EXPLORING THE CAUSES OF LOW CONVICTION RATES IN TEENAGE AND ADULT RAPE CASES IN THE HARARE REGIONAL MAGISTRATES COURTS, ZIMBABWE

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Abstract

This dissertation explores how Zimbabwe's criminal justice system, in particular the Regional Magistrates Courts in Harare, responds to teenage and adult rape cases. Using several complementary methodologies, in particular, the grounded women's law approach, the researcher, relying on his unique inside knowledge and experience of the system as a Regional Prosecutor, critically investigates trial practices through court observations, the perusal of court records as well as discussions and interviews with victims, professional colleagues and key players within the court structure. This gender sensitive approach is key to exposing and suggesting ways to improve the weaknesses of the current system which traumatise teenage and adult rape victims as they get dragged through the court process. High on the list for improvement is the effect of negative perceptions of magistrates and prosecutors towards teenage and adult victims of rape which negatively impact on the outcome of such cases. While Zimbabwe's rape laws are more than adequate, this research proves that unless they are enforced through a well resourced justice delivery system peopled by empathetic gender sensitive professionals, conviction rates for teenage and adult rapes will continue to fall.

Declaration

I, Junior Mugebe, do hereby certify that this dissertation is my original work; it is an honest and true effort of my personal research. I certify that the work has not been presented anywhere before for any other thesis.

Signed……

Date……..

This dissertation is submitted to the supervision of Professor Julie Stewart, Southern and Eastern Regional Centre for Women's Law, University of Zimbabwe, for her examination with my approval.

Signed……..

Date…….

Dedication

To all the teenage and adult victims of rape whose experiences with the Criminal Justice System inspired me to embark on this particular study.

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Firstly my profound gratitude goes to NORAD the sponsors of this Masters Degree Program as well as the staff at Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe (SEARCWL) for making my dreams of acquiring an empowering Masters degree a reality.

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I also wish to express my special thanks to all the victims and other respondents whose contributions were useful to this piece of work.

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List of legislation

Constitution of Zimbabwe, 2013

Criminal Procedure and Evidence Act, Chapter 9:07

Sexual Offences Act, Chapter 9:21

Criminal Law (Codification and Reform Act), Chapter 9:23

Zimbabwe Gender Commission Act, Chapter 10:31

List of cases

S v *Banana* 2000 (1) ZLR 607 (S)

S v D and Another 1992 (1) SA 513 (Nm)

S v Magaya 1997 (2) ZLR 139 (H)

S v Makayanga 1996 (2) ZLR 331 (H)

S v Mhanje 2000 (2) ZLR 20 (H)

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Executive summary

This paper looks at teenage and adult rape cases with particular focus on matters reported at Harare Magistrates Courts. Statistics found from a preliminary research to this study revealed that teenage and adult rape cases have suffered from low conviction rates as compared to other rape matters involving the younger age group. As a result, this study looks at the factors behind such low rates of convictions and how these can be addressed to improve the situation on the ground. The adequacy of rape laws in Zimbabwe is also looked at as well as the extent to which these laws are being effectively implemented. In order to address all of these issues, the paper is divided into six parts which cover different aspects of the study in a more detailed manner.

The first part of this study gives an introduction to the area being researched. A general background of the author is given as well as the driving forces behind embarking on this particular area of study. In this section, the objective and aim of the study is discussed as well as assumptions and research questions. The assumptions and research questions were formulated using experiential data obtained from my work place at Harare Magistrates court prosecution department. Armed with first hand evidence of the problems that teenage and adult victims of rape face at the hands of the court system , it was not difficult to come up with relevant assumptions and research questions to inform this study. This same section justifies why the study was mainly conducted at Harare magistrates courts as well as why focus was mainly restricted to teenage and adult victims of rape.

The second part of this study discusses the methodological approaches used in gathering data throughout the research journey. The women's law approach was used as the main overarching approach in identifying teenage and adult victims of rape's lived realities. The same approach also assisted in linking these victim's experiences to the laws on the ground. The sex and gender analysis was also looked at in order to verify different thoughts of men and women on the same subject of rape. In addition to this, the section looks at the actors and structures approach as well as the grounded theory approach which mainly directed the way

the research was to be conducted. The same chapter also discusses the research methods employed during data collection. The research was mainly informed by court observations, interviews; discussions and perusal of court records. Ethical considerations are also discussed in the same section.

The third part to this study explores the laws relating to rape in Zimbabwe. The definition of rape as provided in the Criminal Law (Codification and Reform) Act is looked at. How the law addresses essential elements of the offence of rape for example consent and penetration is also canvassed in the same section.

The law on protection of vulnerable witnesses under the Criminal Procedure and Evidence Act is also explored. Lastly the third part also looks at what the constitution says in regards to protection of teenage and adult victims of rape.

The fourth part of this research explores the process at the courts in as far as how rape cases involving teenage and adult victims of rape are handled. The way prosecutors and magistrates relate to teenage and adult victims of rape including those who are potentially vulnerable is also looked at. The part also explores the court environment and whether it is conducive to victims of rape. The same section looks at factors that are taken into account by magistrates when reaching decisions on whether or not to retain a guilty verdict in such cases and whether such considerations are proper in terms of the law.

Part five of this study goes further to look at the efficacy of the process referred to in part four. The effects of lack of adequate resources in carrying out effective investigation like forensic analysis in rape cases are explored. The need for training of regional magistrates and prosecutors is also looked at in as far as effective handling of rape cases is concerned. Adequacy of medical forms used during examination of rape victims is also considered in the same section.

The last part of this research discusses the way forward in line with the findings of the whole study. Suggestions for improving low conviction rates in respect of teenage and adult rape

cases are provided to include the need for training as well as improving the handling of rape victims by prosecutors and magistrates at courts. The same section goes on to give an overall conclusion of the whole research by further stressing the need for improving implementation of the laws on paper.

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CHAPTER ONE

1.0 INTRODUCTION

1.1 Why I chose the topic

My first encounter with teenage and adult rape victims was in the victim friendly set down office where I was posted on the first day I joined the Regional Prosecution Department at Harare Magistrates Court. There were three prosecutors in that office, one male and two females. I expected to be given lectures and shown the way cases are handled but it seemed my senior colleagues were so busy attending to their own work that they did not even notice my presence. I was left with no option but to observe what was being done and then apply that to cases assigned to me. When I requested to be assisted later on, I was told to just sit and observe and that is how everyone learnt. There was no time to give detailed lectures due to the heavy workload. It seemed everyone was more worried about time and completing their cases. Victims were summarily dealt with and dismissed without getting detailed encounters of their experiences and this applied mostly to adult and teenage victims of rape who were treated with scepticism and doubt, especially in cases involving past relationships, the character and behaviour of victims before and after the alleged rape. The following were some of the most common questions that victims were asked before they got dismissed:

- Did you fight the accused?
- Did you scream or shout for help?
- Did you sustain injuries?
- Why did you keep quiet for such a long time and pretend as if nothing had happened?
- Was it your first sexual encounter?
- Why did you go to his place?
- Why did you stay at that party till late?

I had been told to just observe and learn from my colleagues. I could tell that these victims were disturbed by this kind of insensitive questioning from the prosecutors. Most of them would leave the office often in tears. I could not stand up and challenge my senior colleagues

on the way they were handling these victims but my sixth sense kept telling me that this was wrong. I couldn't do anything; I just thought this was the way prosecution was conducted. I was absorbed into the system and with time everything became normal and perfect because I got exposed to that environment and way of doing things for the four years I worked at the Regional Prosecution Department. I lost all my senses of sympathy towards rape victims in particular teenage and adult victims. I had been taught that most of them press false allegations of rape for various reasons; I also began to treat them with suspicion. Their tears did not move me at all; I just thought they would be pretending in order to gain my sympathy. I was blinded as to the negative effects all that had on the welfare of the victims involved as well as the outcome of most teenage and adult rape cases.

An eye opener

Enrolling for the Masters in Women's Law Program in 2015 brought with it new revelations and insights which prompted me to look back at my work from a new perspective. Suddenly all the malpractices and gaps within the system began to emerge and I realized there was a need to critically analyse all of them in an effort to improve the system and the handling of teenage and adult victims of rape who had for a long time endured a terrible experience at the hands of the actors within the criminal justice system, prosecutors included. I chose to embark on this particular field of study in a bid to change negative attitudes and improve the experience of teenage and adult victims within the criminal justice system. The other reason which drove me to specifically focus on teenagers and adults is that this group of women has been ignored in the Zimbabwe literature and much focus has been placed on the plight of child witnesses which area has received considerable research.

1.2 Statement of the problem

Women's organizations and the media have for a long time been decrying the need for stiffer sentences in rape cases. Not much attention has been given to improving the process towards securing such convictions. As a result the rates of conviction for rape cases especially those involving teenage and adult victims have remained low. What should be done about that should be the subject of debate. It has to be commended however that Zimbabwe is one of the countries with the most progressive laws addressing sexual violence against women and the laws can safely be said to be well developed and adequate. Such a scenario as well as the calls from women's organizations has led to a significant increase in the number of rape cases

reported. This however has had limited impact on improving the low conviction rates or reducing re-victimization of teenage and adult victims of rape. There is a wider gap between the law and reality and there is a need for more to be done to improve the situation. Many factors are to blame for the low conviction rates including issues to do with resources and negative attitudes by the criminal justice officials towards teenage and adult victims of rape.

1.3 Aim and objective of the study

This study aims to uncover the main issues behind low conviction rates in teenage and adult rape cases. The law regarding rape in Zimbabwe is looked at together with the implementation process in order to bridge the gap between law and practice. It is also an objective of this research to try and identify potential ways to improve the handling of rape cases as well as victims in particular teenagers and adults who are often treated differently from other victims. Basically the aim of this study is to influence change in the response of the criminal justice system to teenage and adult victims of rape as well as finding ways in which conviction rates in such cases can be improved.

