that has come up with specific crimes or a crime that is unbailable must be declared invalid to the extent of its invalidity in line with Article 1(3) of the Constitution.

The Parekh V The People case was thus wrongly decided by the Supreme Court in that it justified the lower court's denial of bail to a suspect citing Article 13(1) (e) of the

Constitution as authority and yet the provision has not discriminately stated any crime against which bail is always unavailable or may be unavailable.

In Chapter 4, the research endeavours to show how possible changes to the law on non bailable crimes in Zambia (by making all crimes bailable) could lead to the promotion of human rights (right to personal liberty of the accused), by assessing Commonwealth jurisdictions similar to Zambia whose superior Courts of Record had dealt with the analysis that the invalidation of statutes that deny bail lead to the promotion of the right to personal liberty and thus comparable to Zambia. The countries that the research focused on for the purposes of this study are Kenya and Gambia, since they both practice Constitutional supremacy, apart from both being former colonies of Britain. Therefore, the research findings were such that all crimes in Kenya are currently bailable.

In the same chapter, the research scanned the draft Constitution prepared by the Mungomba Constitutional Review Commission (CRC) and currently undergoing enactment at the National Constitutional Conference (NCC) [created by Act No. 19 of 2007-National Constitutional Conference Act] for the salient provisions on bail.

Finally, in the research, on the spot interviews with some people accused of having committed some capital crimes and incarcerated without bail before trial were conducted so as to exhibit the negative impacts of having statutory non bailable crimes. Further interviews with Senior Legal Personnel in the Organisations like, the Legal Resources Chambers, the Human Rights Commission, the Legal Aid Board, Zambia Police Service as well as the High Court and Supreme Court Judges were conducted on the subject for the purposes of obtaining independent opinions on the research subject, before the conclusion.

CHAPTER 4

4.0 INTRODUCTION

The research in this chapter, inter alia, justifies the previous chapter's assertion that the provisions of subordinate legislations that contradict the Constitution by coming up with non-bailable specific crimes can be invalidated to the extent of their invalidity given that the Constitution provides for all crimes to be bailable with the discretion of the grant or denial of bail resting in the Court, which is competent enough to determine the compelling reasons for the grant or denial. This justification was done by means of conducting an analysis of what had transpired in Commonwealth jurisdictions with Constitutional supremacy (just like Zambia) such as Kenya and the Gambia. The foregoing human rights breakthrough must be extended to Zambia.

Thereafter, the Mungomba Draft Constitution was scanned for the salient provisions on bail with the intention of assessing the future adequacy of the law on bail in relation to the promotion of human rights (right to personal liberty). Next, the author conducted interviews with prominent legal personnel at the Human Rights Commission (HRC), the Judiciary (i.e High Court and Supreme Court Judges), Police Service, the Legal Aid Board and the Legal Resources Chambers, for the purposes of finding out views independent from that of the author, regarding the research topic. Then finally, before the conclusion, interviews with people accused of having committed non-bailable capital crimes and currently remanded in prison before trial were also held with an intention of having a field experience of how the violation of the right of personal liberty, by virtue of the law pertaining to statutory non bailable crimes, has impacted negatively on society.

4.1 ZAMBIAN STATUTORY BAIL LAW COMPARED WITH KENYA AND THE GAMBIA

The position of the current law in Zambia (due to the obiter decision by the Supreme Court in the case **Parekh V The People**) is that the statutes that deny bail for the commission of capital crimes, for instance, sections 123(1) of the CPC and 43 of the NDPS Act, are consistent with the Constitution and the court used Article 13(1) (e) as authority.

This paper has already laboured in the preceding chapters to show that the above position by our Supreme Court was not entirely correct and was in fact tantamount to the persistent violation of human rights, in particular, the right to personal liberty. Inter alia, the research in the previous chapter already showed that denial of bail by means of statute is tantamount to doing so in a manner not prescribed by the Constitution since it has not specifically mentioned any crime whose bail is precluded. It provides in Article 13(3) for every suspect's right to bail and being considered on the merits of the case by the court.

The Kenyan Scenario

However, other Commonwealth jurisdictions have positively moved forward ahead of us by declaring the bail precluding statutory provisions unconstitutional and consequently, all crimes in Kenya are bailable. The Zambian **Parekh V The People** case should have been decided in the same lines as the Kenyan, **Ngui V Republic of Kenya**¹⁸ case. The facts of the case involved an appellant, a woman who was unwell and aged, 54, charged with robbery with violence and had not been brought to trial within a reasonable time. Section 72(5) of the Kenyan Constitution makes release on bail mandatory and applicable to all offences, if unreasonably delayed. The amendments to section 123(3) of the Kenyan CPC Act had the effect of prohibiting the High Court from granting bail in cases of murder, treason, robbery with violence and attempted robbery with violence, in all circumstances. For instance, where a person is accused of robbery with violence, bail shall not be granted even if he were not tried within a reasonable time.

Section 60 (1) of the Constitution of Kenya confers on the High Court of Kenya unlimited and original jurisdiction in civil and criminal matters. Section 72(5) of the Constitution of Kenya provides: “*If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions.....*”

Sub section (3) (b) applies to ‘*a person who is arrested or detained.....upon reasonable suspicion of his having committed, or being about to commit, a criminal offence.*’

¹⁸ (1986) L.R.C.(Const.) 308

It was successfully contended before a Bench composed of Simpson, CJ, and Cockar and Mbaya JJ in the High Court of Kenya that section 123(3) of the Kenyan Criminal Procedure code (CPC) Act, as amended, was inconsistent with Sections 72(5) and 60(1) of the Constitution. The inconsistency with Section 60(1) of the Constitution came about in that section 123(3) of the Kenyan CPC which precluded bail from the crime committed contradicted Section 60(1) of the Constitution which gave the High Court original and unlimited jurisdiction for all criminal and civil cases, by taking away some discretion of handling some criminal matters from the High Court to the Legislature.

