

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

The aim of this research is to assess whether the legal framework of the right to remain silent is adequate in advancing the administration of justice in Zambia. This will be achieved through examining the legal framework of the right to remain silent in Zambia both at the pre-trial and trial stages. The research will assess whether the right to remain silent at pre-trial and trial stages advances or suppresses the administration of justice in Zambia. Based on these findings, the research will draw a conclusion as to whether the legal framework of the right to remain silent is adequate in advancing the administration of justice in Zambia.

1.2 BACKGROUND

The right to remain silent is enshrined in the Zambian Constitution, Act No.18 of 1996, (hereinafter referred to as the Zambian Constitution) in Article 18 (7). Under this provision, a person who is tried for a criminal offence shall not be compelled to give evidence at the trial. The Zambian courts have affirmed the constitutional right to remain silent in the case of *Thomas Mumba v The People* (1984) Z.R.38. The court held that section 53 (1) of the Corrupt Practices Act, Chapter 91 of the laws of Zambia, was unconstitutional as it took away an accused person's constitutional right not to be compelled to give evidence at his or her trial.

However, the role of the right to remain silent as a promoter of justice has been questioned. While others are of the view that the right to remain silent advances justice, others are of the view that it suppresses it. In the case of *Mambwe v The People*, (2014) SC 16 (hereinafter

referred to as the Mambwe case) the appellant was charged with aggravated robbery and murder. The appellant advanced two grounds of appeal. Only ground two of the appeal will be considered as ground one is of no relevance to this research. In ground two of the appeal, the appellant stated that the lower court misdirected itself both in law and fact when it failed to take into account the evidence of the appellant. The evidence was that he had received the cell phone found in his possession from the second appellant who later abandoned the appeal.

The appellate court held that the appellant portrayed a position that he or through his witnesses presented evidence before the trial court. The appellant had exercised his right to remain silent and called no witnesses at the trial. In the courts view, the appellant misleadingly accused the trial court of allegedly failing to take his evidence into account. This is because the court can only determine evidence that has been presented before it. For the foregoing reasons, ground two of the appeal was dismissed.

One would argue that if the accused had no right to remain silent, this case would have been decided more justly. This is because the accused would have been compelled to testify at the trial. The trial court would then have decided whether to accept his testimony as true or false. Therefore, by electing to exercise his right to remain silent, the accused deprived the court of its power to determine the evidence. This leads one to reflect on the adequacy of the legal framework of the right to remain silent in advancing the administration of justice in Zambia.

Although the Zambian Constitution expressly provides for the right to remain silent at trial, it does not expressly state that a suspect under police custody has the right to remain silent. In addition, the statute that governs the arrest and detention of suspects does not state that police officers have an obligation to caution a suspect before he or she gives a statement. This statute is

the Criminal Procedure Code, Chapter 88 of the laws of Zambia (hereinafter referred to as the Criminal Procedure Code).

Hence the Zambian Courts have adopted the English judges' rules for the guidance of the police. The judges' rules are a set of guidelines for the police in relation to the questioning of suspects. These rules were originally formulated in 1912 in England.¹ In the case of *Muwowo v The People* (1965) Z.R. 91, the police officers did not administer the required warn and caution under the judges' rules to the suspect. The court held that an incriminating statement made by an accused person to a person in authority is not admissible as evidence unless it was made by him voluntarily. This means that the confession must be made in the exercise of a free choice to speak or to be silent.

The judges' rules are not rules of law but rather rules of practice for the guidance of the police.² Consequently the police are not bound by the judges' rules. This also leads one to reflect on the adequacy of the legal framework of the right to remain silent in advancing the administration of justice in Zambia.

1.3 STATEMENT OF THE PROBLEM

The right to remain silent is enshrined in the Zambian Constitution to safeguard the rights of accused persons and for the avoidance of miscarriage of justice. However it is not clear if this right extends to suspects who are under police custody. This is largely due to the fact that the Zambian Constitution only states that an accused person shall not be compelled to testify at trial. In addition, the statutes that relate to the detention and arrest of suspects in Zambia do not

¹Muna Ndulo and John Hatchard, *The Law of Evidence in Zambia; Cases and Materials* (Lusaka: Multimedia Zambia, 1991), 273.

²Muna Ndulo and John Hatchard, *The Law of Evidence in Zambia; Cases and Materials* (Lusaka: Multimedia Zambia, 1991), 273.

state that a suspect has the right to remain silent when they are under police custody. Thus reliance is placed on the judges' rules which are merely rules of practice. The judges' rules do not have the force of law hence they are not binding. This being the case, one would conclude that a suspect's right to remain silent is not protected at law. Furthermore, the right to remain silent as a promoter of justice has been questioned. This is the case even under the Zambian context. The Mambwe case goes to show that the right to remain silent may in certain instances hinder justice than promote it.

1.4 RESEARCH QUESTIONS

1. What is the legal framework of the right to remain silent in Zambia?
2. Is the legal framework of the right to remain silent adequate in advancing the administration of justice in Zambia?

1.5 RESEARCH OBJECTIVES

The following are the specific objectives of the research;

1. To explain the history, rationale and meaning of the right to remain silent
2. To examine the legal framework of the right to remain silent
3. To assess whether the right to remain silent at the pre-trial stage advances or suppresses justice in Zambia
4. To assess whether an accused person's right to remain silent at the trial stage advances or suppresses justice in Zambia.

1.6 SIGNIFICANCE OF THE STUDY

The right to remain silent is examined both at the trial and pre-trial stages in order to assess whether the right to remain silent advances or suppresses justice in Zambia. This is done with a

view of establishing whether the legal framework on the right to remain silent is adequate in advancing the administration of justice in Zambia. The practical importance of this research is that reforms in a nation can only be made once studies have been carried out in that particular area. If it is established that the right to remain silent suppresses justice in Zambia, then a call for reform should be made. If it is found that the right to remain silent advances justice, then the Zambian Constitution and the Criminal Procedure Code should be amended to expressly state that a suspect under police custody should be made aware of his or her right to remain silent.

1.7 LITERATURE REVIEW

In his research, Mwendalubi Mwalusi criticizes the Zambian legal framework of the right to remain silent at the pre-trial stage. He states that the obtaining of voluntary statements has always faced problems in Zambia because police officers do not adhere to the judges' rules. This is attributed to negligence on the part of police officers who are knowledgeable of the judges' rules.³ This research supports Mwendalubi Mwalusi's assertions.

However, Mwendalubi Mwalusi does not address whether the right to remain silent provided for in the Zambian Constitution extends to the pre-trial stage. This research fills that gap by examining the legal framework of the right to remain silent at the pre-trial stage in chapter three of the research.

There has been widespread debate on the right to remain silent at the pre-trial stage. While others are of the view that it advances justice, others are of the view that it suppresses it. The right to remain silent at the pre-trial stage is most stringently adhered to in the United States of America (hereinafter referred to as America). This was established in the case of *Miranda v Arizona* 384

³ Mwendabai Mwalusi. "The Application and Relevance of Judges Rules in obtaining Voluntary Confessions in Zambia." (LLB Thesis, The University of Zambia, 2004), 7.

U.S. 436 (1966). Thus it is understandable that most literature on this debate emanates from America. The right to remain silent is a common principle found in virtually all legal systems of the world.⁴Therefore it has similar implications in all legal systems of the world. It is for this reason that literature that emanates from the Americaand other parts of the world pertaining to the right to remain silent applies to Zambia.

Professor Charles Weisselberg and Professor Stephanos Bibas debate the state of the right to remain silent at the pre-trial stage. They argue that the police have long since abandoned the third degree tactics that were infamous in the last century. There is little evidence that police use fists, rubber hoses or physical force in interrogation except in the rarest of cases. Since the police no longer use such tactics, there is less need for a shield against coercion. This shield is the right to remain silent.⁵Thus the need to avail a suspect with the right to remain silent even when it is not invoked is not necessary as inhumane ways of extracting evidence are no longer employed.

This research will analyse this assertion under the Zambian context as it is not a conclusive proposition that police officers do not use inhumane ways of obtaining evidence from suspects in Zambia. With the use of this information, the research will assess whether the right to remain silent at the pre-trial stage is adequate to advance the administration of justice in Zambia.

