

A CRITICAL ANALYSIS OF CORROBORATION IN DEFILEMENT CASES

By

JUDITH SINZALA CHIYAYIKA

SPR
LLB
CHI
2013
C-1

A dissertation submitted to the University of Zambia in partial fulfillment of the requirements for
the award of the Degree of Bachelors of Laws (L.L.B)

THE UNIVERSITY OF ZAMBIA

LUSAKA

2013

UNZA

2013

A CRITICAL ANALYSIS OF CORROBORATION IN DEFILEMENT CASES

By

JUDITH SINZALA CHIYAYIKA

SPR
LLB
CHI
2013
C-1

A dissertation submitted to the University of Zambia in partial fulfillment of the requirements for
the award of the Degree of Bachelors of Laws (L.L.B)

THE UNIVERSITY OF ZAMBIA

LUSAKA

2013

UNZA

2013

COPYRIGHT DECLARATION

I Judith SinzalaChiyayika, of computer number 26087642 DO HEREBY declare that the contents of this research are entirely on my own findings and that I have not in any way used any persons work without acknowledging that to be so. I bear the absolute responsibility for the contents, errors, defects and any omission herein.

All rights reserved: No Publication, Copy or Transmission of this dissertation may be written without written permission.

SIGNATURE.....*Sinzala*.....

DATE.....*12/8/13.*.....

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

L 410- DIRECTED RESEARCH

I recommend that this obligatory essay is under my supervision

BY

Judith SinzalaChiyayika

ENTITLED

A CRITICAL ANALYSIS OF CORROBORATION IN DEFILEMENT CASES

Be accepted for examination in partial fulfillment of the requirements of the award of the Bachelor of Laws (L.L.B). I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing DIRECTED RESEARCH ESSAYS.

SUPERVISOR.....

DATE.....12/8/2013

DR. PAMELA TOWELA SAMBO

ACKNOWLEDGEMENTS

I would like to acknowledge the following for their contributions to this work;

To my supervisor, Dr P. T. Sambo, thank you for all hard work to make this study a lived reality.

My three lovely children and hubby for being always there for me.

To my little friend Linda, we have come a long way.

DEDICATION

I dedicate this paper to my three children. Thanks for your company.

TABLE OF CONTENTS

COPYRIGHT DECLARATION	i
APPROVAL PAGE	ii
ABSTRACT	iii
ACKNOWLEDGEMENTS	iv
DEDICATION	v
CHAPTER ONE	1
1. Introduction	1
3. Statement of the Problem	5
4. Objectives of the Study	6
5. Significance of the Study	6
6. Conclusion	7
3. Application of Corroboration	10
3.1 Corroboration required by law	10
3.2 Corroboration required by practice	11
5. Rationale for Corroboration in Defilement Cases	13
5. Cases without Corroborative Evidence in Defilement Cases	16
5.1. Cases involving victims below the age of fourteen years	16
5.2. Cases involving victims aged fourteen years and sixteen years	17
6. Corroboration in other Jurisdictions	18

CHAPTER THREE.....	22
THE NATURE OF CORROBORATION REQUIRED IN DEFILEMENT CASES	22
1. Introduction.....	22
2. Elements to be proved in Defilement Cases	22
2.1 Identity of the accused.....	23
2.2 Sexual Intercourse	23
2.3 Proof of age of victim	24
3. Corroborative Evidence in Defilement Cases.....	25
3.2. Complainant’s Distressed Condition.....	26
3.5 Evidence of Opportunity.....	31
3.6 Admissions and Confessions	34
3.8. Flight of the Accused.....	36
3.9. Mutual Corroboration	36
4. Conclusion	38
CHAPTER FOUR.....	40
THE NECESSITY FOR CORROBORATION IN DEFILEMENT CASES IN ZAMBIA.....	40
1. Introduction.....	40
2. Justification for corroboration	40
3. Conclusion	45
CHAPTER FIVE	46

CONCLUSION AND RECOMMENDATIONS46

1. Introduction.....46

2. Conclusions46

3. Recommendations47

BIBLIOGRAPHY50

TABLE OF CASES

Butembo v The People (1976) ZR 29 193

Chisha v The People (1980) ZR 36 SC

Credland v Knowler (1951)³¹ 35 Criminal Appeal Report

Edwards v R (1993) 178 CLR

Gift Mulonda v The People (2004) ZR 135 SC

Ivess Mukonde v The People SCZ Judgment No 11 of 2011

Joseph Mwamba Kalenga v The People SCZ Judgment No 103 of 2011

Kilbourne (1973) 1 AC 729

Makungu v Republic (2003) 2 EA

Mwelwa v The People (1972) ZR 29 HC

Ngobi v R 20 E A C A 154

Nsofu v The People (1973) ZR 287 SC

Nsofu v The People (1973) ZR 287 SC

Phiri v The People (1982) ZR 77 SC

R v Birken (1839) 8 C & P 732

R v Henry (1969) 53 Criminal Appeal Report 150

R v James (1971) 55 Cr App R 229 (PC)

R v Manser (1934) 25 Criminal Appeal Report 18

R v Redpath (1929) 4 Criminal Appeal Report 319

R v Whitehead (1969) 53 Criminal Appeal Report 150

R v Yohanni Mporokoso (1939) NRLR 152

S v D 192 (SA) 513 Nm

S v K 4 BCLR 405 Nm

Smith v Lee (1997) J C 73

Tembo v The People (1980) ZR 218

Zimba v The People (1980) ZR 259 SC

TABLE OF STATUTES

The Juveniles’ Act, Chapter 53 of the Laws of Zambia.

The Penal Code, Chapter 87 of the Laws of Zambia.

CHAPTER ONE

INTRODUCTION TO THE RESEARCH

1. Introduction



The aim of this research is to critically analyse what constitutes corroboration in defilement cases. This research also ascertains whether there is any relevance for the continued applicability of corroboration in defilement cases owing to the fact that the nature of the sexual abuse is itself intimate and occurs in private which means that there are rarely witnesses to the event. In Zambia, defilement charges arise when a man has sexual intercourse with a girl who, at the time of intercourse was under the age of sixteen years. This is provided for in the Penal Code, Chapter 87 of the Laws of Zambia (hereinafter referred to as ‘The Penal Code’). The Penal Code¹ provides that any person who unlawfully and carnally knows any child commits a felony and is liable upon conviction to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life. It is worth noting that by virtue of Section 138(i) of the Penal Code, a ‘boy’ is now covered under the legal definition of defilement.

According to statistics available at the Police Victims Support Unit and Police Crime Statistics Office, the majority of the victims are girls under the age of ten years. For a conviction of defilement to stand, the evidence of the victims must be supported by independent evidence or what is referred to as corroboration. The evidence of the victims needs as a matter of law to be confirmed by independent evidence. This research analyses corroborative evidence in defilement cases as Kulusika notes that “the law on defilement and corroboration in Zambia is still rudimentary and most of the cases reaching the High Court or Supreme Court for sentencing and

¹Section 138 (i)

appeal would appear to be concerned with procedural or evidential matters.”² Evidential matters include defective *voire dres*³ that are conducted in relation to the child witness and in turn relate to the need for corroboration.

✻

This research is presented in five chapters. Chapter two aims at providing a general back ground of corroboration. This chapter examines the outcome of cases without corroborative evidence and provides the rationale for corroboration in defilement cases. The chapter also gives a brief account of corroboration in other jurisdictions. Chapter three aims at giving a critical examination of the nature of corroborative evidence in defilement cases. In analysing corroborative evidence in defilement cases, the following will be discussed: distressed condition of the victim, admissions, medical evidence, evidence of opportunity, mutual corroboration and lies of the accused. Chapter four aims at providing a critical analysis of the necessity for corroboration in defilement cases in Zambia. This research argues that corroboration is of great importance because of the nature of offence of defilement which is easy to allege but difficult to disprove. This chapter discusses Section 122 of the Juveniles Act which is the current law on which corroboration is based in Zambia and concludes that the current law is adequate and serves the needs of the Zambian society. The concluding chapter provides an overview and summary of corroborative evidence in defilement cases. This chapter also presents recommendations drawn from the research.

2. Research Background

Corroboration is a term which means evidence that confirms the accuracy of other evidence. In the case of **Director of Public Prosecutions v Kilbourne**⁴, Lord Simmons stated that

² Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (2006) at 517

³ A *voire dire* is a preliminary examination of a child to determine if the child possess sufficient intelligent and understands the duty to speak the truth in order to give evidence on oath.

corroboration is therefore nothing other than the evidence which confirms or supports or strengthens other evidence. It is in short evidence which renders other evidence more probable.