Section 72 (5) of the Constitution was violated by section 123(3) of the Kenyan CPC in that it denied bail to a crime and yet the Constitution itself in the provision provides for bail for all crimes where there is detention for an unreasonably long period of time.

Section 123(3) of the Kenyan CPC originally contained no restriction on the powers of the High Court to grant bail. In consequence of the amendments made in 1978 and in 1984, however, the section came to read as follows:

“The High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence, direct that a person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”

The words which the amendments added to the section were ‘*save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence*’ - all offences which in Kenya carry a mandatory death penalty. The decision of the High Court was that the words above were to be struck out from section 123(3) of the CPC as they were seen to be in conflict with sections 60(1) and 72 (5) of the Kenyan Constitution..

The High Court in Kenya thus invalidated the amendments to the CPC which were inconsistent with the Constitution which provided for the availability of bail to an

accused unreasonably confined to prison for more than the normal duration of time allowed by the law, before trial.

The Kenyan High Court thus is and was consistent with the promotion and respect of the Constitutional Bill of Rights which, inter alia, provides for the regard of every suspect as innocent until proven guilty or upon admission.

What transpired in Kenya is recommendable to the Zambian scenario for the purposes of the promotion of human rights (the right to personal liberty).

The Gambian Scenario

When coming up with the decision to deny bail to the accused person in the Parekh V. The People case, the court declared sections 123(1) of the CPC and 43 of the NDPS Act as constitutional in that Article 13(1)(e) of the Constitution allows for the grant or denial of bail to a suspect and as such permissive of the above two provisions. The Supreme Court further went on to justify their decision by invoking the decision of the court in the Gambian case of Attorney General of The Gambia V Momodou Jobe¹⁹, as authority.

The author is of the view that the idea of using the above Gambian case as authority by the Zambian Supreme Court in the Parekh case to justify the denial of bail to the applicant was a misdirection. The reason being that, unlike the Zambian Supreme Court, the Privy Council decided the above case based on correct and clear interpretation of the law. This research has already, especially in chapter 3, laboured to show how and why the Zambian Supreme Court erred in fact and in law.

Section 7 of the Special Criminal Court Act (1970) of the Laws of The Gambia was contended by the accused in the Momodou Jobe case as being invalid because it prohibited the granting of bail, **in the absence of special circumstances**, to a person charged with an offence involving misappropriation and theft of public funds and property, the move which was seen to be in conflict with Section 15 of the Constitution of Gambia.

¹⁹ [1984] AC 689

Section 7(1) of the above statute provides: “*Any person who is brought to trial before the court shall not be granted bail unless the magistrate is satisfied that there are **special circumstances** warranting the grant of bail.*”

Section 15(5) of the Gambian Constitution provides: “*If any person arrested or detained as mentioned in subsection 3(b) of this section is not tried within a reasonable time then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.*”

Subsection 3(b) of Section 15 provides, “*Any person who is arrested or detained upon reasonable suspicion of being about to commit a criminal offence under the law of The Gambia, and who is not released, shall be brought without undue delay before a court.*”

The court thus held that, Section 15(5) of the Gambian Constitution provides for bail to a person accused of any crime whose trial is unreasonably delayed, whereas Section 7(1) of the Act prohibits release on bail not totally, but subject to an exception that if the magistrate is satisfied that there are **special circumstances warranting the grant of bail**, he may be compelled to do so. The Lordship’s view therefore was that section 7(1) of the Act cannot be in conflict with Section 15(5) of the Constitution—they are **consistent**.

Given the above holding in the Gambian case, it is clearly discernible that it was a correct decision by the Privy Council, arrived at by proper and flawless interpretation of the Constitutional and statutory provisions. The Act was found to be consistent with the Constitution since as clearly shown (supra), it did not mandatorily or completely deny bail. It provides for the prohibition of bail to a person charged for the misappropriation of government funds in the absence of ‘**special circumstances**’. In short, this implies that there are special circumstances that warranted the grant of bail for the crime of misappropriating public funds, otherwise the crime is unbailable. **The Gambian**

Constitution in Section 15(5) allows for bail in case of unreasonable delay of a suspect's trial and as such, the preceding statutory provision could be said to be consistent with the Constitution since 'unreasonable delay of trial' can qualify to be a special circumstance upon which bail may be granted.

The Constitution of Gambia however in Section 15(3) (b) provides for a person arrested or detained upon reasonable suspicion of his having committed or about to commit a criminal offence, and if he is not released, to be brought to court without undue delay, implying that a suspect may be detained without trial on condition that he is made to appear before court without unreasonable delay. This further means that the Constitution allows the court to grant or deny bail to a suspect, but entitles him to a speedy trial at all times. The discretion of the grant or denial of bail is always in the hands of the court.

The Privy Council's decision in the **Jobe case** was thus right on and the idea by the same court to declare section 7(1) of the Act as having been consistent with Section 15(5) of the Constitution was very much in order. The situation is different with the **Zambian Parekh V. The People** case which in the author's view was inaccurately decided by the Supreme Court when it failed to declare sections 43 of the NDPS Act which denies bail for drug trafficking and manufacture; and 123(1) of the CPC Act which denies bail for murder, treason, misprision of treason and aggravated robbery; as inconsistent with the Constitution in Articles 18(2) (a), 13(3) and 94(1) as already elucidated. Given the analysis, it would have been perfectly in order for the **Zambian Supreme Court** to invalidate the foregoing statutory provisions.

Article 94(1) of the Constitution gives the High Court unlimited and original jurisdiction (except for matters of the Industrial Relations Court) for all civil and criminal matters. This includes the Court's discretion in the grant or denial of bail. Therefore, sections 43 of the NDPS Act and 123(1) of the CPC Act must also be invalidated due to the fact that their denial of bail for specific crimes is inconsistent with Article 94(1) of the Constitution since the discretion to try criminal matters-inclusive of the denial and grant of bail is taken away from the court to the Legislature, in as far as non-bailable crimes are

concerned. In other words, statutory denial of bail is a contradiction, inter alia, of Article 94(1) of the Constitution which gives the High Court original and unlimited jurisdiction in all criminal (as well as civil) matters, the grant or denial of bail inclusive.