Alan Ian Mackenzie argues that the right to pre-trial silence is contrary to the moral duty to respond to a well-founded accusation as well as to common sense.⁶Mackenzie's study has merit in that an innocent person would make use of the right to speak to offer an explanation and vindicate himself or herself.

⁴ Tánaiste and Minister for Justice, Equality and Law Reform, Balance in the Criminal Law Review Group Final Report, (Dublin Balance in the Criminal Law Review Group, 2007), 18.

⁵Charles Weisselberg and Stephanos Bibas, "Debate; the right to remain silent", The University of Pennsylvania law review (2010):77.

⁶Ian Alan Mackenzie "Catching the fox; Restricting the Right to Pre-Trial Silence in Canada," (LLB Thesis., The University of British Columbia, Vancouver, Canada, 2005), 3.

However, if suspects are put under pressure to speak, there is risk that they will produce testimony unfavorable to their case. This might be due to a police dominated atmosphere or the presence of a lawyer during cross examination.⁷ This particularly applies to the Zambian context where there is a tendency of citizens to fear the police.

The right to remain silent at the trial stage has also faced criticism. In his study, VanDijkhorst asserts that the right to remain silent is an impediment to justice. He states that the debate on the right to remain silent is often clouded by emotional reliance on fairness. However, this fairness is one sided as it only protects the criminal. Like Mackenzie, Dijkhorst also argues that there is no better factual evidence in an accused person's favor than evidence from his own mouth.⁸ Therefore, to ensure that justice prevails, whether the accused person is innocent or guilty, the right to remain silent should be abolished.

Dijkhorst's assertion has merit in that an accused person has the best evidence to vindicate himself if at all he is innocent. For instance in a murder case where there are no witnesses and the accused alleges self-defense, the accused person can be the best person to take the stand and give evidence in his favor.

Dijkhorst's assertion that the right to remain silent suppresses justice is also supported by the Mambwe case. If the accused had been compelled to testify at trial, the court would have been able to hear evidence that the phone found in his possession was from the co-accused. Perhaps this might have been favorable to the appellant's case. However, the court could not determine evidence that the appellant had not presented before the court. This is because the appellant had exercised his right to remain silent at trial. This case goes to show that the right to remain silent might hinder a court from arriving at a just decision.

⁷NaziahMohd Alias. "Protections for the Vulnerable Accused in Malaysian Criminal Trials, are they sufficient; proposal for reform." (Masters of Law Dissertation, The Victoria University of Wellington, New Zealand, 2013), 46.

⁸K Van Dijkhorst, "The Right to Silence: Is the Game Worth the Candle?"South Africa Law Journal 118 (2001):26.

However, other scholars argue that the right to remain silent is vital in promoting justice. Thus in the Final Report of the Balance in the Criminal Law Review Group of Ireland, it was stated that invoking the right to remain silent does not necessarily mean that the suspect or accused person is guilty. It may be that an accused is “shocked by the accusation and unable at first to remember some fact which would clear him.”⁹

This point has merit in that it is human for people to get distressed when they are accused of committing a crime. In such situations, it is best for the suspect or accused person to remain silent rather than incriminate himself or herself. It is for this reason that Shmuel Leshem states that the right to remain silent benefits innocent suspects or accused person’s by providing them with a safer alternative to speech.¹⁰ This assertion has merit in that they can choose to remain silent than be questioned by police officers and lawyers whose main aim is to find a person to pin the crime on, albeit the wrong one.

In addition, Professor Seidmann and Professor Stein argue that the right to remain silent indirectly benefits the innocent by inducing the guilty to remain silent, thereby bolstering the credibility of innocent suspect’s and accused person’s statements.¹¹ This assertion has merit in that the innocent person will be able to build a strong case unaffected by lies of the guilty. However this point of view can be defeated by stating that if an innocent person has a strong case; it will stand unaffected by lies of the guilty. Professor Seidmann and Professor Stein proceed to argue that the perception of the right to remain silent that it impedes the search for truth and

⁹ Tánaiste and Minister for Justice, Equality and Law Reform, Balance in the Criminal Law Review Group Final Report, (Dublin :Balance in the Criminal Law Review Group, 2007), 19

¹⁰ Shmuel Leshem, “The Benefits of a Right to Silence for the Innocent” The Rand Journal of Economics 41 (2010):398.

¹¹ Daniel Seidmann and Alex Stein, “The Right to Remain Silent Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege” Harvard Law Review (2000):431.

helps only criminals is mistaken. They state that even if the right to remain silent was abolished, guilty suspects and defendants would make false exculpatory statements if they believed that their lies were unlikely to be exposed.¹²

If the right to remain silent was abolished, criminals would take the stand and give false evidence to escape conviction. Therefore, it is better for the criminals to have an option to remain silent than to compulsorily take the stand and give false evidence.

The studies reviewed above have either been carried out generally or in relation to a particular jurisdiction. None of the studies specifically relate to the study of the right to remain silent under the Zambian context except for the research carried out by Mwendalubi Mwalusi. It has not been established by any of these studies if the right to remain silent provided for in the Zambian Constitution extends to the pre-trial stage. None of the studies have assessed whether the right to remain silent advances or suppresses justice under the Zambian context. Therefore there is a gap in literature as to whether the Zambian legal framework of the right to remain silent is adequate in advancing the administration of justice.

1.8 METHODOLOGY

This research is qualitative and uses secondary sources to achieve the aim. These sources include textbooks, journals, dissertations, thesis and scholarly internet sites. The research applies the findings of these scholarly works to the Zambian context. In addition, visits are made to the police station and interview of police officers in relation to the research is carried out. The research also analyses the right to remain silent at the pre-trial stage in the America in relation to Zambia.

¹²Daniel Seidmann and Alex Stein, "The Right to Remain Silent Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege" Harvard Law Review (2000):431.

1.9 OUTLINE OF CHAPTERS

Chapter two of the research explains the history, rationale and the meaning of the right to remain silent under the Zambian context. Chapter three examines the legal framework of the right to remain silent at both the trial and pre-trial stage. Since the right to remain silent at trial is expressly provided for in the Zambian Constitution, this chapter focuses on the legal framework of the right to remain silent at the pre-trial stage. This is because the Zambian Constitution does not expressly state that a suspect has the right to remain silent when they are under police custody.

Chapter four begins by examining whether the suspect's right to remain silent at the pre-trial stage is stringently adhered to in Zambia. The right to remain silent at the pre-trial stage is stringently adhered to in the America. Therefore, this chapter establishes whether the strict adherence to the suspect's right to remain silent as is the case in America would advance justice in Zambia. This is done with a view of assessing the adequacy of the legal framework of the right to remain silent in advancing the administration of justice in Zambia.

Chapter five analyses the implications of the right to remain silent at trial. The implications are examined to establish whether the right to remain silent at trial advances justice or not. This is done with a view of assessing the adequacy of the legal framework of the right to remain in advancing the administration of justice in Zambia. Chapter six gives a conclusive analysis of the whole research and advances recommendations in accordance with the research findings.

1.10 CONCLUSION

This chapter has introduced the research by giving a background of the right to remain silent. The right to remain silent has been questioned as a promoter of justice thus there has been an on-going debate amongst scholars. While others are of the view that the right to remain silent

advances justice, others are of the view that it suppresses it. The studies conducted by most of the scholars are in relation to foreign jurisdictions. However, the Mambwe case goes to show that the right to remain silent might hinder justice in certain instances in Zambia. Thus this research assesses the adequacy of the legal framework of the right to remain silent in advancing the administration of justice in Zambia.

CHAPTER TWO

THE RIGHT TO REMAIN SILENT

2.1 INTRODUCTION

This chapter aims to explain the history, the rationale and the meaning of the right to remain silent. The chapter will begin by explaining the history of the right to remain silent. The rationale and the meaning of the right to remain silent will also be explained respectively. This is done with a view of understanding what the right to remain silent is about and what it entails.

