

**A CRITICAL ANALYSIS OF S.309 OF THE PENAL CODE, CHAPTER 87 OF
THE LAWS OF ZAMBIA: THE OBTAINING OF GOODS OR PECUNIARY
ADVANTAGE BY FALSE PRETENCES. THE REALITY AND EFFICACY OF
THE SAID PROVISION IN ZAMBIA.**

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RECOMMENDATION FOR EXAMINATION

I _____ recommend that the obligatory Essay prepared under my supervision by Suwilanji Kasese of Computer Number 99543915 entitled:

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Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the requirements governing OBLIGATORY ESSAYS

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Signature: _____

DEDICATION

DECLARATION

This paper is dedicated to the memory of my late father, Mr. Kashe and my baby sister, Ms. Lukanyo Virginia Kashe. I wish you were here to see who we have become. It is also dedicated to my mother, Christine Jane Samulani Nambata Kashe without whom we as a family, could not have been where we are. To my brother, Kalimba, Mulambo and

I KASHE SUNDANI do hereby declare that this dissertation represents my own original work, and it has not been submitted for a degree at the University of Zambia or any other university.

Signature: 

Date: 20/04/2011

DEDICATION.

This paper is dedicated to the memory of my late father, Wilfred Chola Kasese and my baby sister Mwizukanji Virginia Kasese. I wish you were here to see what and who we have become. It is also dedicated to my mother, Christine Janet Namufune Namposya Kasese without whom, we as a family, could not have been where we are. To my brothers, Kaimba, Mulambi and Chipambeso, and to my sister Nkatya Kasese for the never ending and unwavering support. This work is dedicated to the family of Wilfred Chola Kasese.

IV

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ABSTRACT.

For a long time now, s.309 of the Penal Code has been subject to abuse by both the police and members of the public who use it to recover goods or money from debtors. They use this provision on the basis that an accused has procured goods from a complainant by false pretences when in fact the subject matter of the complaint is money borrowed or goods obtained on credit which entails that s.309 ought not to apply. This state of affairs has been perpetrated by way of compromising law enforcement officers, that is to say the police, who usually get a percentage from the complainant upon recovery of the debt or money. In this endeavour, the police will usually detain persons falsely accused of this offence in a bid to expedite the repayment of money borrowed or pay for goods obtained on credit. This is against the purpose for which the police was created, that is, to protect property and enforce the law impartially and in the process safeguard the interests of individuals in the wider society.

The aim of this paper therefore is to examine the reasons why the police abuse this provision and why it is so easy for them to abuse the provision without the officers facing any recriminations from either the courts or disciplinary measures from the police structure itself. The paper also aims to discuss how by detaining complainants on false reasons or tramped up charges, the police are in the process committing the civil and criminal offence of false imprisonment. Specific questions were tailored to gauge the conditions under which the police operate for example the low remuneration levels and conditions of service.

ABBREVIATIONS.

CID: Criminal Investigation Department.

OB: Occurrence Book.

ZP: Zambia Police Service.

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The English Larceny Act 1916.

The English Theft Acts 1968 and 1978.

The English Fraud Act, 2006

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Chapter One.

1.0. General Introduction.

Liability is a very crucial concept in law because it happens to be the bond of necessity that exists between the wrong-doer and the remedy of the wrong. This bond emanates from the supreme will of the state that exercises its authority on the un-conforming member of the society by resorting to the use of force to redress the wrong committed. In legal theory, a crime is any act or omission prohibited by law that is enacted for the protection of the public and the violation of which is prosecuted by the state in a judicial proceeding in its own name.¹ A crime is a wrong or injury to the public as distinguished from a wrong to an individual which, in its turn is a civil wrong. Crimes at common law were divided or classified according to the nature of the act committed.

However, crime and the civil law do overlap. Many torts are also crimes for example, sometimes with the same names and similar elements. And sometimes a civil action is deduced from the existence of a statute creating a criminal offence.² Thus the more serious traditional criminal offences are likely to amount to torts, provided there is a victim who has suffered damages. Generally, criminal proceedings are brought by the state, the objective of which is the imposition of some sanction in the nature of punishment.³ Nevertheless, there are functional overlaps between the two categories. Indeed, incidents of contracts in relation to the criminal law are in no tangible way connected in terms of the nature, remedies and punishments.

In the recent past s.309 of the Penal Code has been subject to abuse by both the police and members of the public who use it to recover goods or money from debtors. They use this provision on the basis that an accused has procured goods from a complainant by false pretences when in fact the subject matter of the complaint is money borrowed or goods obtained on credit which entails that s.309 ought not to apply. This state of affairs has been perpetrated by way of compromising law enforcement officers, that is to say the police, who usually get a percentage from the complainant upon recovery of the debt or money.

¹ J. M. Nyasani. .Legal Philosophy: Jurisprudence. 2001. 6th ed. Consolata Institute of Philosophy. Nairobi. p.21

²R. Winfield et al. Winfield's Jolowicz on Tort. 2006. Sweet and Maxwell. London. p.6

³ R Winfield et al. Winfield's Jolowicz on Tort. 2006. p6.

The Basic Elements of a Crime.

The basic elements of a crime are the *indicia* or the *prima facie* case of a crime to establish that the crime has indeed been completed in its *corpus delicti*.⁴ A *corpus delicti* of a crime which is overshadowed by the specificity of the injury and the accused person's criminality is finally complete and indisputable when the following crucial elements are present: a criminal state of mind or the *mens rea*, the commission of the prohibited act or the *actus reus*, and causation, that is, establishing that the accused person's criminal act was indeed the legal cause of the injuries for which the state is seeking to impose penal sanctions.⁵

In general, we can safely assert that there is no true crime, at common law or statutory, unless there is a criminal state of mind to bear out the Latin maxim: "*actus non facit reum nisi sit rea*". The maxim means that the act alone does not make the doer of it guilty unless the state of mind is also criminal. *Actus reus* or the culpable act must always be attributable to the *mens rea*.

1.1. Due Process of the Law.

The Constitution of Zambia, under Part III provides for the protection of fundamental rights and liberties. Pursuant to these provisions, the Constitution guarantees the protection of personal liberty under Article 13(1), where it states that a person shall not be deprived of his personal liberty except as may be authorised by law. Article 18(1) of the Constitution of Zambia provides that if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. It further provides under the same article in para. (2) (a) that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty and further that every person shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged.⁶

⁴ The Latin phrase translates as "the corpus or the substance or even the content of the crime."

⁵ J. M. Nyasani. *Legal Philosophy: Jurisprudence*. 2001. p.47.

⁶ The Constitution of Zambia, Cap 1 of the Laws of Zambia.

Therefore, the Constitution of Zambia⁷ provides that no person shall be deprived of life, liberty or property without due process of law. Due process is not a simple concept to define or even to elaborate and adumbrate in precise and concise terms since its use may sometimes touch on substantive criminal parameters over and above the procedural province of the law.⁸ Essentially and intrinsically, it is both regulatory and prohibitive in nature since it prescribes a course of conduct by the legislature and at the same time limits the exercise of the powers of the law enforcement agencies vis-a-vis some conduct.⁹

1.2. Statement of the Problem.

Section 309 provides clear guidance on what constitutes the offence of obtaining money or goods by false pretences. However, the police misconstrue the provisions in the section and end up detaining persons accused of this offence in order to hasten the process of an accused person repaying back money to a complainant. Certain officers will go to any length to secure such a repayment, including the detention of an accused on false charges of obtaining money by false pretences. This in itself amounts to false imprisonment.

1.3. The Objective of the Study.

The object of the study is to analyse why the Police Service in Zambia use s.309 of the Penal Code to help complainants to recover money or goods owed to them by people accused of having obtained this property by false pretences. The paper intends to examine the reasons as to why it is so easy for the police to utilise this provision to detain accused persons and why people falsely imprisoned by the police do not seek judicial or administrative redress for their treatment at the hands of such corrupt officers. The paper will ask the question: Should s.309 be amend or repealed or consolidated into one Act of Fraud as in the United Kingdom?

1.4. Specific Research Questions.

- a. Is there an abuse of s.309 by the police?
- b. Why is s.309 of the Penal Code abused?

⁷ This is also provided for in almost all Constitutions of the world.

⁸ J. M. Nyasani. *Legal Philosophy: Jurisprudence*. 2001. p.95.

⁹ J. M. Nyasani. *Legal Philosophy: Jurisprudence*. 2001. p95.

- c. Are the levels of remuneration in part to blame for the abuse the s.309?
- d. Are the levels of training adequate for the police to operate in a modern environment?
- e. Are the administrative and judicial controls effective in keeping the police in check and not abuse their extensive powers of arrest?

1.5. Significance of the Study.

The significance of the study lies in the fact that the police in Zambia, in a bid to help complainants who have money or goods reposed in other persons connive with members of the public who may be having such difficulties in being paid or recovering their money or goods, usually from fellow business persons, will use the provision of s.309. The result is that the provisions of s. 309 are abused to an extent that persons accused in such a manner are usually detained in order for them to realise the gravity of their situation, and in this way the accused persons are forced to find money repay to the complainant with police officers in most instances being entitled to a percentage of the money recovered using their legitimate powers of arrest in a corrupt and illegal manner. The study, thus, aims to discover why this provision is so blatantly abused by the police and why it has not been checked by anyone, including the judiciary.

1.6. Chapter Layout.

Chapter One .

This chapter discusses the concept of theft in general and the offence obtaining money or goods in particular. The chapter also discusses false imprisonment which is a serious consequence of the abuse of the said penal provision by the police.

Chapter Two.

Chapter two will look at elements that constitute the offence of obtaining goods and money by false pretences and the defences available to an accused. The chapter will thus analyse the concepts of the *mens rea* and *actus reus* in relation to the said offences of the penal code. The chapter will also examine the existing penal provisions and their weaknesses. This chapter will also make a comparison between the state of this law in Zambia and in the United Kingdom.

Chapter Three.

This chapter discusses the way the Zambian public has responded to the abuse of said penal provision. The chapter will examine the factors that have led to the abuse of s.309, and will also look at factors that lead persons to opt to use the police in their attempts to recover their money. In particular the chapter will focus on the resultant imprisonment of persons accused of breaching s. 309 of the Penal Code.

Chapter Four.

The chapter will provide a discussion of the questionnaires administered to officers of the Fraud section in the police. The paper will also focus on the scope and level of training police officers receive in relation to the investigation of fraud cases. The chapter will then provide a discussion of the findings of the research paper.

Chapter Five.

The chapter will look at the alternatives open to people to recover either their money or goods without resort to the police system. For example, an option available to a complainant would be to take an accused to the Small Claims Court as most of these transactions are in the realm of the business domain. However, the paper will not only be restricted to the area of business transactions, but will look at the abuse of these provisions in general. This chapter will provide some recommendations on how to remedy the abuse of the said provision and measures intended to dissuade complainants from resorting to reporting matters, which might be purely contractual, to the police where they need to recover the money, debts or goods from people. The chapter will then give a conclusion to the paper.

