

Challenges in Prosecuting Sexual Offences: A Comparative Study with other Jurisdictions.

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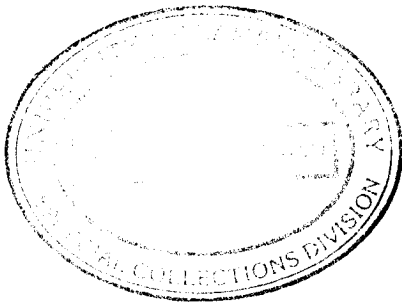


A dissertation submitted to the University of Zambia in partial fulfillment of the requirements of Bachelor of Laws degree (LLB)

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ABSTRACT

Sexual offences have been on the increase in Zambia and have continued to be a constant feature in the media with more and more reports of such offences occurring in society. This is despite the introduction of stiffer punishment such as the mandatory minimum sentence of 15 years to life imprisonment. This dissertation addresses the challenges in prosecuting sexual offences and conducts a comparative study with other jurisdictions.

The dissertation through research found that there is indeed a high prevalence of sexual offences in Zambia. The causes identified include customs and myths, modernisation which has led to the breakdown in social values, ignorance of the law, economic deprivation, the dual legal system, peer pressure and alcohol abuse. This paper also highlights the adverse effects of sexual offences and these range from physical to psychological effects.

The dissertation identified the challenges in prosecuting sexual offences to be legal technicalities such as corroboration and the requirement of a *voire dire* where a witness is a child to be impediments in the prosecution of sexual offences. Other impediments include low awareness levels among the poor and women of the availability of a formal justice mechanism of dealing with such offences, geographical factors which make the formal legal system inaccessible for most, incompetence of service providers and prosecutors, the jurisdiction of lower courts, lack of or inadequate health services due to the constraints faced by the medical field, customs and the dual legal system, and the economic cost of justice. The dissertation also made a comparative study of the legal framework and policies providing for sexual offences in Zambia and other jurisdictions namely; South Africa and Canada. It was established that these two states have made commendable progress in the fight against sexual offences through their legislation and introduction of new policies as compared to Zambia that we can emulate.

The last chapter of this dissertation gives the conclusion and makes recommendations to the effect that there is need for parliament to enact a statute that specifically deals with sexual offences. It also recommends a statutory provision that can be used to compel an alleged offender to be tested for HIV. It is further recommended that a National register for sexual offenders is introduced in Zambia. The dissertation also calls for sexual offences courts to be established in the country and international instruments should be domesticated. Legislation should also be enacted to codify customary law in order to harmonise it with statutory law.

ACKNOWLEDGEMENT

First and foremost I would like to give thanks to God almighty the creator and giver of life for guiding me on this journey and giving me the strength, health and intellect to complete my research.

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DEDICATION

This work is dedicated to my mother Macrina Nchimunya and to the memory of my father Robert Choopa Hadunka. My beloved mother you have been my rock in this journey through life. I cannot put into words how grateful I am for the sacrifices you've made for me over the years. You have been my biggest fan and have always had unwavering faith that I can be and achieve anything I set my mind on. You put no limits on my dreams or ambitions but rather you have cheered me on. The wise advice you have given me will carry me through the years. My greatest achievement in life will be one day becoming half the woman you are. Dad I hope you're proud.

This work is also dedicated to the victims of sexual offences. I sincerely hope that in some small way the recommendations given will contribute in the fight against sexual offences

TABLE OF STATUTES

Canada Criminal Code R.S.C 1985

Constitution of the Republic of South Africa

Republic of South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act

The Anti-Gender-Based Violence Act No. 1 of 2011 of the Laws of Zambia

The Penal Code Amendment Act No. 15 of 2005 of the Laws of Zambia

The Penal Code, Chapter 87 of the Laws of Zambia

INTERNATIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child

Convention on the Rights of the Child

Rome Statute of the International Criminal Court

United Nations Convention on the Elimination of All Forms of Discrimination against Women

United Nations Convention on the Rights of the Child

TABLE OF CASES

Holtzhauzen v Roodt (1997) 4 SA 766 W

Kaitamaki v R [1991] 4 All ER 48

Kalebu Banda v The People (1977) Z.R. 169 (S.C.)

Rex v Chinjamba (1949) 5 N.R.L.R 384

Zimba v The People (1980) Z.R. 259 (S.C.)

Zulu v The People (1973) Z.R. 326 (S.C.)

LIST OF ACRONYMS

ACORD	Agency for Cooperation and Research Development
AIDS	Acquired Immuno Deficiency Syndrome
CCC	Canada Criminal Code
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CSW	Commission on the Status of Women
GBV	Gender Based Violence
HIV	Human Immuno-deficiency Virus
LAZ	Law Association of Zambia
LRF	Legal Resources Foundation
NGOs	Non-Governmental Organisations
NPA	National Prosecuting Authority
NLACW	National Legal Aid Clinic for Women
PEP	Post Exposure Prophylaxis
RR-PTSD	Rape-related Posttraumatic Stress Disorder
STDs	Sexually Transmitted Diseases
UCT	University of Cape Town
UTH	University Teaching Hospital
VSU	Victims Support Unit
WILDAF	Women in Law and Development in Africa
WLSA	Women and Law in Southern Africa
WRC	Women's Rights Committee
YWCA	Young Women Christian Association
ZCEA	Zambia Civic Education Association
ZDHS	Zambia Demographic and Health Survey

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CHAPTER ONE

GENERAL INTRODUCTION OF RESEARCH

1.0 General Introduction

This chapter outlines the basic aspects of the research. These are the introduction, statement of the problem, objectives of the study, rationale and justification of the study, research questions, operational definition of terms, methodology and outline of the chapters. A conclusion will then be drawn.

1.1 Introduction

The problem of the high prevalence of sexual offences is an issue that does not only affect Zambia, but many other countries the world over. The seriousness of this matter has been given international recognition; Article 7 of the Rome Statute includes sexual violence as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.¹ Sexual offences in their various forms are endemic in communities around the world, cutting across age, sex, class religion and national boundaries. They have both physical and psychological impact on victims and can occur within the family, that is, domestic violence and in the community.

In Zambia, sexual and gender based violence have become more pronounced than ever before. Different myths and cultural beliefs among people have led to an escalating number of these offences. For instance despite the stiffer punishment that has been imposed on would be defilers, a week hardly passes without the media reporting about a child who has allegedly

¹ Article 7, Rome Statute of the International Criminal Court 2000.

been sexually molested.² Presenting a report on child sexual abuse at a consultative meeting with female parliamentarians and various stakeholders, University Teaching Hospital (UTH) paediatrician Dr Chomba said that one in every five children is abused worldwide. She further stated that the current statistics on the number of children being defiled locally and globally was alarming and that stringent measures must be put in place to control the scourge.³ This indeed is a sad state of affairs and shows that something has to be done urgently about this problem.

A Judicial Audit Research that was conducted in five African Countries by Agency for Cooperation and Research Development (ACORD) in its findings revealed that the incidence of sexual violence has continued to rise at alarming levels, whilst perpetrators arrests and convictions are negligible.⁴ An assessment of the challenges experienced within the judiciary in determining sexual offences cases are largely similar in most African countries. Firstly there is the insufficiency of the law where some internationally recognised crimes as sexual offences are not captured in the domestic law.⁵ For instance in Zambia there is no such offence as marital rape. Thus a survivor who testifies to such violations can only get redress through normal assault or other sexual offence provisions.

The provisions that allow survivors to withdraw charges against the accused person present another problem as they undermine survivors redress. It has been found that most sexual offences survivors withdraw their cases due to family pressure, threats and trauma they

² N. Kachema, *Defilement Cases on the increase in Zambia*. Available at: <http://www.nkombo.blogspot.com> (accessed October 22, 2011), 1.

³ N. Kachema, *Defilement Cases on the increase in Zambia*, 1.

⁴ ACCORD, *Making the Law count: Kenya: An audit of legal practice on Sexual Violence* (Nairobi: Ramco Printing Ltd, 2009), 13.

⁵ ACCORD, *Making the Law count*, 13.

experience in testifying in courts.⁶ The other challenge is the court process of determining cases which takes unduly long periods of time.

Some countries have however made progress in curbing the scourge of sexual offences and Zambia can learn from them. Two jurisdictions will be looked at in this study namely South Africa and Canada to observe what they've accomplished and what we can learn from them as a nation.

1.2 Statement of problem

Despite the introduction of stiffer punishments for culprits, sexual offences are still on the rise in Zambia. The mind blowing question therefore is “How is it that this criminal offence has continued taking place repeatedly despite efforts from various sectors of society to curb it?” This vice has continued to harm its victims both physically and psychologically. It is evident from various studies and media reports that the scourge of sexual offences is still rampant in Zambia. This gloomy picture shows that something needs to be done urgently. The question remains “What should be done to curb this evil vice?” It is therefore imperative that a closer look is taken at the challenges in prosecuting sexual offences and whether we truly have access to justice. This study will therefore look at how other countries are fighting this battle and from there assess where we have been going wrong as a nation or areas we need to improve on.

1.3 Objectives of the Study

The main objective of this research is to critically examine the challenges in prosecuting sexual offences and whether we really have access to justice as well as to carry out a comparative study with other countries. A critical analysis will examine the laws and what

⁶ ACCORD, *Making the Law count*, 14.

else can be done to curb this vice in society. The specific research areas that will be concentrated on are:

1. To define sexual offences and highlight the different types of sexual offences
2. To identify the challenges faced by victims in reporting sexual offences
3. To identify the challenges in prosecuting sexual offences by law enforcement authorities
4. To look at whether access to justice is a mere fiction for people who have been sexually violated
5. To look at the successes made by other jurisdictions in curbing sexual offences
6. To make recommendations on what should be done in order to ensure that this vice is curbed and victims have access to justice.

