MEASURES TO COMBAT ECONOMIC CRIME

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I. INTRODUCTION

The Land Reform Programme adopted by the Zimbabwe Government in the year 2000 and the subsequent smart sanctions imposed by the Western countries has resulted in the mushrooming of various forms of serious economic crimes.

The most notable forms of economic crimes manifest themselves in money laundering, fraud, corruption, insider trading in the stock/financial markets, externalization of foreign currency and embezzlement of funds both in the private and public sector.

In Zimbabwe, policing of economic crimes is done by the Police and the Anti-Corruption Commission.

II. THE CURRENT SITUATION OF ECONOMIC CRIME INCLUDING MONEY LAUNDERING IN ZIMBABWE

Reflecting back to my introduction, the Land Reform Programme in Zimbabwe brought about both positive and negative aspects to the country. The economy is agro-based and thus the Land Reform Programme affected the growth of the economy.

The few whites who owned the land and supported by masters of industry and multinational companies were not supportive of the reforms. As a result, they worked in cahoots to derail the reforms and at the same time, involved themselves in all forms of economic plunder. Thus today, in Zimbabwe, there is a serious problem of high inflation and unemployment rates. The scenario tends to promote economic crime.

As can be shown in the statistics (*see Appendix A*), serious economic crime was on the increase in 2002 while it decreased in the year 2003.

Serious economic crimes in Zimbabwe:

1. Fraud
2. Money Laundering
3. Corruption
4. Externalisation of Foreign Currency
5. Forgery
6. Insider Trading in Stock and Financial Markets
7. Tax Evasion

The modus operandi for economic crimes mentioned above is as follows.

A. Fraud

Cheque Fraud, Insurance Fraud and Master Card Fraud.

B. Money Laundering

Money stolen is taken to asset management firms and financial institutions where it is deposited to earn interest or alternatively the money is used to buy assets.

C. Corruption

Public officers misuse their offices by accepting rewards and corruptly doing some undue favours, also some violate the Tender Board procedures by offering tenders to their friends or relatives.

D. Externalisation of Foreign Currency

Foreign currency is telegraphically transferred to offshore accounts. Some buy assets abroad with the foreign currency they acquire in Zimbabwe. An example is that of the Minister of Finance and Economic

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Development, Dr. Chris Kuruneri who siphoned foreign currency from Zimbabwe to South Africa where he bought his properties (*see Statutory Instrument 109/96 Exchange Control Regulations 1996, Zimbabwe*).

E. Insider Trading In the Financial Markets

Money market shares are sold privately without public knowledge.

F. Tax Evasion

Some companies avoid paying tax to the government or they understate their business transactions.

III. EFFECTIVE METHODS FOR INVESTIGATION, PROSECUTION AND TRIAL OF ECONOMIC CRIMES

In Zimbabwe, the Police are constitutionally mandated to investigate all criminal matters and bring the cases before the courts for prosecution. When investigating economic crimes, we involve other specialised units, that is, officers from the Central Bank (Reserve Bank of Zimbabwe), National Economic Conduct Inspectorate, Forensic Scientists and investigators from Zimbabwe Revenue Authority and the Comptroller and Auditor General.

Prosecutors are qualified law officers from the Attorney General's Office who have undergone specialised training programmes in prosecuting economic crimes.

The Police work hand in glove with financial institutions when investigating economic crimes because proceeds from these crimes are usually deposited within these financial houses and also they are directly or indirectly involved (In cases of externalization of foreign currency, the banks are used to transfer the externalised funds telegraphically).

Economic crimes trials take place in the following courts depending on the magnitude or value of the amounts involved.

- Magistrate's Court
- Provincial Court
- Regional Court
- High Court

Magistrates and Judges who preside over these economic crimes receive specialised training.

A. Measures for Ensuring the Effectiveness of Investigative Agencies

The Police recruit informers who provide them with information of a criminal nature. They are given an allowance depending on the nature of information supplied. The Police also plant suggestion boxes in places where the public have access. Information is written and placed in these suggestion boxes.

We also have hotlines, which are telephone lines which the public can use to contact the Police and supply information.

The Police in Zimbabwe also practice community policing. In this scenario, the Police and the community are involved in policing and detecting crime.

