A CRITICAL INVESTIGATION INTO HOW THE CORROBORATIVE EVIDENCE ‘RULE’ IN RAPE AND DEFILEMENT CASES TRAUMATISES AND VIOLATES THE RIGHTS OF WOMEN AND GIRLS WHO ARE VICTIMS OF RAPE AND DEFILEMENT IN ZAMBIA: A STUDY CARRIED OUT IN LUSAKA CITY OF ZAMBIA

BY

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A Dissertation submitted in partial fulfilment of the requirements for a Masters Degree in Women’s Law, Southern and Eastern African Regional Centre for Women’s Law, University of Zimbabwe

2014
This study investigates how the corroborative evidence or cautionary ‘rule’ (in reality, a practice that has hardened into a ‘rule’ as a result of judicial interpretation) in sexual offences, such as rape and defilement, traumatises and violates the human rights of women and girl victims in Zambia. The study sets out to discover whether the Zambian criminal justice system adequately protects women and girl victims of rape and defilement during the process of obtaining corroborating evidence. Even though the corroborative evidence rule seems to be important to prove sexual offences beyond a reasonable doubt, it traumatises and violates the rights of women and girls, such as their rights to privacy, to be protected from inhuman and degrading treatment and to equality before the law, to access to justice and not to be discriminated against on the grounds of sex. This problematic rule is essentially founded on the empirically unfounded, gender-biased belief that women and girls are more likely to lay false charges in crimes of rape or defilement than any other crime. As a result of their entrenched prejudicial opinion of women, the courts rigorously apply the corroborative evidence rule in all sexual offences, while completely ignoring how the rule traumatises women and girl victims and violates their human rights. These negative effects of the rule are exposed by this research which focuses on the lived realities of the victims of sexual offences who, in their quest for justice, journey through a criminal justice system which forces them to interact with police officers, doctors, prosecutors, magistrates and judges whose conduct, as state service providers, fall far short of the duties placed on them by local, regional and international instruments ratified by the Zambian government. As a result, the findings of the study demand us to re-visit and determine whether the rule should be abolished completely or relaxed as some countries in the Southern African region have done. The study reveals that women and girl victims of rape and defilement suffer from severe forms of physical, mental, emotional and spiritual trauma. Trials are especially traumatising and many victims report that the day they testified in court was the worst day of their lives. The victims are not only traumatised by the actual crime, but also by the negative attitude of their communities towards them. Finally, the study contains the conclusions and recommendations on the rule of corroborating evidence in Zambia.
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Declaration

I BERNARD PHIRI, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been done. It is in this context that I declare this work as originally mine and it is hereby presented in partial fulfilment of the requirements for the award of the Masters Degree in Women’s Law (MWL) at SEARCWL, University of Zimbabwe, Harare.

Candidates’ signature:___________________________________
Date_________________________________________________

I, ROSALIE KATSANDE, being the Supervisor, have read this dissertation and approved it for fulfilment of the requirement of the Masters Degree in Women’s Law (MWL) at SEARCWL, University of Zimbabwe, Harare.

Supervisors’ Signature___________________________________
Date_________________________________________________
Dedication

To my beloved wife, Grace and my children, Margret, Bernard, James, Hope, Emma and Joshua for their understanding and support during the period that I left them in Zambia to attend the MWL programme at SEARCWL, U.Z., Harare, Zimbabwe.
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In this regard, I am more than indebted to my able supervisor, Ms Rosalie Katsande, for her knowledge, wisdom, patience, motherly legal advice and guidance throughout the research period.

To the Director SEARCWL, Professor Stewart, for her inspiration throughout the programme, High Court Judge of Zimbabwe, Dr Tsanga, for encouraging me to read more of the study materials and to all the members of SEARCWL staff, including, Sesedzai, Rudo, Blessing, Cecilie, Josephine Phiri, a U.Z. librarian, Primrose and all invited lecturers from both inside and outside Zimbabwe.

To all my fellow students who contributed both directly and indirectly, emotionally and in this context I would like to thank our two cleaners who worked hard cleaning our flat at number 6 Basil Fletcher.

In Zambia, to the Permanent Secretary of Home Affairs, Inspector General of Police, the Deputy Commissioner - Administration Zambia Police Headquarters, the Deputy Commissioner - Police College, the National Coordinator Victim Support Unit (VSU), Zambia Police Headquarters, the Registrar of the High Court of Zambia, the Chief Magistrate, Lusaka Magistrate Court, the Young Women’s Christian Association, the Coordinator One Stop Centre University Teaching Hospital Lusaka, all the women and girl victims of rape and defilement I interviewed, all police officers I interviewed and all those who made contributions to the study in one way or the other.
**List of acronyms**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACPHR</td>
<td>African Charter on Human and People’s Rights</td>
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<tr>
<td>CEDAW</td>
<td>Convention for the Elimination of All forms of Discrimination Against Women</td>
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<tr>
<td>CIO</td>
<td>Criminal Investigation Officer</td>
</tr>
<tr>
<td>CJS</td>
<td>Criminal justice system</td>
</tr>
<tr>
<td>DPP</td>
<td>Director of Public Prosecutions</td>
</tr>
<tr>
<td>IO</td>
<td>Inquiry Office</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>LAZ</td>
<td>Law Association of Zambia</td>
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<tr>
<td>MWL</td>
<td>Masters Degree in Women’s Law Program</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>NLACW</td>
<td>National Legal Aid Clinic for Women</td>
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<tr>
<td>NPA</td>
<td>National Prosecute Authority</td>
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<tr>
<td>OB</td>
<td>Occurrence Book</td>
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<tr>
<td>Protocol</td>
<td>Protocol to the African Charter on Human and People’s Rights on the Rights of Women</td>
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<tr>
<td>PTSD</td>
<td>Post Traumatic Stress Disorder</td>
</tr>
<tr>
<td>SEARCWL</td>
<td>Southern and Eastern African Regional Centre for Women’s Law</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
</tr>
<tr>
<td>UNZA</td>
<td>University of Zambia</td>
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<tr>
<td>UTH</td>
<td>University Teaching Hospital</td>
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<tr>
<td>UZ</td>
<td>University of Zimbabwe</td>
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<tr>
<td>VSU</td>
<td>Victim Support Unit</td>
</tr>
<tr>
<td>YWCA</td>
<td>Young Women Christian’s Association</td>
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</tbody>
</table>
List of Zambian cases

*Christopher Nonde Lushinga v The People* (2011) SCZ Judgement No 15 of 2011
*Emmanuel Phiri v The People* (1982) ZR 77 SC
*Kalebu Banda v The People* (1977) ZR 169 (SC)
*Zulu v The People* (1973) ZR 326 (SC)

List of cited cases from other jurisdictions

*Canaan Sodindo Banana v The State* SC 41/2000; Criminal Appeal No.12/99
*Mariette v Republic* (1966-68) ALR (MAL) 119
*S v Banana* 2000 (1) ZLR 607
*S v D 1998* (2) SACR 543 (A)
*S v Mupfudza* 1982 (1) ZLR 271
*S v D and Another* 1992 (SA) 513 (NM)
*S v Jackson* 1998 (1) SACR 470 (SCA)
*S v K (4)* BCLR 405 (NMS)
*Seda v Republic* (1997) I MLR
*Uganda v Peter Matovu* (Criminal Session Case No. 146/2001)

List of statutes

Ant-Gender Based Violence Act, No.1 of 2011 of the Laws of Zambia
Juvenile Act, Chapter 53 of the Laws of Zambia
Penal Code, Chapter 87 of the Laws of Zambia (as amended by Act No. 15 of 2005)
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Executive summary

The objectives of this research were to:

(i) investigate how the corroboration of evidence or cautionary rule in sexual offences, such as rape and defilement, traumatises and violates the human rights of women and girl victims in Zambia;

(ii) find out if the process of obtaining corroborative evidence traumatises and violates the human rights of women and girl victims of rape and defilement;

(iii) investigate whether or not the requirement for corroboration evidence in rape and defilement cases violates the human rights of women and girls;

(iv) find out whether the Zambian criminal justice system adequately protects women and girl victims of rape and defilement during the process of obtaining corroboration evidence;

(v) interrogate whether the Zambian criminal justice system relies on the cautionary rule or corroboration evidence rule in prosecuting sexual offences and to recommend the broadening of the rule on corroboration under sections 140 and 141 of the Penal Code, Chapter 87 by either abolishing or relaxing the rule on corroboration in prosecuting rape and defilement cases;

(vi) find out whether the Victim Support Unit (VSU) has a mandate to provide counselling services; and

(vii) investigate if the VSU is adequately resourced and structured to provide counselling services to prevent trauma and the violation of the human rights of women and girl victims of rape and defilement.

Guided overall by the theoretical framework of the liberal, legal pluralism and feminism theories, a number of methodologies and data collection methods were applied in the research process to investigate how the Zambian criminal justice system traumatises and violates the human rights of women and girl victims of rape and defilement due to the application of the corroboration evidence rule.

The rule does not fit into the lived realities of women and girls victims of rape and defilement as the findings of the study were that:
the requirement of the corroboration evidence rule in sexual offences traumatises and violates human rights of women and girl victims of rape and defilement due to social and cultural set up and some reasons which are unseen to the women and girls of defilement cases. The victims are subjected to some social ties, threats, shame and stigma. This has led cases not being reported at the police in time thus destroying corroborative evidence that might exist;

(ii) the corroborative evidence rule violates the human rights of women and girl victims, including their rights to privacy and to access to justice and their rights not to be discriminated against due to their sex nor to be subjected to inhuman and degrading treatment;

(iii) the Zambian criminal justice system is still relying on corroboration evidence rule in sexual offences which is outdated in some countries of the southern region of Africa because of gender insensitivity, socialization, lack of awareness, culture and finally men protecting fellow men;

(iv) the process of obtaining corroborative evidence in rape and defilement cases is cumbersome and the reporting process from the scene of crime at a family set up, to the police stations for obtaining a medical report form and investigations, to the hospital for medical examination and signing of the medical report form to corroborate the sexual offence committed by the perpetrator and finally to the magistrate court for court proceedings which is done in unfriendly manner. The study revealed that the process or the journey to acquire corroborative evidence is traumatic because it is just too long for women and girl victims of rape and defilement;

(v) the VSU has the mandate to provide counselling services however, it is not adequately resourced and has no adequate infrastructures for counselling service such as conducive office accommodation and no enough transport to take victims to hospitals and for investigations. As a result the study concluded that the VSU officers do not escort victims of rape and defilement to the hospital;

(vi) the research found the emerging issues which traumatises and violates human rights of women and girl victims of rape and defilement. These are customs and dual legal system, jurisdiction of the lower courts and finally economic cost of justice which was discussed in the finding chapter.

Therefore, the study concluded that the Zambian criminal justice system does not adequately protect women and girls who are the victims of rape and defilement from the trauma and the
violation of their human rights as a result of enforcement of the corroborative evidence ‘rule’. The research concluded that:

(i) there are no friendly courts for rape victims;
(ii) no witness screen and the girl child of defilement faces the accused person during trial which increases trauma and stigma;
(iii) there are only two (2) One Stop Centres the whole Zambia where all criminal justice system officers operate at one place to avoid long process of obtaining corroborative evidence;
(iv) the Zambian criminal justice system is still relying on corroboration evidence rule or cautionary rule which is no longer required in some countries;
(v) there are no fast track courts in Zambia for sexual offences;
(vi) there are few doctors for examining sexual assaults victims causing doctors to delay in signing the medical report forms at the hospital;
(vii) VSU officers only operate during the day and there are no shifts;
(viii) there are no pre- and post-counselling services at VSU to prevent trauma caused by corroborative evidence and there are no proper infrastructure at VSU resulting into no privacy;
(viii) VSU has no enough funds for transport for victims and to buy for the instruments to use during counselling services and refer victims to YWCA in Kabwata and Social Welfare for shelters and counselling services;
(ix) most of the victims of defilement are threatened by perpetrators to report cases to the police because of breadwinner syndrome.

In this regard the study formulated some recommendations on:

(i) the need to amend sections 140 and 141 of the Penal Code to develop and reform the application of the rule on corroboration in rape and defilement offences. The rule is infringing upon their rights to equality before the law hence need to harmonise the situation;
(ii) the need to identify ways of preventing trauma and the violation of the human rights of women and girl victims of sexual offences by introducing Victim Child Friendly Court and the same extended to adults victim of rape;
the need a girl child victim of defilement not to face accused during trial of sexual
offence meaning that there is a need to have a witness screen equipment during trial in
defilement;

the need the government to establish One Stop Centres in compounds where
counsellors, doctors and police officers are at one place;

Corroboration evidence rule in Zambia should be relaxed because sexual offences are
done in privacy;

the need for the government to establish Fast Track Courts so that rape and defilement
cases are disposed off as soon as possible to avoid withdrawals;

the need to have specialised doctors for examining and signing medical report forms
to prevent doctors in delaying signing medical report forms at the hospital and to train
more female doctors specialised in handling victims of sexual offences;

the need the VSU officers to start operating day and night time so that victims of rape
and defilement are handled by specialised and trained officers;

the need to have pre- and post- counselling services at all VSUs to prevent trauma and
it must be mandatory for police officers to escort victims of rape and defilement
because the empirical findings are that they are not escorted;

the need to have privacy at VSU offices and to construct shelters for safe keeping of
the women and girl victims of rape and defilement to prevent cases being interfered
by the perpetrators;

the need for the government to fund VSU Section to provide for transport monies for
victims and to buy instruments to use when conducting such services as counselling
and visitation to minimise trauma;

the Ant-Gender Based Violence Act of 2011 to incorporate into police training
curriculum so that all police officers are trained on how to effectively handle women
and girl victims of rape and defilement to prevent trauma and violations of their
human rights in the process of obtaining corroboration evidence in sexual offences.
CHAPTER ONE
1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

This study looks into whether the enforcement of the corroborative evidence rule or cautionary rule in rape and defilement cases traumatises and violates the rights of women and girls victims of such sexual offences in Zambia. In this regard, the study focuses on Lusaka Province of the Republic of Zambia. Being a police officer in the Zambia Police Service with more than twenty five (25) years experience in various fields in the organization, I personally witnessed some violations and trauma of victims of sexual offences as a result of the operation of this rule at various the police stations and in court. In sexual offences, great focus is placed on the rule on corroboration. Yet, this does not occur in the case of other criminal offences.

I was also overwhelmed by the impact of a lecture presented by one of the lecturers here at SEARCLWL in my second semester course on criminal justice systems. I was also very emotionally moved when I read some literature on how the process of obtaining corroborative evidence traumatises and violates the rights of victims of sexual offences. As a result of the negative aspect of the rule, some countries in the southern region of Africa have abolished or relaxed the corroboration evidence rule. Therefore, I developed an interest in investigating whether this corroborative evidence rule also traumatises and violates women and girl victims of rape and defilement in Zambia and, if so, what could be done about it.

In sexual offences there is an excessive unhealthy focus on the personality and motives of women and girls who are victims of sexual offences. A good example is the importance placed on how quickly the victim lodges her complaint after the alleged rape or defilement. This type of focus on women and girl victims of rape is what obtains in Zambian criminal justice system. Like any victims of violent crimes, complainants in rape and defilement cases suffer varying degrees of emotional and other trauma. Therefore, it is important for the police and court officials to be trained on how to effectively manage and reassure victims of sexual offences, such as rape and defilement. The prosecution of sexual offences is different in the
way they are prosecuted from any other criminal offence in Zambia. According to Gregory M. Matoesian (1993):¹

‘Rape was rare and random act committed by a small lunatic fringe of the male population until 1980 and was the most frequent explanation in America. In contrast to psychopathological models which explain rape individualistically, as a disease, feminist model link rape to the social structural conditions of inequality between males and females in violate patriarchal societies.’

Within this explanatory framework, male violence constitutes a socially constructed mode of domination in which rape and the fear of rape produces and reproduces patriarchal social organizations which sustain female subordination to males.

1.2 Statement of the problem
Despite the fact that the rule on corroboration violates the human rights of and traumatises women and girl victims of rape and defilement, Zambia still upholds the rule at the expense of women and girls’ rights which are provided in the Zambian Constitution under Article 23² as well as various international human rights instruments. Even though some countries in the Southern African region have abolished the rule on corroboration in prosecuting sexual offences, the Zambian criminal justice system still relies on the corroboration evidence rule in all rape and defilement cases. This requirement of corroboration has become such an entrenched practice in Zambian courts that it has almost become a rule of law and, in terms of sections 140 and 141 of the Penal Code, it is a requirement in every sexual offence that corroboration evidence must be produced rape and defilement cases in Zambia.

The background of the rule in Zambia has its roots in the unfounded gender-biased belief that women and girls lie in these criminal sexual offences (Malunga, 2010).³ The rule, therefore, violates women and girls’ rights to dignity and privacy of their bodies. This is due to the fact that most of the women are believed to be liars in sexual offences unless proved otherwise. This process of requiring corroboration is also discriminatory against women. The rule

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² Article 23 of the Constitution of Zambia, Chapter one.
affects more women and girls than men because they are the ones who are the victims of rape or defilement. The requirement further violates women and girls’ rights to access justice because they find it very hard or difficult to support the process of acquiring and producing corroborative evidence (Malunga, 2010). Cases which lack such evidence are either dropped by the police or reduced to a lesser offence or lost in the courts of law (i.e., the alleged culprit goes free). In the case of Jackson⁴ it was argued that the magistrate merely paid lip-service to the rule and it was argued that the cautionary rule should be revised because it is discriminatory against women. It was argued that the rule is unnecessary and unfairly increases the burden of proof resting on the state in cases involving sexual offences.