The right to remain silent is a common principle found in most of the legal systems of the world. It is also one of the most recognized criminal law doctrines by the general public. This is due to the worldwide marketing of American movies and television dramas. The Miranda warning, beginning, "You have the right to remain silent," may well be the single most widely known principle of criminal law in the world.¹

The right to remain silent finds expressions in express guarantees in most constitutions of the world.¹The most notable is the Fifth Amendment to the American Constitution (hereinafter referred to as the Fifth Amendment).The Fifth Amendment is part of the bill of rights.²The Fifth Amendment provides that 'no person shall be compelled in any criminal case to be a witness against himself.'The right to remain silent also finds expressions in express guarantees in various international instruments. Article 14(3)(g) of the United Nations International

¹ Janet Ainsworth, "Silence, Speech, and the Paradox of the Right to Remain Silent in American Police Interrogation". In *Law and Languages: Current Legal Issues* volume 15, eds. Michael Freeman and Fiona Smith, (London: Oxford University Press, 2013), 22.

² Tánaiste and Minister for Justice, Equality and Law Reform, *Balance in the Criminal Law Review Group Final Report*, (Dublin Balance in the Criminal Law Review Group, 2007), 18.

Covenant on Civil and Political Rights (1967) provides that an accused person shall not 'be compelled to testify against himself or to confess guilt.'³In Zambia, the right to remain silent at trial is enshrined in article 18 (7) of the Zambian Constitution, Act No.18 of 1996, (hereinafter referred to as the Zambian Constitution). Under this provision, a person who is tried for a criminal offence shall not be compelled to testify at trial. This goes to show that the right to remain silent is a fundamental principle found in most of the legal systems of the world. The history, rationale and meaning of the right to remain silent are now explained below.

2.2 THE HISTORY OF THE RIGHT TO REMAIN SILENT

The right to remain silent has its origins in England. It developed due to the harshness of the inquisitorial system employed by the ecclesiastical Courts.⁴Under inquisitorial proceedings, the accused was forced to take an oath to answer all questions honestly. If they did not take the oath, they could be considered guilty as if they had confessed or they could be imprisoned for contempt. In extreme cases, accused persons faced the threat of imprisonment for life if they remained silent.⁵

The inquisitorial system soon came into conflict with the common law courts. In 1568, Lord Chief Justice Dyer was the first to advocate for an accused person to have the right to remain silent. He objected to an accused person taking an oath in what became a famous maxim: '*nemo tenetur se ipsum prodere*' or, 'no man shall be forced to produce evidence against himself.'⁶

³ Tánaiste and Minister for Justice, Equality and Law Reform, Balance in the Criminal Law Review Group Final Report, (Dublin Balance in the Criminal Law Review Group, 2007), 18.

⁴Gregory W. O'Reilly, "England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice" *Journal of Criminal Law and Criminology* 85 (1994):407.

⁵Gregory W. O'Reilly, "England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice" *Journal of Criminal Law and Criminology* 85 (1994):411.

⁶Gregory W. O'Reilly, "England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice" *Journal of Criminal Law and Criminology* 85 (1994):414.

Since then, the common law system has maintained the upper hand in England and has established the right to remain silent in the criminal justice system.

Zambia is a common law jurisdiction by virtue of being colonized by Britain. Most of the British laws were introduced to Zambia by the colonial masters in the pre-independence era. At independence, most of these laws were retained in the Zambia Legal System. This includes the constitutional right to remain silent.⁷ On this basis, the basic privilege that no one should be forced to be his own betrayer is extended to every citizen in Zambia.

2.3 THE RATIONALE OF THE RIGHT TO REMAIN SILENT

The right to remain silent emerged to protect a suspect or an accused person from being tortured and from all other inhumane ways of extracting evidence.⁸ In the case of *Saunders v United Kingdom* (1996) ECHR 65, the rationale of the right to remain silent was stated. The court was of the view that the rationale lies in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriage of justice.⁹

Basically, the rationale of the right to remain silent is to protect suspects and accused persons from all inhumane ways of extracting evidence. The right to remain silent is a tool used to protect the right of suspects and accused persons.

2.4 THE MEANING OF THE RIGHT TO REMAIN SILENT

The right to remain silent has two tiers. These are the right to remain silent at the pre-trial stage and the right to remain silent at the trial stage. Thus there are different implications at each stage.

⁷“Legal System” New Economia, Last Modified October 7, 2011, www.neweconomia.com

⁸K Van Dijkhorst, “The Right to Silence: Is the Game Worth the Candle?” South Africa Law Journal 118 (2001):31

⁹ Barbara Ann Hocking and Laura Leigh Manville, “What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Action” Macquarie Law Journal 1, No 1(2001):63.

The right to remain silent at the pre-trial stage entails that a suspect cannot be compelled to speak by police officers. In the case of *Muwowo v The People* (1965) Z.R. 91, the appellant was convicted of murder. The evidence relied on by the prosecution was a confession by the accused. The court held that an incriminating statement made by an accused person to a person in authority is not admissible as evidence unless it was made by him voluntarily. This means that the confession must be made in the exercise of a free choice to speak or to be silent.

The right to remain silent at the trial stage entails that a person who is tried for a criminal offence cannot be compelled to give evidence at the trial. This was affirmed in the case of *Thomas Mumba v The People* (1984) Z.R.38. The court held that section 53 (1) of the Corrupt Practices Act, Chapter 91 of the laws of Zambia, was unconstitutional as it took away an accused person's constitutional right not to be compelled to give evidence at his or her trial.

2.5 CONCLUSION

This chapter explained the history, rationale and meaning of the right to remain silent. The right to remain silent basically means that a suspect or accused person cannot be compelled to speak by the authorities. The right to remain silent emerged to mitigate the harshness of the common law system against suspects and accused persons. Thus the rationale of the right to remain silent is to protect suspects or accused persons from inhumane ways of extracting evidence.

CHAPTER THREE

THE LEGAL FRAMEWORK OF THE RIGHT TO REMAIN SILENT IN ZAMBIA

3.1 INTRODUCTION

This chapter aims to examine the legal framework of the right to remain silent in Zambia. The chapter will begin by examining the legal framework of the right to remain silent at the trial stage. This is expressly provided for in the *Zambian Constitution* thus the chapter focus on the legal framework of the right to remain silent at the pre-trial stage.

The chapter examines whether the *Zambian legal framework* provides for the right to remain silent at the pre-trial stage. This will be achieved by examining the *Zambian Constitution, Act No.18 of 1996*, (hereinafter referred to as the *Zambian Constitution*). In addition, the statute that governs arrest and detention of suspects will also be examined. This statute is the *Criminal Procedure Code, Chapter 88 of the laws of Zambia* (hereinafter referred to as the *Criminal procedure Code*).

The judges' rules which are rules of practice that require the police to caution a suspect that he or she has the right to remain silent will also be analysed. They are the only set of rules in Zambia that require the police to caution a suspect that he or she has the right to remain silent. Judges rules are merely rules of practice formulated by judges to guide the police. These rules do not have the force of law.¹ This would lead one to argue that the right to remain silent at the pre-trial stage is not provided for at law. Thus the legal framework on the right to remain silent at the trial stage and the pre-trial stage is now examined below.

¹*R v Voisin* (1918) 1 KB 531

3.2 THE LEGAL FRAMEWORK OF THE RIGHT TO REMAIN SILENT AT THE TRIAL STAGE

The right to remain silent is expressly provided for at law in Zambia. The right to remain silent is enshrined in the *Zambian Constitution* in article 18 (7). Under this provision, a person who is tried for a criminal offence shall not be compelled to give evidence at the trial. Therefore, the right to remain silent at trial is clearly provided for at law.

The *Zambian courts* have affirmed the constitutional right to remain silent in the case of *Thomas Mumba v The People* (1984) Z.R.38. The court held that section 53 (1) of the *Corrupt Practices Act*, Chapter 91 of the laws of Zambia, was unconstitutional as it took away an accused person's constitutional right not to be compelled to give evidence at his or her trial.

3.3 THE LEGAL FRAMEWORK OF THE RIGHT TO REMAIN SILENT AT THE PRE-TRIAL STAGE

Article 1(3) of the *Zambian Constitution* states that the constitution is the supreme law of the land and any law that is inconsistent with it shall be null and void to the extent of its inconsistency. Article 18 (7) of the *Zambian Constitution* states that a person who is tried for a criminal offence shall not be compelled to give evidence at trial. The constitution does not expressly state whether this right extends to suspects that are under police custody. Thus others would argue that the right to remain silent does not extend to suspects because it is not provided for in the supreme law of the land.

