school of law
oblig essay
2003

AN OBLIGATORY ESSAY

LAW AND SOCIAL ORDER: DEFILEMENT CASES ON THE UPSWING; INADEQUACY OF THE LAW? WHAT ARE THE IMPLICATIONS FOR LAW ENFORCEMENT AND SENTENCING?

BY

MUSONDA DANIEL

COMPUTER NO. 99327091

AN OBLIGATORY ESSAY SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF A BACHELORS DEGREE IN LAW, LLB.

NOVEMBER 2003

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the obligatory essay prepared under my Supervision by Daniel Musonda, Computer No. 99327091

Entitled

LAW AND SOCIAL ORDER: DEFILEMENT CASES ON THE UPSWING; INADEQUACY OF THE LAW? WHAT ARE THE IMPLICATIONS FOR LAW ENFORCEMENT AND SENTENCING?

BE ACCEPTED FOR EXAMINATION. I HAVE CHECKED IT CAREFULLY AND IAM SATISFIED THAT IT FULFILS THE REQUIREMENTS RELATING TO THE FORMAT AS LAID DOWN IN THE REGULATIONS GOVERNING OBLIGATORY ESSAYS.

.....
JUDGE K.C. CHANDA (RETIRED)
SUPERVISOR

DATE: 10/12/2003

DEDICATION

To

Muyunda

for her unswerving loyalty

and love, and continued intercessions on

my behalf and also for agreeing to sacrifice

our meagre family finances to support my school

demands;

my parents for supporting me in all my

efforts including school; dad for financially

standing in the gap for me, mum for her silent

encouragement and prayer.

ACKNOWLEDGEMENT

In a work of this kind, one usually finds that there have been lots of help at various stages in its preparation that one always has difficulties to fully thank all those whose help and encouragement made the essay see the light of day. That notwithstanding, I wish to thank Jehovah God Almighty, for the unwavering support and faithfulness to me. At points when friend's support wavered, He remained an ever-present companion and provider.

I sincerely wish to acknowledge the assistance that Judge, K.C. Chanda rendered towards this work. Sir, your patience and willingness to scrutinize the draft chapters; the valuable and incisive suggestions all go towards edifying this work, my weaknesses and mistakes not-withstanding.

I also wish to acknowledge my indebtedness to my employers, Zambia Police, for the support both materially and morally. In particular I thank the office of the Director of training and human resource, the Commanding Officer, Lusaka Division and the Director, Victim support Unit at Police service headquarters. All those who participated in the research at police stations and courts of law deserve my special thanks; to Mrs S. Chanda, for typing the research report. She was ever willing to assist, even at short notice. To you madam, I am grateful. To my wife, Muyunda, and my sister, Tamala and Ms E. Chipunye, I am very grateful for the moral and material support. I, however, remain responsible for any shortcomings and weaknesses in this presentation.

Daniel Musonda
8th November 2003

Table of cases

Page

Anderson Nsofu v The People (1973) selected judgments of Zambia,

p. 85.....14

D (A Juvenile) v Regina (1960) Rhodesia and Nyasaland, L.R., ...15

Diamond Kapwepwe v The Queen (1949-54) NRLR Vol. V part 1 & 2, 68.....11

Kalasa Mvula v R (1949 -54) 5NRLR, 240.....11

Ndalama v The people (1976) ZR, 287 15

Phiri (Macheka) v The People (1973) ZR, 145.....12

R vChinjamba (1949-54) 5 NRLR, 384.....9, 16

R v Jarvis 22QBD, 23 14

R v Jovan Phiri (1949-54) 5 NRLR, Part 1, 324 16

R v Majoni (1963) The Rhodesia & Nyasaland Law Reports, 143 10

R v Marsden (1891) 2QB, 149.....11

R v Samson Manuwa (1949-54) 5NRLR, Part 1, 176 12

Siakukuyu Julias v R (1955-58) 4NRLR, 28.....15

Sibande v The People (1975) ZR, 101 10,16

Table of Statutes

Criminal Procedure Code, Chapter 88 of the laws of Zambia Sections 7 (i - iv).....17

Penal Code, Chapter 87 of the laws of Zambia.

Section 138(1) 1, 3, 7, 12, 17

Section 138 (2) 13, 14

Zambia Police Amendment Act No. 14 (1999)

Section 53(1) 44

Abstract

The study was seized with the task of analysing the law of defilement contextually by considering not only the law but also the institutions that support it in its work. The research endeavoured to find out the following:

(a) Short comings in the law on defilement both procedural and substantive law

(b) The patterns and trends in cases of defilement

(c) The rates of conviction in cases of defilement taken to court

(d) The sentencing patterns in cases of defilement

(e) Crime prevention methods currently used by police; and

(f) To recommend possible ways of strengthening both the law and the prevention methods.

The study discovered that: while the substantive law was adequate, procedural law posed limitations on sentencing powers of magistrates; the cases of defilement have increased in recent times and that most of these were happening in urban centres, particularly densely populated areas; that the conviction rates were low in all the years studied; that the sentencing patterns showed a laxity in penalties imposed; that the prevention methods were inadequate. Therefore, the study recommends a change in the penal policy and crime prevention strategies so as to adequately deal with the rising incidence of defilement.

TABLE OF CONTENTS

	PAGE
Title	i
Certificate	ii
Dedication	iii
Acknowledgement	iv
Table of Cases	v
Table of Statutes	vi
Abstract	vii
Table of Contents	viii

CHAPTER ONE

1.1	Introduction	1
1.2	Statement of the problem	2
1.3	Operational definitions	2
1.4	Methodology	3
1.5	Chapter outline	4
1.7	Limitations of the study	5

CHAPTER TWO

2.0	The law of defilement	7
2.1	Analysis of the law creating the crime of defilement	7
2.1.1	The actus reus of defilement	8
2.2.	The mens rea of defilement	12
2.3	Attempted defilement	13
2.4	Defences to a charge of defilement	13
2.5	Marriage as a defence to a charge of defilement	17
2.6	Punishment for defilement	17

2.7 Trends and patterns in cases of defilement 18

CHAPER THREE

3.0 Law enforcement measures against defilement 26

3.4 Reasons for the rise in cases of defilement 29

3.6 Prevention methods against defilement 31

3.6.1 Victim support unit 32

3.6.2 Police stations 32

CHAPTER FOUR

4.0 Sentencing Patterns in cases of Defilement 36

CHAPTER FIVE

5.0 Conclusions and Recommendations 41

5.1.1 Conclusions 41

5.2 Policy Implications and Recommendations 46

Bibliography 53

Appendices 54

CHAPTER ONE

1.1 INTRODUCTION

One of the primary functions of law is to ensure social order by prescribing how individuals ought to behave among themselves and between them and other social entities both natural and artificial. As lord Wright said of law, "its purpose is to regulate man's conduct in relation to external things and persons, not merely to ascertain and explain what happens in fact."[1] Consequently absence of law would result in utter chaos as individuals would live as their whims and desires dictated. Therefore through its prescriptive function, the law regulates the conduct of individuals so that social order is maintained.

This is achieved by some laws, which prescribe accepted patterns of behaviour from which a departure usually attracts a sanction. The Criminal law is one such branch of law, which is aimed at reducing socially undesirable conduct: "the purpose of Criminal law is to prevent or reduce the incidence of behaviour that is viewed as antisocial."[2] This is accomplished by labelling certain acts and results as a crime; that is to say, behaviour that is forbidden by law and to which certain consequences known as punishments, apply. The penal code of Zambia, Chapter 87 of the laws of Zambia provides, inter alia, the penalty for the crime of defilement.[3] With this law in place, one would therefore hope for reduced occurrence of defilement cases.

---

[1] Dias, R.W.M. (1976) 4th Ed Jurisprudence p. 18
[2] Packer, H.L. (1969) The Limits of The Criminal Sanction 11
[3] Chapter 87 of the Laws of Zambia. Section, 138

1.2 STATEMENT OF THE PROBLEM

In recent times, however, there has been an apparent increase in the incidence of defilement. The Courts of law and the mass media have both reported an apparent increase in cases of defilement. This has in turn cast doubts upon the law of defilement. Consequently calls have been made to make the penalty stiffer. Enforcement and sentencing mechanisms have also come into focus, increasingly.

The study is therefore designed to critically analyse the phenomenon of defilement in order to enable the research arrive at correct conclusions and recommendations. Law alone is powerless and only draws its strength from the institutions that enforce it. Putting the Law into perspective will, therefore, help address the real problems.

Unless the police are able to arrest those who commit the offence of defilement, the courts cannot convict or sentence anyone. Furthermore, unless the courts are able to convict and sentence those offenders brought before it, people intending to commit the offence will not feel restrained from so doing. Thus the enforcement and sentencing have a bearing on the efficacy of the law. Studying defilement in this fashion puts the law into perspective or context. In this way, one could appreciate what the real problems are, with regard to the law of defilement.

1.3 OPERATIONAL DEFINITIONS

⇒ DEFILEMENT:

This is defined according to section 138 of the penal code of Zambia. In this code the offence is described as one, which involves a man having sexual intercourse

with a girl below the age of sixteen years. In this particular offence, consent from the victim is immaterial

⇒ **SENTENCING:**

In this study the word is used to refer to the administration of punishment or penalties on persons found guilt by the courts of law.

⇒ **VICTIM SUPPORT UNIT:**

This is a section in the Zambian Police Service that is concerned with victims of crime. The section is one unit of the police that handles most of the cases of defilement. It is primarily concerned with giving support to victims of crime.

⇒ **LAW ENFORCEMENT:**

In this essay, law enforcement is used to refer to the methods that police are employing to prevent the commission of crimes in general, and defilement in particular. That is to say, focus is on the crime prevention strategies and methods in practice.

