

CRIME AND PUNISHMENT IN ZAMBIA

John Hatchard

Sources of the criminal law

The settlement of the territory by the British South Africa Company in 1894 brought with it, for the first time, English law and courts including the English penal sanctions of the time. From the point of view of the criminal law, the settlement brought about a profound change in emphasis for the English idea of punishment for a crime was by no means the approach found under customary laws. In customary law there was no clear distinction between criminal and civil law although there was a division between private and public injuries. Thus, if the community was threatened by, for example, a case involving witchcraft, death or exile was the normal punishment. However, the underlying purpose of the law was to compensate the victim of the act or his family, to repair any loss suffered and to restore good relations between the parties. This meant that even cases of murder could be redressed by compensation if the community as a whole was not considered to be in danger.

The coming of English criminal law brought about a totally different concept of law on how to deal with offenders and this concept has remained the basis of the criminal law in Zambia. Today, the law is to be found primarily in "the Penal Code" (chapter 146 of the Laws of Zambia). The Penal Code owed its origin to moves in England during the 19th century to codify the English criminal law. In 1880 a Criminal Code Bill, drafted by Sir James Stephen, was introduced in the House of Commons but, due to strong opposition there, failed to receive a second reading.¹ Stephen's Code was still important as it was adopted in Canada and New Zealand and was used in the forming of the Queensland Code which, as will be seen, was very influential in the British colonies in Africa. The Queensland Code, which was largely the work of Sir Samuel Griffith, contained a number of provisions which did not appear in Stephen's Code. This was because it was considered that these new provisions were either a correct statement of the common law or improvements on the English model. It might also be noted that the Italian Penal Code of 1888 also greatly influenced Griffith who considered that in many respects it was the most complete and perfect code in existence.

The Queensland Code was later used by the Colonial Office in London as a model for a new Penal Code which was to be used in the colonies. This Code was first introduced in Northern Nigeria in 1904 and was subsequently put into use in many other colonial territories.² Northern Rhodesia was not originally included in the territories into which the new Code was to be introduced. However, the British Government later became satisfied that the introduction of a code would be advantageous and after initially favouring the Indian Penal Code, it was agreed in 1930 that the Colonial Office model could be introduced into Northern Rhodesia. Thus it was on the 1st of November,

1931 that the Code was adopted by Northern Rhodesia and replaced the English common law which had been in force up to that date. Despite a number of amendments, the Code has formed the basis of the criminal law in Zambia ever since.

Whilst the Penal Code is that prime source of criminal law in Zambia, there are a number of other Acts which are important in that they deal with particular types of crimes. The most important of these (numerically at least) is the Road and Road Traffic Act (Chapter 766 of the Laws of Zambia) which covers the whole range of road traffic offences and which resulted in 110,891 convictions in 1975.³ This was more than the convictions under the Penal Code itself, although most of the road traffic cases involved minor infractions. Formerly, English common law was an important source, Section 2(1) of the Penal Code provides that nothing in the Code affects the liability, trial or punishment of a person for an offence against the common law. However, the preservation of common law offences must be considered in the light of Section 20(8) of the Constitution of Zambia (chapter I of the Laws of Zambia) which states:

No person shall be convicted of a criminal offence unless the offence is defined and the penalty therefore is prescribed in a written law. . .⁴

In the light of this provision, it seems that common law offences as such are now obsolete in Zambia.

With regard to customary law, an important provision is to be found in the Local Courts Act (chapter 54 of the Laws of Zambia). Section 12(2) states:

Any offence under the African customary law, where such law is not repugnant to natural justice or morality, may be dealt with by a local court as an offence under such law notwithstanding that a similar offence may be constituted by the Penal Code or by any other written law. Provided that such local court shall not impose any punishment for such offence in excess of the maximum permitted by the Penal Code or by such other written law for such similar offence.

The relationship between customary law and the Penal Code has been considered in a number of cases. In *R v Mubanga and Sakeni*,⁵ the accused were found guilty by a native court, (the predecessor of the local court) of contempt of Bemba traditional law. The accused, who were Christians, had declined to supply finger millet for the purpose of the worship of certain tribal spirits and had persuaded fellow-Christians to do likewise. The High Court of Northern Rhodesia held that even if the customary law was established, it was inconsistent with the Penal Code and repugnant to justice. Accordingly, the findings of guilt against the accused were reversed. Customary law does permit certain acts which would otherwise amount to an offence under the Penal Code. For example, the offence of bigamy (section 166 of the Penal Code) and the related offence in the Marriage Act⁶ do not apply to marriages contracted solely under customary law. Thus polygamy is a well-established institution which is governed by the various customary laws of the parties concerned. However, once a marriage is contracted under the Marriage Act, the provisions of the Penal Code and Marriage Act apply.⁷ The provisions of section 12(2) of the Local Courts Act do not apply to the higher courts. In *R v Ndhlovu*⁸ the accused was charged in the High Court of Northern Rhodesia with the murder of his wife. It appeared that during an argument between the accused and the deceased, the latter used a 'foul and abusive expression' which according to customary law amounted to a sufficient insult to warrant the chastisement of the wife by the husband.

However, the High Court refused to consider this evidence and emphasised that the law on which criminal cases are to be decided in the High Court is that to be found in the Penal Code and related statutes.

The interpretation of the Penal Code

Notwithstanding the replacement of the common law by the Penal Code, the relationship between English and Zambian criminal law has always been close and the change to the Code did not fundamentally change the criminal law. Indeed, the English secretary of state for the colonies in referring to the Code in 1929 stated:

Officers will find it easier to apply a code which employs to terms and principles with which they are familiar in England.⁹

The general rule of construction of the new Code was stated in the Code itself as follows:

This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England [and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.]¹⁰

The part in square brackets has now been removed by the Penal Code Amendment Act 1972,¹¹—a provision which will be considered later.

The rationale for the interpretation section (as it will be referred to hereafter) was considered by the Court of Appeal in *D.P.P. v Chirwa*.¹² Doyle, Ag. C. J. giving the judgment of the court stated:¹³

The Penal Code is in fact a codification of a considerable portion of the criminal law in England for application to Zambia. It does not follow that in all cases the legislature intended entirely to follow the English law, both statute and case, but substantially it did so intend. It is therefore not strange that [the interpretation section] was introduced. It was in the nature of a slip rule to cover the fallibility of draftsmen.

He continued later:

But as a general rule it is a guide and an injunction to consider the effect of similar English statute and case law when interpreting the Penal Code, unless there are indications to the contrary.