4.2 SCANNING THE MUNGOMBA DRAFT CONSTITUTION FOR SALIENT PROVISIONS RELEVANT TO BAIL

Article 1(1) of the Draft Constitution provides that the Constitution is the Supreme law of the country and any other law that is inconsistent with it is void to the extent of the inconsistency. In Article 1(3) a person or a group of persons may bring an action in the Constitutional Court for a declaration that a law is inconsistent with or in contravention of a provision of the Constitution. The foregoing two provisions of the Draft Constitution simply mean that in Zambia, we are still going to have Constitutional supremacy and any other law or institution inconsistent with it shall be declared void up to the extent of the inconsistency. These pave the way for the invalidation of statutory provisions that have made certain crimes unbailable at all times.

In Article 75(1), there is a provision that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or impartial tribunal. The foregoing simply means that any suspect accused of any crime (inclusive of a capital crime) is entitled to a fair hearing in an impartial court for determination. Furthermore, in **Article 77(1) (a), every accused person has a right to a fair trial which includes the right to be presumed innocent until the contrary is proved by the court of law.**

Article 76(a) provides for a suspect arrested or detained for allegedly committing an offence to have the right to remain silent. This, in addition to Article 77(1) (a) – presumption of innocence, implies that the burden of proof in any criminal trial is on the prosecution in any criminal trial.

In Article 76(e) (i), the Draft Constitution provides for a detained suspect to be brought before the court within forty-eight (48) hours after being arrested or detained. Further, in Article 76(e) (iv), there is a provision that where bail is not

granted to the detained suspect, he is entitled to be tried within ninety (90) days or be released unconditionally or upon reasonable conditions. The foregoing two provisions mean that the discretion for the grant or denial of bail is in the hands of the court and also that there should be no unreasonable delay in bringing a suspect to trial, whether bail is granted or not. In simple terms, if a person is not granted bail by the court, he must be made to appear for trial within a reasonably short period of time of not more than 90 days and failure to do so must entail the release of the suspect.

Article 76(g) provides for the right to bail or bond. It states: “.....a suspect arrested or detained for allegedly committing an offence has the right to be released on bond or bail pending a charge or trial on reasonable conditions, unless there are compelling reasons to the contrary.” The foregoing implies that courts have discretion to grant or deny bail to suspects, and in latter case, there should always be a presence of compelling reasons that may necessitate denial of bail.

In Article 82(2), there is a provision that a law enacted after the commencement of the Draft Constitution, that has the effect of limiting a right or freedom, is inconsistent with the Constitution. This provision in itself will certainly, inter alia, deal with later legislations subordinate to the Constitution that preclude bail to the suspects of specific crimes such as treason, murder, aggravated robbery, drug trafficking, etc., in terms of declaring them unconstitutional.

Article 59(1) provides for the right of every Zambian to the freedom of movement. In Article 213, the Draft Constitution provides for the unlimited and original jurisdiction of the High Court in any civil and criminal matters. This means that the Draft Constitution has also given full discretion, inter-alia, to hear and determine criminal matters in the hands of the court, and any statute that takes away the jurisdiction (including the granting or denial of bail) must be declared invalid in line with Article 1(1) of the Draft Constitution.

Article 205(1) (a) provides for the original jurisdiction of the Supreme and Constitutional Court, sitting as the Constitutional Court in all matters pertaining to the interpretation of the Constitution. This implies that all bail application hearings that end up invoking Constitutional interpretations shall be referred to the Constitutional Court which shall have original jurisdiction.

Article 205(1) (b) provides for the Supreme and Constitutional Court, sitting as the Constitutional Court, to determine a question of violation of any provision of the Bill of Rights. In Article 205(1) (c), it provides for the determination of whether an Act of Parliament, Bill, or statutory instrument made before or after the commencement of the Draft Constitution contravenes a provision of the very Constitution. This paves way for the invalidation of statutory provisions such as sections 123(1) of the CPC and 43 of the NDPS Act that have come up with specific non-bailable crimes, since the same contravene the Constitution which has not discriminated the grant of bail against any crime, it has just given the court the discretion to grant or deny bail based on the merits of the case.

In Article 203(1) of the Draft Constitution, there is a provision that the Supreme and Constitutional Court, when sitting as the Supreme Court, is the final court of appeal of Zambia except in constitutional matters. This implies that unsuccessful bail applicants in the lower courts can appeal to the Supreme Court of the Supreme and Constitutional Court, as the final court of appeal, as long as the appeal does not raise Constitutional issues. Further, the preceding three provisions mean that the Supreme and Constitutional Court can adequately deal with any criminal matter regardless of any direction it takes, that is, even if it involved interpreting the Constitution since it would be sitting in two different forms as already outlined above.

4.3 INTERVIEWS WITH PROMINENT LEGAL PERSONALITIES FROM SELECTED INSTITUTIONS OF RELEVANCE TO THE RESEARCH SUBJECT

This section was aimed at obtaining the views on the research subject, independent from those of the author, from prominent legal personalities in selected organisations and institutions of relevance to the research.

Interview with the Supreme Court Judge

Mr. Justice Sandson Silomba said that the Constitution in Article 13(1) provides for personal liberty and yet in the same provision, there are paragraphs under which the right to personal liberty may be denied. In Article 13(3), he went on to say that it provides for bail in case of inordinate delay. This simply means that there is Constitutional bail for all crimes regardless of their capital nature. The Constitution has not specifically denied bail to any crime but at the same time, it has clearly provided for bail as being available to a suspect, not as a matter of right but as being in the discretion of the court, and this includes the right to Constitutional bail. It is for this reason that in his long Judicial experience, most of the applicants for Constitutional bail have actually been turned down by the High Court, as well as the Supreme Court, on appeal, due to their failure to satisfy the court on the aspect of unreasonable delay.