1.4 Research assumptions

The following assumptions informed my research.

1. Prosecutors and magistrates do not have specialized training to handle rape cases.
2. Magistrates and prosecutors do not follow the provided guidelines on treating potentially vulnerable witnesses as vulnerable.
3. There is a difference in how female and male magistrates as well as prosecutors handle rape cases involving teenage and adult victims.
4. A victim's background and her behaviour at the time of the commission of the offence influence magistrates' judgments in most teenage and adult rape cases.
5. Medical affidavits in teenage and adult rape cases do not provide adequate information to assist courts to come up with informed decisions.
6. The lack of adequate equipment at the police forensic laboratory has led to the non-use of forensic evidence in courts.
7 The lack of adequate resources in police departments has led to the poor investigation of rape cases.

1.5 Research questions

1. Do prosecutors and magistrates have specialized training to handle rape cases?
2. Do magistrates and prosecutors follow provided guidelines on treating potentially vulnerable witnesses as vulnerable?
3. Is there a difference in how female and male magistrates as well as prosecutors handle rape cases involving teenage and adult victims?
4. Does a victim's background and her behaviour at time of the commission of the offence influence magistrates' judgments in most teenage and adult rape cases?
5. Do medical affidavits in teenage and adult rape cases provide adequate information to assist courts to come up with informed decisions?
6. Has the lack of adequate equipment at the police forensic laboratory led to the non-use of forensic evidence in courts?
7. Has the lack of adequate resources in police departments led to the poor investigation of rape cases.

1.6 Demarcation of the study

This study mainly focused on a specific age group of rape victims aged thirteen years and above. This was determined by a preliminary study which was carried out at the onset of this research which revealed that it is this age group which has the highest rate of acquittals in rape cases as compared to those in the group of twelve years and below. My experience as a regional prosecutor also helped to inform my determination of the age groups to focus on.

Geographically, the research was limited to Harare Magistrates Court which is relatively close to the Harare Central Police Station. The study is based on a large representative sample of rape trials heard at the Harare Magistrates Court. Most of the players and informants to my research, for example prosecutors, magistrates and victims of rape were easily locatable at this central place. Harare Regional Court also hears numerous rape cases and I was guaranteed to obtain different views from various players unlike at a smaller station. Harare Regional Court has jurisdiction over all rape cases which take place in Harare, Norton and part of Mhondoro and Chinamhora. Its wide catchment area increased the credibility of the research. The findings in this research can safely be applied to other courts in different areas within Zimbabwe which sites were not researched because court systems across the country operate in almost similar ways.

CHAPTER TWO

2.0 RESEARCH METHODOLOGIES AND METHODS

2.1 The research journey

2.1.1 Putting women at the forefront

My overall research was mainly focused on analyzing the law on rape and how it is used and applied in courts in as far as women are concerned. Women were thus taken as a starting point in the analysis of their position in law and society (Bentzon *et al.*, 1998). Such an analysis assisted me in understanding the effectiveness of the laws on rape and whether rape victims are benefiting from the provisions of such laws. I was also able to bring out the interplay between the implementation of rape laws (such as the definition of consent) and the roles played by enforcement agencies like the police, magistrates and prosecutors in bridging the gap between the law and women's lived realities.

The research was mainly conducted at the Harare Magistrates Courts which houses most of the players and informants of my research. As such it became easier to spot women who would have been victims of rape and who would have gone through the courts and these were mainly used as targets for identifying needs and gaps within the system.

2.1.2 The system and its players

The actors and structures approach was useful to this research as it enabled me to analyze teenage and adult victim's experiences in the processes of their lives and how the normative structures impinge on their lives (Bentzon *et al.*, 1998). I specifically focused and engaged with the court structure as well as the role of the state in investigating, prosecuting and punishing perpetrators of sexual violence against women. The role of actors within these structures was also worth exploring. As such police officers, prosecutors and magistrates were interviewed in an effort to figure out and interrogate their role in perpetuating rape myths and stereotypes about how victims of rape should react before, during and after an incident of rape.

This particular approach also assisted me in identifying how the highlighted actors could possibly contribute towards improving low conviction rates in teenage and adult rape cases as well as the way adult and teenage victims are handled within the criminal justice system.

2.1.3 Sex and gender analysis

This approach was mainly utilized based on perceived notions on what men and women should do and how they ought to behave and interact spliced together with cultural, social and legal interpretation of perceived gender differences (Stolen, 1991).

This approach was also used in trying to interrogate whether there is a difference on how male and female prosecutors viewed adult and teenage victims of rape. Through this method, it was discovered that male prosecutors were less understanding and sympathetic in their treatment of adult and teenage rape allegations in particular those cases involving past or current relationships. On the other hand, female prosecutors seem to relate better to adult and teenage victims of rape.

The same approach was applied in respect of magistrates in trying to see if there is a difference on the way they handle teenage and adult victims. Through this approach, it was established that female magistrates created a more friendly and comfortable court environment through interaction with victims in court unlike their male counterparts. Observations from courts presided over by male magistrates revealed a difference in the responses to rape victims in courts.

2.1.4 Where to go next?

I chose to explore other different methods during the collection of data in order to explore women's lived realties from different perspectives. This was also done in order to address limitations encountered from using other approaches. I was also able to verify positions found from using other methods. For example there was a need to follow up on observations noted during court proceedings with victims and court officials in order to triangulate my findings. This follow up through interviews was used as a way of verifying meanings, interpretations or attitudes observed from the players who were being observed. This also prevented the vulnerability of my observations to bias through overdependence on my own interpretations.

Throughout the research, I constantly engaged with my data which also gave me directions to other new sources of data. As such I was always well informed of the next step to take as my

findings were able to determine what to collect and where to go next as well as which methods to use (Bentzon *et al.*, 1998). The iterative process of the grounded theory approach could not be ignored as a result.

2.2 Research methods

2.2.1 Court observations

The main objectives of this research required methods that were capable of producing in-depth and nuanced data in order to answer the 'how?' and 'why?' questions. As such, the trial observation method was used to provide an insight into what actually takes place in court. These observations were carried out in four different courts. I took advantage of my position as a prosecutor and would sit at the bar with my fellow colleagues and pretended to be assisting them in order to avoid raising suspicion. Whilst at the bar, I was able to jot down notes and pay attention to quotes, actors' demeanour and key words which I later transformed into full field notes. These were mainly focused on the actors within the observed courtroom. Victims, witnesses, magistrates as well as other people in the gallery were not aware of my presence and they did not know that they were being observed. This was done to avoid situations where actors change their behaviour since they would be aware that they are being observed. This way I was able to capture the natural setting of the court environment. I was however aware of the fact that this was a form of a covert research which raised ethical concerns that needed to be considered carefully.

This method was useful to my research since it allowed events to be explored as they took place rather than in retrospect which prevents memories from being distorted before they are recalled (Darlington and Scott, 2002). Since the Harare Regional Courts are always busy providing very limited to no time at all for interaction with informants in particular court officials, observations were useful in minimizing this gap because I was able to proceed with my research whilst informants conducted their daily duties thus avoiding interrupting their busy schedules.

2.2.2 Interviews

I made follow-ups with teenage and adult victims of rape who had gone through the trial process as well as those who came to the prosecution set down office on the initial appearance of their cases. This engagement with victims gave me an opportunity to verify my observations as carried out earlier on in my assessment of gaps between the law on paper and

what actually takes place on the ground. It was not very difficult to engage with victims as they were free and able to confide in me with their views and experiences once they knew I was a court official and once I explained the reasons behind the interviews.
Interviews with court officials were also useful to this research. I interviewed individual prosecutors, victim friendly police officers as well as regional magistrates. I made sure to interview both female and male officials in order to hear different views from different sexes in order to analyze and see whether there is a difference on how female and male officials viewed the crime of rape when committed against teenage and adult victims.

This method was useful as it allowed a dialogue to ensue between the respondents and myself thereby creating a more natural form of exchange within a socially conclusive environment (Stewart, 1997).

2.2.3 Group discussions

Group discussions were mainly carried out at the prosecution department. I took advantage of the morning meetings that we hold each Monday of the week to discuss pertinent issues to do with my research. My aim was to elicit a wide variety of views on the same issues. As a result of such discussions, I was able to pick what male and female prosecutors thought about teenage and adult victims of rape. A form of a debate ensued during the discussions which made the topics more interesting and allowing participants to freely air their views. Taking advantage of these morning meetings also meant that I was able to avoid interrupting the busy schedules of prosecutors as it was difficult to engage them individually.

