ASPECTS OF PRE-TRIAL CRIMINAL PROCESS IN ZAMBIA

A memorandum by the Government of Zambia

Introduction

This paper discusses the pre-trial criminal process in Zambia. It is divided into two parts. The first part deals briefly with the procedure of bringing into motion the criminal process. The second looks at the problem of securing the individual's liberty once the criminal machinery is set into motion i.e. the issue of bail in pre-trial matters.

The provisions of the law in Zambia regarding pre-trial criminal procedure, under the existing circumstances in the country are largely satisfactory. The processes here can be divided into three, viz

(1) Arrest

(2) Laying of charges: and

(3) Trial (hearing conviction/acquittal and sentencing)

(1) Arrest

The presence of an accused at his trial is secured by summons or warrant of arrest. The accused may also be arrested without a warrant in a number of instances. The law also provides for the non-attendance of the accused in the cases of charges punishable by fine or imprisonment not exceeding 3 months.

(2) Summons

Summons issued by court directed to the person requiring him to appear before the court at a place and time appointed is normally served on the person against whom a charge is laid. Where he is not available this can be left with a member of his family, a servant or where this is not possible the summons can be affixed to a conspicuous part of his house.

The system in Zambia of the issue of summons, the service thereof on the person required to attend trial still works. This is a method more preferable to that of arrest for it ensures the liberty of the individual as laid down in the country's Constitution. Where the offence is not of a serious nature, and the accused and his interests are known and it appears that the accused is not likely to abscond, the issue of a summons is preferable.

(3) Warrant

In cases where a person summoned may abscond or is likely to take steps that may defeat the ends of justice, or where an offence is committed in circumstances where the attendance of the accused person can only conveniently be secured by an arrest, a warrant of arrest is resorted to. In Zambia no arrest can be effected unless a complaint or charge has been made on oath. A warrant of arrest is only issued by a judge or a magistrate upon allegations of facts which prima facie show that a punishable offence has been committed and

that there is reasonable ground of suspecting the person named in it. A warrant of arrest states the offence and names the person against whom it is issued and orders that such person be brought before the court to answer the offence charged. The Zambian judicial system recognises that the issue of a warrant of arrest is a serious judicial act and as such normally resort to such in circumstances of necessity. And in recognition of the liberty of the individual the law provides that any court issuing such a warrant may direct that the officer executing the warrant do release the person arrested if such a person executes a bond with sufficient sureties. Perhaps the only recommendation that could be made here is that such a release on bond should be upon the person's own recognisance.

In the case of an arrest effected by a person other than a police officer, such a person hand over the arrested person to the nearest police officer who, in turn, is required by law to bring him before a magistrate without delay. This provision again ensures that a person is not unnecessarily restrained or badly treated. In cases where a person may have been unduly held up in custody, the criminal procedure code empowers a court to issue an order directed to officer in charge of the place where the person in question is being held before such court. The court then takes the necessary steps to see that the case is disposed of expeditiously. This ensures that the ends of justice are met and not defeated.

(4) Arrest without warrant

This is the most common form of arrest in most developing countries including Zambia, perhaps because the offences for which the arrests are made are of a common nature. Among other offences a person could be arrested without warrant if he is suspected of having committed a cognisable offence or breach of the peace. Other instances include the obstruction of the police, being found in possession of stolen property or where one deserts from the defence forces,etc.

However, in any of these instances an arrested person is required to be present before the court without delay. What constitutes unnecessary delay is a question of fact. But if it appears that such a person cannot be taken to court within twenty-four hours the police officer is empowered by the Criminal Procedure Code to release him on bond unless the offence in question carries capital punishment. Police Officers are required to report all cases of persons arrested without warrant within the limits of their jurisdictions.

(5) Prosecution

The law recognised that arresting a person and merely handing him to the court is not a full discharge of justice. Accordingly, it imposes a duty on the court to ensure that once a person is brought before it his case is disposed of as quickly as possible, hence the legal maxim "Justice must not only be done but it must be seen to be done". The judicial process of preparing the case for trial is thus set in motion. If a charge is not yet framed up this is done either by a public prosecutor or at the instance of the office of the Director of Public Prosecutions, or by the court itself.

Our law permits both private and public prosecutions. Private prosecutions are only conducted with permission from the court. This is to ensure that the individual's rights are not jeopardised and that the case trial is meritorious and not frivolous and vexatious. The law subjects the private prosecutor to the same rules and limitations as the public prosecutor and where necessary it permits the Director of Public Prosecutions to take over the prosecution. The permission of private prosecution under our law is a recognition of the fact that under certain conditions some cases are more effectively handled privately than publicly and such privileges given to the private prosecutor have hardly been abused.