The notion that women are habitually inclined to lie about being raped is of ancient origin. In some countries, judges have attempted to justify the cautionary rule by relying on collective wisdom and experience. The cautionary rule is based on principles that women are naturally prone to lie and to fantasise, particularly in sexual matters. It is further erroneously argued that they are vengeful and spiteful and, as a result, likely to point a finger at an innocent man. In this regard, there is no evidence that women are less truthful than men or that they fantasise more or that they are naturally more vengeful or spiteful than men. Therefore, the cautionary rule is based on a principle which is discriminatory against women and inappropriate in countries like Zambia determined to commit to equal rights for men and women, and the rule should be prohibited on this ground. The cautionary rule has been called a lingering insult to women as unreliable witnesses. No evidence has been found to substantiate the cliché that the danger of false accusation is likely to exist merely because of the sexual character of the charge. In the Supreme Court of California in the case of R v Rincon Pineda, ⁵ despite a detailed examination of empirical data, no evidence was found that complainants in sexual offences are more untruthful than complainants in other criminal offences. It concluded that the rule was one without a foundation, that it was unwarranted by the law of reason and that it discriminates against women, and denies them equal protection of the law. Further, it contributes to the brutalization of rape victims by providing an unequal balance between their rights and those of the accused. In this regard, the quoted statement by Lord Hale CJ in the 17th Century, that it is easy to bring a charge of rape and difficult to refute is, with respect, insupportable.

⁴ S v Jackson 1998 (1) SACR 470 (SCA).
⁵ R v Rincon Pineda 14 Cal3d 864.
According to the ruling in Jackson’s case, it was further noted that few things may be so difficult and humiliating for a woman than to cry rape. She is often, within certain communities, considered to have lost her credibility, she may be seen as unchaste and unworthy respect and her community may turn its back on her. She is subjected to undergo the most harrowing cross-examination in court where the intimate details of the crime are traversed. Even if a woman survives this ordeal in court, the prosecution may still fail satisfy the rule on corroboration and the court may acquit the accused.

In addition, the rule in Zambia has led to an infringement of the right to privacy because of the police and the court relying on the medical examination of all the victims in rape and defilement cases in order to obtain corroborative evidence. Therefore, this study looks into how to expose which rights of girls and women are violated by the process of obtaining corroborative evidence in sexual offences. It also investigates in detail how Zambian women and girls are affected by the rule. It shall be argued that there is a big problem in the Zambian criminal justice system which continues to rely on corroboration while sidelining the human rights of girls and women which are inherent in every human being.

1.3 Rationale and justification for the study

When I was conducting a literature review of the topic, I discovered that not much research has been done in the Zambian context. The only literature available was some court judgments of rape and defilement cases. I, therefore, believed that it was important to contribute to the literature and discuss whether the rule has any gender implications; whether the rule traumasises and violates human right of women and girl victims and, finally, whether or not the said rule is relevant in this day and age. It is also the objective of this study to explore possible ways of improving all aspects of the management of rape and defilement cases in so far as they impact on the human rights of their victims.

For example, in order to stop the stigmatisation of raped women or girls, the police should embark on introducing a syllabus for training all officers, specifically in sexual assault cases, in order to have more gender-sensitive police officers. The judiciary should introduce Victim Friendly Courts to allow victims of sexual assaults to express themselves freely as opposed to having to do so open court. The rationale of the study is to look into some reforms, such as reporting protocols at the police station to ensure that the police should have a national
general mandate to accept the victims of rape or defilement by not questioning them too explicitly. The age of the victim should be looked at since they are the most vulnerable persons. The study also looks at the idea of providing shelters for defiled girls so that they are protected at police stations. As it is, there are no shelters at all police stations in Zambia. The state needs to provide shelters for under-age girls of defilement victims.

Hence, there is also a need for the cautionary rule to be reformed due to the false ideas of stereotype behaviour on which it is based. Because the cautionary rule is based on irrational and outdated perceptions that rape is a charge that is easily made by the victim, the empirical finding is that it is not a charge easily made by victims because rape is a grossly under-reported crime due to strong deterrents operating on and within the victim. These deterrents include: the emotional trauma of the investigatory process, the fear of subsequent humiliation and publicity, demeaning trials, harmful and exploitative defence tactics and the police process of deciding whether the rape was provoked by the victim or not. Therefore, as justification for the study it also looks at reforming the public’s attitudes towards rape and defilement and its victims. There is a need to have a national wide strategy to encourage victims of rape or defilement to report to the police freely without fear or intimidation of any kind. The police and the magistrates should undergo specialised training in how to handle sexual assault offences. Also, the public should be encouraged to be sympathetic to their plight and supportive of their effort to prosecute alleged culprits according to the law.

1.4 Objectives of the research
The main objectives of the research are (a) to investigate how the corroborative evidence ‘rule’ in rape and defilement cases traumatises and violates the rights of women and girls who are victims of sexual offences in Zambia; and (b) to identify ways of preventing the violation of the human rights of women and girls who are the victims of rape and defilement and the trauma they suffer as a result of the enforcement of the corroboration of evidence ‘rule’. The specific areas of the research that it will concentrate on are to:

1. find out whether the requirement of corroboration in rape and defilement cases violates women and girl’s rights to protection from cruel, inhuman and degrading treatment.
investigate if the process of obtaining corroborative evidence traumatises women and girl victims of rape and defilement.

3. find out if the Zambian criminal justice system relies on the cautionary rule or corroborative evidence rule in prosecuting sexual offences which is outdated and is no longer required as is the case in some countries in the Southern African region.

1.5 Research assumptions
1. The requirement of corroboration in rape and defilement cases violates the right of women and girls to protection from cruel, inhuman and degrading treatment.
2. The process of obtaining corroborative evidence traumatises women and girl victims of rape and defilement.
3. The Zambian criminal justice system relies on the cautionary rule or the corroborative evidence rule in prosecuting sexual offences which is outdated and is no longer required as is the case in some countries in the Southern African region.
4. The Victim Support Unit (VSU) has a mandate to provide counselling services to women and girl victims of rape and defilement.
5. The VSU is not adequately resourced and has no infrastructure to provide services for traumatised women and girls victim of rape and defilement.

1.6 Research questions
1. Does the requirement of corroboration in rape and defilement cases violate women and girls’ rights to protection from cruel, inhuman and degrading treatment?
2. Does the process of obtaining corroborative evidence traumatisse women and girl victims of rape and defilement?
3. Does the Zambian criminal justice system rely on the cautionary rule or the corroborative evidence rule in prosecuting sexual offences which is outdated and is no longer required as is the case in some countries in the Southern African region?
4. Does the VSU have a mandate to provide counselling services to women and girl victims of rape and defilement?
5. Is the VSU adequately resourced and does it have structures to provide services for traumatised women and girl victims of rape and defilement?
CHAPTER TWO

2.0 CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

The theoretical model chosen in this research was based on the liberal feminist theory and legal pluralism feminist theory. Studies that specifically examine the issue of gender in the Zambian criminal justice system continue to discriminate against women and girl victims of rape and defilement because of the common law rule on corroborating evidence. The rule provides that a person accused of rape and defilement may be acquitted if there is no corroborating evidence. This is due to the fact that women and girls are believed to be liars. However, before discussing the theoretical framework, this chapter begins with an exploration of various concepts relevant to the sexual offences of rape and defilement.

2.2 Rape as a concept

According to Susan Estrich (1987):6

‘A man commits rape when he engages in intercourse or carnal knowledge with a woman not his wife by force or threat of force against her will and without her consent. That is according to the old statute and is a traditional and common law definition of rape and it remains the essence even in the most radical reform statutes.’

Many young women believe that sexual pressure, including physical pressure, is simply not illegal behaviour if it takes place in a dating situation. Most of the girl victims of rape do not perceive their experience of victimization as legitimate (Estrich, 1987). This means that they do not involve strangers or substantial violence. In Zambia, the law states that any person can be an offender of rape so long all the elements of rape are present. It does not matter whether the perpetrator is a stranger or not. Those who do not report the offence do not do so because of cultural and social pressures within the society. The law is very clear on the definition of rape. According to the Penal Code,7 ‘rape’ is dealt with as follows:

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7 Section 132 of the Penal Code, Chapter 87 of the Laws of Zambia.
‘Any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by impersonating her husband, is guilty of the felony termed “rape”.’

Due to the myths that women are untrustworthy, they are subjected to a taxing and languishing interrogation about whether the offence took place at all. Such evidence is called evidence of corroboration.

### 2.3 Defilement as a concept

The definition of ‘defilement’ is contained in section 138(1)\(^8\) of the Penal Code which provides that:

\[
\text{‘any person who unlawfully and carnally knows any child under the age of 16 years is guilty of a felony and is liable to imprisonment for a term of imprisonment of not less than 15 years and may be liable to imprisonment for life.’}
\]

According to the Newsletter of the National Legal Aid for Women for September, 2012:\(^9\)

\[
\text{‘The absence of the legal definition of carnal knowledge in the Zambian Penal Code has resulted in challenges being made that there was no offence which took place. The police in such cases have preferred to charge the perpetrator with the offence of indecent assault as opposed to defilement. This is because it is difficult for them to prove penetration where the hymen is intact.’}
\]

My own view is that the body of a girl may deceive a man as to her age. The man may plead that he believed that she was more than 16 years old. This is because for defilement to take place in Zambian criminal law, the girl must be below the age of 16 years. However, some girls who are in fact below the age of 16 years of age may look older than 16 years of age. Corroboration is then required on the age of the girl to determine whether or not the girl is below that particular age.

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\(^8\) Section 138(1) of the Penal Code, as amended by the Penal Code Amendment Act, No 15 of 2015.

\(^9\) Newsletter of the National Legal Aid for WOMEN Issue No 010 of September, 2012, p. 9.
2.4 Corroboration as a concept

The word ‘corroboration’ has been defined in many ways. According to John, A. Andrews and Michael Hirst (1987)\(^{10}\) corroboration is defined as:

‘Evidence which tends to confirm the truth or accuracy of certain other evidence by supporting it in some material particular.’

Furthermore, Tibatemwa (2005)\(^{11}\) defined ‘corroboration’ as:

‘Independent evidence which supports the testimony of the complainant confirming from some other sources that the witness (complainant) is telling the truth in some parts of her story which goes to show that the accused committed the offence.’

In the Malawian case of *Mariette v Republic*\(^{12}\) ‘corroboration’ is defined as:

‘Independent testimony coming from a source other than a complainant implicating an accused which supports the testimony of the complainant.’

The above definitions are common law definitions. They are based on a legal centrist point of view. The definition of corroboration is not found in the Zambian statutes. It was adopted from English law during Zambia’s pre-Independence colonial days. Even the Constitution of Zambia is silent on this purported rule. In the Zambian Penal Code, ‘corroboration’ is stated as a requirement but it is not defined. It is required as matter of law in the offence of procuration of a female for sexual offences in accordance to section 140.\(^{13}\) It provides that *no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness is corroborated in some material particular by evidence implicating the accused.* In this regard, it is dangerous to convict an accused person without corroboration. In other words, sexual assault offences must be supported by such additional or corroboratory evidence which may occur at any time from the time of reporting the crime.


\(^{11}\) Tibatemwa L. (2005) Criminal Law in Uganda; Sexual assaults and the offences against Morality, Fountain Publisher: Kampala.

\(^{12}\) *Mariette v Republic* (1966-68) ALR (MAL) 119.

\(^{13}\) Section 140 of the Penal Code, Chapter 87 of the Laws of Zambia (as amended by Act No. 26 of 1933, No. 9 of 1954 and repealed and replaced by Act No. 15 of 2005).
at the police station up to the time the accused appears before the court. According to John A. Andrews and Michael Hirst (1987):\textsuperscript{14}

\begin{quote}
‘It reflects the somewhat questionable assumption that allegations of sexual offences are particularly likely to be false and difficult to refute. The stricter nature of corroboration requirement in respect of procuring offences may be explained by the fact that they are thought to be even easier to allege and even harder to refute than the offences of rape or indecent assault if only because there may be less scope for the defence to counter such allegation by pointing an absence of “real” evidence.’
\end{quote}

The above statement supports the need for sexual offences to be supported by independent evidence. This is due to the fact that a victim may fabricate evidence in her own favour. It may be because the man has not paid her money after she has agreed to have sexual intercourse with him. As a result, a scorned woman may punish a man by falsely accusing him of rape. As a matter of practice, corroboration requires the complainant to be distressed. According to Richard May (1986):\textsuperscript{15}

\begin{quote}
‘The evidence of a witness who sees the distressed condition of the complainant after an alleged offence is capable in some circumstances of corroborating the complainant’s evidence. The juries must be warned that except in special circumstances, little weight ought to be given to such evidence. This is because distress is easily simulated. For instance, a girl child may easily pretend that it is very upset.’
\end{quote}

Therefore, the statement above clearly supports the proposition that the distressed condition of the complainant is required to confirm sexual offence. In my own view, especially at the reporting stage at the police station, there is a need for the investigating officer to take into account the distressed condition of the victim as one of the important factors to be considered to prevent the risk of arresting an innocent person. If the investigating officer does indeed observe the distressed state of the victim that is sufficient evidence to corroborate the offence.

It is my further understanding that, apart from the victim’s distressed condition, the rule on corroboration in Zambia applies to all elements of rape and defilement. The elements for the offence of rape are (1) penetration, (2) lack of consent and (3) the identity of the accused. In

the Zambian case of Emmanuel Phiri v The People\textsuperscript{16} the appellant was convicted of rape and appealed against the conviction on the ground of mistaken identity and the heavy sentence. It was held that in sexual offences there must be corroboration of both the commission of the offence and the identity of the offender in order to eliminate the danger of a false complaint and false implication. Also in the case of Christopher Nonde Lushinga v The People\textsuperscript{17} the meaning of the word ‘corroboration’ and the phrase ‘something more’ were considered. In this case the appellant was convicted on two counts of defiling of child contrary to section 138(1)\textsuperscript{18} of the Penal Code. On committal to the High Court for sentence, the appellant was sentenced to 25 years imprisonment on each count, ordered to run concurrently. The appellant appealed against both conviction and sentence. It was held:

‘…that two children of tender years giving their unsworn evidence cannot as a matter of law corroborate one another. Section 122(1)\textsuperscript{19} of the Juveniles Act, requires that the evidence by the prosecution given by a child of tender years requires corroboration whether that was sworn or unsworn. Although the trial magistrate did not make specific reference to the proviso to section 122(1) of the Juveniles Act, the trial magistrate was mindful of the need for corroboration evidence in sexual offences. The trial magistrate did not specifically use the word “corroboration”. There is no magical meaning in the word “corroboration”. It simply means evidence which confirms the commission of the offence, and the identity of the perpetrator of that offence. Put differently, corroboration means supporting or confirming evidence. The Supreme Court was satisfied that the trial magistrate discussed “corroboration” and “something more” which justified the conviction of the appellant. Although the trial magistrate did not warn herself of the fact that the prosecution witnesses were witnesses, who had their own interest to serve. There was corroborative evidence or “something more” to exclude the danger of false implication.’

2.5 The cautionary rule as a concept

According to Nikki Naylor\textsuperscript{20} ‘the cautionary rule’ is defined:

‘.. as a rule of practice that aims to assist judges in assessing evidence. It requires judicial officers to exercise caution before adopting the evidence of certain witnesses on the ground that the evidence of such witnesses is inherently potentially unreliable.’

\textsuperscript{16} Emmanuel Phiri v The People (1982) ZR 77 SC.
\textsuperscript{17} Supreme Court of Zambia, Judgement No 15 of 2011.
\textsuperscript{18} Section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia.
\textsuperscript{19} 122(1) of the Juveniles Act.
\textsuperscript{20} Nikki Naylor, Women’s Legal Centre Chapter Eleven, The Survival of the Cautionary Rule, Cape Town. South Africa.
According to Morris (1988) most definitions of the cautionary rule contain three common elements. These are (1) rape is a charge that is easily made by the victim (2) rape is a charge that is difficult for a defendant to disapprove and (3) the testimony of the victim requires more careful scrutiny by the jury than the testimony of the other witnesses in the trial.

On the element that rape is a charge that is difficult to disprove, the empirical finding is that a rape charge is not difficult to disprove. Far from being a difficult crime to defend, conviction rates indicate that rape is the easiest of violent crime accusations to disprove. Two factors which make the charge of rape easy to disprove are (1) the victim is a convenient target for the focus of a rape and (2) the jury is often reluctant to weigh the evidence impartially (Morris, 1988). The other element is that a rape victim’s testimony needs to be scrutinized more carefully than the testimony of other witnesses (Morris, 1988). In this regard, the empirical findings are a rape victim’s evidence does not need to be scrutinized more carefully than the testimony of other witness. This is because of women’s hesitancy to bring a rape charge and the resulting trauma if they do provide a check against false complaints (Morris, 1988). Given the terrifying experiences of rape victims in court, it is counterintuitive that women would falsify rape charges (Morris, 1988). Also, few women are likely to believe that being a rape victim would enhance their status and worth in the eyes of others. Hence, a motive for fabricating such experiences is likely to be rare indeed. Finally, rape charges are no more likely to be fabricated than other charges of violent crime and there is no evidence that false rape charges are brought with any greater frequency than false charges of other crimes (Morris, 1988).

2.6 Trauma as a concept

According to Thesaurus English Dictionary, trauma can be a shock, an upset, disturbance, ordeal, suffering, pain, strain or distress. According to http://www.stars-elpaso.org/get/effects rape trauma is a common reaction to rape or sexual assault and a common human reaction to unnatural or extreme events. There are three phases, namely:

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22 Thesaurus English Dictionary.
23 http://www.stars-elpaso.org/get/effects Sexual Trauma and Assault Response Services-Stars on 7/03/2014.
1 Acute phase. This phase usually lasts a few days to several weeks. It happens immediately after the sexual assault.