1.4 Rationale and Justification of Study

The importance of this research cannot be overemphasized. Looking at the high prevalence of sexual offences in Zambia, this study is justified on the basis that it is cardinal to find a solution to curb sexual offences. This need is exemplified by the fact that sexual violation not only affects the victim physically but emotionally and psychologically as well. In extreme cases the victims contract the deadly disease of HIV/AIDS. Another harsh reality is that it is not only adults that are victims but children as well.

The Zambia Demographic and Health Survey (ZDHS) 2007 data indicates that one in five (20 percent) Zambian women have experienced sexual violence in their lifetime 64 percent of which is perpetrated by a current/former husband/partner or boyfriend. Among girls younger than age 15 surveyed, the sexual violence/abuse occurred 19 percent by a relative; 6 percent

by a family friend; and 10 percent by the girl’s friend. Almost half (47 percent) of the girls who experienced physical or sexual abuse did not seek help and of these 6 percent never told anyone about it.⁷ Such figures are very alarming and clearly show that there is urgent need to come up with a solution and soon.

Doctor Chomba a paediatrician at the University Teaching Hospital (UTH) disclosed that UTH records about 30 to 35 cases of defilement per week but that most offences were not reported at all. She further stated that the reported cases were a mere tip of the ice berg. A person’s childhood should be a happy one and they should be protected by their communities.⁸ It is therefore saddening because studies have shown that people who are violated as children have a high chance of becoming prostitutes, substance abusers as well as sexual predators themselves. It can therefore become a vicious cycle that never stops if not adequately dealt with.

In this regard, this study will critically evaluate the challenges in prosecuting sexual offences and the reasons that have led to the high prevalence of such offences narrowing it down to specific aspects such as whether the existing laws are adequate, whether the victims and community at large have been sensitized enough on what to do when such a tragedy occurs, lack of access to hospitals and so on. The study seeks to address these and more challenges and to delve deeper into providing practical solutions that will be effective.

1.5 Research Questions

- i. What are sexual offences and how prevalent are they in Zambia
- ii. What are the causes of sexual offences in Zambia

⁷ USAID/Zambia, *Gender-Based Violence Programming Evaluation* (August 2010), 1.

⁸N. Kachemba, *Defilement Cases on the increase in Zambia*, 1.

- iii. Who is to blame for the high prevalence of sexual offences in Zambia
- iv. How well informed are people about sexual offences
- v. What is the impact of court procedures on access to justice by victims of sexual offences
- vi. Are the judicial remedies effective in combating sexual offences
- vii. What is the impact of Zambia's customary laws on the fight against sexual offences
- viii. What is the impact of economic costs of justice on access to justice
- ix. What can be done to deter people from committing sexual offences
- x. What should be done to eliminate impediments in the prosecution of sexual offences

1.6 Operational Definition of Terms

a. Sexual offences – Any crime that involves sexual intercourse or any other sexual act. The main crimes in this category being rape and sexual assault.⁹

b. Rape – Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape.¹⁰

⁹ E. A. Martin, *Oxford Dictionary of Law*, 6th ed. (Oxford: Oxford University Press, 2006), 495.

¹⁰ Section 132, Penal code. Chapter 87 of the Laws of Zambia

c. Consent – In the context of sexual offences it is when someone freely agrees to a sexual act without any pressure to submit.¹¹ It is also defined as agreement by choice, by one who has the freedom and capacity to make that choice.¹²

d. Corroboration - This is independent evidence which supports the evidence of a witness in a material particular.¹³

e. Marital rape – Any unwanted sexual acts by a spouse or ex-spouse, committed without consent and or against a person's will obtained by force or threat of force, intimidation or when a person is unable to consent.¹⁴

f. Justice – A moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs.¹⁵ It is also considered as the ultimate objective of the law.¹⁶

1.7 Methodology

This study will employ desk research and field investigations. The desk research will be qualitative and comprise of data collected from secondary sources such as relevant Law Reports, books, dissertations, journal articles, newspapers, and statistics. Internet data will also be referred to for its value of being up to date with happenings around the world and statistics.

The field investigations will consist of interviews with key stakeholders, people who have been affected by the vice of sexual offences and the community at large. The research will be conducted in Lusaka, other provinces will be catered for as the targeted key stakeholders such

¹¹ S. E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2006), 512.

¹² E. A. Martin, *Oxford Dictionary of Law*, 6th ed. 116.

¹³ J. Hatchard and M. Ndulo, *The Law of Evidence in Zambia: Cases and Materials* (Lusaka: Multimedia Publications, 1991), 128.

¹⁴ *Kaitamaki v R* [1991] 4 All ER 48

¹⁵ E. A. Martin, *Oxford Dictionary of Law*, 6th ed. 301.

¹⁶ C. Anyangwe, *An outline of the study of Jurisprudence* (Lusaka: UNZA Press, 2005), 43.

as International Non-Governmental Organisations and institutions have branches in other provinces and have conducted research in these places and have statistics and information regarding the prevalence of this scourge and impact in these places. Institutions to be consulted include Young Women Christian Association (YWCA), International Justice Mission, CARE International and many others. They will therefore provide valuable insight on the prevailing situation in the country as a whole.

1.8 Layout of Chapters

CHAPTER ONE

General Introduction

This chapter will introduce the research and give an overview of the research. It will comprise of the following; introduction, statement of the problem, research objectives, significance of the study, research methodology and finally the chapter layout.

CHAPTER TWO

This chapter will examine the law on sexual offences in Zambia. It will bring to the fore the causes of sexual offences and the prevailing situation in Zambia. It will also delve into the adverse effects of this scourge and look at the law that addresses sexual offences in Zambia. International instruments ratified and obligations arising under them will also be discussed.

CHAPTER THREE

This chapter will examine the challenges in prosecuting sexual offences and whether access to justice is a mere fiction. It will achieve this by looking at procedural impediments in prosecuting sexual offences, economic cost of justice, dual legal system, lack of basic

information about legal rights, geographical aspects as well as other factors. It will also discuss how preventive measures are more effective in curbing sexual offences rather than dealing with them after they have occurred. It will also highlight how key stakeholders such as NGO's have played a major role in ensuring that this is achieved.

CHAPTER FOUR

In this chapter a comparative study will be carried out on the law providing for sexual offences in Zambia with other jurisdictions. It will compare the laws in these countries and proceed to highlight the successes they have achieved that Zambia can emulate. It will bring to the fore the steps they took to get to where they are today.

CHAPTER FIVE

This is the final chapter and will consist of a general conclusion of what has been discussed in the preceding chapters and give recommendations on how sexual offences can be effectively curbed.

1.9 Conclusion

In conclusion, this chapter gives an overview of the scourge of sexual offences. It states the problem statement upon which the research is based and goes further to highlight the objectives, rationale and justification of the study. The chapter also outlines the research questions and operational definitions of terms. It also gives the methodology employed in conducting the research and finally gives an outline of the chapters.

CHAPTER TWO

THE PREVALENCE OF SEXUAL OFFENCES IN ZAMBIA

2.0 Introduction

The situation in Zambia when it comes to the prevalence of sexual offences leaves much to be desired. In order to deal with this scourge it is important to address the root cause. This chapter will bring to the fore the causes of sexual offences and the prevailing situation in Zambia. It will also delve into the adverse effects of this scourge and look at the law that addresses sexual offences in Zambia. International instruments ratified and obligations arising under them will also be discussed.

2.1 Causes of the High Prevalence of Sexual Offences

2.1.1 Customs - Customs play a major role in perpetuating sexual offences especially against women. Violence against women is often sanctified by customs and reinforced by institutions that limit women's rights, their decision-making power, and their recourse to protection from violence. As such it is both an outcome and expression of women's subordinate status in relation to men in societies around the world.¹⁷ In Zambia, women are taught from a tender age that their place is in the kitchen and when they become of age to bear children for their husbands, it is therefore inculcated in them from a tender age that they are not equals with men. Culture therefore provides a fertile ground for sexual violence.

The key underlying cultural factor that makes girls vulnerable to HIV is the subordinate status of women and girls, which deepens their social and economic dependence on men. Zambian girls are raised to be obedient and submissive to males and not to assert

¹⁷ Gender in Development Division Cabinet Office, *National Plan of Action on Gender-Based Violence (NPA-GBV) 2010-2014* (Lusaka: Cabinet Office and Government Printers, April 2010), 2.

themselves.¹⁸ This is one of the major reasons why most victims of sexual offences do not report these crimes because they have been raised to believe it is the natural order of things for them to be treated as objects of pleasure. Zambia is principally a patriarchal nation and most people are socialised to believe that women are inferior to men, meaning that women should do everything possible to make men happy even if it's at the expense of their own happiness.¹⁹

2.1.2 Myths - Sexual violence and coercion of girls are fuelled by men's targeting for sex younger and younger girls who are assumed to be HIV negative or seeking them out based on the myth that sex with virgins will cure AIDS.²⁰ People therefore need to be educated that by entertaining such thoughts and carrying them out, they are endangering the lives of young children. Sensitisation is even more imperative in rural areas as this is where such myths are strongly entertained. According to Erick Sakala a legal officer at Young Women Christian Association,

“It cannot be taken for granted that an uneducated man will be able to analyse issues the same way an educated man would. Such people are more susceptible to have strong beliefs in myths and see nothing wrong with sexually violating a child.”²¹

People need to be educated that sex with a minor will not cure them of HIV/AIDS but rather by doing such an act they are endangering the life of a young innocent child by exposing him/her to the virus.

2.1.3 Modernisation - The breakdown in social values has contributed to the rise in sexual violence and coercion faced by Zambian girls. Today the usual trend among women is to

¹⁸J. Csette and J Kipperg, *Suffering in Silence: The link between Human Rights Abuses and HIV Transmission to girls in Zambia* (Washington DC: ,2006), 20.

¹⁹T. Thole, *Sexual Violence in Zambia: A specific study on rape*, Obligatory Essay Submitted in Partial Fulfillment of the Award of the Bachelor of Laws Degree 2008, 21.

²⁰J. Csette and J Kipperg, *Suffering in Silence*, 2.