1.4 METHODOLOGY

The data for the essay was collected from the following sources:

a. Law Report Books. This constituted the first part of Chapter two. The report books were studied beginning with the very first report book for 1931. The offence of defilement was followed from the time the penal code was introduced into the Republic.

b. The next source of data was a review of the crime records at both police service headquarters and Lusaka police headquarters. The data was studied beginning with 1997 through to the year 2002.

c. A questionnaire, appendix A, was administered to both police stations and victim support units to collect data on the prevention methods used by police against the crime of defilement.

d. Records at both Chikwa and Boma subordinate courts were reviewed to establish the sentencing patterns in the crime of defilement. The period under review was from January 2002 to December 2002.

The data was analysed using tables, graphs and percentages.

1.5 CHAPTER OUTLINE

Chapter two of the essay focuses on the law of defilement as it appears on the statute books and case law. The analysis considers the constituent elements of the crime of defilement, that is, it *actus reus* and the *mens rea*. The defences to a charge of defilement and the punishment available are also considered in this Chapter. The focus of the analysis is to establish whether the law, as such, is adequate.

In the same Chapter, the trends in cases of defilement over the last five years, that is, 1997 to 2002, are considered. This is aimed at establishing whether the cases have indeed been on the increase. Furthermore, attention is also directed at the number of cases that have been taken to court, convictions secured, cases withdrawn both at police stations and courts of law. The analysis is aimed at establishing whether the courts of law have received as many cases as have been reported at police stations. With this analysis, the essay should be able to establish where the problem is, whether it is at law enforcement or sentencing.

To come up with workable suggestions on enforcement measures, it is vital to appreciate the spatial distribution of defilement cases between urban high-density areas and low-density areas. Equally vital is the need to understand the relationship between victim and offender. If the crime of defilement is happening within a home setting, conventional crime prevention methods such as police patrols are ineffective. This also constitutes chapter two.

In chapter three, current prevention strategies that police are using are considered, both at police station and victim support unit levels.
The sentencing patterns prevailing in courts of law with respect to defilement will constitute chapter four.

In chapter five, the conclusions from the research findings, policy implications and recommendations are presented.

1.6 LIMITATIONS OF THE STUDY

The major problem that the research had to grapple with was limited financial resources to help address all areas of the study. It was difficult to visit certain police stations in the rural parts of the province, Lusaka, and it was also difficult to get data from the various police divisions other than Lusaka, Principally due to financial limitations. This is on account that the research was not funded, coming at a time when government was experiencing the much publicised budget over-run.

The second limitation is the non-availability of reliable records at police stations. Most of these are either incomplete or missing. It was therefore difficult to provide

statistics for the first three years of the research period because this information was not available at police head quarters.

Before the establishment of the victim support unit, data on defilement was not recorded in its own category but grouped with other offences like indecent assault, incest into what are called ' gross indecency.' this made it difficult to isolate the statistics for the crime of defilement in the years 1997 to 2000. The research therefore suffers from these limitations. Only Lusaka Province had relatively up-to-date records. Therefore the research suffers also from this bias towards Lusaka.

CHAPTER TWO

2.0 THE LAW OF DEFILEMENT

The law that creates the offence or crime of defilement can be traced, in Zambia, to 1931 when the penal code of the country was first enacted. That marked the genesis of the law of defilement. Until the year the penal code was introduced into the territory, the country was governed by the various customary laws of the tribes in the land.

From 1931 to 1933, the age below which sexual connection with a girl could amount to defilement was twelve years. Therefore one was guilt of this crime if one had carnal knowledge of a girl below the age of twelve years. However, by amendment number twenty six of 1933, a change was introduced in the definition of the crime. The amendment raised the age below which carnal knowledge of a girl was unlawful to sixteen years of age. Consequently, from 1933 to this day, the age in the definition of the crime of defilement has remained sixteen:

> Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilt of a felony and is liable to imprisonment for life.[4]

The above is the crime of defilement as created by section 138 (1) of the penal code of Zambia, Chapter 87 of the laws of Zambia.

2.1 ANALYSIS OF THE LAW CREATING THE CRIME OF DEFILEMENT

The law on defilement can be analysed on the basis of the *actus reus* and *mens*

[4] Penal Code of Zambia, Chapter 87 of the Laws, section 138 (1).

rea. These two elements are necessary in any definition of a crime. A person without the necessary mens rea can not be guilt of a crime, and this is reflected in the latin maxim: "*actus non facit reum nisi mens sit rea*", meaning that an act does not make a man guilt of a crime, unless his mind is also guilt. Similarly one without the *actus reus* can not be said to be guilt of any crime. Smith and Hogan expresses these two principles in the following terms:[5]

> It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a) that he has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. The event, or state of affairs, is called the actus reus and the state of mind the mens rea of the crime.[6]

2.1.1 THE *ACTUS REUS* OF THE CRIME OF DEFILEMENT

In the above extract, the actus reus is simply defined as the event or state of affairs forbidden by the law which one charged with the offence is said to have created. The above quotation represents the concept of actus reus in very rudimentary terms. The actus reus may consist in the forbidden conduct, or may consist in a particular result like in murder. Resultantly a dichotomy is created between conduct and result crimes. In the latter case, the law is primarily concerned with the result and not the conduct leading to the result. With the former, the law focuses on the conduct. Included here are crimes such as rape,

---

[5] Smith, J.C. & Hogan, B. (1988) (6th Edn) CRIMINAL LAW.
[6] Ibid. Page 31.

and defilement. The actus reus may sometimes include also the circumstances within which the conduct occurs. For instance, there is no general crime which forbids drinking beer, but one which forbids being drunk when driving.[7]

Consequently, the crime of defilement seems to consist in conduct being performed under certain circumstances. The law of defilement does not prohibit carnal knowledge of girls generally, but that which is unlawful and involving girls below the age of sixteen years. As a result the crime of defilement can be analysed in the following terms with respect to its actus reus:

2.1.2 UNLAWFUL CARNAL KNOWLEDGE

For one to be guilt of this offence, the carnal knowledge must have happened under unlawful circumstances. That is to say, the sexual intercourse must be illicit. Consequently where this happens in a marriage set up, even if the girl be below sixteen, it would not amount to a defilement. This was the opinion of Woodman, J in the case of **R.V. Chinjamba**[8] where he opined that;

> The carnal knowledge must be unlawful and it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married, despite the fact that the girl is under sixteen years of age.

The above view was also adopted in a southern Rhodesian case where the court observed that "the question of the wrongfulness of the accused's conduct depended on whether the purported marriage had been duly solemnised. If it was not, then as the girl was under sixteen, the intercourse was wrongful. If the

[7] DIAS, R.W.M. (1976) (4TH Edu) JURISPRUDENCE. p. 302.
[8] (1949-54) 5 NRLR, page 384.

marriage was solemnised, the intercourse would be lawful and the accused would have committed no crime."[9]

It would therefore appear that one can raise the fact that one is married to the person with whom it could be alleged they have engaged in unlawful sexual intercourse due to the girl's age.[10] The burden, however, is for the accused to prove the existence of such a customary marriage in the tribe of the accused person and whether such a marriage as where one partner is below sixteen years of age is allowed.[11]

2.1.3. CARNAL KNOWLEDGE

In the offence of defilement, the prosecution has also to prove that the accused performed the prohibited act on the girl. That is to say the accused must have had sexual intercourse with the victim. It would be vital for the prosecution to prove that the man penetrated the girl without having deposited any semen in her. "... where carnal knowledge constitutes a crime, that crime is complete without emission upon proof of penetration."[12]

2.1.4 OF A GIRL BELOW THE AGE OF SIXTEEN

The age of the victim in the crime of defilement is quite essential in the definition of the offence. The prosecution has to prove beyond reasonable doubt the fact

---

[9] R.V. Njoni (1963) The Rhodesia and Nyasaland Law Reports, p. 143.

[10] Phillips, A. et al (1971) p. indicates that "The position would be the same in a number of other territories, where unlawful carnal knowledge of a girl under a specified age is a criminal offence (cf. Kenya Penal Code section 138), but proof of a valid marriage would be a good defence to such a charge."

[11] In the case of **Sibande v The People** (1975) ZR, 101, the supreme court of Zambia held that:
(i)The court cannot be called up to consider, as being possibly the customary law on a particular issue, a purely speculative suggestion completely unsupported by evidence.
(ii)If there is evidence fit to be left to a jury that parties were married according to customary law, the onus would be on the prosecution to negative that suggestion. But it is not enough for an accused simply to say "we married" or even "we are married according to customary law", he must at least say "we are married according to customary law because we did this and this" and it would then be for the prosecution to show that the events alleged ... did not constitute a valid marriage according to customary law.

[12] R.V. Marsden (1891) 2 Q B 149 at 150 per Lord Coleridge C.J.

that the prosecutrix was below the age of sixteen years. Francis, J. in **Kalasa Mvula V R**[13] stated thus:

> The question of age in a charge of this description is of the greatest importance and must be proved, moreover, proved beyond reasonable doubt.

The question of the victim's age arose in the case of **Diamond Kapwepwe v The Queen.**[14] The appellant was convicted by a class two magistrate court of defilement contrary to section 119 (1) of the penal code and was sentenced to five years imprisonment with hard labour. In the subordinate court, medical evidence had been led to the effect that the "apparent age" of the girl was approximately fifteen years. The medical witness stated that he could not say that the girl was under sixteen years of age "beyond all possible doubt".

Allowing the appeal and setting aside both sentence and conviction, the Court of Appeal for Northern Rhodesia held that the age of the victim in cases of defilement must be proved beyond reasonable doubt.

The above decision was considered and affirmed in the case of **PHIRI (MACHEKA) v the PEOPLE.**[15] The appellant was convicted of defilement of a girl said to be eleven years. The only evidence was that of the girl who said that her mother had told her she was born in 1961. The court of Appeal, ordering a retrial, held that where the age of a person is an essential ingredient of a charge, the age must be strictly proved.

---

[13] (1949-54) 5NRLR page 240.
[14] (1949-54) NRLR volume five part 1 and 2 page 168.
[15] (1973) Z.R. 145 (C.A.).