2 An Outward adjustment phase. This involves resuming what appears to be your normal life but inside you are still suffering from considerable turmoil.

3 Post Traumatic Stress Disorder (PTSD). It is a normal human reaction to an extreme or abnormal situation. In this regard, each person has a different shred hold for what is perceived as traumatic event. It is not a rare or unusual occurrence. In fact, many people experience PTSD as result of traumatic experiences, such as rape and defilement.  

2.7 Development of the rule on corroboration in sexual offences

The rule developed in the Zambian courts from common law. This is because Zambian law developed from English law. Under the common law, the evidence of a victim of rape must be corroborated. This can be corroborated with direct or indirect circumstantial evidence. According to Tibatemwa (2005), at common law every judge is supposed to warn himself and the assessors of the danger of convicting an accused person of a sexual offence on the uncorroborated evidence of the victim of rape.

The rule was developed by the English courts and adopted by the Zambian courts on the basis that women and girls lie in sexual matters. A well known English case is that of R vs. Henry and Manning (1969) where it was stated:

‘In cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases women and girls do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not to enumerate, and sometimes for no reason at all.’

Therefore, the cautionary rule was introduced so that whatever a woman says relating to an allegation of rape or defilement is thoroughly scrutinised. This is because of the strong belief

24 http://www.stars-elpaso.org/get/effects Sexual Trauma and Assault Response Services-Stars on 7/03/2014.
25 Tibatemwa L. (2005) Criminal Law in Uganda; Sexual assaults and the offences against Morality Fountain Publisher: Kampala.
that women are prone to tell false stories. Hence, the need for corroboration evidence has been applied to all sexual offences.

2.8 The common law approach to the cautionary rule
Based on the belief that women and girls may tell lies, judges developed rules concerning corroboration evidence. They came to be known as the cautionary rule or instructional rule. To be cautious means to be careful. The way rape laws and their doctrines are applied make very clear the central role of the appellant in court proceedings and give substance to and legitimate Hale’s distrust of women victims of rape. The courts have succeeded in doing nothing less than translating Hale’s generalised suspicion into a set of clear presumptions applied against women. According to Morris (1988):27

‘The cautionary instruction is a relic dating back to the Lord Chief Justice Mathew Hale in the seventh century. The cautionary rule was required in all illicit sexual conduct cases. The offences include incest, pimping, oral copulation and sodomy indecent exposure, vagrancy lewdness and abduction of a woman for purpose of defilement and rape. In Lord Hale’s day, the fundamental of due process relative to the presumption of innocence and proof beyond reasonable doubt had not yet crystallised into rights. The cautionary rule contains three common elements. These are (1) rape is a charge that can easily be made by the victim (2) rape is a charge that is difficult for the defendant to disprove and (3) the testimony of the victim requires more careful scrutiny by the jury than the testimony of the other witnesses in the trial.’

Therefore, the cautionary rule is there to warn judicial officers of the danger of convicting an accused person on uncorroborated evidence. Without taking into account this rule, a lot of innocent people may end up being incarcerated. This is an important factor to consider in all sexual offence cases. Some complainants in sexual offences may just fabricate the charge because of jealousy or in order to destroy someone’s name in the society. According to Hoffmann and Zeffer (1988),28 the purpose of the cautionary rule is as follows:

‘The purpose of cautionary rules is to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt. They have been evolved because the collective wisdom and experiences of judges have found that certain kinds of evidence cannot be safely relied upon unless accompanied by some satisfactory indication of trustworthiness.’

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In my view, the above statement provides a guide to judges who are required to administer due process in criminal trials for sexual offences where women are the victims. It is a warning to judicial officials that corroboration should always be taken into consideration in sexual offences. Convicting an accused person on uncorroborated evidence is unfair. However, the rule does not look at the other side of the coin, meaning that it does not consider how it affects women and girls as victims of rape and defilement.

*S v. Mupfudza*[^29] is a landmark case which applies the so-called two-stage test. In this regard, the first question to be asked by the court is: ‘Is the complainant credible?’ If the answer is in the affirmative, the next question is: ‘Is there corroboration of, or support for, the evidence of the complainant?’ In other words, the court must not only believe the complainant. It must, in addition, be satisfied by the application of the cautionary rule, i.e., whether it might still not have been deceived by a plausible witness. It must seek corroboration or evidence tending to exclude the danger of false incrimination.

However, in the case of *S v Jackson*[^30] it was held that applying the cautionary rule in sexual offences is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases. Corroboration in sexual assault cases is discriminatory against women. For instance, in the case of *S v D*[^31] the court held that the application of the cautionary rule amounts to inherent discrimination on the ground of gender in breach of Article 5[^32] of CEDAW which provides that:

> ‘The state parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or stereotyped roles of men and women.’

The irrational and outdated perception of women in which the cautionary rule is based (see *Jackson’s* case above) is exacerbated by insensitive and prejudicial attitudes mentioned in the next section. Together, they constitute the ultimate insult to the dignity of women by the administration of justice. Even though corroborative evidence is required by the criminal

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[^29]: *S v Mupfudza* 1982 (1) ZLR 271.
[^30]: *S v Jackson* 1988 (1) SACR 470.
[^31]: *S v D* (198) (2) SACR 543 (A).
[^32]: Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women.
justice systems in Zambia, women and girls victims of rape are traumatised from the time of reporting of the crime at the police station up to the time of the trial proceedings in court. They remain traumatised even after the matter has been disposed by the courts. The fact is that the criminal justice system in Zambia does not actually take any follow-up procedures to find out the attitude of relatives or the community at large towards women and girls who are traumatised by the crime of rape or its aftermath in the hands of the police or the courts. The police and the courts are more concerned with the perpetrators of rape or defilement, not its victims.

2.9 Insensitive and prejudicial police attitudes about rape (stereotype)

In order to theorise whether the corroboration evidence rule violates the women and girl victims of rape and defilement, I applied the liberal feminist theory approach. I critically analysed sections 140 and 141 of the Penal Code of Zambia, Chapter 87, bearing in mind that liberal feminism looks at the way in which laws and policies protect women and girl victims of rape and defilement. Therefore, this theory was applied to find out what gaps there are in human right terms between the corroboration evidence ‘rule’ and the law so that they can be remedied. As a result, it helped me to understand that law should be applied equally without distinction to all people in society. I used this basic principle to measure the extent of a policemen’s understanding of the word ‘discrimination’ in relation to the corroborative evidence ‘rule’. It helped me to determine whether the corroborative evidence rule is discriminatory in itself or in its application and whether it should be amended or eliminated altogether because it could be used as an instrument to acquit guilty offenders in rape cases. According to Rosa Marie (1994):34

‘…the U.S. Congress immediately passed the Equal Rights Amendment to the Constitution to provide that “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” as such be immediately ratified by the several States.’

The above comment clearly provides that when the law is not favourable to women and girl victims of rape and defilement it is better that law be amended to suit the lived realities of the victims.

33 Sections 140 and 141 of the Penal Code of Zambia Chapter 87.
For example, in the case of *Kalebu Banda v The People*, the learned Judge, Mr Justice Baron, in a robbery case, gave an example of the operation of the corroboration evidence rule in a rape case and stated that:

‘In a rape case failure to obtain medical evidence when there was a duty to do so means that the court proceeds as if the doctor had testified that he had examined the victim and found no evidence that force was used nor any evidence of intercourse.’

What this means is that a woman victim of rape must first give evidence of the rape in court; then a medical report form must be produced in court; then the magistrate must state that she was raped and she must be subjected to examination that there is proof of penetration of her vagina. If the medical report form is not signed by a government doctor, the accused can be acquitted simply because there is no medical report form. This is unfair to the victims because some of them come from very far off places where hospitals are difficult to reach because of poor road services. Such difficulties are not taken into account by the rule on corroboration evidence in terms of sections 140 and 141 of the Penal Code of Zambia.

In the above case of *Kalebu Banda v The People*, Judge Baron further ruled that:

‘A victim who has therefore taken a bath to wash away what she considers as dirt will not be able to attain the justice she deserves as the court will consider her as one that lacks corroborating evidence. In trying to curb convictions based on fabricated stories, the law is also in the long run giving an offender an easy way out.’

The law should protect the victim. Also, in the case of *Zimba v The People* an appeal against conviction was allowed on the ground that there was a complete lack of corroboration evidence in the case. However, in a News letter of the National Legal Aid Clinic for Women issue No. 010 of September, 2012 commented on the requirement to corroborate the evidence of minor children:

35 (1977) ZR 169 (SC).
36 (1977) ZR 169 (SC).
37 News letter of the National Legal Aid for Women, Issue No. 010 of September, 2012.
38 News letter of the National Legal Aid for Women Issue No 010 of September, 2012, p.9.
‘It states that the law of evidence in Zambia is that the sworn evidence of a child does not require corroboration. But the court must warn itself of the danger of acting on the uncorroborated evidence of young children. As such in practice, the court requires corroboration of evidence.’

The corroboration was defined in the case of Phiri (E) and others v The People\textsuperscript{39} to be the evidence of ‘something more’. This requirement of young children is very challenging, especially in the cases of defilement, as the victims are usually very young. Sometimes the evidence of ‘something more’ is very difficult to prove. A typical case is that contained in the Newsletter of National Legal Aid Clinic for Women:

‘An adult male was charged with indecent assault of a girl aged 5 years. The medical report showed that the victim suffered bruises on both sides of her vestibule (the entrance to the vaginal) other than the evidence of the victim linking the accused to the offence. The only other evidence was that of the mother who testified that she saw the accused near the building where the victim was found standing with underwear in her hand. Regrettably, the court discharged the Accused person on the basis of insufficient evidence linking to the crime.’

The National Legal Aid Clinic for women has since written to the Director of Public Prosecutions requesting that the state lodge an appeal in the matter. This is because there was evidence of ‘something more’ as the accused was seen near the building where the victim was found, showing, therefore, that he had an opportunity to commit the offence. According to the Newsletter,\textsuperscript{40} they have complained to the police officer who investigated the case. They advocate that, in future, even if the hymen is not broken (as in this matter) and where there is still proof of penetration (in this case, the victim was found with some bruises on the entrance of her vagina), the police or the court ought to have charged the accused with an alternative charge of either defilement or attempted defilement. A response is yet to be received from the state.

This approach was a clear application of the liberal feminist theory. Rape is the most under-reported of violent crimes. Even though a rape case may be reported at a police station, the charge may later be dismissed. Also, the reporting of most rape cases does not necessarily result in the arrest of the alleged perpetrator. Even after an arrest, a trial is not assured. The preliminary hearing may have the effect of intimidating a victim into dropping charges.

\textsuperscript{39} (1978) ZR 79.
\textsuperscript{40} Newsletter of the National Legal Aid for Women Issue No 010 of September, 2012, p.9.
Sometimes the prosecutor's negative attitude towards rape cases causes them to fail, even if the victim is willing to endure a trial. This very attitude of doubting women in rape cases is one of the reasons why victims fail to report them. They feel that even if the matter is reported, it will not be taken seriously. These are stark examples of the kinds of trauma suffered by women and girls who are victims of rape and defilement.

2.9.1 Human rights approach and the rule on corroboration

With the liberal feminist theory in my mind, I looked at the human rights instruments which Zambia has ratified and the Zambian Constitution. The aim was to find out if the rule on corroboration is justifiable and if it is in conformity with the international human rights of women and girl victims of rape and defilement. In other words, the manner in which the Zambian criminal justice system handles women and girl victims of rape and defilement in terms of the rule on corroboration needs to be measured against the relevant laws of human rights. To assess whether the rule is in compliance with the Constitution of Zambia and the international human rights various articles have been invoked. Zambia has a Constitution which contains a Bill of Rights and is also a signatory to a number of human rights conventions. Below are some of the human rights provisions that inform the study.

2.9.2 The rule on corroboration and the right to equality before the law

In terms of international human rights, CEDAW\(^41\) is the most inclusive UN regime for the protection of women’s rights. This is due to the fact of the existing and continuing inequalities which subsist between women and men. Article 5(a)\(^42\) of CEDAW provides for the elimination of prejudices and all other practices which are based on the inferiority or superiority of either sex. Article 7\(^43\) of the Universal Declaration of Human Rights provides that:

> ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’

Article 26\(^44\) of the International Covenant on Civil and Political Rights stipulates that:

\(^41\) Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women.
\(^42\) The Convention on the Elimination of All Forms of Discrimination Against Women.
\(^43\) Article 7 of the Universal Declaration on Human Rights.
\(^44\) Article 26 of the International Covenant on Civil and Political Rights.
‘All persons are equal before the law and are entitled without any
discrimination to the equal protection of the law. In this respect the law shall
prohibit any discrimination and guarantee to all persons equal and effective
protection against discrimination on any ground such as race, colour, sex,
language, religion, political or other opinion, national or social origin, property
birth or other status.’

Furthermore, Article 3 of the Protocol (i.e., the Protocol to the African Charter on Human and
People’s Rights on the Rights of Women):

‘Every woman shall have the right to dignity inherited in a human being and to
the recognition and protection of her human and legal rights, the right to
respect of a person and the free development of her personality.’

A number of foreign cases and articles have held that the rule on corroboration is in
contravention of this right and discriminatory against women. In this regard, under the
Zambian Constitution (which cannot be derogated from under article 23 of the Constitution)
the right to equality before the law is a fundam ent right. In Uganda v Peter Matovu it was
held that the rule was in contravention of the right to equality before the law under the
Ugandan Constitution and other international human rights instruments to which Uganda is
bound. The court declined to apply the rule on the basis that it was discriminatory to women
and declared the rule unconstitutional.

Many prejudices come into operation in rape cases. Some police officers disbelieve the
victim’s story and ask them questions which suggest that they are not telling the truth. Even
some statutory requirements indicate signs of prejudice. For example, on the issue of consent,
corroboration and intention, Smart (1995) notes:

‘We know that a woman’s account for her abuse is always filtered through a
mesh of legal relevancies about, for example, consent, corroboration, intention
and so on. Her story is reconstructed into a standard form of sexual fantasy in
which she becomes the slut who turns men on and indicates her availability
through every fibre of her clothing and demeanour.’

45 Article 23 of the Constitution, Chapter 1 of the Laws of Zambia of 1996.
46 Uganda v Peter Matovu Criminal Session Case No. 146/2001.
As a result, women victims of rape are traumatised at the time of reporting their ordeal at the police station. This is due to a lack of compliance with Article 5(a)48 of the CEDAW. The fact that such prejudices are still found in the statutes of Zambia, shows that the state has not only failed to fulfil its obligation to take appropriate measures to address such issues, but that it has not even started to do so. This contravenes Article 2349 of the Constitution of Zambia which provides:

‘Protection from discrimination on the ground of race and no law shall make any provision that is discriminatory either of itself or in its effect. No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. In this Article the expression “discriminatory” means, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.’

Therefore, because of the police’s prejudicial treatment of complainants at police stations, the question here is whether the effect of this prejudice breaches the human rights principle that all persons enjoy equal protection of the law and prevents some victims from reporting the crime of rape.

Furthermore, Article 1250 of CEDAW provides:

‘State parties are to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services.’

As a police officer, I know that, as a matter of practice, we tell women victims of rape not to take a bath after being raped to prevent evidence (such as sperm in or around the vagina) from being removed or destroyed until they have been medically examined by a government qualified doctor. This is not healthy for women because it allows the spread of infection of diseases such as the HIV/AIDS virus. Furthermore, the medical report form is not easy to obtain due to the fact that the process is cumbersome. There are very few doctors available to

48 Article 5(a) of CEDAW.
49 Article 23 of the Constitution, Chapter 1 of Zambia.
50 Article 12 of Convention on the Elimination of All Forms of Discrimination Against Women.
examine victims of rape and at night they are only on call. When a doctor is on call it means that he is not on duty but may be called to attend a case at the hospital. He/she is normally only called to attend serious cases and rape cases are not considered a priority at night. Most rape victims who attend hospital at night are told to go back to their homes and to come the following morning. Another problem for rape victims is that some may fail to raise money to pay for the transport to get to the hospital and, if they do, they may be unable to afford the cost of the medical examination. In other words, rape victims’ rights are violated due to the state’s failure to provide them with adequate medical health services and affordable transport to get to the hospital to be medically examined.

2.9.3 The rule on corroboration and the right to dignity and personal integrity

The right to dignity entails the state of being dignified in mind, character or bearing whilst integrity is a state of wholeness, probity, honesty and uprightness, according to the Tanzania Law Commission (1991). The rule infringes on this right to dignity because it suggests that women are liars in all sexual offences. As a result, they are subjected to very embarrassing questioning about their bodies in open court. Even if a victim is willing to subject herself to the terrors of a rape trial, she faces the fact that winning such trials is a very arduous process. Apart from the emotional trauma, the victim must also overcome many legal obstacles, such as proving that she did not consent but was forced by the perpetrator into sexual intercourse (Tanzania Law Commission, 1991). This is done during very public court proceedings. It is not easy to prove these elements due to the fact that matters of sex are never talked about in public. In brief, the charge of rape is not easily made. It is in fact a difficult accusation to make and a traumatic charge to carry through to trial. This means that many cases of rape are not reported and those who report them are the most adamant of victims and the strongest of cases survive (Tanzania Law Commission, 1991). Article 15\(^5\) of CEDAW provides:

‘State parties to accord to women equality with men before the law.’