²¹ Interview with Eric Sakala, the Legal Officer at Young Women Christian Association on 2nd January 2010 at Lusaka.

show as much skin as possible. Some offenders use this as a defence by claiming that the lost self-control upon seeing a skimpily clad female. The trend that can be seen is that the western kind of living is being adopted and clashing with the African culture.

2.1.4 Ignorance of the Law - Most times, cases of rape and other related sexual offences go unreported because most families think that they can be resolved outside the court system. There is a misconception that such cases are either domestic or civil in nature and do not require the intervention of the police. This is even worse when prominent people such as those in positions of influence or those considered rich in society are involved.²² The shame associated with rape and incest is also one of the reasons why families desist from revealing what is happening. Sensitisation therefore needs to be done especially in rural areas by educating people that sexual offences are a crime and must be reported in order for the state to deal with the perpetrators.

2.1.5 Economic Deprivation - Due to the high poverty levels young girls are being targeted and victimised. It is a common scene in Zambia to see young girls that are supposed to be in school on the streets selling merchandise. Young girls have even resorted to selling their bodies in exchange for food.²³ These young girls often fall prey of unscrupulous men that violate their bodies and more often than not get away with it. The high poverty levels have also led to inadequate housing which has resulted in adult males sharing a room with young children due to lack of space. This makes young children more susceptible to sexual abuse.

2.1.6 Dual Legal System - It is sad to note that in Zambia it is not illegal for a man to have carnal knowledge of a child as long as she is his wife. This is because of our dual legal system which recognises customary marriage even if it is with a child. For instance in the

²² Gender in Development Division Cabinet Office, *"Gender Newsletter,"* Volume no. 01, Issue no. 04 (October-December 2010): 25

²³ J. Csette and J Kipperg, *Suffering in Silence*, 19.

case of *Rex v Chinjamba*²⁴ it was held that 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 16 years of age. 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.²⁵ A child is a child and such a legal system is in essence turning a blind eye to the plight of girl children that are forced into early marriages as the consent of these girls is not even taken into account.

2.1.7 Lack of Communication - Within Zambia, many traditions and practices impede efforts to tackle HIV related issues. Deep-rooted cultural taboos inhibit parents from discussing sex with their children, and create obstacles to effective sex education. Most of the time when something as tragic as a child being defiled or rape occur such cases are not reported. The fear of reporting abuse and the imperative to keep quiet about what happens to women and girls is widespread. The culture of silence is the biggest problem in the country.²⁶ Most families prefer to keep such offences within the family to keep the family name from being put to shame or disrepute. This in turn provides fertile ground for the continued occurrence of such offences as perpetrators know they can get away with it.

A social worker at a youth-friendly clinic in Lusaka described to Human Rights Watch a case involving Joan S, who was abused since the age of nine by her stepfather. By the time she was eleven, she realised that he was abusing her. Because she was afraid to tell her mother, she told her aunt, who in turn told her mother. The mother's reaction was to chase the girl out of the house. The girl was suffering from STDs. But the case was never reported to the police, it was kept within the family.²⁷ The shame associated with rape and incest

²⁴ (1949) 5 N.R.L.R. 384

²⁵ J. Daka, *Sexual Offences and How to Deal with Them* (Ndola: Mission Press, 2005), 143.

²⁶ J. Csette and J Kipperg, *Suffering in Silence*, 31.

²⁷ Human Rights interview with Jayne Kunda Mwila, Kalingalinga Health Centre, Lusaka, May 30, 2002.

discourages the families from revealing what is happening. More often than not the girl herself is blamed for instigating the abuse.

2.1.8 Peer Pressure – Many young girls fall prey to sexual offences because of the peer pressure to fit in. For instance a girl that comes from a humble family that can't provide her with money to buy the latest trends in fashion will date an older man and have sex in exchange for money. Peer pressure also exists among males, they feel the pressure to engage in sex and sometimes end up forcing themselves on unconsenting females.

2.1.9 Alcohol Abuse - Alcohol abuse is on the increase in Zambia today although very little research is carried out to back this assertion. However, it stands to be concluded as such. This can be attributed to the state of hopelessness in which a lot of Zambian men find themselves in as a result of joblessness, inadequate recreational facilities and increased freedoms they have in the era of liberalism. Coupled with this is the liberalisation of the market which has resulted in many breweries being established, making alcohol more readily available.²⁸ Alcohol is a mind altering drug and its abuse results in those intoxicated committing offences such as rape. It is also very difficult for an intoxicated female to adequately defend herself.

2.2 Adverse Effects of Sexual Offences

Victims of sexual offences suffer both physical and psychological effects. The physical effects include pain and injuries such as bruises. Physical effects can be dealt with by medical physicians but the psychological effects or burden is something that very little can be done about and most victims live with this pain for the rest of their lives as they are emotionally

²⁸ K. Mweemba, *An Examination of the Factors that Sexual Abuse Cases from being effectively Prosecuted in Zambia*, Obligatory Essay Submitted in Partial Fulfillment of the Award of the Bachelor of Laws Degree 2011, 27.

scarred.²⁹ Psychological effects suffered include depression, panic attacks, self-mutilation, sexual dysfunction (not being able to perform sexual acts), hyperarousal (exaggerated feelings/response to stimuli), loss of self-esteem, loss of trust in people, suicidal ideation, psychological disorders, reduced ability to express emotion and many more. Another effect of sexual violence such as defilement as shown by studies is that people who are violated as children have a high chance of becoming prostitutes, substance abusers as well as sexual predators themselves.

The main types of psychological trauma experienced by survivors include stigma; family and spousal rejection; fear and mental depression.³⁰ Evidence suggests that the negative psychological impact of child sexual abuse persists over time, often into adulthood. According to a study among the female adult outpatient population, individuals with sexual abuse histories as children were twice as likely to attempt suicide than their non-abused counterparts.³¹ A survivor of sexual assault may develop Rape-related Posttraumatic Stress Disorder (RR-PTSD). PTSD is a mental health disorder primarily characterized by chronic anxiety, depression and flashbacks which develop after experiencing significant trauma.³²

HIV/AIDS is one of the major adverse effects sexual offences have on victims as well as the country as a whole. Dry sex and forced sex makes women more susceptible to catching HIV. Young girls are at an even higher risk of catching this disease than are older women because the vagina and cervix are less mature and less resistant to HIV and other STDs such as chlamydia and gonorrhoea. Young women produce less of the vaginal secretions that provide

²⁹ Interview with Doctor S. Nyirenda, Medical physician at the University Teaching Hospital on 12th January 62010 at Lusaka

³⁰ Gender in Development Division Cabinet Office, *National Plan of Action on Gender-Based Violence (NPA-GBV) 2010-2014*, 14.

³¹ R. Z. Dominguez et al, *Sexual Abuse of Children*. Available at: <http://www.aets.org/article124.htm> (accessed January 5, 2012), 1.

³² National Center for Victims of Crime, *Sexual Assault*. Available at: <http://www.ncvc.org> (accessed January 5, 2012), 1.

a barrier to HIV in older women.³³ The direct consequence is that due to sexual offences more and more people are getting infected with HIV leading to an increase in the number of orphans. These children suffer the trauma of neglect, the trauma of watching their parents get sick and the trauma of knowing they will die.³⁴ Another resultant effect is that the number of street children is likely to increase even more because of the growing numbers of children being orphaned due to parents dying of AIDS.

2.3 Legal Framework and International Instruments on Sexual Offences

Zambia has enacted different laws to deal with the problem of sexual offences. Article 11 of the Constitution provides for the protection of fundamental rights and freedoms. The Zambian criminal law is enshrined in the penal code. The objectives of the penal code are to sound a fair warning to citizens who might commit offences; to act as a guide in matters of criminal trespass; to distinguish between misdemeanours and felonies and offer respective sentences and to deter misconducts that threaten or inflict harm on human life.³⁵ Sexual offences are provided for under chapter XV which deals with offences against morality. The Juvenile's Act of 1956 provides for care and protection of children. Sexual violence is further provided for in the Anti-Gender-Based Violence Act. The reality of enforcement however is entirely different. This will be fully addressed in the next chapter.

One of the international instruments that deal with sexual offences is the United Nations Convention on the Rights of the Child. Zambia ratified this convention on 6th December 1991 and has undertaken to protect children against all forms of sexual exploitation and sexual abuse. The Convention provides that all States Parties shall respect and ensure the rights set

³³ J. Csette and J Kipperg, *Suffering in Silence*, 13.

³⁴ J. Csette and J Kipperg, *Suffering in Silence*, 18.

³⁵ J. Daka, *Sexual Offences and How to Deal with Them*, 14.

forth in the convention.³⁶ Article 34 provides that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.” It further provides that States Parties shall take appropriate measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials.

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also provides for sexual offences. Zambia ratified this convention on 21st June 1985; it is therefore committed to eliminating all forms of discrimination against women. As will be later discussed in depth, the belief that women are inferior to men has created a fertile ground for sexual offences. Like many African customs, Zambian customs and traditions do not perceive women as equals to men and this is inculcated in young children from a tender age. CEDAW States Parties undertake to condemn discrimination against women in all its forms and to embody the principle that men and women are equal.³⁷

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, better known as the Maputo Protocol, guarantees comprehensive rights to women. Zambia is a state part to this protocol. Article 4(2) of the protocol provides that States Parties shall take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.

The African Charter on the Rights and Welfare of the Child provides in article 16 for protection against child abuse and torture. It states that States Parties to the Charter shall take

³⁶ Article 2, Convention on the Rights of the Child (1989)

³⁷ Article 2, Convention on the Elimination of All Forms of Discrimination against Women

specific legislative, administrative, social and educational measures to protect the child from all sexual abuse. This is further emphasised in article 27 which provides against sexual exploitation. By ratifying this Charter Zambia has undertaken to ensure that its provisions are reflected in our laws.

The adoption of the above international instrument is a positive step in the right direction. It provides a legal framework for the recognition of women and children's rights and creates obligations for states and governments to take measures to ensure that every woman and girl in Africa enjoys these basic rights. The above international instruments though not binding on Zambia unless domesticated create obligations that Zambia as a State has agreed to follow. They can also be used for persuasive value. These instruments can also be referred to by the Zambian legislative body when enacting laws.