(6) Public Prosecutor

The power to institute or discontinue public prosecution on behalf of the State is vested in the Director of Public Prosecutions. However, he has the authority to delegate some of the powers under him and to appoint public prosecutors.

The entrusting of prosecution to the office of the Director of Public Prosecutions is consonant with the fact that a crime is an offence against the State. Centering the process of prosecution to the office of the Director of Public Prosecutions is a way of ensuring law and order to the whole society. This is a further recognition of the fact that executing the judicial machinery of trial commencing with enquiry, charge and the crowning of trial with conviction and sentence is an enormous task. In the interest of the State this function given to the Director of Public Prosecutions must be effectively and speedily executed. For on the other side lies the interest of the accused that is seeking freedom. Only a speedy trial will save him a lot of difficulty.

The law empowers the Director of Public Prosecutions to avoid unnecessary delays of trial and to ensure the liberty and freedom of the individual. Either due to insufficiency of evidence or due to any other sufficient cause he is empowered to enter a nolle prosequi at any stage of the trial, in which case the accused stands discharged. Still for any other sufficient cause he is empowered to withdraw any case before a subordinate court in which case the accused may be discharged or acquitted depending on the stage the trial had reached. Any unnecessary delays that may crop up from the office of the Director of Public Prosecutions, either due to insufficiency of evidence or any other causes as seen above, are taken care of. As a result up to this stage the processes under our law regarding pre-trial criminal procedure still appear satisfactory.

(7) Trial

Preliminary Inquiry still appears in the Criminal Procedure Code, but has attracted criticisms. The main criticism against this process is long delay in the disposal of cases and the fact that it creates a wrong impression to witnesses that the trial has already been disposed of. By the trial they mean the preliminary inquiry.

In inquiries the law limits accused's remand period at any one time to only fifteen days.

As for trial, there is no statutory provision in Zambia fixing the time when an accused person should be brought before the court to stand his trial.

However, the time within which prosecution should commence a summary trial is limited to 12 months. In practice, arrangements for trial are made between the court, the office of the Director of Public Prosecutions or Public Prosecutor and the defence in cases which are defended.

The present laws in Zambia on pre-trial criminal procedure are set to ensure a fair and expeditious trial without infringement upon the rights of the citizen. They also provide effective penal system for those found guilty.

The process commences with preparation of a case and reaches the peak with the trial itself. However, not all cases commenced reach trial for a registered case may be withdrawn for a number of reasons such as a reconciliation. The Zambian Government is now considering instituting legislation under which the police will be given more powers to settle some cases outside court. This will save the courts from undue congestion and enable them to handle more contentious matters.

The general rule is that only contentious cases must reach trial stage. Hence the encouragement of compromise, reconciliation or settlement of disputes out of court i.e. before police officers or judicial officers. An accused who has no defence is encouraged to admit the charge. This is without prejudice to his right to trial. Admission of the charge without the rigour of a trial which may subsequently end up in a conviction actually saves both the accused and the court a lot of trouble, costs and time.

The procedure ensures that unnecessary delays are avoided under a number of instances as seen above. The law only permits necessary adjournments and discards as far as possible unnecessary delays. Both the legal and judicial machinery in Zambia adequately takes care of the legal maxim "Justice delayed is justice denied," and the principle of fair trial. Accordingly the machinery of justice in Zambia is geared to the fulfilment of these goals.

Bail in Zambia

Bail as a device in pre-trial criminal procedure rose out of the need to free untried prisoners. Its theoretical base is the legal doctrine that an accused person is presumed innocent until proven guilty. Putting an accused person in goal before he is tried, convicted and sentenced would in essence be a violation of this legal doctrine and a violation of constitutional rights.

However, on the other side lies State interest to ensure the presence of the accused at his trial.

In Zambia there is no automatic right to bail for any accused person. Where bail may be granted it is granted to a person other than a person accused of murder, treason or espionage. This is done either on the accused person's own promise that he will be present at his trial or on the promise of a suitable surety or sureties acceptable to the court or a police officer. However, in most cases the release or non-release of an accused person on bail is a matter of the court's discretion. A right of appeal exists.

Before a person is admitted to bail, the court considers a number of factors which basically hinge on whether or not the accused will appear and stand his trial. These factors are:

(i) the gravity of the offence charged;

(ii) severity of punishment on conviction;

(iii) possibility of interfering with witnesses; and

(iv) independent sureties. (see 1964, 61 Law Society's Gazette likelihood)

In some cases bail may be refused to an accused if there is a likelihood of repetition of the offence. In other cases bail is denied because of lack of acceptable sureties. In yet others the bail sum may be excessive for there is no objective criteria for assessing bail in relation to the means of the accused, the law merely provides that:

> "The amount of bail shall in every case be fixed with due regard to the circumstances of the case, but shall not be excessive."