Criminals also supply information on other criminals. Syndicates are usually aware of what other groups are doing and if approached, they are sometimes helpful in supplying valuable information in order to "fix" their criminal counterparts.

B. Effective Utilisation of Traditional Investigative Methods

Although we have modern investigative methods, we still practice our traditional investigative methods. In all our investigations, we use our Criminal Records Office. This Office keeps the data of all criminal records, that is, modus operandi of how the crime was committed, who committed the crime, time and place of occurrence and how the case was finalized. Officers are also trained on the job by experienced fellow officers.

C. Measures for Ensuring Effective Investigation of Banks

The Zimbabwe Republic Police, when investigating banks, usually involve officers from the Central Bank

(Reserve Bank of Zimbabwe), which is the controller of all financial institutions. The Central bank has an Investigation Department. This Department is composed of mainly retired Police officers who would have undergone specialised courses in the operations of banks. We also have informers inside banks. These are normally employees of the bank, so they are able to provide detailed information inside the bank.

D. Utilisation of New Investigative Methods

Police officers are attached to banks for three months learning banking systems. In Zimbabwe, all Police officers are sent for computer training and this helps when investigating these economic crimes since information is stored on computers and computer discs.

The Police also conduct electronic surveillance using camcorders on all known criminals. We get extracts of all telephone print-outs to monitor the criminals' associates and communications.

We have officers from the Criminal Intelligence Unit who do undercover operations in hotels and night clubs where criminals spend their proceeds of crime.

In Zimbabwe, only the President is immune from prosecution, however, where an accused person is a competent witness in a case in which he will testify against his accomplices, the Attorney General's Office and the Investigating Officer may forego prosecuting such a witness provided that he/she does not turn a hostile witness.

E. Protection of Witnesses

In Zimbabwe, witnesses are protected both at the investigative and the trial stage. In cases where the witnesses use transport to visit the Investigator and the court, the government pays for both transport and food for the witness.

The witnesses are also informed of their right to give evidence in court and are also encouraged to report any interference from the accused to the Police.

IV. LEGAL FRAMEWORK FOR CONTROLLING ECONOMIC CRIMES

There are a number of regulations in place to control economic criminal activities. These are:

1. Prevention of Corruption Act, Chapter 9:16
2. Serious Offences Act, Chapter 9:17
3. Exchange Control Act, Chapter 22:05
4. Insurance Act, Chapter 24:07
5. Banking Act, Chapter 24:01
6. Reserve Bank Act, Chapter 22:15
7. Criminal Procedure and Evidence Act, Chapter 9:07
8. Postal and Telecommunications Services Act, Chapter 12:02
9. Sales Tax Act, Chapter 23:08
10. Audit and Exchequer Act, Chapter 22:03
11. Companies Act, Chapter 24:03
12. Public Accountants and Auditors Act, Chapter 27:03
13. Building Societies Act, Chapter 24:02
14. Bank Use Promotion and Suppression of Money Laundering Act, Chapter 24:24

These Acts are very effective and complimented by the common law offences of Fraud, Forgery and Theft by False Pretences. Criminals also try to circumvent the provisions of the Acts in order to enhance their criminal activities.

To complement these activities, the Police have put in place a number of strategies to fight economic crimes as mentioned earlier on.

Zimbabwe is also a member of the Eastern and Southern African Anti-Money Laundering Group of countries (ESAAMLG) (Reference the Protocol against Corruption). The Group was established to take effective measures against money laundering.

V. PUNISHMENT AND SANCTIONS

Punishments for criminals involved in economic crimes are imposed by the presiding magistrate or judge. The convicted person can either pay a fine or be incarcerated in prison depending on the gravity of the case. However, in most cases where the accused fails to pay back what he or she has stolen, the alternative is imprisonment. Suspended sentences can also be imposed.

VI. ESTABLISHMENT OF THE SUSPICIOUS TRANSACTIONS REPORTING SYSTEM

In Zimbabwe, most banks have security departments. The security departments receive all reports of criminal activities and the department keeps the Police telephone numbers and they in turn contact the Police.

Co-Operation by Banks and Non-Bank Financial Institutions

The Police in Zimbabwe enjoy very supportive co-operation from banks and financial institutions when carrying out investigations.