2.4 Conclusion

In conclusion this chapter has brought to the fore the causes of sexual offences. It is a fact that there is a high prevalence of such offences in Zambia and they have grave consequences ranging from physical to psychological trauma on the victim. The chapter has also highlighted the laws that deal with such offences and the international instruments to which Zambia is a party and has undertaken to create an environment where women and children who are the most vulnerable are protected.

CHAPTER THREE

CHALLENGES IN PROSECUTING SEXUAL OFFENCES AND INSTITUTIONS INVOLVED IN THE ADMINISTRATION OF JUSTICE

3.0 Introduction

United Nations Secretary General Ban Ki Moon addressing a UN Commission on the Status of Women (CSW) stated that any form of violence against women should never be tolerated. He further stated that concrete steps need to be taken to end impunity and that we must listen to and support victims.³⁸ The need for various stake holders working together to achieve this can therefore not be over emphasised. This chapter will therefore address the challenges in prosecuting sexual offences in Zambia.

3.1 Challenges in Prosecuting Sexual Offences

3.1.1 Legal Technicalities

3.1.1.1 Corroboration- Certain procedural requirements tend to impede the prosecution of sexual offences, one such requirement is that of corroboration. Corroborative evidence is any information that supports the statement of the complainant. This statement or information should be independent from the complainant's statement but it should not be different.³⁹ The two elements that have to be present in order for evidence to be considered as corroborative evidence are that it should show that the crime was committed and that it was committed by the accused. Corroborative evidence can take the form of an eye witness, semen found inside a victims vagina or body, and many others. The complainant's evidence alone cannot be taken to be conclusive unless it is backed by corroborative evidence.

³⁸ Gender in Development Division Cabinet Office, "*Gender Newsletter*," Volume no. 01, Issue no.02 (March-July 2010): 8.

³⁹ J. Daka, *Sexual Offences and How to Deal with Them* (Ndola: Mission Press, 2005), 78.

The requirement of corroborative evidence is to prevent false implication of innocent people. There are a number of reasons for this some of which are that complainants are sometimes motivated by spite, sexual frustration or unpredictable emotional responses.⁴⁰ Some women will also lie out of revenge to someone who has offended them in the past. It is therefore very difficult to secure a conviction without corroborative evidence.

Though the requirement of corroborative evidence is founded, it also serves as an impediment in the prosecution of sexual offences. For instance in the case of *Kalebu Banda v The People*⁴¹ the learned judge Baron in a robbery case gave an example of evidence in a rape case and stated that “In a rape case failure to obtain medical evidence when there was a duty to do so means that, the court must proceed as if the doctor had testified that he had examined the victim and found no evidence that force was used, nor any evidence of intercourse.” A victim who has therefore taken a bath to wash away what she considers as “dirt” will not be able to attain the justice she deserves as the courts will consider her case as one that lacks corroborating evidence. In trying to curb convictions based on fabricated stories the law is also in the long run giving offenders an easy way out, the law should protect the victim. In the case of *Zimba v The People*⁴² an appeal against a conviction of rape was allowed on the ground that there was a complete lack of corroboration in the case.

3.1.1.2 Voire Dire- Where a witness is a child the court is required to conduct a *voire dire*, this legal technicality has proven to be an impediment especially in the prosecution of defilement cases and has led to many offenders being acquitted. A *voire dire* is conducted in order for the court to satisfy itself that the child is competent to give evidence, unless the

⁴⁰ J. Hatchard and M Ndulo, *The Law of Evidence in Zambia: Cases and Material* (Lusaka: Multimedia Publications, 1991), 149.

⁴¹ (1977) Z.R. 169 (S.C.)

⁴² (1980) Z.R. 259 (S.C.)

court is satisfied the child's evidence will not be received at all. This is provided for in section 12 of the Juveniles Act.

Another impediment is that it is in the judge's discretion to decide whether or not the child is a competent witness. In the case of *Zulu v The People*⁴³ Baron DCJ held that a witness cannot be sworn unless the court is satisfied he understands the nature of the oath. Nor can the prosecutrix's unsworn evidence be received unless the court is satisfied not only that she understood the need to tell the truth but also that she was possessed of sufficient intelligence to justify the reception of her evidence. A retrial was ordered as there was nothing in the record to suggest that the magistrate directed his mind to the child's intelligence.

The requirement of conducting a *voire dire* works to the disadvantage of a child especially when the child is the victim. In cases involving an older girl, the case usually hinges on whether or not the judge believes she asked for it, that is, whether or not she triggered or provoked the situation. The problem of applying this strict rule of evidence is that by doing so the law is not taking into account that children who have been sexually violated are traumatised and this may result in them giving distorted facts or being unable to give the full details of what happened to them. A judge can therefore interpret this to mean that the child is not a competent witness when in actual fact it's as a result of being emotionally distressed.

3.1.2 Low awareness levels

According to a study conducted the findings showed that awareness levels about the availability of formal justice mechanisms are quite low among the poor and women. Knowledge is power, therefore if there are low awareness levels of the mechanisms of justice available and rights among the members of the general public, then the right to justice is as good as denied. Paradoxically, the laws of the land are of general application and yet the

⁴³ (1973) Z.R. 326 (S.C.)

public is largely ignorant about existence of the laws and their content. This situation is exacerbated by the often quoted maxim, that ignorance of the law is no defence.⁴⁴ Low awareness levels of the available services can be attributed to factors such as geographical location in remote rural areas, inadequate access to the media, prohibitive clauses within the provision of the law barring legal and paralegal institutions from advertising their services, low literacy levels especially among women, use of technical jargon in the published documentation and lack of translation into local languages.⁴⁵ Unless something is done urgently perpetrators of sexual offences will keep committing these crimes and getting away with it. Every Zambian is as of right entitled to access to justice.

According to a study conducted by Zambia Civic Education Association (ZCEA) on person's who have been found guilty of the crime of defilement and are currently serving prison terms for the offence, one of the observations made by the incarcerated persons as being one of the root causes of child sexual abuse is ignorance of laws and regulations relating to the child. This was portrayed by responses such as "I did not know that it is a crime to have sex with a girl under the age of 16 and I did not see anything wrong with having sex with a young pubescent girl as tradition allows it. Other answers included the girl agreed to have sex"⁴⁶ It is evident from this study that certain acts that are criminalised by the law are considered as normal in traditional set ups such as in the village. These people need to be educated and informed and one of the means that can be used is to have the laws translated into local languages.

⁴⁴P. Matibini, *Access to Justice and the Rule of Law*, An Issue Paper Presented for the Commission on Legal Empowerment of the Poor, 20.

⁴⁵ P. Matibini, *Access to Justice and the Rule of Law*, An Issue Paper Presented for the Commission on Legal Empowerment of the Poor, 21.

⁴⁶ R. M Gwaba, *Root Causes of Sexual Abuse of Children in Zambia* (Lusaka: Zambia Civic Education Association, 2009), 15.

3.1.3 Geographical Factors

One of the major challenges in prosecuting sexual offences is the inaccessibility of courts by most Zambians due to geographical constraints. Those who need the services of the judicial system have to walk for miles as courts are only in district headquarters especially subordinate courts that deal with the bulk of sexual offences. Faced with this challenge as well as the fact that some cases are adjourned to a later date, most people opt to use other channels such as traditional courts to resolve their disputes. This has had an adverse effect on the fight against sexual offences as most perpetrators simply pay a penalty in the form of cattle for instance for damaging another's daughter.

Most poor people in Zambia opt to use informal mechanisms as this saves them the trouble of moving long distances. The research undertaken by WLSA found that most of the magistrate courts with sufficient jurisdiction over most sexual offences are centralized in district headquarters and most magistrates refuse to be deployed to rural areas. The road network in the rural areas is poor or sometimes non-existent. Consequently, most people in the rural areas have no, or very limited access to public transport.⁴⁷ It is therefore evident that people who don't live in district headquarters find it very hard to access the justice system and it can be safely said that the reported cases are merely a tip of the ice berg and many victims go on suffering in silence.

3.1.4 Incompetence of service providers and prosecutors

Most public officers are not adequately trained to deal with the emotional needs of victims of sexual offences and usually lack sensitivity in their conduct. Law enforcement personnel are, in general, ill-equipped to handle complaints from women and girls that allegedly have been

⁴⁷ K. Mweemba, *An examination of the factors that prevent Sexual Abuse cases from being effectively prosecuted in Zambia*, Obligatory Essay Submitted in Partial Fulfillment of the Award of the Bachelor of Laws Degree 2011, 45.

victims of rape and other forms of sexual violence. The relatively low level of training and education of the police force complicates both the quality of investigations and the preparation of dockets, and these problems are particularly acute in cases of sexual abuse.⁴⁸

The discriminatory attitudes of many police personnel and members of the judiciary have led to a lack of confidence in the law enforcement response to acts of violence against women and this to the subsequent under reporting of rape and other forms of violence against women in Zambia.⁴⁹ Many officials carry with them their prejudices and cultural beliefs to work and instead of being of help to the victim often come across as being judgemental. This sends a message that women play a role in the vile acts that occur to them and are also to blame.

3.1.5 Customs and the Dual Legal System

The Zambian dual legal system which consists of statutory law and customary law has also played a role as an impediment in the prosecution of sexual offences. The application of customary law, particularly in cases of defilement has led to these crimes commonly being settled through the payment of money to the victim’s family rather than being pursued through the criminal justice system, thereby reinforcing the idea that the rape of women and girls is an offence against family status rather than constituting a serious criminal offence against the victim.⁵⁰

3.1.6 Jurisdiction of lower courts

The Local and Magistrates courts are subject to restrictions on their jurisdiction to mete out sentences. Local courts cannot impose prison sentences exceeding two years. These courts

⁴⁸ J. Csette and J Kipperg, *Suffering in Silence: The link between Human Rights Abuses and HIV Transmission to girls in Zambia* (Washington DC: ,2006), 63.