However, what is happening on the ground is different and this provision looks good on paper alone. Because of the strict requirements of the rule on corroboration in rape and defilement cases, for example, the study revealed that there are only few rape victims who actually succeed in going to court. And yet this is not because their cases are bad or because

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51 Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women.
they lack sufficient evidence. Since victims of rape are only women and girls, this promotes indirect discrimination. According to the Protocol, Article 3(1)\textsuperscript{52} provides:

‘Every woman shall have a right to dignity and protection of her human and legal rights.’

This provision recognises that women’s legal rights should not be sabotaged and that they need care and protection before, during and after trial. According to Armstrong (1990):\textsuperscript{53}

‘A woman, as a human being is entitled to respect for her dignity of her body and protection of the integrity of her body.’

Furthermore, Article 4(1)\textsuperscript{54} of the Protocol, Article 3(h)\textsuperscript{55} of CEDAW and Article 15 of the Constitution of Zambia provide:

‘Every woman shall be entitled to her life and integrity of her person. All forms of cruel, inhuman or degrading treatment shall be prohibited.’

The above provisions recognise that women are not treated humanely. They are degraded. Failure to create a friendly environment where victims of rape can feel free to report, coupled with unnecessary delays, both at the police station and at the court, given the nature of the offence of rape, could amount to cruel and inhuman treatment. The same could be said of the traumatised women victims of rape who suffer from the application of the rule on corroboration. Stigmatization is another factor which prejudices the victim in sexual assault cases. Once a rape victim has brought her perpetrator to trial, she faces a daunting process. The trials meet all conditions of degrading processes. She is subjected to having to testify in court. The defendant need not testify if he decides not to do so. It is before her witnesses that the victim of rape is denounced and her motives questioned. The fear and emotional turmoil

\textsuperscript{52} Article 3 of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa of 2003.


\textsuperscript{55} Article 3(h) of the Convention on the Elimination of All Forms of Discrimination Against Women.
that may have subsided earlier are once again aroused. According to Alfred W. Chanda (2002):

‘It is a fact that both child and adult victim of sexual assault are often subjected to attacks on their privacy and dignity during cross-examination. Needless to say that defence counsel knows that rigorous cross-examination may cause emotional trauma and the reaction that increases the likelihood of the accused being acquitted.’

The sheer number of charges made that do not result in a trial suggests that only the most adamant of victims and the strongest of cases survive. The ordeal a victim goes through to reach trial is not a sufficient justification for instructing a jury that rape is an easy accusation to make.

2.9.4 Recognition of customary and statutory law of the rule on corroboration

The idea was to investigate how other laws affect women and girls victims of rape and defilement. In this regard, legal pluralism recognises that there are multiple laws which include such laws as customary laws, statutory laws, religion and other regulatory norms controlling women and girl victims of sexual offences. This is due to the fact that women and girl victims’ lived realities are shaped by religious and cultural practices in Zambia (Matie, 2010). According to Bentzon, W. A, et al. (1997):

‘Legal pluralism is the expression to explain the legal systems in colonies and former colonies whereby the former legal system recognizes the presence of customary law systems. It also identifies norms as sources with a special field of application.’

In this regard, the law on corroboration was brought to the former colonies of Zambia by the United Kingdom. This law is still being applied in prosecuting sexual offences. The Zambian legal system has not yet changed the law to fit the lived realities of women and girl victims of rape and defilement. As Zambians, we need to understand and investigate the way in which

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56 T.McCahil, L.Meyer, & Feschan, supra note at 224-25.
our norms and beliefs affect our daily lives, especially those of women. An African woman is different from a westerner in terms of her culture and beliefs. A woman born and bred in Africa cannot talk about sex in public. It is a taboo. As a result, women find it difficult to report issues of sexual abuse to the police. They feel they will not be respected by the general public. This is especially the case with married women who feel that their husbands will divorce them if they open up and say in public that they have been raped. According to the empirical findings, rape cases in Zambia and other countries are seldom reported to the police. Most rape cases are simply dealt with outside the public sphere. Victims prefer the matter to be dealt with according to customary as opposed to general law. The process is just too cumbersome under general law; customary law is informal and not cumbersome. According to customary law, sexual offences are considered civil matters, whereas under statutory law they are treated as crimes. Remedies under criminal law are seen as punishments; under customary law, remedies often take the form of compensation. And under general law, it is the state, not the victim, who benefits. In Zambia, the dual system of law is a big problem. Under the general law, a person is free to apply the law they wish. Therefore, the majority of women prefer customary to statutory law when dealing with the problem of sexual offences. In criminal cases under the general law in which the rule on the corroboration of evidence rule applies the proof must be beyond a reasonable doubt; whereas, in civil or customary law, the standard of proof is lower because it is on a balance of probabilities. As a result, customary or civil cases move faster than they do under the criminal law.

2.9.5 The rule on corroboration in sexual offences in Zambia in comparison with other jurisdictions

The rule on the corroboration of evidence has undergone some revolution over the years in a number of jurisdictions with some abolishing the rule. Others have just simply modified the corroboration rule. The changes are due to the influence of human rights law. Before human rights appeared on the legal scene some countries simply applied the rule under the common law and some are still doing so. Zambia is one of the countries which is still applying the rule. Below are some of the countries which have abolished the rule.
**England**

According to Tibatemwa (2005), England (from whom Zambia inherited its criminal justice system) passed the Public Order Act (1994) which abolished the rule requiring trial judges to warn the jury of the danger of convicting an accused based solely on the evidence of a woman who complains of a sexual assault.

**South Africa**

In South Africa, the rule was considered in the case of *S v Jackson* (1998) and the court held as follows:

‘In my view the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assaults cases, overwhelmingly women, as particularly unreliable. In our system of law the burden is on the state to prove the guilt of the accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach but that is a far cry from the application of a general cautionary rule.’

**Namibia**

In the Namibian case of *S v D and Another* the court considered the rule and its justification. It was held that the rule in sexual offences has no rational basis for its existence; that, while a trial court must consider the nature and circumstances of a particular offence, in the end only one test applies, namely: ‘Was the accused’s guilt proved beyond a reasonable doubt?’ And that the test must be the same whether the crime is theft or rape.

In the year 2000 the Supreme Court of Namibia in *S v K* held that the cautionary rule had outlived 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 the victims of sexual offences which could lead to grave injustices to the victims involved.

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60 Tibatemwa, L. (2005) Criminal Law in Uganda; Sexual assaults and offences against Morality, Fountain Publisher: Kampala.
61 *S v Jackson* 1998 (1) SACR 470 (SCA).
62 *S v D and Another* 192 (SA) 513 (Nm).
63 *S v K* 4BCLR 405 (NmS).
In Zimbabwe they have also abolished the rule. In the case of *Canaan Sodindo Banana v The State* the court stated that:

> ‘But having regard to the abrogatory of the obligatory nature of the rule in such countries as Canada...I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I could emphasise that this does not mean that the nature and circumstance of the alleged sexual offence need not be considered carefully.’

### 2.10 Conclusion

The above analysis covers some of the literature on the rule on corroboration in rape and defilement offences. The analysis has shown the origin, development and application of the rule on corroboration in sexual offences. Most of literature review has dealt with how the rule infringes upon rape victims’ rights to equality before the law. The rule is also discriminatory against women. The literature seems to propose that the cautionary rule should be abolished or modified because it has no rational or reasonable basis and it imposes an additional burden on women and girls who are the victims of rape and defilement. The rule is not only discriminatory against women and girls, but it also imposes many negative effects on women and girl victims of rape in Zambia leading to a constant rejection of their rights to access justice. It has also been observed that most of the literature only emphasises the discriminatory part of the rule; not much has been written about the negative implications of the rule on women and girl victims of rape and their difficulties in securing corroborative evidence in sexual offences. Furthermore, not much has been written on ways of preventing violations of the human rights or trauma suffered by women and girl victims of rape and defilement as a result of the enforcement of the ‘rule’ on corroboration evidence from the Zambian perspective, an area on which this study wishes to concentrate. In this regard, the study in chapter three looks at the influences of my conceptual framework on the methodologies.

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CHAPTER THREE

3.0 METHODOLOGICAL FRAMEWORK

3.1 Methodological approaches

3.1.1 Women’s law approach

The research employed the abovementioned approach. This is due to the fact that it is an inter-disciplinary methodology involving the law based on women victims’ lived experiences and realities. It is a woman-centred legal discipline taking women’s actual lived experiences and life situations based on sexuality, birth, care and domestic work as a starting point to analyse the position of women in law and in society (Bentzon, et al., 1998). According to Dahl (1987):65

‘The methodology of women’s law is cross disciplinary and pluralist and calls for a rather free use of available materials where ever it can be found.’

The application of this approach caused me first to meet the actual people who are affected by the rule on the corroboration of evidence. These are the women and girl victims of rape and defilement. If I did not use this approach I would not have considered it important to interview the women and girls concerned as I would have been concerned with only the actors, such as the police, prosecutors, health personnel and magistrates. This approach allowed me to get the actual feel of the women and girls concerned.

Apart from that it allowed me to ask these women questions as I conducted the study, especially in relation to how they are affected by the obtaining of corroborative evidence in accordance with the rule. This assisted me in the study due to the fact that had I not asked these women such questions I would have ended up concluding or assuming that the rule does not have any problem or effect on women and girl victims of rape and defilement as I would have been under the mistaken belief that it applies to both men and girls. Questioning women in this way enabled me to unearth the problems that they face when the rule is enforced against them in the process of obtaining evidence in sexual offences. I also came to realise that the problems that women and girls face are not only due to their sex but rather as

a result of the substance of the law and its enforcement through the personnel of the Zambian criminal justice system. The law and its enforcers systematically undervalue the problems that women and girl victims of rape and defilement face as a result of the imposition of the corroboration of evidence rule. During the study it was found that an accused person is accorded a fair trial even in the absence of the application of the rule. The rule only succeeds in infringing upon the rights of women complainants. In spite of this, most officers in the criminal justice system continue to insist on enforcing this rule, knowing full well that women and girl victims of sexual offences gain nothing when an accused is found guilty and sent to prison for rape or defilement.

I went to the University Teaching Hospital (UTH), Lusaka, a One Stop Centre, the Young Women Christian Association (YWCA) in Kabwata, Lusaka Magistrate Courts and some police stations within Lusaka Province and interviewed 27 victims of rape and defilement, including the parents or guardians of girl victims of defilement. I was able to understand their lived realities and the circumstances leading to the trauma they suffered as result of the criminal justice system insisting on obtaining corroborative evidence in accordance with the rule. On 20 December, 2013 I attended a court session at Lusaka’s New Complex of Magistrates Courts. After the court session I interviewed the grandmother of a girl who had allegedly been defiled. She said:

‘I am even surprised that the prosecutor did not tell me to bring the said under five clinic card. I told him later that the said document is there at home he refused because the matter was already on record that the doctor should examine the victim’s age. I was given a handwritten order by the prosecutor who told me to go to one of the business centre for typing. When I went at the business centre the typist could not read the hand writing. However, I was advised by a good Samaritan to go to the Magistrate typing pool where it was typed. The matter was adjourned to 6 January, 2014 for continued trial. This is one of the reasons why the case is taking so long. The girl is ten years old and even the mother knows that. To my view the process of obtaining evidence is not good. It takes so long.’

By adjourning the matter for the purpose of determining the age of the girl, it is clear that neither the magistrate nor the prosecutor took into account how old the young girl was based on her appearance and did not even make any effort to ask her grandmother for the under five clinic card to determine her age. As a result, the case was delayed causing further trauma to the victim. The court had relied on Section 140 of the Zambian Penal Code requiring
corroboration evidence to ascertain whether she was under 16 years of age. This position was also the same with other victims of defilement who complained of unnecessary court adjournments in order to obtain proof required by the corroboration of evidence rule. Therefore, based on the women’s law approach, I was able to conclude that when dealing with women and girl victims of rape and defilement, the criminal justice system does not take into account the fact that the process of obtaining corroborative evidence both traumatises victims of sexual violence and violates their human rights, evidence which will be seen later in chapter four which deals with the research findings.

3.1.2 Grounded theory

Grounded Theory (GT) is a systematic methodology involving the discovery of theory through the analysis of data. It can be compared to the actions of a dung beetle, an insect which collects balls of animal dung in which it lays its eggs (Bentzon et al., 1998).66 This approach helped me to gather data, screen it and thereafter analyze it by taking into consideration the implications of the finding and thereafter determine what data should be the next to collect in order to consider the women and girl victims’ needs and continue with the gathering and analysis cycle. GT allowed me to discover new victims of sexual offences and new issues. My approach was that after collecting data every day, I would sit down in the evening in order to analyse the information collected. By so doing, it was assisting me to find out the gaps and to be able to collect relevant data the next day. Using the said theory I was able to discover organisations which deal with victims of rape and defilement, such as the National Legal Aid for Women, the Social Welfare Department and a hospital. Using the grounded theory approach, I also interviewed respondents who were not part of my original sample. When I went to interview the Law Association of Zambia (LAZ) the Director informed me that:

‘Your research on corroboration evidence you need to involve the National Legal Aid Clinic for Women and some relevant NGOs who deal with the victims of rape and defilement case. The National Legal Clinic monitor proceedings of victims of sexual violence at the police and at the court.’

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When I went to the National Legal Aid Clinic, the organisation became interested in this research because they had also observed that the corroboration evidence rule under Sections 140 and 141 of the Penal Code violates the human rights of its victims. They asked me to furnish with them a copy of the study for their advocacy programs in order to help them lobby government to harmonise the rule on corroboration of evidence as, in its current form, it discriminates against women and girl victims of rape and defilement. This is because the process of obtaining corroboration evidence is cumbersome. Initially, the NLAC was not part of my research design. Yet after applying the Grounded Theory approach, this organisation turned out to be a very useful respondent in this research. Through this approach, I managed to confirm my assumptions and to fill in the gaps that were created from other respondents. All of the assumptions were sustained because most of the respondents narrated that the process of obtaining corroboration evidence traumatises and violates human rights of women and girl victims of rape and defilement. As a starting point I had some questions in my mind concerning the five assumptions which I had formulated.

The first research question was: ‘Does the requirement of corroboration evidence rule in rape and defilement cases violate women and girls rights to protection from cruel, inhuman and degrading treatment?’ In response to the said question, most of the respondents confirmed that the requirement of corroboration violates the human rights of its victims. Only a few challenged the assumption.

The second research question was: ‘Does the process of obtaining corroborative evidence traumatise women and girl victims of rape and defilement?’ According to the respondents I interviewed, the majority said the process traumatises women victims of rape and defilement and a small number challenged this assumption.

The third question was: ‘Does the Zambian criminal justice system rely on the cautionary rule or the corroboration of evidence rule in prosecuting sexual offences which is outdated and is no longer required as is the case in some countries in the Southern African region?’ The first three questions targeted the National Legal Aid Clinic for Women because they monitor cases of violence against women starting from police stations right up to and through the Magistrates Courts. The above assumptions were not challenged. I involved this organisation because they also have influence to bring about the amendment of laws which violate human rights. However, some respondents were surprised when they heard that some
countries have abolished the corroboration evidence rule and that it is outdated. Almost every respondent knew that the criminal justice system relies on the corroboration evidence rule, even though its enforcement traumatises women and girl victims of rape and defilement and violates their human rights.

For the last two research questions (i.e., 4 and 5) I wrote a letter requesting authority from the Deputy Inspector General of Police to interview and conduct research with VSU Officers. I did not face any challenges because before commencing my research I approached the Victim Support Unit (VSU) officers so that I could collect information. I had some questions in my mind. The fourth and fifth research questions were: ‘Does the Victim Support Unit (VSU) have a mandate to provide counselling services to women and girl victims of rape?’ and ‘Is the VSU adequately resourced and does it have structures to provide services for traumatised women and girl victims of rape?’ Most of the respondents said the VSU has a mandate to counsel women and girl victims of rape and defilement. However, they also said that it does not have adequate resources and structures to provide counselling services. Various issues which traumatised and violate women and girl victims’ rights during the process of obtaining corroboration evidence in sexual offences were raised and are highlighted in the following chapter which deals with the findings.

### 3.1.3 Legal pluralism approach

According to Bentzon, W.A et al. (1997), legal pluralism is a term used to describe the legal system in colonies and former colonies in which the former legal system recognises the existence of a customary law system and recognises its norms as sources with a special field application. Further, Griffiths defines legal pluralism as a state of affairs for any social field, in which behaviour pursuant to more than one legal order occurs. The legal order of all society is not an exclusive, systematic and unified position depending on the state, but it has its sources in the self-regulatory activities of the entire multifarious social fields present in society (Griffiths, 1986).

Therefore, in this research, legal pluralism was applied because of the nature of the study under investigation which involves both the criminal justice system (which embraces the

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police and the courts who deal with rape and defilement cases) and other laws, such as customary law, which some women and girl victims prefer to apply because they face certain problems under the criminal justice system. Therefore, there is a need to look at the customary law, statutory law and other institutions dealing with rape and defilement cases. Most rape and defilement cases are simply dealt with outside the public sphere. The victims prefer customary law because the statutory law which applies in the Magistrates Courts within the criminal justice system is just too strict and cumbersome. Victims often prefer the customary law approach which treats such cases as civil matters whose resolution procedures are quicker and less formal. Furthermore, while the remedies offered in criminal matters focus on the punishment of the offender and seem only to benefit the state, the emphasis under customary law is on compensation for the victim.

This approach helped me to discover from the police and the courts why rape and defilement cases were being withdrawn. When I asked some respondents most of them told me that they are withdrawn because victims reconcile with their perpetrators. The perpetrators pay their victims some money and, if it is at the village level, they are given an animal so that the matter is settled out of the court. They even said that settling the matters like this is better than proceeding with them criminally because no one benefits by proceeding through the courts. I interviewed one of the respondents, a state advocate from National Legal Aid Clinic for Women, who explained:

‘Last year we had one victim of defilement. She was defiled whilst she was at the private school. This happened when she was in the toilet by one of the male workers at the said school. In the process of the matter, the guardians discontinued the matter. They sued the School management and the defiler. They wanted compensation but in due course, they decided to withdraw the case as civil matter.’