VII. CLASSIFICATION OF PROCEEDS AND ASSETS DERIVED FROM CRIMES, FORFEITURE, FREEZING SYSTEMS AND COLLECTION OF THE VALUE OF PROCEEDS

The Bank Use Promotion and Suppression of Money Laundering Act, Chapter 24:24 empower Police to recover proceeds of crime in whatever form (cash or assets). When freezing money, the Police apply for a subpoena through the courts and the court issues the subpoena instructing the bank or finance house to freeze the money involved.

The assets are kept by the Police until the case is finalised by the courts. The courts usually make a determination on how to dispose of the assets or money recovered. Assets out-flowed to foreign countries are recovered under the terms of the Mutual Assistance Act.

VIII. SHIFTING THE BURDEN OF PROOF OF THE DEFENDANT

The burden of proof in most cases, as provided for by section 18 of the Zimbabwe Constitution, is upon the State, however section 15 of the Prevention of Corruption Act shifts the burden of proof to the accused person where he or she deliberately omits a procedure that must be followed. In such cases, the State would have proved part of the elements of a crime and the accused must prove his innocence (*See Appendix B*).

IX. OTHER ANTI-MONEY LAUNDERING SYSTEMS

As previously stated, the Zimbabwe government has set up an Anti-Corruption Unit and the government also passed the Bank Use Promotion and Anti-Money Laundering Act. This Act regulates the operations of financial institutions.

X. PREVENTATIVE MEASURES AGAINST ECONOMIC CRIMES

The Zimbabwe government has put in place some administrative regulations of economic activities like the National Economic Conduct Inspectorate, Zimbabwe Revenue Authority and the Anti-Corruption Commission.

XI. DISCLOSURE SYSTEMS

Bank employees are governed by the Bank Act not to disclose bank secrecy, that is, if any account is under investigation. The Central Bank (Reserve Bank of Zimbabwe) plays a central role in monitoring economic activities with the help of the Police and the Anti-Corruption Commission.

XII. PUBLIC AWARENESS AND OTHER EDUCATIVE MEASURES

The media and television programmes are being used in public awareness. The Police has a department namely Community Relations which educates the community about crime prevention. Financial institutions also issue pamphlets to the public about economic crime awareness.

XIII. CONCLUSION

Concerted efforts to put mechanisms in place to control economic crimes are being made by the Zimbabwe national policies and regional protocols and international conventions have been entered into by Zimbabwe. In this global village, both regional and international co-operation is required to control all forms of crime. Results of the efforts are pleasing, though remarkable results could have been achieved had it not been for the inadequate resources provided for the fight against crime.

APPENDIX A

Crime Statistics for 2002 and 2003

Offence	2002	2003
Forgery	113	98
Forgery and Uttering	361	261
Fraud	4174	3815
Exchange Control	399	567
Prevention of Corruption	323	413
Tax Evasion	1	2

APPENDIX B

Case

REPORTABLE (85)

Judgment No. S.C. 243/95
Crim. Appeal No. 683/94

LIONEL MFUDZI CHOGUGUDZA v THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, KORSAH JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, DECEMBER 5, 1995 & JANUARY 8, 1996

E W W Morris, for the appellant

B Hammond, for the respondent

GUBBAY CJ: The appellant was arraigned in the court of the regional magistrate upon a contravention of s 4(a) of the Prevention of Corruption Act, 1985. It was alleged that being a public prosecutor in the employ of the Attorney-General's Office and, thus, a public officer, on 17 September 1992 he unlawfully and corruptly consented to the admission of Emmanuel Malunga and Patrick Kanyemba to bail, in the knowledge that he had no authority to do so in respect of that class of offender. To this charge the appellant pleaded not guilty. Nevertheless, he was convicted and sentenced to fifteen months' imprisonment with labour, of which period eight months were conditionally suspended for three years. He now appeals to this Court against both conviction and sentence.

An important preliminary point was taken by counsel for the appellant. It was that save for the invocation by the State of the presumption in s 15(2)(c) of the Prevention of Corruption Act which, so it was submitted, placed

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upon the appellant the *onus* of establishing his innocence, he could not properly have been convicted of the charge.