In the case of **Nsofu v The People**⁵ corroboration was defined as:

✿3

As independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it. It is the evidence of the witness of which a conviction is based; the corroborative evidence serves to satisfy court that it is safe to rely on that evidence.

From the foregoing statements, corroboration means confirmation or support. Corroborative evidence, therefore, means evidence from an independent source which confirms or supports proof of a matter on which evidence has been or will be given and which implicates the defendant in the commission of the offence. Corroboration must be independent from the evidence given by the complainant. If it is not independent then it cannot meet the requirement of corroboration. In addition the accused must be connected to the evidence so that it is shown that indeed the accused was involved in the commission of the crime.

Corroboration is one factor that is most known to impede on the effective application of criminal law as a means to the protection, dignity, integrity and liberty of children as victims of sexual abuse in defilement cases. Acts of defilement are not done in public. It is among the most clandestinely committed offences. Despite deterrent and harsh punishments being meted out, little progress has been made in curbing such defilement cases. This has been attributed to the difficulties in adjudication of defilement cases because of the intense focus on

⁴ (1973) AC 729 at 739

⁵ (1973) ZR 287 SC

corroboration.⁶The Zambian government also acknowledges that the need for corroboration presents obstacles to prosecuting perpetrators of child abuse.⁷

The requirement of The Juveniles Act, Chapter 53 of the Laws of Zambia (hereinafter referred to as 'The Juveniles Act') for a child testimony to be corroborated has made it difficult to secure convictions in defilement cases as very often such independent evidence tending to confirm the commission of the offence is missing. Section 122 provides that:

Where in an criminal proceedings against any person, a child below the age of fourteen years is called as witness, the court shall receive the evidence on oath, of the child if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence; on oath and understands the duty to speak the truth: provided that – (a) if in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and does not understand the duty to speak the truth, the court shall not receive the evidence; and (b) where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support therefore implicating the accused.

The above provisions indicate that where the witness is a child below the age of fourteen and gives evidence in court, an accused person cannot be convicted on this evidence unless it is corroborated. This research has been undertaken due to the attention on corroboration with some people arguing that the rule is relevant whilst others argue that it has lost meaning in the present time as the nature of the sexual abuse is itself intimate and occurs in private hence there are rarely witnesses to the event. This research, therefore, analyses whether corroboration is necessary in defilement cases.

⁶ The Judiciary News Magazine , 'Defilement v Convictions'(2011) P 22

⁷ The LRF News Issue 20, (2000)

3. Statement of the Problem

There have been a number of defilement cases over ruled on appeal and the accused persons walking to freedom because of the technicality of rules relating to corroborative evidence in defilement cases. In the case of **Mweemba and another v The People**⁸, the appellants were convicted of rape. The trial court commenced the judgment by a warning of the danger of convicting on the uncorroborated evidence of the complainant but did not in fact address the question of corroboration. The trial court did not state whether corroboration was found in the case, and if so, what evidence was regarded as such, or whether the trial court found there was no corroboration. In allowing the appeal, the Court of Appeal stated that the trial court failed to address the question of corroboration.

In **Chisha v The People**⁹, the case against the appellant rested solely on the evidence of a boy aged fourteen years. The trial court conducted a perfectly proper *voire dire*, at the end of which he was satisfied that the boy was able to give evidence on oath. The issue was whether the sworn evidence of a child should be treated like the sworn evidence of any other witness. In allowing the appeal, the Supreme Court stated that there was no corroboration of the boy's evidence. The trial court treated as corroboration evidence which could not be conceivably being such or indeed as 'something more'. This was a fatal misdirection. For this reason alone, the appeal against conviction was bound to succeed.

The two cases of Mweemba and Chisha show the challenges faced by the trial courts in relation to the technicality of the rules on corroboration. Corroboration has been a challenge to the investigators, prosecutors and adjudicators because they are not really certain of what corroborative evidence to look for. This has led to the decisions of the trial courts in defilement

⁸ (1973) ZLR 127 at 129

⁹ (1980) ZLR 36 at 40 SC

cases to be overturned where corroboration is a mandatory requirement. This has in turn caused public outcry because of the unusually high number of accused persons being acquitted of defilement.

❖

4. Objectives of the Study

The following are the objectives of the research:

1. To establish the nature of corroboration needed in defilement cases.
2. To critically analyse whether corroboration is necessary in defilement cases owing to the intimate and private nature of the sexual offence itself.

This research will be guided by the following research questions:

1. What is corroboration in general?
2. What evidence is required to secure a conviction in defilement cases?
3. Does the current law on corroboration serve the needs of the people and the changing circumstances of the Zambian society?
4. Is corroboration necessary owing to the fact that the nature of the sexual abuse is intimate and occurs in private?

5. Significance of the Study

The technicality of the principles of corroboration throws a lot of doubt on the ability of the investigators¹⁰, the prosecutions and the courts who adjudicate on defilement cases where corroboration is a mandatory requirement. This research is important as it examines the

¹⁰ Investigators such as the V.S.U where cases of a sexual nature such as defilement are reported and investigated before being forwarded to court.

application of the principles relating to corroboration in defilement cases and evaluates whether corroboration serves the needs of society generally. The information gathered will help the courts that adjudicate on defilement cases to overcome the tendency of frequently passing decisions which are subsequently over ruled by the High court and Supreme Court where corroboration is a requisite.

6. Conclusion

The chapter has given the aims of the study and the general introduction of the subject of corroboration. It has highlighted the statement of the problem, significance of the study and the methodology of the study. The next chapter will discuss corroboration in general.

CHAPTER TWO

BACKGROUND TO CORROBORATION

1. Introduction

The chapter provides a general view of corroboration by tracing the origins of the concept and why it was formulated. This chapter will also consider how corroboration applies to defilement cases in general by analyzing case law. It will also be important to discuss corroboration in other jurisdictions.

2. Historical Background

Corroboration is a common law principle meant to guard against the dangers of false implication and its origin can be traced from the biblical times¹¹ which state that “one witness is not enough to convict a man of a crime; at least two witnesses are necessary to prove that a man is guilty.” The necessity for corroboration is further necessitated by Mathews 18: 16¹² which states that “if he will not listen to you, take one or two other persons with you so that every accusation may be upheld by the testimony of two or more witnesses.”

In law, the general rule is that evidence given against an accused person does not need to be corroborated and the court may act upon the uncorroborated evidence of a single witness provided that the magistrate or judge is satisfied beyond all reasonable doubt of the accused's guilt.¹³ This simply means that the evidence of a single witness is sufficient to prove any issue and the court may convict if such witness is competent.

¹¹ Deuteronomy 19: 15, Good News Bible (1994) at 195

¹² Ibid at 27

¹³ Elliot D, Phipson's Manual of the Law of Evidence, 10th ed, at 246

Under common law, corroboration rules were formulated in the interests of the accused with the aim of avoiding wrongful convictions in three types of cases, namely the evidence of accomplices, the evidence of the complainant in sexual offences and the evidence of children.¹⁴ This practice under the Common Law has been adopted by the Zambian courts since the law in Zambia developed through English law. This is evident through the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia (herein after referred to as The English Law (Extent of Application) Act). The English Law (Extent of Application) Act provides that “subject to the provisions of the constitution of Zambia and to any other written law, the common law and ... shall be in force in the Republic.”¹⁵

Thus the requirement of corroboration in criminal cases developed in Zambia on the basis that certain witnesses cannot be relied upon hence it is dangerous to convict on the uncorroborated evidence of such witnesses. This was expressed in the case of **Phiri v The People**.¹⁶ In this case, the appellant was convicted of rape by the subordinate court and sentenced to two years imprisonment with hard labour. On appeal the sentence was enhanced to five years. The appellant appealed further on the grounds of mistaken identity and against the sentence being too severe. The Supreme Court in considering the issue of mistaken identity stated that:

Experience has shown that complainants do sometimes for a variety of reasons tell false stories. Because of this the court reminds itself that it would be dangerous to convict on the evidence of the complainant alone unless it is corroborated by evidence showing that the offence was committed and it is the accused who committed it.

¹⁴ Cross R, Evidence, London, Butterworths, 1974 at 169

¹⁵Section 2

¹⁶ (1982) ZR77 at 82

From the decision in Phiri, it is evident that corroboration is important in order to avoid wrongful convictions. This is because the victims usually make false allegations against the accused persons.

✿

3. Application of Corroboration

Corroboration can arise by law or by the practice of the courts.