This clearly shows that most these cases are withdrawn and the victims use other means to settle the matter. In customary law, cases are dealt with quickly and this is an example of restorative criminal justice. The accused is called and talked to by the village headman in rural areas. Each member of that particular community is given a chance to talk to the accused person and admonish him. The victim is present and has an opportunity to hear how the perpetrator is being scolded and shouted at by and in the presence of the people. The victim is given a chance to say what she wants to say so that the matter is disposed of. This is part of the counselling and healing process for the victim and it helps to minimise her trauma.
3.1.4 Human rights approach

According to Bentzon, et al. (1998), the women’s law approach is a woman-centred legal discipline taking women’s actual lived experiences and life situation based in sexuality, birth, care and domestic work as a starting point for the analysis of the position of women in law and in society. I applied this approach when meeting the actual victims of sexual violence such as women and girls involved in the process of obtaining evidence of corroboration during criminal proceedings. I targeted those who are affected in sexual offences and by the rule on corroboration in Zambia.

The human rights approach involves asking what human rights are being affected by an issue under examination. I was helped by this approach in gathering very important information as to whether the rule is in conformity with the Bill of Rights in the Zambian Constitution and the relevant articles of relevant international human right instruments. I was also able to uncover aspects of human rights which are being violated by the application of the corroboration of evidence rule. In this regard it helped me to discover that the rule does not only violate the right to equality alone but also the rights to access to justice and the right to privacy. In addition, this approach helped me to assess whether the Zambian government is fulfilling its obligations under the international human rights instruments which are designed to promote and protect the rights of women and girl victims of rape and defilement in criminal proceedings. The human rights approach focuses on whether the criminal justice system in interpreting the rule on corroboration takes into account the country’s obligations in complying with the international human rights framework that Zambia has ratified and which advocates the non-discrimination of women and girls on the basis of their gender and discrimination. For this purpose, I analyzed Article 23 of the Constitution which prohibits discrimination on the basis of sex. Further, Article 5(a) of CEDAW provides for the elimination of prejudices and all other practices which are based on the inferiority or superiority of either sex. Article 7 of the Universal Declaration of Human Rights provides that all are equal before the law without any discrimination. The provisions of Article 26 of the International Covenant on Civil and Political Rights are similar. In this regard, Article

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70 The Convention on the Elimination of All Forms of Discrimination Against Women.
71 Article 7 of the Universal Declaration of Human Rights.
72 Article 26 of the International Covenant on Civil and Political Rights.
23\textsuperscript{73} of the Constitution, which protects the right to equality before the law, is a fundamental right. A number of foreign cases and articles have held that the rule on corroboration is in contravention of this right and discriminates against women. Article 23\textsuperscript{74} of the Constitution of Zambia provides:

‘Protection from discrimination on the ground of race and no law shall make any provision that is discriminatory either of itself or in its effect. No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.’

Furthermore, Articles 12\textsuperscript{75} and 15\textsuperscript{76} of CEDAW provide that state parties are to provide women’s equality with men before the law and to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure women access to health care services on the basis of their equality of men. According to the Protocol, Article 3(1)\textsuperscript{77} provides a right to dignity and protection of women’s human and legal rights. These provisions recognise a woman’s legal rights, that they should not be sabotaged and that she needs care and protection during and after a trial. Furthermore Article 4(1)\textsuperscript{78} of the Protocol, Article 3(h)\textsuperscript{79} of CEDAW and Article 15 of the Constitution of Zambia all provide that every woman shall be entitled to her life and to the integrity of her person. All forms of cruel, inhuman or degrading treatment shall be prohibited.

However, the study established that in construing the rule on the corroboration of evidence under section 140 and 141 of the Penal Code of Zambia (which provides that in sexual offences an accused person cannot be convicted on uncorroborated evidence), the criminal justice system does not take into account the international human rights framework provided on the Constitutional provisions prohibiting the non-discrimination of women on the basis of sex. This is because in criminal cases courts base their decisions in sexual offences on proof beyond a reasonable doubt and the belief that women are liars. This is confirmed by the High Court Judge in the case of \textit{Kalebu Banda v The People} where it was held that:

\textsuperscript{73} Article 23 of the Constitution, Chapter 1 of the Laws of Zambia of 1996.
\textsuperscript{74} Article 23 of the Constitution, Chapter 1 of Zambia.
\textsuperscript{75} Article 12 of Convention on the Elimination of All Forms of Discrimination Against Women.
\textsuperscript{76} Article 15 of the Convention on Elimination of All form of Discrimination Against Women.
\textsuperscript{78} Article 4(1) of the Protocol to the African Charter on Human and People’s Rights on the Rights of women in Africa of 2003.
\textsuperscript{79} Article 3(h) of the Convention on the Elimination of All Forms of Discrimination Against Women.
'In a rape case failure to obtain medical evidence when there was a duty to do so means that the court proceeds as if the doctor had testified that he had examined the victim and found no evidence that force was used nor any evidence of intercourse.'

Therefore, using this human right approach, I was able to establish that, to a large extent, the rule does not benefit women and girl victims of rape and defilement. This is due to the fact that the Zambian criminal justice system does not take into account Zambia’s human rights framework and it ignores the country’s Constitutional provisions prohibiting the discrimination of women and girl victims of rape and defilement on the basis of their gender.

3.1.5 Liberal theory

The liberal theory helped me to look at the way in which laws and policies protect women and girl victims of sexual offences. Therefore, I had to find out what gaps were there on corroborative evidence ‘rule’ so that they could be remedied. The theory helped me to understand that the law should be applied equally without distinction to all people in society. According to Tong (1989), classical feminists contend that law should be applied equally without distinction to all people in society and this should be done without regard to similarities or differences between people. Therefore, this contention helped me to understand the data which I collected from legal officers and judicial officers, especially what they understood the word ‘discrimination’ to mean. Most of the respondents were of the view that the law is discriminatory because women are the victims of sexual offences as opposed to men. No man complained of being raped or defiled. I realized generally that the distinguishing behaviour between men and women is their gender. If both women and men were of the same sex biologically this rule would not be discriminatory. Without the help of this liberal approach I would have been confused and I would have find it difficult to understand and gather data which provided me with different meanings on the same issue; for example, some respondents denied that the rule discriminates against any one, while others admitted it did.

3.2 Sampling methods

In conducting my research, grounded and purposive sampling was employed. In this regard, I selected respondents who were key subjects of the study to provide useful information.

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Because I was conducting research about the victims of rape and defilement I went to the police where they report such offences and to the University Teaching Hospital (UTH), Lusaka to meet some actual victims.

Purposive sampling was also used in this research. My method of sampling was to look at the potential value of the respondents to this study. For instance, I decided to choose the police, prosecutors, medical health officers, counsellors and the magistrates at the Lusaka Magistrates Court. I chose the police because they are the ones who investigate the cases, prosecutors, because they prosecute such cases before the courts and magistrates because they hear the cases and, finally, convict or acquit accused persons. Below is a table of my respondents.
Table 1: Respondents/informants interviewed according to geographical location and gender (Lusaka Province)

<table>
<thead>
<tr>
<th>DEPARTMENT/ORGANISATION</th>
<th>SEX</th>
<th>NO. OF RESPONDENTS INTERVIEWED</th>
<th>TOTAL NO. OF RESPONDENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>NPA OFFICE (DPP)</td>
<td>FEMALE</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>UTH (One Stop Centre) LUSAKA</td>
<td>FEMALE</td>
<td>25</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>ZAMBIA POLICE LEGAL DEPT</td>
<td>FEMALE</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>YWCA KABWATA</td>
<td>FEMALE</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>CHILANGA POLICE STATION</td>
<td>FEMALE</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>LUSAKA CENTRAL POLICE STATION</td>
<td>FEMALE</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>LUSAKA POLICE DIVISION</td>
<td>FEMALE</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>CHONGWE POLICE STATION</td>
<td>FEMALE</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>KABWATA POLICE STATION</td>
<td>FEMALE</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>LUSAKA DISTRICT SOCIAL WELFARE</td>
<td>FEMALE</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>NATIONAL LEGAL AID CLINIC FOR WOMEN</td>
<td>FEMALE</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>UTH WARD CO3</td>
<td>FEMALE</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
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<td></td>
</tr>
<tr>
<td>ZAMBIA POLICE RESEARCH DEPT</td>
<td>FEMALE</td>
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<td>1</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>CHILD PROTECTION UNIT</td>
<td>FEMALE</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>LINDA POLICE POST</td>
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<td>1</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>LUSAKA PROSECUTION DEPT</td>
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<td>5</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>LUSAKA MAGISTRATES COURT</td>
<td>FEMALE</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>ZAMBIA POLICE HEADQUARTERS VSU</td>
<td>FEMALE</td>
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<td>1</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>CHAWAMA POLICE STATION</td>
<td>FEMALE</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>MINISTRY OF GENDER</td>
<td>FEMALE</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>MALE</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>
3.3 Methods of collecting data

In the first week of the research, I made some appointments with officials within Lusaka Province by submitting letters of request to conduct various interviews and research. The departments visited were police stations (i.e., Victim Support Units), the Ministry of Health, the judiciary, Non-Governmental Organisations, the National Legal Aid Clinic for Women, the Ministry of Health, the Criminal Prosecution Department, the Ministry of Gender and Development and the Ministry of Community Development (See some of the letters attached in the Appendix.) In terms of collecting data from the field, I used various methods in order to conduct the research. These were: individual interviews, focus group discussions and observations. My interviews were focused on the main assumptions that the Zambian criminal justice system does not adequately protect women and girl victims of rape and defilement because of its slavish or blind enforcement of the rule on corroboration. In total, I had one hundred and eight (108) respondents categorized into officials, Non-Governmental Organizations and victims of rape and defilement as per the following tables.

Table 2: Respondents interviewed according to gender and category (Lusaka Province)

<table>
<thead>
<tr>
<th>S/NO.</th>
<th>CATEGORY OF RESPONDENTS</th>
<th>SEX</th>
<th>NO. OF RESPONDENTS</th>
<th>TOTAL NO. OF RESPONDENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>GOVERNMENT OFFICIALS</td>
<td>FEMALE</td>
<td>50</td>
<td>67</td>
</tr>
<tr>
<td></td>
<td></td>
<td>MALE</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>NON-GOVERNMENTAL ORGANISATIONS</td>
<td>FEMALE</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td></td>
<td>MALE</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>WOMEN AND GIRL VICTIMS OF SEXUAL OFFENCES</td>
<td>FEMALE</td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td></td>
<td>MALE</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>
Table 3: An overview of the main assumptions and the responses from the respondents interviewed

<table>
<thead>
<tr>
<th>MAIN ASSUMPTIONS</th>
<th>GOVERNMENT OFFICIALS INTERVIEWED</th>
<th>NGO OFFICIALS INTERVIEWED</th>
<th>VICTIMS OF RAPE AND DEFILEMENT</th>
<th>TOTAL RESPONDENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Zambian criminal justice system does not adequately protect women and girls of rape and defilement due to the corroboration rule.</td>
<td>50</td>
<td>10</td>
<td>24</td>
<td>84</td>
</tr>
<tr>
<td>The Zambian criminal justice system does adequately protect women and girls of rape and defilement due to the corroboration rule.</td>
<td>17</td>
<td>4</td>
<td>3</td>
<td>24</td>
</tr>
</tbody>
</table>

3.3.1 In-depth interviews

This method was applied by going out and meeting an individual to gather data. I mainly used this method when talking to the women and girl victims of rape and defilement in order to provide them the respect and privacy that they deserve according to their human rights as human beings. This helped me to get information on sexual offences and they were able to express themselves freely in private. Individual strategy interviews were employed when meeting key respondents, such as magistrates, with whom it was not easy to secure group interviews because of the respect the community accords them as magistrates.

I made sure that when interviewing women and girl victims I made it clear to them that the aim was not to pass judgment on them but rather to investigate the circumstances which they had to go through in the process of obtaining corroborative evidence. Allowing women and girl victims of rape and defilement to express themselves using their own voices was very
important to the nature and purpose of the study. I used these in-depth interviews to avoid the risk of distorting or misrepresenting the information they provided me. Twenty seven (27) victims were interviewed at the University Teaching Hospital, Lusaka and at the Young Women Christians Association (YWCA) which included victims of rape and defilement. Some of these victims went right through the criminal justice system.

3.3.2 Focus group discussions
I conducted two focus group discussions during my field research. One was with some health officers, police officers, prosecutors and counsellors at UTH, Lusaka. The second one was at the YWCA with counsellors. As a result of the said discussions, I managed to collect data relating to the assumptions and the goals informing people’s values, beliefs and actions (Tsanga, 2003: 44). This method proved to be effective because I managed to obtain data from many respondents in the shortest period of time.

3.3.3 Observations
This was one of the major methods used in the study. This involved visiting the court and listening to the court proceedings in rape and defilement cases. This method was used at the Lusaka New Complex Magistrates Courts. I was able to observe how the magistrates conduct themselves when conducting rape and defilement trial cases in court. I personally witnessed one case of defilement which was delayed. This case started in August, 2013 and was being adjourned unnecessarily. One of the reasons for the adjournment was to determine the age of the girl who had been defiled. From my observations, it was clear to everyone present that the girl was under 16 years but the prosecutor and the magistrate ordered that she should be examined by the doctor at UTH to determine her age and the case was adjourned in my presence to 6 January, 2014. I had also visited the One Stop Centre at the University Teaching Hospital (UTH), Lusaka where victims of defilement are referred to for examination. I personally observed some girl child victims crying when they were asked to narrate the story of how they were sexually abused. Once again, I realized that the process of obtaining corroborative evidence does indeed traumatise victims. This is due to the fact that they are forced to narrate the bad incident of defilement more than once to those at the police station, the hospital and, finally, in open court.
3.3.4 Triangulation of data

The triangulation of research method was useful. The idea was to find out whether, after the introduction of additional variables, the data still pointed towards a dominant inference towards new explanations for the phenomenon in question (Tsanga, 2003: 45).81

3.4 Limitations of the study

The inability to visit and interview the women and girl victims of rape and defilement in their sheltered accommodation at the YWCA where most of the victims stay was difficult. They did not allow me to go there and see where they stay because they are of the opposite sex. The officer-in-charge of YWCA told me that they do not allow some researchers to visit them for fear of traumatizing them further because some of them are still in a confused state. This was further proof that victims of sexual offences are traumatised and that is why there is a need to counsel them.

81 Tsanga, A., Taking the Law to the People; Gender, Law Reform and Community Legal Education in Zimbabwe, Harare, Weaver Press.
CHAPTER FOUR

4.0 PRESENTATION AND DISCUSSIONS OF RESEARCH FINDINGS

4.1 Introduction

This chapter discusses the findings of the research which was to investigate how the corroboration evidence rule in sexual offences traumatises and violates the human rights of women and girl victims of rape and defilement. I will explain the various steps of obtaining corroborative evidence and how it traumatises and violates the human rights of women and girl victims of rape and defilement. In this regard, this chapter will look at the process of obtaining corroboratory evidence in rape and defilement cases. Secondly, it will ascertain whether the corroboration rule is justifiable and should be continue to be applied in the Zambian criminal justice system. This chapter also looks at how the rule works in prosecuting sexual offences in Zambia in comparison with other jurisdictions. Findings on other emerging issues will be also looked at in this chapter. Finally, identifiable gaps which come out in the study and the deeper analysis of the study or research will be undertaken.

In conducting this research, I visited some government and Non-Governmental Organizations which handle victims of rape and defilement. The aim was to investigate how the corroboration evidence rule in sexual offences traumatises and violates the human rights of both women and girls victims. A further aim was to find out whether the Zambian criminal justice system adequately protects women and girl victims of rape and defilement in the process of obtaining corroborative evidence and to find possible ways of preventing violations of the human rights and trauma they suffer during the enforcement of the said rule in Zambia. The following were my assumptions:

1. The requirement of corroboration in rape and defilement cases violates women and girls’ rights to protection from cruel, inhuman and degrading treatment.
2. The process of obtaining corroborative evidence traumatises women and girl victims of rape and defilement.
3. The Zambian criminal justice system relies on the cautionary rule or on the corroboration of evidence rule in prosecuting sexual offences which is outdated and is no longer required in some countries in the Southern African region.

4. The Victim Support Unit (VSU) has a mandate to provide counselling services to women and girl victims of rape.

5. The VSU is not adequately resourced and has no structures to provide services for traumatised women and girl victims of rape and defilement.

4.2. Stages in the process of obtaining corroborative evidence in rape and defilement cases

The four basic stages in the process of obtaining corroborative evidence are illustrated in the figure below.

![Diagram illustrating the four basic stages in the process of obtaining corroborative evidence](image)

Figure 1: The four basic stages in the process of obtaining corroborative evidence

The above figure illustrates the long journey which victims of rape and defilement are forced to go through to obtain corroboration evidence in sexual offences.

The finding under this part related to my first assumption based on my research question: ‘Does the Zambian criminal justice system adequately protect women and girls who are the victims of rape and defilement as a result of enforcement of the corroborative evidence
“rule”? Most of my eighty-four (84) respondents said that the Zambian criminal justice system does not adequately protect women and girl victims of rape and defilement due to the process of obtaining corroboration evidence during the prosecution of these sexual offences. This results in trauma and a violation of their rights. For example, when I had in-depth interviews with some of the 84 respondents some of the following issues were raised.

