



The Zimbabwe Electronic Law Journal

Commentary on Contemporary Legal Issues

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The Editorial Board of this new electronic journal comprises:

Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us other articles for possible publication.

Strengthening Our Law on Child Sexual Abuse

By G. Feltoe

Introduction

Sexual abuse of children is a terrible social evil. It blights the lives of the child victims, as well as their families, and debases our society.

Young people are especially vulnerable to sexual abuse and exploitation and all possible steps must be taken to protect children against sexual predators who prey upon them. The Constitution defines a child as a boy or a girl under the age of 18 years. Section 81 of the Constitution proclaims that every child has the right to be protected against sexual exploitation and section 19 of the Constitution places an obligation upon the State to adopt reasonable measures to ensure that children are protected against all forms of abuse.

In Zimbabwe there has been an alarming increase in the number of reported cases of child sexual abuse.¹ Economic decline has undermined family structures and conditions of poverty have made children more vulnerable to sexual abuse. Certain cultural and religious practices have also contributed to the high rate of child sexual abuse, especially the practice of child marriage.

Child sexual abuse has completely devastating effects. Victims often feel significant distress and display a wide range of psychological symptoms, both short- and long-term. They may feel powerless, ashamed, and distrustful of others. The abuse may disrupt victims' development and increase the likelihood that they will experience other sexual assaults in the future or become abusers themselves. Sexual abuse can result in HIV infection and other medical problems. Girls may become impregnated, with all the health risks arising from early pregnancy and the social consequences for young girls who give birth.

The offenders are often the very persons who are supposed to care for and protect the children, such as the father of a girl child, a relative, a child minder or a schoolteacher. Those who sexually assault very young children, in some cases even babies, deserve extremely severe punishment.

Main issues covered

In this article;

- I will suggest ways to strengthen the current laws against child sexual abuse and will underscore the need for deterrent sentences for the worst offenders;
- I will propose that we make it compulsory for persons having knowledge of child abuse to report such abuse to the authorities;
- I will emphasise the need for proper detection and enforcement of these laws, using child-friendly investigation and trial techniques;
- I will allude to social and cultural practices that can lead to child sexual abuse;

¹ *Hidden in plain sight: Child sexual abuse in Zimbabwe*
http://www.unicef.org/zimbabwe/resources_15420.htm

- I will also recommend that we establish a register of sex offenders to allow the monitoring of such offenders after their release from custody.

The current law

Before we can suggest changes to the current law, we need to know what the current law says.

The two-stage system

Our law presently has a two-stage system for dealing with child sexual abuse. The law differentiates between consensual and non-consensual sexual activity with a child. The crimes of rape², aggravated indecent assault³ and indecent assault⁴ cover non-consensual sexual assaults upon a child, but the law provides that a child under 12 is deemed incapable of consenting to sexual activity for the purposes of these crimes.

The maximum sentence for rape and aggravated indecent assault is life imprisonment and for indecent assault it is imprisonment for two years.

I will discuss later the much discussed issue of whether we should raise the age below which the child is deemed to be incapable of consenting.

There is a separate crime commonly known as “statutory rape”, but it is also called “defilement” in some countries. The crime of statutory rape⁵ seeks to protect children between 12 and 15 from sexual exploitation. A person who engages in sexual activity with a child in this age group with the consent of the child is still guilty of statutory rape as the law lays down that the consent of the child is no defence to this charge. The maximum sentence for this offence is imprisonment for 10 years.

This two-tier approach is followed in many countries but the age group covered by these different crimes varies from country to country. For instance, Britain has set 13 as the age below which a child is deemed to lack the capacity to consent and the crime of defilement in Uganda covers girls up to the age of 18. Additionally, in some countries the penalties for statutory rape or defilement are far more severe than in Zimbabwe. For example, in Zambia the sentence for child defilement is a minimum term of fifteen years imprisonment and a maximum sentence of life imprisonment.⁶ In Uganda, the death sentence⁷ may be invoked for defilement of a girl under the age of 18.