2.2.4 Perusal of court records

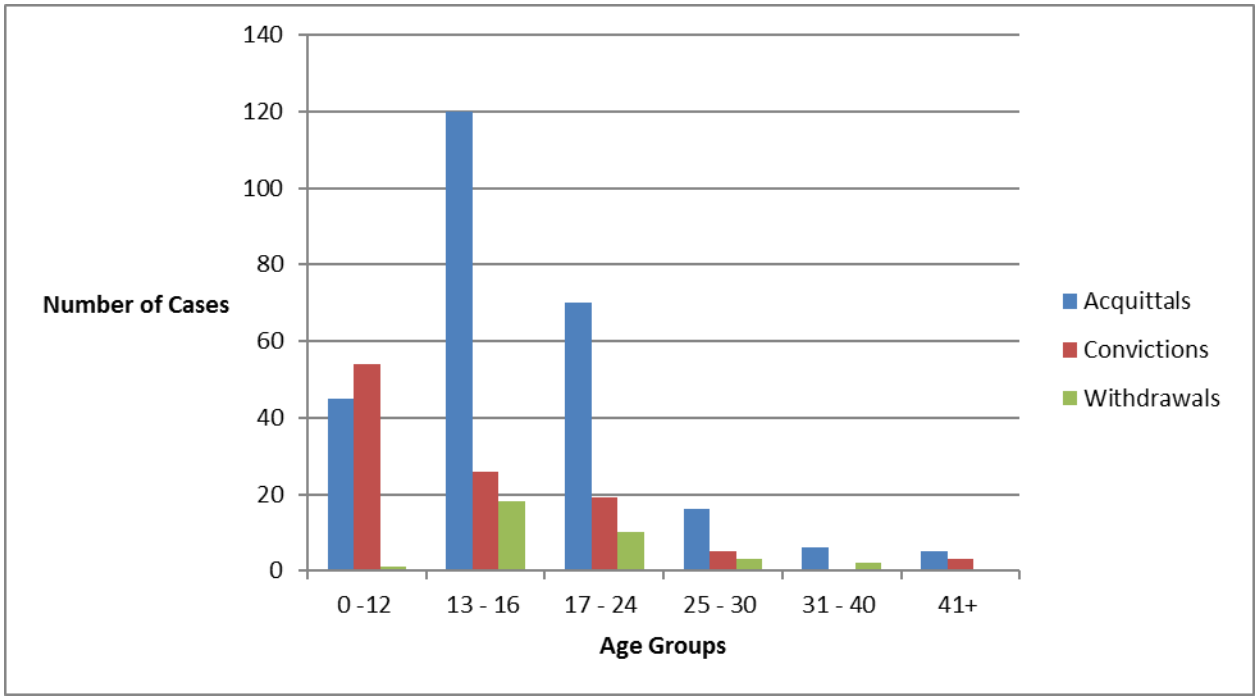
My research area was formally informed by this method of data collection. Before embarking into the field, I first did preliminary research in order to verify the viability of pursuing the research. I needed to verify first whether it was true that most teenage and adult rape cases resulted in acquittals and withdrawals. This was confirmed to be so through statistics from the Criminal Record Book at Harare Regional Clerk of Court office. Through a perusal of court records, I was also able to take note of cases of interest which assisted me in noting the reasoning of different magistrates on cases to do with teenage and adult victims of rape. I was also able to pick differences on judgments handed down by female as compared to male magistrates. Accessing court records was not a difficult task since the clerks at the office

knew me as a fellow work mate. The following statistics shown in Table 1 and Figure 1 were found.

Table 1: Showing statistics of rape cases at Harare Regional Courts for 2015

Victim Ages	Acquittals	Convictions	Withdrawals
0 -12	45 %	54 %	1 %
13 - 16	73%	16%	11%
17 - 24	71%	19%	10%
25 - 30	67%	20%	13%
31 - 40	75%	0%	25%
41+	63%	37%	0%

Figure 1: Bar chart showing statistics on the outcome of rape cases at Harare Regional Courts



2.2.5 Experiential data

It was my experience as a regional prosecutor which directed me to embark on this particular area of study. Some of the gaps within the system were drawn from my professional experience.

2.2.6 Ethical considerations

From the onset of the research, I was aware that there was a possibility that some participants might experience discomfort in talking about the topic of the research. As such I fully briefed my respondents of the reasons behind the study and further assured them that their names would not be published. As such, all details which could reveal the identity of the victims were excluded from this study and all the obtained information was dealt with sensitively and respectfully.

Gaining consent from those being observed during court proceedings was problematic. As a result I took advantage of the public nature of trial proceedings to assume that consent was not necessary under such circumstances. However I felt uneasy taking notes and using participants' difficult experiences without first acquiring their consent.

Although avoiding deception should be one of the core principles in research ethics, the particular nature of this research made it practically impossible. I was therefore guided by observations from Bachman and Schutts (2011) that at times some level of deceit is inevitable due to the need to balance openness whilst avoiding bias.

It also felt uncomfortable to build rapport with participants especially officials within the criminal justice system whilst at the same time critiquing the practice at the courts. This situation however contributed to it being a more rigorous piece of research as it allowed me to look at alternative perspectives of this area of the law while at the same time avoiding being overly critical of it.

It is also important to note that I struggled to hear the emotional and distressing experiences and re-victimization caused by court officials and court proceedings to victims of rape. As they narrated their ordeals, I could see that victims expected my research to have a positive impact on their experiences and problems. This motivated me to carry on with the study in

the hope that it would bring positive change to the whole criminal justice system in terms of its response to victims of rape in particular teenage and adult victims.

2.2.7 Effectiveness of the chosen research methods

The methods chosen to carry out this field research were very useful in obtaining crucial data. Challenges from different methods cannot be ruled out although ways to go around them were employed in order to carry on with the research. The different views of informants, perusal of court records as well as court observations all played a significant role in arriving at the findings of this study.

CHAPTER THREE

3.0 A REVIEW OF THE LAW ON RAPE IN ZIMBABWE

3.1 Introduction

The law and its framework are widely considered to be powerful weapons in combating sexual violence against women. Zimbabwe can be said to have developed its rape laws up to an internationally acceptable standard. This can be noted from its efforts towards introducing improvements and reforms to its criminal laws through the Criminal Law (Codification and Reform) Act. The Code brought together major aspects of the common law and other different pieces of legislation. Prior to the enactment of the Criminal Law (Codification and Reform) Act, sexual offences were contained in the Sexual Offences Act which did not cover all the crucial aspects of the crime of rape. For example under common law, rape only covered male vaginal sexual intercourse with a female person without her consent. The Criminal Law (Codification and Reform) Act brought with it new improvements to the definition of rape as it expanded its scope to include scenarios where the male person has anal sexual intercourse with a female person without her consent. It has to be noted also that previously under common law, non-consensual anal intercourse with a female person by a male person was not identified as rape but instead as indecent assault since the definition of rape then did not encompass anal sexual intercourse. As such the passing of the Criminal Law (Codification and Reform) Act was received with gratitude and relief from many women's organizations who had for a long time been calling for the recognition of sexual violence as a more serious offence. As shall be discussed in this chapter, Zimbabwe is a step ahead in terms of development of its rape laws and it will only take effective implementation from actors within the criminal justice system for the efforts to be fully realized.

Zimbabwe's commitment to the improvement of rape laws is also reflected in the abolition of the need for corroboration in rape trials. Under common law, a magistrate or judge hearing a rape trial was required to warn himself or herself of the danger of convicting an accused person based on the uncorroborated evidence of the victim. The case of *S v Magaya* 1997 (2) ZLR 139 (H) illustrates how this rule was of significance before the coming into operation of the Code. Gillespie J commented in that judgment:

> '…The cautionary rule evolved from practice and has a valuable role to fulfil… it rightly remains part of our law. It does not constitute discrimination against women or against any person or class of persons whose evidence might be subjected to special scrutiny as a result of its application.'

It has to be noted that by that time other neighbouring countries had long abolished the rule. Reference should be made, for example, to *S v D and Another* 1992 (1) SA 513 (Nm).

It was however not long before Zimbabwe realized there was a need to do away with the cautionary rule. The S v *Banana* 2000 (1) ZLR 607 (S) case handed down a landmark ruling which abolished the need for the application of cautionary rules in sexual offences. Although this was a sodomy case, its effects applied to all sexual offences including rape. It is important however to emphasise that although the corroboration warning has been discarded by our laws, in practice magistrates are still applying the same rule through 'the back door' when dealing with evidence in rape cases in particular where the prosecution case is based solely on the evidence of the victim. This is particularly true in cases involving teenage and adult victims as shall be discussed in the following chapters.

3.2 Definition of rape

Rape is defined in the Criminal Law (Codification and Reform) Act under section 65(1). The elements of the offence are clearly laid out as situations where a male person has vaginal or anal sexual intercourse with a female person without her consent. The male person should also have realized a real risk that the female person may not have consented to the sexual intercourse. This is a broader definition than the former common law position where anal non-consensual sexual intercourse was not regarded as rape. It is important to discuss further what these essential elements mean or imply.

3.2.1 Consent

The Criminal Law (Codification and Reform) Act is exhaustive in covering the issue of consent in rape cases. It gives clear situations where consent can be said to be absent. There is no requirement for the victim to have resisted physically to prove non-consent although in practice focus is placed on physical resistance. Magistrates are supposed to be guided by the provisions in the Code when deciding whether the victim consented or not. Section 69 of the Criminal Law (Codification and Reform) Act clearly states circumstances when consent is deemed to be absent or vitiated.

The circumstances provided include where the accused would have used violence or threats of violence to induce consent. Intimidation and unlawful pressure also amounts to vitiated consent. Consent is also said to be invalid where the accused fraudulently misrepresents to the victim that something other than sexual intercourse is taking place. A common example in Zimbabwe is where church leaders or self-styled prophets within the white garment churches perform sexual intercourse with women on the pretence of curing them of certain conditions.

Impersonating someone's lover or spouse in order to induce consent is also not regarded as valid consent by our law. This also applies to an accused who has sexual intercourse with a sleeping victim who would not have consented prior to sleeping. Vitiated consent also applies to situations where a victim is intoxicated to the extent that she is incapable of giving consent and the accused takes advantage of that and has sexual intercourse with her. The accused cannot say the victim consented unless she had given her consent prior to being intoxicated.

Unlawful pressure can also nullify consent under our laws of rape. This covers situations of unequal power relations where for example a male employer threatens a female subordinate with dismissal if she refuses to accept his sexual advances. The same applies to cases where a male person who holds a position of trust pressurizes sex on a victim for example a father and his daughter who depends on him financially or a university lecturer who threatens a student with failure of exams if she does not submit to his sexual advances.