Reference was made to the Privy Council decision in *Mawji v The Queen*¹⁴—a case which illustrates the difficulty of defining the full extent of the section. Although the section refers only to questions as to interpretation of the law, in practice this can be difficult to separate from substantive law. In *Mawji* itself, the appellants, a husband and wife, were convicted of conspiracy contrary to section 110 of the Penal Code of Tanganyika. The main question for the judicial committee to consider was whether the rule in England that a husband and wife cannot be convicted of conspiracy alone applied to Tanganyika. It was held that this rule was incorporated into the Penal Code by virtue of the interpretation section and the conviction of the appellants for conspiracy was quashed. Lord Somervall, delivering the judgment of the committee stated that:

It was submitted for the respondent that in applying the [interpretation section] substantive law must be distinguished from 'interpretation' and 'meaning'. It may be difficult to define the limits of the effect of the section. The contrast between substantive law and interpretation does not seem to assist. The most obvious form of interpretation will extend or restrict the application of words and thereby affect the substantive law. Their lordships are of the opinion that the rule

is incorporated into the provisions of section 110. The words 'conspires' and 'conspiracy' in English criminal law are not applicable to husband and wife alone; the words 'other person' in section 110, if English criminal law is applied to their 'interpretation' or 'meaning' cannot in this context include a spouse.¹⁵

The relationship between Zambian and English law in the light of the interpretation section has been considered in a number of cases. In *Mubwana*,¹⁶ Evans, J. in the High Court of Northern Rhodesia held that the words of the Code must be interpreted according to their natural sense. He found support for this reasoning from the decision of the Privy Council in *Wallace-Johnson v The Queen*,¹⁷—a case dealing with a provision in the Criminal Code of the Gold Coast. The judicial committee held that where a code was intended to contain a full and complete statement of the law, it was to be considered free from any glosses or interpolations derived from any expositions of the law of England. The decision in *Wallace-Johnson* was also followed by Conroy, C. J. in *R v Zulu*,¹⁸ where it was stated that if the words of a Northern Rhodesian Ordinance are clear and unambiguous, they, only, should be looked at.¹⁹ However, when the matter was considered by the Court of Appeal in *Chitenge v the People*,²⁰ the decision in *Wallace-Johnson* was held to be inapplicable. Doyle, J. A. giving the judgment of the court, stated that on its face the section is a directive that the Code is to be interpreted, save where inconsistent to do so unless expressly provided, with the glosses and interpolations derived from expositions of the law of England. Two years later, the same judge in *D.P.P. v Chirwa*,²¹ sought to lessen the effect of the *Chitenge* decision stating that on further consideration the law may have been stated in words which were unduly broad. He continued:

[The interpretation section] does not of course require the Zambian courts to accept the interpretation of English courts holus-bolus and without critical appraisal. It is only correct English interpretation which, if consistent and not expressly provided against, must be used in interpreting the Penal Code. The Zambian courts can and must examine the English decisions to see whether they have been correctly decided before using them to help in interpreting the law in Zambia.²²

On the whole therefore, the courts in Zambia have sought to emphasise their independence in decision making free from the direct influences of English criminal law. This process has been further assisted by the amendment to the interpretation section mentioned above. The effect of this provision is that now, Zambian courts do not need to follow English decisions although they are still persuasive authorities. The importance of this is that the Zambian courts are free to determine cases in the light of local conditions and need not feel constrained by English law.²³ In the future therefore, it may be that more emphasis will be laid on decisions of other African countries rather than English authorities.

The incidence of crime in Zambia

The incidence of crime in Zambia is perhaps more difficult to ascertain than, for example, in the United States of America or Western Europe for a number of reasons. Firstly, there is the problem of actually reporting a crime. In a country as large as Zambia and with relatively poor communications, especially in the rural areas, the distance from or inaccessibility of the police may deter a person from reporting an offence. Indeed

Tanner²⁴ quotes the police in Uganda (where similar problems prevail) as stating that the immediate consequence of the erection of a new police station is a substantial increase in reported crime. It might well be speculated therefore that the crime statistics are on the low side for this reason. Secondly, there is the preference of some people to deal with such matters by using traditional means. As was said above the customary law remedy for a 'criminal case' has always been compensation for the victim or his family and if people view the courts (in particular the higher courts) as places for punishment rather than compensation then there may be a reluctance to report the commission of an offence. Thirdly, there is the question of whether people consider a matter worth reporting either because of the minor nature of the offence or because it is felt that the police will be unable to apprehend the offender. Clearly the more serious the offence the more likely are the chances of it being reported, but failure to report, for whatever reason, does make it very difficult to assess the incidence of crime in Zambia accurately.

Again, in considering the criminal statistics themselves, these factors must be taken into account.²⁵ However, there is no doubt that there has been a great increase in reported crime since independence. In 1967 there were 65,389 cases under the Penal Code which were reported to the police, whilst in 1975 there were 101,050 cases.²⁶ Much of this relates to increases in violent crime and property offences. Thus in 1967, 571 cases of robbery were reported to the police whilst by 1975 this figure had risen to 1,431. With regard to assaults and unlawful wounding, in 1968 there were 10,295 cases reported whilst in 1975 there were 18,803 such reports.²⁷ When these figures are set against the rise in the population of the country, it is possible to see the scale of the increase. The 1963 census population estimate shows a total of 4,016,300 persons living in Zambia. By 1975 the population was estimated²⁸ as being just under five million. It is clear therefore that the rise in crime bears little relation to the increase in the size of the population.

One of the major reasons for the increase in crime seems to be the increasing urbanisation of the population. For example, the population of Lusaka has grown from 123,000 in 1963 to 401,000 by 1974.²⁹ The population in the urban areas still continues to grow and with it the crime rate. A second factor that should be considered is the size and efficiency of the police force, for the very presence of the police, for example, has a deterrent effect on the commission of crime. The police in Zambia have been under great pressure for a number of years, not only due to the shortage of officers and equipment but also to the security problems on the borders. This has inevitably reduced their effectiveness in fighting crime. For example, out of 1,431 cases of robbery reported in 1975, 979 remained undetected and only 139 were convicted.³⁰ These figures give real cause for concern as they are not an isolated example and show why the sentence for certain cases of aggravated robbery was increased to death.³¹

Another important indicator as to the incidence of crime are the statistics relating to the conviction of offenders. Table I gives details of the latest figures for persons convicted of offences against the Penal Code. As can be seen, there has been a steady rise in the number of persons convicted in the years for which figures are available. However, this increase does not match that for reported offences (see above) and convictions for serious offences were relatively low. As Table I indicates, of the more serious offences it is offences against the person and property which predominate. Offences

in category 3 are most numerous for the sole reason that it contains cases of drunk and incapable or disorderly.

Table I: PERSONS CONVICTED OF OFFENCES UNDER THE PENAL CODE

| OFFENCE | 1968 | 1969 | 1971 | 1973 | 1974 | 1975 |
|------------------------------------------------|--------|--------|--------|--------|--------|--------|
| 1. Offences against public order etc. | 5 556 | 5 939 | 5 654 | 6 292 | 5 018 | 5 232 |
| 2. Offences against lawful authority etc. | 253 | 294 | 311 | 317 | 415 | 371 |
| 3. Offences injurious to the public in general | 10 928 | 11 868 | 12 023 | 12 928 | 24 056 | 17 671 |
| 4. Offences against the person | 5 070 | 5 289 | 5 916 | 6 678 | 7 001 | 6 671 |
| 5. Offences relating to property | 7 344 | 9 043 | 92 43 | 9 893 | 10 227 | 10 704 |
| 6. Malicious injury to property | 474 | 709 | 592 | 535 | 534 | 501 |
| 7. Forgery, coining impersonation | 601 | 517 | 461 | 486 | 476 | 371 |
| 8. Offences relating to corrupt practices | 14 | 14 | 14 | 15 | 16 | 18 |
| TOTAL: | 30 249 | 33 673 | 40 695 | 37 144 | 47 743 | 41 549 |

Source: Zambia Police Annual Reports

Note: At the time of writing, no police reports were available for post-1975 years.

The sentence of the court

Any rational penal system requires a wide range of sentences to be available to the courts so that as far as possible each convicted offender can be dealt with in an appropriate manner. The Penal Code sets out the possible sentences.

Section 24 states:

The following punishments may be inflicted by a court:

(a) Death; (b) Imprisonment; (c) Corporal punishment; (d) Fine; (e) Payment of compensation; (f) Finding security to keep the peace and be of good behaviour; or to come up for judgment; (g) Forfeiture; (h) Deportation; (i) Any other punishment provided by this code or by any other law.