3.1 Corroboration required by law

When corroboration is required by law, it is stated in the relevant statute. The accused cannot be convicted in the absence of such corroboration. These offences include;

1. Perjury:¹⁷ Perjury is the offence of giving false evidence. The offence may be committed by any witness who has taken oath or has affirmed in any judicial proceedings. Corroboration is required by law. The evidence required may be of any form but it must corroborate the falsity of the statement in order to show that it is false.

2. Procurement of Females for Sexual Offences:¹⁸ Here the law requires that the corroboration evidence must do so by implicating the accused person in the commission of the offence.

3. Seditious Practices:¹⁹ Seditious practices include the speaking or writing of words that are likely to incite ordinary people to public disorder. The offence requires corroboration. In the case of **Chitambala and others v R**²⁰ it was held that a police constable's evidence as to being present during the making of a statement by the accused did not amount to corroboration of the contents of the statement but only showed that it was voluntary.

¹⁷ Section 106, Penal Code

¹⁸ Section 140, Penal Code

¹⁹ Section 59, Penal Code

²⁰ (1961) R & N 166

4. *Speeding:*²¹ In this case, an accused person will not be convicted merely on the opinion evidence of one witness as to the speed at which the vehicle was travelling. If the evidence is not however, opinion evidence, but the reading of a speed trap, or speedometer of another car, corroboration is not required, even if no evidence is adduced as to the accuracy of the device.

5. *The Evidence of Children below the age of Fourteen years:*²² Cases of defilement by nature relate to children under the age of sixteen years hence corroboration is mandatory and there is no discretion for the court to convict in the absence of corroboration. This can be seen in the case of **Chisha v The People**²³ where the Supreme Court quashed the conviction of the appellant on the basis that the only evidence of a fourteen year old boy was not corroborated.

3.2 Corroboration required by practice

Where corroboration is required as a matter of practice, the court may accept the evidence though there is no corroboration but the court must warn itself of the danger of acting on uncorroborated evidence and give its reasons for so acting. However, this is not applicable to the research as cases of defilement relate to children below the age of sixteen years hence corroboration by law. The offences where corroboration is required by the practice of the court include:

1. *Cases involving Accomplices:* Accomplices may be participates in the crime charged as principals or accessories after the fact. They will also include receivers of stolen property and witnesses with who have their own interests to serve or who are biased. In **R v Baskerville**²⁴ it was stated that although the uncorroborated evidence of an accomplice is admissible at law, it

²¹ Section 192(3), Roads and Road Traffic Act, Chapter 464 of the Laws of Zambia

²² Section , Juveniles Act

²³ (1980) ZR 36 SC – discussed under Chapter one.

²⁴ [1916] 2KB 658 at 667

has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice.

2. Evidence of an Adult Complainant in Sexual Offences: Complainants in sexual cases, particularly female complainants, have been found by experience to be capable of giving false information purely to implicate the accused in a crime which did not occur. Such charges are easy to make but difficult to disprove. Because of this, the rules of practice require that a court warn itself against the danger of convicting an accused on the uncorroborated evidence of the complainant. Having so warned itself, a court may, nevertheless, still convict on such evidence as long as it can justify such a course and exclude the danger of false implication.

4. Essential Requirements of Corroboration

In order for evidence to be corroborative, it must come from an independent source, other than the witness requiring corroboration. In **R v Redpath**²⁵ the accused was charged with indecent assault on a young girl. The complainant's mother testified that the complainant returned home very distressed and immediately complained. The court held that while the complainant's distressed condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any, weight to the evidence because it is all part and parcel of the complainant.

In **R v Whitehead**²⁶, the accused was charged with unlawful sexual intercourse with a girl under sixteen years. The complainant mentioned the incident for the first time weeks later when she was pregnant. The court rejected the argument that the complainant's conversation could amount to corroboration saying the complainant cannot corroborate herself, otherwise it is only

²⁵ (1962) 46 Criminal Appeal Report 319

²⁶ (1929) 1 KB 99 at 102

necessary for the complainant to repeat her story twenty five times to get twenty five corroborations of it.

From two cases, it can be deduced that corroboration must be independent from the evidence given by the person requiring corroboration. If it is not independent, then it falls short being corroborative evidence.

Further corroboration must also implicate the defendant as the one who committed the offence. For example, in the case of **Phiri v The People**²⁷, the appellant was convicted of rape. The appellant appealed against conviction and sentence. The major ground of appeal related to the identification of the appellant. In considering the issue of identification, the Supreme Court stated that the principles upon which corroboration is required apply equally to the identity of the offender.

In **R v Birken**²⁸ it was held that the accused must be connected to that evidence so that it is shown that indeed the accused was involved in the commission of the crime. It must therefore be shown that the accused was the one that committed the offence.

Corroboration therefore, must be independent evidence which not only confirms that an offence was committed but also that it was the offender that committed it.

5. Rationale for Corroboration in Defilement Cases

Generally, corroboration is required in all sexual offences including defilement. The justification for the requirement of corroboration was expressed in **R v Henry**²⁹ when the court guided that:

²⁷(1982) ZR 77 SC

²⁸(1839) 8 C& P 732

²⁹(1969) 53Criminal Appeal Report 150 at 153

The judge has to use clear and simple language that will without doubt convey to the jury that in cases of sexual nature, it is dangerous to convict on the evidence of a woman or girl alone. This is dangerous as human experience has shown that in these cases women or girls do sometimes tell an entirely false story. It is very easy to fabricate but difficult to refute.

From the case, it is clear that the evidence of a woman or girl in a sexual offence needs to be confirmed by some independent evidence in order to secure a conviction. In rape cases the question of consent depends entirely upon the word of the victim as against that of the accused. In defilement cases, the complainants are susceptible to influences from both adults and other children and at times the children do not appreciate the need to tell the truth. Due to these reasons, it is dangerous to rely on their evidence as some of them fabricate false stories that are difficult for the accused persons to refute.

In Zambia defilement cases involve children below the age of sixteen years as the victims. The evidence of a child below the age of fourteen years needs corroboration as a matter of law.³⁰ This simply means that an offender cannot be convicted only on the testimony of the child. Heydon³¹ gives a detailed analysis as to why a child's evidence should be corroborated:

The child's power of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated in their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by both adults and other children. A fifth danger is that children often have little notion of the duty to speak the truth and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes believe in a way evil beyond their age. They may consent to sex offences. Some children know that adult world regards such matters in a serious and peculiar way and they enjoy investigating this mystery or revenging themselves by making false accusations.

³⁰ Section 122, Juveniles Act

³¹ Heydon, Evidence, Cases and Materials (London, Butterworths, 1975) at 84

It is clear from the observation of Heydon that the evidence of children is considered suspect due to their youth as they are susceptible to influence from the third parties such as adults and other children. Children do not have the maturity to understand the moral duty to speak the truth and may not appreciate the need for accuracy in evidence and may forget the important details. At times a child may deliberately tell lies when there has been consent to a sexual act and later deny that consent was given. It is thus clear that for the reasons given by Heydon on his observation of a child, the evidence of a child must corroborated in order to avoid the danger of false implication.

The danger posed by children's evidence was appraised in Zambia in the case of **Chisha v The People**.³² The case was an appeal against conviction on a charge of stealing K29. The case against the applicant rested solely on the evidence of a boy aged fourteen years. The case had no other corroborative evidence. In allowing the appeal, the court stated that the evidence of a child is suspect simply for the reason that it is the evidence of a child as the child's mind is yet to mature.

From the given cases of Henry and Chisha and the analysis as to why child's evidence must be corroborated, corroboration rules were formulated in defilement cases to avoid an offender being falsely convicted on the evidence of the children unless it was corroborated. The reason for the need to corroborate the evidence of a child is due to the fact that some children would tell lies while others would be tutored by the adults to implicate the offender in the commission of the offence.

³² (1980) ZR 36

5. Cases without Corroborative Evidence in Defilement Cases

The general rule is that the court can convict on the uncorroborated evidence or testimony of a single witness. This general rule is applicable if there is no statute requiring corroboration of such evidence. In defilement cases, the age of the victim is a determining factor that there must be corroboration as a matter of law.

5.1. Cases involving victims below the age of fourteen years

It is the requirement of the law that the evidence of children aged below the age of fourteen years in defilement cases must be corroborated in order to secure a conviction. According to Section 122 of the Juveniles' Act, Chapter 53 of the Laws of Zambia (hereinafter referred to as the Juveniles' Act.) which provides:

Where in any criminal or civil proceedings against any person, a child below the age of fourteen is called as witness, the court shall receive the evidence, on oath, of the child if in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the child's evidence and understands the duty of speaking the truth: Provided that –
(b) where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused.