4.3. Factors that traumatise women and girl victims throughout the process of enforcing the rule on the corroboration of evidence

Women and girl victims of sexual assault face a number of problems as a result of the operation of the rule on corroboration. The problems they experience occur both inside and outside the criminal justice system and they militate against their taking their cases forward in their pursuit of justice. The challenges women face cause them trauma. They are not of their own making but arise from the social and cultural settings in which they live but do not always perceive and understand. The following are some of the factors which were found during the study.

4.3.1 The first stage: The scene of the crime, usually, the home

The process of reporting a sexual offence is a long journey. It starts from the scene of the crime which is often in the home or at the level of the family. This is because most victims are attacked by close family members within the comfort of their homes and not outside their homes by strangers. The victim is influenced by social ties, threats, shame and stigma at the family or community level and these dissuade her not to report the case. (See the diagram at the beginning of this section.)

4.3.1.1 Fear of the loss of social ties

According to Tanzanian Law Commission (1991),\textsuperscript{82} social ties are those factors that prevent someone from reporting a wrong which another person of the same society has done to him or her for fear of losing support and benefits from the community they live in. When a rape or defilement case has been committed, some women or girls do not report it because they fear losing ties with their community. During my research I came across a victim who narrated that when she was defiled by her uncle she reported the matter to her auntie and she was advised not to tell anyone because he was the only person supporting the family. The victim

\textsuperscript{82} Tanzanian Law Commission (1991), Criminal Law as a vehicle for the protection of the right to personal integrity, dignity and liberty of women.
was pressured into not reporting the rape or defilement case by the family. Sometimes women or girls may be threatened with the loss of any support they receive from a family or community member if they report the offence. This has led to cases not being reported to the police on time and this has often let to the destruction of any corroborative evidence that might have existed. Therefore, when cases like this are finally reported to the police after a long period of time, the victim is often disbelieved and, as a result of the lack of corroborative evidence, the case is either dropped at the investigation stage or, if the case proceeds to trial, it is dismissed (i.e., the accused is acquitted) by the magistrate. An example is the following case of defilement which was not reported because the girl was threatened and in her own voice she related:

‘I was not sure how my auntie was going to handle the bad news. I was scared. The case was not taken to court because I was defiled by my uncle. When I told my auntie she threatened me not to report to police because my uncle was the only breadwinner. She said that there will be no one to feed us. It happened two years ago when I was 14 years old and I was very young.’

In another defilement case, which was reported at the One Stop Centre at UTH, Lusaka, I interviewed the mother of the victim and she said that she did not want the boy who defiled the girl to be arrested because they belonged to the same church. The mother of the victim of defilement narrated the following:

‘I don’t want the perpetrator to be arrested because we go to the same church and I have been keeping the boy at my house. Am very sorry for him of what he has done to my daughter. Am willing to withdraw the case if the relatives come to see me.’

The research also found that the effect of social ties may cause some crucial witness who could have offered corroboration of a complainant’s story in a rape or defilement trial not to testify in court. These witnesses may refuse to testify because of their close relationship with the suspect and also due to their economic dependence on the suspect. A woman, therefore, may refuse to testify against her husband or a close relative who has committed a rape or defilement for fear that he will divorce her and she will suffer social exclusion. Also women fear reporting that another woman’s husband has committed a sexual offence because he may be arrested and go to prison resulting in the children losing their father and only breadwinner. I interviewed one of the legal officers in relation to the challenges faced by girl victims of
defilement in the context of their being denied the right to access justice. Her response was as follows:

‘During the process of handling sexual offences in court, we face some challenges due to culture, customs and religious belief. The challenges are that these offences are committed within the homes or community. According to my experience, there are very rare cases whereby the perpetrator is a stranger. They are committed within the conference of our homes such that an important person is the one who commits defilement such as breadwinners. Therefore due to poverty they are enticed to pay some money. We have one case right up now which was committed by a police officer in Chinsale District in Muchinga Province of Zambia. One of our prosecutors went to prosecute the case. The local prosecutor did not prosecute the case because they developed an interest since they know this officer. Someone from Lusaka went there to prosecute the case. But he is facing some challenges because we suspect the girl did not appear before the court to give evidence including the mother. The father came but was not willing to testify. There is a possibility that they compromised so that the case does not proceed.’

These are just some examples of cases in which social ties undermine the victim’s complaint and make it difficult to secure corroborative evidence to support it. According to the study there are many cases which have been reported to the police after some delay without corroborative evidence due to the fear of souring social relations. Therefore, the influence of these social ties on the victims force them to decide between pursuing justice and forfeiting social acceptance or sacrificing justice simply to remain members of the community. In most cases, they sacrifice justice. Often, when a child is defiled, others make this decision for her because she is considered to be too young to make it herself. Usually, her elders sacrifice her right to justice.

4.3.1.2 The victim’s fear of threats and her trust in the perpetrator
The second factor contributing to trauma during the process of obtaining corroborative evidence is threats and trust. The research found that in some cases the victims of rape and defilement delay in reporting the sexual assaults against them. This is because some victims are fearful because they are threatened, while others trust their assailants, especially close committed by family members and/or friends in defilement cases, when the assault is misrepresented to them as being normal. As a result of this fear and trust the chances of securing corroborative evidence in sexual offences is reduced. Victims become fearful when they are intimidated or threatened with something that will prevent them from reporting the offence and without some intervening factor. I followed one case of defilement of a girl aged
8 years at One Stop Centre at UTH, Lusaka. The child was defiled by her biological father in Kitwe. She did not report the matter to her mother until she went on holiday to her grandmother in Lusaka. She reported the matter immediately to her grandmother when she arrived in Lusaka. This is what she said:

‘I was threatened not to report to my mother by my father when he defiled me and I was forced to go to my grandmother in Lusaka for a holiday. I was feeling some pains on my vagina and I told my grandmother that I was abused by my father. My grandmother checked me and found some bruises on my vagina and she took me to Chawama police.’

Most of the time children of tender age are threatened not to say anything after they have been defiled. Some victims take a very long time to report because of this fear and, according to my findings, most of them do not report directly to their mothers. Instead, they make a report to their neighbours and they, in turn, report to the victim’s mother. Sometimes they report after the evidence has been destroyed. This makes the investigation difficult for the police because of the lack of corroborative evidence. Before the case is reported, the child also suffers psychological or mental injury. This causes trauma, especially if it is the victim’s first sexual experience. She also becomes fearful.

The issue of the victim’s trust in the perpetrator as a factor causing the case not to be reported in Zambia is common. This prevents a child enjoying the right to access justice due to the fact that corroborative evidence is destroyed as time passes without the case being reported. Most of the prosecutors and VSU officials I interviewed reported that children who are defiled by the people they trust do not make a report until an adult person notices something strange going on with the child. There was one VSU officer who narrated that she handled a defilement case in which the victim did not report the matter to anyone. But the neighbours were aware of what was happening. The father was having sexual intercourse with his own daughter and the daughter was enjoying the act. After the mother realised this, the girl was sent to her grandmother to prevent the relationship from continuing. The officer narrated the following to me:

‘I received a report of defilement of the girl by one woman who was the neighbour of the father who was defiling her (sic.) own child. When I followed up the matter I found that the girl was sent to the grandmother and the mother was reluctant to report the case to the police to avoid the husband to be arrested. However, the girl came back from the grandmother because she
wanted the sexual intercourse to be continuing since she had a trust in the father and she was enjoying the act as she was thinking that it was a normal thing.'

It was found that people in positions of trust do not defile girl victims using force. As a result, of the delay in the eventual reporting of such cases often leads to the loss of corroborative evidence. This helps to explain the reason why in most defilement cases the state relies on medical report evidence and if the medical report does not indicate anything the state loses its case automatically. This state of affairs violates the right child victim’s access to justice.

4.3.2 The second stage: Reporting at the police station

I found it very important to obtain first-hand information from rape and defilement victims as to how the corroboration evidence rule treats them and what exactly happens on the ground. In this regard, the women’s law approach was applied to make a comparison between what the law says and how it is applied to the actual victims of rape and defilement.

The victim first comes into contact with the police through the procedures they must comply with at the inquiry office at police stations. The office is an open office where reports are made and interviews are conducted by ordinary police officers whose work involves performing general duties. The problem at the inquiry office is that victims may be interviewed by more than one police officer or sometimes they may even be interviewed in the presence of other complainants who have come to report various other crimes.

4.3.2.1 Reporting at the police station and the victim’s experience

The reporting of a sexual offence is not a comfortable experience. Rape and defilement cases are not offences victims feel free to talk about. Therefore, privacy at the reporting stage is needed. The inquiry office is a place where people are constantly walking through. This lack of privacy may be very traumatizing to a victim who is relating such a sensitive matter.

84 of the 118 respondents interviewed agreed that the environment at police stations is not a conducive environment for victims to report their rape and defilement cases. However, they blamed the government for failing to offer any solution. One of the police officers explained:

‘The police has no adequate facilities to allow us to handle rape and defilement case very well. Looking at some police stations here in Lusaka
some police officers have no conducive offices where to sit in privacy with the victim of rape or defilement. Most of the stations do not have enough motor vehicles to transport victims to the hospital for medicals.’

All 27 victims of rape and defilement interviewed said that they did not freely report their cases at police stations. Those who did report did not find it easy or friendly. Those who did not report had heard other people complain about the process they had to undergo at the police station. Most of the victims I interviewed said that the police officers are not gender sensitive when handling victims of sexual offences. Most of them said they were interviewed by male police officers. I confirmed this with the National Co-ordinator of the Victim Support Unit (VSU) who said:

‘There is shortage of man power in our section. We have very few female officers under VSU. As a result, male officers handle victims of rape and defilement case.’

In my opinion, the experience rape and defilement victims endure at the police stations leaves a lot to be desired. Being a police officer, I was able to observe the activities that took place at the different police stations where I conducted my study.

4.3.2.2 Who conducts the interviews?

The study revealed that even though it is a requirement that sexual assault cases be conducted by female police officers, the reality is different. Of the victims of rape and defilement interviewed, only a few victims said that they were dealt with by female police officers. Of all the police stations I visited, there were no female police officers on duty at the Inquiry Office and most of them were male police officers.

4.3.2.3 How and where are the interviews conducted?

The police officers interviewed were able to provide me the details of how the interviews are conducted at the police stations. Some rape and defilement victims that were able to report their cases also gave their side of the story. I was also able to observe how the interviews are conducted using the case study. Rape cases are normally reported by the complainant herself, unlike defilement cases. After the statement has been recorded from the victim the next step is to visit the doctor at the hospital for medical report. The hospital is normally the government hospital. The medical report is given by the police with some remarks and should be signed by the receiving officer of the case. These cases are supposed to be handled by
female police officers. However, the practice is different. Any police officer on duty can handle rape or defilement cases. When I asked whether there was a special or private room or place where interviews are conducted, one of the VSU officers from Lusaka Central Police narrated that:

‘There is no special room for interviewing women and girl victims of sexual offences. You can see there is no enough space here in this office. Sometimes other officers are told to go out from this office so that the officer can have one-to-one interview with the victim.’

4.3.2.4 The importance the police place on the obtaining of a signed medical report form

After it has been established that there is an offence of rape or defilement a docket or a file is opened and the case is entered in the Occurrence Book (OB). This is done after receiving the medical report form which has been signed by the doctor. Without the medical report, the docket is not opened. Once a docket of case is opened, the case is sent to the Criminal Investigation Officer (CIO) who goes through it to check if everything is done properly. Thereafter, if the docket is correct, he allocates it to any officer in the Victim Support Unit (VSU). However, the docket or file may be handled by more than ten (10) officers depending on how complicated the evidence is. An officer handling the case at any stage may seek advice and send it back to the CIO. At any stage, the CIO may contact the victim for clarification. Depending on the number of officers on duty, the officers may visit the scene of crime to gather more evidence. Thereafter the police may go ahead to arrest the suspect.

On the issue of arresting the suspect before or after acquiring the medical report, most of the police officers said that they do not arrest the suspect until after the medical report form has been signed and the doctor has confirmed that there was rape or defilement. Not one officer said that the suspect is arrested immediately after the case is reported. I interviewed one of the police officers who explained:

‘We don’t rush into an arrest of the suspect before receiving signed and confirmatory evidence from the qualified doctor of the government. We avoid wastage of scarce resources to proceed and arrest the suspect where there is no corroborative evidence because some women and girls allege rape as a means of revenge.’
However, the law states that the suspect of a crime must be arrested as soon as a police officer has reasonable grounds to believe that a crime has been committed. One may wonder why in rape and defilement cases there is a pause, delay and reluctance. This indicates that most police officers still believe that women are prone to telling lies which is a clear indication of discrimination against women.

4.3.3 The third stage: The process of acquiring the medical report to be signed by the doctor

A medical examination may be used to corroborate the allegation that the complainant had sexual intercourse and that the intercourse was without her consent. It may also confirm that it was the accused person who had intercourse with the complainant. The procedure for getting the medical report is that once the victim has reported the case and a statement recorded by the police, the next step is for the victim to go for a medical examination to the government hospital. This should be the right procedure but, from the study, it was revealed that of most of the respondents who reported to the police, only a few are interviewed after they had gone for a medical examination. The study revealed that most of the victims spend a great deal of time at the police station and the hospital in an effort to acquire a medical report. If victims try to make a report to the police at night they are told to go back home because the VSU officers do not work at night. They do not even work at weekends. This means victims spend even longer trying to acquire a medical report. Once the medical report has been issued to the victim she is not escorted to the hospital by a police officer. This is because there is a lack of transport at most police stations. Victims are not even counselled at police stations. Instead, they are referred to the Government’s Social Welfare Department and some NGOs, like the YWCA. This simply increases the victim’s trauma and stress.

At the hospital they wait for the doctor to examine them and there are very few doctors in Zambia. Most of them are male doctors. This also adds to the time spent by victims trying to acquire a medical report. As a result, most victims give up and withdraw their complaint. This delay effectively violates the victim’s right to access justice. The procedure is not victim friendly because victims are forced to keep the semen of the perpetrator inside her because she is told not to take a bath until she has been examined by a doctor. The doctors do not work the whole day, so victims are not treated as soon as possible. This makes the victim anxious and increases her trauma. I observed that the system operates on at first come first serve basis. This means that if this system is to work for rape victims it literally means that
they, the victims, must make sure that before they are raped they must have in their
possession the money they will need to pay for transport to reach the police station as well as
the hospital. If they do not have this money the victim will be unable to acquire a medical
report form as soon as possible.

Another issue that contributes to this delay concerns the type of the doctor who is qualified to
sign the medical report form. The doctors must be qualified government doctors because they
are the only ones authorised to examine and sign the medical report form. This is a challenge
because private doctors are not allowed to examine the victim. The other reason for not
allowing private doctors to examine and sign the medical report is that they are not competent
witnesses for the state and they are continually moving from one hospital to another. I
interviewed one of the medical officers at the One Stop Centre at UTH, Lusaka who narrated
the following:

‘The victim must be examined by the government doctor not a private doctor
because they are not paid by the government and cannot stand as state witness.
The rationale of using government doctors rather than private doctors is that
they may not be willing to testify when the case is on trial or may be
transferred to other hospital out of Lusaka. Even nurses are not allowed to
examine and sign the medical report form.’

The other issue is that the government doctors have a heavy workload in that they also have
to deal with other serious cases, such as injuries arising from car accidents and serious
assaults. At the hospitals there is only one doctor on duty who has to attend to various types
of cases. As a result, the victims of rape and defilement who are wreaking from the smell of
the sexual attack are forced to wait for long periods before being attended to by the only
doctor on duty. One victim of defilement case was interviewed at UTH, Lusaka who complained bitterly after for waiting for almost six hours without being attended to by the
doctor.

‘I came here at around 0800 hours but up to now the doctor is not seen. I have
been told that there is only one doctor and he is attending to serious cases.’

The above respondents clearly indicate that victims of rape and defilement find it difficult to
acquire the medical report form after being raped or defiled. Their journey towards justice is
very long, slow and painful. This can cause the victim to be infected with HIV/AIDS and it
can lead to unwanted pregnancy. This increases the victim’s trauma. However, the process does not end at the hospital. There is yet another stage to the journey: that of going to court.

4.3.4 The fourth stage: The proceedings in the Magistrates Court

The research revealed that after the medical report form has been signed by the doctor, the report must be given to the police as part of the evidence required to corroborate the sexual offence. When the docket is opened and the accused arrested, there is another process. The process involves going to a court of law to give evidence. According to the study, the law allows open courts for rape victims in Zambia. However, for defilement cases trials are conducted in camera but this does not address the problem of adult complainants testifying in open court. In cases involving adult complainants, the practice is that the proceedings are held in open court. In practice, requiring adult complainants to testify in public is yet another traumatic experience for her and it affects the demeanour and credibility of the victim. In some instances the Magistrate Court trying rape cases are full of interested observers whose presence make the whole court environment a ‘prison without walls’ for the victim of rape.

One of the victims related the following:

‘I did not find it easier to narrate the case and it was my first time to appear in the court of law. I was scared and lost confidence in myself. My experience in court was difficult to open up because a lot of people were there and judges were rude. It took three weeks to report because I was not sure on how my relatives, friends were going to handle the issue and I was threatened.’