With regard to paragraph (i) there are two important sentences to be considered. The first is the probation order (under the Probation of Offenders Act, Chapter 147 of the Laws of Zambia), which empowers a court to require an offender to be under the supervision of a probation officer for a specified period. This is considered later. The suspended sentence gives the court the power to suspend a sentence upon conviction for the majority of offences.³² This is also considered later in this section.

Table II shows the use of these sentences for offences under the Penal Code.

Table II: SENTENCES PASSED ON PERSONS CONVICTED OF OFFENCES UNDER THE PENAL CODE

| SENTENCE | 1968 | 1969 | 1971 | 1973 | 1974 | 1975 |
|-----------------|---------------|---------------|---------------|---------------|---------------|---------------|
| 1. Death | 11 | 19 | 8 | 8 | 27 | 12 |
| 2. Imprisonment | 12 549 | 13 531 | 13 519 | 14 969 | 15 484 | 15 115 |
| 3. Caning | 1,375 | 1 532 | 1 924 | 1 996 | 1 853 | 1 974 |
| 4. Fine | 20 195 | 22 235 | 24 440 | 26 005 | 35 956 | 30 241 |
| 5. Other (a) | 934 | 877 | 1 134 | 1 118 | 1 205 | 942 |
| TOTAL | 35 064 | 38 194 | 41 025 | 44 096 | 54 525 | 48 284 |

Sources: Zambia Police Annual Reports.

(a) Warned, bound over or discharged.

Each sentence will now be considered individually.

The death sentence

Capital punishment is mandatory for both murder³³ and treason³⁴ and for certain types of piracy.³⁵ By virtue of section 12 of the Penal Code Amendment Act (Number 2) of 1974, the penalty for aggravated robbery is death: (i) where a firearm was used,³⁶ or (ii) where the offensive weapon or instrument used is not a firearm and grievous harm is done to any person in the course of the offence.³⁷ Unless otherwise directed the sentence of death is carried out by hanging.³⁸

The death sentence cannot be passed: (i) if the person convicted of a capital offence was under the age of 18 years at the time of the commission of the offence;³⁹ or (ii) if a female convicted of a capital offence is pregnant. In this case she must be sentenced to be imprisoned for life.⁴⁰

The prerogative of mercy vests in the president and gives him the power to commute the death sentence or to issue a pardon.⁴¹ By virtue of section 61 of the Constitution of Zambia (chapter I of the Laws of Zambia), an advisory committee on the prerogative of mercy is established and all cases in which a sentence of death has been passed are referred to it. The recommendation of the committee is to be based on the record of the case together with any recommendations or observations, which the judge, who confirmed the sentence, may think fit to make.⁴² As a result each case is decided upon its own particular facts and explains the reason why the method of dealing with persons sentenced to death may vary from year to year. Table III illustrates this point.

Table III: DISPOSAL OF PERSONS SENTENCED TO DEATH

| | Number of persons dealt with (c) | Commuted to Imprisonment | Released on appeal | Executed (a) | Otherwise dealt with (b) |
|------|-------------------------------------|-----------------------------|-----------------------|-----------------|--------------------------------|
| 1964 | 74 | 36 | 9 | 7 | 22 |
| 1966 | 42 | 10 | 4 | 7 | 21 |
| 1969 | 34 | 16 | — | 2 | 16 |
| 1971 | 46 | 11 | 3 | 5 | 27 |
| 1973 | 28 | 10 | — | — | 18 |
| 1974 | 44 | — | — | 5 | 39 |
| 1975 | 49 | 3 | 6 | 6 | 34 |
| 1976 | 58 | 5 | 8 | — | 45 |
| 1977 | 50 | 5 | 6 | 4 | 35 |

(a) Those persons executed in any year may include persons sentenced in a previous year.

(b) Includes condemned prisoners remaining in custody.

(c) Includes those persons admitted during the year and those already in custody.

Source: Prisons Department Annual Reports.

It is interesting to note that the number of persons sentenced to death has remained relatively constant since independence. All the sentences of death have been passed in cases of murder and this gives some indication that the murder rate in Zambia may not be rising unlike the rate for other types of violent crimes. The size of the number of persons awaiting the final outcome of their cases does give rise to some concern, as does the time taken to deal with the cases. Whilst each case must be scrutinised as carefully as possible, it is to be hoped that final decisions can be made expeditiously so as to prevent excessive stress on the persons concerned.⁴³

Imprisonment

With the dissolution of the Federation of Rhodesia and Nyasaland, the penal establishments in Zambia returned to territorial control and on the 1st December, 1963 the Zambia Prisons Department came into being. Moves were immediately made to modernise the prison system and in particular a new Prisons Act was passed in 1965 and this came into operation on the 31st October, 1966.⁴⁴ The Act is based upon the Minimum Standard Rules which were agreed upon by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders.⁴⁵

The prisons department report for the year 1964 shows that there were 55 penal institutions in Zambia made up as follows:

- 12 regional and central prisons;
- 8 remand prisons;
- 2 star (first offender) prisons;
- 30 local prisons;
- 1 pre-release camp;
- 1 special training prison;
- 1 reformatory (for juveniles).

Since then a number of new prisons have been built whilst some of the older establishments have been closed down. Thus, for example, a new female prison at Kabwe was opened in 1976—which is the only penal establishment dealing solely with females. However, the economic problems of the country in recent years has meant that there have been shortages of building materials and transport such that many of the improvements planned have been either delayed or postponed. It is worth noting that the majority of prison building and maintenance work has, in the past, been carried out by prison labour. By 1977 there were 24 prisons, 27 district prisons and one reformatory under the control of the prisons department. These figures include four remand prisons at Kabwe, Kitwe, Lusaka and Ndola. The prison service continues to face problems. The commissioner of prisons stated in the 1976 Prisons Department Annual Report that the main difficulties facing the service are overcrowding in the prisons, lack of transport and shortage of staff. By virtue of section 26(i) of the Penal Code, all imprisonment shall be with or without hard labour at the discretion of the court unless hard labour is expressly prescribed.

The prison population

There are a number of factors which considerably effect the size of the prison population and in considering the fluctuation in the numbers of the prison population since independence these factors must be borne in mind.

Firstly, there is the length of the prison sentence passed by the courts. Clearly any move by the courts to increase the length of sentences must inevitably lead to a higher prison population. Table IV shows the trend in sentencing since independence. As Table IV indicates, there has been a major shift away from the 'short sharp shock' sentence to sentences in excess of six months. Thus in 1965 over 77% of all sentences were for less than six months whereas by 1977 over 62% were for six months or more. This trend towards longer sentences is a fairly constant one as the figures for intervening years indicate. The reasons for this increase are difficult to assess, although one factor may be that courts have given longer prison sentences in the hope that this may deter potential offenders especially in view of the increase in the amount of crime in the country. If this is the case, then the increase in the length of sentences does not, on the face of it, seem to have had the desired effect.⁴⁶

A second factor to be considered is the use made of other sentences. As Table II indicates, there has been a considerable increase in the use of the fine, and this may indicate that some cases which were in the past dealt with by a sentence of imprisonment are now being dealt with by means of a fine. If this is the case, then it is an important factor in considering the trends in the size of the prison population. A third factor that might be noted is the question of what changes have been made in the Penal Code which might affect the prison population. Thus any abolition or enactment of offences may be of importance. In fact there have been a number of changes in the Code since 1965, for example, the abolition of suicide as an offence and the enactment of obtaining a pecuniary advantage by false pretences. However there is no evidence from the statistics that this has had any real effect on the prison population.