From the wording of Section 122, it is clear that the evidence of children below the age of fourteen years cannot by law secure a conviction unless corroborated. Cases without corroborative evidence are either withdrawn by the police during investigations or reduced to lesser charges or lost in the courts of law. In the case of **Tembo v The People**,³³ the appellant was convicted of burglary and theft and a child of twelve years of age had given evidence. Although the trial court found that the child was capable of giving evidence on oath, it was not

³³ (1980) ZR 218 SC

considered whether the child's testimony required corroboration. In allowing the appeal against conviction and sentence, the court held that the evidence of all children who give evidence in court must be corroborated.

✽

5.2. Cases involving victims aged fourteen years and sixteen years

In defilement cases, where the victim is aged between fourteen and sixteen years and gives evidence, statutory law is silent as to whether there must be mandatory corroboration or corroboration by the rules of practice of the court. However, case law is indicative and clearly shows that the evidence of a child between fourteen and sixteen years must be corroborated. In the case of **Chisha v The People**,³⁴ the case against the appellant rested solely on the evidence of a boy aged fourteen years. The trial magistrate conducted a perfectly proper *voire dire* at the end of which there was satisfaction that the boy was able to give evidence on oath. The issue for the appellant court was whether the sworn evidence of a child of that age is to be treated like the sworn evidence of any other witness. The court stated that:

As a matter of practice, the evidence of such a child requires corroboration but the court should warn itself that there is a risk of acting on the uncorroborated evidence of young boys and girls. Where there is no corroboration in the strict sense, the court should look for something more that satisfies the court that the ... danger has been excluded and that it is safe to rely on the evidence implicating the accused.

From the case of Chisha, it is clear that where a child aged between fourteen and sixteen years gives evidence, the rules of practice require that corroboration be looked for but provided the court adequately directs and warns itself, it is permissible to convict on such evidence, even though uncorroborated as long as the court is satisfied that the child is telling the truth.

³⁴ (1980) ZR 36 SC

6. Corroboration in other Jurisdictions

Corroboration rules have undergone some revolution over the years in a number of jurisdictions with some abolishing the rules while others have simply modified it.³⁵

✻

England

The corroboration rules in respect of sexual offences were abolished by Section 32 of the Criminal Justice and Public Order Act, 1994 which provides:

Any requirement whereby at a trial on indictment, it is obligatory for the court to give the jury a warning about convicting accused on the uncorroborated evidence of a person merely because that person is; (b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed is hereby abrogated. (2) Abolition of requirement of corroboration warning in respect of evidence of a child.

The reason for abolition in England was that the rules concerning corroboration were deemed to be inflexible, complex and anomalous.³⁶ There is therefore, no need for any warning for convicting on the uncorroborated evidence of complainants evidence in sexual offences. Considering the increasing number of defilement cases, Zambia having inherited the British Law and practices should try and relax the law regulating the mandatory requirement of corroboration in defilement cases.

³⁵ These jurisdictions include England, Namibia, Tanzania and Kenya

³⁶ Law Commission Report: Corroboration of Evidence in Criminal Trials (Cmnd 1620) 1991

Namibia

The case of **S v D**³⁷ in Namibia considered the rule and its justification and held that the rule in sexual offences has no rational basis for its existence as the same test of prove beyond all reasonable doubt must be the same whether the crime is theft or rape.

In the case of **S v K**,³⁸ the Supreme Court of Namibia held that the cautionary rule had lived its usefulness. Further, that there were no convincing reasons for its continued application and that it exemplified a rule of practice that placed an additional burden on victims in sexual offences.

Kenya

The requirement for corroboration in sexual offences was considered in the case of **Makungu v Republic**³⁹ which declared the requirement for corroboration in sexual offences involving adult women and girls as unconstitutional to the extent that the requirement is against them as women and girls and that is discriminatory. This arose out of an outcry of a decision in court where a man accused of rape was acquitted because of lack of corroborative evidence connecting him to the crime. The court was of the view that independent medical evidence including DNA test should have been tendered into court.

In the case of **Solomon Mungai v Republic**⁴⁰ the appellant had been tried and charged before the Senior Resident Magistrate with defilement. The appellant was tried and convicted of defilement and subsequently sentenced to life imprisonment. This was despite the fact that the testimony of the complainant at the trial was that of a child. The appellant appealed to the High Court on the basis of being convicted on the uncorroborated evidence of a child. The appellant

³⁷ 192 (SA) 513 (Nm)

³⁸ (4) BCLR 405 (NmS)

³⁹ (2003) 2 EA

⁴⁰ (2012) eKLR High court

court held that following the amendment of Section 124 of the Evidence Act by the Sexual Offences Act, the trial court can receive uncorroborated evidence of a child in a sexual offence case and convict if for reasons to be recorded, it is satisfied that the alleged victim is telling the truth.

Section 124 of The Evidence Act, Chapter 80 of the Laws of Kenya provides that:

...where in any criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for the reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

It is clear from the case law and the provisions of the Evidence Act that the need to corroborate the evidence of a child has been abolished in Kenya. The court can convict on the uncorroborated evidence of a child witness provided that the child is telling the truth.

Tanzania

Following the 1980 amendment of the Evidence Act, the courts in Tanzania may now convict an accused person on the uncorroborated evidence of a child of tender years that is one aged fourteen years or below. Section 3 of The Evidence (Amendment) Act 1980 of the Laws of Tanzania provides that:

Notwithstanding any rule of law or practice to the contrary, where evidence received by the court is given on behalf of the prosecution and is not corroborated by any other material evidence in support of it implicating the accused, the court may after warning itself of the danger of doing so, act on that evidence to convict the accused if it is fully satisfied that the child is telling nothing but the truth. For the purposes of ... the expression child means a child of or below the apparent age of fourteen years.

From the provisions of the Act, it is evident that in Tanzania, corroboration is not a mandatory requirement for a conviction on a charge where the only evidence is that of a child. The court can convict on the uncorroborated evidence of a child as long as it warns itself of the dangers of acting on the evidence of a child and is satisfied that the child is telling the truth.

7. Conclusion

The chapter has examined the general nature of corroboration and shown the rationale for corroboration in defilement cases, emphasising that it is not different from other sexual offences. The two different requirements of corroboration such as corroboration as required by law and as required by practice have been discussed. The emphasis has been on corroboration as required by law which is the subject of the discussion. This chapter has also analysed cases on corroboration in Zambia. This chapter has also given the position of corroboration in other jurisdictions such as England, Kenya, Namibia and Tanzania in relation to sexual offences that also cover defilement. The next chapter will discuss the nature of corroborative evidence in defilement cases.

CHAPTER THREE

THE NATURE OF CORROBORATION REQUIRED IN DEFILEMENT CASES

1. Introduction

This chapter provides a critical examination of the nature of corroboration required in defilement cases. As discussed in the previous chapter, the evidence of the victims in defilement cases requires corroboration as a matter of law in order to secure a conviction against the accused. The requirement for corroboration permeates cases of defilement from suspicion to conviction. Corroboration is not just a test adopted by the courts. The existence of corroboration means that, in respect of defilement cases, the investigators and hence the prosecution needs to find corroboration. If corroboration is not found, the case will not normally progress.

2. Elements to be proved in Defilement Cases

The constituent elements of the *actus reus*⁴¹ of defilement are sexual intercourse and that the victim is a child below the age of sixteen years. The *mens rea*⁴² is the intention to have sexual intercourse with a child and knowledge of or recklessness as to her age. There must therefore be corroborative evidence for both the *actus reus* and *mens rea*. In the case of **Emmanuel Phiri v**

⁴¹ The *actus reus* is simply the act done in an offence. It is the essential element of a crime that must be proved to secure a conviction.

⁴² The state of the mind the prosecution must prove a defendant to have had at the time of committing the offence in order to secure a conviction.

The People,⁴³ the Supreme Court held that in a sexual offence there must be corroboration of both the commission of the offence and the identity of the accused.

2.1 Identity of the accused

The identity of the accused is the most difficult element to be corroborated due to the fact that defilement cases do take place in secrecy. Without corroborative evidence relating to the identity of the accused, there can be no conviction in a case of defilement. For example, in **R v James**⁴⁴ it was held that in sexual matters, evidence must confirm in some material particularity, that not only sexual intercourse has taken place but also that it was the accused that committed it.

The nature of the corroborative evidence required ranges from opportunity evidence⁴⁵ such as where the assailant was seen immediately before or after the occurrence of the offence with the victim. Admissions by the accused person also constitute corroboration as to the identity of the offender. Without corroborative evidence as to the identity of the accused, there can be no conviction.