The presumption of innocence conferred by s 18(3)(a) of the Constitution of Zimbabwe upon every person charged with an offence lies at the very heart of criminal law. It finds expression in the fundamental and hallowed principle that the prosecution bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence) upon a standard of proof to be satisfied beyond a reasonable doubt (instead of proof on the balance of probabilities). This principle, which is reflected in the maxim *"in favourem vitae, libertatis et innocentia omnia presumuntur"* (in favour of life, liberty and innocence all possible presumptions are made), was affirmed by DAVIS AJA in *R V Ndhlovu* 1945 AD 369 at 386. The only common law exception to it is that where the defence is one of insanity, the burden of proof rests on the accused. See *R v Britz* 1949 (3) SA 293 (AD) at 302; *S v Taanorwa* 1987 (1) ZLR 62 (S) at 65F; and generally, Hoffmann and Zeffertt, *The South African Law of Evidence*, 4 ed at pp 513-515.

There is, however, a qualification in s 18(13)(b) of the Constitution. It reads:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of -
>
> (a)
>
> (b) subsection (3)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts."

The immediate questions that arise are: How far does this provision go? What particular facts are involved? What proportion of the facts could the accused be expected to prove? No indication is given as to where the line should

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be drawn. Yet what is clear is that, read in the context of the presumption of innocence, s 18(13)(b) cannot be construed as holding valid a statutory provision that in actuality imposes upon the accused the burden of proving his innocence or disproving his guilt.

In the resolution of these questions I have examined many cases dealing with the extent to which it is permissible for legislation to create presumptions, commonly referred to as "reverse *onus* provisions", against an accused. From them the following guide-lines emerge:

1. The presumption must not place the entire *onus* onto the accused. There is always an *onus* on the State to bring the accused within the general framework of a statute or regulation before any *onus* can be thrust upon him to prove his defence. See *S v Broughton's Jewellers (Pvt) Ltd* 1971 (2) RLR 276 (AD) at 279 E-G, 1971 (4) SA 394 (RA) at 396 E-F; *S v Marwane* 1982 (3) SA 717 (A) at 755H-756C.

2. The presumption may relate to a state of mind, that is, an intention, where the element of the crime is a fact exclusively or particularly within the knowledge of the accused. See *Katz & Khan v Town Council of Germiston* 1930 TPD 373 at 376; *Ex parte Minister of Justice: In Re R v Jacobson and Levy* 1931 AD 466 at 470-471. The proposition that a state of mind is a fact has never been doubted since the famous *dictum* of BOWEN LJ in *Edgington v Fitzmaurice* (1889) 29 ChD 459 (CA) at 483 that:-

> "... the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what

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> the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

See also, *Curtis Estate v Gronningsaeter and Anor* 1943 CPD 531 at 540; *R V Blackmore and Anor* 1959 (4) SA 486 (FSC) at 493H; *S v Pineiro* 1993 (2) SACR 412 (Nm) at 418a.

3. A presumption will be regarded as reasonable if it places an *onus* upon the accused where proof by the prosecution of such a specific fact is a matter of impossibility or of difficulty; whereas such fact is well known to the accused. See *R v Chapman* 1934 CPD 338 at 341; *R v Michelson* 1939 AD 10 at 15; *R v Mahabeer* 1945 NPD 130 at 132; *R v Maseko* 1946 TPD 263 at 268; *R v Rabinowitz and Ors* 1950 SR 77 at 80, 1950 (3) SA 279 (SR) at 282H; *S v Schoenfeld* 1963 (4) SA 77 (T) at 81 E-F; *S v Pineiro, supra* at 415b.

4. The presumption must not be irrebuttable. *R v Rabinowitz and Ors supra* at 80 and 282 D-E respectively; *S v Schoenfeld supra* at 81D.

Under s 4(a) of the Prevention of Corruption Act an offence is committed when

(i) a public officer

(ii) in the course of employment

(iii) does anything contrary to or inconsistent with his duty

(iv) for the purpose of showing favour or disfavour to any person.

But by virtue of s 15(2)(e) of the Act, if it is proved in any prosecution for an offence in terms of s 4 that -

(i) a public officer
(ii) in breach of his duty as such
(iii) did anything to the favour or disfavour of any person "it shall be presumed, <u>unless the contrary is proved</u>, that he did ... the thing for the purpose of showing favour or disfavour, as the case may be, to that person" (emphasis added).