Moreover, if the *Zambian Constitution* grants a suspect the right to remain silent, the statutes that govern arrest are supposed to reflect this. However, this is not the case. The law governing arrest and detention of persons at the police station is silent on a suspect's right to remain silent. The

Criminal Procedure Code, Chapter 88 of the laws of Zambia (hereinafter referred to as the Criminal Procedure Code), only provides guidelines for the procedure of arrest. There is an absence of a requirement that the police officers must caution a person on their right to remain silent before questioning commences.

The judges rules are the only set of rules in Zambia that expressly require police officers to caution a suspect that he or she has the right to remain silent. In the case of *Charles Lukolongo and Others v The People* (1986) Z.R.115 (S.C) , it was held that the Judges' Rules applicable in Zambia are the 1930 rules set out in paragraph 1118 of the 35th Edition of Archbold.

The relevant rules to this research are rules two, three and four. Rule two of the judge's rules requires a police officer who has made up his mind to charge a suspect with a crime to first caution such person before asking any questions. Rule three requires a police officer to caution a suspect in custody before questioning commences. Rule four requires a police officer to caution a prisoner who wishes to volunteer any statement. The rationale of the rules was expressed by the Royal Commission on Criminal Procedure (UK) in 1981:

the presumption behind the judges rules is that the circumstances of police questioning are of their very nature coercive, that this can affect the freedom of choice and judgment of the suspect (and his ability to exercise his right of silence), and that in consequence the reliability (the truth) of statements made in custody has to be most rigorously tested.²

This quotation means that the principle requirement of the judge's rules is that a suspect who is subjected to police questioning be made aware of his right to remain silent. This is to be done by the police issuing a caution to this effect.³ The proper form of caution administered by police officers to accused persons is: 'Do you wish to say anything in answer to the charge? You are not

²"Criminal Investigation and Police Interrogation of Aborigines", Australian Law Reform Commission, Last Modified August 13, 2014, <http://www.alcr.gov.au/publications22>.

³"Right to Silence in Criminal Cases", Citizens Information, Last Modified June 3, 2014, [www.citizeninformation.ie/en/justice/arrests/right to silence in criminal cases.html](http://www.citizeninformation.ie/en/justice/arrests/right%20to%20silence%20in%20criminal%20cases.html)

obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.’ These words are known as the caution.⁴

It was stated in the case of *R v Voisin* (1918) 1 KB 531, that the judge’s rules were not rules of law but rather rules of practice for the guidance of the police. This means that the breach of the judges’ rules will not result in the automatic exclusion of evidence. These rules do not have the force of law thus it is up to the judge to decide whether or not to admit evidence that has been obtained in breach of the rules.

In the case of *Liswaniso v the people* (1979) ZR 297 (SC), it was held that the Courts are reluctant to exclude a confession on account of a breach of judges’ rules to cases where the breach has no effect on the voluntariness of the statement. Thus the court can admit evidence if the breach of judges’ rules was minor or the breach was not closely related to the making of the confession.

O’Higgins CJ stated in the case of the *The People v Farrell*³⁸ [1978] IR 13 that:

The Judges’ Rules are not rules of law. They are rules for the guidance of persons taking statements. However, they have stood up to the test of time and will be departed from at peril. In a very rare case a statement taken in breach may be admitted in evidence but in very exceptional circumstances. Where there is a breach of the Judges’ Rules, each of such breaches calls for adequate explanation. The breaches and the explanations (if any) together with the entire circumstances of the case are matters to be taken into consideration by the trial judge before exercising his judicial discretion as to whether or not he will admit such statement in evidence.

This quotation means that the judge has discretion to admit evidence taken in breach of the judges’ rules. This is unlike the American Criminal Justice System where evidence is automatically inadmissible when the right to remain silent is breached.

⁴ “Right to Silence in Criminal Cases”, Citizens Information, Last Modified June 3, 2014, www.citizeninformation.ie/en/justice/arrests/right_to_silence_in_criminal_cases.html

One would thus argue that the right to remain silent at the pre-trial stage is nonexistent in the Zambian Legal Framework. This is because the statutes that govern arrest and detention are silent on the issue and the suspect's right to remain silent is only left to be protected by rules of practice.

Moreover, in our present constitutional system it might be regarded as a breach of the separation of powers for the judicial branch to make formal rules of this kind that regulate the conduct of persons in the executive. This ought to be done by means of legislation enacted by the legislature and not rest on judicial rules made by English judges prior to independence.⁵

However, it can be argued that compelling an accused person to produce evidence during police questioning is against the spirit of article 18 (7) because the evidence produced by compulsion will be used at trial. Thus were a suspect is compelled to produce evidence by the police officers and the evidence is later produced at trial, it can be said that such a person has been compelled to give evidence at trial.

Moreover, the Fifth Amendment to the American Constitution (hereinafter referred to as the Fifth Amendment) does not also expressly state that a suspect has the right to remain silent during police interrogation. However, a suspect's right to remain silent is stringently adhered to in the United States of America such that evidence obtained without giving the Miranda warning is inadmissible as evidence in court. This was established in the case of *Miranda v Arizona* 384 U.S. 436 (1966). The court stated that there can be no doubt that the Fifth Amendment privilege

⁵ Tánaiste and Minister for Justice, Equality and Law Reform, Balance in the Criminal Law Review Group Final Report, (Dublin Balance in the Criminal Law Review Group, 2007), 31.

is available outside of criminal court proceedings and serves to protect persons from being compelled to incriminate themselves.

The right to remain silent is a fundamental principle of law found in virtually every legal system of the world.⁶ Thus it has the same implications in most legal systems of the world. If most jurisdictions interpret it to include the right to remain silent at the pre-trial stage even if it is not expressly provided for in the constitution, then the same must be applied to Zambia. Therefore after such an analysis, it can be stated with conviction that the Zambian Constitution grants a suspect the right to remain silent when they are under police custody, albeit implicitly. The fact that the Criminal Procedure Code and other statutes are silent on the right to remain silent during police interrogation does not mean it is nonexistent at law.

3.4 CONCLUSION

Article 18 (7) of the Zambian Constitution expressly provides for the right to remain silent at trial. Article 18 (7) of the Zambian Constitution, by implication provides for the right to remain silent at the pre-trial stage. However the statutes that govern arrest are silent on the matter. Therefore recourse is had to judges' rules that are merely rules of practice and not law.

⁶ Tánaiste and Minister for Justice, Equality and Law Reform, Balance in the Criminal Law Review Group Final Report, (Dublin Balance in the Criminal Law Review Group, 2007), 18.

CHAPTER 4

THE RIGHT TO REMAIN SILENT AT THE PRE-TRIAL STAGE AND THE ADMINISTRATION OF JUSTICE IN ZAMBIA

4.1 INTRODUCTION

The aim of this chapter is to assess whether the legal framework of the right to remain silent at the pre-trial stage is adequate in advancing the administration of justice in Zambia. In order to achieve this, the suspect's right to remain silent in Zambia will be examined. This is done with a view of establishing whether the right to remain silent is strictly adhered to by the police officers in Zambia.

The right to remain silent at the pre-trial stage in the United States of America (hereinafter referred to as America) where the right is stringently adhered to is also examined. The research will apply these findings to the Zambian context. This is done with a view of establishing whether strict adherence to a suspect's right to remain silent would advance or suppress justice in Zambia. Based on these findings, the chapter will conclude by assessing whether the legal framework on the right to remain silent at the pre-trial stage is adequate in advancing the administration of justice in Zambia.

