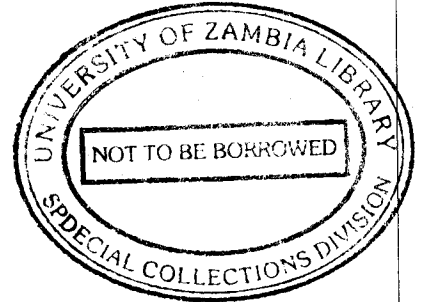


**A CLOSER LOOK AT THE LAW ON RAPE WITH
REGARDS TO MARRIAGE.
(WHY MARITAL RAPE IS NOT POSSIBLE IN ZAMBIA)**

BY



Mtonga .H. Patrick

**Submitted to the University of Zambia in partial fulfillment of the
examination requirements for award of the degree of the bachelor of
laws (LLB).**

The University of Zambia

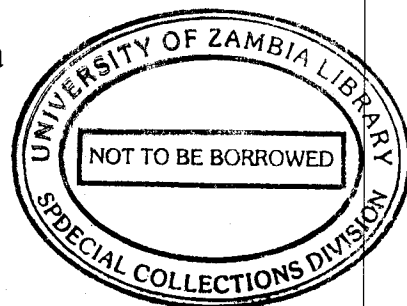
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**A CLOSER LOOK AT THE LAW ON RAPE WITH
REGARDS TO MARRIAGE.
(WHY MARITAL RAPE IS NOT POSSIBLE IN ZAMBIA)**

**Be accepted for examination. I have checked it carefully and I
am satisfied that it fulfills the requirements relating to format
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5th December 2005

Date

A handwritten signature in black ink, appearing to be 'S. E. Kulusika', written over a horizontal dotted line.

Simon E. Kulusika

SUPERVISOR

DEDICATION

To the loving memory of my late father, Leighton Mtonga (Sr), who past away on the 25th October, 1999. Throughout my life you did for me the very best that was humanly possible within your very limited resources and you therefore take credit for any good that will ever come out of me, while any shortcomings in my life shall be entirely my fault.

I wish you where here with me today. You will always be remembered.

This dedication would be incomplete and meaningless if i omit to recognise and acknowledge the Almighty Lord's continued intervention and favour in my entire life.

It is you Lord who gave my mother, Esther Banda Mtonga the strength to go on and educate and guide me even after the death of her true love.

I thank you dear Lord for your grace, favour and love you have given me.

ACKNOWLEDGEMENT

I wish to acknowledge my very profound gratitude to my supervisor Mr Simon. Kulusika lecture in the school of law at the University of Zambia, who kindly supervised this study, for your guidance and patience.

You did the very best that you possibly could within your means and I remain absolutely accountable for any mistakes and shortcoming in this work.

Mum, Leighton (Jr) and Midlam, you merit special gratitude for your understanding, encouragement and emotional support while I struggled with this work. You encouraged me to soldier on even when I lost hope.

Mwape Angela Kateka, you are indeed a special friend. I am the luckiest man in the world to have you for my girlfriend. You not only gave me emotional support but you also gave me your time by typing for me, proof reading my work and you even cooked for me. You gave me emotional and

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Andrea Masiye and company, for the use of your office computers. You allowed me to use the internet during my entire research. This was most hopeful in that most of my work was done using the internet. Thank Mr. Masiye and Mr.Lungu for your understanding and guidance.

My room mate, Kasonde, you critically analysed my work. You also ensured that I was not disturbed during my studies. Thank you very much big brother.

My entire class, for informing me when I became too playful. Please accept my heartfelt gratitude and I shall forever remain indebted to you.

To all of you all, I say once again thank you very much for everything and may the good Lord Almighty bless you abundantly. You all did the very best

you could and I remain absolutely responsible for any failures and shortcomings in this work.

Mtonga.H.Patrick
University of Zambia
Lusaka.
November, 2005

PREFACE

Rape is a sensitive crime which evokes and attracts public outrage in most societies in the world. It generally involves a man having carnal knowledge with a woman without her consent.

In most countries around the world and Zambia inclusive, a husband had immunity against the rape of his own wife. In fact, rape in marriage was not recognised in these countries.

However, this immunity has been eliminated in some countries due to the negative effects it had on a woman. This immunity has also been eliminated in the English legal system. The elimination of this immunity has led to the recognition of marital rape in these legal jurisdictions and hence criminalizing it.

In Zambia, the husband's immunity against the crime of rape has not been eliminated. Hence in Zambia, marital rape does not exist.

This work, therefore attempts to discuss the reasons why marital rape cannot exist in Zambia.

DECLARATION

I, Patrick H. Mtonga (Computer Number: 20041845) declare that the information contained in this obligatory essay is enterly my research and that I have made due acknowledgement of other sources of material used in this research.


.....

PATRICK H. MTONGA

06/12/05
.....