The plain language of s 15(2)(e) mandates that the presumption will stand unless proof to the contrary is adduced by the public officer, who is the accused. It is a presumption rebuttable at his instance. It imposes a legal burden upon him which must be discharged on a balance of probabilities. It is not discharged merely by raising a reasonable doubt. In *R v Carr-Briant* [1943] 2 All E R 156 (CCA) HUMPHREY J, renowned for his knowledge and experience of criminal law, made the point at 158 *in fine* - 159A in these words:-

> "... in any case where, either by statute or at common law, some matter is presumed against an accused person 'unless the contrary is proved', the jury should be directed that it is for them to decide whether the contrary is proved; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

See also *S v Ramara* 1965 (4) SA 472 (C) at 474 A-B; *S v Mhlongo* 1967 (4) SA 412 (N) at 416 B-D; *S V Nduka* 1972 (1) SA 231 (E) at 232H-234H;' *S v Zuma* 1995 (2) SA 642 (CC) at 653 H-I; *S v Bhulwana*; *S v Gwadiso*, a judgment of the South African Constitutional Court of 29 November 1995 at para 7.

It is apparent, then, that before the State can rely on the presumptive proof of s 15(2)(e) of the Act, it must establish beyond a reasonable doubt the following factual premises

(i) that the accused is a public officer
(ii) that in the course of his employment and in breach of his duty
(iii) he did something which objectively considered, showed favour or disfavour to another.

This leaves proof of the <u>purpose</u> of showing favour or disfavour to the accused to discharge. It is an element that may be described as -

(a) a particular fact (a state of mind)
(b) a matter which he should know and can easily prove
(c) a matter difficult for the State to prove.

The presumption does not have the effect of requiring the accused unfairly to discharge a major ingredient of the offence for no reason at all. A strong suspicion will have been created on the facts proved by the State from which a permissible inference could be drawn that the purpose was to show favour or disfavour. The accused is simply called upon to reveal something peculiarly within his knowledge - why he acted as he did. This seems to me essentially an exercise in common sense.

As I have mentioned, the exception to the presumption of innocence in s 18(13)(b) of the Constitution does not define the facts the proof of which may be placed on the accused. It does no more than codify or carry forward what was already allowed under the common law, namely, that a reverse *onus* may be placed on the accused. In other words, what the framers of the Constitution

intended to convey, without specifying the exact limits, was that it is permissible for the Legislature to enact reverse *onus* provisions in conformity with the guide-lines developed by the common law.

Section 18(13)(b) has no counterpart in either the Canadian Charter of Rights and Freedoms or the South African interim Constitution (Act 200 of 993). In both if, as a result of a preliminary enquiry, the statutory presumption is shown to be in breach of the right to be presumed innocent, the court must proceed to consider whether such presumption is nonetheless saved as being reasonably justifiable in a free and democratic society (see, respectively, s 11(d) as read with s 1, and s 25(3)(c) as read with s 33(1)(a)).

In Canada a presumption will be held to be constitutional if it passes a proportionality test. It must be (a) rationally connected to the objective and not arbitrary, unfair or based on irrational considerations; (b) impair the right or freedom as little as possible; and (c) be such that its effect on the limitation of the right and freedom is proportional to the objective. See *R v Chaulk* (1991) 1 CRR (2d) 1 at 26-30; *R v Downey* (1992) 90 DLR (4th) 449 (SCC) at 465g-466b. The position in South Africa is similar. See *S v Zuma supra* at paras 21-25; *S v Bhulwana*; *S v Gwadiso supra* at paras 12 and 17-18.

More analogous to the situation under ss 18(3)(a) and 18(13)(b), is Art 6(2) of the European Convention on Human Rights and Art 11(1) of the Hong Kong Bill of Rights Ordinance [*Chapter 383*]. Each guarantees the right to be presumed innocent until proved guilty according to law, yet does not expressly sanction a reverse *onus*. Nonetheless, it has been held that a reverse *onus* provision is permissible within certain limits. This is demonstrated in the judgment of the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 where at 388 para 28 it was said:-

> "Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

In much the same vein are the words of LORD WOOLF in *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 All E R 939 (PC) at 949 c-d:-

> "Placing to one side for the moment the decisions in Canada, all of the many decisions in different jurisdictions to which their Lordships were referred recognise that provisions similar to art 11(1) (of the Hong Kong Bill of Rights) are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial."