Rape and aggravated indecent assault

The most serious sexual offences against children are rape and aggravated indecent assault. As already indicated, in Zimbabwe both these crimes currently attract a maximum penalty of life imprisonment.

A male is guilty of rape of a girl child if he has sexual intercourse with or without her consent. If the girl is under the age of 12, the male is automatically guilty of rape as the law deems such a girl to be incapable of giving consent to sexual intercourse.

² Section 65 of the Criminal Law Codification and Reform Act [Chapter 9:23]

³ Section 66 of the Criminal Law Codification and Reform Act [Chapter 9:23]

⁴ Section 67 of the Criminal Law Codification and Reform Act [Chapter 9:23]

⁵ Section 70 of the Criminal Law Codification and Reform Act [Chapter 9:23]

⁶ Section 138 of the Penal Code of Zambia [Chapter 87]

⁷ Section 129 of the Penal Code of Uganda [Chapter 120]

The offence of aggravated indecent assault is committed when a person, without consent, engages in a penetrative sex act, other than sexual intercourse, with a girl or with a boy such as where a male sodomises a boy or a female forces the boy to have sexual intercourse with her. Again, if the girl or boy is under the age of 12 the other person is automatically guilty of aggravated indecent assault as the law deems such a girl or boy to be incapable of giving consent to the sexual act.

Age of consent in Zimbabwe

It has been strongly argued that the age of consent for the purposes of the offences of rape and aggravated indecent assault is far too low at 12 years and should be raised to 14 or 16.

If we were to raise the age of consent to 16, this would mean that any person who engages in sexual activity with a girl or boy below 16 would automatically be guilty of the crime of rape or aggravated indecent assault as the law would have deemed a child under 16 to be incapable of giving consent to the sexual activity.

This would mean that the criminal offence of statutory rape would fall away as all cases of sexual activity with children under 16 would be covered by the offences of rape or aggravated indecent assault.

Persons in position of authority over the child

The law on rape or aggravated indecent assault in relation to child victims could be strengthened by creating a presumption of absence of consent when the person charged stands in a position of trust or authority in relation to the child. Such a position would usually mean that the child is inhibited from indicating his or her unwillingness or resistance to the sexual act.

“A position of authority or trust” must include the following relationships—

- a parent, step parent or a foster parent, and a child;
- a school headmaster, headmistress or a teacher, and a child pupil;
- a head or staff member in a children’s home, and a child in the home;
- a member of staff of a hospital and a child patient;
- a traditional healer and a child patient;
- a minister of religion and a child parishioner.

Sentencing for rape and aggravated indecent assault

The sentence for rape or aggravated indecent assault upon a girl or a boy must fully reflect the depravity and seriousness of the crime. In a series of cases, our courts have laid down that a person who rapes a young girl must be sentenced to imprisonment for a period of at least 10 to 15 years. In one case in Bulawayo, a child of 3 years was raped by a man in whose care the child was left and the child was infected with syphilis. The man was sentenced to an effective sentence of 15 years and the appeal court commented that the sentence was on the lenient side.⁸

Long prison terms will always be imposed for rape and aggravated indecent assault and no court would ever impose a suspended sentence or a sentence of community service for these crimes.

⁸ *S v Mpande* HB-43-11.

Even longer prison terms are appropriate in situations where a father rapes his very young daughter.

Vice-President Mnangagwa has come out in favour of minimum mandatory sentences for rape but has said that such sentences should not be applicable where there are special circumstances. The First Lady has even suggested that we should consider castrating rapists. In some countries – such as Poland, South Korea and Russia – chemical castration is mandatory for sex offenders and in some countries – such as Britain – sex offenders, particularly repeat offenders, can volunteer to undergo chemical castration. Chemical castration involves an offender taking a course of drugs that will severely decrease the prisoner's testosterone levels to reduce their sex drive.

Statutory rape or defilement

There is another crime which is commonly known as statutory rape. This is also called defilement in some countries.

In Zimbabwean law, if a girl or boy is between 12 and 15 consents to engage in the sexual act, the other person is still guilty of the separate crime of statutory rape and it is no defence to this offence that the girl or boy consented. The maximum sentence for statutory rape is imprisonment for up to 10 years.