1.7. Theft in General.

In Zambia, offences against property are dealt with under the Penal Code and the provisions of other Acts of Parliament. The major offence against property is theft¹⁰ or stealing¹¹. These terms are used differently from the old usage under the common

¹⁰ s.265 of the Penal Code. Cap 87 of the Law of Zambia.

¹¹ S.E. Kulusika. Criminal Law in Zambia. 2006. The University of Zambia Press. Lusaka. p.578.

law offence of larceny, although constructive taking is still being employed by the courts in cases involving trick or cheating by trick.¹²

The offence of theft is concerned with fraudulently taking of another person's property without claim of right and with the intention of permanent deprivation of the other person of his property or the right in it. The term 'fraudulently' in s.265 is intended to add something to the words 'without claim of right'; it means that the taking must be intentional and without mistake and with knowledge that the property taken is that of another.¹³ Property which is the subject of theft or stealing is supposed to be a thing capable of being stolen.

Section 265 of the Penal Code provides a concise definition of the offence of theft moving a little away from the common law offence of larceny. But it keeps the law in Zambia under the shadow of the common law. The section provides that a person who fraudulently takes or fraudulently converts to the use of any other person anything capable of being stolen is said to steal that thing.¹⁴

1.8. Obtaining Goods by False Pretences.

The Penal Code Chapter 87 of the Law of Zambia provides from s.308 to s. 309 and s.309A for the offence of false pretences. It provides:

“308. Any representation made by words, writing or conduct, of a matter of fact or of law, either past or present, including a representation as to the present intentions of the person making the representation or of any other person, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.

309. Any person who, by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.

309A. (1) Any person who, by any false pretence, dishonestly obtains for himself or another any pecuniary advantage, is guilty of a misdemeanour and is liable to imprisonment for five years.”

According to Kulusika,¹⁵ the Penal Code creates several offences of obtaining something by false pretences.¹⁶ In the case of *Sinyinza v The People*,¹⁷ false pretence was stated

¹² *R. v. Chungu*(1954) 5NRLR 681.

¹³ S.E. Kulusika . Text, Materials and Cases in Criminal Law in Zambia. 2006. p578

¹⁴ S.E. Kulusika . Text, Materials and Cases in Criminal Law in Zambia. 2006.581.

¹⁵ S.E. Kulusika. Text, Materials and Cases in Criminal Law in Zambia. 2006. p.588

¹⁶ Kulusika proceeds and lists five types of such offences which include obtaining execution of a security by false pretences under s. 310 and obtaining credit or delivery of any charge on property under s.312, in addition to the two types of pretences the object of which are the discussion of this paper.

to be “ any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact and which the person making it knows to be false or does not believe to be true is a false pretence.” A false pretence according to the law must be of a matter of fact which is either past or present.

Section 309 enacts that for an accused person to be found guilty of obtaining anything capable of being stolen by false pretences and with intent to defraud, his statement must operate on the victim’s mind, or must induce the victim, so as to deceive him, and this must cause the victim to hand over the property to the accused person, or to any other person.¹⁸ Therefore s.309 requires the prosecution to establish false pretence in addition to intent to defraud and the necessary causal link between the obtaining and the false pretence and the intent to defraud.

In the case of *Patterson Ngoma v The People*,¹⁹ Baron DCJ stated that “it is an essential ingredient for a conviction of obtaining by false pretences that the victim should be actually deceived by the false pretence.” And in the instant case, it was found as a matter of fact that a Bank Manager on whom the pretence was to be perpetrated was not so deceived.

The definition of obtaining by false pretences excludes any representations as to the future.²⁰ In *John Crawford Mashilipa v The People*,²¹ the accused pleaded guilty before a magistrate to obtaining money by false pretences. The facts were that the appellant had with intent to defraud, money from the complainant by falsely pretending that he was selling empty grain bags, when in fact he was not. The complainant agreed to buy grain bags from the accused who promised to deliver the bags two days after payment had been made to him by the complainant. Thereafter, the accused was unable to supply the bags or return the money.

On appeal, the accused argued that the facts of the case did not disclose the offence charged, that is, the offence of obtaining money by false pretences, contrary to section

¹⁷ (1972) ZR 218 (HC). The definition is as provided for in the Penal Code.

¹⁸ S.E. Kulusika. Text, Materials and Cases in Criminal Law in Zambia. 2006. p590.

¹⁹ (1978) ZR 369 (SC)

²⁰ A retrial was in ordered in *Sinyanza v the People* (1972)ZR (218) in which the representation was held not to pertain to an event in the future. This case also furnishes the elements of obtaining by false pretences.

²¹ (1988-1989) ZR 113 (HC)

309 (a) of the Penal Code Cap. 146²² and was sentenced to twelve months imprisonment with hard labour. The appellant was subsequently convicted on his own plea of guilty and in his appeal contested both the conviction and the sentence. The High Court held that the facts in the matter did not in any way disclose the offence charged.

The court stated that what was disclosed was an ordinary contract between the appellant and the complainant wherein the appellant was not able to fulfil his contractual promise. No fraudulent intent could be inferred from the facts of this case in this instance. The court held that the facts of the case revealed that the transaction between the appellant and the complainant was a promise by the appellant to do some act in the future which did not amount to a false pretence. The court further stated that the court below misdirected itself in that the facts disclosed no offence of obtaining money by false pretences, but an ordinary contractual transaction on which the complainant could sue the appellant for breach of contract. Thus, the conviction was quashed and sentence set aside.

1.9. Obtaining Pecuniary Advantage by False Pretences.

The ordinary meaning of ‘pecuniary advantage’ is some kind of monetary advantage or benefit. If this is the meaning of the phrase, then it can be concluded that s.309A covers almost all sorts of cases. But this is not the case. Under the section it is not necessary to prove that the accused did actually obtain a pecuniary advantage. It is also not a requirement that the victim so deceived should have suffered a financial loss [*different from the English Acts*].

1.10. The Law on the Offence of Obtaining Goods or Money by False Pretences.

Most offences involving false pretences have several concepts common to most, if not all of them. It must be noted at this juncture that under the English Theft Act, 1968 (and in subsequent amendments of 1978, 1996 et al) the phrase ‘false pretence’ has been replaced by a single word ‘deception’.²³ Therefore, the law in

²² Now Chapter 87 of the Laws of Zambia.

²³ S.E. Kulusika. Text, Materials and Cases in Criminal Law in Zambia. 2006. p.588. The whole section which contains offences of deception in the Theft Acts of 1968 and 1978 have been repealed and replaced by the Fraud Act of 2006.

England is phrased as ‘obtaining property by deception’ instead of ‘obtaining property by false pretence’ as it is under the *Zambian Penal Code*.

In England, the distinction between larceny and false pretences can be stated clearly enough, but it has often happened in the past that the evidence given at trial was somewhat different from what was expected, so that it might appear, for example that the prosecutor, where larceny was charged, had really been induced to give his consent to passing the ownership of the goods charged to have been stolen.²⁴ It is important to note that in every such case as is envisaged by the above provisions²⁵ the evidence must, at the trial, clearly establish which of the two crimes has in fact been committed.²⁶ If the indictment is for attempted larceny the accused cannot, under s.44 (3) be convicted of attempting to obtain by false pretences.

In Zambia, a charge of theft can be substituted for a charge of obtaining by false pretence and vice versa. In the case of *Ngoma v The People*,²⁷ the appellant, being a police officer, stole K54.64n, the property of the Government. However, on appeal to the High Court, the State Advocate argued that the facts alleged against the appellant did not constitute theft, but amounted only to obtaining money by false pretences. The learned appellate judge thereupon quashed the conviction for theft and substituted a conviction for the latter offence.

The evidence adduced by the prosecution was that the appellant submitted a false claim as expenses for travelling and lodging while on duty patrol, when in fact the accused never travelled. There was also evidence that the appellant had obtained a cheque for the amount which he falsely claimed and that he had cashed the cheque at a bank. In view of the fact that the Government and the bank voluntarily parted with the money, the offence of theft was not established and a finding that the offence, if any, was one of obtaining money by false pretences was correct. The Supreme Court thereupon dismissed the appeal.

²⁴ In *R. v. Caslin* [1961] 1 WLR 246, a conviction of larceny was quashed and a conviction of false pretences submitted, the objection of futurity being obviated by a special view of the facts.

²⁵ These provisions are provided for by s.16(44) of the Larceny Act of 1916.

²⁶ *R v. Fisher (Grace)* (1926) 19 CR. App. R 166.

²⁷ (1976) ZR 82 (SC)

1.11. Difference between Theft and Obtaining Goods or Money by False Pretences.

In *Wilson Makasa Kapasa v The People*,²⁸ it was found to be clear on the facts that the complainants did not intend to part with the ownership of the two sums of money the accused was charged with having obtained by false pretences. It followed that the taking of the money by the appellant was theft. The trial magistrate found that all there was to it really was stealing through a devised trick which the accused had executed. He found that he could not substitute such an offence for one of theft, and convicted the appellant of the original charge of obtaining money by false pretences. Silungwe CJ, on appeal, however, held that the magistrate in relying on this position had misdirected himself.

According to the learned Chief Justice:

“s. 188 (2) of the Criminal Procedure Code specifically provides that, when a person is charged with obtaining anything capable of being stolen by false pretences with intent to defraud and it is proved that he stole the thing, he may be convicted of the offence of stealing even though he was not charged with it. The charge of false pretences does not apply in this case and it is necessary therefore for this court to set aside the conviction for obtaining money by false pretences and substitute therefor convictions for theft on each count under s. 265 of the Penal Code.”

Thus, apart from the amendment of substituting the charge of theft for that of obtaining money by false pretences, the appeal against conviction was dismissed.

Obtaining by False Pretence as a Misdemeanour.

Crimes at common law were divided or classified according to the nature of the act committed. Depending on the grievousness of the offending act and the severity of the punishment available thereto, crimes can be further divided at common law into felonies or misdemeanour. Common law at its earliest stage held a felony to be that offence that was punishable by forfeiture of the property of the offender and sometimes could entail a death sentence or a harsh punishment often in excess of one year in a maximum prison.

Common law felonies thus included larceny. Misdemeanours at common law, on the other hand, were a whole range of crimes which did not fall under the category of

²⁸ (1980) ZR 114 (SC).

felonies. The controlling factor in determining which category is at stake depends on the kind of punishment meted out to the offender.

For frauds of a personal character, whereby a man was induced by deceit or lies to part with his ownership of money or of other property, the common law provided no criminal punishment; as for example, where a man tricked another by sleight of hand or by some false statement about the material or quality of some article which he was selling.²⁹ Thus, when A was charged with obtaining money from B by falsely stating that C had sent him to receive it for his use,³⁰ Holt CJ said: ‘shall we indict one for making a fool of another?’ and bade the prosecutor to have recourse to a civil action.³¹

1.12. Defences open to an accused.

General defences are open to an accused in the offence of obtaining money or goods by false pretences. The defences to be looked at include where the defendant obtains something from the complainant from the complainant’s consent; mistake and the absence of the *mens rea*.