Once the question of the victim's age has been proved, it is immaterial that the presecutive had consented to the illicit sexual intercourse:

> Upon the charge of defilement contrary to section 119 of the penal code, the all important question is that of age, and ... once the age is established however, the question of consent or no consent becomes immaterial.[16]

The foregoing exposition leads to the submission that the crime of defilement is committed when it can be proved beyond reasonable doubt that sexual intercourse was performed in circumstances where it was unlawful, and on a victim whose age is below the age of sixteen years. Consequently a successful defence would be one aimed at negativing the essential points in the definition of the crime. This will be considered in the section on defences available to the crime of defilement.

2.2 *THE MENS REA* OF DEFILEMENT

Section 138 (1) of the penal code does not clearly or expressly indicate what the mens rea of the crime is. However, it does seem clear that one would not be guilt of this offence unless one had intention to have sexual intercourse with a girl whose age is below sixteen years and someone who is not one's wife. It is submitted, therefore, that the mens rea of defilement would consist in one having an intention to have carnal knowledge of a girl (i) knowing that the intercourse is unlawful and that the girl is below sixteen years of age, or (ii) without caring to address oneself to the age of the girl at the time of the sexual connection.

[16] **R.V. Samson Manuwa**, NRLR volume five part 1, 176 at 180 per Lewey, C.J.

2.3 ATTEMPTED DEFILEMENT

This is created by section 138 (2) which provides that:

> Any person who attempts to have unlawful carnal knowledge of any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for fourteen years.[17]

The above section does not define what constitutes an attempted defilement. An attempted defilement would probably be where someone before making full sexual connection is disturbed from doing so. In other words, without penetration, there can be no defilement but only an attempt. This is so because "to constitute penetration on a charge of carnally knowing ... a girl, the parts of the male must be inserted into those of the female."[18] So where no penetration is proved that could amount to the charge of attempted defilement.

2.4 DEFENCES AVAILABLE TO A CHARGE OF DEFILEMENT

The first defence to consider is the one that is provided by the statute in the section creating the offence of defilement:

> Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe, and did in fact believe, that the girl was of or above the age of sixteen years.[19]

A close analysis of the above citation reveals that the defence consist of two cardinal points both of which must be proved if an accused is to benefit from the

[17] Penal Code of Zambia, section 138 (2).
[18] R.V. Jordan (1839), 9 C & P at 118.
[19] Penal Code of Zambia, Chapter 87 of the Laws of Zambia sec. 138 (2).

proviso. The accused therefore has to prove the two limbs of the proviso in order to claim this defence. "For it is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused."[20]

2.4.1 The accused person must have had reasonable cause to believed that the girl was of or above the age of sixteen years. The belief must be one that is backed by reasonable cause. Consequently where one has an honest but unreasonable belief that the girl is of or above sixteen years of age, that belief would not help such an accused. The appearance of the girl in terms of physical features would provide such reasonable cause for belief in her being over the age of sixteen years.

The proviso to section 138 (2) was considered in the case of **Anderson Nsofu v The people**[21] The appellant was convicted of defiling three girls aged nine, seven and nine respectively. The trial magistrate considered the question of the girls' ages and stated: "having seen the girls myself, I am satisfied that no one can think that any one of them could be over sixteen years." In approving the decision of the trial magistrate, the supreme court observed that; even, therefore, if the appellant could have satisfied the court that he did not in fact believe the girls or any one of them was over the age of sixteen years, it is clear that he could not have satisfied the court that he had reasonable cause so to believe.[22]

---

[20] R.V. Jarvis, 22 QBD 23 at 33 per Lord Manfield, C.J.
[21] (1973) Selected judgements of Zambia. Page
[22] Ibid per Baron, D.C.J. at page 87.

2.4.2 The second limb of the defence which the defence has to prove is that the belief by the accused person must in fact have existed. One who does not address oneself to the question of the girl's age at the time the intercourse is committed can not be said to have in fact believed the girl was of above the age of sixteen years. In the case of **D (A JUVENILE) v R**,[23] Blagden, J opined thus: "if the magistrate was right in finding that the appellant had not directed his mind at all to the question of the girls' age, then of course, it could not be said that he "did in fact believe" that she was of or above the age of 16 years and the proviso could not apply."

In cases where an accused person is unrepresented, it is the duty of the magistrate to explain the proviso to the accused either before taking plea or when the accused is called upon to make his defence. This rule of practice has been so developed that a failure to explain the proviso could, in cases where it is apparent that the defence would help the accused, lead to the conviction being quashed:

> I would say that in every case where am unrepresented African is on trial for an offence contrary to section 119 of the penal code on a plea of not guilt, at the time he is called upon for his defence, the nature of the proviso should be indicated to him so that he can make his defence on that basis if he chooses. The omission to do so, either on a plea of guilt before the plea is recorded or on a plea of not guilt when the accused is put upon his defence, might lead to the appellate court quashing a conviction; although where the child complainant was very young and her age well below the statutory age of sixteen, it is unlikely that the appellate court would regard the omission as fatal.[24]

---

[23] (1960) N & R Law Reports, 755.

[24] **Siakukuyu Julias V.R**. (1955-58) NRLR volume v1 per Somerhough J. at p. 28.

The need to explain the proviso to the accused was considered in the case of **Ndalama v The people.**[25] The appellant was convicted of defilement of three girls, two of them aged 15 years and one 14 years. He denied the charges starting that he had carnal knowledge of them and that they looked mature and that he paid them money. The trial court did not explain the proviso to 138. The supreme court of Zambia allowing the appeal held that:

(i) failure to explain the proviso to section 138 is an irregularity which can be cured if there is no prejudice.

(ii) The purpose of explaining the proviso is to make clear the defence that is available and the explanation must be given to the accused at a time when the knowledge of the defence would be of some use to him.

The decision of the supreme court in the above case invites two submissions. The first is that the failure to explain the nature of the proviso in a case where the age of the victim is clearly way below the age of sixteen years will not prejudice the accused. Where one is, for example, charged with defiling a five years old girl the proviso would not help him, and the failure to explain would not affect his conviction.

The second is that a failure to explain the proviso to an accused would not be an issue where such accused is represented by a lawyer for in such a case, it is the duty of counsel to explain the defence to the accused. The court in **R v Jovan Phiri**[26] made mention of this factor:

---

[25] (1976) ZR. 287.

[26] (1949-54) NRLR volume v. part 1 page 324.

It has been argued that the defences of provocation, self defence and so on, in cases of homicide are not explained to the accused person before the plea is taken. This comparison to the proviso to section 119 of the penal code is quite irrelevant because in cases of homicide, both here and in the U.K., the accused is defended by counsel, who is well aware of the appropriate defence that could be raised.

2.5 MARRIAGE AS A DEFENCE TO A CHARGE OF DEFILEMENT

Marriage, particularly a customary one can be raised as a defence. This was carefully and exhaustively considered in section 2.1.2 of the essay. The defence was considered in the cases of **R.V. Chinjamba**[27] and **Sibande v The people**.[28]

2.6 PUNISHMENT FOR DEFILEMENT

Section 138 (1) of the penal code provides that the maximum sentence that can be slapped on a charge of defilement is life imprisonment. The magistrate has power to vary the sentence within powers conferred by the law. The criminal procedure code provides that a magistrate who is a senior resident magistrate can impose any sentence but not one exceeding a term of nine years.[29] That is therefore the maximum a senior resident magistrate can go in terms of sentence. An accused who appears before a resident magistrate would only be subjected to a sentence of imprisonment not exceeding a term of seven years.[30] A court presided over by a first class magistrate can only impose a maximum sentence of five years imprisonment.[31] Subordinate courts presided by magistrates other than

[27] Supra. Note 8.
[28] Supra. Note 11.
[29] Criminal procedure code, chapter 88 of the Laws of Zambia. Section 7 (i)
[30] Ibid section 7 (ii).
[31] Ibid section 7 (iii).

those mentioned above can only impose a maximum sentence of three years imprisonment.[32]

From the above it can be seen that only the High court can impose the maximum sentence of life imprisonment. Therefore where a case requires a sentence other than those allowed to magistrates, that would necessitate committing the case to the High Court whose powers of sentencing are not so restricted.

2.7 TRENDS AND PATTERNS IN CASES OF DEFILEMENT

Table 2.7.1. Number of cases reported per province in the last five years.

PROVINCE	YEAR					
	1997	1998	1999	2000	2001	2002
LUSAKA	-	49	-	57	131	462
COPPERBELT	-	-	-	-	126	128
CENTRAL	-	-	-	-	17	91
SOUTHERN	-	-	-	-	54	57
EASTERN	-	-	-	-	9	37
WESTERN	-	-	-	-	6	14
N/WESTERN	-	-	-	-	3	9
NORTHERN	-	-	-	-	18	56
LUAPULA	-	-	-	-	2	11
TOTAL	**-**	**49**	**-**	**57**	**366**	**865**

SOURCE: Police Service Headquarters, Victim Support Unit Directorate, Annual Reports.

The table above shows the national distribution in cases of defilement over the last five years. It can be noticed that eight provinces did not have any information for the first three years. This is due to poor record keeping in most of the police Divisions which are essentially provinces. That does not, however suggest that in the mentioned years, the said provinces did not record any cases of defilement. On the contrary they did but for the disregard of statistics.

[32] Ibid section 7 (iv).

Lusaka province, however, had some information for the three years of the five year period under study. The data above shows a general rising trend in the cases of defilement. In 1998, the province recorded 49 cases, in 1999 the statistics were unavailable. In 2000, the province recorded 57 cases. In 2001, the figure rose to 131 cases representing a percentage increase of 56.5%. In the year 2002, the figure nearly trebled to 462 cases of defilement. The percentage increase was 71.6%.

The rest of the provinces showed similar trends in the cases of defilement. They all recorded increases in the years in which statistics were provided. The Copperbelt recorded a 1.5% increase in the year 2002. Central province recorded a percentage increase of 8.1%, Southern province, 5.2%, Eastern province, 7.6%; Western province 56.8%; Northwestern, 66.6%; Northern province, 67.8% and Luapula recorded 69.3% increase in defilement cases.