These considerations may deviate from the very objective for which bail was conceived - namely that of ensuring that an apparently innocent person does not remain in custody before his trial. Being in custody for the want of raising the necessary bail money

is inconsistent with the presumption of innocence of the accused. In most cases, this works more unfairly to the poor and may not augur well for those acquitted trial.

There is, however, a provision for the High Court to order that the bail or deposit required by a subordinate court or by a police officer be reduced or varied. Needless to add, an illiterate person may be left unaware of such a provision.

Other jurisdictions have voiced strong sentiments against pre-trial detention. The court in one case noted thus:

> "Pre-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty. His incarceration is indistinguishable in effect from that on..... who is retried after obtaining past conviction relief. In both instances the power of the State has been utilised to punish the complainant."

One may well argue that to detain a person before trial is to punish him and to deny him protection under the Bill of Rights which decrees freedom and justice to all citizens. Perhaps it is safer to suggest that, since pre-trial detention is there basically for making certain the reappearance of a person at his trial, then those for whom bail cannot be granted should be the exception in the law.

Conclusion

It is clear from the foregoing that the grant of bail in pre-trial criminal procedure is a privilege rather than a right. Perhaps one could suggest a position which recognises that the main factor which induces an accused person to appear for his trial is not the forfeiture of his money or property but his reliability as a person. And his reliability or non-reliability can be established by investigation. The investigation could be directed to establish a number of things such as:

(i) the character of the accused;

(ii) his background;

(iii) his occupation;

(iv) his hobbies;

(v) his close relatives or friends and their addresses;

(vi) his criminal records, etc.

Where the investigation proves satisfactory the accused should be released on his own recognisance without having to buy his freedom.

As argued above, it is obvious that a delicate balance between the interest of the State and those of an individual need to be established. The State has enormous resources which an individual does not have.

It is obvious, therefore, that legal rights historically achieved by the people should have a socio-economic basis for their enforcement. In more cases that not congestions at both courts and prisons seriously jeopardise the individual's freedoms and rights.

One would have appealed for a statutory provision creating a limit on the time for prosecuting a matter. But, attractive as this might be, it would in reality, be illusory, given both the material and financial limits of Government.

What should be forcibly pleaded for is a system that is more objective than subjective in application. Indeed every defence lawyer has been confronted with a situation whereby Magistrate A grants an individual bail, whereas B refuses bail when the operative circumstances are the same.

Granted the acumen of the adversary system, it may be that in one instance the prosecution was agreeable to bail, whereas in the other serious objections were entertained.

Given a heterogeneous society caught up in a vortex of rural-urban migration, it is hard not to sympathise with the prosecutor's objection for admitting to bail a "person of unfixed abode just come from the village." For all purposes and intents sureties may not be forthcoming. The mentality of a good number of rural people who have not yet articulated legal consciousness is to equate an accused with a convict.

They are frightened of the legal apparatus embodied in the police, courts and prisons. As such, many illiterate persons who cannot afford a legal counsel, and may not be aware of the legal aid schemes, may languish in prison for a considerable period of time pending the clearance of overloads at the court. Moreover, when the matter does eventually come before the courts it will be a prologue to further adjournments . The accused is perplexed by such terms as "mention", "adjournment", "trial", etc.

In all fairness it may be stated that the Zambian bench has been very aggressive in protecting individual freedoms. Mbandangoma v the Attorney General 1979 ZLR 45 was an instance where the court showed dissatisfaction at an arrangement whereby an arrested person who was released on police bond was subsequently made to report himself to the police station in relation to the same offence. The court stated clearly that the police can only arrest persons for offences and have no power to arrest anyone in order to make enquiries about him, and further that it was improper for the police to detain persons pending further investigations without bringing them before court as soon as practicable.

Provided the applicant is a person of social integrity, the court is likely to be more sympathetic. That is why an exploratory exercise on the person's social standing is often carried out. In Shamalambe v The People (1985) (unreported), Commissioner Kabamba went on at length to explain that:

> "There can be no other purpose for seeking to know all about the accused when considering bail applications than to answer the silent question concerning his personal integrity. The value he attaches to his name stands at the centre of inquiry. A man who values his name highly is more likely to stand his ground and defend it without the fear of suffering physical pain that a custodial sentence threatens. On the other hand, a man who cares less about what value his name may have so long as he enjoys himself is less likely to stand his ground to defend it".

The practice of the courts has been largely influenced by the reaction of the State to a bail application. In the same judgement Commissioner Kabamba stated:

> "that the State's non-opposition to a bail application presumes that it has favourable information concerning the reliability of the applicant."