1.13. False Imprisonment in General.

False imprisonment is stated by the learned authors of Smith and Hogan’s Criminal Law as being a misdemeanour at common law and tort, just like assault and battery. They further say that the civil law remedy is much more invoked and that most cases on this subject are civil actions. False imprisonment is committed where the defendant unlawfully and intentionally or recklessly restrains the plaintiff’s freedom of movement from a particular place. The authors state that “‘imprisonment’ is probably a wider term than, and includes, ‘arrest.’”³²

The imprisonment must be “false”, that is unlawful.³³ The authors of Smith and Hogan’s Criminal Law³⁴ give instances of when there is no false imprisonment, as examples, where a constable³⁵ arrests under a valid warrant or where the constable or other person arrests without warrant under a power provided by the Criminal Act

²⁹ J.W.C. Turner (Ed). Kennny’s Outline of Criminal Law. 1964. At Cambridge University Press. Cambridge. p.339

³⁰ *R. v. Jones* (1703) 2 Ld Raym. 1013

³¹ *Ibid.* p339.

³² B. Smith and J. C. Hogan. Smith and Hogan’s Criminal Law. 1965. 5th ed. Cambridge University Press. London. p385.

³³ Hogan B. and J C Smith. Smith and Hogan’s Criminal Law. 1965. p.385.

³⁴ Hogan B. and J C Smith. Smith and Hogan’s Criminal Law. 1965. p385

³⁵ Police officer of the lowest rank, thus the least powers of arrest.

1967; the Criminal Procedural Code in Zambia. In an action for false imprisonment, it is necessary for the plaintiff to prove nothing but the imprisonment itself; it is then for the defendant to discharge the onus of justifying it.³⁶

1.14. False Imprisonment as a Result of the Abuse of the Provisions of s. 309.

Being motivated by the need to acquire a percentage of the money or goods recovered, the police in many instances are willing to breach the law to satisfy this appetite for extra income. False information and trumped up charges are used to detain persons accused in order for them to realise the gravity of their situation and find the resources to pay the complainant, who in turn will be obliged to part with “something” in return for what the police have done for them. Thus the police are willing to falsely imprison an accused person to achieve their illegal end.

1.15. Alternative Methods for Recovery of Money or Goods.

Other options are available to a complainant who wants to recover his money without having to resort to the criminal law. One example is that the complainant can issue process in a civil court for recovery of his money or goods. Another way in the civil courts would be to seek an order for specific performance or restitution in contract law. This would entail that an accused would not have to be subjected to the rigors of the criminal law. A third option again in civil law could be to take an accused person to the recently established Small Claims Court for the recovery of the money or goods.

1.16. Conclusion.

In conclusion, chapter one has given a general introduction of the paper and has also discussed the layout of the essay and what it intends to analyse. The chapter has provided the background to the whole paper. It has provided the major definitions of the conceptual issues and the relevant penal provisions relating to the offence of obtaining goods, or pecuniary advantage by false pretences.

The next chapter shall look at what constitutes the offence of obtaining goods or pecuniary advantage by false pretences. The chapter will analyse what elements

³⁶ Attorney General v. Kakoma (1975) ZR 212 (SC)

constitutes the *mens rea* and the *actus reas* of these offences. The chapter will also examine the existing provisions and their weakness.

2.0. Chapter Two.

2.1. Background to the offence of Obtaining by False Pretence.

At common law, the three major theft offences are larceny, embezzlement and false pretences. Larceny was a common law offence created by judicial action, while embezzlement and false pretences were statutory offences created by legislative action. Larceny is by far the oldest. The elements of larceny were “well-settled” by the thirteenth century. The only other theft offence then existing was *cheats* which was a misdemeanour.³⁷ *Cheats* was a primitive version of the crime of false pretences and involved obtaining property by the use of false weights or measures.

In 1541, a statute was enacted by Parliament in the United Kingdom that made it a misdemeanour to obtain property by a false token or a counterfeit letter “made in any other man’s name.” This statute did not cover obtaining property by the use false spoken words. The first “modern” false pretence statute was enacted by the English Parliament in 1757. The statute prohibited obtaining “money, goods, wares, or merchandise” by “false pretence.” The first general embezzlement statute was thereafter enacted by Parliament in 1799.³⁸

The broad distinction between obtaining by false pretences and larceny is that in the former the owner intends to part with his property, in the latter he does not. At common law the only remedy originally available for an owner who had been deprived of his goods by fraud was an indictment for the crime of cheating, or a civil action for deceit. These remedies were insufficient to cover all cases where money or other properties had been obtained by false pretences.³⁹

The scope of the offence was enlarged to include practically all false pretences by the Act of 1756, the provisions of which were embodied in the Larceny Act 1861.⁴⁰ Zambia, being a common law jurisdiction literally followed the example set in the British Empire and practically adopted the provisions of the law as they stood in England and implemented virtually the same laws as were then existing in the British empire in the late 19th and early 20th centuries.

³⁷ <http://www.oup.com.uk/orc/lawfalsepretences>. Visited 24/12/2010.

³⁸ La Fave. Criminal Law 3rd ed. 2000. West. London. p.828.

³⁹ <http://www.oup.com.uk/orc/lawfalsepretences>. Visited 24/12/2010.

⁴⁰ La Fave, Criminal Law. 2000. p.829.

2.2. Definition of *mens rea* and *actus reus*⁴¹ and their constitutive elements.

Before a man can be convicted of a crime, it is usually necessary for the prosecution to prove first of all, that a certain state of affairs which is forbidden by the criminal law, has been caused by his conduct and secondly that this conduct was accompanied by a prescribed state of mind. The event or state of affairs is usually called the *actus reus*, and the state of mind or the mental element the *mens rea* of the crime. Both these elements have to be proved beyond reasonable doubt by the prosecution before a conviction can be secured.⁴² The *actus reus* amounts to a crime only when it is accompanied by the appropriate *mens rea*.⁴³

To cause an *actus reus* without the requisite *mens rea* is not a crime and this may be an ordinary, innocent act. In order to establish criminal liability, certain elements of the crime alleged to have been committed must be identified. The first is the conduct which is prohibited. For example, taking and moving another person's property. This conduct is known as the *actus reus*. The second element is known as the *mens rea* which is the state of mind or fault which is required in the definition of the crime in question. *Mens rea* is simply defined as 'the guilty mind.' The third element which may or may not be necessary to ground liability is the absence of a defence. This will be assumed unless some credible factors suggest otherwise.⁴⁴

2.3. *Actus Reus*.

Since the *actus reus* includes all the elements in the definition of the crime except the accused person's mental element, it follows that the *actus reus* is not merely an act.⁴⁵ Much more often, the *actus reus* requires proof of an act or an omission (conduct), and usually it must be proved that the conduct had a particular result. The *actus reus* then is made up, generally but not invariably, of conduct and sometimes its consequences and also of the circumstances in which the conduct takes place (or which constitute the state of affairs) in so far as they are relevant.⁴⁶ Circumstances,

⁴¹ These two phrases are derived from the Latin maxim: *actus non facit reum mens sit rea*; which translates as 'there cannot be such a thing as legal guilt where there is no moral guilt'.

⁴² B. Smith and J.C. Hogan. *Smith and Hogan's Criminal Law*. 1965. p.29.

⁴³ B. Smith and J.C. Hogan. *Smith and Hogan's Criminal Law* p.30.

⁴⁴ S.E. Kulusika. *Text, Cases and Materials on Criminal Law in Zambia*. 2006. p.33.

⁴⁵ S.E. Kulusika. *Text, Cases and Materials on Criminal Law in Zambia*. 2006. p.33.

⁴⁶ B. Smith and J.C. Hogan. *Smith and Hogan's Criminal Law*. 1965. p.32.

like consequences, are relevant in so far as they are included in the definition of the crime.⁴⁷

It is this prohibited conduct which in criminal law is known as *actus reus*. It is defined as whatever act or commission or state of affairs as laid down in the definition of the particular crime charged, in addition to any surrounding circumstances and any consequences of the act or omission as the definition of that particular crime requires.⁴⁸ The basic element of the *actus reus* is the accused person's conduct.⁴⁹ However, as will be pointed out later in this paper, the offence of obtaining by false pretence is not necessarily a 'conduct crime' but rather a 'result crime.'⁵⁰

2.4. *Mens Rea*.

Mens rea is whatever state of the accused person must be proved to have as required by the definition of the offence charged.⁵¹ It is also used to describe the fault elements such as negligence and objective recklessness which do not depend on the state of mind of X.⁵² The fundamental principle of *mens rea* states that an accused person should be held criminally liable for events or consequences which he intended or knowingly risked.⁵³ He should also be criminally liable, if he was aware of the possible consequences of his conduct. The principle of *mens rea* also covers the belief principle where the defendant acts in a certain way with knowledge of certain facts.⁵⁴ As with *actus reus*, *mens rea* also differs from crime to crime.⁵⁵ Invariably, there are also different definitions of *mens rea*.

2.5. The Definition of False Pretences and Related Conceptual Definitions.

The expression '**false pretence**' is defined in s.308 of the Penal Code in Zambia.⁵⁶ There are several elements of false pretences which must be proved if the prosecution is to succeed in securing a conviction of obtaining something by false pretences.⁵⁷ The definition also stresses the importance of a matter of fact or of law. In other words, the

⁴⁷ B. Smith and J.C. Hogan. Smith and Hogan's Criminal Law. 1965. p.32.

⁴⁸ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.34.

⁴⁹ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.34.

⁵⁰ R v Royle (1971) 56 Cri. App Rep 131

⁵¹ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.52.

⁵² S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.52.

⁵³ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.52.

⁵⁴ B. Smith and J.C. Hogan. Smith and Hogan's Criminal Law. 1965. p.53.

⁵⁵ B. Smith and J.C. Hogan. Smith and Hogan's Criminal Law. 1965. p.52

⁵⁶ Penal Code Cap 87 of the Laws of Zambia.

⁵⁷ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.589.

false representation must be as to an existing fact.⁵⁸ The definition also contains the phrase:

“a representation as to the present intentions of the person making the representation or of any other persons.”

In the United Kingdom, a similar provision is enacted by s.15 (4) of the Theft Act 1978.

The deception may take the form of either words or conduct. Usually the words or conduct will involve an express assertion of a fact which is untrue, but sometimes the words or conduct of the defendant may be intended to imply certain facts though there is no express assertion of those facts.⁵⁹ Conduct covers a very wide range of activities, including showing a false identity or wearing a uniform. Where the conduct of the defendant is relied on, there is an implied representation through that conduct. For example, in *R. v Harris*,⁶⁰ it was held that booking in at a hotel implied an intention to pay.

The above case can be contrasted with the old case of *R. v Barnard*,⁶¹ where the defendant, knowing that it was the practice for Oxford shops to extend credit to students, obtained goods on credit by stating that he was a student. The court held, *obiter*, that he would have been guilty even if he had said nothing. The wearing of the cap and gown of the Oxford colours, was itself a false pretence. Bollard, B., said that even if nothing had passed in words, the jury might find pretence in the fact that the defendant wore a cap and gown of Oxford University.⁶²

In the English case of *Director of Public Prosecution v Ray*,⁶³ the accused went to a restaurant with a group of people to have a meal. By ordering a meal, he implied that he had money to pay for it. The court held that there was a continuing false pretence as to the accused person's intentions. The waiter would not have taken the order if he had known that the accused person did not intend to pay. When the waiter left the room, the accused person's false pretence was present. He failed to rebut the

⁵⁸ <http://www.oup.com.uk/orc/lawfalsepretences>. Visited 24/12/2010. Reference is made to *John Crawford Mashilipa v. The People*. (1988-1989)ZR 113 (HC).