⁴⁹ E Sottas, *Violence against Women in Zambia*, Report prepared for the Committee on the Elimination of Discrimination against Women (Geneva: OMCT, 2002), 22.

⁵⁰ E Sottas, *Violence against Women in Zambia*, 23.

should therefore be stopped from trying offences for which they do not have jurisdiction to impose deterrent sentences and from applying customary civil law to criminal offences including defilement, incest, rape, and assault which should be heard in the magistrate courts.⁵¹ Magistrate courts are also restricted in their authority to impose sentences and instances arise where they have to send the matter to the High court for sentencing. All this causes delay in the victim getting justice, therefore it's either the jurisdiction of these lower courts is increased or they should not try such cases to start with.

3.1.7 Health Services

Public and private health institutions are an important agent in the administration of justice especially that they provide treatment to the victims of gender violence and child abuse. Victims of sexual violence are provided with medical care which includes medicines such as Post Exposure Prophylaxis to prevent HIV infection; antibiotics to treat STI infections, contraceptives; and Tetanus and Hepatitis B vaccines. However in Zambia the medical field is faced with many constraints that result in poor services or no services being offered to victims. Evidence suggests that public health institutions have no specific policy to provide specific guidance to health personnel on how to handle the victims of Gender Based Violence (GBV) especially of a sexual nature. Health institutions do not usually have a well-established and co-ordinated system which links the victim of GBV and other service providers such as the police, the courts and Department of Social Welfare.⁵² As a result victims find it difficult to access services as they are required to move from one point to another and in most cases opt to ignore some procedures which contribute to the failure of the prosecutors to effectively carry out their duties.

⁵¹ J. Csette and J Kipperg, *Suffering in Silence*, 61.

⁵² Gender in Development Division Cabinet Office, *National Plan of Action on Gender-Based Violence (NPA-GBV) 2010-2014*, 16.

Other constraints faced by Health Institutions include poor infrastructure, limited qualified health personnel, Limited availability of medicines, and long distances that have to be covered to get to a health centre especially in rural areas. There is also lack of forensic equipment in Zambia to establish evidence in cases of rape and defilement.

3.1.8 Economic Cost of Justice.

As already established above women comprise the majority of people living in abject poverty in Zambia. Many poor people do not use the legal system because they believe often correctly-that the legal system will not provide them with an effective remedy for their problem. Those who might otherwise avail themselves of the legal system to resolve disputes do not do so because they lack the time, resources and expertise necessary to navigate the legal system on their own and are not able to source the assistance of a legal service provider who could help them.⁵³ This is especially so for people who have to travel for miles and have to make arrangements for lodging and food during the trial of the case. As will be discussed below institutions such as Legal Aid due to their overwhelming caseloads usually only take on those accused of committing serious offences and this in turn limits the odds of women and children getting much needed legal representation.

3.2 Institutions involved in the Administration of Justice

3.2.1 Judicature

The judiciary is a creation of the constitution of Zambia. It consists of the Supreme Court, High Court, Industrial Relations Court, Subordinate Courts, Small Claims Court, and the Local Courts. Any person has the liberty to initiate legal process or defend him or herself in

⁵³ E Sottas, *Violence against Women in Zambia*, 23.

the courts of law. Local courts comprise the base of the hierarchy of the judicature. They are presided by lay persons and the procedure is informal and simple. A litigant can therefore represent himself and are easily accessible by the poor. The Subordinate Courts are presided over by magistrates that are trained and the procedure is formal.

The High Court has both original and unlimited jurisdiction. The High Court is presided over by professional judges and the procedures are formal and complex. One therefore would require the services of a trained litigant. The Supreme Court is the highest court of appeal in Zambia and only serves as a court of first instance in relation to Presidential election petitions.

3.2.2 The Legal Aid Board

The objective of the Legal Aid Board is to provide legal aid in civil and criminal matters and causes to persons whose means are inadequate to enable them to engage practitioners to represent them. The Legal Aid Board has offices in Lusaka, Kitwe, Ndola, Kabwe and Livingstone. The lawyers for the Board are faced with crashing caseloads. Apart from facing a critical shortage of staff, the Board has inadequate transport and operations tend to suffer.⁵⁴ In view of the preceding constraints, the Board tends to limit the grant of legal aid to accused persons facing serious criminal cases mostly in the High Court. The woes of the Board are also worsened by the fact that the Board is unable to attract and retain lawyers due to the poor conditions of service. The failure to decentralize the Board and its myriad of administrative and logistical problems has resulted in denying many indigent persons especially in rural areas legal aid.⁵⁵

⁵⁴ P. Matibini, *Access to Justice and the Rule of Law*, 15.

⁵⁵ P. Matibini, *Access to Justice and the Rule of Law*, 15.

3.2.3 Victims Support Unit

Government has established Victim Support Units in all police stations and these have the responsibility of providing specialised services to the victims of Gender Based Violence (GBV). Evidence reveals that the Victim Support Units have had some positive impact on GBV and that the Units are accessible in most parts of the country. On the other hand, it has been realised that the VSUs do not have the required capacities; logistical support; infrastructure; equipment and training in gender analytical and counselling skills. In addition, the enforcement mechanisms are not in a position to fully protect the victims of GBV from intimidation and other threats that might hinder the justice processes.⁵⁶ Access to justice is therefore in this respect not adequately provided to victims of sexual offences.

3.2.4 Pro bono Services

Non-Governmental Organisations (NGOs), have been formed to provide pro-bono or free legal services, this is in order to deal with prohibitive costs of legal services and generally improve access to justice for the poor. NGOs have mobilised around many aspects of gender violence, and have adopted a broad range of strategies to challenge the acceptability of violence against women and provide services to women experiencing abuse.⁵⁷ NGOs are therefore a major player in the fight against this vice in our society.

3.2.4.1 National Legal Aid Clinic for Women

National Legal Aid Clinic for Women (NLACW) was established in 1990, as a project under the Women's Rights Committee (WRC) of the Law Association of Zambia (LAZ). NLACW has offices in Lusaka, Livingstone and Ndola. It was established to provide affordable legal

⁵⁶ Gender in Development Division Cabinet Office, *National Plan of Action on Gender-Based Violence (NPA-GBV) 2010-2014*, 17.

⁵⁷ C. Watts and WILDAF, *The Private is Public: A Study of Violence against Women in Southern Africa* (Zimbabwe: Benaby Printers. 2005), 50.

aid to women and children from marginalised social sectors as they would not usually afford the normal legal costs to hire a legal practitioner to represent them.⁵⁸ In this sense NLACW has empowered women and children to access justice. The overall objective of the clinic is to empower women by facilitating their access to legal rights by way of legal representation, counselling, legal and human rights education. Some of the challenges faced by this organisation include a small team of lawyers hence it is not able to meet the high demand; it is donor dependant, inadequate social workers as well as a need to expand its services to rural areas.

3.2.4.2 Women in Law and Development in Africa

Women in Law and Development in Africa (WILDAF) provides victims of sexual violence with free legal advice, give advice in special cases such as defilement on the procedure to be followed, it also networks with other NGOs. WILDAF does not offer legal representation but refers victims to organisations that do such as the Legal Aid Clinic. It therefore provides victims of sexual offences with guidance as to what steps they should undertake and institutions that can help them in ensuring that justice is done. Pro- bono services are available to any person meeting the set criteria for example, someone who is not in gainful employment. However there are limitations in terms of lack of decentralization of the services by those institutions providing them. Most institutions are only located in a few selected urban areas, limiting access by the rural poor. The other challenge is that some poor people may lack information about the available services and requirements for them to obtain assistance from these institutions.

⁵⁸ P. Matibini, *Access to Justice and the Rule of Law*, 18.

3.2.4.3 Young Women Christian Association (YWCA)

YWCA is one of the organisations that offers services to the survivors of gender based violence and offers protection against early marriages. YWCA offers shelters or safe houses for survivors and provides psycho-social counselling services and facilitates linkages with other service providers which include the police, judiciary, social welfare and health personnel among others.⁵⁹ YWCA has scored successes in rescuing girls from early marriages and works with women advocates for the elimination of gender based violence at community level. In 2010 YWCA embarked on awareness raising activities as it considers it to be critical in increasing knowledge levels in society on issues affecting them such as gender violence and HIV/AIDS.⁶⁰

YWCA has played a major role in the fight against sexual offences and is one of the few organisations in Zambia with branches in most rural provinces. The weight of sexual offences is one that cannot be shouldered by the government alone therefore organisations such as YWCA play a very critical role. Like most NGOs YWCA also experiences constraints in the area of resource mobilisation.

3.2.4.4 Legal Resources Foundation (LRF)

LRF is an indigenous NGO established in 1991, to promote and protect human rights principally through the provision of legal aid services to the poor. The primary goal of LRF is to supplement the chronically understaffed Legal Aid Board in the provision of legal services to the poor. Although LRF runs a legal aid programme, it is also engulfed with a myriad of problems. Firstly, most lawyers do not join LRF due to poor conditions of service offered to its staff. Secondly, LRF operates from rented premises; this has the potential risk of

⁵⁹ Gender in Development Division, "*Gender Newsletter*," Volume no 2, Issue no. 01 (January-March 20 11): 22.

⁶⁰ Young Women Christian Association (YWCA) 2010, Annual Report, 12.

constantly changing offices depending on existing relationships with the owner of the building. This constant change of rented premises could easily affect the access of the general public to LRF who may not be able to find the new premises. Lastly, LRF has inadequate transport to meet the challenges of providing legal aid.⁶¹

3.3 Conclusion

From the fore going it is evident that access to justice in Zambia is a mere fiction for most especially the poor in rural areas. The judicial system only has courts in district headquarters; this makes it hard for people who have to travel for miles to access these services. Most women as they form the majority of the poor in the nation are unable to afford the exorbitant fees charged by lawyers therefore in most cases do not pursue such cases in the legal system or opt for compensation instead. Pro bono services though available can only be accessed in urban areas. There is also an acute lack of awareness on sexual offences and the fact that it is a crime. If people are not able to access the justice system due to the above cited challenges, it basically translates into them being denied justice.