4.2 A SUSPECT'S RIGHT TO REMAIN SILENT IN ZAMBIA

According to police records, police officers in Zambia follow the practice of administering a caution. However the suspects rarely exercise the right to remain silent. An explanation for this phenomenon is that the suspects do not understand the import of the right or are not given the

impression by their interrogators that they are really free to remain silent.¹ This is due to the fact that they usually retract the confessions at trial or allege that they were forced to make them.² It is for this reason that Nsanda Nsekero who carried out studies on police questioning in Zambia stated that ‘the police ritual is therefore an empty ritual: a mere façade.’³

Police officers are made aware of the judge’s rules. This is cemented by the fact that the judges’ rules are included in the publications called the police instructions. Moreover, the judges’ rules are also printed at the back of police note books that are given to police officers to record various cases.⁴

However, the obtaining of voluntary statements from accused persons has always faced challenges in Zambia in the sense that the interrogating officers have not adhered to the judges’ rules. Non compliance is attributable to negligence by police officers who are knowledgeable about the judges’ rules as it is mandatory for them to know them.⁵

Furthermore, ‘*uza kamba kusogolo*’ has become a common phrase in Zambia. This is because these are usually the first words the police officer will avail to a suspect instead of the caution. The phrase is usually used during custodial situations at the point of arrest. ‘*Uza kamba kusogolo*’ is said to be synonymous to the Zambian Police Miranda rights.⁶ The fact that police

¹ M. Cherif Bassiouni and Ziyad Motala, *The Protection of Human Rights in African Criminal Proceedings*, (Dordrecht: Martinus Nijhoff Publishers, 1995), 94.

² M. Cherif Bassiouni and Ziyad Motala, *The Protection of Human Rights in African Criminal Proceedings*, (Dordrecht: Martinus Nijhoff Publishers, 1995), 94.

³ M. Cherif Bassiouni and Ziyad Motala, *The Protection of Human Rights in African Criminal Proceedings*, (Dordrecht: Martinus Nijhoff Publishers, 1995), 94.

⁴ Mwendabai Mwalusi. ‘‘The Application and Relevance of Judges Rules in obtaining Voluntary Confessions in Zambia.’’ (LLB Thesis, The University of Zambia, 2004), 7.

⁵ Mwendabai Mwalusi. ‘‘The Application and Relevance of Judges Rules in obtaining Voluntary Confessions in Zambia.’’ (LLB Thesis, The University of Zambia, 2004), 7.

⁶ ‘‘ZP or Buju Slag Yapa Zed’’ *Zambian Insights*, Last Modified January, 2011, http://zambia-insights.blogspot.com/2011_07_01_archive.html?m=1

officers in Zambia do not stringently adhere to the right to remain silent is cemented by the following factors.

4.2.1 Interview of Police Officers

According to information obtained from interviews, police officers are knowledgeable about the judge's rules. The police officers interviewed state that usually, suspects are cautioned on their right to remain silent.⁷ However, they accept that there are a pocketful of police officers who do not adhere to the judges' rules but just beat up the suspects. This coerces them to speak thus their right to remain silent is not respected in such cases.⁸

4.2.2 Reported Cases

A number of reported cases also go to show that the judges' rules are usually breached by police officers. In the case of *Charles Lukolongo and Others v The People* (1986) Z.R (S.C), the appellants were each charged and convicted of two counts of murder and one count of aggravated robbery. There was evidence that the appellant had been questioned by the police while in custody before being warned and cautioned. On appeal it was argued that the judges' rules in force in Zambia required that persons in custody should be warned before being questioned. The fact that the police officers did not adhere to the judges rules rendered the suspects answers inadmissible as evidence in court.

Similarly, in the cases of *Chileshe v The People*(1997) Z.R 125 and *Muwowo v Thepeople*(1965) Z.R. 91, the police officers did not administer the required warn and caution under the judges' rules. Such cases go to show that police officers do not strictly observe the judges' rules.

⁷ Jennipher Mushabati, interview by Isabel Kapotwe, February 15, 2015.

⁸ Maambo Mulogelwa, interview by Isabel Kapotwe, February 27, 2015.

4.2.3 Research Carried Out by Human Rights Groups

The Human Rights Watch, the Prisons Care and Counseling Association and the AIDS and Rights Alliance for Southern Africa interviewed prisoners at six prisons throughout Zambia's central corridor. The interviews were conducted as part of research into the health conditions in six Zambian prisons between September 2009 and February 2010. The prisoners described what happened to them in police custody. Dozens said they were beaten with metal bars, hammers, broom, handles, police batons, sticks or even electrified rods. Hanging suspects from the ceiling and beating them to coerce confessions was found to be routine police practice in Zambia.⁹

If police officers do not respect fundamental human rights that are constitutionally protected, they are bound to disregard mere rules of practice. In addition, through police brutality, a suspect is coerced to speak thus the right to remain silent is abrogated.

4.3 A SUSPECT'S RIGHT TO REMAIN SILENT IN AMERICA

The Fifth Amendment does not expressly state that a suspect has the right to remain silent when they are under police custody. The Fifth Amendment merely states that 'no person shall be compelled in any criminal case to be a witness against himself.' However, the case of *Miranda v Arizona* 384 U.S. 436 (1966) affirms that suspects have a constitutional right to remain silent whilst they are in police custody. In this case, Ernesto Miranda was accused of kidnapping and raping an 18-year-old, mildly retarded woman. He was brought in for questioning and confessed to the crime. He was not told that he did not have to speak or that he could have a lawyer present.

⁹ "Zambia: Police Brutality, Torture rife" Human Rights Watch, Last Modified June 22, 2013, <http://m.hrw.org/news/2010/09/03/zambia-police-brutality-torture-rife>

The case came before the Supreme Court. The Court ruled that the statements made to the police could not be used as evidence since Miranda had not been warned prior to any questioning that he had the right to remain silent. The court went on to state that the prosecution could not use statements stemming from custodial interrogation of the defendant unless they could demonstrate the use of procedural safeguards to secure the privilege against self-incrimination. Ultimately, the United States of America Supreme Court reversed the judgment of the Supreme Court of Arizona in the Miranda case. The state was required to retry the criminal charges against Ernesto Miranda without the use of his signed confession. Thus from the case of *Miranda v Arizona* stems the famous Miranda rights. An officer is required to give the following caution to a person before questioning commences:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me? ¹⁰

The suspect must give a clear, affirmative answer to the Miranda questions. He must state clearly whether he wishes to speak to the police officers. Thus the right to remain silent is stringently adhered to by police officers in America. This is because adherence to the rule means less chance of a case being overturned in court due to poor procedure on their part. ¹¹

4.4 THE IMPLICATIONS OF THE MIRANDA RULE

The preceding section established that police officers in America are under an obligation to read the Miranda warning to the suspect. They administer the caution to avoid having

¹⁰ Become Aware of your rights”Miranda Warning, Last modified March 23, 2014, <http://www.mirandawarning.org/whatareyourmirandarights.html>

¹¹ Become Aware of your rights”Miranda Warning, Last modified March 23, 2015, <http://www.mirandawarning.org/whatareyourmirandarights.html>

evidence obtained in breach of the Miranda rule being deemed inadmissible by the courts. The Miranda rule will be examined in depth and applied to the Zambian context to determine whether strict adherence to the right to remain silent at the pre-trial stage would advance or suppress justice in Zambia.

4.4.1 Police officers are only required to give a Miranda warning to a suspect if he or she is under police custody

The definition of custody was analysed in the case of *Illinois v Perkins*⁴⁹⁶ U.S. 292 (1990). In this case, undercover agent Parisi was placed in a jail cellblock with respondent Perkins. When Parisi asked him if he had killed anybody, Perkins made statements implicating himself in the murder. He was then charged with the murder. The trial court granted the respondents motion to suppress his statements on the ground that Parisi had not given him warnings required by *Miranda v Arizona*, before their conversations.

On appeal, it was held that an undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. This is because the essential ingredients of a police dominated atmosphere and compulsion are lacking.

This is particularly important under the Zambian context where the presence of a policeman may be considered a threat to the mind of the individual being interrogated. The policeman's uniform, comport and temperament are likely to create a spectacle to many citizens.¹² Thus chief justice Warren opined that unless adequate protective devices are employed to dispel the compulsion

¹² M. Cherif Bassiouni and Ziyad Motala, *The Protection of Human Rights in African Criminal Proceedings*, (Dordrecht: Martinus Nijhoff Publishers, 1995), 94.

inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.¹³

Thus the right to remain silent would be seen to advance justice in this regard. This is because it does not protect guilty persons who make voluntary statements without police compulsion as was exemplified in *Illinois v Perkins*. Evidence obtained from a criminal's free will without police compulsion would be used against him thus benefiting the Zambian society by securing the conviction of a guilty person.