As to whether the statutory denial of bail is a violation of the Constitutional right to personal liberty, it is debatable. Parliament enacted the so called provisions out of public pressure. In other words, the Legislature took into account public policy to enact the provisions on non bailable crimes, e.g., drug trafficking, murder, aggravated robbery, etc. But, of late, there has been an increase of voices of the human rights organizations and personalities on the subject and for this reason, there has been calls towards making all crimes bailable, given, inter alia, the presumption of innocence Constitutional provision in Article 18(2)(a), and personally, the Judge is in support of such calls, provided that the Executive Branch of government institutions such as the police are beforehand, given enough capacity in terms of equipment, incentives and manpower to ensure that non of the suspects released on bail escape, do not interfere with witnesses or evidence, do not commit suicide, do not commit more crimes etc. In other words, the courts must come up with strict bail conditions and the police must have capacity in terms of manpower and

equipment to ensure that they are complied with. The foregoing undertakings are extremely essential before Parliament could go ahead and amend the law declaring all crimes bailable, in line with the Constitution.

Interview with the High Court Judge

According to Justice Tamula Kakusa, the Constitution does not provide for any crime to be unbailable, as is the case in section 123(1) of the CPC for the crimes of murder, treason, misprision of treason, aggravated robbery and section 43 of the NDPS Act, for drug trafficking. It actually provides for a suspect to be released on bail in case of unreasonable delay, in Article 13(3). This simply means that there is Constitutional bail for any crime whose trial has unreasonably been delayed regardless of whether it is capital or not. This further means that the discretion for the grant of bail is always in the hands of the court, and not the Legislature, and all statutory provisions that deny bail must be declared invalid in line with Article 1(3). There is also the aspect of the presumption of innocence of every suspect, as provided for by the Constitution. This implies that no suspect must be detained for an unreasonably long period of time before being found guilty by the court because it amounts to presuming a suspect guilty until being proved innocent.

Courts must, in the event that all crimes became bailable, ensure that a suspect released on bail does not flee, does not tamper with evidence etc. This has to be done in corroboration with the police.

Interview with the Legal Aid Board Legal Personnel

According to the Deputy Director of the Legal Aid Board (L.A.B), Mr. Linus Eyotia Eyaa, there is Constitutional bail which covers all crimes whose trials have taken too long. It is available to all crimes regardless of whether a crime is bailable or not. He went on to say that having crimes whose bails are denied by statute is perfectly in line with the Constitution because in Article 13(1) (e), the Constitution provides that bail may not be availed to a suspect as a matter of right. It may be denied at times, that is why we have Constitutional bail available for all crimes whose trials have taken unreasonably too long to be finalized. Further, alternatively or in addition to Constitutional bail, an accused

person aggrieved for his unreasonably long detention without trial may apply for a **writ of habeas corpus** to test the legality or constitutionality of such a detention.

The other reasons why the Legislature was justified to come up with non bailable crimes is that of the need to give chance to the police to finish their investigations without the likelihood of interference by the accused. There is no way a suspect could be taken to court before police investigations are complete. The accused must be detained in prison without bail or bond for the purposes of allowing for the completion of investigations by the police. At times, the suspects when released on bond end up tampering with the evidence or witnesses, and the Legislature must have had such issues in mind when enacting laws on non bailable crimes. The way forward is for relevant authorities, for instance the courts, the police etc., to expedite criminal cases. In fact time limits must be given to investigatory bodies through which they have to finish their jobs, and failure to unearth anything on a suspect within a given time limit must result into unconditional or reasonable conditional release.

On the other hand, Senior Legal Aid Counsel for Ndola, Mr. Kelvin Muzenga, had a slightly different view point. He said that the presumption of innocence as provided by our supreme law, the Constitution in Article 18(2) (a) must be respected. Accordingly, every person accused of having committed a crime must be presumed innocent until proven guilty. Therefore, the idea of having statutes that bar bail is tantamount to presuming a suspect guilty until proven innocent, the move which goes against the Constitution. It is imperative that bail is granted to every suspect, regardless of the capital nature of the crime, until such a time that the court determines the case. In this way, the likelihood of infringing on the right to personal liberty of a person who could have been wrongly or maliciously accused of having committed a capital crime is minimized.

Interview with Legal Resources Chambers' Lawyers

Legal Resources Chambers is a Donor funded Non Governmental Organisation (NGO) that was primarily set up for, among other important charitable causes, to assist the underprivileged with the provision of cheap legal services. Most of the people accused of committing non-bailable crimes like aggravated robbery and murder fell into the

underprivileged social strata and as such cannot afford the services of a conventional private legal practitioner. Therefore, it supplements the efforts exerted by the government through the Legal Aid Board in assisting the poor who cannot afford private legal services.

Counsels for the Legal Resources Chambers, Messrs. Siakamwi Chikuba and Hastings Pasi, had this to say on the research subject: The law may at times be used for arbitrariness, especially to meet selfish objectives of the Executive Branch of government, for example, the law that ensured that the crime of theft of motor vehicles had no bail was made for the sole purpose of punishing political opponents of the government in power. Opposition politicians that appeared to be vocal against the ruling party ended up being remanded in prison, accused of the crime of theft of motor vehicle, which had no bail, and by the time the courts would find them innocent, they would have already been detained in prison for 2 or more years, on some occasions. It is for this reason that the Constitution in Article 18(2) (a) provides for the presumption of innocence for any suspect in a criminal trial until proven guilty in the court of law. Consequently, all crimes, regardless of the capital nature, must be made bailable. Remanding a person in prison who is yet to be found guilty by the court, on the pretext of having committed a non bailable offence is a violation of the Constitutional rights to personal liberty as well as the presumption of innocence, hence the need to amend the statutory provisions that preclude bail, for them to be consistent with the Constitution.