It can be noted from the above that generally, all provinces recorded increases in cases of defilement in the years 2001 and 2002. The lowest increase was recorded in Copperbelt province. The highest percentage increase was in Lusaka province which recorded 71.6% increase in 2002. The National figures of defilement cases in 2002 accounted for a 57.68% increase from 2001.

Table 2.7.1 also shows that most of the cases were reported from provinces along the line of rail. Lusaka had the highest number recorded followed by the Copperbelt province. Rural provinces on the other hand had the lowest figures. In 2001, the lowest was recorded in Luapula with two cases only and

Northwestern with three cases. In 2002, Northwestern province recorded the lowest cases followed by Luapula with eleven cases.

The highest figures in cases of defilement from the provinces along the line of rail can be explained by the fact that most of the public awareness campaigns mounted by the victim support unit and non-governmental organisations have concentrated in these areas. Unlike in the rural provinces where this has not been as rigorous. Population densities also can explain the figures recorded. The rural parts of the country are sparsely populated compared to urban provinces like Copperbelt, Lusaka, Southern and Central. So it is expected that were there are more people, more cases of crimes will be recorded. Therefore the higher figures in defilement cases in urban provinces is characteristic of the general trend in crimes at the national level.

Table 2.7.2 Rates of Convictions in cases of defilement at national level for the years 2001 and 2002.

YEAR	CASES TAKEN TO COURT			NOT TAKEN TO COURT			
	CASES REPORTED	CONVICTIONS	ACQUITTALS	WITHDRAWN	PENDING	CARRIED FORWARD	WITHDRAWN
2001	366	52	9	37	151	106	11
	TOTAL: 249				TOTAL: 117		
2002	865	238	10	29	425	146	17
	TOTAL: 719				TOTAL: 163		

SOURCE: Police Service Headquarters, Victim Support Unit Directorate: Annual Reports.

The above table indicates that nationally in the year 2001, 249 cases of defilement were taken to court and out of which 52 cases secured convictions. In percentage terms, 68% of the cases reported were taken to courts and 20.1% of these cases were successfully prosecuted and secured convictions. The number of acquittals

was fairly low only 9 cases. Of the cases taken to court, 14.9% of these were withdrawn by the complainants while in court. The number of cases that were pending in court was 151 representing 60.6% of the cases taken to court. Only 11 cases were withdrawn before being taken to court representing only 3% of the total number of cases that were reported in 2001. The number of cases which were not taken to court due to the fact that the offenders were not arrested was 106 representing 28.9% of the cases reported. The number of cases which were not taken to court, either because the complainant decided to settle the matter outside court or those where offenders were not arrested, was 117 which accounted for 31.9% of the total number of cases reported in 2001.

With respect to figures for the year 2002, the number of cases which were taken to court was 719. This accounted for 83.1% of the cases that were reported in the year. The number of cases which were successfully prosecuted was 238, representing 33.1% of the cases that were taken to court. Acquittals accounted for only 1.4% of the cases which found their way to court. The number of cases withdrawn in court was 29 which represented 4% of the cases taken to court. The number of cases that were still pending in the courts of law was 425 representing 59% of the total number of cases which were taken to court.

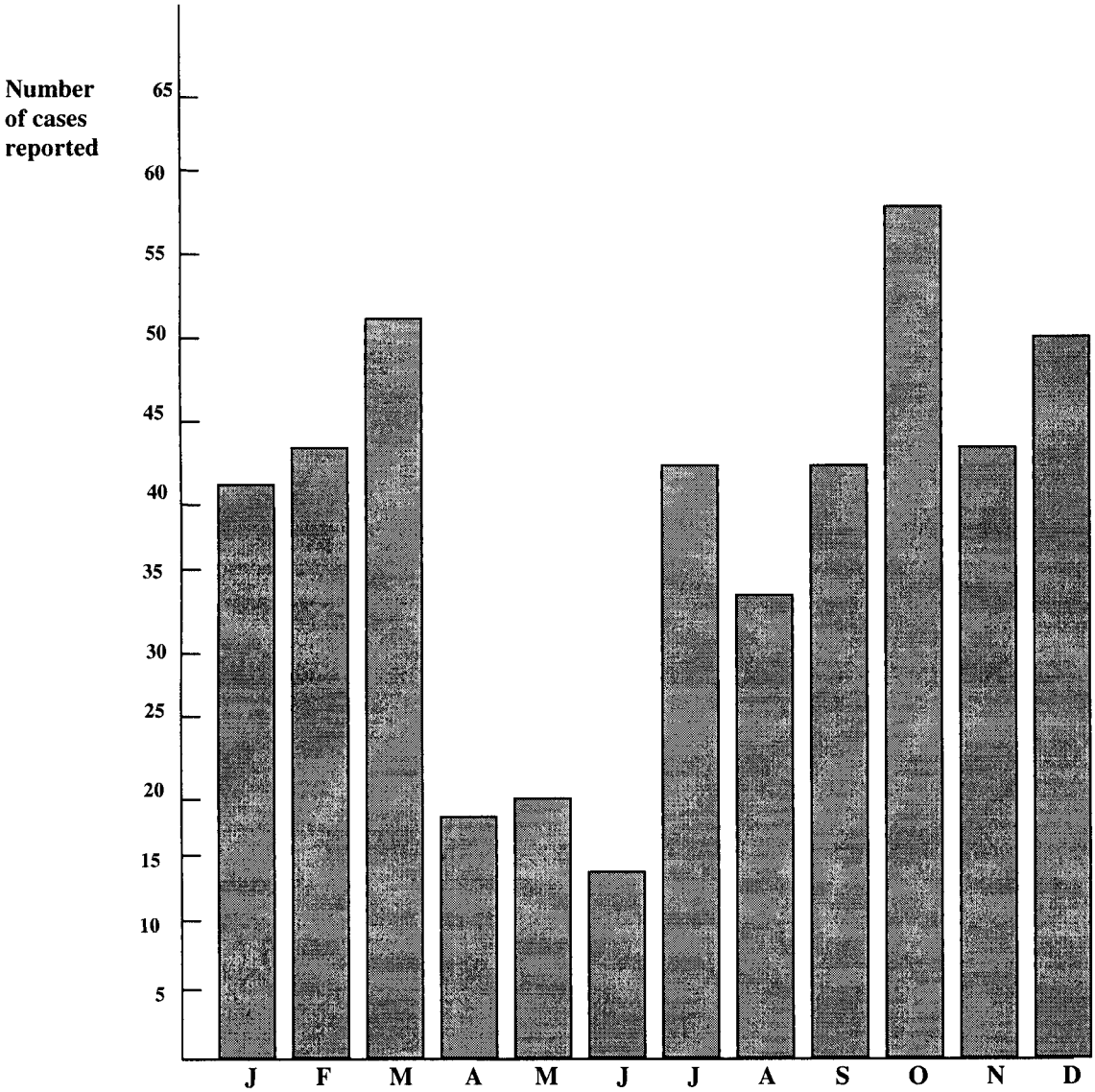
A total number of 163 cases were not taken to court either because there was no arrest made or that the complaint decided to settle the matter outside court. The former accounted for 16.9% of the total number of cases reported in 2002, while the latter accounted for 2% of the cases reported in the year. The combined effect was that 18.8% of the total number of cases reported in the year did not reach the courts of law.

Comparatively, more cases were taken to court in 2002 than in 2001. In the former, 83% of the cases reported to police were taken to court, compared to only 68% in the latter year. Similarly, there were more convictions in 2002 than 2001. In 2001, only in 20.1% of the cases taken to court were convictions secured, compared to 33.1% in 2002. More cases were not taken to court in 2001 than in 2002. In the former, 31.9% of the total number of cases reported to police were not taken to court compared to only 18.8% in 2002.

2.7.3 TRENDS AND PATTERNS IN DEFILEMENT CASES IN LUSAKA PROVINCE

Owing to the large number of cases reported in 2001 and 2002, Lusaka province indicated on unmatched increase in the number of these cases and it became apparent that a close scrutiny of the phenomena was needed. The following therefore are the findings.

2.7.3.1. **Monthly distribution of defilement cases in 2002 for Lusaka province.**



SOURCE: Lusaka Police Division Victim Support Unit Annual Reports.

The above bar graph shows that the first quarter of the year recorded a steady increase in the cases of defilement that were reported to police. The second quarter saw a sharp decline in the number. The general trend in the third and fourth quarters was one of an increase in the reported cases of defilement. The average number of cases being reported for the month was 39 cases.

2.7.3.2 RELATIONSHIP BETWEEN VICTIM AND OFFENDER

Relative	Neighbour	Stranger	Other	Total
11	8	30	8	57

SOURCE: Lusaka Division Victim Support Unit Annual Reports.

Of the 57 cases reported in 2002, the above represents the relationship between the victim in cases of defilement and the offender. In a sample of 57 cases, victims who were defiled by their relatives accounted for 11 cases. Most of the relatives were either stepbrothers, stepfathers, uncles, bothers-in-law and in one case, the boyfriend to the mother was the accused.

In the majority of cases, the victims were defiled by strangers who in most cases convinced the unsuspecting victims with gifts such as sweets, biscuits and money. In other cases, the strangers threatened the victims with violence or death itself.

In the other category, the majority were defiled by either school mates or boy friends. It would appear that the public campaign that the victim support and a number of non-governmental organisations have raised has led to situations were defilement cases which in the past were not reported are now being reported. For how can a boy and a girl who are in a relationship find themselves being offender and victim to a matter which in most cases is consented to. Probably, the reported cases where boyfriends were offenders arose from misunderstandings because normally boys and girls are known to indulge in casual sexual intercourse, secretly so that it is difficult to find any one raising a complaint.

2.7.3.3. Spatial distribution of defilement cases between urban police stations and rural police stations of the year 2002.

URBAN POLICE STATIONS	CASES REPORTED	TO COURT	CONVICTIONS
LUSAKA CENTRAL	16	9	4
EMMASDALE	34	21	4
RURAL POLICE STATION			
CHONGWE	10	5	4
CHALIMBANA	1	-	-

SOURCE: Lusaka Division Victim Support Unit Annual Reports.