2.2 Sexual Intercourse

The act of sexual intercourse is established by proving penetration of the penis into the vagina. Penetration is sufficient to establish sexual intercourse for the purpose of defilement. In **R v Yohanni Mporokoso**,⁴⁶ the Court of Appeal stated that “to prove that sexual intercourse took place, it is necessary to prove penetration or partial penetration.” It is therefore not necessary to prove the completion of the intercourse by the emission of semen⁴⁷ but intercourse is deemed

⁴³ (1982) ZR 77 (SC) at 77

⁴⁴ (1971) 55 Cr App R. 299 (PC) at 301

⁴⁵ Evidence of what a witness thinks, believes or infers in regard to facts in dispute.

⁴⁶ (1939) NRLR 152

⁴⁷ R v Cox [1832] 1 Lew at 292

complete upon proof of penetration only. Medical evidence or the evidence of an eye witness would suffice as corroboration.

2.3 Proof of age of victim

Proof of age is vital to a conviction for defilement. This is because defilement is an offence committed against children below the age of sixteen years.⁴⁸ In the case of **Gift Mulonda v The People**,⁴⁹ the appellant pleaded guilty to a charge of defilement of a girl under the age of sixteen years and was given a conditional discharge. Subsequently, the record was called for review by the High Court which proceeded to set aside conditional discharge and sentenced the appellant to fifteen years imprisonment with hard labour. One of the grounds of appeal raised by the appellant was that the trial court erred in law by convicting the appellant when the age of the prosecutrix which was an essential ingredient of defilement was not revealed by the facts of the case as read out by the prosecutor nor was the same ever enquired into by the trial court. The Supreme Court in quashing the conviction and setting aside the sentence held that the age of the victim in defilement cases is a crucial and essential ingredient of the charge. Further the High Court as a reviewing court had no power to impose a sentence which was not within the jurisdiction of a trial court.

From the case of Mulonda, it is very evident that the age of the victim is a vital ingredient to the offence of defilement. Age may therefore be proved by production of a birth certificate or record of birth. It is not sufficient for the court to rely on the observation of the girl age because wrong conclusions can be made.⁵⁰

⁴⁸ Section 138(1) Penal Code, Chapter 87 of The Laws of Zambia

⁴⁹ (2004) ZR 135 SC

⁵⁰ R v Mvula IN.R.L.R. at 84

3. Corroborative Evidence in Defilement Cases

Defilement cases, being inherently intimate, normally take place in seclusion. Consequently direct supporting evidence may be difficult to obtain. However, corroborative evidence may be obtained from the state of the clothes or the body of the complainant. The nature of corroborative evidence needed varies from one case to the other.

3.1. Evidence of Early Complaint

Evidence of an early complaint is a complaint made by the victim to a third party soon after the alleged defilement. Although evidence of early complaint is admissible because it enhances the reliability of the complainant's testimony, it does not constitute corroboration of that testimony. This is because it is based on what the complainant says and not on the material evidence of the complainant. Corroboration must come from a source independent of the complainant's testimony. In the case of **Mwelwa v The People**,⁵¹ the appellant was convicted of the offence of indecent assault on a female. The complainant made an early complaint to her sister in law. The trial court considered that the evidence of early complaint amounted to corroboration. On appeal against conviction, the High Court in allowing the appeal stated that evidence of early complaint is not corroboration in sexual offences. It only goes to the issue of consistency on the part of the prosecution.

From the foregoing, it is clear that an early complaint does not constitute corroborative evidence. This is because for evidence to amount to corroboration, it must be extraneous to the witness who is to be corroborated. However, an early complaint may be given in evidence not as

⁵¹(1972) ZR 29 HC

evidence of the facts complained of but as evidence of the consistency of the conduct of the complainant. For such evidence to be admissible, it must be made at the earliest opportunity.

3.2. Complainant's Distressed Condition

Evidence of the distressed condition include situations where the complainant is seen crying, appears to be withdrawn, is sad or not walking properly after the alleged offence. It may also include the state of the body of the complainant soon after the alleged sexual encounter, for example, bruises on her body. A complainant's distressed condition is capable of amounting to corroboration only in very special circumstances. For instance, in **R v Redpath**,⁵² the court held that:

It seems to this court that the distressed condition of the complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously and in some circumstances quite clearly no weight or little weight could be attached to such evidence as corroboration. Thus if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition is capable of amounting to corroboration, quite clearly, the jury should attach little, if any weight to that evidence, because it is all part and parcel of the complaint.

From the case of Redpath, it can be deduced that evidence of the distressed condition of the complainant does not amount to corroboration in a situation where the complainant makes a report about her distressed condition to a third party because it is not independent from the evidence given by the person requiring corroboration. However where a complainant has not made a report but a third party has made an observation of the complainant's distressed condition, the third party's observation amounts to corroboration as it is independent evidence of

⁵²(1962) 46 Criminal appeal report 319 at 321-322

the complainant's evidence. For example, in **Kalimukwa v The People**⁵³ the appellant was convicted for the offence of rape. One of the grounds of appeal was that there was misdirection by the trial court on the question of corroboration. In considering the trial court's finding that the complainant had sperms running down her thighs following what the appellant did, the court held that independent evidence of the distressed condition of the complainant soon after the alleged offence may amount to corroboration.

The complainant's distressed condition, in itself, cannot corroborate the identity of the accused in **Smith v Lee**,⁵⁴ where it held that while the victim's distress could corroborate her account which caused her distress, it could not corroborate the crucial fact that the accused is the one who committed the indecency complained of. The facts of the case were that the accused and his brother in law had taken three girls and two boys to a campsite where they were to camp over night. One of the children was the complainant aged thirteen years. Two tents were pitched with the boys going into one of them and the girls in the other. The brother in law stayed outside beside the fire, while the accused decided to sleep in the girls' tent between the complainant and one of the girls. Sometime later the complainant woke up and found the accused's penis on her hand. As the complainant lay there pretending to be asleep, the accused took hold of her hand and moved his penis up and down against it. When the accused stopped, the complainant left the tent, too frightened and upset to tell the brother in law who was her uncle. The complainant's uncle also gave evidence saying the complainant was distressed when she came out of the tent and that she came out quickly. The accused was charged with indecent assault and found guilty. The Court of Appeal, however, set the conviction aside because the evidence of what the accused had done was not corroborated.

⁵³ (1971)

⁵⁴ (1997) JC 73

The Smith case discussed above provides clear authority for the view that evidence need not be incriminatory in order to be corroborative because all that is needed is that it should be consistent with the evidence of the complainant or other eye witness or indeed with a confession.

✱

The basis for admission of evidence of a distressed condition of the complainant as corroboration is not its independent value but its intrinsic and obvious value as evidence supporting the complainant.⁵⁵ It follows therefore that for such evidence to amount to corroboration, the court must be satisfied that the distress was genuine and not stimulated, for example, in **Zimba v The People**,⁵⁶ the appellant was convicted of rape. On appeal, the court considered whether the fact that the complainant was crying when seen by an independent witness could amount to corroboration. The appellate court held that although the distress of the complainant could have been regarded as corroboration, it was necessary for the trial court to warn itself that the evidence of distress at the time of making the complaint may not enough amounts to corroboration as it might have been stimulated.

From the fore going, it is clear that for evidence of distress to amount to corroboration, the distress must be genuine and not acted out. If genuine, the distress condition must implicate the accused in the offence charged, that is, the cause of the distress was by the accused's actions or words. Evidence of torn clothing must be treated the same way and tested for self infliction.⁵⁷ If the evidence of torn clothing is genuine, then such clothing should be taken possession of by the investigations officer and produced in court as an exhibit.

The basic weakness of evidence of distress is that its value or cogency as independent evidence diminishes rapidly with the passing of time. The longer the interval from the original event, the

⁵⁵ Cross R. Cross on Evidence (London, Butterworths, 1975) at 481

⁵⁶ (1980) ZR 259 SC

⁵⁷ Swarbrick, Magistrates Handbook (Lusaka, 1991) at 606

more difficult it is to be sure that a condition of distress not manifested or observed until well after that event is not due to some intervening and unrelated cause. Once it ceases to be independent evidence of its cause, the complainant's distress is no longer capable of corroborating her evidence. The interval of time that lapses between the incident and distress is plainly therefore an important factor in deciding whether or not they are casually related.