The Criminal law (Codification and Reform) Act widely canvasses the issue of consent. Consent can be said to be sufficiently broad enough to protect victims in different circumstances. The law on consent is sufficient on paper and if implemented effectively, many of the problems in addressing the pandemic of sexual violence against women would be addressed.

3.2.2 Penetration

Although not expressly stated in the Criminal Law (Codification and Reform) Act, the definition of penetration is well established through case law. The slightest degree of penetration of the female vagina or anus suffices. It is therefore not necessary that there should be full penetration. As such the legal definition of penetration is different from the medical definition. In the case of *S v Mhanje* 2000 (2) ZLR 20 (H) it was decided:

> ‘It is not necessary that there should be full penetration. The slightest degree of penetration will suffice.’

3.3 Protection of vulnerable witnesses

Witnesses in criminal proceedings occupy a central position within the criminal justice system. From the onset of investigations, their role revolves around assisting the police during investigations as well as giving evidence in court which assists in achieving effective prosecutions.

Harris (1991) observed the central role played by witnesses and noted that their absence would cause insurmountable barriers to conviction and the whole criminal justice system would cease to function. This is due to their crucial role in identifying the accused as well as establishing a nexus between the accused and the offence which is all central to effective prosecutions. It is surprising to note however that this crucial role played by witnesses within the criminal justice system seems to be taken for granted.

It has to be noted that the whole process of giving evidence in court can be a stressful and traumatic experience for all victims of rape, including adults. Victims are often confronted by lawyers for the accused whose aim during trial and cross-examination is to make the witness, especially the victim, appear forgetful, inconsistent or spiteful as well as make them look less credible. As a result Harris (1991) notes that most witnesses frequently leave the witness box ‘angry and in tears.’

It has to be noted further that the mere fact of being in the witness box results in most individuals being vulnerable to abuse in the form of threats or other verbal abuse from the public gallery or simply being stared at by the accused (Maynard, 1994). Further intimidation may also be noted during court adjournment times where the accused, his relatives and other people from the gallery would leave the courtroom and sit in public waiting areas within the building. In such scenarios, the chances of further intimidation are high as there are no measures to separate the victim from accused and other potential intimidators within the gallery. As such, the whole process of giving evidence in court can be a stressful and traumatic experience for most victims of rape and this applies to adult and teenage victims alike. It should be stressed that such an experience by victims can affect the quality of their evidence adduced in the court and that in turn also affects the outcome of cases.

Due to various circumstances and conditions such as fear of intimidation and other personal circumstances, witnesses may find it difficult to testify in an open court. In such circumstances, the witness should be considered for treatment as a vulnerable witness and there would be a need for special measures to be put in place.

Zimbabwe introduced a range of measures and guidelines that should be used by courts to facilitate and help vulnerable witnesses as well as reduce the traumatic experience associated with giving evidence in court in particular in offences of a sexual nature. Guidelines to be put into consideration when assessing who is a vulnerable witness are laid down in the Criminal Procedure and Evidence Act under sections 319B and 319C. From those specific sections, issues which should be taken into account by the courts include intimidation of the witness and this could be by the accused himself or even any person in the public gallery. The age of the witness is also taken into consideration. Since no specific age is laid down in the Criminal Procedure and Evidence Act, this means that everyone can qualify for consideration even teenage and adult victims. However as shall be noted later in the study, the practice in courts has been to treat only victims and witnesses twelve years and below as automatically qualifying as vulnerable witnesses in need of the Victim Friendly Court facilities when giving evidence.

The other group of women is treated differently as they are left to testify in open court where they have to face the perpetrator. Their concerns are often disregarded and one wonders which law or guidelines inform prosecutors and magistrates to make such differentiations. It seems that this is just part of an institutional culture which has been followed for a long time now. This could be attributed to the belief that adult victims are less traumatized than child victims by the effects of rape. Crites (1998) however observes that it is not only children who experience trauma from sexual abuse but all women who go through it. As such all victims should be treated equally when assessing who qualifies as a vulnerable witness. Any such differentiation will amount to discrimination.

Other factors that should guide magistrates and prosecutors are listed as the cultural background of the victim as well as the relationship between the victim and any other parties to the proceedings. For example, most victims grow up in environments in which talking about sexual matters is considered taboo. It would therefore be difficult for such a witness to testify in open court where the gallery would be filled with her relatives including her mother

and father. This is so because the nature of sexual trials requires that that the victim give a clear and in most cases graphic detailed description of the incident which can prove to be difficult for the victim who may end up omitting some of the evidence.

The relationship between the victims and accused persons can also compromise the quality of evidence to be adduced in court if she is made to testify in open court. For example where the relationship involves a father and his daughter, it would be difficult for the victim to testify in open court against her biological father. This undoubtedly would affect the quality of her evidence in court.

All these issues could be curtailed by following the measures provided in the Criminal Procedure and Evidence Act. These measures include letting the victim testify in the absence of the accused like in a Victim Friendly Court or when the magistrates order the gallery to be cleared so that the victim can testify out of the sight of the public including the media who may take an unhealthy salacious interest in the victim's private life. The court may also appoint an intermediary for the victim who acts as a support person. Intermediaries are also important when a victim is testifying from a Victim Friendly Court as they convey the accused's questions to the victim through earphones and via a closed circuit television viewed from the main court room. The intermediary will only convey to the vulnerable witness the substance and effect of any questions put to the witness. This means the victim does not have to hear the accused's voice directly and this helps to lessen the likelihood of intimidation.

Despite these well developed provisions towards protection of vulnerable witnesses, victims are routinely intimidated and the courts seem to be reluctant to afford them protection as provided by the law. Doak (2005) notes that any theoretical advantages from the law on paper can easily be undermined by the daily practices of legal personnel as is the situation in our local courts. There is a need for the courts to be sensitized to the needs of vulnerable witnesses and to understand why following guidelines provided by the Criminal Procedure and Evidence Act would be useful in the carrying out of effective prosecutions and increasing conviction rates in rape cases.

3.4 What does the Constitution say?

Zimbabwe has a young and very vibrant Constitution which is reflective of international human rights standards and can be said to be a step ahead in as far as protection of women's rights is concerned.

Section 51 of the Constitution provides for the right to human dignity. This applies to teenage and adult victims of rape who often suffer humiliation in courts in particular during cross-examination by defence lawyers when their private sexual life is dissected in the presence of the public seated in the gallery. It is therefore unconstitutional for the courts to allow such disrespect of the victim during court proceedings. The courts should disallow irrelevant questioning of the victim which is only aimed at undressing the woman in question.

Equality and non-discrimination are also fundamental human rights provided under section 56 of the Constitution. It provides for equal protection and benefit of the law as well as the right not to be treated in an unfairly discriminatory manner on grounds such as opinion, culture and age. This addresses the problem concerning the treatment of vulnerable witnesses as victims appear to suffer discrimination on the basis of their age. As emphasised earlier, in practice, only victims aged twelve years and below are accorded protection as vulnerable witnesses yet the Constitution is very clear that there should be no discrimination on the basis of age. The disregard of teenage and adult victims of rape is therefore unconstitutional. Since there is no law stating that victims over twelve years old should not be regarded as vulnerable witnesses, courts seem to be guided by some deeply entrenched customs within the system which are informed by cultural beliefs and opinions. This could be deemed to be a breach of fundamental human rights as clearly provided by section 56 (3) of the Constitution which prohibits discrimination on the basis of opinion, culture and custom.

Considering that Zimbabwe has advanced laws on the protection of vulnerable witnesses, what seems to be lacking is the implementation of those laws. There is a need for a complete change in the way courts view teenage and adult victims of rape in order to improve the handling of rape cases that come before them. This also ensures victims are protected and that they feel safe and confident to come and testify in courts. Without all this, the law would just remain on paper without anything meaningful coming out of it.

CHAPTER FOUR

4.0 THE PROCESS

4.1 Introduction

Victims of rape who seek redress through the formal criminal justice system process have to go through a long and often stressful legal process at the courts, from the instance they meet the prosecutors up to the day that they stand in the witness box and face the accused person. Many factors contribute to the re-victimization of witnesses at the hands of the courts and these include: the poor handling of victims, negative attitudes by court officials towards victims as well as having to face the accused and being exposed to in-depth and often irrelevant questioning about their most intimate and private areas of their lives in an open court. Although the laws on rape in Zimbabwe have proved to be adequate at least on paper, challenges with implementation on the ground have created barriers to women accessing courts with rape complaints. This chapter explores the findings in respect of the whole process of dealing with rape victims at Harare Magistrates Court and how these impact on the outcome of most cases in particular cases involving teenage and adult victims.

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4.2 Victim's first point of contact: How prosecutors relate to rape victims

From the police station, victims of rape will proceed to the court where the first office they have contact with is that of the prosecutor in the victim friendly set down office. In that office, victims are expected to give their version of the story. The prosecutor will then, depending on its circumstances, decide the next step, i.e., (1) to give the case a trial date; (2) to instruct the investigating officer to conduct further investigations, (3) to decline to prosecute or (4) to withdraw the charge before the accused tenders his plea.