⁶¹P. Matibini, *Access to Justice and the Rule of Law*, 18.

CHAPTER FOUR

A COMPARATIVE STUDY OF THE LAW PROVIDING FOR SEXUAL OFFENCES IN ZAMBIA WITH OTHER JURISDICTIONS

4.0 Introduction

Zambia does not have a comprehensive law that specifically deals with sexual offences. In this chapter a comparative study will be carried out on the law providing for sexual offences in Zambia with other jurisdictions namely the Republic of South Africa and Canada. It will compare the laws in these countries and proceed to highlight the successes they have achieved that Zambia can emulate.

4.1 South Africa's Progress on Sexual Offences

4.1.1 Legislation: South African legal response to sexual offences against women and children has substantially expanded in the past decade. It has made commendable efforts to expand its legal response to sexual offences. This legal response is contained in a framework of legislation, policies and other measures. South Africa's response largely ties-in with international human rights and prosecution standards. South Africa unlike Zambia has an Act that specifically deals with sexual offences and it's known as the Criminal Law (Sexual Offences and Related Matters) Amendment Act. It provides in great detail different types of sexual offences and their penalties.

The preamble provides that sexual offences have a particularly disadvantages impact on vulnerable persons, the society as a whole and the economy. It further states that women and children being particularly vulnerable are more likely to become victims of sexual

offences.⁶² The objects of this Act are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic. The Act comprehensively reviews and amends all aspects of the laws and the implementation of the laws relating to sexual offences.

The Act also addresses the archaic law on sexual offences that existed prior to this law coming into effect. Amongst other critical things, it repeals the common law offence of rape and replaces it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. This simply means that a woman, a man (or a child) can now be raped by another woman or man.⁶³ Unlike section 132 of the Zambian penal code, section 4 and 6 of the South African Act goes further to expressly criminalize compelled rape and sexual assault. This basically occurs when one unlawfully and intentionally compels a third person without their consent to commit an act of sexual penetration with a complainant without their consent. In the case of compelled sexual assault this occurs when the accused unlawfully and intentionally compels a third person without their consent to commit an act of sexual violation. Compelled self-sexual assault is also criminalized in section 7, and this occurs when one compels the victim to perform sexual acts on himself or herself.

⁶² Preamble of Republic of South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32, 2007

⁶³ Department of Justice and Constitutional Development of the Republic of South Africa, *The New Sexual Offences Act: Protecting our children from sexual predators*. Available at: <http://www.justice.gov.za/docs>. (accessed March 29, 2012), 1.

The Act goes further in section 56 to provide that if a person is charged with rape or sexual assault it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant. This is not the case in Zambia as there is no such offence as marital rape. A man can therefore have sex with his wife without her consent and this is very rife in Zambia due to cultural beliefs that result in Zambian girls being raised to be obedient and submissive to males and not to assert themselves.⁶⁴ The Act in part 3 of chapter 2 further criminalises compelling or causing children and persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”). The Zambian penal code⁶⁵ attempts to provide for this in section 177A by criminalizing engaging a child in pornographic activity but does not expressly provide for instances of “flashing”, the law is therefore vague on this matter.

Another notable feature of South Africa’s Sex Offences Act is that in Chapter 5 it deals with services for victims of sexual offences and compulsory HIV testing of alleged sex offenders. The services provided to victims are outlined in section 28. If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may receive the following services; which are receive Post Exposure Prophylaxis(PEP) for HIV infection at a public health establishment, be given free medical advice surrounding the administering of PEP prior to its administering thereof; and be supplied with a prescribed list containing the names, addresses and contact particulars of accessible public health establishments. The equivalent of this section in Zambia is section 5

⁶⁴J. Csette and J Kipperg, *Suffering in Silence*, 20.

⁶⁵ Section 177A, Penal Code (Amendment) Act No.15 of 2005

of the Anti-Gender-Based Violence Act⁶⁶, it does not however expressly provide for the administering of PEP to victims of sexual violence.

In Zambia there is no law that a victim or investigating officer can use to compel an alleged offender to be tested for HIV. Considering that this is an aggravating factor, it should therefore be expressly provided for under statute. Notable about the South African Act is that section 30 provides that an application can be made by the victim or an interested person for HIV testing of an alleged sex offender. This has to be done within 90 days after the alleged commission of the sexual offence. The results are to be disclosed to the victim or interested person or to a police official. The Act provides that an interested person can lodge such an application without the victim's consent in the event that the victim does not have capacity to do so for example if under the age of 14 years, a person who is mentally disabled; or unconscious. An application can also be made by an investigating officer for HIV testing of an alleged offender for purposes of investigating a sexual offence. The results of the HIV test are in accordance with section 34 to be used only in two circumstances and these are:

- i. To inform a victim or an interested person whether or not the alleged offender in the case in question is infected with HIV with the view to reduce secondary trauma and empowering the victim to make informed medical, lifestyle and other personal decisions; or using the test results as evidence in any ensuing civil proceedings as a result of the sexual offence in question; or
- ii. To enable an investigating officer to gather information with the view to using it as evidence in criminal proceedings.⁶⁷

Chapter 6 of the Act provides for a National Register for sex offenders. A person who has been convicted of the commission of a sexual offence against a child or is alleged to have committed a sexual offence against a child may not be employed to work with a child or have

⁶⁶ Section 5, The Anti-Gender-Based Violence Act No. 1 of 2011

⁶⁷ Section 34, Republic of South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32, 2007

a child placed under his supervision. Such a person cannot be granted a licence to operate an entity where children are present neither can they become the foster parent or adoptive parent of a child. An employer cannot employ a person appearing in the register to work in an entity that deals with children. If already in employment such employment has to be terminated. The Zambian legislature should therefore enact this into law as this will help ensure that sexual offenders do not have access to children.

4.1.2 Sexual Offences Courts: The increase in the number of sexual offences, for instance according to the national crime statistics released in September 2004, 57 733 rape cases were reported from 1 April 2003 to 31 March 2004 coupled with the complicating factor in combating sexual violence inherent in the difficulty of prosecuting such offences due to numerous evidential, procedural and other complexities led to South Africa undertaking serious reforms to effectively deal with this scourge.⁶⁸ Accordingly the legal response was expanded by means of new legislation, government policy and other measures to deal with sexual violence.

In 1993 the first sexual offences court was introduced in South Africa as an innovative measure to enhance the prosecution and adjudication of sexual offences following a public outcry at the inefficient handling of rape cases. Mr F Kahn the attorney-general initiated it in Western Cape. This court tried sexual offences exclusively and was also equipped with appropriate facilities to address the needs of complainants in these cases.⁶⁹ The extent of the problem prompted the establishment of these courts and these include the high number of sexual offences being reported.

⁶⁸ H. B. Kruger, *Comparing the South African legal response to International standards: Is there justice for women and children after sexual abuse?* (Bloemfontein: Department of Criminal and Medical Law, and University of the Free State, 2005), 2.

⁶⁹ H. B. Kruger, *Comparing the South African legal response to International standards*, 7.

A second reason was that the successful prosecution of sexual offences is a multi-faceted and challenging task. A wide range of sexual offences exist including rape, indecent assault, incest, prostitution and various other related statutory offences. These offences usually occur in private with no eye witnesses to corroborate the complainant's testimony. Therefore the police investigation and the collecting of evidence are a taxing undertaking. Prosecutors also find it demanding to consult with traumatised complainants, to prepare them for court and eventually to present the case in court. It was due to these challenges that the need for specialised courts arose to enhance the efficient prosecution and adjudication of sexual offences.

A third reason motivating the introduction of specialised courts concerned the victims of sexual offences. Due to the traumatic effect of sexual offences on victims, they often require support and specialised treatment to ensure a fair trial.⁷⁰ The research study conducted by Rape Crises Cape Town, African Gender Institute: University of Cape Town (UCT) and the South African Human Commission emphasised that rape victims frequently suffered secondary victimization in the normal criminal justice system.⁷¹ The need for a victim-centered approach in dealing with sexual offences cases, called for the establishment of specialised courts.

South Africa has more than 50 Sexual Offences Courts. The minimum standards set are two prosecutors with at least five years of experience per court, a dedicated and sensitised magistrate; intermediary facilities with closed-circuit television, separate waiting rooms for victims and appropriate legal aid.⁷² The objectives of these courts is to reduce insensitive

⁷⁰ K. D. Muller and I. A. Van Der Merwe, "The Sexual Offences Prosecutor: A new specialization?", 135-151," *Journal for Juridical Science* no. 29(1) (2004): 135.

⁷¹ H. B. Kruger, *Comparing the South African legal response to International standards*, 9.

⁷² H. B. Kruger, *Comparing the South African legal response to International standards*, 14.

treatment or secondary victimisation of victims in the criminal justice system by following a victim-centered approach, adopt a co-ordinated and integrated approach among the various role players who deal with sexual offences, and to improve the investigation and prosecution as well as the reporting and conviction rates in sexual offences cases. It is sad to note that Zambia to date does not have even one specialised court that deals specifically with sexual offences. This is so even though sexual offences such as defilement are a major feature in the media. The puzzling question is therefore “why is it that this has not been done?” We have courts that deal specifically with commercial matters and industrial relations, why not have one for sexual offences considering their detrimental effects to the country as a whole.