3.4. Medical Evidence

Medical evidence includes the state of the body after the sexual assault. This includes the injuries of the complainant and perhaps even the accused as was observed in the case of **Butembo v The People**⁵⁸. In this case, the appellant was convicted of rape. The allegation was that the appellant gave a lift to the complainant and while on their way, the appellant drove to a secluded place and used violence on the complainant which resulted in bruising of her face and other minor injuries. In addition, the appellant had sexual intercourse with the complainant who did not consent. The appellant alleged that there was consent from the complainant. The appellant was convicted and appealed against his conviction with the major ground of appeal being that the trial court had failed to heed the warning on the need for corroboration and hence must be acquitted. In dismissing the appeal, the Supreme Court stated that there was ample corroboration in the case which included not only the complainant's injuries but most importantly the injury suffered by the appellant himself which the complainant said had been inflicted by the sharp point of her umbrella that had blood stains.

From the case of Tembo discussed above, it is clear that just like in rape cases, the injuries sustained on both the complainant and the accused in defilement cases can amount to

⁵⁸ (1976) ZR 193

corroboration of the identity of the accused. The injuries inflicted on the complainant also show that the accused was reckless in the commission of the offence hence constituting the *mens rea* of the offence. In certain instances, there may be medical evidence of the presence of spermatozoa which simply indicates that the victim had sexual intercourse as alleged. However, the police have not exploited the use of DNA to link the accused to the commission of the offence through the spermatozoa and also other body fluids found on the complainant.

Further, medical evidence from a fresh infection of a Sexually Transmitted Infections amount to corroboration as decided in the case of **Ngobi v R**⁵⁹ where evidence was given that a girl aged seven years was found three days after an alleged assault suffering from an old infection of gonorrhea. The accused was also found to be suffering from an old infection of gonorrhea. The court held the finding that the accused was also suffering from an old infection of gonorrhea was capable of being corroboration of the girl's own evidence.

Similarly, the subsequent birth of a child from an alleged sexual intercourse amounts to corroboration that sexual intercourse took place. Further a DNA test as to the paternity of the child is corroborative enough to connect the accused to the commission of the crime if it is found that he is the biological father of the child.

With the use of the latest medical equipment, medical evidence can be regarded as one of the best corroborative evidence in defilement cases. This is because if medical examinations are conducted on semen, blood, hair or any other article found on the victim, it can easily be used to link the accused to the commission of the offence. The development of expertise to use medical evidence can ease the difficulties of corroborating the identity of the offender.

⁵⁹ 20 E.A.C.A. 154

3.5 Evidence of Opportunity

The location of the scene of crime and circumstances surrounding each particular case presents the accused with an opportunity to commit the offence. However, opportunity on its own does not amount to corroboration of the perpetrator's identity. For example in the case of **Credland v**

Knowler,⁶⁰ found that:

Mere opportunity alone does not amount to corroboration but ... the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration.

From the case of Credland discussed above, it is clear that in order for evidence of opportunity to amount to corroboration, the location of the scene of crime and certain circumstances such as time of commission of the offence must be taken into account as in the case of **Nsofu v The People**⁶¹ where the appellant was convicted on three counts of defilement. In this case, it was argued that the corroborative evidence of the three girls was not conclusive in itself. The appellant appealed on the grounds that the evidence put forward as corroborative evidence was not conclusive and therefore had not been corroborated. In considering the ample evidence of an opportunity to commit the offence, the Supreme Court held that whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case.

Thus there is need for evidence concerning the nature of the place such as an isolated place, disused building or where the accused was the only person with the complainant which may amount to corroborative evidence. The time of commission of the offence is vital.

⁶⁰(1951) 35 Cr App R 48 at 55

⁶¹ (1973) ZR 287

The following two cases illustrate circumstances in which evidence of opportunity may be regarded as corroborative evidence. First, in **Joseph Mwamba Kalenga v The People**⁶² the appellant was charged of indecent assault. On the date alleged the appellant had met the complainant who was the grandmother. The appellant informed the complainant that he had gathered some firewood in the bush. The appellant offered to give the complainant some firewood. The appellant went with the complainant in the bush. The appellant left the complainant behind. The complainant was shocked to find the appellant stark naked behind her. The appellant then descended on the complainant and had sexual intercourse without her consent. The appellant fled while complainant went home and immediately informed the appellant's mother. The matter was first reported to the village headman, then the chief and subsequently to the police. The seventy year old complainant was medically examined by the doctor whose findings were that she had a sexually transmitted infection called trichomonas vaginalis, a condition that can affect a woman without her knowledge. In considering the issue of corroboration, the trial court accepted the complainant's evidence that she was tricked into going into the bush by the appellant because no firewood was collected. The appellant was found guilty and committed to the High Court for sentencing. The High Court upheld the conviction and sentenced him to sixteen years. One of the grounds of appeal to the Supreme Court was that the conviction was unsafe and unsatisfactory as there was no finding of corroborative evidence and the evidence was insufficient. In considering the issue of corroboration, the Supreme Court held that the admission by the accused that he escorted the prosecutrix in the bush to fetch firewood amounted to corroboration as he had an opportunity to commit the offence.

⁶²SCZ judgment No 103 of 2011

The circumstances leading to corroborative evidence include the scene of crime where the prosecutrix was lured into the bush on the pretext that she was going to be given firewood. There is evidence that in the bush, there were just the two of them therefore, the accused had an opportunity to commit the offence. The evidence regarding the nature of the scene of crime as well as being together with the prosecutrix confirms the evidence of the prosecutrix both in the commission of the offence and commission of the offender.

Secondly, the case of **Ivess Mukonda v The People**,⁶³ brings out a number of issues on evidence of opportunity. The appellant was charged with two counts of defilement and sentenced to twenty five years imprisonment. The case for the prosecution centered on the evidence of two victims aged eleven and eight years and also their mother. The mother stated that the appellant was her husband and that on the date in question they had a fight with the appellant and subsequently ran away from home in the night. She left the two children at home with the appellant. The two victims of whom the eight year old was his daughter testified that they slept with the appellant in the same room which was locked. The accused woke up in the night and lifted the victim's leg and forced his penis into her vagina and did the same to the other victim. Both victims reported the incident to their mother. The trial court took into account that the accused had ample opportunity to have carnal knowledge of the two girls particularly that he was in the bedroom alone with them the whole night and that they could not escape as the door was locked. The appellant appealed alleging inter alia that the case against him rested on the evidence of the two victims that required corroboration as to the commission of the offence and the identity of the accused. The Supreme Court in addressing the issue of corroboration accepted that there was an opportunity for the accused to commit the offences because the circumstances

⁶³SCZ judgment of 11 of 2011.

and the locality of the opportunity amounted to corroboration of the commission of the offences. It is clear that the accused slept with the two victims in the same bedroom that he had locked therefore; there was no opportunity for another man to enter the bedroom and commit the offence other than the accused himself.

It is evident from the two cases of Kalenga and Mukonda that for evidence of opportunity to amount to corroboration, each case has to be considered on its circumstances. For instance, the scene of crime and presence of the accused at the scene of crime play a major role in determining whether an accused person had an opportunity to commit the offence.

3.6 Admissions and Confessions

Where an accused admits committing the offence, that is, pleads guilty to the charge of defilement, there is no need for corroborative evidence. However, if the accused admits part of the allegation, for instance commission of the offence, corroborative evidence may only be needed to prove the age of the complainant and not his identity as in **R v Kaponda**⁶⁴ where the appellant admitted to the complainant's parents that he had defiled their daughter aged about seven years old and offered them money if they would drop the case. The appellant's admission was held to be corroboration of the girl's evidence. This case also brings out another piece of evidence which is an offer of the money in order for the case to be dropped. Evidence of begging for mercy would also constitute corroboration.

A confession can also amount to corroboration where, prior to trial, an accused confesses his guilt or makes a statement containing incriminating matter. That confession in a statement is admissible in evidence provided that the prosecution can establish beyond all reasonable doubt

⁶⁴ 2 NRLR 160

that the accused made it voluntarily, that is, of his own accord and not as a result of an inducement or threat held out or made by a person in authority.

3.7. Lies of the Accused

It was once suggested in **R v Chapman**⁶⁵ that lies told in court by the accused could not amount to corroboration, but this view has now been rejected by the decision in **Edwards v R**⁶⁶ where it was held that:

The telling of a lie merely affects the credit of the witness who tells it. A lie told by an accused may go further and in limited circumstances, amount to conduct which is inconsistent with innocence and therefore amount to an implied admission of guilt. In this way the telling of a lie may constitute corroborative evidence.

A lie of an accused can corroborate the witness' evidence only in certain circumstances that were spelt out in **R v Lucas**⁶⁷ which summarised the circumstances as:

The lie ... must first all be deliberate. Secondly, it must relate to a material issue. Thirdly the motivation for the lie must be a realisation of guilt and a fear of the truth... Fourthly, the statement must be clearly shown to be a lie by evidence other than that of the accomplice to be corroborated, that is, to say by admission or by evidence from an independent witness.