Interview with the Director of Legal -Zambia Police Service

The Zambia Police Service Director of Legal, Mr. Emmanuel Simukoko, had this to say on the research subject: the duty of the police service is to enforce the law, regardless of whether it is consistent with the Constitution or not, or as to whether it is arbitrary or not, or as to whether the law is good or bad. When dealing with a suspect, it is also important to deem him or her as somebody who has been accused of having violated other people's rights. Therefore, as far as the law is concerned, the rights of the public in general are very important, and usually, when coming up with statutes that preclude bail, the Legislature took public policy into consideration - a balancing act was done. The Legislature must have responded to the calls by the general public in making the crimes

of for instance; murder, aggravated robbery and drug trafficking non bailable, given the rises in the national crime levels and loss of human lives.

There are other reasons that could have prompted the Legislature to enact the bail precluding statutory provisions, and they are as follows: at times suspects do not easily submit to custody. As a result, they need to be confined so as to ensure that they are made to appear before the court to be proved innocent or guilty. Also, detention of a suspect reduces the likelihood of escape, interference with evidence and witnesses etc.

Therefore, speaking as Director in Charge of Legal for the Police Service (officially), Mr. Simukoko concluded the interview by saying that the duty of the police is to enforce the law, regardless of whether it is bad or good, and good laws without enforcement are useless. On the other hand, when he spoke from his personal point of view, he advocated for the invalidation of sections 123(1) of the CPC Act and 43 of the NDPS Act as being inconsistent with the Constitution on the aspects of Articles 18(2) (a)-presumption of innocence and 94(1)-original and unlimited criminal and civil jurisdiction of the High Court. Statutory provisions on non bailable crimes have the effect of contradicting the Constitution by taking away from the unlimited criminal jurisdiction held by the High Court.

Interview with the Deputy Chairperson of the Human Rights Commission (HRC)

The Deputy Chairperson of the Human Rights Commission (HRC.), Mr. Palan Mulonda, had this to say: The Constitution in the Bill of Rights guarantees the right to personal liberty, and at the same time, it has come up with exceptions through which it may be denied. The main purpose of arrest is to secure attendance of a suspect to court. Bail is granted by the court (or police) on the understanding that a suspect will without fail avail himself to court on the appointed date. However, certain crimes have been denied bail by statute, and most of these crimes are capital in nature, e.g., treason, murder, drug trafficking, misprision of treason etc. Before amendment of the law, even the crime of theft of motor vehicles was not bailable and as such, there were complaints that it was politically motivated. However, there were counteractions to these complaints by means of arguments that the crime rate had reached alarming proportions beyond the

management of the police and hence the calls by the public urging the Legislature to remove bail on the crime for deterrence purposes, even though capital offences are the ones that are usually not bailable.

The position of the HRC is that it has no problem with the statutory denial of bail as long as other rights of the suspects do not suffer given the fact that the Constitution presumes them to be innocent until proven guilty. On this basis, remandees or inmates are entitled to humane treatment in terms of the food they eat, proper medication, sanitation, beddings, hygiene etc. The Constitution in Article 13(1) (e) has allowed statutory denial of bail. This implies that sections 123 of the CPC Act and 43 of the NDPS Act are consistent with the Constitution. Even when it comes to bailable crimes, the grant or denial of bail is always at the discretion of the court and is not given to a suspect as a matter of right. Those denied bail must, in accordance with the requirements of the HRC, be treated humanely, i.e., detention centres must be in such a state befitting someone who is innocent until proven guilty.

The other concern of the HRC is the speeding up of trial and access to justice. A suspect, on the basis of presumption of innocence, must have his trial sped up so as to avoid the prolonged detention of a person who might potentially be innocent. The law is meant for the people, and not to be tyrannical. Undue delay of trial through no fault of the accused may bring about the grant of Constitutional bail to the accused. This also answers the question of whether the statutory denial of bail contradicts Article 94(1) of the Constitution in which the High Court is granted, inter alia, original and unlimited criminal jurisdiction. There is Constitutional bail granted by the High Court and Supreme Court, on appeal, for all crimes where trial has taken unreasonably too long, regardless of whether a crime is bailable or not, and as such, there is no effect to the High Court's unlimited criminal jurisdiction as a result of having statutory non bailable crimes.

Mr. Mwanawasa's (counsel for the accused) argument in the case, **Parekh V The People**, was that the Constitution has granted bail to all crimes as long as they meet the qualification of having taken unreasonably too long through no fault or stratagem of the

accused, and yet subordinate legislations that deny bail do not contain any qualification, they simply bar bail at all times once a person has been accused of their commission. According to Mr. Mulonda, the foregoing argument cannot stand because by means of Article 13(1) (e), the Constitution has allowed the grant or denial of bail to a suspect, and has given the Legislature power to prescribe specific crimes which should be without bail, in line with a democratic society where public opinion usually reigns supreme. Therefore, statutory denial of bail is consistent with the Constitution. In other words, all subordinate statutes that have come up with non bailable crimes are consistent with the Constitution.

4.4 INTERVIEWS WITH PRISON INMATES OF NON-BAILABLE CRIMES

On 23rd October, 2008, the author undertook a tour of Lusaka Central Prison, commonly known as “Chimbokaila”, for the purposes of having an on the spot experience of the negative impacts of the laws pertaining to non bailable capital crimes. It is currently the main prison in Lusaka where capital crime inmates are kept. There were no treason inmates interviewed as they are only kept at Kabwe’s Mukobeko Maximum Prison and it for this reason why the only capital crime inmates interviewed at Chimbokaila Prison are those accused or convicted for murder and or aggravated robbery, for the purposes of this research.

Mr. Matthews Mwangi, aged 35, was arrested on 26th April, 2004, accused of aggravated robbery. There was no proper evidence that he committed the crime. He is currently still confined in prison with trial still not finalized. During the last trial in September, 2008, he was represented by a Counsel from Legal Aid Board. This is approximately his fourth year in detention with trial still not yet finalized.