4.1.3 Ratification of international human rights instruments and implementation: The South African government has confirmed its policy of respecting and protecting human rights by signing, ratifying or acceding to a number of international human rights instruments that contain stipulations apposite to sexual violence. For instance South Africa acceded to the African Charter on Human and People’s Rights in 1996 and ratified the International Covenant on Civil and Political rights in 1998 which specifically includes rights relevant to victims of sexual offences. It recognises the right of freedom and security of one’s person, and prohibits cruel, inhuman and degrading treatment. It also enacted legislation to remove legislative stipulations discriminating against women in order to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995. It has also ratified many other instruments involving children.⁷³

Milestones regarding the incorporation of United Nations and Regional Human Rights treaties include the following; section 231 of the Constitution gives the procedure for acceding to and ratifying international agreements and then adopting them into domestic law. Section 232 of

⁷³ H. B. Kruger, *Comparing the South African legal response to International standards*, 16.

the Constitution states that “customary international law is our law unless it is inconsistent with the Constitution or an Act of Parliament.”⁷⁴ South Africa in the 1990s embarked on a process to implement human rights standards into national legislation. It made many stipulations in ratified international human rights instruments enforceable law after being incorporated in national legislation.⁷⁵ For instance the obligation created by CEDAW to embody the principle of the equality of men and women in national constitutions was specifically complied with in section 9 of the South African constitution. The constitution directs that requirements related to human rights must be adhered to in the interpretation of legislation.⁷⁶ The courts are required to consider international law when interpreting the Bill of Rights.

The National Prosecuting Authority Act stipulates that prosecutors should adhere to the United Nations Guidelines on the Role of Prosecutors which provides that prosecutors shall respect and protect human dignity and uphold human rights. The National Prosecuting Act has adopted this and provides specific guidelines for the prosecution of sexual offences. These guidelines require that sexual offences trials are handled by specialist prosecutors, preferably with experience and ability. The same prosecutor must handle the case from the beginning to its finalization and prosecutors are expected to guide and monitor the investigation to ensure that only fully investigated cases are brought to trial in order to prevent unnecessary delays.⁷⁷ Prosecutors apart from quality preparation for the trial are also obligated to consult with victims before the trial and introduce them to the court setting and the court procedures. This is to ensure that they have a full understanding of the court process.

⁷⁴ Office of the United Nations High Commissioner for Human Rights, *National Plans of Action for the Promotion and Protection of Human Rights-South Africa*. Available at: <http://www2.ohcr.org> (accessed March 28, 2012), 1.

⁷⁵ H. B. Kruger, *Comparing the South African legal response to International standards*, 17.

⁷⁶ Section 39(1)(b), Constitution of the Republic of South Africa

⁷⁷ H. B. Kruger, *Comparing the South African legal response to International standards*, 24.

The South African Policy Directives require prosecutors to prosecute efficiently and to apply specialist legal knowledge on aspects such as forensic evidence and intermediaries. Prosecutors must also assist the court arrive at a just sentence by placing all aggravating circumstances on record. This was highlighted in the case of *Holtzhauzen v Roodt*⁷⁸ where it was emphasised that prosecutors must present relevant expert testimonies on the multi-faceted impact of the crime on the victim, the treatment of for example paedophiles, the “rape trauma syndrome” and so forth. The NPA Policy Directive on sexual offences is therefore well aligned with the international guidelines as set down in the UN Guidelines.

4.2 Canada’s Progress on Sexual Offences

The country of Canada has equally made commendable progress in the fight against sexual offences, notably so in ensuring protection and justice for children who have been sexually violated. The true extent of child sexual abuse in Canada has only come to light in recent decades. The Badgley Report, a cross-Canada study on the abuse of children, revealed horrifying statistics about how prevalent these crimes are in Canada. The report found that one in two girls and one in three boys were the victims of unwanted sexual advances before the age of eighteen; three out of five of these victims were threatened or physically coerced.⁷⁹ These numbers are startling. The Badgley report stated, “Child sexual abuse is a largely hidden yet pervasive tragedy that has damaged the lives of tens of thousands of Canadian children and youths. For most of them, their needs remain unexpressed and unmet”.⁸⁰ The progress made by Canada will be shown by addressing what the law was before it was amended and highlight the changes made to it and the current form it is in.

⁷⁸ (1997) 4 SA 766 W

⁷⁹ Department of Justice Canada, *Child Abuse: A fact sheet from the Department of Justice Canada*. Available at: www.Justice.gc.ca. (accessed April 1, 2012), 1.

⁸⁰ Department of Justice Canada, *Child Abuse*, 1.

4.2.1 Old law on Sexual Offences

The original laws in Canada had a number of problems and deficiencies in addressing sexual offences. Prior to 1988, laws governing child sexual abuse did not reflect the reality of the situation. Some of the problems included Gender bias. Many offences were only applicable to female victims and male offenders. The reality however was that many young boys were sexually abused and they were not protected. Another problem was that there was a limited range of sexual activity covered. Many offences only covered vaginal intercourse and did not encompass the many different types of sexual molestation, such as touching or fondling.⁸¹ Invitation was also not an offence under previous legislation.

Under the old law there were requirements of previous chaste character. Girls who had some previous “consensual” sexual experiences were not considered “of chaste character” and were not protected. A victim’s sexual reputation could be used to discredit the victim. The law did not therefore take into account that a child needs to be protected from unscrupulous adults who prey on their innocence and take advantage of their trusting nature. The old Act also had time restrictions which basically meant that the offence had to be prosecuted within a year of the offence being committed.⁸² The reality however is that many victims take many years to gather up the courage to report their victimisation due to the fact that they have a lot of fears and in certain instances the person violating them is their guardian and worry about who will provide for them if they report what is happening to them.

⁸¹ Canadian Centre for missing children, *It shouldn't hurt to be a child*. Available at: www.victimsofviolence.on.ca. (accessed October 27, 2011), 1.

⁸² Canadian Centre for missing children, *It shouldn't hurt to be a child*, 1.

4.2.2 Current Child Sexual Abuse Laws

4.2.2.1 Canada Criminal Code (C.C.C): The need to adequately address the problem of the high prevalence of sexual offences led to changes made to the Criminal Code to combat the shortcomings of previous laws. Child sexual abuse was no longer restricted to intercourse; changes were made to include other sexual behaviour. This is provided for in section 151 of the C.C.C. which makes it an offence to directly or indirectly touch, for sexual purposes, any part of the body of a child less than fourteen years of age. The touching includes anything with either a body part or an object.⁸³ The maximum punishment for this offence is imprisonment for a term no longer than ten years or a summary conviction.

Section 152 of the C.C.C. further goes on to make it an offence to invite, counsel or incite a child less than fourteen years of age to directly or indirectly touch another person (including the person who invites, counsels or incites) for a sexual purpose. The touching includes anything with either a body part or an object. The maximum punishment for this offence being imprisonment for a term no longer than ten years or a summary conviction.⁸⁴ The C.C.C. also criminalises sexual exploitation. This is provided for in section 153, it makes it an offence for anyone who is in a position of trust or authority over a young person or in a relationship of dependency with a young person, to sexually touch them in any way (including with either a body part or an object), or to invite, counsel or incite them to touch another person, including the person who invites, counsels or incites, in any way (including with either a body part or an object).

⁸³ Section 151, Canada Criminal Code R.S.C . 1985

⁸⁴ Section 152, Canada Criminal Code R. S.C. 1985

The *Zambian* provisions on sexual offences do not go into great detail. This is why it is imperative for an Act that specifically deals with this problem to be enacted in order to ensure that all aspects are covered and adequately dealt with in the law.

4.2.2.2 Parole conditions: The law in Canada provides for various parole conditions. Offenders convicted of a sexual offence against a child can be prohibited from frequenting public parks or public swimming areas, day-care centres, school grounds, playgrounds, or community centres where children are likely to be found. The offender can also be prohibited from using a computer for the purpose of communicating with a person under the age of fourteen years. They may also be prohibited from seeking or obtaining employment in a position of trust or authority over children.⁸⁵ The ban imposed by the court can be a lifetime ban if the court finds that is what is necessary to ensure protection of children.

In *Zambia* the Anti-Gender-Based Violence Act in section 10 has a similar provision but the problem is that the protection order issued is meant for the protection of the victim and does not take into account that other potential victims have to be protected as well.

4.2.2.3 Testimony of children: There is much concern in the criminal justice system surrounding the testimony of young people. Many people have serious concerns about allowing children to testify, especially in sexual abuse and assault cases. One of the concerns is that children cannot tell the difference between truth and fantasy and that the abuse may be a fantasy. Another concern is that children will lie to get back at a parent or someone else, or that a parent can coach children to lie, such as in the case of a custody dispute.⁸⁶ Despite all the negative beliefs about child witnesses, research conducted in Canada, the United States,

⁸⁵ Canadian Centre for missing children, *It shouldn't hurt to be a child*, 1.

⁸⁶ Department of Justice Canada, *Child Abuse: A fact sheet from the Department of Justice Canada*, 1.

Australia, England, Ireland and Scotland has demonstrated that children are highly undervalued in the legal system.

Empirical studies done in the 1980's showed that the memory of a person is not directly correlated to age. Children from the age of three or four are capable of providing reliable information. It was also established that children are no more likely to fabricate evidence than adults. Psychological and medical studies also reveal that, although children engage in imaginative play, they are capable of discerning fact from fantasy in the context of witnessed events.⁸⁷ Under the Canada Evidence Act, persons who are under the age of fourteen are presumed to have the capacity to testify. In Zambia where a witness is a child the court is required to conduct a *voire dire*, this legal technicality has proven to be an impediment especially in the prosecution of defilement cases and has led to many offenders being acquitted as shown in chapter two of this research.

4.2.2.4 Corroboration: The law in Canada has been changed with respect to corroboration. Corroboration is basically the confirmation that a fact or statement is true through some sort of evidence. It used to be that a person could not be convicted of a sexual offence unless there was some kind of corroborating evidence, or proof, to back up the child's testimony; this is no longer the case. An accused can be convicted on the evidence of the child's testimony alone. This does not mean that the court has to convict on that evidence, only that it has the option to do so. The prosecution still must prove the case beyond a reasonable doubt, so it is important to gather as much evidence as possible.⁸⁸ The need to do this arose from the fact that most cases of sexual abuse are committed in a private setting where only the offender and the

⁸⁷ Canadian Centre for missing children, *It shouldn't hurt to be a child*, 1.

⁸⁸ Canadian Centre for missing children. *It shouldn't hurt to be a child*, 1.

victim are present. The fact that the child has information of a sexual nature that they should not otherwise have is a good indicator that they are telling the truth.