⁵⁹ B. Smith and J.C. Hogan. *Smith and Hogan's Criminal Law*. 1965. p.508.

⁶⁰ (1975) 62 CRim. App. R 28, CA.

⁶¹ (1837) 7Car & P 784.

⁶² B. Smith and J.C. Hogan. *Smith and Hogan's Criminal Law*. 1965.p.508.

⁶³ (1974) AC 370

representation which amounted to a false pretence.⁶⁴ In the same said case, Lord Reid approved of a definition of deception given in the case of *Re London and Globe Finance Corporation Ltd*,⁶⁵ where it was said:

“to deceive is to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false.”

False pretence does not need to be planned or made deliberately. This is so because a false pretence at the moment of need will suffice.⁶⁶ Any deception has to be made deliberately or recklessly. A deliberate deception is where the defendant knows that what he is representing is false. To decide whether a deception has been made recklessly involves a subjective test;⁶⁷ the defendant must be aware that the representation may be false.⁶⁸ If the defendant believes that what he is saying is true then this is not a reckless deception. This is so even if the defendant’s belief is unreasonable, provided it is what the defendant genuinely believes.⁶⁹

2.6. The Old Law in the United Kingdom; some problems still evident in the Zambian Act.

False pretences as a concept in the criminal law are no longer used in English law.⁷⁰ The modern concept is a deception and it is used as the common basis of the *actus reus* in the deception offences under the Theft Acts 1968 and 1978. The Fraud Act 2006 repealed these latter two Acts and replaced deception offences with other offences. In the United Kingdom, the offence of obtaining by false pretences was, until 2006, provided for under s.15 (1) of the Theft Act of 1968.⁷¹ This offence gave rise to many difficulties in its interpretation in England. For example, Edmund Davies LJ in the case of *R v Royle*,⁷² described the section as a ‘judicial nightmare’, and after several recommendations, s. 16(2) (a) was repealed.⁷³ The offence of obtaining a

⁶⁴ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p590.

⁶⁵ [1900-03] All ER Rep 891

⁶⁶ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.590.

⁶⁷ In *R. v. Goldman* [1997] Crim. L R 894 the Court of Appeal affirmed that it had to be a subjective test because otherwise it would be inconsistent with the requirement for dishonesty.

⁶⁸ J. Martin and T. Storey (editors). *Unlocking Criminal Law*. 2007. 2nd ed. At Hodder Education. London. p.504.

⁶⁹ J. Martin and T. Storey. *Unlocking Criminal Law*. 2007. p. 504.

⁷⁰ It used to refer to the means whereby the defendant obtained anything with intent to defraud as a misdemeanour under the larceny Act 1861 as amended by the Larceny Act 1916. Reference here is made to Chapter One where this aspect of the English law on theft is discussed.

⁷¹ The law in United Kingdom has been modified with the introduction of the Fraud Act 2006 which now covers all offences previously covered by the Theft Acts of 1968 and 1978.

⁷² (1971) 56 Cri. App Rep 131 at 136.

⁷³ This was replaced by the offences of obtaining services by deception and evasion of liability by deception.

pecuniary advantage by deception was retained and may be committed in the ways specified in s.16 (2) (b) and (c).

The victim must be deceived. If the accused person does not deceive the complainant, there would be no obtaining by false pretences, and no charge should follow.⁷⁴ In the case of *Sharma v The People*,⁷⁵ Skinner CJ held, when refusing to substitute a conviction for obtaining money by false pretences for that of theft, that the pretence laid in the particulars of the offence was that the appellant falsely pretended that he was *D. Clack*, the payee of a specified cheque, when in fact not. There was no evidence that the appellant either expressly or by conduct held out that he was *D. Clack*. Skinner CJ stated that in order to prove the making of the pretence as laid in the charge, and any variation in substance between the pretence laid and that proved, was fatal.

The defendant may be convicted not only where he knows that what he represents as true is untrue, but also where he represents as true that which, as he is aware, may or may not be true. Clearly, there would be no offence where the defendant represents as true that which he believes to be true but which, as he ought as a reasonable man to have known, is false. Recklessness ordinarily involves a subjective awareness which is absent from negligence and the offence of deception requires dishonesty and negligence is no substitute for dishonesty.⁷⁶ The same test for dishonesty is applied to deception offences as to theft.⁷⁷

The deception must operate on the mind of the plaintiff and cause him to part with the property or confer the pecuniary advantage. The deception need not be addressed personally to the plaintiff. These offences cannot be committed, though there may be an attempt, where the plaintiff is not taken in by the deception even though he does in fact part with the property or confer the advantage. Even where the plaintiff is deceived there can be no offence unless he is caused by it to do or refrain from doing something.

⁷⁴ There would be a possibility of an attempt charge. For example, the on-going case of Mark Mushili and Sydney Mushili (unreported) in the Ndola Magistrate court reported in the Daily Mail of the 4th of November 2010. This can also be illustrated by the case of R. v. Deller (1952) 36 Cr. App. R. 184.

⁷⁵ (1969) ZR 91 (HC).

⁷⁶ R. v. Staines [1975] Crim.LR 651, CA.

⁷⁷ R. Card, Cross and Jones' Criminal Law. 2008. 18th ed. London. This subjective test follows the criteria set out in Ghosh (1982) 2 All ER 1032. This is the so-called *Ghosh Test*.

In this instance, the question to be posed is whether a person in business is reckless in his dealings where he obtains goods or credit to facilitate his business transactions where he knows that the guarantee he gives to the other party is false or is it merely a common mistake in line with the principles of contract and should never be entertained in the realm of the criminal law?

2.7. The Present State of the Law on Obtaining by False Pretences in Zambia.

The law on the offence of obtaining by false pretences in Zambia is contained in sections 309 and 309A of the Penal Code. Section 309 of the Penal Code in effect enacts that for an accused person to be held guilty for obtaining anything capable of being stolen by false pretence and with intent to defraud, his statement must operate on the victim's mind, or must induce the victim so as to deceive him, and this must cause the victim to hand over the property to the accused person or to any other person.⁷⁸ This law has not changed since independence.

Section 309, therefore, requires that the prosecution should establish the false pretence, in addition to the intention to defraud (which can be described as dishonesty) and the necessary causal link between the obtaining and the false pretence and intent to defraud.⁷⁹ Therefore, the framing of the charge or the information sheet is very crucial to securing a conviction.⁸⁰ In Zambia, most officers use this provision by framing the charge in an unclear way so as to manoeuvre around the charge sheet.

The group of offences provided for by the Fraud Act, 2006 enable the criminal law to address problems hitherto posed by developments in technology, commercial transactions and property transfer. In doing so, the Act has simplified the law and provided offences which are flexible enough to meet future developments of the above type. The Fraud Act 2006, under s.1, creates the offence of fraud which has replaced a total of eight deception offences under the Theft Acts 1968 and 1978: obtaining property by deception, obtaining a money transfer by deception, obtaining a pecuniary advantage by deception, procuring the execution of a valuable security by deception, obtaining services by deception, obtaining the remission of an existing liability to make a payment by deception, inducing a creditor to forgo or wait for

⁷⁸ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.590.

⁷⁹ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.590

⁸⁰ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.590.

payment by deception, and obtaining the exemption from or abatement of, a liability to make a payment by deception.⁸¹

According to the learned authors of *Card Cross and Jones' Criminal Law*, the abolition of these offences was welcomed in the United Kingdom since they posed difficult problems in practice. These problems resulted in part from the need to prove a deception.⁸² They also resulted from the need to prove that the deception was an operative cause of the property, pecuniary advantage etcetera, being obtained or induced.⁸³ In addition, the law about deception was criticised on the grounds that there were too many offences and too much overlap, and on the ground that they were over-particularised with the result that some conduct deserving of punishment fell into gaps between offences.⁸⁴ On the basis of this, it is quiet easy to frame a charge in such a way that an accused person will not proceed to court from the police as the charge is usually vague and overlapping.

In the United Kingdom there is one offence of fraud which can be committed in the three ways specified in the Fraud Act 2006, ss. 2 to 4. The offence is a 'conduct crime'⁸⁵; unlike the repealed deception offences under the Theft Acts 1968 and 1978, no consequence is required by to result from the defendant's fraudulent conduct.⁸⁶ The offence of fraud is triable either way and is punishable with a maximum of 10 years' imprisonment on conviction on indictment.⁸⁷

2.8. *Actus reus*.

According to Kulusika,⁸⁸ the constituent elements of obtaining property by false pretence under s. 309 and intent to defraud are that the accused person must obtain a thing capable of being stolen; in other words, property. The property or thing stolen

⁸¹ R. Card. Card, Cross and Jones' Criminal law. 2008. p.500.

⁸² For instance, in *Re, Holmes* [2004] EWHC 2020, [2005] 1 All ER 490 DC, it was stated that a computer or other machine cannot be deceived. Does the law in Zambia still maintain this position in its law regarding the deceiving of machines?

⁸³ R. Card. Card, Cross and Jones' Criminal Law. 2008. p.500.

⁸⁴ R. Card. Card, Cross and Jones. 2008. p.500.

⁸⁵ R. Card. Card, Cross and Jones. 2008. p.500

⁸⁶ R. Card. Card, Cross and Jones. 2008. p.501

⁸⁷ R. Card. Card, Cross and Jones. 2008. p.501.

⁸⁸ R. Card. Card, Cross and Jones. 2008. p591

must belong to another; and the property or thing stolen must be procured by false pretence which must be accompanied by an intention to defraud⁸⁹.

The element of the *actus reus* must be understood as suggesting that an accused person is to be treated as having obtained a thing by false pretence and with intent to defraud if he obtains ownership, possession or control of it.⁹⁰ It is to be noted that anyone of these alternatives will be considered as sufficiently constituting an obtaining in Zambia. This may be taken as meaning that physical control of a thing without ownership will satisfy the requirement of the *actus reus* under first requirement in the preceding paragraph where the accused person must obtain something.⁹¹

S. 309 of the Zambian Penal Code makes use of the words ‘any person’, which would be satisfied where the accused person deceived or induced the victim to deliver goods to a friend. This has similarities to the requirement for the offence under the Fraud Act in the United Kingdom. The accused in this case would have obtained goods on behalf of his friend. Another issue to be considered which is connected with obtaining property by false pretence and intent to defraud is how to determine the place where the obtaining of the property occurs. Such a consideration may involve aspects of civil law regarding acquisition of property which is not supposed to be the concern of the criminal law.⁹²

Under the Fraud Act 2006 of the United Kingdom, the *actus reus* is a simple one: making a false representation (that is, making a representation in the circumstances that it is false). No one is required to be deceived by it or to have acted on it. Indeed, it is irrelevant that the intended recipient is never aware of the representation because. Nothing (in particular, no gain or loss or risk of loss) is required to result from the representation, although doubtless in most cases it will. The offence is complete as soon as the false representation is made with the requisite *mens rea*.⁹³ There is, thus, merit in the claim by Ormerod,⁹⁴ that the offence appears to criminalise lying.