Mr. Moses Lindayi Chisamba, aged 34, was arrested on 27th December, 2004, accused of aggravated robbery. There was no proper evidence that he committed the crime. Upon arrest, he was kept for one year and six months without appearing before any court, meaning, from the date of arrest above, he only appeared before court on 6th June, 2006. His application for a writ of habeas corpus aimed at compelling the court to hear his matter, given that he was kept without trial for a long time, was rejected. His case is still

not yet finalized, meaning, he has already clocked almost 4 years in detention. He last appeared before court in October last year. The next trial date is not yet known and there is currently no lawyer from Legal Aid Board representing him

Mr. Humphrey Ngoma, aged 38, was arrested on 16th January, 2008, accused of aggravated robbery in which he was alleged to have demolished the house armed with iron bars in Chawama township of Lusaka. The arrest was based on indirect evidence, that is, the victim or owner of the house was informed about the involvement of the accused (Mr. Ngoma) by a neighbour. That is how he went on to report the suspect to the police and subsequently was arrested. Upon arrest, he first appeared before court on 2nd March, 2008, meaning, he was confined for almost 48 days without trial. The case is yet to be finalized and is represented by a Legal Aid Board Counsel with the next trial slated for 31st October, 2008.

Mr. Chowa Sakala, aged 35, was arrested on 13th January, 2003, accused of murder. The case has not yet been finalized by the court, implying that this is his 5th year in detention without determination of the case by the court. The last time he went to court for trial was last year on 11th September, represented by a counsel from Legal Aid Board. The arrest was based on indirect circumstantial evidence. Before the arrest, the accused was employed by the Zambia Wildlife Authority (ZAWA) as a game ranger at South Luangwa National Park, and as such allowed to keep a gun at home. The deceased was found shot dead outside the suspect's home and on this basis, he was picked up by the police, accused of murder and also on account of the fact that he was found with a fire arm in the house-which he had been keeping as a result of his duties as a game ranger.

Mr. Fazi Mwanza, aged 44, was arrested on 2nd April, 2008, accused of aggravated robbery. Upon arrest, he was initially kept for 3 months without going to court. He was only taken to court on 27th September, 2008 after his plea for habeas corpus was successful. He was arrested based on the information given to the police by an informer tipping them that he was in the company of the gunmen who robbed a security vehicle hired by Zambia - China Friendship Farm - based in Lusaka West, at gun point of

K80million, 4 cell phones, a pistol and a shot gun. The matter has not yet been finalized with the next court appearance slated for 29th October, 2008. He is represented by a lawyer from Legal Aid Board.

Mr. Moses Hamoonga, aged 21, was arrested on 13th July, 2008, accused of murdering his girl friend in Mandevu. The deceased died during the 5 days the suspect was away for a visit at his parents' farm at Chikankata in Mazabuka. When he returned, he was picked up by the police accusing him of murder, as the first suspect. Even though he had been to court on 19th August, 2008, he was not represented by any lawyer from Legal Aid Board and does not know the next trial date.

Mr. William Siame, aged 38, was arrested in September, 2005, accused of murdering his wife. Upon arrest, he only appeared before court for the first time in January, 2006, meaning, he was detained without trial for almost 4 months. The matter has not yet been finalized by the court and he has no legal representation from Legal Aid Board. This further implies that he is in his third year of prison detention as a murder accused without his matter having been finalized by the court. The particulars of his matter are as follows: He chased his wife amid a heated domestic quarrel, intending to slap her and in the process; she had fallen down, injuring her leg. The injury, with the passage of time, got worse, and despite hospital efforts in treatment, death resulted. On that account, the suspect was arrested by the police accused of murder. But the question is as to whether the suspect had the *mens rea* and *actus reus* of murder at the time he was chasing his wife with a intention of slapping her, in the midst of a domestic quarrel.

Mr. Derrick Mwanza, aged 18, was arrested on 6th February, 2008, accused of aggravated robbery. There was no concrete evidence that he committed the crime. He has not yet been to court and in fact, the trial date is yet to be set. There is no Lawyer from Legal Aid Board representing him. At his age, Mr. Mwenda is still a juvenile, meaning, he is not supposed to be confined in the same prison as adult inmates.

Mr. Teddy Mwenda, aged 17, was arrested on 25th December, 2006, accused of murder. He was confined for approximately six months without first going to court, that is, from his date of arrest, he only went to court on 4th June, 2007. He was eventually convicted by the court, and is earmarked for Mazabuka Juvenile Prison, given the fact that at his age, he is still a juvenile. It is not known when he would finally be sent to the Juvenile Prison, meaning, there are chances that he could be kept in Chimbokaila for a few more years, together with adult inmates.

Mr. Kennedy Mwanza, aged 24, was arrested on 8th September, 2007, accused of murder. There was no proper evidence that he committed the crime given that he was arrested on the basis of circumstantial evidence, that is, he was said by the police as the last person who was with the deceased before he died of poisoning. The deceased actually vomited to death and postmortem revealed poisoning as the cause of death. After arrest, he went to court on 3rd November, 2007 represented by a lawyer from Legal Aid Board. The matter is not yet finalized, with the next trial date set for 17th November, 2008.

Mr. Dennis Palasulani Banda, aged 43, was arrested on 22nd July, 2008, accused of murder. He was arrested on the basis of circumstantial evidence, having been the last person to be with the deceased before he was found murdered. He has not been to court yet and the trial date has not yet been set. Even though he is expecting a lawyer from the Legal Aid Board, there is no one appointed yet to represent him.

There are currently many people currently detained in Zambian prisons accused of different types of non bailable crimes and most of them based on very unsubstantiated circumstantial evidence. But for the purposes of this research, the author was of the view that the above few interviewed suspects would be representative enough of the general negative impact of non bailable crimes on the personal liberty of the citizens.

4.5 CONCLUSION

The position of the current law in Zambia, as given by the **Parekh V The People case**, regarding legislations subordinate to the Constitution which preclude bail for the commission of certain specific crimes is that they are consistent with the Constitution.