Another victim admitted:

‘I did not find it easier bringing out evidence before the court and it is somehow hard but I explained my situation vividly. I reported the case the next day because the day I was raped was the same day my mother had gone to give birth at the hospital leaving me alone with the accused. I was issued with medical report form at the police which gave my evidence of being raped.’
4.4 Additional findings as to whether the rule on corroboration traumatises and violates the human rights of women and girl victims

This part contains some findings in relation to trauma and human rights violation of women and girls victims of rape. Most of the respondents said there is traumatisation and violation of rights of women and girls victims of such offences due to the process of obtaining corroboration evidence. These start from the time of reporting at homes, at the police, at the hospital and, finally, at the court during trial. At their homes the finding was that some girl victims do not report immediately the offence of rape or defilement due to fear. For instance, one of the female counsellors at YWCA narrated:

‘Corroboration process rule brings more trauma. I feel it has to be amended because most of the perpetrators will be scooted (sic.) free, therefore, leaving the victims powerless and have no confidence in the judicial system. It provides prove beyond reasonable doubt that the victim was raped. Hence, brings back the memories.’

I had also in-depth interviews with a male legal officer at the YWCA who told me the following:

‘Few sexual cases are reported. The whole procedure of obtaining corroborative evidence is not appropriate and is unusual. I feel some amendments can be made.’

4.4.1 Shame and stigma

During the field research I observed that one of the issues which contributes to the trauma of women and girl victims of rape and defilement was shyness. When some victims were being interviewed at the hospital some were shy. They could not open up. Some girl victims took a long time to inform their parents of the abuse. Instead, they informed their neighbours and they were the ones who told their parents. Thereafter, the case was reported to the police. Therefore, if the case is not reported as soon as possible, corroboration evidence disappears. This shame is mostly keenly felt by victims who have never experienced sexual abuse in their life time. One of the reasons for their hesitating in reporting the abuse is the stigma attached to such offences. Also, it is usually the women and girl victims who are judged and blamed for these traumatic issues. This thinking generates the common myth that the women and girls provoke the sexual violence they suffer because of their conduct towards men. For
example, victims are blamed for so-called ‘careless’ dressing or taking ‘careless’ journeys at night. One of the respondents a victim of defilement was interviewed and narrated:

‘According to my court experience it was a kind of uncomfortable experience for me especially that it was my first time opening up. It took me three to five months to report because I was scared that they would not believe me.’

Furthermore, I interviewed another victim, a student aged 18 years. She narrated as follows:

‘I did not find it easy to bring out evidence before the court especially when I was thinking of the act of defilement. I did not tell any of my family members when it happened. I did not know what to do. I could not come out and I had to let it out after two weeks of the incident.’

The evidence of the above respondents clearly shows that corroboration evidence is not easy to obtain. This is because most of the victims do not come out or open up due to the uncomfortable environment and because of their fear of being laughed at by members of their community. This clearly shows that most victims of rape and defilement are traumatised. From what the respondents were narrating, it confirmed that the court environment is not friendly in Zambia. Most of the victims are scared of the process and as a result they tend to withdraw the case by not coming to testify. See the statistical data from the police in the Appendix.
Figure 2: Factors contributing to victim’s trauma from the impact of the corroborative evidence rule

The above figure illustrates factors contributing to the trauma suffered by women and girls victims of rape and defilement due to the process of obtaining corroborating evidence in sexual offences.
4.4.2 Types of human rights violations

The figure above shows the different human rights violations suffered by women and girl victims of rape and defilement due to the process of obtaining corroboration evidence. I discovered some human right violations caused by reliance on the corroboration evidence rule. They include breaches of the right to privacy, the right not to be subjected to inhuman and degrading treatment, the right to access to justice and the right not to be discriminated against on the grounds of one’s sex.

4.4.2.1 Breach of the human right to privacy

In terms of privacy, I noticed that there is no privacy at the hospital or the court. At the hospital, most of the rape and defilement victims are examined by male doctors instead of female doctors. This was confirmed by one of the respondents I interviewed:

‘There must be ethical standard. Victims must be examined by female doctors. There must be medical professionalism. For women victim of rape it is traumatic because there is no Victim Friendly Court and trial is conducted in the open court. There is a need to harmonise the situation. The victims are
exposed to strangers at the police station and taken for medical test at the hospital because she cannot take a bath until she is examined by the doctor.’

4.4.2.2 Breach of the human right to protection from cruel, inhuman and degrading treatment

A further finding on the issue of human right is on inhuman and degrading treatment. For example, according to Alfred W. Chanda (2002):\textsuperscript{83}

‘It is a fact that both child and adult victim of sexual assault are often subjected to attacks on their privacy and dignity during cross examination. Needless to say that defence counsel knows that rigorous cross-examination may cause emotional trauma and the reaction that increases the likelihood of the accused being acquitted.’

4.4.2.3 Breach of the human right to access justice

I understand that the right to access justice means the capability of women and girl victims to find and acquire remedies through the formal criminal justice system in Zambia in accordance with human rights standards. This means allowing disadvantaged persons, such as women and girls, to have adequate access to the criminal justice system. This can be in the form of removing the obstacles that women and girls victim face. For example, it includes providing women and girls transport to allow them to go to the hospital whenever they are raped or defiled. If the government could provide adequate transport for victims at all police stations and at all courts, this would be a good start at removing the numerous barriers to accessing justice.

According to the findings this right is violated when the police insist on the issue of obtaining corroborative evidence. Because of the lack of corroborative evidence, some rape and defilement cases are dropped by the police at the investigation stage before the case goes to court. As a result, some women and girl victims of rape and defilement do not have an opportunity to receive assistance from the Magistrates Court. All the VSU officers I interviewed said that a docket is only opened when there is a medical report form signed by a qualified government doctor. One officer explained as follows:

‘We wait for the victim to be examined by a qualified doctor and the medical report form to be signed. The results should be consistent with the alleged offence of rape or defilement. If the results are not consistent with the alleged offence, we do not open up a docket of case and we do not arrest the perpetrator.’

I also interviewed some prosecutors and most of them narrated that they do not proceed to court with a case based on a docket which does not contain corroborative evidence. One prosecutor said:

‘In order to avoid embarrassment in the open court we advise the investigating officer of a sexual offence to release the accused person to avoid unlawful detention because there is no medical report form or because the doctor stated that there was no consistency with the alleged offence of rape or defilement even if the torn underwear is there because we rely very much on medical report form signed by the doctor.’

Sometimes, the police and the prosecutors are forced to go ahead with a case even if there is no medical report form signed by the doctor. This is because of pressure they come under from the victim and members of the public if it is a case of public interest. The officers fear being accused of corruption. One prosecutor said this:

‘I was given a case where there was no corroborative evidence such as a medical report form and I was forced to take it to the court by my Officer-In-Charge because I was suspected of obtaining money from the accused person. When the case went to the court the accused was acquitted and (that) is when the burden was removed from me of being corrupted.’

Therefore, out of fear of being labelled incompetent or corrupt if they decide not to continue investigating a problematic case, prosecutors and investigating officers take such cases to trial and thereby shift the onus to the court to acquit the accused.

4.5 The rule on the corroboration of evidence in other jurisdictions

In this section, the findings relate to my research question: ‘Does the Zambian criminal justice system rely on the cautionary rule or corroboration evidence rule in prosecuting sexual offences which is now outdated and no longer required in some countries in the Southern African region?’ The findings were that the Zambian criminal justice system relies on the corroboration evidence rule. Most of the respondents demanded that the rule be amended. And the findings are that the rule on corroboration should indeed be relaxed. This
does not necessarily mean abolishing it, but there is a need to speed up the process. The cases of rape and defilement in Zambia take such a long time to finalise. One of the respondents suggested the following in support of relaxing the rule:

‘I support corroboration in sexual offences but my general comment is that there is a need to have more sexual friendly courts and should be done in camera. There is a need to relax the corroboration evidence rule and sensitize many people about rape and defilement cases. The police, prosecutors, the court and defence counsel should be trained on the corroboration evidence rule in sexual offences.’

In order to understand more about this issue, I probed the respondents further about the factors which cause Zambia to continue relying on corroboration evidence whilst other countries have abolished the rule because it traumatises and violates the human rights of women and girl victims of rape and defilement. Below are some of the factors which were identified.

4.6 Reasons why the rule continues operating in Zambia despite its violation of the human rights of women and girl victims

Below is a figure illustrating the reasons why the rule continues operating in Zambia despite its violation of the human rights of women and girl victims.
There are a number of factors why Zambia is still relying on the corroboration evidence rule in sexual offences. These include gender insensitivity, socialization, lack of awareness, culture and, finally, men protecting fellow men.

**4.6.1 Gender insensitivity**

Most of the officers working in the criminal justice system are not concerned about gender sensitivity. They just follow the law as it is laid down in the Penal Code. I interviewed one of the legal officers who admitted, quite honestly:

‘What we look at is the law not anything when we deal with rape and defilement cases. The law says that if there is no corroborative evidence, the matter should be dropped. We don’t care whether it infringes the victim or not.’

**4.6.2 Socialisation**

Some officers in the criminal justice system just follow how the system is run by those already within the system. They are just told that corroboration is ‘a must’ in sexual offence
cases and without it an accused person must be acquitted. Most of them said they have been
told by the officers who have been in the system that it is wrong to convict an accused person
on uncorroborated evidence.

One respondent said:

‘When I joined the criminal justice system as a prosecutor, I was advised by
my fellow prosecutors that when a docket of rape or defilement has no
medical report form to corroborate the alleged offence, don’t waste time, just
take it back to the arresting officer so that the accused is released to avoid
unlawful detentions at the police station.’

In my view, the issue of socialisation in the Zambian criminal justice system prevents officers
from critically questioning the reason for and function of the rule on corroboration; for
example, the fact that it sometimes traumatises or violates the human rights of women and
girl victims of sexual offences. They just follow what others have been doing since time
immemorial.

4.6.3 Lack of awareness
Most of the officers handling cases of rape and defilement are not aware of the impact of the
rule of corroboration on women and girl victims. Some respondents were very surprised
when I introduced the topic that some countries in the Southern African region have
abolished the rule on corroboration. One of the respondents I interviewed described his
reaction as follows:

‘I am surprised that other countries have abolished reliance on corroboration. However, it has come to my mind now that some rape or defilement cases
happen in secret places and most of the perpetrators are very careful so that
they are not seen by any other person when they are about to commit such
offences. This means the women may not find it easy to provide corroboration
evidence.’

In this regard, it is important to raise awareness in Zambia about the impact of the rule on
victims. The officers dealing with sexual offences should be made aware of gender-biased
rules. Once they are informed, they will start questioning them more closely. I myself am a
good example of one who never knew that the corroboration evidence rule infringes the
human rights of women and girls until I started thinking about it while studying for this
Masters Degree in Women’s Law here at SEARCWL. The teaching at SEARCWL and this research have really opened up my mind.

4.6.4 Culture
This is another factor that causes the Zambian criminal justice system to continue applying the corroboration evidence rule. In Zambia, when a man proposes to have sex with a woman or a girl, there is a belief that she cannot accept his offer immediately. The man has to struggle to show that there is real love. Most of the men believe that when a woman says ‘no’ to sex, it really means ‘yes’. Most women are shy when it comes to matters of sex. As a result, men take advantage of that belief which exists because it is in the culture. Men do not consider it ‘normal’ for a woman or girl to accept immediately their offer to have sex. Therefore, the criminal justice system in Zambia continues relying on the corroboration evidence rule because there exists in the culture an attitude that women are liars. I interviewed a sex offence victim who confirmed this attitude toward women when she said:

‘I resisted to have sexual intercourse with the man who raped me and he continued and said you pretend not consenting to sex when in fact you need sex.’

Due to the cultural beliefs Zambians, people doubt a woman who reports that she has been raped or defiled because men believe that a ‘proper’ woman does not immediately accept a man sexually and that, if she does, she must be a prostitute. This cultural belief contributes to the difficulty in proving beyond a reasonable doubt that the sexual offence has taken place.

4.6.5 Men protecting fellow men
The criminal justice system officers protect their fellow men in matters of accusation of sexual offences. The perpetrators in this regard are men. Most of the law enforcement officers are men, especially in the Zambia Police to whom victims first report their case before the matter goes to court. As a result, they try to protect their fellow men to avoid embarrassment.

4.7 What to do about the rule
Two ways were suggested about how to do away with the rule. The majority of the respondents proposed that the rule be relaxed by amending sections 140 and 141 of the Penal Code. They stated that even though the rule is in the Penal Code, there is a need to amend it
to harmonise the situation and that it can only be relaxed to apply with statutory provisions just like any other provision to sexual offences in the Penal Code forbidding its application. One of the respondents (a state advocate from DPP) suggested as follows:

‘The rule on corroboration evidence should be relaxed, not abolishing it completely. What is needed is to provide Fast Track Courts and One Stop Centres so that everything is done at one place.’

However, 34 respondents were in favour of abolishing the rule completely and one of the respondents proposed:

‘Since other countries have abolished the rule on corroboration evidence, it is better the Parliament abolishes it completely although it was established by the common law. Most of the common law provisions have been amended in the Penal Code, therefore, there is nothing wrong for the Parliament through statutory instrument to be amended.’

Apart from those respondents who proposed some amendments to the rule, there were 24 respondents who did not want the rule on corroboration evidence to be abolished or relaxed. Their stand was that women and girls are liars and, therefore, there is a need to continue with the corroboration evidence rule. One of them narrated as follows:

‘The requirement of corroboration confirms the commission of the alleged crime. The rule on corroborative evidence is justifiable and relevant to avoid suspects being wrongly sent to prison for crimes they may not have committed. The corroboration evidence is important in order to provide such cases beyond reasonable doubt.’

Another respondent said:

‘The process only helps to arrive at proper evidence on the case to know the truth.’

Most of the respondents were of the view that the rule on corroboration evidence be amended. In total 84 respondents supported the idea that the corroboration evidence rule in sexual offences be amended and 24 of the respondents were against the idea of abolishing the rule. Looking at the responses of the respondents there is empirical evidence that most of the community in Zambia would like the corroboration evidence rule to be amended in order to harmonise it with the lived realities of women and girl victims of rape and defilement.
4.8 Emerging issues

However, during my field research I realised that some other new issues were becoming obvious. Some of the areas include customs and dual legal system, jurisdiction of the lower courts and, finally, the economic cost of justice.

4.8.1 Customs and the dual legal system

Rape and defilement crimes are commonly being settled through payments to the victims’ families under customary law in order to stop them from pursuing criminal charges against the culprits. This is evidenced from the statistical data considered in the Appendix which I got from the National Coordinator of the Victim Support Unit at Zambia Police Headquarters in Lusaka. This reinforces the idea that rape and defilement are considered offences against the family rather than serious criminal offences against the bodies and persons of female victims. As a result, most of the charges for sexual offences are withdrawn by the family and are considered civil matters in which ‘the crime’ can be settled by way of payment of compensation and, as a result, the criminal case is withdrawn and comes to an end. The victims also fear the long process of obtaining corroboration evidence. For instance, one of the VSU officers offered some very revealing insights:

‘I have come across the cases whereby the uncle or the parent of the victim would like to withdraw the case due to culture and would like to maintain the relationship. When I come across such situation, I don’t normally encourage the same but they decide on their own. This is done by maintaining their stands not attending court session whenever they are required. In this regard the case can be adjourned for more than 3 times until the case is discharged. The magistrate can be on our nick as arresting officers so that the witnesses appear before the court. In this regard am just revealing to you but the magistrates do not know. But us sometimes we know.’

I then asked the said officer what action they take against such witnesses and he said:

‘We do not do anything and do not detain them. How can we detain witnesses? It is difficult because they are the main complainants compared to the state. We cannot force them if they want to keep their relationship as per their culture or religious belief. The other challenges are that of a breadwinner. In this regard you find that the perpetrator is the breadwinner. As a result the victims do not come back here at the police or at the court. They normally go for good. Sometimes even without our consent they reconcile and pay each other money.’
Another respondent put forward the following:

‘The other problem is that law in the Constitution that covers customary laws. According to customary law, once a girl child goes on puberty it means she is manure enough and yet it is an offence under criminal law because it defeats the whole essence of the law. Since the law states that any person who have carnal knowledge of a girl under the age of 16 years commits defilement. Because traditionally we can do that to 14 years old girl and can get married. Of course, the government has come up with policy to prevent early marriages but legally we need to put up a law. That law needs to be enacted whereby even if a girl has reached puberty age should not get married and it should be a criminal offence.’

The victims proceed by way of other channels or laws in solving sexual offences because the formal criminal justice procedures involved are just too cumbersome. To re-cap, some of these procedures are: the doctors’ delay in signing the necessary medical report form at the hospital; the fact that VSU officers are only on duty during the day time; VSU officers do not work around the clock on a shift basis (which they should); the VSU offers no pre- or post-counselling to victims to minimise their trauma; the VSU does not offer victims any privacy; the VSU does not transport or provide victims with funds for transport and it does not have funds to purchase the equipment necessary for treating and counselling victims. As a result, victims use other laws they think are more favourable to bring the matter to a quicker end for a consideration.

4.8.2 The limited jurisdiction of the lower courts

This is also a big problem facing women and girls victim of rape and defilement. In this regard, the Magistrates Courts which hear rape and defilement cases do not have jurisdiction to sentence perpetrators because their maximum jurisdiction is 9 years whereas sentence for rape and defilement is not less than 15 years. In other words Magistrates’ Courts can hear rape and defilement cases but only the High Court can pass sentence on guilty culprits. I had a chance to interview the Director Legal who confirmed this finding:

‘In sexual offences the subordinate courts are the ones prosecuting them. The sentencing is done by the High Court. This is because the Subordinate Court has got power to sentence up to 9 years. In this regard the sexual offence carry the sentence of not less than 15 years imprisonment. The presumption is that the High Court has already handled the matter.’
Therefore, it would be better to increase the jurisdiction of the Magistrate Courts so that they can both try and sentence culprits of rape and defilement so that cases are not delayed.