It is at this stage that irregularities in the way rape cases are handled by the criminal justice system were noted. The police officers do not separate victims from the accused when bringing their matters to court. Police officers interviewed indicated that this is primarily due to financial constraints as victims do not usually have any other means of reaching the court except to accompany the police. This means that police officers are left with no choice but to escort the accused and the victim to the court together. The same problem also occurs at the courts. Prosecutors seem not to be concerned about separating victims of rape from contact

with accused persons. This is particularly true in the case of teenage and adult victims who are left to stand in the corridors together with the accused and his relatives as they await their turn to see the set down prosecutors. During my research I noticed one adult victim who was waiting her turn to see the set down prosecutor faint upon setting eyes on the accused person who was brought to court after her. An ambulance had to be called and she was rushed to hospital. A follow-up with the victim on the day she came back for the trial indicated that she got a fright when she saw the accused as she had not expected to see him on that day. Her exact words were:

> 'This was the first time to meet him ever since I got raped. I had only been told that we were going to see the prosecutor who was to handle our case. I had not expected to see him there. When I had sight of him my heart skipped, I was taken back to the horror of that day, I felt weak in my knees, I don't know what happened next but when I woke up I was in hospital bed. It was difficult for me to come back here again.'

On the day this victim fainted the set down prosecutors were not even aware of what was happening outside their office as they were busy attending to other victims who were ahead of her in the queue. Their door was closed and the police officers waiting with their cases were the ones who attended to the victim and called the ambulance. The prosecutors in the set down office were not concerned about what was taking place outside. One prosecutor interviewed from the set down office said:

> 'It's not possible to check on what would be happening outside. We will be under so much pressure to clear the queue outside and the clerk of court closes at 10.30 hours. From that time they won't be accepting new records so we should have attended everyone by then. So you see how difficult it would be to attend to other people standing outside when you have a deadline to meet.'

From my analysis of these findings, it seems that prosecutors are more concerned with clearing the paperwork relating to their cases and less about caring for the complainants or witnesses related to each of them. An interview with one senior female prosecutor revealed that there are no resources at the courts to facilitate the separation of victims from accused persons during the interview process. This results in victims mixing with perpetrators and this has a bearing on the chances of success or failure of rape cases as some of the complainants, especially adult victims, end up withdrawing charges. Such conduct on the part of prosecutors creates room for accused persons to interfere with complainants and witnesses.

It must also be noted that prosecutors to do commit much time to interviewing and explaining the procedures that lie ahead. When victims come to court, they are rushed through their preparation for court by the prosecutors in the set down office. Some are even cut short while they are in the midst of narrating their stories. As a result most victims interviewed said that they felt rejected and that their cases were not being properly handled. One 23 year old victim explained:

> 'I expected to be treated differently at the prosecutor's offices. I thought they were going to hear my side of the story. Instead the prosecutor I talked to seemed disinterested in what I was telling her, I was cut in the middle of explaining my experience. The prosecutor constantly glanced at his watch and told me that I was to narrate everything in court as there was limited time to say out everything.'

One wonders how prosecutors can properly decide on how to proceed with cases armed with less than all the relevant evidence of victims. Should the need for expediency in dealing with these cases compromise the quality of evidence to be presented in court? There is an obvious need to revise such practices in order to improve the management of victims and the prosecution of rape cases.

It was also noted that prosecutors do not take their time to familiarize victims with the court procedures. After the initial meeting with the prosecutors, victims are instructed to go home and wait for the investigating officer to give them a trial date after the completion of the police's investigations. No further communication is made with the victim. When she comes for trial, she is sent to a court which is different from the one she attended on the initial day that the accused was placed on remand. The environment is new and intimidating to her. One victim interviewed explained how she felt uneasy and intimidated by the Regional Court environment. She indicated that it may have been better had she been informed and familiarized herself with the environment prior to the trial date.

Some witnesses had their cases postponed not because they had not come to court on the date of trial but because they had sat in the wrong court the whole day waiting for their names to be called.

I was present when an adult victim came to the set down office at around 16:00hrs complaining that her case had not been heard. Upon questioning which court she had been waiting in, she indicated that she had been in the court that she had been refereed to on the initial day the accused was placed on remand. No one had advised her that the trial was to be held in a different court which is the Regional Court and not the remand court. She had wasted the whole day in the wrong court, her name had been called at the Regional Court and because she did not appear, it was decided that she had defaulted (not come to give evidence at the trial) and therefore was not interested in the case. The accused who had been detained in custody was removed from remand and he went home. The witness got frustrated and she ended up weeping uncontrollably when she heard the way her case had been handled. I felt guilty as a prosecutor and realized the importance of giving complainants and witnesses full details of the procedures and the courts they need to attend throughout the entire prosecution of their cases. I also realised the need to also keep in constant contact with victims was also seen as essential.

An element of discrimination was also noted in the way child victims and adult victims are treated by prosecutors. Prosecutors tend to sympathize more with child victims of twelve years and below. From the very start, investigating officers are told not to bring young victims to the office of the prosecutor directly. There is a Childline office at the court and all child victims are sent to that office first and there they wait their turn to be called to the prosecutor's office. In that office, they can receive counselling, play with dolls and watch television. The prosecutor will deal with the accused first and dismiss him. She will then go to collect the victim from the Childline office after making sure that there is no chance of the child victim coming into contact with the accused. After interacting with the prosecutors, the victim's guardians are then informed of the trial date and told to bring the child back to Childline office at the court on the day of the trial where she will be collected by the trial prosecutor and taken to the intermediary who prepares her to give her testimony in the Victim Friendly Court.

One prosecutor interviewed as to why there is a difference between the way teenage and adult victims are treated from child victims, stated:

> ‘Teenage and adult victims of rape are less traumatized by sexual abuse as compared to a child victim. Children are susceptible to vulnerability and they need extra care from us so that they can testify freely and comfortably.’

This view was contrary to what was found on the ground. The evidence showed that teenage and adult victims were traumatized just as much by rape as any other victims and there were incidents in which adult victims fainted at the unexpected sight of their alleged rapists. One wonders what criteria prosecutors are using to differentiate the levels of trauma suffered by victims as a result of rape.

4.3 Inside the courtroom: Are victims comfortable with the environment?

The way Regional Court rooms are designed in such a way that the public are able to follow court proceedings of different cases with ease. On average, the courtroom accommodates about forty people in the public gallery. During the hearing of a criminal trial there are usually four uniformed prison officers, one uniformed police officer, the magistrate in his or her black robe on the bench, the defence lawyers and prosecutors at the bar who are dressed very formally as well as the interpreter and the accused person in the dock. The witness box is very close to the dock where the accused is seated.

The public gallery is usually comprised of relatives and friends of the accused person, family of the victim, other people are waiting for their cases or their relatives’ cases to be heard and in some instances, the media. The victim who is the focal point of the whole rape case waits, seated on the benches outside the courtroom waiting for the accused to give his defence outline and for her name to be called to come inside the court and give her evidence. From the moment she steps through the door and into the courtroom, all heads in the public gallery turn towards her and all eyes follow her until she enters the witness box. All this creates a tense environment in which the victim is expected to testify coherently.

One 21 year old victim vividly recalled her experience of the court’s atmosphere in these words:

> ‘When I was walking to the witness box, I could feel all eyes were on me, everyone was quiet, there were no movements, my heart began to beat so fast, I felt so uneasy, the distance from the doorway to the witness stand seemed very long for me, it took forever to reach the witness box. All of his friends and family and other people I didn’t know were there seated in the gallery.

> Already my confidence was swept away; I wasn't sure whether I was to succeed with giving my evidence under such an environment.'

Most victims report feeling so intimidated by this environment that they fail to recall all of the finer and crucial details of the offence which often results in the failure of the trial.

Further, despite the discomfort of this ordeal, victims they are not provided with a chair to use whilst giving their evidence. The witness box is constructed in such a way that it is so high that even if they were given a chair to use they would disappear behind it and from the view of the magistrate and the public gallery. So the victim, the complainant in the rape trial, is required to stand whilst the prosecutor leads her through her evidence in chief during which she remembers and recounts the details of her traumatic experience and then she must remain standing throughout cross-examination at the hands of defence counsel, an ordeal which often lasts up to two or more hours.

In one case, a heavily pregnant victim collapsed during cross-examination. No one had considered that it the light of her circumstances and condition it would be considerate to allow her to give her evidence from a seated position. Her situation stands in stark contrast to the rest of the people in the courtroom who sit on chairs and benches. Chairs are provided for the magistrate, the lawyers and all other courtroom staff like prison officers and police officers while benches are made available for the public in the gallery and the accused in the dock. One male magistrate pointed out:

> 'It is necessary for witnesses to testify whilst standing because most of them especially victims do not speak audibly, one would struggle to pick what they would be saying and in most instances they would be asked to repeat statements over and over again. It is therefore better that they testify whilst standing for progress sake.'

It seems that the criminal justice system and its personnel generally take victims of rape for granted. The comments by magistrates themselves indicate that no special measures are being followed to protect victims who might feel intimidated by the court's environment. This leads us to the most important subject concerning what is being done by prosecutors and magistrates to protect vulnerable witnesses.

4.4 Potentially vulnerable witnesses: What are prosecutors and magistrates doing?

As emphasised above in Chapter 3, the Zimbabwean law provides very clear and adequate provisions under the Criminal Procedure and Evidence Act for the protection of vulnerable witnesses. The factors to be taken into account are clearly laid down but are prosecutors and magistrates actually implementing the law?

Knowledge of the provisions of section 319B and 319C of the Criminal Procedure and Evidence Act

It was discovered that most prosecutors are ignorant of the provisions of the Criminal Procedure and Evidence Act in regard to the protection of vulnerable witnesses. During interviews with individual prosecutors, one male prosecutor confessed not even having knowledge of the said law. He admitted:

> 'To be honest with you I am not very familiar with those provisions. Usually when we are dealing with witnesses here, we only regard the younger victims as vulnerable and adults are just treated as adults, they are left to testify in an open court.'