⁸⁹ R. Card. Card, Cross and Jones. 2008. p591.

⁹⁰ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.591.

⁹¹ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.591.

⁹² S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.591

⁹³ R. Card. Card, Cross and Jones. 2008. p.502.

⁹⁴ “The Fraud Act 2006- Criminalising Lying? [2007] Crim LR 193 at 196

By s.2(5) of the Fraud Act, a representation may be regarded for the purposes of s. 2 as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention). As a result of the wording of the Fraud Act in s.2 (1) (absence of a requirement that someone be deceived) and s.2 (5), s.2 can be breached where the false representation is submitted to a computer or other machine, rather than being addressed to a human being.

2.9. *Mens rea*.

The constituent elements of the *mens rea* of obtaining property by false pretence and intent to defraud provided by the Penal Code are set out by Kulusika.⁹⁵ In the first instance, there must be deliberation or recklessness on the part of the accused person with regard to the false pretence and intent to defraud. Secondly, the fraudulence or dishonesty in regard to the obtaining, and thirdly, and the obtaining must be with the intention of permanently depriving the victim of the property.

The *mens rea* required for a breach of s.2 of the Fraud Act under the English criminal law consists of three elements: first of all, the defendant must know that his representation is, or might be, untrue or misleading.⁹⁶ This extends the ambit of the offence. It is similar to the concept of recklessness, but differs from that concept because it does not require that the risk is an unreasonable one to take. Secondly, the defendant must make the false representation dishonestly.⁹⁷ Finally, the defendant must intend, by making the false representation either to make a gain for himself or another, or to cause loss to another or to expose another to risk of loss.

2.10. **Defences Open to an Accused.**

If the defendant raises a defence, then it is for the prosecution to negate that defence. In *Woolmington v The Director of Public Prosecutions*,⁹⁸ the defendant stated that the gun he used to kill his estranged wife had gone off accidentally, thus raising the defence of accident. The prosecution was obliged to disprove this if the defendant was to be found guilty. For all common law defences except insanity, the defendant only

⁹⁵ S.E. Kulusika. Text, Cases and Materials on Criminal Law in Zambia. 2006. p.591.

⁹⁶ Fraud Act s. 2(1) (b).

⁹⁷ Fraud Act s.2 (1) (a)

⁹⁸ 25 Cr. App. R. 72.

has to raise some evidence of the key points of the defence. This can be from evidence given by the defence or by the prosecution.⁹⁹

2.11. Consent to appropriation.

The question to be posed is this: can a defendant appropriate an item when it has been given to him by the owner? This is an area which has caused major problems. Nowhere in the Theft Act in England does it say that the appropriation has to be without the consent of the owner. So what is the position where the owner has allowed the defendant to take something because the owner thought that the defendant was paying for it after some time? Or where the item was hired, but unknown to the owner, the defendant intended to take permanently?¹⁰⁰

In the case of *Edward Fred Malama v. The People*¹⁰¹ the appellant was convicted of two counts, one of which was for obtaining money by false pretences. The appellant did not dispute the fact that he had obtained the loan, but he raised the defence whereby he stated that he intended to repay the money. The court wondered if such an intention was a good defence. The court held that the fact that the appellant intended to repay the money was no defence to the charge as the position is the same as in case of theft that is s.265 (2) (e) of the Penal Code. According to Bruce-Lyle at p338

“the defence of the appellant that the money he received was a loan and that he intended to repay it, is no defence to the charge, the position is the same as in a case of theft.”

2.12. Mistake.

Chomba. J., in *Esme Mary Gallias v The People*,¹⁰² stated that the mental element in crime is usually marked by incorporating any of the following words; ‘maliciously’, ‘fraudulently’, ‘negligently’ or ‘knowingly’ in the statute creating the offence. Section 309 uses the term ‘with intent to defraud.’ Section 11 of the Penal Code provides for the defence of mistake. Its effect in cases in which it applies is that:

⁹⁹ J. Martin and T. Storey. *Unlocking the Criminal Law*. 2007. p22.

¹⁰⁰ B. Smith and J.C. Hogan. *Smith and Hogan’s Criminal Law*. 1965. p.

¹⁰¹ (1978) ZR 336 (SC)

¹⁰² (1971) ZR 41 (HC).

“more often, however, the defence of mistake relates to the absence of *mens rea*, that is to say, the mistake negatives the existence of the particular intent or of that foresight of the consequences which the law requires to render the prisoner guilty.”¹⁰³

The proviso to s.11 ensures that the defence of mistake is not of universal application. It may be excluded expressly or impliedly by the law relevant to the subject under consideration. The mistake that absolves one from guilt has to be both honest and reasonable.¹⁰⁴ The rules are an application of the general principle that the prosecution must prove its case, including the *mens rea* or negligence which the definition of the crime requires.

The ‘defence’ is a denial that the prosecution has proved its case.¹⁰⁵ Where the natural inference from the defendant’s conduct in the particular circumstances is that he intended or foresaw a particular result, the court is likely to convict him if he introduces no testimony that he did not in fact foresee; but the onus of proof remains throughout on the prosecution and, technically, the defendant does not bear even an evidential burden.¹⁰⁶

2.2.0. The Evident Weaknesses in the Zambian provision relating to the Offence of Obtaining by False Pretences and the General Framework of the Law on Theft.

The Act¹⁰⁷ does not take into account the developing nature of technology in relation to false presences. An example can be seen with the way the law on deception in the United Kingdom has been modified to fit in and accommodate new developments in technology. For example, the criminalisation of Automated Teller Machine (ATM) frauds. For obvious reasons, there are many practical problems associated with proving the offence of obtaining goods or pecuniary advantage which has led to the modification of the various sections, first from offences of obtaining, to offences of deception and now to the offence of fraud, which now covers all previous offences relating to deception under English law.

The fact that there is still no consolidated Fraud Act in Zambia is a weak point in our law. The law relating to fraud is scattered in various Acts. People in most cases are

¹⁰³ *Esme Mary Gallias v. The People* at p.48.

¹⁰⁴ *Esme Mary Gallias v. The People* at p.48.

¹⁰⁵ Smith and Hogan’s Criminal Law p188.

¹⁰⁶ Russell on Crime.

¹⁰⁷ The Penal Code Cap187 of the Laws of Zambia.

charged with wrong offences thus ensuring their acquittal due to technicalities, for example, with computer fraud. As has been stated, to secure a conviction on false pretences, the charge sheet or information sheet should be laid out with care or else the prosecution will fail to secure a conviction. It therefore seems that the legislature in Zambia is not changing the statute at the same pace as technology is evolving around the world, meaning that it becomes very difficult to prosecute and secure convictions for crimes committed using advanced technology.

It is feared by this author that with the passing of so much legislation regarding the offence of false pretence, clothed as it is in the language of fraud, there will be an over-particularisation of the offences as it was in the United Kingdom before the advent of the Fraud Act. This is as a result of the lack of harmonisation of the Penal Code with recent Acts passed by Parliament,¹⁰⁸ and the jurisdiction of the various law enforcement agencies whose work or investigations tend to overlap.

This chapter has looked at what constitutes the *actus reus* and *mens rea* of the offence of obtaining something by false pretences. It has also compared the state of the law on false pretences in Zambia and in the United Kingdom. The next chapter discusses the response of the public to the abuse of s.309 and the reasons why the section is abused. It will also discuss the resultant false imprisonment.

¹⁰⁸ For example, the Computer Misuse Act, 2004 and the National Payment System Act, 2007.

Chapter Three.

3.0. The Public's Response to the Section's Abuse and their Understanding of the Provisions.

Masiye James¹⁰⁹ in his obligatory essay, states that a cross-section of members of the public have complained that the performance of the police is below what is expected of them. He states that it has become every day normal in the local news to hear such statements as the police should 'stop giving people fake charges'. The police have been accused, *inter alia*, of failing to respect people's human rights, corrupt practices and alleged incompetence in the handling of cases. According to Masiye, factors such as inadequate accommodation, poor salaries and other conditions of services coupled with other inadequacies have a negative effect on the police service's effort to offer satisfactory services which most state has led to the police being corrupt.¹¹⁰

The situation in Zambia is such that members of the public prefer to use the police as a means of recovering their goods or money which in most instances involves dealings of a business nature. This has resulted in the police using their powers of arrest to recover such items. In most cases, the complainant usually is in favour of such practices as they stand a chance to derive a benefit. On the reverse, the accused person does not find cause to appreciate such practices as they have to endure, not only the agony of being falsely imprisoned, but also their families have the further burden of finding the money to pay to have their relative released.

One member of the public interviewed¹¹¹, Mr. Kharika Phiri of Kabwe, who had suffered at the hands of these unscrupulous police officers, stated that the police preyed on the ignorance of the detained for three by police after he was accused of having falsely obtained 15 tonnes of scrap metal by his supplier. Asked as to why he had not done anything about the detention, Mr. Phiri stated that when he reported the issue Police Divisional Headquarters he was informed that the offices would be disciplined, but up to now he has not heard of any disciplinary measures being taken against the officers concerned.

¹⁰⁹ J. Masiye. The Zambia Police Service: Do they Perform to the Expectation and Satisfaction of the Public. A Legal Perspective. 2005. At the University of Zambia. Lusaka. p.3.

¹¹⁰ J. Masiye. The Zambia Police Service: Do they Perform to the Expectation and Satisfaction of the Public. A Legal Perspective. 2005. p7.

¹¹¹ Interview with Mr. Kharika Phiri on the 12th of December 2010, a member of the public who had been accused of obtaining property by false pretences and detained for three days.

The Response of the Law and the Courts Toward Fraud Offences.

The attitude of the Zambian law towards the crime of fraud in general, is that it is a misdemeanour; a simple crime whose maximum prison sentence is only three years.¹¹² The spirit of the Zambian government reflected in the Penal Code is that a fraud crime is not a serious offence and by implication it cannot cause alarm. Lukonde¹¹³ poses the question-

“Is it really true that a crime which devastates a country’s economy is not a serious one?”

In the United Kingdom, the opposite is true of the offence of obtaining anything capable of being stolen, which carries a stiffer punishment than the generic offence of theft. The judge or magistrate will look at the nature of the offence, how prevalent the offence is, the number of bills of indictment and the prior criminal record of an accused before court. Thus, the court will usually rely on past precedent, the frequency of the offence occurring and the nature of the offence. However, with so few cases being ‘resolved’ at police station level, the courts are hard-pressed to do this.

3.1. Factors leading to the Abuse of Sections 309 and 309A.

In the opinion of this scholar, it seems evident that the section is abused for the ease with which a complainant can approach the police, make a report over an allegation of another person having made off with their money or goods, which the person does not pay for. It is usually very easy for a police officer to write such particulars in their Occurrence Book and from there to follow up such a matter without the machinery of the law being involved. It is common these days to find officers in the Criminal Investigation Department (CID) moving around with dockets as if these were their personal property.