In *R v Sin Yau Ming* [1992] HKCLR 127 (CA) the Hong Kong Court of Appeal held that a mandatory presumption of fact was compatible with the presumption of innocence if it could be shown by the Crown, due regard being paid to the enacted conclusion of the legislature, that the fact to be proved rationally and realistically follows from that proved; and, also, if the presumption is no more than is proportionate to what is warranted by the nature of the evil against which society requires protection. One of the presumptions with which the court was concerned provided in effect that if the accused was proved to have had more than a certain quantity of dangerous drugs it would be presumed, until the contrary was proved, that he had such drugs in his possession for the purpose of trafficking therein. Clearly the presumption related to an intent on behalf of the accused. On the facts the court declined to uphold the presumption. But it did so on the ground that the amount of drugs to trigger the presumption was so low that it was not in excess of the average addict's daily consumption.

In *Attorney-General of Hong Kong v Lee Kwong-kut supra*, LORD WOOLF, giving the opinion of the Board, pointed out that there was a

degree of flexibility implicit in Art 11(1) of the Hong Kong Bill of Rights. He went on to say at 950 c-h:-

> "There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence.' ...
>
> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which art 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However, what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v US* (1969) 395 US 6 at 36, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'."

At 952 *in fine* - 953A the learned LORD of APPEAL in ORDINARY remarked that where there was real difficulty and the case came close to the borderline, regard could be had to the tests which have been identified in Canada. e added, however, that these tests are not to be applied rigidly or cumulatively, nor the results achieved to be considered conclusive; and that the test of proportionality in particular provides useful guidance, since "it is the need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule".

Viewed against the common law limits and guide-lines previously set out, as well as the features referred to in *Attorney-General of Hong Kong v Lee*

Kwong-kut supra (which respectfully are approved as applicable to ss 18(3)(a) and 18(13)(b)), I am satisfied that the presumption in s 15(1)(c) of the Prevention of Corruption Act falls easily within constitutional limits. It is a reasonable and natural presumption flowing from the facts proved. It impairs the rights of the accused as little as possible and relates to a fact peculiarly within his own knowledge.

In my opinion, it would be a perfectly reasonable inference, even without the presumption created by s 15(2)(c) of the Act, to conclude that if the State proved that the accused, in breach of his duty as a public officer, did or omitted to do something that was to the favour or prejudice of any person, he would have a case to answer. Only he could say that he did not do the act for the purpose, or with the intention, of showing favour or disfavour.

In any event, I consider that the use of the presumption is justified by the fundamentally important legislative objective of controlling the spread of corruptive practices in this country. Insofar as this offence is concerned, societal interests outweigh individual interests.

It is for these reasons that the preliminary submission fails. The propriety of the conviction must be adjudged therefore on the basis that it was for the appellant to disprove on a balance of probabilities that he had an innocen purpose or state of mind in showing favour to the two alleged motor car thieves Malunga and Kanyemba.

The facts of the case are somewhat unusual:

On 1 April 1992 the appellant entered the employment of the Ministry of Justice, Legal and Parliamentary Affairs as a public prosecutor.

After a two month period he was assigned to prosecute in court six at the Harare magistrate's court. Court six deals exclusively with remands of accused persons and their applications for bail.

During the last few days of July 1992 Malunga and Kanyemba, both Zambian nationals, were apprehended while attempting to smuggle two stolen notor vehicles from Zimbabwe into Zambia. On 3 August 1992 the two appeared in court six. They were unrepresented and were remanded in custody to 17 August 1992. Neither applied for bail.

The Request for Remand Form 242, signed by the investigating officer, had been handed to the appellant. It bore on its face an instruction from one of the Attorney-General's officers that, on the grounds detailed therein, the Attorney-General was opposed to the grant of bail. These were that the accused were foreigners and likely to abscond; and if released could well resume stealing motor vehicles in Zimbabwe for removal to Zambia.

The instruction was in accord with a circular previously issued to prosecutors by the Director of Public Prosecutions. It drew to their attention that in terms of ss 7 and 10 of the Criminal Procedure and Evidence Amendment Bill 1992, which was shortly to become law magistrates would be empowered no longer to grant bail to persons charged with certain scheduled offences, which included theft of a motor vehicle, without the specific consent of the Attorney-General.