Table IV: LENGTH OF PRISON TERMS IMPOSED ON ADULT MALE OFFENDERS (a)

| Length of sentence | 1965 | 1967 | 1971 | 1972 | 1973 | 1974 | 1975 | 1976 | 1977 |
|-----------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Under one month | 39.19 | 26.90 | 16.50 | 14.53 | 12.40 | 10.07 | 10.55 | 9.43 | 8.91 |
| One to under 3 months | 20.42 | 22.55 | 12.51 | 12.12 | 12.30 | 11.40 | 12.42 | 10.50 | 8.54 |
| 3 to under 6 months | 17.82 | 22.20 | 24.92 | 23.44 | 22.23 | 21.66 | 19.65 | 18.49 | 18.32 |
| 6 to under 12 months | 11.00 | 15.73 | 25.70 | 29.56 | 30.87 | 31.74 | 31.66 | 27.09 | 32.79 |
| 12 to under 18 months | 4.78 | 5.42 | 9.46 | 8.54 | 8.81 | 10.05 | 10.96 | 13.01 | 14.49 |
| 18 months and over | 6.79 | 7.20 | 10.91 | 11.35 | 12.78 | 14.20 | 14.18 | 21.11 | 16.74 |

(a) All figures are expressed in percentage terms.

Source: Zambia Prisons Department Annual Reports

The effect of imprisonment

Whatever the reason for sentencing an individual to imprisonment, there is always the hope that this experience will persuade the offender not to transgress again. It is of no little interest therefore to examine the statistics relating to the number of previous convictions of offenders sentenced to imprisonment. With regard to Table V, the figures for 1977 show the highest percentage of offenders with no previous convictions since the Zambia prisons service began. It seems abnormally high for between the years 1966 and 1976 first time offenders accounted for between fifty and fifty-nine percent of all prison inmates. On the other hand, the number of offenders with three or more previous convictions has dropped significantly from the peak in 1969 and has dropped consistently since 1973. The reasons for these changes are not altogether clear but in the 1977 Prisons Department Annual Report it is suggested that the general drop in committals to prison of individuals with previous convictions may be due to the trade training which is given during the term of imprisonment. More work might well be done on this area as there is a definite trend away from recidivism.

Table V: PREVIOUS CONVICTIONS OF OFFENDERS SENTENCED TO IMPRISONMENT

| Number of previous convictions | 1966 | 1969 | 1971 | 1973 | 1975 | 1976 | 1977 |
|--------------------------------|-------|-------|-------|-------|-------|-------|-------|
| None | 58.05 | 50.62 | 50.25 | 54.24 | 54.49 | 58.41 | 66.33 |
| One | 16.81 | 14.96 | 17.51 | 16.10 | 19.10 | 20.17 | 15.83 |
| Two | 15.32 | 13.05 | 12.87 | 14.01 | 14.10 | 11.23 | 9.64 |
| Three or More | 13.74 | 21.37 | 19.37 | 15.65 | 12.31 | 10.19 | 8.20 |

(Figure in percentage terms)

Source: Zambian Prison Department Annual Reports.

Whilst this fall in the number of recidivists in prison is welcome there is still cause for concern at the consistently high rate of first offenders who are being imprisoned, as Table V indicates. In a number of countries there is special legislation making it possible to sentence a first offender to imprisonment only if all other means of disposing of the case by non-custodial means have been rejected. No such legislation exists in

Zambia, and it seems that there is a need for this to ensure that offenders are only imprisoned in the last resort. This is especially necessary because of the serious social and economic consequences that imprisonment can bring to an offender and his family.

Classification of prisoners

All prisoners are classified at the time of admission into the prison system and the different categories are kept separate as far as possible. Section 60(i) of the Prisons Act states that "male and female prisoners shall be kept apart and confined in separate prisons or in separate parts of the same prison, in such a manner as to prevent, as far as is practicable, their seeing or communicating with each other". Sub-section two further divides prisoners and states:

Subject to the provisions of sub-section (i) convicted and unconvicted prisoners of each sex shall be divided into the following classes: (a) young prisoners; (i.e. persons under the apparent age of twenty years—section 2 Prisons Act); (b) adults (c) first offenders; (d) prisoners with previous convictions; (e) prisoners suspected or certified as being of unsound mind; (f) such other classes as the commissioner [of prisons] may determine; and, so far as the prison accommodation renders it practicable, each such class shall be kept apart from the other classes.

Other matters that are taken into consideration are the character of the prisoner and the tendency to escape.⁴⁷ At present, the implementation of section 60 (with the exception of the segregation of males and females) is being hampered by the lack of accommodation, especially in regional and district prisons. With regard to persons classified as long-term prisoners, these are normally transferred to Kabwe Maximum Security Prison, where they are employed in industrial workshops.

Female prisoners

As in most countries the number of females in prison in Zambia is comparatively small—as Table VI indicates.

Table VI: NUMBER OF FEMALES SENTENCED TO IMPRISONMENT AND THE LENGTH OF SENTENCES

| Length of sentence | 1966 | 1969 | 1971 | 1973 | 1975 | 1976 | 1977 |
|------------------------------|------|------|------|------|------|------|------|
| Under one month | 329 | 193 | 138 | 144 | 156 | 147 | 108 |
| One month to under 3 months | 131 | 81 | 86 | 113 | 140 | 113 | 63 |
| 3 months to under 6 months | 27 | 54 | 73 | 95 | 122 | 101 | 133 |
| 6 months to under 12 months | 13 | 15 | 53 | 50 | 48 | 56 | 82 |
| 12 months to under 18 months | — | 6 | 15 | 4 | 6 | 22 | 15 |
| 18 months and over | — | 5 | 22 | 6 | 3 | 16 | 9 |
| | 500 | 354 | 387 | 413 | 475 | 456 | 410 |
| | (a) | | (b) | | (c) | | (d) |

- Notes: (a) This figure includes 89 females who were imprisoned for non-payment of fines.
 (b) 102 female prisoners were released after payment of their fines.
 (c) 175 female prisoners were released after payment of their fines.
 (d) 128 female prisoners were released after payment of their fines.

Sources: Prisons Department Annual Reports.

As can be seen from Table VI many of the females were imprisoned for non-payment of fines. This seems an unnecessarily high number bearing in mind that the offences committed by females seem comparatively minor. For example, the Police Annual Report for 1975 shows that of the 326 offences committed by imprisoned females, the most common offences were:

- | | | |
|----|-----------------------------------|-----|
| 1. | Drunk and disorderly or incapable | 103 |
| 2. | Affray | 61 |
| 3. | Theft | 60 |

In every year since independence these offences have been the most common committed by females.

It is arguable therefore, that courts are imposing unnecessarily high fines and are not sufficiently taking into account the ability of the offender to pay. Any time spent in prison, especially by a female with a family, can impose great stress on the family and should be avoided as far as possible. The increase in the length of sentences being passed on female offenders is marked. Whilst sentences over twelve months are still rare, the three to twelve month range has increased greatly since 1966. This would appear to be in line with the trend towards the sentencing of offenders to longer terms of imprisonment which was discussed earlier. It does not appear to reflect an upsurge in the commission of more serious offences by females.