The problem with statutory rape is that it covers a range of situations which vary in seriousness. The offence covers both the following situations:

- A 60 year old man persuades a 13 year old girl to have sex with him by offering her money or a gift;
- A boy of 17 and a girl of 15 fall in love and they mutually agree to have sexual relations.

Community service is never appropriate for the first case, but it may be appropriate in the second type of case. There are thus a number of court cases where community service has been imposed in situations similar to the second case.⁹

Where both the parties who are involved in voluntary sexual activity are children under the age of 16, the question arises as to whether it is appropriate to criminalise these teenagers. The General Laws Amendment Bill provides that if both the parties involved are over 12 but below 16 neither party will be charged with this offence unless a probation officer reports that it is appropriate to charge one of them with the offence. South Africans have a different approach to this matter. They recently amended their legislation on sexual offences to provide that if both parties are children they are not criminally liable.

If we create a mandatory prison sentence for statutory rape this sentence would have to be imposed in both these cases. It would be preferable to create separate crimes involving clear situations of sexual exploitation by sexual predators.

⁹ See, for instance, *S v Tirivanhu* HH 219-2010; *S v Matsiga* HH 227-2011; *Ginandi* HB 55-2012; *S v Everson* HH-461-2012. However, in *S v Dlodlo and Ors* HB-124-2006 the court severely criticised the trial court for sentencing the accused, aged 20, to perform community service at the same school where he had had illegal sexual relations with a 14 year old girl.

As in South Africa and England we should have various separate offences with very heavy penalties to cover exploitive situations. These should include—

- The offence committed by a person who induces or influences a child to agree to engage in the sexual act by paying or promising to pay the child money or provide the child with some other gift or reward or benefit.
- The offence of a person in a position of authority or trust having consensual sexual activity with a person in his or her care such as a teacher engaging in sexual activity with a pupil;
- The offence of trafficking children for prostitution;
- The offence of causing a child to become a prostitute;
- The offence of involving a child in child pornography;
- The offence of distributing child pornography;
- The offence of sexual grooming of a child, which offence will punish a paedophile who entices or persuades a child to engage in a sexual act with him by using the Internet to communicate with the child.

Compulsory reporting of sex abuse

Child abuse is often hidden away within the home and we need to take all possible steps to detect such abuse and protect the abused children. Children themselves must continue to be educated on their rights and be encouraged to come forward to report abuses to the authorities. Organisations such as Childline provide a free counselling service for distressed children.

We also need to adopt measures to increase the reporting of child abuse. It is suggested that we should adopt strategies similar to those in South Africa. In South Africa, it is a criminal offence for a person who has direct knowledge that such abuse is occurring not to report this to the authorities. Additionally, persons including doctors and nurses who have reasonable grounds for believing that child sexual abuse is taking place must report this to the authorities. Similarly, school teachers should be trained about the behavioural warning signs of child abuse so that they can take appropriate action.

Conviction rates in child sex abuse cases

We need to maximize conviction rates in child sexual abuse cases. Allegations of child sexual abuse need to be carefully and sensitively investigated and the vulnerable witness provisions need to be used when offenders are being tried. The use of DNA evidence would greatly help in the identification and conviction of culprits, as well as exonerating the innocent.

National register of sex offenders

A national register of sex offenders should be established, to contain details of all sex offenders against children; to monitor sex offenders upon release from prison to ensure that they are not employed in institutions where there are children, such as schools; and to keep them under surveillance to try to prevent them from re-offending.

Conclusion

Our criminal laws that deal with the evil of child abuse must be strengthened; these laws must be rigorously enforced; and the courts must impose deterrent sentences upon child sexual abusers. However, we also need to confront the societal factors that are leading to the upsurge in cases of

child abuse. A good starting point is enforce effectively the judgment in the Constitutional Court in *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors* CC-12-15 which prohibited all future child marriages and by engaging in an extensive public education campaign to disseminate information about why child marriages are no longer acceptable in our society and constitute a form of child abuse.