DATE

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STATUTE

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CHAPTER ONE

DEFINITION OF RAPE

In Zambia rape is an offence which is punishable by imprisonment for life.¹ The Zambian Penal Code defines rape in Section 132 as:

“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 threat or intimidation of any kind or by fear of bodily harm, or by means of false misrepresentation as to the nature of the act, or in the case of a married woman, by personating her husband...”

In order to understand what the offence of rape is there is need to divide this definition into two major components namely: the actus reus and mens reus

¹ Section 133 of the penal code CAP.87 of the Laws of Zambia.

Actus Reus of rape

The actus reus of rape can be divided into three components.² These components include unlawful sexual intercourse, carnal knowledge and the absence of consent.

The phrase “unlawful sexual intercourse” or “unlawful carnal knowledge” has meant in the past that the offence could not be committed by a husband upon his wife. This view was stated by Hale³ that “the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract”

It is because sexual intercourse between husband and wife is sanctioned by law then it follows that all other intercourse outside marriage is unlawful⁴.

This view was upheld in the case of R. v. Miller,⁵ where Lynskey J after a careful examination of the authorities, concluded that Hale’s proposition was correct and that the husband who was charged with rape, had no case to

² Smith and Hogan (1973) **Criminal Law** 3rded, Page 324-326

³ 1P.C 629 cite on page 324 ibn Smith and Hogan **Criminal Law** (1973)

⁴ Cf Chapman (1959) 1Q.B. 100

⁵ (1954) 2 Q.B 282

answer. The facts of this case were that, the wife committed an act of adultery as a result of which a child was born in December 1951. The accuser condoned that act of adultery as he allowed his wife to continue living with him. Then in January 1952, the wife left the accused because according to her he said that he would be harsh to the child born in December and who was living with them. The wife then issued a petition for divorce but before the petition could be heard the husband had sexual intercourse with his wife without her consent. It was held that since the two were still married and no separation order nor judicial separation and no agreement to separate was granted, the application of a petition had no effect on the consent of the wife as the petition could have either been accepted or rejected.

Hence according to law the wife still consented to sexual intercourse with the husband. It was further held that the offence of rape could not stand due to the fact that the act by the accused was lawful as he was the husband of the woman and also because consent was present by matrimonial consent. Therefore, the charge of rape could not stand.

However, in the case of R v R,⁶ this old rule of the common law has now been eliminated from the English Legal System. The facts of this case are that a husband and wife were having matrimonial problems. The wife left her husband and went to live with her parents. She left a note at the matrimonial home saying she was going to petition for a divorce. Some three weeks later the husband forced his way into the house of his wife's parents who were out at the time and attempted to have sexual intercourse with his wife against her will. In the course of doing so he squeezed her neck and therefore, assaulted her. He was tried, amongst other things, for attempted rape. His defence was that he could not in law commit rape or attempted rape upon his wife as her consent was presumed. He was convicted, the trial judge following an existing rule that rape could take place if the wife had ceased as, in this case, to live with her husband. Nevertheless, the husband appealed saying there could be no rape of a wife in the absence of a court order of divorce or separation or separation agreement.

The House of Lords eventually heard the appeal and held that a husband could rape his wife if he had intercourse with her without her consent even if they were not divorced or separated but were cohabiting. It was

⁶ (1991) 4 All ER 482

unacceptable that by marriage a wife submits to sexual intercourse in all circumstances. The House of Lords further held that the phrase "unlawful sexual intercourse" is to be no longer treated as meaning "outside marriage" since it is clearly unlawful to have sexual intercourse with any woman without her consent.

However, Zambia still follows the old common law rule laid down by Sir Mathew Hale. Hence in Zambia a husband cannot be guilty of raping his wife. This law has affected marriage life in various ways but will be discussed in the next chapter.

In Zambia and in other common law Jurisdictions, a husband can be convicted for aiding and abetting the rape of his wife as was held in the case of DPP .v. Morgan.⁷

The second element of the actus reus of rape is that of the occurrence of sexual intercourse. To prove rape it is necessary to show that the defendant had sexual intercourse with the victim.

⁷ (1975) 2 All ER 347

This includes any degree of penetration of the penis into the vagina. Thus in the case of R. v. Gaston,⁸ it was held that oral sex without the consent of the woman or girl could not amount to rape but rather, only amount to indecent assault.

Therefore, if a man forces his fingers into a woman's vagina without her consent then that is only indecent assault due to the fact that there has been no penetration by his penis into her vagina.

It must be noted that it is not necessary to prove that the hymen was ruptured but rather the slightest penetration will suffice. Hence the slightest penetration of a man penis into the vagina will amount to rape if it can be proved that it occurred without the woman's consent.