Juvenile offenders

The sentencing of juveniles is considered in detail later. However, with regard to imprisonment, no person under the age of sixteen years may be so sentenced,⁴⁸ and a person between sixteen and nineteen years of age may only be sentenced to imprisonment if he cannot be suitably dealt with in any other manner.⁴⁹ The sentencing of a juvenile offender to imprisonment should be undertaken only in the last resort. As Silungwe C. J., stated in the Supreme Court in *Mvula*:⁵⁰

The object of the Juveniles Act is that as far as possible juveniles should not be sent to prison, because if they come into contact with adult hardened criminals, the chances are that they will become hardened criminals.

Once a court has decided that a juvenile cannot be dealt with in any other manner save by sending him to prison, it is obliged to impose the statutory minimum sentence for the offence.⁵¹

The number of juveniles being sentenced to imprisonment has been dropping in recent years, although the actual figures are unclear.⁵²

The suspended sentence

Section 16 of the Criminal Procedure Code⁵³ gives any court the power to pass sentence on a convicted person but order that the whole or part of such sentence be suspended for a period not exceeding three years. This provision applies to all offences save those which are expressly excluded by the Criminal Procedure Code. These, in general, relate to the most serious criminal offences.⁵⁴ The court is empowered to attach conditions to the order. These may relate, for example, to compensation being paid by the offender to the victim, or to the requirement that the offender refrain from committing

further offences of the type for which he was convicted. Failure to comply with any condition renders the offender liable to have the original sentence implemented.⁵⁵

The procedure for the court is for a determination to be made of whether or not a sentence of imprisonment should be imposed. If it is decided that a prison sentence is warranted, the court should then consider whether this sentence can properly be suspended.⁵⁶ There is, however, no authority concerning the principles upon which the court should act in considering whether to exercise this power. Silungwe C.J., in *Masissani*,⁵⁷ in considering this point stated:

... a material consideration will obviously be the extent to which suspension would fail to protect the public, either directly by leaving the offender at large or indirectly by serving as an indirect deterrent. The extent to which the court will be influenced by mitigating factors such as the prisoner's previous good character, the fact that he is in regular employment, a student or a mother of young children etc., will depend upon the circumstances of each given case.⁵⁸

The main reason for the use of the suspended sentence has been said by Doyle C.J., in *Mbanga*⁵⁹ "to be in order to ensure that an offender behaves himself in future." There are no figures readily available as to the use of the suspended sentence but in view of the high rate of imprisonment (see Table II above) it would appear that relatively few sentences are being suspended. This is unfortunate especially in view of the fact that a large proportion of persons being imprisoned are first time offenders. (See Table V above). As well as this, the prisons in Zambia are overcrowded and it is extremely expensive to keep men in prison. In these circumstances, the extended use of the suspended sentence should be seriously considered.

Other sentences

Fines and compensation

The imposition of fines is by far the most frequent sentence passed by the courts, (see Table II above) and account for almost 60% of all sentences in cases of offences against the Penal Code. The powers of the court as regards the imposition of fines is found in section 28 of the Penal Code. This section states that when a fine is imposed under any written law, then in the absence of any express provisions relating thereto, the amount of the fine which may be imposed is unlimited but must not be excessive, provided no sum is expressed to which the fine might extend. The section also lays down the length of imprisonment which may be ordered by a court in respect of the non-payment of the fine.⁶⁰ In the case of juvenile offenders, the offender and/or his parent or guardian may be ordered to pay a fine.⁶¹ However, no parent or guardian may be ordered to pay a fine in such a case unless the court is satisfied that the parent or guardian has condoned to the commission of the offence by neglecting to exercise due control over the juvenile.⁶²

A person who has been convicted of any offence other than one punishable by death, may be ordered to pay compensation if it appears: (a) that some person has suffered material or personal injury in consequence of the offence committed; and (b) that substantial compensation is, in the opinion of the court, recoverable by that person from the offender by a civil suit.⁶³ Such compensation shall not exceed fifty kwacha.⁶⁴ However in most cases of theft and related offences,⁶⁵ compensation may be ordered

to any bona fide purchaser of stolen property who has restored such property to the person entitled to it.⁶⁶ There is little evidence from the statistics to indicate a wide use of compensation orders by the higher courts—in contrast to the local courts where it is a common order. This may well be due to the different approaches of the courts as to how such cases should be dealt with—a matter that was discussed earlier.

Forfeiture

A court is empowered to order the forfeiture of any property (or its value) passed in connection with certain offences involving corruption, extortion and compounding felonies or penal actions.⁶⁷ Payment of any sum ordered to be forfeited to the state is enforced in the same manner as in the case of a fine.⁶⁸

Corporal punishment

Section 27 of the Penal Code restricts the use of caning to (i) male offenders over 21 years of age who have been convicted of either certain named offences (which generally cover sexual offences or offences involving violence), or property offences where it is expedient in the interests of the community to do so;⁶⁹ and (ii) male offenders who have been convicted of any offence punishable by imprisonment for under a term of three months or more. Caning is often used as an alternative to a prison sentence in juvenile cases.⁷⁰ No female may be caned.⁷¹ A maximum of twelve strokes may be awarded against a person under 19 years or less and a maximum of 24 strokes in other cases.⁷²

Absolute and conditional discharge⁷³

In all cases where a person has been convicted of an offence, not being one for which the sentence is fixed by law, the court is empowered to make an order discharging that person either absolutely or subject to the condition that he commits no offence for a specified period which must not exceed twelve months.⁷⁴ The criteria for making such an order are: the nature of the offence; character of the offender; and the inexpediency of any other punishment.⁷⁵ Absolute and conditional discharges are important in that they give the offender another chance for once the order is made, the conviction for that offence only remains in connection with the proceedings in which the order was made and for any proceedings arising from a breach of a conditional discharge.⁷⁶ In the event of a breach of a conditional discharge, the offender may be dealt with in respect of the original offence in any manner that was open to the court which made the discharge order.⁷⁷

Deportation

Section 33(i) of the Penal Code (as amended)⁷⁸ states that any court which sentences a person to imprisonment may in addition recommend that such person be deported if: (i) he is not a citizen of Zambia; and (ii) he has committed any offence referred to in the sub-section. This recommendation must be sent to the High Court for approval. An interesting provision is to be found in section 34 of the Penal Code. This states that where a person is convicted before the High Court of a felony, the High Court may, in addition, to or in lieu of any other punishment, recommend to the president that such person be deported to such part of Zambia as the president shall direct. Deportation may also be recommended to the president in cases where a person has failed to find security for his

peace and good behaviour and in cases where the conduct of a person is dangerous to peace and good order in any part of Zambia. A subordinate court is given the same powers as the High Court in this matter but the decision must be reported to the High Court which has the power to revise the decision.⁷⁹

Security for keeping the peace, etc.