Of the urban and rural police stations, two from each category were selected for close observation. From the research, it was discovered, as indicated above, that urban police stations recorded more cases of defilement than their rural counterparts. The figures for Emmasdale were higher due to the number of compounds the station services. This tallied with the University Teaching Hospital Police Post which indicated that most of the victims going for medical examination in cases of defilement were from areas of Lusaka with high population densities. The figures for Lusaka Central Police excluded those from areas like Kanyama, John Laing, Misisi and Chibolya. They could be higher than that recorded.

Rural Police stations had lower figures reported. For Chalimbana, the year 2002 recorded only one case of defilement which never even went to court. The low number of defilement that were reported to police were probably due to agreement or negotiations with offenders which usually ended up into marriages. The UTH police post report also indicated that illiteracy played a part in the low incidence of reported defilement cases.

CHAPTER THREE

3.0 LAW ENFORCEMENT MEASURES AGAINST THE CRIME OF DEFILEMENT

In this chapter, the findings from a study conducted in six police stations in Lusaka province will be presented. The study was aimed at establishing whether the officers regard defilement as being on the rise and what preventive measures are currently being used to curb the incidence of this crime. The respondents were further required to indicate whether the current measures of fighting the crime of defilement are adequate, and if not, what ought to be done to improve the same. The population sample consisted of fifteen officers from criminal investigations department, victim support unit and general police duties section of the police service. The following, therefore, are the results of the study.

3.1 STATION WHERE THE RESPONDENTS OPERATE FROM

TABLE 3.1

POLICE STATION	NUMBER OF RESPONDENTS
Chilenje	3
Chelstone	2
Emmasdale	4
Kalingalinga[33]	3
Matero	2
Lusaka Division[34]	1
Total	**15**

Source: Questionnaire administered to six police stations in Lusaka.

The above table indicates the number of respondents who were asked to answer the questionnaires that where administered to them. Twenty percent of the respondents where from Chilenje police station and Kalingalinga police post, respectively. Those from Emmasdale police accounted for 26.7%. While 13.3%

[33] This is a Police Post under Woodlands Police Station.

[34] This is the headquarters of Lusaka Province Police Stations, where the head of victim support units in the province is also stationed.

were from Matero Police. From Chelstone police came 13.3% of the sample population. From Lusaka Police Division only one respondent was asked to answer the questionnaire. This represented 6.7% of the sample population.

TABLE 3.2

3.2 DEPARTMENTS IN THE POLICE WHERE RESPONDENTS OPERATE FROM

	NUMBER OF RESPONDENTS
victim support unit (VSU)	4
criminal investigations department (C.I.D)	4
general police duties (G.D)	7
Total	**15**

Source: Questionnaire administered to six police stations in Lusaka.

3.3 RESPONDENTS AWARENESS ABOUT DEFILEMENT CASES

Fifteen police officer's from six police stations and from the above sections of the police were asked to indicate whether they were aware of any cases of defilement. All the fifteen respondents indicated that they were aware of cases of defilement. They were further asked if they had handled any cases of defilement in the last two years of their service. Their response is indicated in the table below.

Table 3.3

OFFICERS WHO HAVE HANDLED CASES OF DEFILEMENT IN THE LAST TWO YEARS

	V.S.U	C.I.D	GENERAL DUTIES	TOTAL
have handled cases of defilement	4	2	6	12
have not.	0	2	1	3
Total	**4**	**4**	**7**	**15**

Source: Questionnaire administered to six Lusaka police stations.

The above table indicates that whilst all the interviewed officers were aware of cases of defilement, some of them have not handled any of these cases in the last two years. All the officers from the victim support unit who were sampled indicated that they had handled at least a case involving a girl being defiled. Only two officers from those interviewed from the criminal investigations department indicated that they had handled cases of defilement in the last two years. Those from the general duties section of the police who responded that they had handled at least a case of defilement were 6. The total number of respondents who stated that they had handled a case of defilement in the last two years was 12 which represented 80% of the population sampled.

Additionally the table shows that no respondent from the victim support unit had not handled any case of defilement. Half the number of respondents from criminal investigations department stated that they had not handled any case of defilement in the last two years. Only one respondent from the general duties section of the police indicated not having handled any case of defilement in the two years preceeding. The total number of respondents who indicated that they

had not handled any case of defilement in the last two years was three, representing 20% of the population that was sampled.

3.4 REASONS FOR THE RISE IN CASES OF DEFILEMENT

The respondents were further asked to indicate what they regard as the likely reasons for the rise in defilement cases, see table 3.4. The respondents from the victim support unit who cited weak law on defilement as the reason for the upsurge in cases of defilement was only one. Two respondents from the criminal investigations department also indicated that the rise in cases of defilement was due to weak law on defilement. Six respondents from the general duties section of the police stated that the rise in cases of defilement was attributable to a weak law on defilement. The total number of respondents who cited weak law on defilement as the reason for the rise in cases of defilement was nine, which accounted for 60% of the population sampled.

A total of six respondents indicated other reasons as the cause of the rise in defilement cases. This represented 40% of the respondents who participated in answering the questionnaire. From the victim support unit, three respondents indicated that law was not the reason for the rise in cases of defilement. From the Criminal Investigations department and general duties, two and one respondents, respectively, cited other reasons as the cause of the rising cases of defilement.

Some of the reasons, other than weak law on defilement, for the rise in cases of defilement were that the poverty levels due to the economy were driving men to direct their frustration on unsuspecting young girls. Other respondents indicated

that the wholesale assimilation of western culture through the Television and films has contributed to the erosion of the strong social morals that value young children. Still other respondents suggested that the belief that young girls who are virgins can cure HIV and AIDS was the reason for the rise in cases against girls below the age of sixteen years.

Table 3.4 REASONS FOR THE RISE IN CASES OF DEFILEMENT

The law on defilement is weak	V.S.U	C.I.D.	GENERAL DUTIES	Total	%
	1	2	6	9	60%
Other reasons	3	2	1	6	40%
Total number of respondents	4	4	7	15	100%

Source: Questionnaire administered to six Lusaka police stations.

3.5 SUGGESTED SOLUTIONS TO THE UPSURGE IN DEFILEMENT CASES

The respondents were asked to indicate what could be done to reduce the cases of defilement. Only two respondents, one from victim support unit and another from Criminal Investigation department indicated that law enforcement should be stepped up in order to reduce the crimes of defilement. This accounted for 13.3% of the total population that was sampled. Another two respondents, one from VSU and another from CID indicated that the public should be more involved in the fight against the crime of defilement in order to reduce its incidence. This number also accounted for another 13.3% of the sample population. Only one respondent from the victim support unit indicated that the courts of law should double their efforts in order that the cases of defilement can be minimised. This represented 6.7% of the population sample. Nine respondents, one from VSU, two from CID and six from general police duties

indicated that the rise in defilement cases can only be reduced if the law enforcement, the public and the courts of law double their efforts. This number accounted for 60% of the total number of respondents. Only one respondent suggested another method of reducing cases of defilement. This respondent indicated that apart from all the three being involved, that is the police, public and courts of law, there should also be more stress laid on African customary culture as opposed to western culture most of which is copied from the movies and television sets. The table below shows the respondents views on how to limit the number of defilement cases.

TABLE 3.5 WHAT SHOULD BE DONE TO REDUCE CASES OF DEFILEMENT

	V.S.U	C.I.D.	G.D.	TOTAL	%
(a)Intensity Law enforcement	1	1	0	2	13.3
(b) More Public Involvement	1	1	0	2	13.3
(c) Stiffen Penalties by Courts of Law	1	0	0	1	6.7
(d) All the above three to increase their efforts.	1	2	6	9	60
(e) Any other suggestion.	0	0	1	1	6.7
TOTAL	**4**	**4**	**7**	**15**	**100**

Source: Questionnaire administered to six police stations in Lusaka.

3.6 CRIME PREVENTION METHODS AGAINST DEFILEMENT

The respondents, in view of their statement that cases of defilement were on the upswing, were asked whether they were aware of any particular crime prevention method against the crime of defilement. All the respondents indicated that they were aware of a crime prevention strategy against the crime of defilement. Fourteen respondents indicated that **awareness campaigns against defilement** was the particular method that was being employed to curb the incident of defilement. The one respondent who did not cite awareness campaigns as the

prevention strategy against defilement indicated that the victim support unit was the prevention method that was being employed to reduce the cases of defilement. See table 3.6 below:

Table 3.6

AWARENESS CAMPAIGN AGAINST DEFILEMENT

	V.S.U	C.I.D.	G.D.	TOTAL	%
Aware of campaign against defilement	4	4	6	14	93.3
Not aware of any campaign against defilement	0	0	1	1	6.7
Involved in campaign	4	1	4	9	60
Not involved in campaign	0	3	3	6	40
TOTAL	**4**	**4**	**7**	**15**	**100**

Source: Questionnaire administered to six police stations in Lusaka.

3.6.1 VICTIM SUPPORT UNIT

The above table indicates that most officers from the victim support unit are aware of this method of combating defilement – awareness campaigns. All the respondents also stated that they were involved in these campaigns. This can be explained by the fact that most cases of defilement are handled by the victim support unit, and that this section of the police has exposed most of the personnel in this unit to seminars and workshops. Indeed most respondents from this section indicated, when asked how they became aware of awareness campaigns against defilement, that it was at seminars and training workshops that they were educated or exposed to prevention strategies in curbing the crime of defilement.

3.6.2 POLICE STATIONS

Out of the eleven respondents from the Criminal Investigations department and general police duties branch of police stations, ten respondents indicated that

they were aware of prevention strategies against defilement. This represented 66% of the total number of respondents. Only one indicated that they were not aware of campaigns against defilement. In terms of awareness, respondents from police stations were fairly knowledgeable of the campaigns against defilement. However not many of them were actually involved in these campaigns. Of the respondents from police stations, that is respondents who operate from CID and general duties, six of them indicated that they were not involved in these awareness campaigns. This accounted for 75% of the respondents from Criminal Investigations department. This can be explained by the fact that defilement is viewed as business solely for the victim support unit. This tallies with the data from table 3.3,[35] which shows that half the respondents from the CID indicated that they had not handled any case of defilement in the past two years.