In Zambia strict adherence to the requirement of corroboration has led to many offenders being acquitted. This is especially so if the offence occurred many years ago and the victim has no way of proving an offence that in most cases happens in private and it sometimes takes years for one to have courage to talk about what happened to them. This strict adherence is evident in sections 140 and 141 of the penal code (Amendment) Act which both state that a person cannot be convicted upon the evidence of one witness only, unless such witness be corroborated in some material particular.⁸⁹ In the case of *Zimba v The People*⁹⁰ an appeal against a conviction of rape was allowed on the ground that there was a complete lack of corroboration in the case.

4.2.2.5 Past Sexual History: Past sexual history is not an issue for young children. Prior to 1992, a defendant who was accused of a sexual offence could use the victim's past sexual history in a trial in order to portray the victim as more likely to consent or less worthy of belief, basically to discredit the victim. Past sexual history could involve a multitude of things, such as the number of previous sexual partners. In 1992, however, legislation amended the Canadian Criminal Code to ensure that past sexual history may not be permitted in the legal system. This is commonly referred to as Canada's "rape shield law." The rape shield law limits a defendant's ability to cross-examine sexual assault victims about their past sexual behaviour; it also prohibits the publication of the identity of an alleged rape victim. It has been said that the rape shield law, "is a fair balance between the rights of suspects and of alleged sexual assault victims."

⁸⁹ Sections 140 and 141, Penal Code (Amendment) Act No.15 of 2005

⁹⁰ (1980) Z.R. 259 (S.C.)

In Zambia there is no statutory provision that addresses this issue. It is therefore uncertain whether an accused person can bring such evidence forth to discredit the reputation of the victim. This should be addressed in order to ensure that judges are not influenced by the victim's past experiences in making their decision.

4.2.2.6 Register: In 2004 the Canadian Government created a National Sex Offender Registry in order to provide rapid access to vital information to the police about convicted sex offenders. An offender may under court order be required to register before their release from prison and must register annually and any time they change address or legal name.⁹¹ Registration is for a period of ten years to life depending on the maximum length of the sentence for the crime. Provinces are required by Federal legislation to send information about sex offenders to the national database.

It is imperative that such a register is introduced in Zambia. This is especially so in order to ensure that such people do not have children placed under their custody or care. Such a register will therefore provide a reference point for employers as well as investigating officers and prosecutors as it is a systematic system of keeping such vital information.

4.2.2.7 Progress made as a result of the legislative changes

A study of the effects of the changes to the law governing child sexual abuse found that more cases were being reported and that more charges were being laid due to the fact that the law covered a wider range of forms of abuse. More cases involving younger victims were being prosecuted, and younger victims were being allowed to testify in court. More cases involving

⁹¹ Canadian Centre for missing children, *It shouldn't hurt to be a child*, 1.

male victims were being reported because the gender specific crimes were eliminated and higher conviction rates imply that the changes have been successful.

4.3 Conclusion

In conclusion the Republic of South Africa and Canada have made commendable progress in the fight against sexual offences through their legislation and introduction of new policies. Zambia can therefore learn from them and take the necessary steps by amending our existing laws and introducing new provisions and policies that adequately provide for the scourge of sexual offences.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 General Conclusion

The focus of this research paper has been to bring to the fore the challenges in prosecuting sexual offences and to conduct a comparative study with other jurisdictions namely the Republic of South Africa and Canada. The study has shown that there is a very high prevalence of sexual offences in Zambia hence the urgent need to address it. Various factors have been identified as the causes of the high prevalence of sexual offences, one of the factors being customs. Customs play a major role in perpetuating sexual offences as Zambian girls are raised to be obedient and submissive to males and not to assert themselves. Myths such as HIV/AIDS can be cured if one has sex with a virgin have also played a role in contributing to the high prevalence of sexual offences.

The research also identified ignorance of the law as one of the causes. There is a misconception amongst the people especially those in rural areas and those who are illiterate that such cases are either domestic or civil in nature and not criminal. This has led to most of these cases being settled through compensation. Another factor is the high poverty levels which have led to many girls being on the street hence rendering them easy prey. The dual legal system is also another factor which has led to archaic practices such as marrying a young girl to be accepted. These and many other causes were identified. The study went further to highlight the adverse effects of sexual offences.

The research further addressed the issue of the challenges faced in prosecuting sexual offences. The challenges include legal technicalities such as corroboration and the requirement of a *voire dire* in cases involving children. Low awareness levels about the availability of formal justice mechanisms especially among the poor and women is another

factor. Another challenge involves the inaccessibility of courts by most Zambians due to geographical constraints. The incompetence of service providers and prosecutors is another source of concern as well as the economic cost of justice. The jurisdiction of lower courts is another challenge that has to be addressed. Institutions involved in the administration of justice were also looked at. The research also highlighted the progress made by the Republic of South Africa and Canada and what Zambia can emulate from them.

5.2 Recommendations

Having discussed the high prevalence of sexual offences and the challenges faced in prosecuting such offences, there is therefore need for action to be taken to subdue this scourge in society. The following recommendations can be employed to deal with the scourge of sexual offences:

i. It is recommended that Parliament enact a statute that specifically deals with sexual offences. The Penal code as it is contains a lot of weaknesses and lacunas that do not adequately address sexual related cases. It is therefore necessary that a law is put in place that will provide in great detail different types of sexual offences and their penalties. It is sad for instance to note that the offence of marital rape to this day has not been incorporated into the penal code as an offence. There is urgent need for the law to adequately provide for sexual offences if the fight against sexual offences is to be won.

ii. In Zambia unlike South Africa there is no law that can be used to compel an alleged offender to be tested for HIV. There should therefore be a statutory provision providing for this as HIV is an aggravating factor and should therefore be considered when meting out a sentence. Sentences imposed on offenders should always take into account HIV/AIDS,

stigmatisation and humiliation suffered by the victim. Civil proceedings should therefore follow after criminal proceedings in order to ensure that the victim is compensated.

iii. It is recommended that a National Register for sex offenders is introduced in Zambia. Such a register can be used to ensure that offenders are not employed to work in places where children are placed under their care and supervision. It can also be used as a reference point in adoption cases as well as provide prosecutors with a systematic record that they can employ as a reference when investigating cases.

iv. It is recommended that sexual offences courts are established in the country. The high prevalence of sexual offences is an indication that more has to be done. There is therefore need for specialised courts if the difficulty in prosecuting such offences due to inefficient handling is to be overcome. These courts should be empowered with appropriate facilities to address the needs of complainants especially that the successful prosecution of sexual offences is a challenging task. Such courts should ensure the reduction of insensitive treatment or secondary victimisation of victims in the criminal justice system by following a victim- centered approach.

v. It is recommended that Zambia should not just end at ratifying international and regional instruments but rather should ensure that they are domesticated. It could do this by following in the footsteps of South Africa by ensuring that the supreme law of the land which is the constitution expressly provides for the application of international law. The legislature should therefore embark on a process of implementing international human rights standards into the national legislation. Prosecutors of sexual offences should also adhere to the United Nations Guidelines on the Role of Prosecutors which requires that prosecutors respect and protect human dignity and uphold human rights. The guidelines require that sexual offences trials are handled by specialist prosecutors with experience and ability.

vi. It is recommended that legislation is enacted to codify customary law so that it is harmonised with statutory law. Codification of customary law will bring about certainty and predictability with regard to customary law. This exercise should also ensure that archaic and repugnant practices such as marrying of young girls are criminalized. This should be followed by the removal of the word “unlawful” with regard to sexual offences in the Penal code. As the word unlawful means illegal, the law allows men who marry young girls under customary law to get away with having carnal knowledge of a child. The law also turns a blind eye to the plight of women who are forced by their husbands to have sex without their consent. Zambia must emulate South Africa in that it expressly provides in section 56 of its Sexual Offences Act that it is not a valid defence for the accused person to contend that a marital or other relationship exists or existed between him and the complainant.⁹²

vii. It is recommended that provisions in the Criminal Procedure Code (CPC) that restrict the jurisdiction of magistrates to mete out sentences be amended. According to the (CPC) Resident magistrates can only impose a maxim sentence of nine years. A case that requires a higher sentence has to be sent to the High court for sentencing. It is recommended that the powers of the magistrate court should be increased so that there is no limitation on the sentences that magistrates can mete out. This is because the limitation results in delays in the victim getting justice. Someone who has gone through something as traumatising as being sexually violated should be granted justice in the shortest possible period of time. In essence justice delayed is justice denied.

viii. It is recommended that the procedural requirement of corroboration as a prerequisite for successful conviction should be done away with. This is because it serves as an impediment

⁹² Section 56, Republic of South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32, 2007

in the prosecution of sexual offences. Corroboration is basically the confirmation that a fact or statement is true through some other evidence. Corroboration is an impediment in the successful prosecution of sexual offences because many of these offences occur in a private setting with only the victim and offender present. It also sometimes takes years for a victim to have courage to come forward and report that they were sexually violated. Such victims should not therefore be denied justice that they so rightly deserve based on lack of corroboration alone. In the case of a child knowledge of a sexual nature should be an adequate sign that they are telling the truth.

ix. It is recommended that the testimony of children should not be undervalued. Where a witness is a child the court is required to conduct a *voire dire* in order for the court to satisfy itself that the child is competent to give evidence. This has proven to be an impediment especially in the prosecution of defilement cases and has led to many offenders being acquitted. This is especially so because the case hinges on whether or not the judge believes a child is a competent witness and whether she asked for it (whether or not she provoked the situation). Zambia should follow in the footsteps of Canada that has under its Evidence Act provided that children under the age of fourteen are presumed to have capacity to testify. Strict adherence to this rule therefore works to the disadvantage of child victims as it is left to the judge's discretion to decide whether or not they are competent to testify.

x. It is recommended that a statutory provision should be enacted to prevent victims from withdrawing cases. This is usually done to protect the family name and when compensation is offered by the perpetrator. This should not be allowed, once reported a case should be tried by the courts of law.

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