Any person, upon conviction for any offence other than one punishable by death, may be ordered by the court to enter into his own recognizance, with or without sureties, conditional that he shall keep the peace and be of good behaviour for a period specified by the court.⁸⁰ In the case of juvenile offenders, a court may require the parent or guardian of the juvenile to give security for his good behaviour if the court is satisfied that the parent or guardian has condoned to the commission of the offence by neglecting to exercise due care of the juvenile.⁸¹ Security for good behaviour may also be required from persons suspected of being about to commit an offence, or suspected of being habitual offenders.⁸²

Juvenile offenders in Zambia

Introduction

Section 14(i) of the Penal Code states that a person under the age of eight years is not criminally responsible for any act or omission. Similarly section 2 of the Juveniles Act (chapter 217 of the Laws of Zambia) states that a juvenile means a person who has not attained the age of nineteen years. It should be noted that the age of which a person claims to be may not necessarily be accurate. He may not actually know when he was born but in some instances the age given is deliberately lowered to bring the offender into the "juvenile" category and thus permit him to face a lighter sentence upon conviction than he would otherwise have received if he had revealed his true age.⁸³ The amount of reported juvenile crime is surprisingly small as compared to the total number of convictions for criminal offences as Table VII indicates.⁸⁴

Table VII: JUVENILE OFFENDERS FOUND GUILTY OF OFFENCES UNDER THE PENAL CODE

| Year | 1968 | 1969 | 1971 | 1973 | 1975 |
|------|--------|--------|--------|--------|--------|
| | 1 756 | 1 866 | 2 559 | 2 585 | 2 575 |
| | 30 249 | 33 673 | 40 695 | 37 144 | 41 549 |

These figures may be compared to the total number of convictions for the same year:

Source: Zambia Police Annual Reports

As can be seen, the figures for juvenile crime have remained virtually static since 1968—a very different situation to the number of convictions generally. This situation is also in sharp contrast to the one pertaining, for example, in Western Europe and the United States where juveniles commit a far higher proportion of the crimes committed

than their Zambian counterparts. Little research has been undertaken in this area, but one important factor explaining the relatively small number may well be the closeness of the African family unit. With other members of the family helping in the upbringing of the children, juveniles seem, on the whole, to receive more help and guidance than their western counterparts. Some support for this hypothesis may be gained from the fact that juvenile delinquency in Zambia is essentially a problem of the urban areas. In these areas many families live in conditions of poor housing and acute overcrowding. This has meant that the extended family structure has come under pressure and has led to a weakening of the ability of the family to give the necessary time and support to the children as they would otherwise have done.⁸⁵ A recent study of juvenile delinquency found that older children, especially from a large family with a low income, are more at risk.⁸⁶ This is because with the breakdown of the normal family life, the older children are increasingly left to fend for themselves whilst younger children are attended to and, with the added problems of poor educational and employment opportunities, the potential for juveniles to commit delinquent acts is high. Indeed, many social welfare officers consider that the breakdown of the family unit is the most important factor in juvenile delinquency. Thus on the data available, it does seem that a strong family unit plays an important part in preventing juvenile crime.

The trial and sentencing of juvenile offenders

All cases, in which juveniles are charged with the commission of criminal offences, are heard firstly by a juvenile court—which is a subordinate court exercising a special jurisdiction (see section 63 of the Juveniles Act). This court is empowered to hear and dispose of all cases brought before it with the exception of cases of homicide and attempted murder which must be determined by the High Court.⁸⁷

Part V of the Juveniles Act (*inter alia*) lays down strict rules concerning the appearance of juveniles in juvenile courts. Firstly, provision is made for the juvenile court to sit in a room other than that which any other court ordinarily sits. If this is not possible the court must sit at different times or on different days to the ordinary courts.⁸⁸ Secondly, the only persons permitted to be present at any sitting of the juvenile court (or High Court if the case involves a juvenile) are court officials; other persons connected with the case; bona fide representatives of the press; and others with specific permission from the court.⁸⁹ Thirdly, no report or picture in the media may contain anything which might lead to the identification of the juvenile, unless the court or minister so orders if satisfied that it is in the interests of justice to do so.⁹⁰ The rationale for these provisions is to prevent juveniles mixing with other offenders and to protect them from possible harmful publicity.

When a juvenile court is satisfied as to the guilt of the juvenile, it may deal with him in one of the following ways: (i) by dismissing the charge; (ii) by making a probation order; (iii) by making an approved school order; (iv) by making a reformatory order; (v) by ordering the offender to be caned; (vi) by fining the offender or his parents; (vii) by ordering the parents to give security for the good behaviour of the offender; (viii) by sentencing him to imprisonment, if he is over sixteen years; (ix) by sentencing him in any other manner in which the case could be dealt with (section 73(i)). With regard to the approved school and reformatory orders, these can only be implemented with the

consent of the High Court.⁹¹ Before deciding on how to deal with a juvenile offender, the juvenile court must, if practicable, obtain a report on him.⁹² This is normally compiled by a social welfare officer of the department of social welfare.⁹³ If the ultimate sentence is one of probation or an approved school order, it is this department which is responsible for dealing with the offender. Although caning and the imposition of fines are numerically the most frequent sentences passed on a juvenile, the focus here will be on those sentences which aim primarily at reforming and rehabilitating the offender.⁹⁴

Probation

The Probation of Offenders Act (chapter 147 of the Laws of Zambia) gives a court the power to make a probation order requiring the offender to be under the supervision of a probation officer for a specified period which must be between one and three years.⁹⁵ Although there is nothing in the Act to limit the use of this power, in practice probation is normally used only for juvenile offenders. The reasons for this seem to be that, firstly, it is an order which is considered to be more suitable to meet the needs of juveniles rather than adults and, secondly, on a more practical level, there are an insufficient number of trained probation officers in Zambia and any move to increase the number and type of probation would seriously overstretch existing resources. The latter reason is a sound one for not extending the system to others, but the former seems to be very debatable especially when one considers the extensive use made of probation orders in other countries. If resources do become available in due course, it would be most unfortunate if the probation system were not generally extended to adult offenders generally.

Legal provision for probation was first made in Zambia in 1933 but it was not until 1954 that a regular system of probation was developed. Today the service covers the main urban areas which means that offenders from other areas do not get the benefit of any supervision and in such cases the juvenile court may find it necessary to send the offender to the approved school. In 1977 there were 493 probation cases handled by the department of which 80 involved female offenders. Of the 233 cases closed in that year 33 were classed as being unsatisfactory. Only 24 persons over 18 years of age were made the subject of a probation order and this number included three females.⁹⁶

Although there are comparatively few female juvenile offenders, these can pose a problem for the authorities as there are few ways of dealing with such persons. Caning is expressly forbidden⁹⁷ and there is no institution available for them. In these circumstances probation may be the only alternative for the court to order. However, if the girl then fails to comply with the terms of the order there is no more serious sentence available. This can be especially difficult in that a probation officer has no sanction in case of non-compliance and therefore his power is very limited. There are plans for an institution to be built for female juveniles but at present there are no funds to finance the building of it.

The Insakwe Probation Hostel in Ndola is available for male probationers who require to be removed from their home environment although their case does not warrant an approved school order. The hostel has a capacity of twenty-four but at present it is under-used mainly, it appears, because of the reluctance on the part of some social welfare officers to recommend its use to the court due to the poor living conditions there.

The approved school

The only approved school in Zambia is the Nakambala Training School at Mazabuka which is some 130 kilometers south of Lusaka. It was opened in 1963 and replaces a school in Ndola. One of the main reasons for its establishment at the present site was to reduce the number of escapes therefrom by increasing the distance from the Copperbelt where the majority of the juvenile offenders come from.

The school has a capacity of 75 and with the increasing number of admissions this figure may soon be reached. The length of an approved school order depends on the age of the person concerned but normally it lasts for three years. No person may be detained beyond the date on which he attains the age of nineteen years.⁹⁸ There is also a compulsory supervision period after the expiration of the order. The period of supervision depends once again on the age of the person but will be for at least two years.⁹⁹ The Commissioner for Juvenile Welfare may release any juvenile on licence at any time. This enables the boy to live at his home or other specified place. The commissioner retains the power to revoke this licence at any time.¹⁰⁰ As the supervision of the boy falls on the probation officers, only those persons who live in urban areas will normally be able to be supervised. The majority of juveniles sent to the school normally have at least one previous conviction and virtually all have received no secondary education. Property offences make up the vast majority of offences committed by the boys.