The Rapid Liberalisation of the Economy.

The liberalisation of the economy in the Third Republic not only opened up the economy, but it also seems to have liberalised the operations of the police as well various others departments of the government. The lack of serious administrative and

¹¹² M. E.Lukonde. *The Investigation of Fraud Cases in Zambia*. 1984/85. University of Zambia Press. Lusaka. p69. In the United Kingdom, the offence of fraud carries more weight than the offence of theft being imprisonment for seven years.

¹¹³ M. E.Lukonde. *The Investigation of Fraud Cases in Zambia*. 1984/85. p.69.

judicial controls has evidently opened up the police service to criminal elements previously vetted before being accepted for employment. Today, due to various factors such as nepotism, graft and a lack of training, re-training and refresher courses being undertaken by the police service, it seems that most officers do not care to carry out the operation of investigations in the proper procedure. Police training at all three Training Centres of the Zambia Police Service inculcate into officers that 80% of what they live on comes from the public.¹¹⁴ They go into the work environment after training with a very strong belief that this is true and thus end up committing wrongs such as the abuse of the provisions of the Penal Code, including the abuse of s.309, in order to obtain this other '80%' from the public.

Major Administrative Concerns.

There are many major administrative concerns within and outside of the police that lead to a serious lack of oversight on the part of the police structure and on the part of the courts which in this instance are meant to oversee the activities of the police, for example the weekly review of the operations of the police such as inspecting their Occurrence Books and visiting their holding cells. The courts cite the lack of financial resources as well as the lack of manpower to oversee police activities. The police also cite lack of manpower as the reason for their ineffective supervision of their officers.¹¹⁵

There are certain officers that abuse Penal provision because of this lack of oversight by their superiors, among other reasons. The Officers- in-Charge of erring officers, through nepotism and favouritism, ensure the protection of these officers from administrative sanctions. According to one senior officer interviewed,¹¹⁶ the low remuneration received by the police also contributes to the general abuse of the Penal Code by police officers. The low pay results in the demoralisation of many officers, including the supervisors who would rather be attending to their personal business than controlling and keeping officers in line. Supervisors in turn will also ask officers for a 'cut' when they catch a thieving officer, instead of disciplining them. In most

¹¹⁴ Stories abound of the Second Republican President FTJ Chiluba, stating that there was no need then of increasing police officers' salaries allegedly because "my boys talk to the public unlike the armed forces who do not interact with the public."

¹¹⁵ E. Simukoko. *The Exemption of Trade Unions from the Zambia Police Service: A Quest for Meaningful Reform*. 2004. At The University of Zambia. Lusaka. p.5-7.

¹¹⁶ Interviewed on the 10th December, 2010.

cases, according to the said senior officer, most supervisors will only react to such abuses when an officer's conduct and misdeeds becomes public knowledge.

Lack of Suitable Alternative Mechanisms for Resolving Disputes.

The expense associated with the court process in Zambia leads many people to abandon any hope of securing a quick and timely rendering of their case such that they rather prefer the '*kangaroo courts*' that are set up by certain corrupt police officers. Through such procedures a complainant can be assured that he or she will recover their money or goods quickly at less of a cost to themselves, even though they will have to part with a portion of such moneys which they will then give the officer facilitating their case. This is not the correct procedure and most people know this including the complainants themselves and the accused persons.

Lack of Implementation of Mechanisms that are already in place etcetera.

The implementation of the already existing provisions also leads to many people resorting to use the police as a means of recovering their goods and money. For example, the Debtors Act and licensed debt collectors are scarcely used in Zambia. Questions may be raised regarding the effectiveness of such Acts and the courts in helping people recover their goods and money without recourse to the criminal law.

Levels of Public Awareness.

With literacy rates among the lowest in the Southern Africa region, it is not surprising that some officers will use the ignorance of the public against them. Most members of the public know for a fact that it is 'mandatory' for them to pay a certain fee for what is referred to in police circles as a 'call-out', when this should not be the case. The levels of education do play a role in how members of the public will respond to summons by the police. Also the expense associated with the court process in Zambia discourages most complainants from pursuing this route. The expedience experienced with using police officers to sort out debts is far cheaper than the court process.

The Incorrect Procedure Used by Some Police Officers.

The police in most instances will first issue a police ‘call-out’¹¹⁷ for any person who is the subject of a complainant’s report. In most cases such complaint is only received verbally and is usually not recorded in a police station’s Occurrence Book or OB. If this is done, the officer handling it will usually move around with such a docket without his Criminal Investigations Officer being aware of such a docket. This ensures that the courts will not query any wrong entries in the Occurrence Book.

What usually happens then is that an accused person is taken to a distant place or a police station on the outskirts of town where he is detained. These stations usually have inadequate transportation back to the place of origin of the accused person. The police will in many instances refuse to grant a police bond to the accused. A person’s relative may not be aware of where the relative is taken and may have to make inquiries with the arresting officer who then communicates to them that such a person has been detained because of a certain sum or goods owing and if they procure this amount their relative will be released.

They will usually falsely state that the accused person has already been formally arrested and will be taken to court and remanded. In most cases, the police will use fabricated dockets which may not even be taken to court for prosecution. The officers will often explain the consequences and repercussions to the accused person of appearing in court. During an interview¹¹⁸ D/const. Kumwenda formerly of the Anti-Fraud Section in Central Province said that in most cases the police will use past lifted finger-prints or will lift the accused person’s finger print in a show of effecting an arrest or from cases which have not been prosecuted due to various technicalities. After such an arrest, in most cases, the accused person is given a police bond and told to look for money to pay back to the complainant or to return the goods obtained.

According to various authorities, such detentions are clearly cases of false imprisonment.¹¹⁹ The question is why do the persons so detained and arrested not file in actions for false imprisonment both by the complainant who causes their detention

¹¹⁷ A trend has emerged of charging for these call outs with the amounts ranging from K10000 to as much as K50000.

¹¹⁸ Interviewed on the 10th December 2010 in Kabwe.

¹¹⁹ *Garner v Cowley* (1971) ZR 50 (HC); *Chuulu v Monarch (Zambia)Ltd.* (1983) ZR 33 (HC). and *Mbanga.* (1979) ZR 234 (HC).

or arrest and the police as the ministerial authority for effecting the false imprisonment, including the individual officers who are responsible for this imprisonment?

3.2.0. The Concept of False Imprisonment.

False imprisonment is a specific crime at common law although its frequent association with assault and battery has tended to obscure this fact. It has, however, been an indictable misdemeanor from the earliest times. Of course, in many cases of arrest and imprisonment, the arresting officer has plainly intimated that he is about to take the person by force, and this is sufficient to constitute assault by the ordinary principles even if the man goes quickly without in fact being touched.¹²⁰ In *Bird v Jones*,¹²¹ Lord Patterson defined false imprisonment as follows:

“[F]alse imprisonment is a restraint on the liberty of the person without cause, either by confinement in prison, stocks house etc., even by forcibly detaining the party in the streets against his will.”

It should be noted that emphasis in such an action is placed on the unlawfulness of the arrest.

3.2.1. Imprisonment.

The imprisonment may consist in confining the plaintiff in a prison¹²² (in remand or simply in police cells), a house,¹²³ even in one's house (or business premises, for example, a market stall), or simply detaining the plaintiff in a public street¹²⁴ or in any other place. It is not necessary that the plaintiff is physically detained. There may be an arrest by words alone, but only if the plaintiff submits. If the plaintiff is not physically detained and does not realise that he is under constraint he is not imprisoned.¹²⁵ If the plaintiff agrees to go to a police station voluntarily, he has not been arrested though the constable would have arrested him if he had refused to go. The distinction between a command, amounting to an imprisonment, and request not doing so, is a difficult one.

¹²⁰ J. W Cecil Turner (ed.). *Kenny's Outlines of Criminal Law*. 1962. At Cambridge University Press. Cambridge. p212-213.

¹²¹ [1845] 7 Q.B. 742.

¹²² *Cobbett v Grey* (1850) 4 Exch 729

¹²³ *Warner v Riddiford* (1858) 4 CB NS 180.

¹²⁴ *Ludlow v. Burgess* [1971] Crim. LR 238.

¹²⁵ *Alderson v. Booth*[1969] 2 QB 216; [1969] 2All ER 271.

Though the older authorities speak of false imprisonment as a species of assault it is quite clear that no assault need be proved.¹²⁶ The restraint need only be momentary. In *Bird v Jones*,¹²⁷ the plaintiff was involved in ‘a struggle during which no momentary detention of his person took place.’ It was decided that it was not an imprisonment wrongfully to prevent the plaintiff from going in a particular direction, if he was free to go in other directions. Coleridge, J., said;

“a prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed: but a boundary it must have.”

Like other crimes, false imprisonment can be committed through an innocent agent. So the defendant is responsible for the *actus reus* if, at his direction or request, a policeman takes the plaintiff into custody,¹²⁸ or signs the charge-sheet when the police have said they will not take responsibility of detaining the plaintiff unless he does; but merely giving information to a constable, in consequence of which he decides to make an arrest has been held not to be actionable, at all events if the defendant is *bona fide*.¹²⁹

3.2.2. Unlawful Restraint.

The imprisonment must be ‘false’, that is, unlawful. However, there are certain exceptions. Since the great majority of cases are civil actions, there is little authority on the nature of the *mens rea* required for false imprisonment. It is clear that an arrest is unlawful and that the arrestor is civilly liable if he does not have reasonable grounds for his belief in circumstances justifying the arrest.¹³⁰ It is submitted that this question in the criminal law ought to be governed by general principles and that the defendant should be liable if he intentionally or recklessly caused an *actus reus*.

In *Mubita Mbanga v The Attorney General*¹³¹ it was stated by Muwo, J., citing the case of *Meering v Grahame-White Aviation Co. Ltd*,¹³² that false imprisonment is possible even if the plaintiff is too ill to move in the absence of restraint. Restraint, therefore, is one of the essentials of the action founded on false imprisonment. In that

¹²⁶ *Grainger v. Hill* (1838) 4 Bing NC 212; *Warner v. Riddiford* (1858) 4 CB NS 180.

¹²⁷ (1845) 7 QB 742.

¹²⁸ *Gosden v. Elphick and Bennett* (1849) 4 Exch. 445.

¹²⁹ B. Smith and J.C. Hogan. *Smith and Hogan’s Criminal Law*. 1965. p384. A comparison can be made with the case of *Claude Samuel Gaynor v. Cyril Robert Cowley* (1971) ZR 50 (HC).

¹³⁰ B. Smith and J.C. Hogan. *Smith and Hogan’s Criminal Law*. 1965. p.388.

¹³¹ (1979) ZR 234 (HC).

¹³² (1919) 122 44 LT 44 MA

case the court went further by stating that the plaintiff need not know that he is being detained “because the other essential is that the plaintiff is not free to go where he likes. The imprisonment is restraint of a man’s liberty.” In the instant case, the fact that the plaintiff accepted to go to the police station, he was at the time under the influence of the police, so he was no longer a free man.