The same prosecutor also revealed that there are no written guidelines or laws which prosecutors and magistrates follow to distinguish between young and adult victims when considering the protection of vulnerable witnesses:

> 'When I joined the regional prosecution department, I just noted that it was only the younger victims, twelve years and below, who were given a chance to testify from the Victim Friendly Court. There was never a case when I witnessed an adult or teenage victim of rape testifying from the Victim Friendly Court.'

I have to confess also that even I was not fully conversant with the provisions on the protection of vulnerable witnesses until I started this research. Interaction with prosecutors and magistrates revealed that most of them believed that rape was less traumatic for teenage and adult victims than for child victims who were seen to be in need of more protection from the courts. This belief has been correctly challenged. The fact is that any female victim who is raped is left with emotional scars which are almost impossible to heal (Crites *et al.*, 1998). Therefore one must ask what laws or procedures are leading magistrates and prosecutors to

justify practices which provide more protection to children and little or no protection to teenage and adult victims of rape. This research unearthed that there is no written policy or law to this effect. It would seem however that this practice has just become part of the culture of the way our courts deal with rape cases and any new employees who become part of and are absorbed into the system just end up following the same culture practised by everyone else.

As has been emphasised in the previous section, most victims of rape are prone to intimidation by the court environment itself as well as people in the gallery. Interactions with victims who were coming from court revealed that most of them experienced discomfort testifying in a fully packed open court and in front of close relatives, the family of the accused and other people they did not know. The courts expect victims to explain the particulars of the offence in explicit and graphic detail and in particular how the accused penetrated her. One 16 year old victim commented:

> 'It was difficult for me to say out the vulgar words considering that when we were growing up, our parents were so strict and they never wanted to hear any such language coming from any of us. I failed to explain myself out and this was made difficult by the fact that my parents and relatives were also in the gallery, I could not explicitly explain what happened and the magistrate kept on insisting that I should explain all the details of the act.'

Magistrates also expected adult victims with past sexual experience to fully describe how the offence occurred and to do so without much difficulty. During one trial proceeding involving a 32 year old victim who was having a difficult time expressing the actual sexual act, the magistrate had this to say to the victim:

> 'I am surprised you are failing to explain the sexual act as if this was your first time to engage in sexual intercourse. Is there anything new there that you do not know. May you please tell us what actually transpired for progress's sake!'

It was discovered that due to their background, most victims struggled to explain the sexual act in the vernacular. The courts however expected them to relate their experiences without difficulty in an open court and no heed was given to the provisions of the Criminal Procedure and Evidenced Act concerning the protection of vulnerable witnesses which states that a victim's cultural background should also be taken into account when considering the

vulnerability of witnesses. Under such circumstances, courts should either clear the gallery or allow the victim to testify from the Victim Friendly Court.

It was also part of my findings that prosecutors and magistrates expect adult and teenage victims who are related to the accused to experience no difficulty testifying against the accused to his face and in front of a courtroom of people. One male magistrate commented:

> 'Most adult rape cases take place between people who know each other for example those in a love relationship current or previous. In such a scenario, I do not see the need for the victim to fear testifying in the presence of the accused person in an open court. The victim already knows the accused and this would be different from a case where a victim would have been raped by a total stranger at night and she would have to clearly face the accused in court for the first time. Such a scenario would be understandable and warrants consideration for the victim to testify from the Victim Friendly Court.'

However three victims interviewed who had been raped by people close to them confirmed that they had difficulties facing the accused in court. They had invested a lot of trust in their perpetrators and because they had never expected them to betray that trust they said they could not bear to face their assailants again. One 23 year old victim revealed this:

> 'He was my uncle, we were so close, I trusted him with anything and it seems he took advantage of that and raped me. I never wanted to see him again. When I got into court, and when I set my eyes on him I got so overwhelmed with anger and grief, I could not say anything, the words failed to come out, I just wept and I was excused for some minutes before I went back to give my evidence.'

In this particular case, the prosecutor and magistrate failed to appreciate that they should have considered the nature and implications of the relationship between the victim and the accused as provided by the law. It had also become clear that the victim was having difficulties testifying in front of the accused person the first time she went into the witness box. All the prosecutor and magistrate thought of was that since she was an adult, she should be in a position to speak in an open court.

A brief discussion with the trial prosecutor of that particular case indicated that this was not the first time a victim had cried before giving her evidence:

> ‘We are used to this, they will eventually calm down, and we just give them some few minutes to compose themselves before they resume giving evidence. I do not think there is need for a Victim Friendly Court under such circumstances considering that we have few Victim Friendly Courts here which are usually reserved for younger victims.’

What prosecutors and magistrates fail to appreciate is the fact that rape is a very violent attack against the deepest and most intimate part of the female person and different women react differently to it based on the particular circumstances of each case. As such each case and each experience should be considered carefully and separately so that victims can be fully afforded the protection that they deserve. This would help in eliciting the kind of quality evidence needed to improve conviction rates in cases involving teenage and adult victims.

It was also noted that magistrates and prosecutors as well as the criminal justice system at large are not concerned with the importance of separating the accused and his relatives from victims and their relatives in particular during the times when the court sessions are adjourned from time to time. After the proceedings are adjourned the magistrate and prosecutor just leave the courtroom and proceed to their respective offices apparently unconcerned about the fate of victims who are left to sit on the benches outside the courtroom which they must share with the accused, his friends and relatives. Such a situation increases the victim’s exposure to interference from and intimidation by the accused and his supporters. It would seem no one really cares about protecting victims from such dangers.

An interview with one female magistrate revealed this:

> ‘We do appreciate the need for such separation but as you can see, there are no provisions for such arrangements here. When the courthouse was designed, it seems all that was not put in mind. As such our hands are also tied, there is nothing we can do except to warn the victim and accused not to discuss the case during court breaks.’

This shows that very little or nothing at all is being done to minimize the intimidation of teenage and adult victims of rape. The practice on the ground has become the norm in our courts and court officials find no fault within the system. It is only through interacting with victims that we learn of the daunting experiences they encounter when they interact with the processes of the criminal justice system. As a result of these inherent weaknesses in the court system and its actors which expose teenage and adult victims of rape to the very

intimidation/interference from which they should be protecting them, most teenage and adult victims of rape find themselves incapable of explaining themselves properly in court as a result of which they omit crucial evidence which in turn forces magistrates to acquit the accused.

If conviction rates are to be improved, it all starts with the key witness who is the victim and complainant in question. Meaningful improvements to create a free and secure environment for her in court will encourage her to testify freely and without fear so that she provides the quality of evidence needed to raise conviction rates in adult and teenage rape cases.

4.5 What are magistrates looking for? Convictions in adult and teenage rape cases

As has been pointed out earlier in chapter 3, the law on rape is very clear and adequate. The essential elements are clearly laid out and the Criminal Law (Codification and Reform) Act goes even further to give details of what constitutes consent and circumstances where consent would be vitiated. The law however does not operate in a vacuum; magistrates are there to interpret and apply the law in question in an impartial manner without exhibiting any form of bias. Findings however show that judgments by magistrates in teenage and adult rape trials are in most cases influenced by attitudes and beliefs rather than by facts presented in court. Magistrates interviewed and records perused prove that magistrates rely on stereotypical expectations of what a victim should do before, during and after the rape. This has an effect on how evidence is interpreted as well as on perceptions of the victim.

4.5.1 The issue of consent

The law on consent is very clear and a reading of section 69 of the Criminal Law (Codification and Reform) Act provides that the absence of consent does not always need to be expressed in words; there are other different ways that a victim can communicate it. It has to be noted that even in circumstances where the victim does nothing should not be interpreted to mean that she has given her consent. For example one interview with a 19 year old victim who was raped by a co-worker revealed this upon being questioned by the court as to why she failed to resist accused's advances:

> ‘I had not expected it, I could not resist, the events took me by surprise, I literally froze from fear, I felt helpless, I failed to scream or move, I felt paralyzed as he went on to rape me.’

Herman (1992) observes:

> ‘When a person is completely powerless and any form of resistance is futile, she may go into a state of surrender. The system of self defence shuts down entirely. The helpless person escapes from her situation not by action in the real world but rather by altering her state of consciousness.’

Most of the trials observed and records perused indicated that magistrates would question why a victim failed to verbalize or physically resist the accused’s advancement. This mainly applied to cases involving teenage and adult victims. There were questions as to how the victim expected the accused to have known that she was not consenting if she had not expressed it through words or actions. The accused was acquitted in almost all of the judgments in which the victim had failed to physically express resistance.

In line with these findings, magistrates also expected to see evidence of physical injury on the part of the victim if the case was to succeed. Magistrates expected the medical reports to have evidence of either bruises or tears on the vagina, marks on the body indicating use of force and also evidence that the victim tried at some point to at least resist the accused. Such cases which had fresh evidence of force resulted in guilty verdicts. One male magistrate had this to say when asked as to the relevance of medical reports in adult and teenage rape cases:

> ‘They are very useful as they enable us as magistrates to pick whether sexual intercourse was as a result of force and whether the victim resisted or there are chances that she consented. We can also pick whether the complainant would be lying. There would be signs of fresh bruises and tears on the hymen or vagina and other physical bruises in genuine rape cases.’

These views by magistrates disregard the fact that it is possible for a rape to occur even where there is no evidence of physical injury. Examples occur where consent is induced through intimidation, fraudulent misrepresentation, threats or unlawful pressure. In such cases no injuries are apparent as the victim is prevented from physically resisting depending on the circumstances of each case.