The emphasis at the school is on reformation rather than punishment and, to this end, practical, as well as academic, training is available. Thus formal primary education is provided and some boys are able to join a local school for secondary education. Brickwork, carpentry and metalwork courses are available and boys may be trade-tested in these areas. However, problems with the shortage of staff and materials have reduced the effectiveness of these programmes. Another reason for the transfer of the school to Mazabuka was because of the agricultural potential of the area. The move has been justified in that, for example, the school has been self-sufficient in mealie-meal since 1970. This training in agricultural work is another means of helping the boys adjust to the needs of society. Nakambala faces a number of problems at present: Firstly, whilst efforts to integrate the school into the local community have been made, these have generally met with apathy on the part of many influential members of the local community. This undoubtedly hampers the work of the school in its attempts to reform and rehabilitate. Secondly, as with other institutions under the control of the department of social welfare, the shortage of staff has put considerable strain on officers there. As well as this, promotion prospects for existing staff are limited due to financial constraints. This means that an appointment at the institution is not popular with officers of the department. Whilst juveniles await confirmation of their approved school order by the High Court, they are held at the Chilenje Remand Home in Lusaka.

The reformatory

The sole reformatory in Zambia is situated at Katombora about fifty kilometers from Livingstone. It is under the control of the prisons department although officers from the department of social welfare are seconded to run recreational programmes.¹⁰¹ A reformatory order is authority for the detention of a juvenile for four years, although a person may be released on licence at any time during that period in the same manner

as at the approved school save that the licence is granted by the chief inspector of reformatories.¹⁰² There is also a period of supervision for the juvenile at the end of his detention, conditions are similar to those pertaining to the approved school.¹⁰³ No juvenile under the age of sixteen years may be sent to the reformatory unless the court is satisfied that it is expedient for his reformation and the prevention of crime.¹⁰⁴ The upper age limit for detention is twenty-three years of age.¹⁰⁵ On average about fifty boys are sent to Katombora each year—the majority being between sixteen and eighteen years old.

In general a boy is sent to the reformatory if other means of preventing his criminal activities have failed. Indeed, in many cases a reformatory order is made instead of the imposition of a prison sentence. Thus the boy sent to Katombora will normally have a number of previous convictions together with institutional training at the approved school. The institution has been developed upon the lines of the English borstal system and has the prime aim of rehabilitating young offenders. As with the approved school, educational classes are run together with a number of practical courses for which boys may be trade-tested.¹⁰⁶ However, the location of the place greatly hampers rehabilitative training. As the prisons department annual report of 1969 states:

Successful reformatory training should include the integration of the lives of inmates with extra-mural activities such as participation in social development projects in a nearby community, and the ability of the local civil community to participate in reformatory activities. Under existing conditions this is mainly impossible.

Nothing has changed to invalidate this assessment. In fact hopes have been expressed in the past that other reformatories might be opened in Zambia to off-set this kind of problem. However, with Katombora being normally less than half full and with the financial constraints on the prisons department, this does not appear to be a likely occurrence in the near future.

The future

The major need now is to continue to develop the criminal law to meet the needs of Zambia. It will be of interest to see whether the English criminal law continues to have a strong influence in the future or whether a definite move is made towards using other African jurisdictions.

At present two matters need to be considered which affect the whole basis of the criminal law. Firstly, there is the question of what criteria is to be used in determining guilt. The Code comes down generally in favour of an objective test.¹⁰⁷ However there is a distinct move towards the use of a subjective test in a number of other jurisdictions. Thus in England the leading case advocating the objective test—*D.P.P. v Smith*,¹⁰⁸ has been abrogated¹⁰⁹ and the Zambian courts need to consider the whole question of whether the present test is suitable for this country. Secondly, a clear distinction needs to be drawn between the terms 'intention', 'recklessness' and 'negligence'. At present the courts seem unable or unwilling to tackle this vital problem.¹¹⁰ This attitude leaves the whole meaning of *mens rea* under the criminal law confused.

The economic and other problems which have faced Zambia since independence have meant that the penal system has not developed as well as it might otherwise have

done. Too much reliance continues to be placed on imprisonment, at the expense of non-custodial measures. The inexperience of many of the judiciary has meant that no coherent sentencing policy has been implemented. The continued lack of probation for adult offenders also leaves an important gap in the powers of the courts, highlighting the lack of development of the system.

As more trained lawyers are produced, it is to be hoped that many of these will be attracted to the judiciary so that a co-ordinated effort to deal with the sentencing of offenders can be made. The present disparity between sentences imposed by magistrates' courts in similar cases must be urgently tackled if the system is to retain the respect that it deserves.

Notes

1. In fact, the criminal law in England has never been codified although much of it has been consolidated by statute: e.g. Theft Acts 1968 and 1978.
2. i.e. Tanganyika, Uganda, Kenya, Nyasaland and The Gambia. The Code was later adopted in The Seychelles, Fiji and Cyprus.
3. Zambia Police Annual Report 1975. The figures for previous years also exceed those under the Penal Code.
4. The operation of this constitutional provision was suspended until 1970 to allow time for customary law offences to be written down. See Zambia Independence Order (Prescribed Date) Act 1966. Act No. 55 of 1966.
5. [1959] II R & N 169.
6. Marriage Act, section 38 (chapter 211 of the Laws of Zambia).
7. Section 38(a) Marriage Act. In *The People v Katango*, [1974] Z.R. 280, it was held that a previous customary marriage does not render a subsequent union under the Marriage Act bigamous. (per Cave J. in the High Court). However, in *The People v Nkhoma* [1978] Z.R. 4, it was held by the High Court that a previous customary marriage can render a subsequent union under the Marriage Act bigamous. The attention of the court was not drawn to the decision in *Katango*, but it seems that the latter decision is in line with the terms of the Act.
8. (1951) 5 N.R.L.R. 298.
9. Dispatch Number 380: 10th May, 1929.
10. Section 4 of the Penal Code. Now section 3.
11. Act No. 5 of 1972.
12. [1968] Z.R. 28.
13. *Ibid* at page 32.
14. [1957] A.C. 126.
15. *Ibid* at 134-135.
16. [1958] R. & N. 890.
17. [1940] A.C. 231.
18. [1961] R. & N. 645.
19. See also *Kalaluka* (unreported, Court of Appeal)