In terms of general duties respondents from police stations, four of them indicated that they were involved in the campaigns against child defilement. This represented 72.2% of the number of respondents from police stations who operate in general duties. Only three indicated that they were not involved in the awareness campaigns against defilement, representing 27.8% of respondents from general duties department of the police. This situation, where a good number of respondents indicate that they are aware of campaigns can be explained by the fact that general duties officers operate from the Inquiries Office[36] where most reports at police stations are received before they can be

[35] This is cited at page 26 of this essay.

[36] This is the office where complainants first report the cases to the police at any police station. It is here that complaints are received and recorded in the Daily Occurrence Book of the Police.

referred either to CID or the victim support unit or any other specialised section of the police station. Therefore, by virtue of the office from which these officers operate, they have first contact with victims of defilement. Consequently, the majority of the respondents from this category stated that they became aware of these campaigns either through the mass media, that is Television and Radio or through the frequency of reports reaching police stations.

3.7 ADEQUACY OF CURRENT PREVENTIVE METHODS AGAINST THE CRIME OF DEFILEMENT

Table 3.7.1: VIEWS OF RESPONDENTS ON CURRENT METHODS OF PREVENTING DEFILEMENT

	V.S.U	C.I.D.	G.D.	TOTAL	%
Respondents who think prevention methods are adequate	0	1	3	4	26.7
Respondents who think prevention methods not adequate	4	3	4	11	73.3
TOTAL	**4**	**4**	**7**	**15**	**100**

Source: Questionnaire administered to six police stations in Lusaka.

The table above indicates that only respondents from police stations, that is criminal investigations department and general duties think current methods are adequate to address the rising incidence of cases of defilement. This represents 26.7% of the number of respondents who answered the questionnaire. All respondents from the victim support unit indicated that the current methods of preventing the crime of defilement were inadequate. Another four from the general duties thought that the methods were not adequate. From the criminal investigations department, three indicated that the methods were adequate. The number of respondents who indicated that the prevention methods were not adequate was eleven, which accounted for 73.3% of the sample population.

3.8 SUGGESTED WAYS OF STRENGTHENING THE PREVENTION METHODS

The suggested methods or ways of improving the current strategies included the following. The first was that the awareness campaigns must also be taken up by the churches, extended to public places like bars, markets besides the ones currently focussed on schools. The other suggestion was that these awareness campaigns must also be part of the school curricular beginning with grade ones. Further, it was suggested that parents must also actively be involved in equipping their children with knowledge about the evils of defilement. Still others suggested that the campaign should also be extended to both public and private sector workers. The last suggestion from the respondents was that defilers should not be given police bonds.

CHAPTER FOUR

4.0 SENTENCING PATTERNS IN CASES OF DEFILEMENT

In the present chapter, data collected from Chikwa and Boma courts on the type and duration of sentences given to convicted persons in defilement cases is presented.

Table 4.1.0 DURATION OF SENTENCES HANDED DOWN BY SUBORDINATE COURTS AT CHIKWA

Duration of sentence in years (I.H.L.)[37]	No. of convicted persons (frequency)	%	Cumulative frequency	Relative Cumulative frequency %
0 –11 months	3	21.4	3	21.4
1 – 2	1	7.1	4	28.6
3 – 4	2	14.3	6	42.9
5 – 6	5	35.7	11	78.9
7 – 8	3	21.4	14	100
Over 9	0	0		
Total	**14**	**100**		

Source: Criminal Registry at Chikwa Subordinate Courts for the period January 2002 to December 2002

The above table indicates the range of jail sentences in 2002 in months and years. According to the table, 28.6% of the accused persons were given sentences ranging from eight weeks to two years. In two instances, the courts at Chikwa sent juvenile offenders to reformatory institutions for a period of eight weeks during which time the convicted juveniles were assigned some community work and also given counselling lessons. The table further indicates that most convicted persons were given sentences ranging from 5 to 6 years, accounting

[37] Imprisonment with hard labour.

for 35.7% in the above table. It means, therefore, that the likely jail sentence one would receive for defilement is between five to six years.

Only 21.4% of the convicted persons were given higher jail sentences of seven to eight years imprisonment. No one was given a jail sentence beyond nine years. This is explained by the limitation imposed on subordinate courts by the procedural law which prescribes the maximum sentences that classes of magistrates can impose in any particular case. Sentences beyond nine years can only be given by the High Court. Where, therefore, a magistrate is of the view that a particular case requires a sentence that is beyond their powers, such a magistrate can submit the case to the High Court for sentencing.

Table 4.1.1 **DURATION OF SENTENCES GIVEN BY SUBORDINATE COURTS AT BOMA**

Duration of sentence in years (I.H.L.)[38]	No. of convicted persons (frequency)	%	Cumulative frequency	Relative Cumulative frequency %
0 –11 months	1	9.1	1	9.1
1 – 2	1	9.1	2	18.2
3 – 4	6	54.5	8	72.7
5 – 6	1	9.1	9	81.8
7 – 8	2	18.2	11	100
Over 9	0	0		
Total:	**11**	**100**		

Source: Criminal Registry at Boma Subordinate Courts for period January 2002 to December 2002.

The above table indicates that out of the eleven cases sampled for the year 2002, 18.2% of the convicted persons were sentenced to imprisonment terms ranging between five months and two years. In one case a juvenile offender was given an option of either a five months jail sentence simple imprisonment or a

[38] Imprisonment with hard labour.

fine of fifty thousand Kwacha. In the other, the convict was given a jail sentence of one year and six months imprisonment with hard labour.

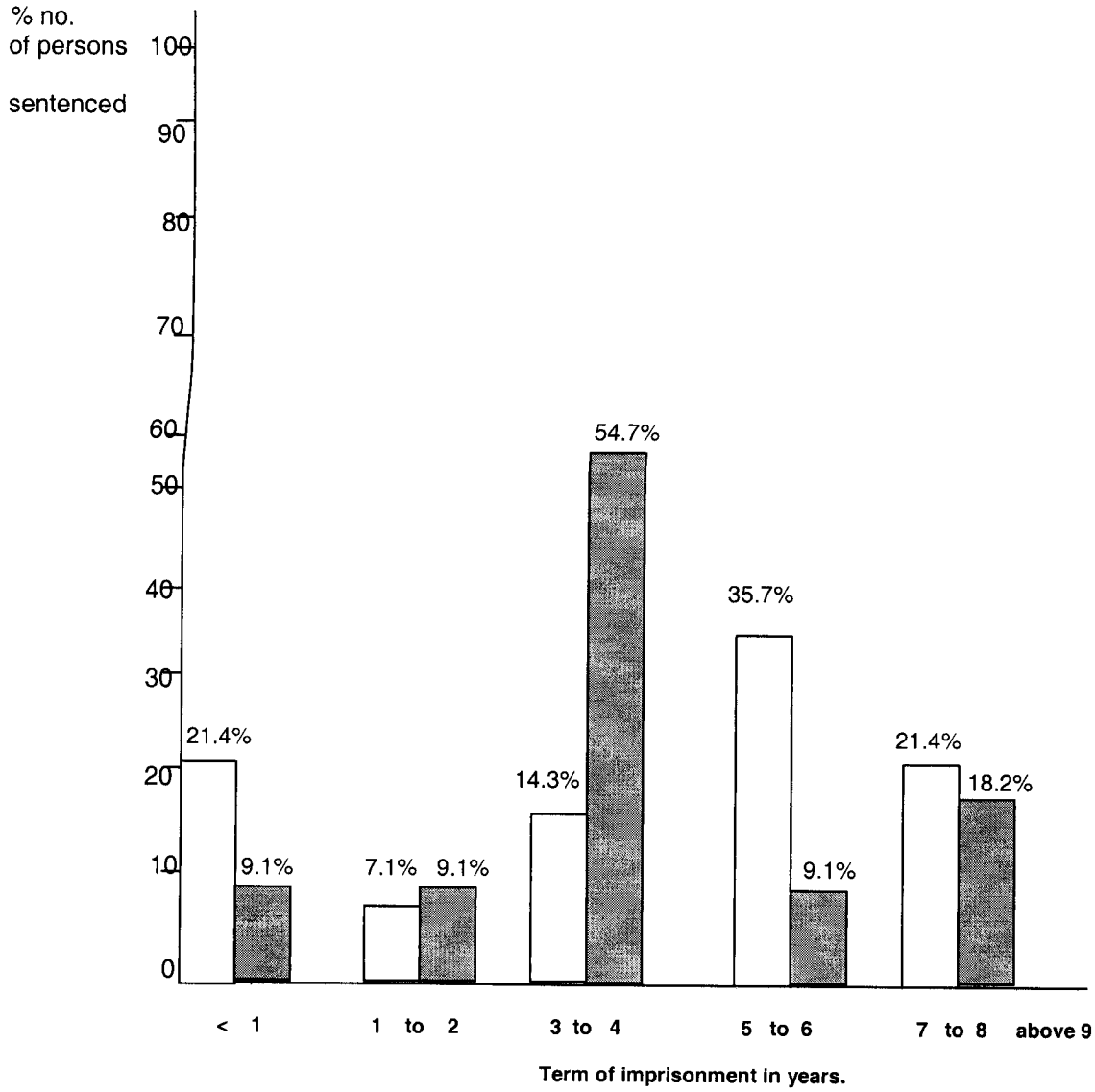
In the majority of cases, convicted persons were handed down jail sentences ranging between three to four years imprisonment with hard labour. The percentage representation was 54.5%. Out of this 54.5%, there were five cases in which the convicted reasons were sent to jail for three year with hard labour. Only in one case of the 54.5% was a convicted person sent to jail for four years imprisonment with hard labour. The table thus indicates that the sentence that one convicted of defilement would be likely to get is between three and four years.