In proving the occurrence of sexual intercourse without woman consent, it is not necessary to prove the completion of the intercourse by the emission of the seed, but intercourse or carnal knowledge shall be deemed completed upon proof of only penetration.⁹

⁸ (1981) 79 Cr App R 164

⁹ Smith and Hogan (1973) **Criminal Law** 3rd Ed Page 324

Therefore, it is no defence for a man to say that he did not ejaculate and hence should not be convicted of rape. All that is needed to convict him of the crime of rape is to prove that he penetrated her vagina with his penis without her consent.

The final element of the actus reus of rape is that the absence of consent. When a man has carnal knowledge with a woman without her consent, it amounts to rape. However, even with existence of consent, rape can still exist. Section 132 of the Penal Code¹⁰ does not give situations when consent is negated and hence a man can still be convicted for rape.

One such a situation is where the victim is unaware that she is submitting to sexual intercourse because, for instance, she has been convince by the defendant who misrepresents to her the nature of act, as in the case of Williams¹¹ where he taught singing to a 16 year old female. He told her that he wanted to perform an operation that would improve her singing voice. The girl allowed him to have intercourse with her and made no resistance. She believed what he said and in any case was not mature enough to know that he was having sexual intercourse with her. She did not know that what they

¹⁰ CAP 87 of the Laws of Zambia

¹¹ (1923) 1 KB 340

were doing. He was convicted of rape and his appeal was dismissed. Lord Hewart CJ said, she was persuaded to consent to what he did... because she thought it was a Surgical operation. Therefore, there was in effect no consent.

However, it is not rape if a man procures a prostitute to have sex with him by promising to pay her money but after the sexual encounter he refuses to pay her. This point was upheld in the case of Lineakar.¹² The facts of this case were that, the defendant procured a prostitute to have sex with him by promising to pay her 25 pounds which he in fact never intended to pay. The court held that he could not be convicted of rape as he did not falsely represent the prostitute as to the nature of the act (which was sexual intercourse), but rather he refused to honour the contract and hence could not be convicted for rape. Furthermore, this contract could not be enforced by law as it was an illegal contract.

Consent can also be negated if a man has sexual intercourse by personating a married woman's husband. In the case of R .v. Young,¹³ a man who intruded into a bed in which a married woman was sleeping with her husband in the

¹² (1995) 2 Cr App Rep 49

¹³ 14 Cox CC114 cited by R .v. Mpolokoso

night and proceeded to have intercourse with her while she slept. He was convicted of her rape.

It hence must be stated that if the victim does not consent for whatever reason the actus reus occurs. In the case of Larter,¹⁴ it was held to be rape for a man to have carnal knowledge with a 14 year old girl who appeared to have been asleep through out the entire episode.

It is no defence that the woman did not resist when the man tried to have sexual intercourse with her provided that she was asleep, as she was incapable of resisting. This point was held in the case of R .v. Mayers¹⁵

This consent by the woman must continue while the intercourse is in progress, that is the consent must continue through the whole entire act¹⁶.

Thus during the sexual intercourse when a woman decides to withdraw her consent and a man continues to insert his penis into her vagina then that constitutes rape.

¹⁴ (1995) Crim LR75

¹⁵ Cited by Robinson, Ag in R .v. Mpolokoso 2 NRLR 152

¹⁶ Smith and Keenan (2000) **English Law** Page 618

Mens Reus.

The Mens reus of rape is an intention to have sexual intercourse with a woman knowing that she does not consent or being reckless whether she consent or not.

Where the defendant knows that the victim might not be consenting but has intercourse anyway or goes on to have intercourse that behaviour may amount to the necessary recklessness¹⁷. It is possible, however that a man might have intercourse believing that the woman does consent whereas in fact she does not¹⁸. He might suppose she was consenting whereas in fact she was asleep in a drunken stupor,¹⁹ or an idiot not capable of giving or withholding consent.

In the case of DPP .v. Morgan,²⁰ Morgan and his three companions were members of the Royal Air Force. Following a drinking session, Morgan took the three men home to have sexual intercourse with his wife. He told them she might resist because that is the way she gets sexually stimulated. When they got to Morgan's home, Mrs Morgan was in bed asleep in her bed. She

¹⁷ R .v. Satriam (1983) 78 Cr App R 149

¹⁸ Per Denman in Flattery Case cited by Smith and Hogan (1973) **Criminal Law** 329

¹⁹ Smith and Hogan (1973) **Criminal law**, Pg 329

²⁰ (1975) 2 All ER 347

was frog – marched to another bedroom and laid on a double bed. Each of her arms was held and her legs were held apart. All three men then had sexual intercourse with her. When they had finished and left the room Morgan had intercourse with her himself. Mrs Morgan immediately left the house and went to a nearby hospital. She said she had done all she could to resist. They three men were charged with rape and all four with rape and with the aiding and abetting the rape.

It was held by the House of Lords that, the crime of rape was committed by having sexual intercourse with a woman with the intent to do so without her consent or with reckless indifference as to whether she consented or not.