However, one would argue that the strict adherence to the Miranda Rule does not advance justice. This is because where a guilty suspect makes a confession without being cautioned under police custody, the statement will not be admissible even if the suspect was not coerced to speak. This sets a criminal free to commit the crime again. His rights are thus protected at the expense of society.

However, in the case of *Colorado v. Connelly*, 479 U.S. 157 (1986), the Supreme Court considered the case of a mentally ill man who walked into a police station and confessed that he had murdered a young woman. The Supreme Court heard the case and decided that Mr. Connelly's confession should not have been suppressed. This is due to a specific sentence in *Miranda v. Arizona* that stated that confessions may only be thrown out if the accused is coercively interrogated by the government. In this case, the man had not been coercively interrogated. Thus the right to remain silent cannot be said to defend criminals as it specifically protects only those that are coercively interrogated by the police. Therefore, if Zambia was to

¹³ M. Cherif Bassiouni and Ziyad Motala, *The Protection of Human Rights in African Criminal Proceedings*, (Dordrecht: Martinus Nijhoff Publishers, 1995), 94.

stringently adhere to the suspect's right to remain silent, it would be promoting the administration of justice in this regard.

4.4.2 Not only express questioning is covered under the Miranda warning but also its functional equivalent

In the case of *Rhode Island v Innis* 446 US 291 1980, the meaning of interrogation in relation to the Miranda warning was analysed. In this case, a taxicab driver who had been robbed by a man wielding a shotgun identified a picture of the respondent as that of his assailant. A patrolman arrested the identified man and advised him of his Miranda rights. While en route to the station, two of the officers engaged in a conversation between themselves concerning the missing shotgun. One of the officers stated that there were a lot of handicapped children running around in the area because a school for such children was located nearby. He went on to state that God forbid one of them might find a weapon with shells and hurt themselves. The respondent interrupted the conversation stating that the officers should turn the car around so that he could show them where the gun was located.

At trial, the respondent's motion to suppress the shotgun and the statement he made to the police regarding its discovery was denied as he had waived his Miranda rights. On appeal, it was held the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. The term interrogation under Miranda refers not only to express questioning but also to any words or actions that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Thus the functional equivalent would include threats, torture and any other act by the police that would reasonably elicit an incriminating response from the suspect. This is particularly important

under the Zambian context where police officers have been cited as violating the rights of suspects under their custody.¹⁴ Thus the stringent adherence to the right to remain silent in Zambia would be seen as a promoter of justice in this regard. This is because if evidence is obtained due to behavior on the part of police officers that is reasonably likely to elicit an incriminating response, it would have to be rendered automatically inadmissible.

4.4.3 Questions may be asked without the defendant being given the Miranda warning for public safety reasons.

Public safety is an exception to the Miranda rule. If public safety is an issue, questions may be asked without the defendant being given the Miranda warning. Any evidence obtained may be used against the suspect under these circumstances.¹⁵ This was established in the case of *New York v. Quarles* 467 U.S. 649 (1984).

In this case, a police officer apprehended a rape suspect who was thought to be carrying a firearm. The arrest took place in a crowded grocery store. When the officer arrested the suspect, he found an empty shoulder holster and asked the suspect where the gun was. The suspect nodded in the direction of the gun and said “the gun is over there”. The suspect argued that his statement was inadmissible in evidence because he had not been given the Miranda warning. The Supreme Court found that the Miranda rule must yield in a situation where concern for public safety must be paramount to adherence to the literal language of the rules enunciated in Miranda. The rule in Miranda is therefore not absolute and can be more elastic in cases of public safety.

¹⁴“Zambia: Police Brutality, Torture rife” Human Rights Watch, Last Modified June 22, 2013, <http://m.hrw.org/news/2010/09/03/zambia-police-brutality-torture-rife>

¹⁵ “Become Aware of your rights” Miranda Warning, Last modified March 23, 2015, <http://www.mirandawarning.org/whatareyourmirandarights.html>

Similarly, in the case of *Salinas v Texas*⁵⁷⁰ U.S. 133(2013), two brothers were shot and killed in their home. Police officers recovered shotgun shell casings at the home and their investigation led to the defendant who agreed to hand over his shotgun for ballistics testing. The defendant answered the police officer's questions for most of the interview, but went silent and tightened up when asked if the shotgun would match the shells recovered at the murder scene. The prosecution used his silence in response to the officer's question as evidence of his guilt. They argued that an innocent person would not have acted the way the defendant acted at the time of questioning.

It was held that in such cases, a witness must expressly invoke the right to remain silent. The court refused to adopt an exception to the express invocation requirement for cases in which witnesses remain silent and decline to give an answer. The court was of the view that such a rule would do little to protect those genuinely relying on the Fifth Amendment privilege. Such a rule would place a needless new burden on society by declaring evidence that has probative value as inadmissible.

This is vital for the Zambian society to ensure that perpetrators of crime are brought to justice and do not rely on the right to remain silent as a shield for their wrongful acts. This is because a guilty suspect who elected to tell the truth cannot later change his mind and state that his silence at a point in the interview meant that he did not want to speak. This aspect takes into account the interest of the public in securing the conviction of a criminal.

However, as was stated earlier, most citizens in Zambia do not invoke their right to remain silent due to the compulsion to speak under a police dominated atmosphere. They would elect to remain silent due to fear of the police.¹⁶ This is because some police officers in Zambia tend to

¹⁶ M. Cherif Bassiouni and Ziyad Motala, *The Protection of Human Rights in African Criminal Proceedings*, (Dordrecht: Martinus Nijhoff Publishers, 1995), 94.

use torture and other inhumane ways to extract evidence.¹⁷ In this regard, it would be vital to secure a suspect's right to remain silent in Zambia even when he does not expressly invoke it.

However, the court in the *Salinas v Texas* case further stated that a witness's failure to invoke the privilege may be excused where government coercion made his forfeiture of the privilege involuntary. Thus if it can be shown that the suspect did not invoke his right to remain silent due to police coercion, the evidence would be rendered inadmissible.

Thus the right to remain silent is fairly balanced in this regard. It does not protect the accused until he invokes it. If it can be shown that he did not invoke it due to police compulsion, the evidence obtained is deemed inadmissible. Thus the rights of a suspect are respected while society's need to convict guilty persons is also taken into consideration. Thus the interests of both sides are fairly balanced. Therefore, the stringent adherence to the suspect's right to remain silent would be seen as a promoter of justice in Zambia in this regard.

These cases go to silence all the critics of the stringent adherence to the suspect's right to remain silent at the pre-trial stage. This is because it is clear that the right to remain silent does not protect the interests of the suspect at the expense of society. Thus under the Zambian context the stringent adherence to the right to remain silent would be beneficial for the protection of the rights of suspects under police custody. In addition, the rights of the general public would be catered for in that public safety is an exception to a suspect's right to remain silent.

4.5 CONCLUSION

This chapter assessed whether the right to remain silent at the pre-trial stage is necessary in advancing the administration of justice in Zambia. This was done by analyzing the American

¹⁷“Zambia: Police Brutality, Torture rife”Human Rights Watch, Last Modified June 22, 2013, <http://m.hrw.org/news/2010/09/03/zambia-police-brutality-torture-rife>

Criminal Justice System were this right is stringently adhered to. This was applied to the
Zambian context and it has been deduced that a suspect's right to remain silent is vital in
advancing the administration of justice in Zambia. This is due to the fact that Police officers have
been reported to use torture and other inhumane means to extract evidence in Zambia. Therefore
the right to remain silent is necessary to protect the rights of suspects in Zambia. In addition, the
right to remain silent is fairly balanced as it considers the interests of the society in securing the
conviction of criminals.

However, police officers do not respect a suspect's right to remain silent. This is due to the fact
that judges' rules which are rules of practice are the only set of rules that expressly provide for
this right in Zambia. The legal framework of the right to remain silent at the pre-trial stage is
thus inadequate in advancing the administration of justice in Zambia.