There was also in operation at the Harare magistrate's court a system of weekly meetings whereat the senior public prosecutor would explain to the prosecutorial staff, who were required to attend, the need for liaison between

himself and the Attorney-General's Office before any bail application by alleged motor car thieves was consented to.

On 17 August 1992 Malunga and Kanyemba were again remanded in custody for two weeks. Meanwhile a relative, Annah Malunga-Mhende, had instructed a legal practitioner, Mr David Drury, to apply for them to be admitted to bail. This Mr Drury did, after having arranged for his clients to be brought before the magistrate in court six on 18 August 1992. Evidence was led from Mrs Mhende that she was prepared to furnish the two accused with a place of abode in Harare pending the determination of the trial. There was also the offer made by her of the surrender of the title deeds to an immovable property as part of the suggested bail conditions.

The appellant was the prosecutor in court six. Another prosecutor, one Makwakwa, who was inexperienced, was his understudy at the time. The appellant strenuously opposed the application, contending that the accused were facing extremely serious charges, and being foreigners of no fixed abode were likely to abscond if set free. The presiding magistrate reserved judgment to 20 August 1992. On that day he dismissed the application on the basis advanced by the appellant and remanded the two accused to 3 September 1992.

Thereafter, and unknown to the appellant, Mr Drury was instructed to appeal against the ruling to the High Court. He proceeded to prepare the necessary papers for such an appeal.

On 28 August 1992 the Criminal Procedure and Evidence Amendment Act, 1992, became operative. The magistrate in court six, the appellant and Makwakwa only became aware of this several weeks later.

On 3 September 1992 the appellant, who by then was prosecuting mainly in court one but still lending assistance, when required, to Makwakwa in court six, appeared before the magistrate in that court. He announced his consent to Malunga and Kanyemba being admitted to bail on condition that each reported to the police three days a week and deposited the sum of $5 000 in cash. The magistrate made the order requested. In acting as he did the appellant neither consulted the Attorney-General's Office, nor advised the senior public prosecutor of his intention. He did not contact the investigating officer to determine if the docket had been completed. He did not even inform Mr Drury that be was now of the opinion that his clients should be admitted to bail and that he was prepared to withdraw his previous opposition. Furthermore, after their admission to bail the appellant failed to tell Mr Drury of what he had done.

A day or so later Mr Drury, having prepared the appeal papers in draft, went to the Harare magistrate's court to ascertain whether the record of the proceedings of 18 August 1992 had been transcribed and was available for the High Court hearing. Purely by chance he encountered Mrs Mhende in the office of the clerk of court. She informed him that the two accused had been granted bail (Malunga met the bail conditions on 3 September and Kanyemba on 17 September). This surprised Mr Drury. He went in search of the appellant to establish what had happened. After some hesitation the appellant explained that he d been approached by a relative of the accused with the information that the title deeds to immovable property could be pledged to the State as security for them standing trial. This, he said, had caused him to change his mind and consent to bail. Mr Drury was perplexed at the explanation, for the availability of the title deeds was one of the proposals he had addressed to the magistrate on 18 August 1992 in the presence of the appellant; yet bail had been opposed.

Having tendered notice of resignation on 1 September 1992, the appellant joined a firm of legal practitioners, as a professional assistant, the following month.

On 2 November 1992 the appellant obtained the consent of the senior public prosecutor to the partial relaxation of Malunga's and Kanyemba's reporting condition. He then appeared on their behalf in court six and was granted the requisite alteration by the magistrate. He also applied for the accused to be remanded to 4 January 1993. This lengthy remand was allowed.

Both accused were in default of appearance on 4 January 1993. Malunga was later arrested at Victoria Falls border post while attempting to drive another stolen vehicle into Zambia. Kanyemba absconded successfully.

This scenario was uncontentious at the trial. In addition there was the telling evidence of the magistrate and Makwakwa, disputed by the appellant, that in court six on 3 September 1992, no verbal application had been made by either Malunga or Kanyemba prior to the appellant indicating that he was prepared to consent to their admission to bail.

The appellant denied in evidence that he had seen the instruction endorsed on Remand Form 242 or that he was aware of the circular issued by the Director of Public Prosecutions. He further maintained that he had not attended any meeting of prosecutors at which the standing orders in respect of bail to alleged motor car thieves was discussed.