However, the research in chapter four laboured to show how and why this position must be changed by conducting a selective study involving some jurisdictions similar to Zambia such as Kenya and Gambia. The Kenyan High Court declared their CPC section 123(3) inconsistent with Sections 72(5) and 60(1) of their Constitution. The Constitution of Kenya provided for bail at all times in cases of unreasonably long detentions. Section 123(3) of their CPC precluded bail for, inter alia, aggravated robbery. This statutory provision thus was found to have infringed the Constitution and as such invalid, given that the Constitution provides in Section 72(5) for bail for all offences that have unreasonably been delayed and yet the statute precluded bail at all times for certain specific crimes like murder, treason, aggravated robbery and attempted aggravated robbery. Further, the statute contradicted Section 60(1) of the Constitution which gave the court, inter alia, unlimited criminal jurisdiction, by taking away the discretion from the Courts to the Legislature, in trying criminal matters.

The Kenyan experience must be extended to Zambia as authority in that the CPC and the NDPS Acts clearly violate the Constitution in Articles 18(2) (a) – presumption of innocence, 18(7) – non compulsion to give evidence, 13(3) – right to bail in case of unreasonable delay and 94(1) – unlimited and original criminal and civil jurisdiction of the High Court.

The Draft Mungomba Constitutional report has literally not made significant changes to the law on bail, from the position in the 1996 Constitution (current Constitution). The only notable changes being the inclusion of provisions in Articles: 76(e)(i)-which specifically stipulates for a detained person to be brought for trial within 48 hours, and 76(e)(iv)- for a detained person, if bail is not granted, to be brought for trial within 90 days or be released unconditionally or upon reasonable conditions. These will also sort out the problems of unreasonable delays in bringing detained suspects to trial and hence, enhance the respect for the right to personal liberty.

The research, after interviewing various legal personalities of standing in various relevant institutions, the majority came up with a unified call for the amendment of the law on bail

- the need to make all crimesailable and the Constitution to be adhered to, which places the discretion of trying criminal matters in the hands of the court and not the Legislature, regardless of how capital a crime is. The foregoing must however be preceded by ensuring that there is increased capacity in terms of equipment and manpower in the Executive wing of Government institutions like the police, who are tasked with duties of ensuring that the suspects released on bail do not abscond, do not tamper with evidence or witnesses, do not cause further loss of lives etc., as was submitted by the Honourable Supreme Court Judge, Mr. Justice Silomba, during the interviews the author had with him.

Finally, to highlight the negative impacts of the statutory nonailable crimes, interviews with a few prisoners of capital crimes were conducted which revealed among other negative things: the confinement of suspects for an unreasonably long time without trial, lack of legal representation for numerous inmates, prolonged arrest of people based on flimsy evidence etc.

Chapter 5 proceeds to present the summary of the whole paper and gives recommendations based on the research findings and studies, and then finally, the entire research was concluded.

CHAPTER 5

5.0 INTRODUCTION

This chapter serves as the last one and summary of the whole paper and as such gives all the possible recommendations, followed by the overall research project conclusion.

5.1 RECOMMENDATIONS

- (a) The research with certainty found that all statutes that deny bail, for instance, section 123 (1) of the CPC Act which denies bail for treason, misprision of treason, aggravated robbery and murder; as well as section 43 of the NDPS Act, which precludes bail from the crimes of drug trafficking and manufacture, are inconsistent with the Constitution and as such must be declared invalid to the extent of their invalidity, in line with Article 1 (3) of the 1996 Constitution. In Chapter 4, the research came up with the Kenyan scenario as an authority in which the law on bail was amended, ensuring that all non bailable crimes became bailable as was required by the Constitution of Kenya. This was a culmination of the court's decision in the case Ngui V Republic of Kenya case (already discussed in chapter 4.1).
- (b) Related to the above recommendation, all crimes must be made bailable. The discretion for the grant or denial of bail must always entirely be in the hands of the court and not the Legislature, in line with Article 94 (1) of the Constitution which gives the High Court unlimited and original jurisdiction to hear and determine any criminal and civil proceedings under any law. All statutes that take away this discretion from the court by coming up with non bailable crimes must be declared unconstitutional to the extent of their invalidity.
- (c) During the interview the author had with the Supreme Court Judge, Mr. Justice Silomba (chapter 4.3), he submitted that in as much as he was in support of calls to make all crimes bailable, in line with the Constitution, it was also necessary that the foregoing were preceded by giving the Executive Branch of government organizations such as the police and other investigatory institutions, enough capacity in terms of equipment and

manpower to ensure that non of the suspects released on bail escaped, did not interfere with witnesses or evidence etc. The author is fully in agreement with this submission and henceforth includes it amongst the research recommendations.

(d) During the separate interviews the author had with the Deputy Chairperson of the Human Rights Commission (Mr. Palan Mulonda) and the Deputy Director of Legal Aid Board (Mr. Linus Eyotia Eyaa), they both submitted that non bailable crimes have no effect on the unlimited jurisdiction given by the Constitution to the High Court to hear and determine all criminal matters, as per Article 94(1), because there is Constitutional bail grantable by the High Court or Supreme Court, on appeal, regardless of whether a particular crime is bailable or not. This, according to them, means that the discretion is still in the hands of the court and not the Legislature, and thus in line with Article 94(1). The author begs to differ with the foregoing submission by opting for the idea of making all crimes bailable instead of only relying on Constitutional bail alone, to deal with a suspect of a non bailable offence because, inter alia, the Honourable Supreme Court Judge S. Silomba submitted during the interview that in his long judicial experience, applicants for Constitutional bail have usually actually been turned down by the High Court as well as the Supreme Court, on appeal, due to failure to satisfy the court on the aspect of unreasonable delay. It is on this premise that the recommendation for the amendment of the law by making all non bailable crimes bailable must stand, in addition to retaining the possible entitlement of Constitutional bail from the court.

(e) In the event that an accused is denied bail due to compelling reasons by the court, the Draft Constitution in Article 76(e) (iv) provides for that suspect to be tried within 90 days and failure to which, he or she must be released unconditionally or upon reasonable conditions in line with the spirit of promoting the right to personal liberty as espoused by Article 13(1) of the 1996 Constitution. The author recommends that the above period of 90 days of keeping a person confined in prison without bail be reduced to not more than 30 days because the Constitution in Article 18(2) (a) provides for the presumption of innocence to any suspect until proven guilty. Confining a person who is potentially innocent to prison before trial for too long a period of time as 90 days without bail is

tantamount to the presuming a suspect guilty until being proven innocent-this is unconstitutional.