A lawful arrest of course, is no false imprisonment, but like in *Hogg v Ward*,¹³³ police officers were held liable for the arrest of a the plaintiff on a mistaken charge of theft. Where a policeman or a private person arrests another, the general principle is that the person who was arrested must be informed of the true background for his arrest because the policeman is not supposed to be silent as to the reason for the arrest or to give a reason which is not true. If he does any of these things the police officer is guilty of false imprisonment.

These principles were laid down by Viscount Simon in *Christie v Leachinsky*.¹³⁴ In *Re Puta*¹³⁵ it was stated by the learned judge while citing *Christie v Leachinsky*:

“that a police constable or indeed a private person effecting an arrest without warrant would at the time of arrest need to inform a person of the true reason for effecting such arrest.”

In an action for false imprisonment, it seems to be irrelevant whether the report was deliberately false or inadvertently false. In either case, the issue is whether the defendant “made a charge on which it became the duty of the constable to act” or simply “gave information on which the constable acted according to his own judgment.”¹³⁶

In *Richman Chulu v Monarch (Z) Ltd*,¹³⁷ it was stated that for the imprisonment to be false, there was need to for the detention to be unlawful. In the instant case, the plaintiff was arrested and detained on suspicion of theft for two days, upon a complaint by his employers- the defendant company. Due to insufficient evidence, the plaintiff was discharged and released. He subsequently brought an action for false imprisonment against the defendants since there was no reasonable cause for his arrest. The defendants contended that there was a reasonable and probable cause since a felony had been committed and the plaintiff was a suspect.

¹³³ (1858) 27 LJ Ex 443.

¹³⁴ [1947] AC 573.

¹³⁵ (1973) ZR 133 (HC) at p.138

¹³⁶ B. Smith and J.C. Hogan. *Smith and Hogan’s Criminal Law*. 1965. p.56

¹³⁷ (1983) ZR 33 (HC).

It was held by the court that false imprisonment only arose where there is evidence that the arrest which led to the detention was unlawful since there was no reasonable and probable cause.¹³⁸ The court referred to the case of *Gosden v Elphick and Bennett*,¹³⁹ where it was stated that “the mere giving of information to police officers although it may lead to an arrest does not make the giver of the information liable for the imprisonment.” It was further stated that reporting a crime and even signing the charge sheet which may lead to an arrest is insufficient to make the giver of the information liable for false imprisonment; even if there is insufficient evidence to prosecute, unless the report was made *mala fide*.¹⁴⁰

Therefore, where the defendant only sets in motion the machinery of the law by reporting a plaintiff to the police, it will not amount to false imprisonment. When the police start their investigations and according to how they operate, they may or may not, detain the plaintiff. In the instant case¹⁴¹ *Mumba, Comr.*, relied upon the statement made by Sir Henn Collins MR in *Sewell's case* at page 458 where he said:

“...if a person only desires to obtain a judicial decision, and for that purpose merely makes a statement before the proper officer who then intervenes and acts upon the statement that person does not commit trespass; he merely sets in motion the machinery of the law, and by doing that does not commit any trespass.”

3.3.0. Conclusion

This chapter has endeavoured to discuss the response of the Zambian public to the abuse of s.309 of the penal code and the resultant false imprisonment. The chapter has also discussed the reasons behind the abuse of the said provision. It has endeavoured to highlight the factors that have led to this situation in relation to the unchecked conduct of the police not only in light of this discussion but also with other provisions of the Penal Code.

The next chapter is intended to provide a discussion of the findings of the statistics collected and the questionnaire administered to various sections of the police who handle cases of such a nature. The chapter will look at the trend of the crime of false pretences to see how it has evolved in Zambia to the stage that it has reached, and

¹³⁸ (1983) ZR 33 at p.36.

¹³⁹ (1849) 4 Exch. 445.

¹⁴⁰ Authority for this proposition of law relied upon was the case *Sewell v. National Telephone Co. Ltd.* [1904-1907] All ER 457.

¹⁴¹ *Richman Chulu v. Monarch(Z) Ltd* (1983) ZR 33.

analyse whether it is on the increase or is actually being handled professionally by the Police Service.

4.0. Chapter Four.

This chapter will focus on the discussion of the findings of the questionnaire administered to police officers in the Criminal Investigations Department (CID). The chapter will also look at the alternatives open to people to recover either their money or goods without resort to the police system. For example, an option available to a complainant would be to take an accused to the Small Claims Court as most of these transactions are in the realm of the business domain. However, the paper will not only be restricted to the area of business transactions but will look at the abuse of these provisions in general.

4.1. The lack of proper training of Police officers.

Lukonde¹⁴² in an interview with Lusaka-based magistrates stated that cases of fraud are generally poorly investigated. This is as a result of the following factors. There is a serious lack of training. For example, the Zambia Police Service offers no specialised training to officers in the fraud section. Such training is rare and far in between. It leaves them to fend for themselves through on-job training. The Service also exhibits a serious misplacement of manpower. Coupled with this, is the fact that there is an inadequate personnel staffing levels through such reasons as the high mortality level of police officers due to factors such as HIV/AIDS. Mortality

The lack of proper police training creates a conducive atmosphere to commit crime by the police officers, instead of suppressing crime. Many of the police curricula or syllabi focus on technical courses, guerrilla and conventional warfare tactics training etcetera. It is only Cadet Assistant Superintendent who have undergone a next to complete training regime inclusive of the tactics devised decades ago and with only some average computer skills, communication skills and forensic investigation techniques which were not availed to the rest of the recruited officers of other ranks. These were subjected to these antiquated techniques of fighting and suppressing

¹⁴² M.E. Lukonde The Investigation of Fraud Cases by Detectives in Zambia. At the University of Zambia. 1984/85. Lusaka. p58.

riotous behaviour and crowd control.¹⁴³ The Police have attributed the low conviction rate and the high rate of cases closed 'undetected' to poor training.¹⁴⁴

4.2. Scope of Training of Police Officers in Criminal Investigations Departments.

Police training is arranged on a regular and on-going basis to cover Refresher Training for all officers in the regular section of all ranks up to and including the rank of Senior Assistant Commissioner of Police. It is also arranged for personnel in the Criminal Investigation Detectives and refresher training and lastly there is Training of specialist sections¹⁴⁵ and units of the police service. In addition police reservists are also trained in various Centres.¹⁴⁶

With reduced or no funding to hold such training sessions the result is that new techniques of crime detection are not learnt, they do not keep pace with changing technology being used by criminal and are thus caught napping where a crime using advanced technology is committed e.g. computer frauds.

Training provided to the police by other government department or non-governmental organisations will normally be arranged as required. However, with the increase of HIV/AIDS and the aspect of Victim Support Units, the police have nearly almost abandoned any other form of training in preference to these as they provide higher allowances and are funded by donors as opposed to refresher courses offered by police at their training centres like Lilayi Police Training College. However, no refresher courses have been held for junior officers who are on the frontline of fighting crime and thus more susceptible to fall prey to corrupt tendencies. Recently in 2010, an advanced CID course was offered to subordinate officers. But this is not enough to remedy the many evident problems related with the detection and prevention of crime, especially complex crimes such as fraud and fraud-related crimes.

¹⁴³ M. E. Lukonde. The Investigation of Fraud Cases in Zambia. p39Aspects of human rights have, however, been integrated into the current police Training Manual and Standing Orders.

¹⁴⁴ M. E. Lukonde. The Investigation of Fraud Cases in Zambia. p.59

¹⁴⁵ These may include Bomb Disposal experts, forensic technicians and computer specialists.

¹⁴⁶ C. E. Musonda. The Effect of Training in The Suppression of Crime in Zambia. At the University of Zambia. Lusaka. 1991-92. p.21.

4.3. Crime Detection Fund.

This fund previously was used by the Police Service's CID to train officers, provide refresher courses at station, district, provincial and national level in the area of crime prevention detection and educating members of the public on aspects of police work. It was also used for paying informants. This fund, however, is no longer available as government funding is not only erratic but is not enough to cater for such activities.

4.4. Importance of Criminal Statistics.

According to Wolfgang;¹⁴⁷

'the aim of criminal statistics is to measure the total volume of crime so that society can plan counteraction.'

That is to say criminal statistics are used as the basis of action for a particular group of crimes to see whether or not such offences are on the rise or not. According to Nkama¹⁴⁸ in her obligatory essay, criminal statistics are the main source of information about the extent of criminal behaviour and the operation of the Penal system. Statistics are the indicators of social reality or the extent of crime problems in any system.

According to Nkama, the question to be posed in relation to the public not reporting crime involves a number of reasons. As already pointed out in chapter three, the police do not always go out detecting crimes as they are put in motion by the public complaints. In this case the attitude of the public in reporting offences is very important.

Statistics for this research will mainly be focused on one division, the Central Division of the Zambia Police Service, whose jurisdiction is the Central Province of Zambia. The statistics are derived from the Zambia Police Consolidated Annual Reports for 2009 and 2010. In terms of the offence of obtaining by false pretences, the Province recorded 105 cases of false pretences as being reported for 2010. This is in comparison to 136 cases reported the previous year, 2009. Of these reports 8 were false on inquiry in 2010, while 11 were this status in 2009. Of this number 56 were

¹⁴⁷ M.E. Wolfgang. *The Sociology of Crime and Delinquency*. 1967. 2nd ed. N.J. Wiley and Sons Inc. Toronto. p.64.

¹⁴⁸ C.B. Nkama. *Criminal Statistics and the Control of Crime*. 1985. At the University of Zambia. Lusaka. p1.

closed undetected in 2010, while 89 were closed undetected in 2009. It is this category of closed undetected that of importance to this research as this is what happens when a case that has been handled in an incorrect manner ends up. It ends up as statistic of the level of abuse of the provisions by the police. Almost the same number as were reported, were brought forward from the previous years in both instances. In 2009, 96 cases were brought forward and in 2010, 61 cases were brought forward.

From the total number of cases reported for 2010 and 2009, 37 and 45 of cases respectively ended in convictions of the perpetrators. This represents less than one third of the total number of cases reported for both years. Of these numbers, only 5 cases for both years ended in an acquittal, or were dismissed, or a *nolle prosequi* was entered into by the state. At station level, the picture is pretty much the same. For example, according to the statistics obtained for two urban stations of the four urban stations in Kabwe urban revealed similar figures. In comparison to cases of Theft, 54 cases were reported at station level as opposed to 12 cases of obtaining by false pretences. Cases of house breaking and theft were more prevalent in the sampled area.

A questionnaire prepared and administered showed the perception of the police in the conduct of their duties. The questionnaire revealed that most officers in the Criminal Investigations Department were well vested with the law on the obtaining of goods or property by false pretences. Most officers sampled knew the basic elements that constituted the offence of false pretences. The majority of the respondents stated that theft was the most common offence followed by house breaking and obtaining money or goods by false pretences. Most, however, stated that theft by trickery was also common. Of the officers sampled, almost all of them stated that the levels of remuneration were in part to blame for the abuse of s.309 of the Penal Code. In relation to this, the majority believed that the section was in fact abused by the police.