The test of recklessness is subjective and not objective because if the defendant believes that the woman is consenting, that belief need not be based on reasonable grounds. It was further held that there was no subjective belief in the circumstances of the case that Mrs Morgan was consenting and so the conviction of rape and aiding and abetting rape was upheld.

Hence, in order to prove the offence of rape one must prove the presence of all the elements of actus reus of the crimes of rape, and upon proving this, the prosecution must prove that the defendant did in fact have the required mens reus for the crime. If this is proved then it follows that one can be convicted for rape and in accordance to section 133 of the penal code is liable to imprisonment for life.

CHAPTER 2

HUSBANDS IMMUNITY AGAINST THE CRIME OF RAPE

In most commonweath countries and Zambia inclusive a husband has immunity against the crime of raping his own wife. This immunity was first stated many years ago in Hale's *plea of the crown*. There it was said that:

“a husband cannot be guilty of rape upon his wife for by their mutual matrimonial consent and contract the wife hath given herself in this kind to her husband which she cannot retract.”²¹

It can be stated that Sir Mathew Hale founded the proposition that a husband could not be guilty of rape upon his lawful wife on the grounds that; firstly on marriage a wife "gave" up her body to her husband; and secondly, that on

²¹. History of the Pleas of the Crown, 1st ed. (1736), vol. 1, ch. 58, p. 629 and also Cited by Lynskey,j in R.v.Miller (1954) 2QB 282

marriage she gave her irrevocable consent to sexual intercourse. These two grounds are similar, though not identical.

The theory that on marriage a wife gave her body to her husband was accepted in matrimonial cases decided in the Ecclesiastical Courts. Thus in Popkin v. Popkin²², Lord Stowell, in a suit by a wife for divorce stated that, at p. 767:

"The husband has a right to the person of his wife, but not if her health is endangered."

These concepts of the relationship between husband and wife appear to have persisted for a long time and may help to explain why Hale's statement that a husband could not be guilty of rape on his wife was accepted as an enduring principle of the common law.

In short, by virtue of the fact that a woman agrees to marry a man, she on the wedding day gives her consent to having unlimited carnal knowledge with her husband. It is for this reason that a husband cannot be guilty of raping his own wife.

²². (1794) 1 Hag. Ecc. 765n, at p. 767:

This view of the law was so generally accepted that there was no recorded prosecution of a husband for having carnal knowledge with his wife when she expressly denied to have sex with him.

Byrne, J in the case of R .v. Clarke,²³ accepted Hale's statement as being generally correct but held that an indictment would lie in that case, because the justice had made an order providing that the wife should no longer be bound to cohabit with the accused. He further stated that:

“the position therefore, was that the wife by process of law namely by marriage had given consent to the husband to exercise the marital right during such a time as the ordinary relation created by the marriage contract subsisted between them, but by a further process of law namely the justice order, her consent was revoked.”²⁴

²³ (1949) 2 All E.R 448

²⁴ .ibid

In Reg. v. O'Brien,²⁵ Park J. ruled that a decree nisi effectively terminated a marriage and upon its pronouncement the consent to marital intercourse given by a wife at the time of marriage was revoked:

"Between the pronouncement of a decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality. There can be no question that by a decree nisi a wife's implied consent to marital intercourse is revoked. Accordingly, a husband commits the offence of rape if he has sexual intercourse with her thereafter without her consent."

This simply means that a husband does have immunity against the rape of his own wife, but this immunity will cease to exist when a separation order is issued or if a divorce nisi is issued. However, in the absence of such court orders the husband's immunity continues to exist. Lynskey in the case of R v. Miller,²⁶ after a careful examination of the authorities, concluded that Hale's proposition was correct and that the husband who was charged with rape of his own wife had no case to answer. In this case the wife had presented a petition for divorce before her husband had sexual intercourse

²⁵ (Edward) [1974] 3 All E.R. 663, 665

²⁶ (1954) 2Q.B 282

with her. Lynnskey, J held, distinguishing the Clarke case²⁷, that that was immaterial. He said obitar, that if there had been an agreement to separate, particularly if it had contained, non molestation clause the wife's consent would have been revoked.

The law does not however, leave the wife defenceless against violence by her husband. In the Miller case²⁸, Lynskey held that though the husband had a right to sexual intercourse with his wife, he was not entitled to use force or violence in order to exercise that right, for if he does so he may make himself liable in criminal law, not for the offence of rape, but for whatever other offences the facts of the particular case warrant. If he should wound her, he might be charged wth wounding or causing bodily harm or he may be liable to be convicted of common assault.