The higher sentences of seven to eight years imprisonment with hard labour were given in 18.2% of the cases. This percentage is represented by two cases where convicted persons were given jail sentences of seven years each. In no case was a convicted person sent to jail for a prison term exceeding nine years. Again, this reflects the limitation that procedural law imposes on the powers of subordinate court magistrates.

The table further indicates that *less than stiff jail sentences* of between five months and four years were given in the majority of cases. This accounted for 72.7% of the 11 cases that were sampled. It, therefore, demonstrates that one convicted of defilement would be more likely to get a jail sentence of between a few months and four years.

In Graph 4.1.2, a comparison between the sentences at Chikwa courts and Boma Courts is shown.

Bar Graph 4.1.2



Source: Criminal Registries at Boma and Chikwa Courts, for the year 2002

KEY

Chikwa Subordinate Courts

Boma Subordinate Courts.

In comparative terms, Chikwa subordinate courts handed down more sentences of between five to six years than the subordinate courts at Boma. Instead, the figure was higher in sentences between three to four years at the Boma subordinate courts. Additionally fewer cases at Boma Courts were subjected to jail sentences between seven and eight years. At Chikwa courts, however, the number of cases in which the jail sentence was between seven and eight years was high.

The table thus reveals that if one was to have their case heard at the Boma subordinate courts, one would likely be more get a more lenient sentence than if the some case where heard at the Chikwa courts. The figures give the impression that magistrates at Boma courts are less likely to impose stiffer jail sentences than those at Chikwa Courts.

However, in both classes of the courts that is Boma and Chikwa subordinate courts, there was no case in which the jail sentence was beyond eight years. This confirms the fact that the powers of a magistrate to sentence are procedurally limited.

Jail sentences below one year were, however, passed more at Chikwa courts than at the Boma courts. In the former, the number represented 21.4% of the cases while in the latter only 9.1%. Therefore, even though courts at Chikwa were more likely to hand down stiff jail sentences ranging from five to seven years, they were also more likely to give lenient sentences of below a year than their counterparts at the Boma Courts.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

In this part of the essay, the findings from the research will be summarised by making general observations on the research findings. Further some policy implications for effective policing of the crime of defilement will be made. Additionally changes that the findings of the research suggest to the law, both substantive and procedural, will be made by way of recommendations. Possible areas for further inquiry will also be proposed.

5.1.1 THE LAW OF DEFILEMENT

The research analyses revealed that the law of defilement in Zambia can be traced to 1931 when the penal code of the Republic was first introduced by the colonial authorities. It was further established that before the code was introduced, the territory of Northern Rhodesia was regulated by the various customary laws of the many tribes inhabiting the territory. The analyses revealed that the crime of defilement consists of three ingredients that the prosecution has to prove beyond reasonable doubt:

(a) that a man had sexual intercourse with a girl; proof of penetration is vital in this charge.

(b) That the sexual intercourse was unlawful;

(c) That the girl was below the age of sixteen years.

It was further discovered that consent is immaterial in the offence of defilement.

Furthermore, it was established that the age at which carnal knowledge is unlawful with a girl was twelve years until 1933 when the age was increased to sixteen years. It has remained so since then.

It was discovered also that the defence to a charge of defilement consists in proving two elements which must be proved on a balance of probabilities, that the standard of proof in these two elements of the defence is less than that on the prosecution. Therefore an accused who manages to prove that:

(a) he had reasonable cause to believe that the girl was of, or above the age of sixteen years; and

(b) that he did in fact believe that the girl was of or above the age of sixteen years, will have successfully made out the defence to a charge of defilement.

The research further discovered that customary law was acknowledged, and specifically customary law marriages. Consequently were one manages to prove that the victim of defilement is one's wife, such an accused cannot be guilt of defilement. It is the thesis of this essay that the interplay of customary law and Zambian Criminal law has tended to encourage the commission of defilement in the countryside. This is one of the possible areas of reform that could be suggested.

In terms of punishments, the research discovered that the substantive law provides for a maximum sentence of life imprisonment. Furthermore, the law provides a magistrate with discretion regarding what the minimum sentence should be in any particular case. However, it was discovered that procedurally

the powers of magistrates are limited. The law only provides for 9 years imprisonment when the case is handled by a senior resident magistrate. The highest a second class or third class magistrate can impose in terms of sentence is three years. Therefore at Subordinate court level, the sentences range between the maximums of nine and three years. The research proposes this as another area where reform can be undertaken, and more about this will come in the second section of the chapter.

5.1.2 PATTERN AND TRENDS IN CASES OF DEFILEMENT

The research discovered that the general pattern in cases of defilement at the National level showed a rising trend. Further, it was discovered that the highest increase was recorded in 2002 which recorded a 71.6% increase from the previous year's figures. It was further discovered that rural provinces recorded low levels of the cases compared to provinces along the line of rail. Lusaka province recorded the highest figures for all the years where data was available and the lowest was recorded from North Western Province. The research further established that the majority of the cases were happening in high density areas of the towns. In Lusaka most of these cases were reported from police stations servicing high density locations like Kanyama, Mandevu and Kalingalinga.

The findings of the study were that in terms of cases taken to court, the general trend was that more were taken to court in the year 2002. It was further discovered that the number of cases successfully prosecuted was low compared to the number of cases taken to court. It was further discovered that most cases

were withdrawn at police stations and in the courts of law. Further the number of pending cases in courts of law was also high.

The research further discovered that a majority of the victims of defilement were actually defiled by strangers. Others were defiled by relatives and persons close to them such as neighbours, pastors, teachers and boyfriends to their mothers.

The reasons for the rising trends in cases of defilement ranged from the influence of western culture on the traditional way of life to the worsening economic situation in the country. It could also be proposed that the rising trend can be explained by the general willingness on the part of crime victims to report the crime particularly with the introduction of the victim support unit of the police service. This is one section of the police that is 'user friendly' to victims of crimes as opposed to traditional branches of the police which are viewed particularly with suspicion and resentment. Therefore, this factor seems to have encouraged victims of the crime to report the same to police. Consequently, the rising trends in defilement may not necessarily indicate a rise in the incidence of defilement, but rather an increase in reported cases. According to Walker (1971) "This is especially true of rising trends since some of the apparent increase may be due to increased willingness on the part of the public to report crime ..."[39] it is the thesis of this essay that reported cases of defilement have increased. Consequently the first hypothesis that was to be proved: that cases of defilement have been on the increase in recent years is thus confirmed by both statistical data and information from respondents who answered a questionnaire

[39] Walker, N. (1971) **Crimes, Courts and Figures: An Introduction to Criminal Statistics**. P. 25.

administered to them. All the respondents indicated that cases of defilement had indeed increased.

5.1.3 CRIME PREVENTION METHODS EMPLOYED BY POLICE AGAINST DEFILEMENT

The research discovered that the police has supplemented traditional crime traditional crime prevention methods of foot patrols and arrests with awareness campaigns. These campaigns were found to be the major prevention strategy that is being employed to curb defilement. The campaigns consist of disseminating information to the public in general and schools in particular on the evils of defilement and how it can be avoided. In some instances posters and leaflets were circulated at public places like police stations, bars, bus stations and schools.

Additionally, it was discovered that the victim support unit of the police service was the principal unit of the police that was primarily concerned with the crime of defilement. [40] Most of the police officers belonging to this department indicated that they had not only handled cases of defilement before, but that they were also involved in the awareness campaigns aimed at sensitising members of the public. Officers from the Criminal Investigations Department (C.I.D) and general duties section indicated that, though they were aware of campaigns against defilement, most of them did not participate in these. The research further established that the crime prevention methods were not adequate to address the incidence of defilement.

[40] Police Amendment Act no. 14 (1999) section 53 (1).

It became clear during the research that record keeping in police stations particularly crime records was not up-to-date. Most of it was manually handled and easily destroyed with time. The data for the five years, that is, 1997 to 2002 was not all available principally due to poor record keeping. It was only at police headquarters that an improved record base on defilement was available but even here the records were up-to-date only for the years 2001 and 2002. The years before 2001 seem to have been poorly accounted for. This is possibly another area of crime prevention that should be subject to reform in order to accord with the changing times.

5.1.4 SENTENCING PATTERNS IN DEFILEMENT CASES

The research discovered that the most prevalent prison terms that magistrates were handing down were mostly between three to five years. In cases were the sentences could be said to be higher or stiff, it was only seven years. No court, in the research, was discovered to have given a sentence beyond eight years. The general impression that was gathered was that the range of prison terms between some months to six years was indicative of the procedural limitation imposed on the sentencing powers of a magistrate. This was therefore one area that the research considered was worth reforming.

5.2 POLICY IMPLICATIONS AND RECOMMENDATIONS

The purpose of the research has been to place law into a social context, particularly the law of defilement, with a view to finding out whether it is effective in its task as an "instrumentality in the hands of society whereby society shapes

things within its sphere of influence according to its will."[41] To effectively use the law in such manner, society and policy makers in particular have to appreciate what the law can accomplish, and what help and from which institutions, the law needs in its task of ordering society. However the recent debates on the cases of defilement have placed the law of defilement on centre stage to the exclusion, almost, of other social institutions and instruments that aid the law in its task. Therefore, it has been the thesis of this essay that the law of defilement, save for a few adjustments needed, is adequate for the task at hand, but has been let down by the social institutions which have to support the law to achieve its purpose. As professor Jenkins observes; "but although law is sovereign and indispensable, it is neither omnicompetent nor self sufficient; rather, it is heavily dependent upon other institutions both to accomplish what it cannot do and to support it in its work."[42]

In this regard, therefore, the role of the managers of the law is extremely important in the task of the law. The role of the police, for instance, is quite vital. The managers of the law must not only apply the law but also understand it. The research discovered that the police have to step up their effort in the fight against the crime of defilement. The police can effectively contribute to the task that society has assigned the law. In this respect, it is the **recommendation** of the essay that the keeping of records be improved in order that information can be stored and used in planning. Without information, it is not only difficult to measure one's performance, but also unlikely that effective and relevant planning

---

[41] Ehrlich. E (1936) Fundamental Principles of the Sociology of Law. Translated by Moll, W.L. (1962). Page 202-203.