4.5.2 Threats or unlawful pressure to induce submission

Cases of this nature were noted through a perusal of various records. In one particular case which was handled by a male magistrate, the victim a 36 year old adult was a subordinate police officer who assaulted a person who had come to report a different case after they had a misunderstanding. She was due to be charged administratively under the police regulations and she risked losing her job. Her supervisor an Assistant Inspector who was on duty that day offered to help her with that case provided she submitted to his sexual advances. The accused had told the victim that she was definitely going to lose her job if she resisted him. During the trial, the victim explained that she feared losing her job as she was a single mother of three minor children. She unwillingly submitted to his sexual advances in the hope that the accused was going to protect her job. The victim was later transferred to another station but the accused kept on following her and threatening to expose her previous misconduct if she resisted his further sexual advances. The victim could not stand it anymore and she decided to finally lodge a report.

This was a clear case in which the accused used his authority and power to induce this victim, his subordinate, into submission. The court was blind as to the circumstances of this case and the provisions of the Criminal Law (Codification and Reform) Act as to what constitutes vitiated consent. The presiding magistrate threw out the case at the close of the state case citing that the victim had consented to the sexual act. This is an example of a magistrate mistakenly believing that rape only occurs where there is evidence that the accused forced himself on her. Folk (1988) correctly observes that men obtain sex by the use of fraud, through lying and intentionally creating situations that frighten women into submitting to sex without a fight.

This is similar to McGregor's (2005) observation concerning an employee who is threatened with her job unless she succumbs to her employer's sexual advances. She may have no choice but to submit because the loss of her job might constitute a serious undeserved evil. In Zimbabwe's current harsh economic situation it is hard to find another job if you lose your current one. That victim's fear was therefore reasonable.

Feltoe (2006) also provides an example which relates to offences of this nature. He gives the case of a male employer who threatens to dismiss a female employee unless she agrees to have sexual intercourse with him as constituting unlawful pressure.

Most of the cases perused involving teenage and adult victims gave an indication that there is a rise in the number of rape cases involving fraudulent misrepresentation to induce consent. In one case, a 16 year old girl who had abdominal problems was sent by her mother to seek treatment from a well known traditional healer within the area of Chinamhora. The traditional healer told the victim that he needed to examine her first as he suspected there was something in her womb and she was supposed to get undressed and close her eyes. Little did the girl know that the accused was penetrating her vagina with his penis. The accused had lied to the victim as to the nature of the act. This was a clear case and the accused did not even refute the allegation that he had told the girl that he wanted to remove something from her womb. The accused proffered the defence that the victim had consented to the sexual act as she did not resist when he penetrated her. The male magistrate who dealt with that case dismissed the matter despite the fact that consent had clearly been obtained fraudulently. The magistrate held that the victim had not clearly demonstrated non-consent as she failed to resist the accused's advances.

There were also a number of cases where consent was induced under the guise of religious guidance. A number of self-styled prophets and church leaders or pastors used their authority to induce followers to submit to sexual acts. In one case a certain church leader from a local apostolic sect induced a woman to submit to sexual intercourse after misrepresenting to her that he wanted to cleanse her from evil spirits which he alleged her husband had transmitted into her body each time they had sex. The church leader invited the woman into his office and called one of his assistants to help him convince her that she needed such cleansing to save her life. The woman was led to believe that the accused was exorcising evil spirits from her when in actual fact he was having sexual intercourse with her. The woman later admitted what had happened to her husband leading to the accused's arrest. The matter was however thrown out on the basis that the state had failed to prove lack of consent on the part of the victim.

In most cases of this nature, magistrates found that victims had consented to the sexual act. Courts failed to explore the parameters of vitiated consent as provided by the Code and this resulted in acquittals in many cases of this nature. There is a need for the courts to be alert and more rigorous in the application of the law in cases of this nature. Perpetrators of these types of rapes seduce, manipulate and sexually exploit their victims in a variety of ways and contexts.

Cases where the accused administers drugs or other intoxicants to victims for purposes of impairing their judgment or control before having non-consensual sexual intercourse were also noted. Most cases of this nature resulted in acquittals as most magistrates viewed women who were drunk or drugged at the time of the alleged offence as contributing to their assault. Instead of condemning the behaviour of the accused, victims instead were blamed and most of these cases resulted in acquittals.

4.5.3 Witness credibility

The credibility of a witness also plays a crucial role in determining the guilt or otherwise of an accused in a rape case. A victim is expected to give a full account of the actual rape, she is not expected to mumble, or claim that she has forgotten any of the details of the offence. Her evidence is expected to be consistent and coherent. This however is difficult to achieve for the emotionally devastated victim of rape who has to relive the terrifying encounter of the attack over and over again at the hands of the courts. One male magistrate shared his views on this:

> 'One way that we use to test whether a victim is telling the truth is through consistency and being able to give full details of the incident. It would be suspicious for a victim to reveal she has forgotten some of the details or to introduce new evidence during cross-examination and pretend to have recalled some of the evidence. All evidence should come out during her evidence in chief. You will find out in such cases as magistrates, we would be hesitant to convict the accused.'

Discussing this problem, Burt (1980) explains that delayed complaints and those complaints which contain gaps and which are incoherent and where the complainant experiences difficulties recollecting the rape incident are often seen as being less credible and are more prone to suffer from attrition.

I found that in most cases in particular those involving teenage and adult victims, magistrates expect victims to have a vivid memory of the incident. This was different from child victims whose loss of memory was viewed as normal. One male magistrate commented:

> 'It's not expected for an adult victim to report that she has lost her memory of some of the details of the offence. That raises suspicion and if it was a younger victim that would be different.'

Most judgments which resulted in the accused's acquittal were justified on the basis of inconsistency coupled with other reasons. Tromp *et al.* (1995) however notes that traumatic events like rape impair rather than enhance the performance of a victim's memory.

4.5.4 Behaviour of the victim

Another factor that influenced conviction rates in teenage and adult rape cases was found to be the behaviour of the victim prior to and after the commission of the rape. All of the magistrates interviewed indicated that a victim of rape was expected to report the crime promptly if she had indeed been raped. One magistrate noted:

> 'If one had been raped, you would expect her to report right away. I do not see any reason why one would keep quite or feel ashamed if indeed she would have been raped.'

Magistrates emphasised that they are also guided by case law when making their decisions and that it stressed the requirement of reporting promptly. I was referred to the case of *S v Makayanga* 1996 (2) ZLR 331 (H) which states that:

> 'A report must have been made without undue delay and at the earliest opportunity in all the circumstances and to the first person to whom the complainant could reasonably be expected to make it.'

A question then popped into my head as to who decides what undue delay is and what constitutes the earliest opportunity. The answer I got from a male magistrate interviewed was that it is up to the magistrates themselves to decide and they use their own discretion to come with such a determination.

Records perused indicated that cases which were reported 'late', for example, after more than a week from the day of the abuse quite often resulted in acquittals. One such case involved a 14 year old victim who was working as a domestic worker in the eastern suburbs of Harare. She had been taken from the rural areas of Gokwe by the accused's wife since they came from the same rural area. One day the accused came back early from work and before his wife arrived home, he took advantage of her absence and raped the innocent girl. The accused threatened her and told her not to reveal the incident to anyone. The little girl had only been working in their employ for two weeks. The victim did not tell the accused's wife when she came back from work fearing that she would not believe her and the accused had also

threatened her not reveal to anyone. She had no access to a phone to call her relatives. She did not know anyone else in the neighbourhood and she had nowhere to go. She only managed to reveal the rape a month later after her aunt who stayed in a different suburb came to visit her. This case was dismissed by the court and the reason given by the magistrate was the victim's delay in reporting the crime. The court reasoned that the complainant should have reported the rape to the neighbours in that area if she feared opening up to accused's wife.

This shows that magistrates' reasoning in cases of this nature is often clouded by rape myths which they bring into the courtroom. Evidence however suggests that rape victims often delay opening up or reporting their experience for a wide variety of reasons. The same finding was observed by Alder (1987).

Victims interviewed during this research reported that they had been threatened not to report the rape by the accused. Some victims explained that they feared that they would not be believed, whilst others feared the humiliation and blame they would face at the hands of the actors within the criminal justice system. It is therefore important for magistrates to seek detailed explanations from the victims as to why they reported the crime when they did.

4.5.5 Offender/victim relationship

This research also found that the relationship of the victim to the accused before or at the time the offence was committed had a bearing on the outcome of most cases involving teenage and adult victims of rape. From the records perused, magistrates seemed to differentiate between rapes committed by strangers and those committed by people known to their victims. This is consistent with the observations by Black (1976) and Gottfredson and Gottfredson (1988) who argue that the offender/victim relationship is an important predictor of the outcome of most cases and that rapes committed by intimate partners were perceived as being less serious than those committed by strangers.

Drawing from my experience as a Regional public prosecutor and from the perusal of court records, I found that the majority of rape cases coming to court are committed by people known to the victims. It is however unfortunate that magistrates tend to treat rapes committed within the context of a relationship differently from those in which no relationship exists. One male magistrate commented:

> '….one thing that makes a huge difference here is that the two had previously been in a relationship and it would be different obviously when we had been presented with a scenario where a victim had been attacked in a dark street by someone they didn't know. One would have a different view of such a case and it obviously affects outcome of judgment by simply having evidence that the two were a couple. In such cases one is forced to exercise caution when coming to a decision.'

This attitude of magistrates clearly indicates that although the cautionary rules were abolished in 2000, the courts are still somehow applying them through the back door.