²⁷. (1949) 2 All E.R 448

²⁸. (1954) 2Q.B 282

CHANGES IN LAW REGARDING HUSBANDS IMMUNITY AGAINST THE CRIME OF RAPE

Some countries have modified, changed and in some cases even repealed law that gives effect to the existence of a husband's immunity against the crime of rape on his own wife. This law that gives a husband such immunity has also been repealed even in the English legal system. It was repealed in the landmark case of R. v. R.²⁹

The facts of the case are these. The appellant married his wife on 11 August 1984. They had one son who was born in 1985. On 11 November 1987 the parties had separated for a period of about two weeks before becoming reconciled. On 21 October 1989, as a result of further matrimonial difficulties, the wife left the matrimonial home with their son, who was then aged four, and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs and indeed had left a letter for the appellant in which she informed him that she intended to petition for divorce. However, no legal proceedings had been taken by her before the incident took place which gave rise to these criminal proceedings.

²⁹ (1991) 4 All ER 482

It seems that the appellant had on 23 October spoken to his wife by telephone indicating that it was his intention also to "see about a divorce."

Shortly before 9 o'clock on the evening of 12 November 1989, that is to say some 22 days after the wife had returned to live with her parents, and while the parents were out, the appellant forced his way into the parents' house and attempted to have sexual intercourse with the wife against her will. In the course of that attempt he assaulted her, in particular by squeezing her neck with both hands. That assault was the subject of count 2. The appellant was interviewed by the police after his arrest and admitted his responsibility for these events as his eventual plea of guilty indicates. The only other matter which need be noted is that on 3 May 1990 a decree nisi of divorce was made absolute.

The question which the judge had to decide was whether in those circumstances, despite her refusal in fact to consent to sexual intercourse, the wife must be deemed by the fact of marriage to have consented.

The House of Lords held that a husband could rape his wife if he had intercourse with her without her consent even if they were not divorced or

separated but were cohabiting. It was unacceptable that by marriage a wife submits to sexual intercourse in all circumstances. The House of Lords further held that the phrase “unlawful sexual intercourse” is to be able treated as mere surplusage and no longer meaning “outside marriage” since it is clearly unlawful to have sexual intercourse with any woman without her consent.

In the United States of America the husband’s immunity was eliminated in 1995. Other countries that have removed this immunity include Canada, Victoria, New South Wales, Western Australia, Queensland, Tasmania and notably in New Zealand.³⁰

The elimination of this immunity a husband enjoyed means that marital in these countries does exist and is a crime. It further means that law in these countries does recognise the existence of marital rape or wife rape. In short in these countries a husband can be charged for the rape his own wife. It entails that a wife must expressly consent to having carnal knowledge with her husband. If he does have carnal knowledge without her consent then he

³⁰ R. v. R (1991) 4 All ER 482

has committed the crime of marital rape. It is committed when a husband has sex with his wife without her consent.

However, some countries like Zambia still recognise the existence of the husband's immunity against the crime of rape.

REASONS WHY MARITAL RAPE DOES NOT EXIST IN ZAMBIA

(1) Statutory definition of rape

Section 132 of the penal code defines rape as:

‘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 threat or intimidation of any kind, or by fear of body harm or by means of false...’

Smith and Hogan have argued that the term unlawful in this context probably means simply intercourse outside the bond of marriage.

“Sexual intercourse between husband and wife is sanctioned by law and hence all other sexual intercourse is unlawful.”³¹

Furthermore, from the statutory definition of rape one of the elements of the actus reus of rape is the absence of consent. As stated by Sir Methew is that in marriage, consent is presumed to be given and this presumption can only be rebuttable when an order of separation,³² or decree nisi,³² is granted. Hence the statutory definition of rape excludes rape in marriages is sexual intercourse of husband and wife is not only lawful but also with consent.

(2) Cultural reasons

Another reason why marital rape cannot exist in Zambia is because of cultural reasons. African tradition emphasizes on women’s obligations rather than their rights. One such traditional obligation is to give in to sex when the husband demands of it. This obligation is taught to females at a tender age, just when they become of age during initiation ceremonies. Such teachings are further reinforced just before a woman gets married.

³¹ perkins, criminal law, 115 cited by Smith and Hogan (1973) criminal law, 324

³² see Rex v. Clarke [1949] 2 All E.R. 448)

³² see Reg v. O’Brian (Edward) [1974] 3 All E.R. 663

Hence tradition teaches women that when they get married one of their main obligations is to give in to sex whenever their husbands demand of it.

Furthermore, males in traditional societies are taught that once they get married sex is one of the rights they will enjoy. Males are taught that in marriage a woman has no right to say no to sex for it is not for her to make such decision. The right to make such a decision is only given to the husband. Traditional culture only places an obligation on the wife to obey the husband's demands for carnal knowledge.

It is because of such cultural beliefs in traditional African societies that there is always a presumption of consent to sexual intercourse between husband and wife. Since sexual intercourse between husband and wife is the husband's a right, it follows that the husband does not need his wives permission to exercise his marital right. This presumption is only rebutted when a divorce is granted.

Furthermore, tradition encourages wives to endure hardships and self sacrifice and not to challenge their husband's authority. According to

African tradition, a woman does not have an individual right to body integrity when she is married. Hence it is not possible for one to rape himself.