(f) Related to the foregoing recommendation is the justification by the Deputy Director of Legal Aid Board in his submission during interviews that there is no way a suspect could be released on bail and later on taken to court, before the completion of investigations by the police, given that the same may interfere with witnesses or evidence. He further submitted that the way forward is for relevant investigatory organizations such as the police, task force etc., to be given time limits in which to finish their jobs, and failure to do so must result into unconditional or reasonable conditional release of a suspect. The author is in partial agreement with this submission and hereby recommends that relevant investigatory institutions be given reasonable time limits in which they have to finish their investigations of for instance 30 days. The time limit should not be too long to avoid prolonged detention of a person who is yet to be found guilty by the court.

(g) The Draft Constitutional provision of Article 76(e) (i) which stipulates for a detained person to be brought to trial within 48 hours or given bail must be retained since it is positively in line with the promotion of the right to personal liberty.

(h) Since the research had already established that the Constitution in Article 13(1) (e) has allowed the court to have the discretion towards the grant or denial of bail, and in the event that a suspect is denied bail, **there is need for speedy trial so that the right to personal liberty is respected.** This particular recommendation is equally important so as to avoid certain occurrences like those amongst the interviewed capital crime suspected prison inmates, with some of them being in their fifth year of prison detentions, and their matters currently still not yet finalized. Justice delayed is justice denied.

(i) After interviewing prison remandees accused of capital crimes, the research found a great number of them arrested on flimsy evidence and kept confined in prison for as long as five years without finality of trial as well as without legal representation. Since most of them are too poor to afford the services of a conventional private legal practitioner, the

author hereby recommends that the government must greatly increase capacity of the Legal Aid Board in terms of equipment, manpower and incentives to ensure that all of them have legal representation.

(j) The deterrence of capital crimes in the nation must be done as prescribed by the Constitution and not unconstitutional means-coming up with statutes that deny bail. For instance, deterrence of capital crimes may be arrived at by the courts by means of stiffer penalties to the guilty offenders and not non bailable statutory provisions.

(k) Courts are competent enough to determine a suspect who deserves bail and the one who does not, by means of, inter alia, determining the *mens rea* and *actus reus*, as well as other compelling reasons such as previous convictions, previous attempts to escape whilst on bail, possibility of suicide, safety of a suspect from mob justice, mental instability, etc. Therefore, the discretion for the grant or denial of bail must always be in the court of law and not the Legislature-by means of non bailable crimes, in keeping with requirements of the Constitution in Articles 13(1) (e), 13(3) and 94(1).

(l) The research established that part of the reason for the delays in the speedy finalizing of cases is due to understaffing of judicial personnel like Judges, Magistrates, Registrars, etc. There is thus need for concerted efforts by the relevant authorities to employ more of the foregoing for the sake of ensuring the speedy conclusion of cases.

(m) There is also need for better incentives to all personnel in the judicial service, particularly the Judges, Registrars, Magistrates, etc., so that they could get motivated to do their jobs, as well as attract more of the high quality personnel to the service.

5.2 CONCLUSION

From the research, it is discernible that indeed the statutory denial of bail is a violation of the right to personal liberty. All crimes must be made bailable with the discretion for the grant or denial of bail being at all times entirely in the hands of the court. Constitutional bail must continue being available to those suspects denied bail by the court but have unreasonably overstayed in detention through no fault or stratagem of theirs. All statutes

that deny bail must therefore be declared invalid to the extent of their invalidity, in line with Article 1(3) of the Constitution because they violate Articles: 94 (1) which gives the court unlimited criminal jurisdiction; 13(3) - the right to bail and 13(1) (e) – power of court to grant or deny bail to a suspect; by taking away the discretion of the court to hear and determine criminal matters from the court to the Legislature.

Other reasons why personal liberty is infringed when the discretion is taken away from the court to the Legislature is as follows: Article 18(7) provides for non compulsion to give evidence by the accused since the onus must always be on the prosecution, but non bailable offences impliedly shifts the onus to give evidence to the accused since his liberty is curtailed before being found guilty beyond reasonable doubt ; Article 18(2) (a) provides for the presumption of innocence of every suspect until proven guilty, but non bailable offences presume every suspect to be guilty until proven innocent; and also Article 13(1) provides for the right to personal liberty, but since a person is confined in one place without enjoying the freedom of movement even before being pronounced guilty by the court of law, his right to personal liberty is curtailed as a result of being accused of a non bailable offence.

The research, with certainty, stated that courts are competent enough to, inter alia, determine the interaction of the *mens rea* and *actus reus* in the definition of every crime charged. Further, they are equally competent enough to determine the compelling reasons that may warrant one to be bailed or not, such as previous attempts to escape, potential to tamper with witnesses or evidence, protection from an instant justice mob, etc. The research also already established that the argument by the defence in the case, **Parekh V The People**, in which they stated that the statutory provisions that deny bail must be invalidated because they preclude bail without qualification and yet the Constitution grants bail for all crimes, regardless of how capital they are, with the qualification of unreasonable delay through no fault or stratagem of the accused, must stand. It is for this reason, inter alia, that the foregoing case was wrongly decided by our Supreme Court.

The deterrence of capital crimes in the nation must be done through constitutional means and not by means of bail precluding statutory provisions as these are inconsistent with the

Constitution. Capital crimes may, for instance, be deterred by Courts coming up with stiffer penalties as already recommended by the research.

Finally, given that the research has recommended for all crimes to be bailable in line with the Constitution, the challenge is on the relevant institutions to ensure that modalities that would ensure that suspects at all times stick to the strict bail conditions are put in place. There is need to increase capacity in terms of incentives, equipment and manpower amongst relevant institutions like the courts, Police Service, Task Force and the Zambia Prison Service in terms of ensuring that suspects comply with the strict bail conditions.

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