4.8.2.1 The establishment of Child Friendly Courts
In Zambia there is no building which has been built specifically for rape and defilement cases. The magistrates handling defilement cases use their own discretion to conduct trials *in camera* or in chambers. In cases of rape, trials are conducted in open court. A Child Friendly Court should be built and extended for use by adult victims of rape and provision should be made to have a witness screen and voice distortion equipment in court so that child victims of defilement are protected from public view and recognition. The process of corroboration should be relaxed a little so that sexual offences are tried in private. There is also a need to have Fast Track Courts to speed up the disposal of cases as quickly as possible. As it is, there are no such provisions in the Anti-Gender Based Violence Act.

4.8.3 The high economic cost of pursuing and securing justice
The issue of the economic cost of pursuing justice came out as a finding. It was discovered that women comprise the majority of people in poverty in Zambia. Those who have the money to secure legal services to resolve rape and defilement cases do not do so. This is due to lack of time, resources and lack of expertise to manage legal procedures on their own. These include making arrangements for accommodation and long distance travel arrangements and food and lodging during the course of a trial. The government does not provide such services as legal aid in Zambia only supports and concentrates on those who commit serious offences like murder. This is a barrier to women and girl victims of rape and defilement cases who require legal presentation. One of the respondents said that:

‘According to my experience, there are very rare cases whereby the perpetrators are strangers. They are committed within the conference of our homes such that an important person is the one who commit defilement such as breadwinners. Therefore, due to poverty they are enticed to pay some money. Also we have economic challenges where the father or a relative who has committed that offence, maybe, a breadwinner. The wife is reluctant to go ahead with the case for fear of the relationship to breakdown. Victims of defilement are threatened to report to police because of breadwinner syndrome.’
4.9 The identifiable gaps which came out in the findings

During the research there were some identifiable gaps which emerged during the interviews I had with the respondents I also checked in the relevant statutes with reference to the corroboration evidence rule and I discovered that there are gaps which need to be filled so that victims of rape and defilement cases are not traumatised and their human rights not infringed. I critically analyzed the provisions of the Ant-Gender Based Violence Act. It was discovered that the law does not oblige police officers to escort victims of rape and defilement to hospital, even at night. This was confirmed by one of the respondents with whom I had in-depth interviews and who explained:

‘When I was issued with the medical report form at the police the police did not escort me to the hospital for examination and the signing of the medical report form. This is dangerous because the perpetrator can attack me on the way.’

In order to confirm the existence of this gap I further interviewed some police officers in the VSU. Most of them said they do not escort victims of rape or defilement to hospital because of lack of transport. One of them admitted:

‘We don’t escort them to the hospital after issuing with them a medical report form unless under special circumstances. Most of them go on their own and use their own transport money because VSU is not adequately funded.’

I also noticed another gap at the police station. It was the issue of a safe place for victims. I observed that none of the police stations in Zambia has a shelter for victims of rape and defilement. Furthermore, the law does not require capable experts within the criminal justice system to visit and treat victims in order to reduce their trauma.

Secondly, the findings were that the government of Zambia has no policy to train more female doctors so that women and girls victims are examined only by them rather than male doctors. There is no DNA testing available at hospitals to assist in the identification of the accused as quickly as possible to obtain corroboratory evidence. The law does not provide for clinic officers or nurses to examine and sign medical report forms for sexual offences. Only a qualified doctor is entitled to examine and sign the medical report. This causes some delays because in Zambia there only a few doctors. As a result victims wait for long periods of time to be examined by one doctor who is also supposed to attend to other serious cases.
Thirdly, the identifiable gaps were that the law does not provide Friendly Courts for rape cases. In short, rape cases are not conducted in camera. As a result, only a few cases are actually reported due to the fear victims have of narrating their story in public. In terms of remedies, the law does not provide compensation to the victims of rape and defilement offences causing them to become vulnerable.

Therefore, most of the victims use customary law so that the victims receive something rather than nothing which is the case when the state, through its criminal justice system, simply punishes the perpetrator. Only the state benefits when the accused is convicted and sent to prison to serve the minimum 15-year sentence of imprisonment. Sometimes, in traditional proceedings there restorative justice takes place in which the perpetrator is summoned and advised to stop committing sexual offences. When it comes to witnesses, the law does not accept the evidence of a single witness to convict an accused of rape or defilement. This means that women and girl victims are required to produce ‘more evidence’ in sexual offences. The court cannot rely on her testimony alone. There must be ‘something more’ to it. Failure to provide this extra proof leads to the case being dropped simply because of the lack of corroborative evidence. In this regard, to rely on another witness is difficult because there often isn’t one. Rape and defilement cases are typically committed in secret.

The other identifiable gap is that there is not yet a policy or law to set up any One Stop Centres in shanty compounds or high density areas. The whole country of Zambia has only two One Stop Centres, one in Livingstone and the other in Lusaka. The Co-ordinator of the One Stop Centre confirmed this and said that:

‘I started working in the year 2005 with Professor Chomba who initiated One Stop Centre. We have two centres here in Zambia that is Livingstone and Lusaka UTH. The other hospitals have got Gender Based Violence centres. But here we are specialized in handling defilement cases.’

Therefore based on my analysis, this gap needs to be filled so that all clinics in shanty compounds have One Stop Centres in order to minimize the need to move victims of defilement cases long distances. It also emerged during the research that One Stop Centres are only for defilement and not rape cases. These Centres should cater for both defilement and rape victims.
CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

My conclusion is that the Zambian criminal justice system does not adequately protect women and girls who are the victims of rape and defilement from the trauma and violation of their human rights as a result of the enforcement of the corroborative evidence ‘rule’. Therefore, the research has concluded that the rule traumatises and violates the human rights of women and girl victims of rape and defilement because:

(i) There is no victim friendly court for rape victims. The Child Friendly Court is not extended to adult victims of rape and there is no provision for a witness protection screen or voice distortion equipment in court so that child victims of defilement are protected from public view and recognition.

(ii) There are only two (2) One Stop Centres in the whole of Zambia where all criminal justice system officers operate at one place to avoid long process of obtaining corroborative evidence.

(iii) The Zambian criminal justice system is still relying on the corroboration evidence rule or cautionary rule which is no longer followed in some countries.

(iv) There are no fast track courts in Zambia to try sexual offences.

(v) There are only a few doctors who are able to examine sexual assault victims and this often results in delays in the signing of the necessary medical report forms for victims at hospitals.

(vi) VSU officers only operate during the day time and they do not work shifts.

(vii) There are no pre- or post-counselling services for victims to prevent or reduce their trauma which is caused by the obtaining of corroborative evidence, and there is no proper infrastructure at VSU premises, as a result of which victims lose their precious and crucial right to privacy.

(viii) The VSU does not have enough funds to pay for transport for victims or for equipment for counselling services; instead, they refer victims to YWCA in Kabwata and Social Welfare for shelters and counselling services.
Most of the victims of defilement are afraid to report attacks against them to the police because they suffer from the ‘breadwinner syndrome.’

5.2 Recommendations

5.2.1 Reform of the corroboration of evidence rule
Based on the above conclusion that the corroborative evidence rule does indeed traumatis and violate the human rights of women and girl victims of rape and defilement, the study recommends reforms to the application of the rule on corroboration in rape and defilement offences. Most of the rules focus on the rights (i.e., of women and girls who are the victims of rape and defilement cases) which the rule specifically infringes or breaches, especially the right to equality before the law. Hence, there is a need to harmonise the situation by broadening the provisions under section 140 and section 141 of the Penal Code so that some sexual offences can be dealt with, even if no medical report form has been signed by a government doctor. In addition, the provision should state that even clinic officers and nurses should be allowed to examine and sign a medical report form for the victim of rape or defilement. This will prevent delays in examining the victims of rape and defilement cases.

5.2.2 Establishment of Victim Friendly Courts
On the conclusion that there are no Victim Friendly Courts in Zambia, the study recommends that the government introduce Child Victim Friendly Courts and extends the same facilities to adult victims of rape. There is also a need to have Fast Track Courts to prevent trials from being dragged out for long periods of time which forces victims to prolong their suffering (which they relive every time they attend court) and to pay the burdensome costs of transport and accommodation moving back and forth to court in their quest for justice. By establishing such courts, rape and defilement cases are more likely to be quickly disposed of and there will be less opportunity for victims to withdraw their complaints, e.g., after reconciling with the culprits.

5.2.3 Establishment of many One Stop Centres
Based on the finding and conclusion that there are only two One Stop Centres for victims of defilement cases, the study recommends that the government should establish many One Stop Centres in compounds where counsellors, doctors and police officers are mobilised in one place. Each and every clinic should have a centre so that victims of rape and defilement do
not have to walk miles to go to UTH where there is a centre for defilement cases. This should be extended to rape victims. At the moment there is no such One Stop Centre for women victims of rape in Zambia.

5.2.4 Introduction of witness protection devices during trials
On the finding and conclusion that there are no witness screens in courts during trial in defilement cases, the study recommends that the government introduce such equipment during trials of defilement cases in order to reduce the trauma of girl child victims of defilement who are presently forced to face their alleged attackers during the trial process. Therefore, the government should introduce a witness screen during trial in defilement cases. To protect the identity of young victims, one-way viewing devices should be introduced in court and the voices of victims should be distorted. This will not only prevent the shame and stigma which usually attach to victims during and after the trial, it will also remove the ability of their communities to identify victims so that they cannot be threatened by relatives or friends of the accused either during or after the trial.

5.2.5 Relaxation of the rule on corroboration in rape and defilement cases
On the conclusion that the Zambian criminal justice system relies on the corroboration evidence rule and the cautionary rule which has been found to be outdated in other counties, my recommendation is that the corroborative evidence rule in Zambia should be relaxed so that sexual offence trials are held in camera. The criminal justice system should reduce its reliance on medical report form evidence because some victims fail to obtain such evidence reports due to the long (and sometimes unsuccessful) process of acquiring such evidence. Hospitals are few and far between and in Zambia and there very few doctors to attend to these victims. Some victims face the traumatic ordeal of being forced to bear the evidence of the sexual attack both inside and outside their bodies while queuing for long periods to be examined by one doctor (because they are not allowed to bathe or clean themselves before they are examined). Therefore, because of this terrible, humiliating process, many tend to give up on trying to obtain a medical report form from the hospital.

5.2.6 Introduction of specialised doctors in sexual offences
On the finding and conclusion that there are only a few government doctors and no specialised doctors to handle sexual offences, my recommendation is that there is a need to have specialised doctors for examining and signing medical report forms to prevent doctors
from delaying in their signing medical report forms at hospitals. In addition, more female doctors should be trained so that women and girl victims are examined by doctors of the same sex to minimise their trauma.

5.2.7 Introduction of shifts in the Victim Support Unit

On the issue that the VSU only operates during the day time, I recommend that the Zambia Police High Command make it a policy of allowing the VSU officers to start operating 24-hour a day service and to work manageable shifts during this period. At the moment no such service is provided by VSUs in Zambia. As a result, victims of sexual offences who try to report attacks at night are told to go back to their homes and report the following morning when victim support officers are on duty.

5.2.8 Establishment of pre- and post-counselling services

The research concluded that there are no pre- and post-counselling services in VSUs. Therefore, I recommend that there is a need to make such services available to women and girl victims of rape and defilement. The research findings have revealed that most of the victims of rape and defilement are referred to other relevant organisations for counselling. They police refer them to Social Welfare Departments and YWCA for counselling services. If proper counselling can be provided at police stations, most victims will be encouraged to report such cases. The VSU has a mandate to counsel victims of rape and defilement but they are not providing an adequate service.

5.2.9 Construction of shelters at all police stations for victims of rape and defilement

On the finding that there are no shelters at any police stations, I recommend that there is a need to have privacy at VSU offices and the government should build shelters for victims of rape and defilement to prevent attacks on victims by the relatives of the accused which seems to occur in the absence of such shelters. Such shelters should be made available at all police stations. There is a need for the government to give the VSU section funds to provide victims with money to pay for transport to go to hospital and to buy medical equipment, instruments, etc., for use in conducting certain medical procedures. The medical equipment, instruments are for the purpose of conducting DNA testing which shortens the process of obtaining corroboration evidence.
5.2.10 Training of criminal justice system officers

On the finding and conclusion that criminal justice system officers are not trained in counselling victims of rape and defilement, this study recommends that all officers should be trained in counselling and handling victims in a friendly manner. In this regard, the victims of both rape and defilement should be called ‘clients’ because it is friendlier than the word victim.

5.2.11 Mass sensitisation

The research concluded that the process of reporting rape and defilement is so long, cumbersome and traumatic (in which victims are subjected to various social pressures, threats, shame and stigma) that its overall effect discourages victims from reporting their cases timeously to the police, thereby risking the destruction of corroborative evidence that might exist. I, therefore, recommend that there must be mass sensitisation by the government and Non-Governmental Organizations of all Zambian citizens to encourage women and girl victims of sexual offences to report such crimes immediately. They should be taught not to believe in the cultural myths that that they will be laughed at by their neighbours or that they will run the risk of being divorced by their bread-winning husbands should reports against them result in their arrests.
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Appendix

Appendix 1: Supervisor’s letter dated 18.9.13

18 September 2013

Re: Student Request to conduct interviews and research

The Southern and Eastern African Regional Centre for Women’s Law (SEARCW), which is a Department within the Faculty of Law at the University of Zimbabwe, runs a regional Masters in Women’s Law. This Master’s Programme brings together students from Kenya, Tanzania, Uganda, Zambia, Malawi, and Zimbabwe. The students, comprising of men and women, include magistrates, prosecutors, legal practitioners, NGO activists and social scientists.

In partial fulfillment of the Master’s Programme, one of the key requirements is that students must carry out research on a topic of their choice within their own country. This is to enable students to get hands-on experience of the issues affecting women’s lives from a research perspective in their own countries. The research period runs from October through to January after which they return to the University of Zimbabwe for data analysis and the final write up of their dissertations.

In carrying out their research, the students need to liaise with different departments and institutions.

This letter serves to confirm that Bernard Phiri is one of our Master’s students. His research topic is entitled:

A Critical Investigation into how the Corroborative Evidence ‘Rule’ in Rape Cases Traumatizes and Violets the Rights of Women and Girls Victims of Rape in Zambia

As one of the institutions that he would like to get data from, we are writing this letter to request that you kindly grant him the necessary permission to carry out interviews and collect the relevant data from your institution. Should you like a copy of the research once the student has completed his programme, we would be happy to avail this as the research exercise is done in the spirit of co-operation in order to bring meaningful change to women’s lives.

As I am directly responsible for supervising the student in question, kindly feel free to email me should you require further information. My address is Katsande@law.uz.ac.zw. Thank you for your co-operation.

Yours Sincerely

Katsande R.K. (Ms)
Dissertation Supervisor

[Signature]

[Stamp]"Republic of Zambia
Zambia Police Service"

23 Sep 2013
APPENDIX - 2.

This is to confirm that the identity of the victim will be concealed.

The Senior Medical Superintendent
University Teaching Hospital
P/Bag RW 1X
LUSAKA

Dear Sir

RE: PERMISSION TO CONDUCT RESEARCH.

I refer to the above subject matter.

I am a student of University of Zimbabwe. I would like to conduct a research in relation to rape and defilement cases.

I would be very grateful if my request is granted.

Yours faithfully

Bernard Phiri

Lilayi Police College
P.O Box 34001
LUSAKA

Approved - 05/11/13

Dr. Henry, CSA - Team

Please allow the following to be interviewed by Mr. Phiri:
- Doctors
- Nurse Counselors
- Social Worker
- Co.
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# APPENDIX 4

## DEFILEMENT / PEP SUMMARY - CASES BY MONTH
FROM SEP 2012– SEP 2013

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MEDICAL REPORT

THE MEDICAL OFFICER
THE GOVERNMENT/MINE HOSPITAL
AS ABOVE

The bearer, KAPAMA KALINDE, complains of
(Give details of injury) DEFILED

Under the following circumstances:
REPORTED AS HAVE BEEN DEFILED BY
A NAKUHLE PERSON

Will you please report on the extent of injuries, and whether they are consistent with the alleged circumstances

Date

Place

POLICE OFFICER

Name and rank in block letters

I have examined the above named and find:

1. ABSENT HYMEN
2. PREGNANCY

My findings are consistent with the circumstances alleged above or inconsistent with the circumstances alleged for the following reasons:

1. ABSENT HYMEN
2. PREGNANCY

Dr. Mitzi S

Medical Officer
ZAMBIA POLICE
REPORT OF MEDICAL EXAMINATION
FOR RAPE/DEFILMENT CASE

(TO BE COMPLETED IN TRIPlicate):

1. Doctors full names: Dr. Miti sam

Hospital: PFCE-CON

Phone: V.81.30.41 of KABAMBA, KALINDA, Age 13

2. Names of Abused Person: KABAMBA, KALINDA, Age 13

3. Referred by Police officer's No.35, Rank, ... Cell phone, Name: KABAMBA, KALINDA, Formation, 111, OB No.

4. Name of Nurse present at examination Time:

His/her Signature:

5. Consent must be obtained from: Parent/Guardian. Le Verbal/Written

6. External examination
a. Condition and appearance of clothes: Normal, No
b. Identification marks or other evidence: Normal, No
c. Condition of inner garments: Normal, No
d. Has the victim previous sexual experience: No

e. Did the victim take drugs or alcohol at time of crime: No

7. Internal examination:
   a. Condition of hymen in deferiment: Absent, HYMEN
   b. Body injuries (Bruises, Bites): Pregnant, CHANG ESA

8. Doctors Opinion:
   a. The findings are consistent with the alleged circumstances.
   b. The findings are not consistent with the alleged circumstances.

Other remarks:

Signature of Doctor:

Police officer:

Date: DEC 2013
### 2013 National Crime Statistics Second Quarter Returns

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86
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