It is because of such cultural beliefs that marital rape in Zambia cannot exist. Such cultural beliefs have a huge impact on the law on rape. Culture has such a huge effect on law, that if a law was to be passed to the effect of making rape possible in marriage then such a law would be very difficult to enforce due to the influence of culture on people. An interview with the head of the victim support unit in Lusaka Mr Kanuka reviewed,³³ that one of the difficulties such a law would encounter is that of collection of evidence to prove the occurrence of such a crime. According to African societies, what happens in the bedroom between husband and wife should remain between the two of them. Hence very few women will be willing to review that their husbands had carnal knowledge with them without their consent for fear of being labelled as uncultured.

³³ Direct interview at Victim Support Unit Head Office in Lusaka

Another difficult which would be faced, if a law was enacted to the effect of making marital rape possible is that of the proving of the absence of consent. At common law and by statute, consent can be express or implied. However, the exposition of female consent placed in the context of English law as discussed in the previous chapter seems to suggest that female consent to sexual intercourse must only be expressed in order to preclude the crime of rape. If such a law was enacted husbands would not only be forcibly accused but also wrongfully convicted. It is conventional wisdom and common knowledge cutting across time and space that women are generally not known to give open, vivid and express consent to sexual intercourse, no matter how much they desire it themselves. They display a natural and inherent propensity towards sketchy resistance to any sexual advances even when they themselves solicit it.

African traditional society socializes girls and women to be feminine and reserved by simulating resistance to all sexual advances all the time even when they themselves desire it. It is unfeminine and a taboo for an African woman to expressly say 'yes' to a love proposal. African women are trained by society from childhood to always refuse and shy away

behind sketchy and pretentious gestures of protest in line with the perceived norms of femininity. An African woman expects the man to be patient with her resistance and to push on. If he gives up, she is frustrated and the man is considered not man enough.

Traditional female consent is, therefore, passive and is expressed by passively giving in or letting things happen. The woman invariably takes pleasure and pride in the feeling of 'not being easy' or 'loose' through being 'forced into submission.

Under these circumstances, a man has to infer the female consent from conduct, which can sometimes be misleading. You do not know when she is being a 'lady' and feigning resistance and when she is genuinely refusing consent, since in both cases her conduct is much the same. The husband might reasonably and genuinely mistake her equally genuine refusal with the usual and familiar feminine pretences of resistance and consequently indicted for rape. Hence enacting such a law would cause more injustice than justice.

(3) Dominance of Men in key government positions

Most of the key government positions are held by men, hence women do not have an equal representation in government. Parliament is the law making body of government. It is made up of the president and the national assembly. This law making organ of government is dominated by males to the point that, Zambia has never had a female president. Furthermore, the national assembly has never had over twenty five percent of female representation from the time it was created.³⁴

An illustration of this gender inequality can be seen from the fact that out of the one thousand one hundred and ninety eight parliamentary candidates for the 2001 parliamentary election, two hundred and two were women and only nineteen of these female candidates were elected.³⁵

It is because of such unequal representation in decision making process that, it is very difficult for parliament to pass a law that will remove an old customary privilege which is only beneficial to men. It must be however, noted that there are a few females in top government position.

³⁴ www.un.org/new/doc.

³⁵ *ibid*

However, these few cannot adequately represent the needs of all the women in Zambia.

(4) Lack of social pressure

There is a misconception by people that law will provide all solutions. If there is a conflict or dispute for instance in marriage, one is advised by friends and relatives to seek recourse in law. This view is wrong, law will not provide answers to all problems in life. Law should only be viewed as an instrument of social change. Social change and legal change are related in that social conditions can impact on the law. In a democratic country like Zambia, social change can be achieved through the legal process. In order for legal change to occur there is need for public pressure to demand for such a change. Therefore, in order for there to be change in law regarding a husband's immunity against the crime of rape, there must be a social change and pressure existing. Women need to change from the old cultural beliefs and demand that this immunity should be removed. Women's lobby groups need to advocate for the removal of such immunity. Married women need to speak out about the existing horrors of this immunity, if any based on their experiences. For if they do not voice out the law will not change on its own.

In the United States of America, because of social change and pressure from the feminists and women's lobby groups, the law regarding a husband's immunity has been modified and even repealed in some states.³⁶ These feminists argued in public, vociferously and systematically that economic and political equality would not be achieved if married women are not granted a right to set the terms of marital intercourse.³⁷ These feminists spoke in public about the negative effects of such a law on a married woman and even her children. This led to the existence of public pressure and a change in the attitudes of the American women. Women came out in the open and reviewed their horrific experiences of such a law. It was because of such public pressure and the social change, that the law regarding a husband's immunity against the crime of rape was modified and even repealed in some states.

Hence, until there is an existence of social change which is coupled with public demand for the change of such a law, the husband's immunity against the crime of rape will continue to exist.