From the case of Lucas discussed above, for a lie told by the accused to constitute corroboration, such a lie must be one that is intentional due to guilt or fear to speak out the truth. There is also need for independent evidence to prove that such statement produced by the accused is indeed a lie.

⁶⁵ [1973] QB 774
⁶⁶ (1993) 178 CLR 193 at 208-9
⁶⁷ (1981) 2 All ER 1008

3.8. Flight of the Accused

The sudden departure of an accused from his usual place of residence, where the location of the alleged offence occurred for no apparent reason, amounts to corroboration. Shepherdson observes that: “it is universally conceded today that the accused’s flight, escape from custody, resistance to arrest and related conduct are admitted as evidence of consciousness of guilt and thus of guilt itself.”⁶⁸

3.9. Mutual Corroboration

Mutual corroboration is the type of corroboration where one witness corroborates the evidence of the other, for instance the sworn evidence of a child could corroborate another child’s evidence. In **R v Manser**⁶⁹ where it was stated that:

Let it be granted that the evidence of Barbra (the elder child witness for the prosecution who was probably sworn) has to be corroborated: it is corroborated by the evidence of Doris (the younger child witness who is unsworn). She however, also needs to be corroborated. The answer is that she is corroborated by the evidence of Barbra, and that is called ‘mutual corroboration’.

Mutual corroboration also applies to a situation where the accused is charged with two or more separate offences and there is only one piece of evidence. It may be possible that the accused committed another crime in similar circumstances against someone else and the complainant can corroborate this in her evidence. Mutual corroboration is also referred to as the Moorov doctrine. It comes from the famous case of **Moorov v H.M Advocate**⁷⁰ where the accused was charged with a string of sexual offences. Moorov ran a shop in Glassgow where all the victims

⁶⁸ Shephardson, Wigmore on Evidence, (London, Sweet & Maxwell) at 333

⁶⁹ (1934) 25 Cr App Rep 18 at 20

⁷⁰ (1930) JC68

were employees in his shop and the only piece of evidence was the similarity between the incidents. There was no corroborative evidence but the incidents were connected in time and circumstances. All the incidents occurred approximately within a period of three years. The court found that:

Before the evidence of a single credible witness to separate acts can provide material for mutual corroboration, the connection between the separate acts must be such as to exhibit them as subordinates in some material particular and ascertained unity of intent, project, campaign or adventure which lies beyond it or behind but is related to the separate acts. The existence of such an underlying unit, comprehending and governing the separate acts provide the necessary connecting link between them and becomes a circumstance in which corroboration of the evidence of the single witnesses in support of the separate acts may be found.

In order to apply the Moorov doctrine, two basic conditions must be met. First, the separate acts must be connected by time, character or circumstances and secondly, there must be some adventure connecting the individual acts, that is, the manner in which the accused committed the offence. It is important to note that the crimes do not have to be of the same name as the importance lies in the nature of the offences. Mutual corroboration can thus be used in situations not only where there are two victims defiled by the accused who are called as witnesses but also in circumstances where the accused is charged with a series of offences on different indictments with offences connected by nature and time. In such a situation the witnesses can be called to corroborate the evidence of identification and also the commission of the offence.

3.10 Accused's own previous statements

The accused's own statement may amount to corroboration as in **Chibinga & another v The People**⁷¹ where the appellants were charged with murder. The prosecutions' evidence was that the appellants cut the deceased body into several pieces and threw them on the railway line. There was evidence of one witness who stated that some weeks later after the murder, when the witness was at the tavern, he saw the first appellant brandishing a knife against another man's neck. Evidence further revealed that the man demonstrated with the first appellant who then told him 'I can cut you into pieces as I do to people at the railway line.' The witness alerted the police. On appeal, the Supreme Court was satisfied that the evidence as to the statement made by the first appellant in the tavern was corroboration that the appellant was involved in the murder at the railway line.

It is evident that previous statements made by the accused persons either on arrest or at the scene of crime amount to corroboration. They link the accused person to the commission of the offence. These statements may be adverse to the accused but are admissible as confessions provided that they are made freely and voluntarily and not induced.

4. CONCLUSION

This chapter has analysed the nature of corroborative evidence required in order to secure a conviction in cases of defilement. The essential elements of defilement such as the age of the victim, identity of the accused and whether sexual intercourse took place must be proved beyond all reasonable doubt. Apart from direct evidence, a case of defilement can be proved from various corroborative evidence such as medical evidence, evidence of opportunity, evidence of

⁷¹ SCJ No 84 of 1986

distressed condition of the accused and admissions and confessions of the accused. It has also been observed that some pieces of evidence such as evidence of early complaint though not constituting corroboration go to the consistency of the evidence of the complainant. The next chapter will discuss the justification of corroboration.

CHAPTER FOUR

THE NECESSITY FOR CORROBORATION IN DEFILEMENT CASES IN ZAMBIA

1. Introduction

This chapter discusses Section 122 of the Juveniles' Act which is the basis for the requirement of corroboration in Zambia. This chapter will examine the necessity for corroboration in defilement cases in Zambia. It will be argued that corroboration should remain in order to provide a fair trial to the accused persons due to the nature defilement cases that are easy to allege and difficult to disprove.

2. Justification for corroboration

The requirement for corroboration in Zambia is justified by Section 122 of the Juveniles Act, Chapter 53 of the Laws of Zambia (hereinafter referred to as 'The Juveniles Act'). The Juveniles' Act provides that:

Where in any criminal or civil proceedings against any person, a child below the age of fourteen years is called as a witness, the court shall receive the evidence on oath, of the child if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence; on oath and understands the duty to speak the truth: provided that – (a) if in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and does not understand the duty of speaking the truth, the court shall not receive the evidence; and (b) where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused.

The provisions of Section 122 indicate that a child can be a competent witness only after the court satisfies itself that the child understands the duty to speak the truth and whether from the

extent of her intellectual capacity and understanding, the child is able to give a rational account of what he has seen, heard or done on a particular occasion. It is thus a requirement of the law that the evidence of children aged below fourteen years cannot by law, secure a conviction. It needs as a matter of law to be confirmed by independent evidence or what is referred to as corroboration.

The current provisions of law are adequate and serve the needs of the Zambian society. This is because the standard of the child's competency to testify is lower compared to the previous law before the current law was amended. The old provision of the Juveniles' Act before the amendment by Act Number 3 of 2011, an Act to amend the Juveniles' Act provided that:

Where, in any proceedings against any person for any offence or in any civil proceedings, any child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing... provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated...

The above provisions of the previous law required that the child understands the nature of an oath before the evidence of such a child is admitted in court. This set the standard of the child's competency to testify very high as understanding the nature of an oath is not an easy thing to do. Further, the unsworn evidence of a child can no longer be received by the courts according to the law which is a safeguard against wrongful convictions. Therefore even if there is a mandatory requirement of corroboration, and notwithstanding that defilement cases are committed in secrecy, the current law serves the needs of the changing society of Zambia because a number of children who possess sufficient intelligence and appreciate the need to tell the truth can testify.

The logical basis of the provisions of the Juvenile Act on the requirement of corroboration is that the sworn evidence of the child is suspect due to immaturity and therefore needs corroboration.

Child witnesses are usually affected by certain factors as summarised by Nokes:⁷²

The sworn evidence of a young child, whether accomplice or not, requires corroboration in practice; and the judge should warn the jury of the risk of acting on the uncorroborated evidence of such children. There is no fixed rule as to when children grow out of this category. The evidence of young children is always subject to doubt. Very young children live in a world of imagination, and their powers of observation, understanding, memory and expressions are rudimentary. Most children are influenced by what they hear from adults, not necessarily by way of deliberate suggestion or instruction. Yet the children may be ... accurate, particularly with regard to offences committed against themselves.

It is evident from the observation of Nokes on children that there is no specific age at which a child would be regarded as mature in order to comprehend the court process. It is not easy for them to recall everything that happened during the defilement. Due to the child's immaturity, it is easier for the adults to influence them on what to say in court.

The main justification for corroboration is the need to minimize the possibility of convicting an innocent person. Although corroboration rules cannot provide an absolute guarantee that every conviction is correct, abolishing the requirement of corroboration would make the risk of wrongful conviction greater. A conviction is denunciatory and stigmatic.⁷³ The convicted person is not accepted by society and discriminated against. The convicted person is liable to punishment which may involve deprivation of his liberty.