[42] Jenkins, I (1980) **Social Order and the limits of Law.** Princeton University Press. New Jersey p.371.

can be undertaken. With information, trends can easily be detected and appropriate responses devised without necessarily waiting for NGOs, churches or politicians to march in protest. Information keeping can be enhanced if computers were utilised. Indeed with three years into the new millennium, it is inconceivable that information can still be handled using techniques belonging to 1964 that our colonisers bequeathed to us.

Additionally, the prevention strategies have to be improved upon. **Awareness Campaigns** are admittedly a useful tool that society in general and the police in particular can use to prevent the commission of defilement. When potential victims are armed with information they may be able to avoid circumstances likely to attract prospective defilers. If children in a home are given information, they would trust less the uncle or pastor and be on the alert. Most victims of defilement either were too trusting or unsuspecting. In this regard the awareness campaigns can not be left to the police alone. It has to involve the whole of society. The church, schools, mass media, parents and the police must all be involved. As matter of fact, defilement lies more within the province of mortality than legal so much that the role of the church, family and school is quite enormous. Therefore, the triad must actively take the challenge to reform potential offenders before society can begin to ask the courts of law to send these people to prison for longer jail terms. Prevention, indeed, is the real cure of the scourge of defilement.

Apart from the role of the police and the above institutions of society, courts of law have also to be seen to be assisting the law in its mission of ordering society. The courts have been imposing sentences that do not tally with the nature and

circumstances of the defilement cases. One of the factors to consider in sentencing is prevalence of the offence. Granted that few cases might be reaching the courts, judicial notice ought to be taken of the fact that cases of defilement have been on the upswing. The sentences that have been handed down, of five or six year jail terms are the same ones that subordinate courts were giving offenders in cases reported in the 1940's and 1950's. consequently to expect such sentences to be the pattern in the new millennium reflects an inability on the part of the managers of the law to adapt to the changing time. "Adaptability is truly a condition *sine qua non* of the continued existence of a legal system."[43] Furthermore, mangers of the law, magistrates, need to know that, "failure to use power to adapt to change is in its own way an abuse of power."[44] Lord Scarman epitomised the need for adapting a legal system in the following terms:

> I shall endeavour to show that there are in the contemporary world challenges, social, political and economic, which, if the system cannot meet them, will destroy it. These challenges are not created by lawyers; they certainly cannot be suppressed by lawyers: they have to be met either by discarding or adjusting the legal system, which is it to be?[45]

It is indeed the **recommendation** of this essay that the law on defilement, besides the sentencing policy, has to change to accommodate the rise in cases of defilement. The change proposed must be in the procedural law. According to the power given to subordinate courts, the maximum sentence that a high ranking resident magistrate can impose is nine years. Beyond that, the case has

---

[43] Dias, R.W.M. (1976) (4th edn) Jurisprudence, p.415.
[44] Ibid page 415.
[45] Ibid.

to be submitted to high court for a higher jail sentence. In this vein, the changes can assume the following forms:

(a) Removing cases of defilement from the subordinate court jurisdiction.

(b) Increasing the powers of magistrates so that no limitation is placed on the sentences which the court can impose.

(c) Providing for a minimum sentence so that the magistrates do not impose inappropriately very lenient sentences. The proposed penal policy changes have their own limitations.

Removing the cases of defilement from subordinate court jurisdiction would accord with the seriousness of the crime of defilement. The offence is a felony and carries a maximum sentence of life imprisonment. It is, therefore, in the same class as murder which also has a maximum of death sentence. There is basically no difference between a life imprisonment and a death sentence since it practically ends upon the death of the prisoner. However, this has the limitation that cases would take long before they are heard because the High Courts are already inundated with pending cases.

Providing for more powers to allow magistrate impose sentences up to the maximum and also providing for a minimum would ensure that magistrates do not go below a certain minimum. This is appropriate because there is always the right of appeal where the sentence is excessive. Consequently, providing for a minimum sentence and giving magistrates more power would be achieving the same effect of taking the cases of defilement into the High Court jurisdiction.

Since the magistrates courts are many relative to High Courts, more cases can thus be heard in relatively short time.

Therefore, the essay **recommends** the above change in the penal policy by amending the procedural law in order that it accords with the changing times. However, it is worth remarking that, still, jail sentences alone are not enough. For one to be punished, one has first to be caught after committing the offence. Therefore, the deterrent effect of punishment ultimately depend on the likelihood not only of being caught but also on having the case successfully prosecuted, without the chance of its being withdrawn. Withdrawal of cases reduces or waters down the significance of the long jail sentences. There is also an added limitation with punishment as a way of reducing crime generally and defilement in particular. Sexual offences reflect an imbalance in the psychological constitution of most accused. As Dais observes, "punishment can have deleterious effects, for sexual immorality stems from deep-seated drives which need channelling, not punishment. "One strives to cure disease, not to punish sufferers."[46] It is for this reason that the research **recommends** a concerted effort by all institutions of society in order that the law can be aided to accomplish its task of ordering society. As Professor Jenkins germanely observes:

> Law has certainly become the dominant element in this complex of institutions – the major factor in arranging the life of society. But just as certainly, law cannot by itself maintain the social order. The power of law as an instrument of order is limited by the very nature of the legal apparatus ... The effectiveness of law depends heavily upon contributions of these other institutions.[47]

---

[46] Dias, R.W.M. (1976) (4th edn) **Jurisprudence**.
[47] Jenkins, J. (1980) **Social Order and the limits of Law**: A Theoretical Essay.

The research raised some questions which it is proposed future studies should attempt to answer:

1. The apparent increase in cases of defilement has been linked to the prescription for treatment that traditional leaders have been giving their patients.

2. The prevalence of defilement cases is reflective of the influence western culture has had on traditional African culture.

3. Most of the perpetrators of defilement could be suffering from some of mental disorders. Further research could provide answers to these questions.

BIBLIOGRAPHY

Dias, R.W.M. (1976) 4th edition. *Jurisprudence*, Butterworths. London.

Ehrlich, E. (1976) *Fundamental Principles of the Sociology of Law.* Translated by Moll, W.L. (1962) Russell inc. New York.

Hatchard, J and Ndulo, M. (1994) *Readings in Criminal Law and Criminology in Zambia,* Multimedia, Lusaka.

Hatchard, J and Ndulo, M. (1983) *A Casebook on Criminal Law*, Government Printer, Lusaka.

Jenkins, I. (1980) *Social Order and the Limits of Law: A theoretical Essay*, Princeton University Press, New Jersey.

Mutale Bwembya (1978/79) Law Obligatory Essays.

Parker, W.L. (1969) *The Limits of the Criminal Sanction*, Stanford University Press, California.

Podgorecki, A. (1974) *Law & Society.* Routledge & Kegan Paul, London.

Post Newspaper, Tuesday 25th March, 2003.

Saturday Post, 15th March, 2003.

Smith, J.C. & Hogan, B. (1988) 6th Edition, *Criminal Law*, Butterworths, London.

Walker, N. (1971) *Crimes, Courts and Figures: An Introduction to Criminal Statistics,* Penguin, Middlesex.

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

QUESTIONNAIRE

TOPIC: LAW AND SOCIAL ORDER: DEFILEMENT CASES ON THE UPSWING; INADEQUACY OF THE LAW? WHAT ARE THE IMPLICATIONS FOR LAW ENFORCEMENT AND SENTENCING

Dear Respondent,

I am a student of the University of Zambia, School of Law, conducting a research on the topic: "Law and social order: Defilement cases on the upswing: inadequacy of the law? What are the implications for law enforcement and sentencing".

You have been selected at random to take part in the study. You are sincerely requested to answer the questions that follow faithfully and trustfully. The information that you will give shall be treated in the strictest confidence.

Thank you in anticipation.

INSTRUCTIONS

In answering the following questions. You are requested to **TICK ONE** of the options available to you. Where you are required to fill in the space provided, write your response in the space provided.

Part A. **PERSONAL INFORMATION**

1. When did you join the Zambia Police?----------
2. Which department of the Police do you operate from?
   (a) Victim Support Unit { }
   (b) Criminal Investigations Department { }
   (c) General Police duties { }

3. Which Police Station do you operate from? ----------

Part B.

1. Are you aware of defilement cases against children?
   Yes { } No { }

2. If you are aware, do you think they are on the increase?
   Yes { } No. { }

3. If you think they are on the increase, what could be the reason for this?
   (a) The law on child defilement is weak { }
   (b) The society has lost respect for children { }
   (c) Any other reason----------

4. If your answer in the above is 'a', what do you think should be done to make the law on defilement strong enough?----------

   ---

5. If your answer to question 2 was 'Yes' which of the following needs to put more effort to help reduce the cases?

(a) Law enforcement { }

(b) The public { }

(c) The Courts of Law { }

(d) All the above three { }

(e) Any other suggestion { }

Part C

1. Are you aware of any awareness campaign against child defilement? Yes { } No. { }

2. If you are aware, are you involved in any one of these campaigns?
Yes { } No. { }

3. If your answer is 'Yes', how did you come to know about the awareness campaign?----------

4. Have you handled any defilement cases in the last two years?
Yes { } No. { }

5. Are you aware of any particular crime prevention method against child defilement? Yes { } No. { }

6. If you are, which of the following is it?
   (a) Foot patrols { }
   (b) Public awareness campaigns { }
   (c) Awareness campaigns in schools { }
   (d) Any other----------

7. Do you think the current prevention methods are adequate?
Yes { } No. { }

8. If your answer is 'No', what do you think should be done?

---

9. Do you think the courts of law are passing stiff jail sentences?

Yes { } No. { }

10. If your answer was 'No. in question 9, what do you think should be minimum and maximum terms of imprisonment?