CHAPTER FIVE

THE RIGHT TO REMAIN SILENT AT THE TRIAL STAGE AND THE ADMINISTRATION OF JUSTICE IN ZAMBIA

5.1 INTRODUCTION

The aim of this chapter is to analyse the adequacy of the legal framework of the right to remain silent at the trial stage in advancing the administration of justice. This will be achieved by analyzing the implications of the right to remain silent at trial. The first implication is that an accused person cannot be compelled to give evidence at trial. The second implication is that no adverse inference can be drawn from an accused person invoking his right to remain silent at trial. This chapter will examine these implications under the Zambian context with a view of establishing whether the right to remain silent is a promoter of justice or not under the Zambia context.

There has been on-going debate on the right to remain silent at trial. Others are of the view that the right to remain silent promotes justice while others are of the view that it suppresses it. Most scholarly works that have added to the on-going debate have done so in relation to foreign jurisdictions. This chapter will analyze various studies and apply them to the Zambian context.

5.2 THE ACCUSED CANNOT BE COMPELLED TO TAKE THE STAND

The right to remain silent at trial entails that an accused person cannot be compelled to take the stand and give evidence. Some scholars have criticized this. For Palmer, there is a clear rationale

for the courts distinction between pre-trial and at-trial silence.¹ The right to remain silent at the pre-trial stage is advanced by some critics as they are of the view that a suspect is compelled to incriminate themselves in a police dominated environment. This assertion has merit under the Zambian context where citizens tend to feel intimidated by police officers. Since the accused person cannot feel coerced to speak at trial by police officers, then the right to remain silent at trial is not necessary.

Most critics of the right to remain silent are of the view that those that invoke the right to remain silent at trial are guilty. Thus Bentley states:

If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.²

This quotation means that there is a moral duty on a person who is accused of a crime to give an explanation to vindicate himself. A failure to answer a strong prosecution case with evidence from the accused's peculiar knowledge suggests that there is no innocent explanation.³

Other scholars argue that the right to remain silent is an impediment to justice. They are of the view that the debate on the right to remain silent is often clouded by emotional reliance on fairness. However, this fairness is one sided as it only protects the criminal. There is no better factual evidence in an accused person's favor than evidence from his own mouth.⁴ Therefore, to ensure that justice prevails, whether the accused person is innocent or guilty, the right to remain silent should be abolished.

¹ Sharon R. Gromer, "Fifth Amendment- The Right to a no Adverse Inference Jury Instruction", *Journal of Criminal law and Criminology* 72, No 4 (1981): 1308.

² K Van Dijkhorst, "The Right to Silence: Is the Game Worth the Candle?" *South Africa Law Journal* 118 (2001):34.

³ Sharon R. Gromer, "Fifth Amendment- The Right to a no Adverse Inference Jury Instruction", *Journal of Criminal law and Criminology* 72, No 4 (1981): 1308.

⁴ K Van Dijkhorst, "The Right to Silence: Is the Game Worth the Candle?" *South Africa Law Journal* 118 (2001):26.

By invoking the right to remain silent at trial, the accused person deprives the court of a valid explanation for the events in contention. This was also the case in the case of *Mambwe v The People*, (2014) SC 16. Had the accused person given testimony, he would have been able to produce the evidence that the phone found in his possession was from his co-accused. This goes to show that the right to remain silent at trial might hinder justice in Zambia.⁵

Furthermore, the right to remain silent is considered to be a trick or tactic. If an accused person decides to remain silent at trial, they tactically exclude cross examination and a vast array of evidence. Cross examination is a vital tool for a lawyer to prove to the judge that the accused committed the crime. During cross examination, the judge is able to assess whether the accused person's testimony is true or false. This helps the judge to determine the outcome of the case. Thus others argue that the right to remain silent enables the guilty person to evade justice.⁶ This would enable perpetrators of crime to freely commit the crime again to the detriment of the Zambian society.

However, the majority of Zambian citizens tend to feel intimidated in court due to the presence of the judge and the learned lawyers. In such an environment, an accused would incriminate himself. In addition, the accused person might have problems with communication making it more difficult for him or her to take the stand and adduce evidence. In this regard, the right to remain silent can be viewed as advancing justice in Zambia.

The right to remain silent indirectly benefits the innocent by inducing the guilty to remain silent, thereby bolstering the credibility of innocent suspects' and accused person's statements.⁷ This

⁵ Barbara Ann Hocking and Laura Leigh Manville, "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Action" *Macquarie Law Journal* 1, No 1(2001):63.

⁶ Barbara Ann Hocking and Laura Leigh Manville, "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Action" *Macquarie Law Journal* 1, No 1(2001):63.

⁷ Daniel Seidmann and Alex Stein, "The Right to Remain Silent Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege" *Harvard Law Review* (2000):431.

assertion has merit in that the innocent person can be able to build a strong case unaffected by the lies of the guilty. Moreover, even if the right to remain silent was abolished, guilty suspects and defendants would make false exculpatory statements if they believed that their lies were unlikely to be exposed.⁸ If the right was not available, criminals would take the stand and give false evidence to escape conviction. Therefore, it is better for the criminals to have an option to remain silent than to compulsorily take the stand and give false evidence.

Moreover, the accused person does not have to prove anything. This is because the burden remains on the prosecution to prove that the accused person is guilty beyond a reasonable doubt. It is not an accused duty to make the prosecution's case.⁹ The content of prosecutorial evidence is in some cases not sufficient to prove guilt beyond reasonable doubt. In such cases it is arguable that an accused may assist his or her case by saying nothing before and during trial.¹⁰ An accused might otherwise augment suspicion of their guilt if cross-examined. Thus there are compelling reasons for such accused parties exercising their right to remain silent.¹¹

Taking all the arguments into consideration, the right to remain silent is a promoter of justice in Zambia. This is because it takes into account the accused person's rights. The accused person in Zambia has a high chance of incriminating himself due to lack of knowledge of the law, fear of

⁸Daniel Seidmann and Alex Stein, "The Right to Remain Silent Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege" *Harvard Law Review* (2000):431.

⁹Barbara Ann Hocking and Laura Leigh Manville, "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Action" *Macquarie Law Journal* 1, No 1(2001):63.

¹⁰ Barbara Ann Hocking and Laura Leigh Manville, "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Action" *Macquarie Law Journal* 1, No 1(2001):63.

¹¹ Barbara Ann Hocking and Laura Leigh Manville, "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Action" *Macquarie Law Journal* 1, No 1(2001):63.

the justice system and intimidation by learned counsel at cross examination. The society's interests are protected by the judge's who have undergone extensive training and are highly learned. This is because in certain circumstances, they can draw an inference of guilt from an accused person's silence thus advancing society's interest to secure the conviction of a guilty person. This is fully examined in the next section of the research.

5.3 NO INFERENCE CAN BE DRAWN FROM AN ACCUSED PERSON INVOKING HIS RIGHT TO REMAIN SILENT

No inference of guilt can be drawn from an accused person invoking his right to remain silent. In the case of *The people v Nyambe Musakanya*, (2012) HC 74, the accused elected to remain silent. The court was of the view that there is no obligation on an accused person to give evidence. Where an accused elects not to give evidence, the court should not speculate as to possible explanations for the event in question. The courts duty is only to draw the proper inference from the evidence it has before it. The court cannot therefore draw adverse inferences from an accused person who invokes his right to remain silent. The courts duty is only to draw inferences from the evidence presented before it.

In the American case of *Carter v. Kentucky*, 101 S. Ct. 1112 (1981).the Supreme Court held that a criminal defendant who remains silent at trial has a right to a jury instruction that his silence is not evidence of his guilt. Invoking his Fifth Amendment right against compulsory self incrimination, Carter elected not to take the stand at his state criminal trial. Carter requested a jury instruction that the defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.