(5) Other reason

³⁶ Manderson and Bennett(2003) *Violence against women in asian societies*, Pp194

³⁷ Jill Elaine Hasday(2003) Contest and Consent: A Legal History of Marital Rape

Other reasons include: religious beliefs and also the lack of availability of statistics if any of the the harm and dangers caused by such immunity.

It must be stated that because of all the reasons stated above, marital rape cannot exist in Zambia and in most African Societies and until the cultural beliefs of the people are changed marital rape will never exist in Zambia.

CHAPTER 3

The effect of the existance of the husbands immunity against the crime of rape of his own wife

There are two lines of argument about the effect of the existance of the husband's immunity against the rape of his own wife. The first one states that the immunity has a positive effect on the institution of marriage and hence such immunity should be maintained in order to preserve the peace enjoyed in marriage. The second line of arguement states that the existance of such immunity has a negative impact on the institution of marriage and hence such immunity should be eliminated. In order to fully understand the effect of such immunity, this chapter will discuss both lines of arguement in depth.

Supporters of the existance of the husband's immunity against the rape of his own wife argue that it strengthens the family. They argue that it strengthens the family by protecting the privacy of the institution of marriage and also by promoting marital harmony and reconciliation. Marital

disputes remain private and hence giving time for parties to reconcile. This line of thought states that reconciliation is possible in that legal intervention in the form of the courts of law is avoided.³⁸ This line thought states that, if the courts intervene the matter becomes one between the accused and the state. This makes reconciliation between the husband and wife impossible. Even if a wife forgives her husband, if he is found guilty by the courts of law, he will still be arrested and sent to prison.

A wife might forgive her husband for forcefully having carnal knowlegde with her without her consent, but a husband will find it very had to forgive his wife for having reported him to the police. Furthermore, his experience in prison even makes the situation worse. Due to his experience in prison he is most likely to develop a strong feeling of resentment and anger towards his wife for having reported him.

Hence, supporters of the existance of the husband's immunity argue that the intervention of the courts of law in the institution of marriage would destroy the marriage and not strengthen it. The courts intervention in the institution of marriage would destroy it in that, wives would have to be made to witness

³⁸ direct interview with High Court Judge phillip musonda

against their husbands, the man whom they have children with. This intervention would cause more harm than good as relatives of husbands would develop anger for the action of the wife and even blame her for the situation their relative is in. The anger could even lead to fights between relatives of the husband and relatives of the wife.

The children would even blame their mother for them not having a father present during all their stages of childhood development. The situation would even be worse if the husband was the breadwinner and his arrest and sentence leads to the change in life style due changes in the financial earning of their household.

These children would even blame their mothers for the stigmatisation they would face as a result of their father being arrested. Children would be stigmatised at their schools and even in their communities. People would always remind them of what their father and mother did. These children would be labelled as children of an uncultured mother and father. Hence, such a law would destroy the very institution it seeks to protect.

Supporters of the husband's immunity against the crime of rape of his own wife further argue that the immunity gives time for parties to reconcile and hence strengthen the family. If the couple still fails to come up with a solution, they engage the use of a close elderly relative. He brings to the table the advantage of communicating one's point of view in a way free of anger and hence helps the couple come up with a lasting solution. A wife can use him to communicate to the husband that he should reduce on his demand for carnal knowledge in a peaceful manner. His style and skill in resolving family disputes help to preserve the institution of marriage.

These supporters further argue that it is because of such immunity that the institution of marriage is preserved.

However, supporters against the existence of the husband's immunity against the rape of his own wife argue that this immunity causes more harm than good. They argue that it leads to the failure by the courts of law to recognise the existence of marital rape or wife rape and its negative effects on the wife, children and even the accused himself. They argue that wife rape in fact does exist in marriages. They define wife rape as sexual acts committed without a person's consent and or against a person's will when the

perpetrator is the woman's husband.³⁹ The argue that when a woman expressly refuses to have sex then it follows that if her husband still has carnal knowledge with then he has raped his wife.

They argue that marital rape and other forms of violence have a significant impact on health of the woman. This impact on the woman's health can be divided into two categories namely: physical effect and psychological outcome. Physically marital rape causes harm, to the heath of the woman in that, it causes women to sustain injuries as a result of this forced sex. Women who are forced to have carnal knowledge without their consent experience painful intercourse and even have vagina pains as a result of such sexual assault by their husband's.⁴⁰ Other physical effects of marital rape include; vagina bleeding, anal bleeding, pelvic pains, injuries to the vagina and anal areas, laceration bruising, torn muscles.⁴¹

Specific gynaecological consequences of marital rape include vaginal stretching, miscarriges, still births, bladder infection infertility, and the

³⁹ www.wife.spouse.marital.abuse.infor

⁴⁰ www.criminologist-marital.rape.htm

⁴¹ www.partner.violation.him

potential of contraction of sexually transmitted diseases including the deadly HIV/ AIDS.⁴¹

Another physical effect of forced carnal knowledge with their husband's is that of unwanted pregnancy.