The regional magistrate resolved these conflicts in favour of the State. In my view, there was every justification to disbelieve the appellant's contrary assertions. Neither the magistrate nor Makwakwa had any motive to

testify falsely, and they corroborated each other as to what occurred on 3 September 1992. It is also inconceivable that the appellant, who must have read the remand form, could have failed to notice the very plain instruction written thereon by the Attorney-General's officer; and, furthermore, that he would have remained oblivious of both the circular and the standing orders.

In short the appellant, in the circumstances pertaining, acted contrary to his duty as a public officer and showed favour to the two accused. No other conclusion is possible from his extraordinary conduct in not informing the Attorney-General, the senior public prosecutor, the investigating officer and especially Mr Drury, that he had changed his mind and considered bail should be granted. It is, moreover, incomprehensible that the appellant, being totally unmoved by the offer to surrender the title deeds made by Mr Drury on 18 August 1992, would have become persuaded by precisely the same offer just two weeks later; and then have omitted to recommend to the magistrate that the title deeds be surrendered as one of the conditions of bail.

The *actus reus* of the offence of contravening s 4(a) of the Prevention of Corruption Act having been proved by the State, it was for the appellant to displace the presumption by satisfying the trial court that his purpose of showing favour was legitimate - that in doing what he did, he had acted with an innocent state of mind. It was not for him to establish that his evidence on this aspect was necessarily true - only that on a preponderance of probabilities it was true. See *S v Ndlovu* 1983 (4) SA 507 (ZSC) at 510 D-G; *Miller v Minister of Pensions* [1947] 2 All E R 372 (KBD) at 374 A-B.

I entertain no doubt whatsoever that the appellant came nowhere near discharging the burden placed upon him by s 15(2)(c) of the Act. The strong probability arising from his inexplicable behaviour of 3 September 1992 and,

thereafter, in arranging for a reduction of the reporting condition with a long remand, is that he must have been induced by a gift or consideration to act as he did. Why should he, no longer a prosecutor but in private practice, in the knowledge that Mr Drury represented the two accused, gratuitously involve himself? Furthermore, it was far too much of a coincidence that the appellant, as he would have the court believe, fortuitously encountered the two accused at the Harare magistrate's court on 2 November 1992.

The probabilities apart, it must not be overlooked that the appellant was found to be an evasive and untruthful witness. Unless therefore this Court considers that such criticisms were unwarranted - which I hasten to add it does not the presumption of a corrupt purpose, by virtue of that finding alone, was not rebutted. See *S v Nhari and Ors* S-9-87 (not reported) at p 16.

This brings me to the matter of sentence. Any form of corruption is rightly viewed by the courts with abhorrence. It is a dangerous and insidious evil in any country particularly in a developing one. It is difficult to detect and more so to eradicate. If unchecked or inadequately punished, it will disadvantage society by depriving it of good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the appropriate penalty. See the remarks of BAKER J in *S v van der Westhuizen* 1974 (4) SA 61 (C) at 65G, quoted with approval in *Attorney-General v Chinyerere and Anor* 1983 (2) ZLR 329 (SC) at 332 E-G and *S v Pawenl and Anor* 1985 (2) ZLR 133 (SC) at 141 B-D. As a general rule therefore, it is right to approach such cases on the basis that imprisonment is called for unless there are cogent reasons which indicate the contrary. See *S v Newyear* 1995 (1) SACR 626 (A) at 628i-629a.

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Corrupt practices resorted to by public prosecutors, who play a crucial role in the administration of justice, are particularly serious. Prosecutors are placed in positions of authority. It is their duty to ensure that accused persons are dealt with properly and in accordance with the law. As officers of the court, their bounden obligation is to uphold the law and by their conduct set an example of impeccable honesty and integrity. A failure to do so will lead to an erosion of confidence in the minds of the public.

The appellant sorely abused the trust reposed in him. That he disgraced the good standing of his fellow prosecutors by corrupting the system of justice cannot be gainsaid. He acted for personal gain and in so doing knowingly afforded the two accused the opportunity of fleeing the jurisdiction. One of them succeeded in doing so.

I am satisfied that the punishment imposed upon the appellant represents nothing more than he deserved. There is no room for this Court to interfere with it.

In the result, the appeal must be dismissed in its entirety.

McNALLY JA: I agree.

KORSAH JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Chikumbirike & Associates, appellant's legal practitioners