20. [1966] Z.R. 37.
21. *Op. cit.*
22. At page 32.
23. For a good example of the change in the approach of the Zambian courts, see the varying definitions of the term 'reasonable' in *Jackson* [1957] R. & N. 443; *Mutambo v the People* [1965] Z.R. 15 and *Chibangu v the People*, S.C.Z. Judgment No. 11 of 1978.
24. R. E. S. Tanner, *Three Studies in East African Criminology*, Scandinavian Institute of Africa, Uppsala, 1971.
25. An additional factor that should be noted is that amendments to the criminal law itself can mean a fluctuation in the amount of reported crime. However, in Zambia the Penal Code has not been amended significantly to make this an important factor.
26. Source: Zambia Police Annual Reports. It is difficult to compare later figures with pre-1967 figures as the statistics up to 1966 were compiled differently. The number of cases reported to the police for intervening years were: 1974: 103, 917; 1973: 90,984; 1972: 85,391; 1971: 89,227; 1970: 88,047; 1969: 86,407; 1968: 76,312.
27. Zambia Police Annual Reports.
28. Monthly Digest of Statistics.
29. *Ibid.*
30. Zambia Police Annual Reports. The figures for cases of robbery for intervening years are as follows (cases reported/undetected) 1974: 1688/1327; 1973: 1754/1258; 1972: 1637/1025; 1971: 1488/1005; 1970: 1330/880; 1969: 1316/873; 1968: 946/549.
31. *Ibid.* By virtue of the Penal Code Amendment Act (Act No. 29 of 1974).
32. Section 16(i) Criminal Procedure Code.
33. Section 201 Penal Code . A proposal has now been put forward whereby, in cases of murder, other than a murder committed in the course of an aggravated robbery under Section 294(2) of the Penal Code, a court may pass a sentence of life imprisonment if there are extenuating circumstances, i.e. any fact which diminishes morally the degree of guilt of the offender.
34. Section 43(i) Penal Code.
35. The law on piracy and related offences is that pertaining in England, (s 73 Penal Code). The English provisions relating to the punishment for piracy are rather unclear, but it appears that piracy accompanied by an assault with intent to murder, or an act endangering life, is punishable by death. Piracy Act 1837, s. 2. It has been suggested that this provision applies only to piracy *jure gentium*. (see, Smith and Hogan, *Criminal Law*, Butterworths, London, 4th edition, p. 790).
36. This provision applies unless the accused was either not so armed and was not so aware that any other persons involved were so armed, or where the accused had disassociated himself immediately on becoming so aware (s 294 (2) (a)).
37. This provision applies unless the accused could not reasonably have contemplated that grievous harm might be inflicted in the course of the offence. (s 294(2)(b)).
38. Section 25(i) Penal Code.

39. Section 25(2) Penal Code. In this case the person will be sentenced to be detained during the president's pleasure.
40. Section 25(4) Penal Code.
41. Section 60 Constitution of Zambia.
42. Section 305 Criminal Procedure Code.
43. For example, two persons sentenced to death in 1975 were hung in 1979.
44. Chapter 134 of the Laws of Zambia.
45. Held in Geneva in 1955.
46. In England, there have been moves recently to return to the system of short prison sentences for some offenders.
47. See Prison Department Annual Report 1976.
48. Section 72(i) Juveniles Act.
49. Section 72(2) Juveniles Act.
50. [1976] Z. R. 80 at 81.
51. *Chisala* [1975] Z.R. 240 (S.C.).
52. This is a good example of the problems surrounding the obtaining of accurate statistics in this field. The figures for the number of juveniles imprisoned vary considerably between the reports of the police, prisons department and the department of social welfare. See especially the statistics for 1975.
53. Chapter 160 of the Laws of Zambia.
54. The offences for which courts may *not* suspend sentence are: any offence punishable by death; any offence contrary to section 226 of the Penal Code (acts endangering railways and persons travelling thereon); arson; robbery; any offence in respect of which any written law imposes a minimum sentence; any conspiracy, incitement or attempt to commit any of the above offences; (5th Schedule, Criminal Procedure Code).
55. Section 16(3) Criminal Procedure Code.
56. *Masissani*, [1977] Z.R. 234.
57. *Ibid.*
58. *Ibid* at p. 239.
59. [1973] Z.R. 186 at 187.
60. Section 28(d) Penal Code.
61. Section 73(i) Juveniles Act.
62. Section 74(i) Juveniles Act. The payment of damages or costs may also be ordered from the parent or guardian on similar grounds.
63. Section 175(i) Criminal Procedure Code.
64. *Ibid.*
65. The offences are those in chapters XXVI-XXXI, inclusive, of the Penal Code.
66. Section 175(2) Criminal Procedure Code.
67. Section 29 Penal Code and section 3 Penal Code Amendment Act (Act No. 29 of 1974). The relevant sections of Penal Code relating to forfeiture are: 94-96, 113-4 and 385-6. A person convicted of the illegal possession of diamonds or emeralds shall have these forfeited by the state, s 288B Penal Code. (enacted in the Penal Code Amendment Act 1972, Act No. 5 of 1972).
68. *Ibid.*
69. See *Alakazumu* [1973] Z.R. 31.

70. Per Cox, C. J. in *Subulwa*, IV (1950) N.R.L.R. 61.
71. Section 27(5)(a) Penal Code.
72. Section 27(5)(a) Penal Code.
73. See *Zimba* [1976] Z.R. 86.
74. Section 41(i) Penal Code.
75. *Ibid.* An additional factor is that a probation order must be inappropriate. This will rarely be of practical importance as probation is, in practice, confined almost exclusively to juvenile offenders.
76. Section 41(5) Penal Code.
77. Section 42(5) Penal Code. One seemingly unsatisfactory point in the sub-section is that it would appear that *any* other offence committed during the period of the conditional discharge renders the offender liable to punishment both for the new and the old offence regardless of whether the earlier offence is of a totally different nature to the new offence or the new offence is minor in character.
78. See Penal Code Amendment Act 1974 (Act No. 8 of 1974).
79. Section 34(4) Penal Code.
80. Section 31 Penal Code.
81. Section 74(i) Juveniles Act.
82. Section 43–44 Criminal Procedure Code.
83. For example, in a recent study by the author, an offender gave his age as fifteen years and was given an approved school order in 1977. In 1978 the offender made another court appearance and, upon a medical examination being undertaken, was certified as being over twenty years old. (Case DN 117/77) (Hatchard, Report No. 2 on Juvenile Delinquency in Zambia, 1980).
84. Similarly, small figures for juvenile delinquency have been reported from other African countries. See for example the criminal statistics in Botswana and Kenya.
85. A recent U.N.I.C.E.F. Report (1979) states that 38% of the population in Lusaka live in high density accommodation.
86. Report No. 2 on Juvenile Delinquency in Zambia by J. Hatchard (1980).
87. Section 64(i) Juveniles Act: All section numbers referred to hereafter relate to the Juveniles Act unless otherwise stated.
88. Section 119(i).
89. Section 119(ii).
90. Section 123.
91. Sections 79 and 94.
92. Section 64(7).
93. The department of social welfare is responsible for all matters concerning juveniles (apart from those at the reformatory). The director of social welfare is also the principal probation officer and commissioner for juvenile welfare. Similarly, all social welfare officers are also gazetted probation officers. There is no separate probation service in Zambia and any reference to probation officers in the text refers to officers of the department of social welfare.
94. The other possible sentences have been discussed earlier.
95. Section 3(i) Probation of Offenders Act.

96. Department of Social Welfare Report 1977. The figures for previous years are: 1976: 511; 1975: 578; 1974: 552; 1973: 504; 1972: 469; 1971: 436.
97. Section 27(5)(b) Penal Code.
98. Sections 78 and 86.
99. Section 88.
100. Section 87.
101. Section 96.
102. Sections 93 and 104.
103. Section 105.
104. Section 72(3). In 1977, 10 out of the 53 juveniles admitted to the reformatory were under 16 years old.
105. Section 102.
106. The courses are in carpentry, brick-laying, plumbing, motor mechanics and tailoring.
107. As evidenced by the use of the decision in *D.P.P. v Smith* [1961] A.C. 290 as the test for the foresight of consequences. See, for example, *Yanyongo v the People* [1974] Z.R. 149.
108. *Ibid.*
109. See *Hyam v D.P.P.* [1975] A.C. 55 also *D.P.P. v Morgan* [1976] A.C. 182.
110. e.g. in *Mwape v the People* S.C.Z. Case No. 20 of 1979, the Supreme Court dealt with the definition of recklessness in one short paragraph without examining its relationship with other states of mind.