Supporters of this line of thought further argue that women who have been battered and raped by their husbands may suffer other physical consequences such as broken bones, black eyes, injuries to the nose and even knife wounds.⁴²

These supporters also state that the psychological consequences of rape include anxiety, depression lack of sleep, eating disorders, lack of interest in sex, ideation and even post traumatic stress disorder.⁴³

They further argue that there is no evidence to suggest that victims of wife rape are less likely to experience these outcomes relative to victims of rape by a stranger. They argue that on the contrary, there is considerable evidence

⁴¹ www.criminologist-marital rape.

⁴² www.partner.violation.htm

⁴³ Kilpatrick, Edmunds, C. N., & Seymour, A. K. (1992). Rape in America: A report to the nation. Charleston, SC: Medical University of South Carolina, Crime Victims Research and Treatment Center

that the psychological consequences of wife rape victims are more severe.⁴⁴ However, due to the lack of availability of such statistic and also due fact that marital rape is not recognised in Zambia such a proposition cannot be verified.

Supporters of marital rape in America further argue that a common misconception regarding wife rape is that forced sex between husband and wife should be less traumatic as the woman was previously engaged in consensual intercourse with her husband.⁴⁵

They argue that such a conception is wrong. They further argue that marital rape can be even more traumatic for it's victims than rape occurring outside the context of marriage since the victim of marital rape experiences the additional trauma of betrayal, entrapment and isolation.⁴⁶

⁴⁴ www.partner.violence

⁴⁵ A research by Kilpatrick and colleagues in 1985 found that suicidal ideation and nervous breakdown rates were higher among victims who had experienced completed rape when compared to victims of attempted rape and other crime victims. Studies have shown that sexual assaults between intimates are more likely to result in completed rape than are assaults by strangers. These findings were verified by similar research by Ullman & Siegel in 1993(see.www.partner.violence)

⁴⁶ www.bc.edu/school/law/lawreview/metal-element

The also argue that compared to women rape by strangers and those whom they dont know well, marital rape survivors have a higher rate of anger and depression.⁴⁷

It must be stated that due to the fact that marital rape does not exist in Zambia or is not recognised such propositions made by the supporters of marital rape cannot be proved.

It is hence clear that the consequences or effect of the existance of the husbands immunity in Zambia is that marital rape is not recognised and until proven otherwise, such an immunity works strengthens the institution of marriage. It must also be stated that the removal of such immunity would in fact increase the number of people infected with the deadly HIV/AIDS virus. This is due to the fact that if women refuse to have carnal knowledge with their husbands, these men would leave their marital homes in search for prostitutes with whom to have sex with. This in the end will not only lead to an increase in the number of HIV infections in the country, but will also destroy the institution of marriage leaving alot of children ophans. Such a law would definately destroy the moral fibre of society.

⁴⁷ www.new.criminologist-marital.rape

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

This essay has undertaken to analyse what the law on rape provides with regards to marriage and also whether there is a possibility of changing such a law.

The law on rape in Zambia unlike in the United States of America does not recognise the existence of marital rape. This can be established from the fact that the statutory definition of rape expressly excludes rape between husband and wife by demanding that one of the elements of marital rape is that, the sexual act should be unlawful. This simply means that unlawful sexual intercourse which occurs in marriages is excluded. Furthermore, Zambia still follows the old common law principle laid down by Sir Mathew Hale that provides that a husband has immunity against the rape of his own wife. Until a statute in Zambia is passed to repeal such a common law principle marital rape will never exist or even be recognised.

However, if marital rape is to exist in Zambia not only should the statutory definition of rape be changed but cultural beliefs should also be changed.

If ever marital rape is to be recognised in Zambia there is need to revisit our traditional beliefs and change them. There is need to change what girls are taught when they become of age. This is also need to change what women are taught just before they get married during kitchen parties.

This change of culture beliefs should also be coupled with women advocating for the change in law. If such a law is to be changed women need to come out in public and reveal the dangers of maintaining such a law. In their demand for the change of such a law women would have to demand for the recognition of their individual rights.

In deed to remove the husband's immunity against the crime of rape is a huge and impossible task. It is impossible due to the influence of culture and custom on the lives of the people. It is also impossible due to the fact that, removing this immunity would cause more harm than good. Removing such immunity would destroy the institution of marriage.

However, this law does not give men the power to beat his wife or even wound her for if he does then it follows that he will be liable for the of common assault.

It must be further stated that women who no longer want to have carnal knowledge with their husbands should apply for a divorce. If these women are unable to fend for themselves and would like to have custody of their children it is recommend that in the application for divorce they should also plead for maintenance orders.

In conclusion, it must be stated marital does not exist in Zambia.

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