The trial judge refused Carter's request, on the authority of the applicable Kentucky statute. The Supreme Court held that the trial court's refusal to issue this no "adverse inference" instruction

was reversible error. The Court decided that, upon request, a defendant in a state criminal trial has a right under the Fifth Amendment to a jury instruction on the meaning of the privilege against compulsory self-incrimination.¹²

This is different from the *Zambian* context where the right to a “no adverse inference” is not stringently adhered to as is the case in America. This is illustrated by the case of *Tobias Kambenja v the people*, (2014) S.C 22. In this case, the accused had carnal knowledge of a girl under the age of 16 years. The prosecution relied on evidence from five witnesses. The trial court found that in the midst of all these allegations, the appellant had opted to remain silent which was an indication that what the witnesses told the court was truthful. On that basis, the appellant was convicted as charged. Counsel for the appellant contended that the court erred in law and fact in making an adverse finding against the appellant on account of his election to employ his right to remain silent. The Supreme Court held:

We find this argument to be peripheral and of no consequence in the face of the overwhelming evidence and corroboration before the trial court and now this court. We see the trial courts comment on the appellant’s silence no more than saying that the appellant did not challenge the evidence of the witnesses to the effect that they recognized the appellant.

This quotation means that under the *Zambian* context, if there is overwhelming evidence against an accused person, the ‘no adverse inference’ rule is of no relevance. This is vital as it takes into account the public interest of convicting a guilty person.

The ruling is similar to the Australian case of *Weissensteiner v R*. (1993) HCA 65. It was held that the judge may direct the jury to draw an adverse inference from the accused person’s

¹² Sharon R. Gromer, “Fifth Amendment- The Right to a no Adverse Inference Jury Instruction”, *Journal of Criminal law and Criminology* 72, No 4 (1981): 1308 .

silence. This applies to a case where there are things that the accused is reasonably expected to know and would disclose if they were consistent with his or her innocence.¹³ It is for this reason that Mason CJ, Deane and Dawson JJ stated that drawing an adverse inference is not to deny the right to remain silent. It is merely to recognize that the jury or judge cannot be required to shut their eyes to the consequences of exercising the right.

The rule against the drawing of an adverse inference should not be as stringent as it is in America. This is because the interests of society to convict a guilty person have to be taken into account. Thus the drawing of an adverse inference should be allowed in circumstances where the evidence admitted overwhelmingly points to the accused person's guilt but he elects to remain silent.

5.4 CONCLUSION

This chapter has analyzed the implications of the right to remain silent at trial. It has analyzed the assertions by various authors on the on-going debate on the right to remain silent. These assertions were applied to the Zambian context. Other scholars were of the view that the right to remain silent advances justice while others were of the view that it suppresses justice. While both ends of the debate advance valid points, this chapter established that the right to remain silent is necessary in advancing the administration of justice in Zambia.

This is due to the fact that the right to remain silent takes the accused person and society into consideration in its quest for justice. It fairly balances the rights of the accused person and the interests of society. It protects the accused person from incriminating himself whilst taking into

¹³ Sharon R. Gromer, "Fifth Amendment- The Right to a no Adverse Inference Jury Instruction", *Journal of Criminal Law and Criminology* 72, No 4 (1981): 1308.

account society's need to convict offenders. The right to remain silent advances justice in Zambia and it is expressly provided for in the constitution. Thus the legal framework of the right to remain silent at the trial stage is adequate in advancing the administration of justice in Zambia.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter aims to draw a conclusion to the research based on the findings in each chapter. The chapter proceeds to offer recommendations in relation to the research. These recommendations pertain to how the legal framework on the right to remain silent can be reformed to advance the administration of justice in Zambia.

6.2 CONCLUSIONS

Chapter two established that the right to remain silent means that a suspect cannot be compelled to speak by police officers. It also means that an accused person cannot be compelled to testify at trial. It was established in this chapter that the right to remain silent emerged to mitigate the harshness of the common law system. This is due to the fact that it encouraged inhumane ways of extracting evidence. Thus the right to remain silent emerged to protect the rights of suspects and accused persons.

Chapter three analyzed the legal framework of the right to remain silent at both the trial and the pre-trial stage. The right to remain silent at trial is expressly provided for in the constitution. Pertaining to a suspect's right to remain silent while he or she is in police custody, it was found that this right is not expressly provided for in the Zambian constitution. Furthermore, there is lack of legislation that states that a suspect has to be cautioned on his right to remain silent at the police station. Reliance is only placed on the judges rules that are merely rules of practice.

However, this does not mean that the right to remain silent is nonexistent at the pre-trial stage. The constitution provides for the right to remain silent at the pre-trial stage, albeit implicitly.

Chapter four established that a suspect's right to remain silent is necessary to protect suspects but it is not expressly provided for in the constitution. This led to the conclusion that the legal framework on the right to remain silent at the pre-trial stage is not adequate in advancing the administration of justice in Zambia. Chapter five analyzed the right to remain silent at the trial stage. The right to remain silent at trial in Zambia is expressly provided for in the Zambian Constitution; it is fairly balanced and is playing an important role as promoter of justice. This led to the conclusion that the legal framework on the right to remain silent at the trial stage is adequate in advancing the administration of justice in Zambia.

6.3 RECOMMENDATIONS

The right to remain silent at the trial stage is fairly balanced thus it is playing its role as a promoter of justice. The legal framework on the right to remain silent at trial is adequate in advancing the administration of justice in Zambia. Thus there is no need for reform in this area.

However, the legal framework of the right to remain silent at the pre-trial stage is not adequate to advance the administration of justice in Zambia. The suspect's right to remain silent has to be respected in order to ensure that police officers do not use inhumane ways of extracting evidence. However it has been established that police officers do not strictly adhere to the suspect's right to remain silent. This hinders the administration of justice in Zambia.

Police officers would respect the right to remain silent if evidence obtained in breach of the judges' rules was automatically deemed inadmissible. Thus there is need to amend the Zambian Constitution so as to expressly state that a suspect who is under police custody has the right to

remain silent. The Criminal Procedure Code should also be amended to include a section that will include the judges' rules so that they acquire the force of law. In such an instance, evidence obtained in breach of the judges' rules would be automatically inadmissible thus protecting a suspect's right to remain silent. This would ensure that police officers in Zambia stringently adhere to the right to remain as much as the American police officers adhere to it. The Police officers should also be trained on the rights of a suspect so that they do not use inhumane ways of extracting evidence thereby compelling the accused person to speak.

The judiciary should also give a strict interpretation of what constitutes police coercion as is done in America. For instance, in the case of *Chambers v Florida* 1940, 309 U.S 227 (1940) the court held that a confession obtained after five days of prolonged questioning amounted to a coerced confession.

In *Ashcraft v Tennessee* 322 U.S. 143 (1944) the suspect had been interrogated for thirty six hours under electric lights. This amounted to coercion. In *Haynes v Washington*, 373 U.S. 503 (1963), the court held that an unfair and inherently coercive context included a prolonged interrogation and this rendered a confession inadmissible.

One would argue that Zambia is a young nation and is still developing thus it cannot be compared to developed nations such as America. By hinging on that argument, we are bound not to develop at all because that is an excuse we will always give for our inefficiencies.

It should also be recognized that suspects and accused persons are vulnerable to have their rights violated thus the right to remain silent is vital in ensuring that their rights are protected. Gerard Hogan, Chairman of the Balance in the Criminal Law Review Group society in Ireland states:

We must not ignore the fact that the majority of prisoners are drawn from the more disadvantaged sections of the community and that any balanced response to the problems of crime must also have regard to this factor. A large number of prisoners are the product of dysfunctional families and have experienced significant educational, housing and other social disadvantages. Many of them have only ever encountered hardship, disadvantage and failure in their lives and they have often fallen prey to the evils of alcohol and drug addiction. While not for a moment excusing their crimes, the fact remains that some at least of the prison community can justly say that they too are also in one sense the victims of society. The principle that we must hate the sin, but love the sinner is at least two thousand years old, but yet I fear that as a society we have sometimes lost sight of this fact.¹

This quotation means that the right to remain silent should be advanced as suspects and accused persons are to a certain extent victims as well. They need the support of society to change. Thus the right to remain silent at both the pre-trial and trial stage should be respected to achieve this aim.

¹ Tánaiste and Minister for Justice, Equality and Law Reform, Balance in the Criminal Law Review Group Final Report, (Dublin Balance in the Criminal Law Review Group, 2007), 21.

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