4.5. Discussion of the Findings.

Thus far, the paper has looked at what the offence of obtaining by false pretences is, its *mens rea* and *actus reus* and the way the police abuse the provisions of the Penal Code to help complainants retrieve money or goods from persons accused of the offence. It has also looked at one of the results of this abuse, that is, false

imprisonment. Previous chapters have also examined the response of the public and the courts to the said abuse of s.309 of the Penal Code.

From the questionnaires administered and the statistics gathered, it is evident that although the commission of the said offence has been on the rise since and preceding independence, the rate at which convictions have been secured has not only been stagnant, but has also been plummeting.¹⁴⁹ The reasons for this plunge are numerous and include low remuneration levels of the police, low morale and a serious lack of training, re-training and refresher courses targeted specifically at police work.

According to Lukonde in his obligatory essay¹⁵⁰ written in 1984, “the picture is even worse where the offence of obtaining by false pretences; a total of 1234 cases were investigated but only 244 perpetrators were convicted. This gloomy picture has notably continued to repeat itself during subsequent years, but what is even more sorrowful to note is the fact that despite this state of affairs, the conviction rate nose-dived during the year 1988, while the crime rate was palpably on the upswing.”

Because of this low conviction rate, compounded by the fact that a good number of criminals are not apprehended, fraud crime rates remain on the increase. The police service has attributed the low conviction rate and the high rate of cases closed undetected to poor police investigations. Poor police investigations are directly related to the levels of training that police officers receive both at their initial training and once they are deployed into the field.

In the findings from the questionnaires, N will be taken to mean the total sample of respondents with 20 being the total number of police officers sampled. In the sample N=20 of police officers, the sex of respondents was represented by a ratio of 16 males and 4 females translating to 80 percent males and to 20 percent females. The average age of the police officer respondents represented in the sample N = 20 was 42 years. While the years of service spent in the force for the sample N=20 averaged at 17.8 years.

From the findings, it is clear that there is an abuse of s.309 of the Penal Code. This is evidenced from the fact that in the sample N= 20 of police officers sampled, 45

¹⁴⁹ M.E. Lukonde. The Investigation of Fraud Cases by Detectives in Zambia. 1984/85.1984/85. p.58.

¹⁵⁰ M.E. Lukonde M. E. The Investigation of Fraud Cases by Detectives in Zambia. 1984/85. p58.

percent of all the respondents stated that the section was being abused by officers among their rank and file. 40 percent however denied that the section is abused, while 5 percent of the respondents were not sure that the section was being abused. As to whether the section should be amended or repealed to control the abuse of the s.309, 45 percent agreed that the section should be amended, while 35 percent stated that the section should be maintained as it was, while 20 percent were not sure whether the section should be amended or repealed.

It is apparent from the questionnaires administered that there is some confusion over the classification of the offence of obtaining by false pretences and fraud. From the sample N=20, 45 percent of the respondents stated that there was no difference between the offence of obtaining by false pretences and fraud, while 55 percent stated that there was a difference between the offence of obtaining by false pretences and fraud, but that the former was a species of the umbrella offence of fraud. Most respondents stated that both offences involved some element of cheating and the deprivation of some property or money by the accused with a loss to the complainant.

As regards the element of false imprisonment, almost all the respondents knew what it the offence entailed. However, of the sample N=20, only 40 percent responded that they had either carried out an arrest or a detention that would have amounted to false imprisonment, while 45 percent knew of a fellow police officer who had been sued as a result of the false imprisonment. 55 percent were not aware of any officer having been sued as a result of falsely imprisoning a person accused of falsely obtaining goods or money. Of the officers sampled, 60 percent stated that they had assisted a complainant in retrieving goods or money from an accused by ‘manipulating the facts to ensure that they fit into the provisions on credit-related cases.’

The lack proper police training, therefore, creates a conducive atmosphere to commit crime by police officers instead of suppressing crime. Many of the police curricula or syllabi focus on technical courses like guerrilla and conventional warfare tactics training.¹⁵¹ This author as a cadet assistant superintendent in 2006 had to undergo the same training devised decades ago with only average computer skills and forensic investigation techniques which were not availed to the rest of the recruited officers of

¹⁵¹M. E. Lukonde. *The Investigation of Fraud Cases by Detectives in Zambia*. 1984/85 p.39.

other ranks who were subjected to these antiquated techniques of fighting and suppressing riotous behaviour and crowd control. The broad and deep-seated law knowledge which would enable officers to develop a more enlightened understanding of Zambian laws and its people is not seriously put in place.

Since the police do not have sufficient training they have become mechanical in their investigations of reported crime. They only make a move when crime has been committed and reported for their recording in their Occurrence Books. And then trail behind the suspect(s). This has changed with the advent of technology and corrupt officers only have to receive a cell phone call and proceed without having entered anything in the OB. A check of the Occurrence Book revealed very few red lines indicating a report of crime or incidence via the telephone.

In conclusion, this chapter has analysed the finding of the questionnaire administered to detectives in the Fraud section of the Zambia Police Service based in Kabwe. The next chapter will look at the alternatives available to persons whose money or goods have been obtained in the line of business without resort to the criminal law. Chapter five will also look at some recommendations to try and correct the prevailing situation in the country in relation to the abuse of s.309 of the Penal Code by Zambia Police Service.

Chapter Five.

This chapter will provide some recommendations on how to remedy the abuse of the said provision and measures intended to dissuade complainants from resorting to reporting matters, which might be purely contractual, to the police where they need to recover the money, debts or goods from people. The chapter will also give a conclusion to the paper.

The increasing complexity of our society, with its urbanisation, industrialisation, technological improvement and mobility have brought greater need for appropriate laws and efficient protection and investigations. In Zambia there has long been a crisis of confidence on the part of the public as to the ability of the police to deal effectively with crime.¹⁵² Some members of the public view the police with suspicion; other treat officers with hostility and contempt. There is no doubt that the performance of the police service has left a lot to be desired, with clean-up rates for many offences remaining unsatisfactory.¹⁵³

An examination of most provisions of the laws and regulations the police enforce reveals either inadequacy or obsolescence for effective and satisfactory policing in a democratic society. According to Simukoko,¹⁵⁴ factors such as inadequate accommodation, poor salaries and other conditions of services coupled with other inadequacies have a negative effect on the police service's effort to offer satisfactory services which most officers state have led to the police being corrupt. Crime is caused by a lot of factors and policemen and women being human as anybody else, have within their rank and file certain elements who have been unable to withstand the temptations of engaging in crime.

The broad and deep-seated law knowledge which would enable officers to develop a more enlightened understanding of Zambian laws and its people is not seriously put in place. To illustrate this point, a Report stated that our prosecutions are weak, and that they lack sufficient training. The report cited a report in which the police depended on confession statements after the accused had been 'worked on', the court, after

¹⁵² J. Masiye. *The Zambia Police Service: Do they Perform to the Expectation and Satisfaction of the Public. A Legal Perspective.* 2005.

¹⁵³ J Hartchard and M. Ndulo. *Readings in Criminal Law and Criminality in Zambia.* 1994. Multimedia. Lusaka. p74.

¹⁵⁴ E. Simukoko. *The Exemption of Trade Unions from the Zambia Police Service: A Quest for Meaningful Reform.* 2004. p.5-7

acquitting the accused, concluded that there was need in Zambia to improve the training and quality of prosecution and investigations as otherwise self-confessed thieves will be walking the street as free men.¹⁵⁵

5.0. Alternatives to the instituting of judicial proceedings through police action.

As has already been pointed out in the foregoing chapters of this paper, on alternative means through which a person wishing to retrieve money or goods from another person is to institute proceedings in the small claims court. This would be an appropriate forum because it is cheaper and takes less time than ordinary litigation in civil process.

5.1. Recommendations.

- i. **Re-enforce the role of the courts in checking and keeping police holding cells free of unnecessary and unlawful detentions.**

The courts are the main control channel for the actions of the police. In this vein, it is important that the court upped its ante and ensured that the police are checked in the conduct of the activities of the police. The reason that the courts are over-stretched with lack of resources, both financial and human, should not be used as a scapegoat for their inability to oversee the operations of the police. There is also a need to review the law on fraud in Zambia.

As was shown by the responses to the questionnaire, most officers questioned had difficulty distinguishing between the offence of fraud and that of obtaining something by false pretences. In short, there is need to re-define certain offences to make them very specific and define clearly the circumstances in which these offences can be committed. It is important that the law on false pretences should move from the broad definitions to more particular ones.

- ii. **Administrative measures.**

Siakalima¹⁵⁶ states in his obligatory essay that numerous cases occur of unlawful arrest and detention, but only a very few come to the notice of the courts. Siakalima

¹⁵⁵ E. C Musonda. The Effect of Police training in the Suppression of Crime in Zambia. 1991-92. p.39.

¹⁵⁶ Z. Siakalima. Police Public Relations as a Factor in Crime Prevention in Zambia. 1985. University of Zambia Press. Lusaka. p.23.

states that the Ministry of Legal Affairs does handle cases of persons falsely imprisoned have sued the Attorney-General for acts committed by the police in their dealings with the public. Over 93 percent of these cases were those of unlawful arrest and detention by the police. To redress the situation, the Attorney-General's office now and again makes various recommendations to the Inspector-General of Police to take disciplinary action against erring officers. Some of these recommendations have been to surcharge the officers concerned, demotions or even dismissals.¹⁵⁷

Clearly these measures have not deterred officers from continuing to engage to corrupt activities. However, since the office of the Attorney General is limited only to making recommendations, it is left to the desire of the Inspector-General of Police to decide.¹⁵⁸ It therefore incumbent upon the Police High Command to ensure that administrative measures are instituted against erring officers, whether high or low in the police structure.

iii. Adjust the remuneration of police officers and offer them better incentives e.g. accommodation, adequate training, the provision of crime detection fund.

The remuneration of the police service has been a cry that has been sounding in the dark for a long time now. In the Ministry of Home Affairs, the Police and the Prison service are some of the least paid services in the Ministry. This disparity is even more glaring when such remuneration is compared with that of the other members of the armed services. Therefore, one of the root cause of corruption among many police officers is the level of remuneration.

iv. Change the curriculum that is delivered to officers on course and the way in which it is delivered.

This change should be extended to a change of instructional staff which in most instances is not academically qualified to deliver lessons to the officers.

¹⁵⁷ Z. Siakalima. Police Public Relations as a Factor in Crime Prevention in Zambia. 1985. University of Zambia Press. p.24.

¹⁵⁸ Z. Siakalima. Police Public Relations as a Factor in Crime Prevention in Zambia. 1985. University of Zambia Press. p.24.

It has thus been established that s.309 is being abused by the police and the members of the public who connive with the police in the adventures to retrieve money or goods obtained by others. Therefore, the police abuse their powers of arrest to force such an accused person to quickly come up with the money or return the goods obtained or pay for them. This situation is very disturbing to say the least. This is because persons with minor offences have been known to have been detained in police holding cells for more than is necessary.

It is more disturbing that the majority of persons who suffer arbitrary arrests are those who do not know their rights. The breaches committed by the police in this manner has been regarded by many legal personalities to be due to lack of training and understanding of the law or to sheer deliberate misuse of power.

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