⁷² *An Introduction to Evidence*, Nokes G.D. Sweet & Maxwell, (1967) at P 454

⁷³ Scottish Law Commission Discussion Paper on Rape and other Sexual Offences, January 2006

As discussed in chapter two,⁷⁴ there is a general belief that women and girls simply make false accusations when it comes to defilement cases. The rationale for this belief and for corroboration is based on the biblical story of Joseph and Portiphar's wife.⁷⁵ The justification for the operation of the rule on corroboration in defilement cases in Zambia was that the false accusations was said to be originating from the influence of the adults. The mind of the child is easily persuaded and that in defilement cases, most children are sent by adults to implicate certain people.

It has been observed during some court sessions in defilement cases⁷⁶ that girls especially aged above sixteen years old were forced to lie on their age by their mothers so as to fall within the definition of the term 'child' within the meaning of the Penal Code.⁷⁷ This was mainly done for the accused to be convicted of defilement in situations where the victims had fallen pregnant due to consented sexual intercourse and the accused refused responsibility. In other instances, the older girls who spend their nights in bars drinking would allege a defilement to escape punishment from their parents for not spending a night at home. All these circumstances point to a situation of false allegations hence the need for corroboration to exonerate the innocent men.

⁷⁴ Chapter two at page 11

⁷⁵ Good News Bible, Genesis 39: 1-20. Joseph was well built and good looking young man. Portiphar's wife admired him asked him to go to bed with him. He refused but one day she caught him by the robe and forced him to have sex with her but he resisted and ran away. He left his robe in her hand. She later alerted the others that Joseph tried to rape him. She made false accusations against him because he had refused to have sex with her. He was later put in prison. Therefore, this story brings out the belief that girls and women make false accusations thus the need for their stories to be corroborated in order to avoid false accusations.

⁷⁶ By virtue of being the writer being a court official, such observations were made during court sessions.

⁷⁷ Section 131 A

Cases of defilement are very easy to allege and difficult to disprove hence the requirement of corroboration by Macferlene⁷⁸ who states that:

It is true rape and defilement are some of the detestable crimes and therefore ought severely and impartially to be punished with death: but it must be remembered, that it is an accusation easily made and hard to be proved, and harder to be defended by the accused person though never so innocent.

Once an allegation of defilement has been leveled on an accused person, it is very difficult to refute it because there are usually false witnesses called upon to support the false allegation. If corroboration were to be abolished, there would be a requirement that every allegation made by a believable complainer especially girls above the age of twelve years to go for trial. However, this would be unworkable in practice because it leads to injustice as certain complainants would be afforded an opportunity to trial while others not.⁷⁹ This would lead to more miscarriage of justice and more work for the courts. It is a well known fact that cases do take long to be disposed of in the courts of law and to burden the courts with more would lead to unnecessary delays and injustice.

Defilement is one of the most shameful offences that one can ever be accused of. The offence tends to tarnish the moral image of a person whether they are found guilty or not. Due to this risk to the good moral standing of men in society, there should be a higher standard accorded to girls who allege that they were defiled. This is because a sexual offence is a serious offence; it touches upon a person's reputation for the rest of his life.⁸⁰ The accusations also go against a person's freedom in society.

⁷⁸ Macferlene B, Historical Development of the Offence of Rape (London, Bar Association, 1993) at 120

⁷⁹ Scottish Law Commission Discussion Paper on Rape and other Sexual Offences, January 2009

⁸⁰ Sherphardson, wigmore on Evidence, London, Sweet & Maxwell, (1967) at 324

Although it is argued that defilement cases involve only the victim and the perpetrator, it should be acknowledged that it is more likely that they will be forensic evidence which is corroborative. Therefore corroboration should remain in our law as a safeguard against wrongful convictions.

CONCLUSION

The chapter has discussed Section 122 of The Juveniles' Act which is the basis of corroboration in Zambia. This section makes it mandatory for the evidence of a child aged below fourteen years to be corroborated. This chapter has also given the reasons for the justification of corroboration in defilement cases. From the reasons discussed, it can be deduced that the main reason for the necessity of corroboration in defilement cases is that it acts as a safeguard against wrongful convictions. For this reason, the law as it stands in Section 122 of The Juveniles Act serves the needs of the Zambian society.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

1. Introduction



This chapter provides an overview of what has been discussed in relation to the aims of the research. The chapter gives a summary of the rationale for corroboration in defilement cases. It gives a brief outline of the nature of corroborative evidence required in defilement cases. It also gives recommendations drawn from the research.

2. Conclusions

The dissertation has given a comprehensive review of corroboration and includes such recommendations that may improve the application of corroboration rules by the courts. The dissertation has provided a general view of the subject of corroboration and its rationale in defilement cases. It has been observed that corroboration rules were formulated in order to avoid the false implications of the accused persons taking into consideration the seriousness of the cases. Due to the immaturity of a child's mind, corroboration is needed in defilement cases before a conviction can be sustained.

By giving the position of corroboration in other jurisdictions, the research has shown that a number of countries have either abolished the rules on corroboration or developed them. Zambia, on the other hand, has reformed corroboration rules making it mandatory that the evidence of a child below the age of fourteen be corroborated.

This research has given a critical analysis of what constitutes corroboration in defilement through case law. Some pieces of evidence may, such as early complaint by the victim to an independent not constitute corroborative evidence however, this is necessary as it leads to

consistency of the complainant's evidence. Other pieces of evidence such as distressed condition of the victim amount to corroborative evidence, however, they are not conclusive as to point out to the offender.

The research has given the current position of the law in Zambia in regards to corroboration and concludes that the law is adequate for the Zambian society and that in order to avoid injustice, corroboration must be maintained.

3. Recommendations

Considering the subject of corroboration as an important one in the criminal justice system, the following are the recommendations:

3.1 Reinforced corroboration Rules.

There is need for mandatory DNA testing to enable identification of the perpetrator of crime based on DNA evidence at the crime scene. Currently, the equipment is available however, the police are not exploiting this facility. DNA testing is expensive as each service provided by the University Teaching Hospital has to be paid for.

3.2 Mass sensitization

There is need for the government and Non Governmental Organisations to sensitise the public on the importance of prompt report of defilement cases and the need for parents to be open to discuss sex related matters with their children in order for them to be free and report immediately if such offences are committed against them. Although there are some organizations doing so, not all the parts of Zambia are visited. There is therefore need for Social Welfare Department to visit all parts of the country to sensitise the community on the importance of prompt reports.

3.3 Medical equipment

The hospitals need modern equipment that can be used to determine whether the accused is the one that committed the offence based on tests like presence of spermatozoa, blood and other traces of evidence that can easily be gathered at the scene. For example, in Lusaka Province, the only University Teaching Hospital is the only one that attends to victims of defilement. If a defilement case is reported at a clinic, the victim is referred to UTH because of lack of qualified medical staff as well as equipment. There is therefore need to equip the surrounding clinics with medical equipment and qualified staff.

3.4 Education and Training

From time to time, there is urgent need to train the investigators, prosecutors and magistrates on the subject relating to corroboration. Some investigators are unaware of the various pieces of evidence that constitute corroboration. There is therefore need to recruit experienced and professional prosecutors and investigators with specific focus on sexual offences. Training should be ongoing.

3.5 Documentation training

Documentation of evidence is a critically important part of proper medical care. Documentation must be complete and precise. For example the medical form used on reports of defilement and medical examination must be completed accurately with attention to detail. A brief conclusion should be made on completion of the general examination as well as the genital examination.

3.6 Mandatory medical examination

The government should consider enacting a law that makes it mandatory for the suspected offenders in defilement cases to undergo medical examinations such as DNA. The use of DNA would be of great help in identifying the offenders with certainty.

3.7 Introduction of fast track courts

The government should consider introducing fast track courts that will deal with cases of defilement within a short period of time. This will enable the victims of defilement testify while the memory is still fresh as a child tends to forget easily due to the immaturity of the mind.

BIBLIOGRAPHY

BOOKS

1. Collingwood J.J. *Criminal Law of East and Central Africa*. (London, Sweet & Maxwell, 1976)
2. Cross R, *Cross on Evidence*, (London, Butterworth, 1975)
3. Heydon, *Evidence, Cases and Materials* (London, Butterworth, 1975)
4. Kulusika S.E *Text, Cases & Materials on Criminal Law in Zambia*, (Lusaka, UNZA Press, 2005)
5. Nokes G.D. *An Introduction to Evidence*, (London, Sweet & Maxwell, 1967)
6. Sherphardson, *Wigmore on Evidence*, (London, Sweet & Maxwell, 1976)