The verdicts in cases were also found to be closely connected to the existence or non-existence of a victim/offender relationship and the place at which the rape occurred. For example, magistrates were more likely to convict where the rape was committed as the result of a surprise attack by a stranger in a dark alley or after breaking into the victim's home. Where, however, the offence was committed by an accused who was known to the victim at the accused's residence, in his motor vehicle or at a party, magistrates were more likely to return a verdict of not guilty in his favour. In their reasons for doing so, magistrates would blame the victim for putting herself in a compromising position. In one case, for example, a 24 year old victim went to collect her portable personal computer from her ex-lover after their relationship had ended. When she reached the accused's residence, he offered her something to drink which she accepted. The next thing she knew was that she felt dizzy and passed out. When she gained consciousness she found herself lying naked next to the accused bearing clear signs that she had been raped after being drugged by him. The court blamed the victim for visiting the accused's residence after the two had ended their relationship. The magistrate seemed to sympathize with the accused for having been misled by the complainant. She, on the other hand, was blamed for having visited the accused's residence, reasoning which seem to support the belief that she had contributed to the sexual attack.

Most teenage victims were blamed for going to parties at night which resulted in their being taken advantage of and being raped. One magistrate observed:

> 'The problem with that age group is that they like partying a lot. When we were growing up we were never allowed to go out at night, our parents expected us to be indoors before sunset. It seems now things have changed and teenagers are putting themselves in risky positions and then they would want to come here and cry rape afterwards. In most such cases the victims would

> have consented although the consent might not have been expressively put out.'

From these findings, it appears that it is not necessarily true that the reason why most rape trials end in acquittals is because there is insufficient evidence. In fact as has been noted, it is the attitudes of magistrates towards the evidence and the victims themselves which affects the outcome of most rape cases involving teenage and adult victims. Sadly, these findings confirm Mackinnon's (1983) observation that rape is not prohibited, it is regulated. Her words accurately describe what is happening within Zimbabwe's justice delivery system despite the adequacy of its rape laws.

CHAPTER FIVE

5.0 EFFICACY OF THE PROCESS

5.1 Does it make any difference whether a magistrate or prosecutor is male or female?

5.1.1 Male or female magistrate

From court observations, interviews and discussions with magistrates and victims themselves, it emerged that female magistrates are more friendly and accommodating than their male counterparts who generally appear to be unsympathetic and insensitive to victims during court proceedings. At one trial I attended I observed that the presiding male magistrate was treating the victim a bit harshly. When he ordered to the victim to clearly explain how the accused had raped her, she struggled do so since it appeared that she did not want to use words which she knew from her upbringing would be vulgar to speak in public. And in this case there were many people in the public gallery. As the public prosecutor was trying to extract such evidence from her, the magistrate intervened and shouted at the victim asking her why she was shy about using such words considering her age. She was asked whether she had been sexually active before the abuse to which the victim replied that she had. The magistrate then questioned whether such words were new to her.

Words like 'stupid', 'silly', 'nonsense' and 'stop wasting the court's time' were continuously used by this male magistrate to address the female victim who got very uneasy in the witness stand. I made a follow-up with the victim who had given evidence before a male magistrate in order to find out how she viewed the court environment. This was her response:

> 'I didn't know it was this embarrassing to give evidence in court. I didn't expect the court to require me to say out such vulgar words. I really struggled to say them out and it was difficult for me to describe the rape. I have never been in such an environment before and I don't wish to come back to court again in the near future.'

The court was insensitive to the victim who had expected to be treated differently and perhaps more sensitively at the hands of the courts. The situation was however different when I observed proceedings in another court presided over by a female magistrate. The magistrate was very friendly and sensitive to the 17 year old victim giving evidence. Whenever the

victim did not fully understand a question, she would ask the prosecutor or defence lawyer to kindly repeat it for the benefit of the victim. I also noted that the magistrate smiled on numerous occasions when talking to the victim. A follow-up with the victim after the court session confirmed the environment in that court. This is what the victim had to say:

> 'Ever since I reported this case I have been dreading to come and testify in court because many people had told me before that there are so many regulations which one has to follow when he or she goes to court and if you fail to follow them you can get arrested. I actually got surprised when I got into court to note that it is a free and friendly environment and the magistrate was also friendly. I am so happy that I managed to say out my case in a free environment since the magistrate had to clear the court first before I gave evidence. I did not expect such from the courts.'

Observations done in two other courts, one presided over by a male and the other by a female magistrate, also confirmed these differences. Generally, victims reported feeling more comfortable and better able to testify before female magistrates. One 15 year old victim commented:

> 'I felt comfortable pouring out my heart to a fellow woman; I do not think I would have opened up so freely if the magistrate had been male.'

From the completed records perused, it also emerged that women were more sensitive and more emphatic in their decision making although there were some signs that they too were affected by institutional culture and legal socialization pertaining to rape myths.

It was also found that in their judgments, male magistrates tend to conform to traditional beliefs and values as to what behaviour is expected from a woman. There was also overwhelming evidence that male magistrates were mostly affected by gender based biases which were reflective of their attitudes towards teenage and adult victims as compared to their female counterparts. One male magistrate confirmed his reluctance to convict a person accused of raping a teenage and adult victim as follows:

> 'I can actually count the number of cases I have returned a guilty verdict in cases involving teenagers and adults. The circumstances under which those alleged offences are committed makes it difficult for a magistrate to convict. You will find that in most cases there would be a history of a love relationship between the parties and when the relationship turns sour most women would want to revenge.'

On the other hand, one female magistrate observed:

> '…women tend to view cases of rape from a different perspective from that of men. To some extent the presence of female magistrates on the bench really makes a difference on the way such cases are handled.'

This view was also confirmed by one writer who observes that the presence of female judges serves an educative function as it helps to break negative attitudes about women held by male judges as well as defence lawyers (Sherry, 1986). This is to largely true in particular in respect of attitudes towards adult and teenage victims. As has been emphasised in observations made in different courts, female magistrates tend to respond to victims better than male magistrates. Gilligan (1987) a professor of Education at Harvard University, observes the difference going a step further in particular when responding to moral issues. She observes that women have unique ways of taking into consideration their relationships to others.

One female magistrate also confirmed that women magistrates are different from male magistrates in that they have knowledge and can understand women's experiences better than men and they often apply that in the performance of the their judicial duties.

5.1.2 Male or female prosecutor?

A general discussion carried out with prosecutors during one of their morning meetings revealed that there was indeed a difference between how female and male prosecutors handled rape cases. I asked prosecutors how they viewed female adult victims of rape. There were eleven prosecutors in the meeting including myself. Five of them were male and six were female. The general response from male prosecutors was that most adult victims of rape usually make false reports in order to satisfy their own agenda or out of vindictiveness against men. One male prosecutor had this to say:

> 'Most adult rape victims report abuse by intimate partners like their boyfriend or someone they know. The man in question might have promised marriage and when they fail to meet such a promise most women will then try to find a way of fixing the men and go on to report rape.'

Another male prosecutor supported the above view as follows:

> ‘Most alleged adult rape cases occur at the men’s place of residence or at a private place like a lodge, one then wonders why a woman would want to go to a men’s place if she is not interested in having sex with that man. It’s something expected, if these women do not want to engage in sex with these men then they should stop going to their places and instead meet somewhere else.’

The general consensus view held by male prosecutors was that most adult rape claims are staged. This revealed how males viewed rape in particular when committed against teenage or adult victims. On the contrary, the female prosecutors were more supportive of victims and related personally to their experience probably because they were fellow women. One senior female prosecutor had this to say:

> ‘Most abusers are people we know and not strangers. Most victims who report do so against people they know who take advantage of their vulnerability and trust that they have in such closely related people.’

During some individual interviews with prosecutors, one female prosecutor shared her view that she had been working in the victim friendly set down office for many years and had observed that most victims felt more comfortable opening up to female as opposed to male prosecutors. She emphasised that:

> ‘It is easier for women to put themselves in the shoes of the victims than for males. Women can relate better to the public and to fellow women as compared to men. I have to admit that from my vast experience as a prosecutor, indeed a difference cannot be ruled out between the way female and male prosecutors handle rape cases and victims.’

The same was confirmed by victims interviewed from the set down office who confirmed that they would prefer opening up to a female rather than a male prosecutor. Most of them preferred their cases be handled by female prosecutors for they believed that they would understand their experiences better.

If women magistrates and prosecutors could work together in trying to influence institutional cultures and myths surrounding rape which are reflected in our court proceedings and in trying to persuade their fellow male counterparts to improve their attitudes towards and

perceptions about teenage and adult victims, perhaps they will succeed in improving the way victims are treated and such cases are handled.

5.2 The need for trained and qualified magistrates and prosecutors handling rape cases

5.2.1 Training for prosecutors

The overwhelming response from the discussion carried out with regional prosecutors was that they have never received any training on how to handle rape cases. There are 20 Regional prosecutors at the Harare Magistrates Court. It was also revealed during the discussion that out of all these regional prosecutors, only five of them have University degrees and one of the prosecutors said that this tended to affect the quality of their work. 8 of these prosecutors underwent an intensive 18 month training course held by the Judicial College which they said was more of a crash course in which they were expected to grasp basic information to help them carry out their daily duties. One prosecutor explained as follows:

> 'We trained for a period of eighteen months and there were three short breaks in between. It was difficult to grasp all of the nineteen courses that we learnt in such a short space of time. It would have been better if the period for training had been extended to at least three years.'

It also emerged during discussions with prosecutors who trained at the Judicial College that about 10 of the courses studied were also covered by the Faculty of Law undergraduate programmes at local universities. It was however noted that the 18 month training period was too short for prosecutors to learn the skills needed to effectively carry out their work. This is worsened by the fact that no further training is being offered to prosecutors.

One female prosecutor commented:

> 'When I first came to the Regional Courts I had no experience at all on how to handle rape cases and the first thing I expected was to receive a tour on the courts especially the Victim Friendly Courts but to my surprise I was just allocated a court to work in with one other prosecutor who had joined the Regional Courts earlier than me. I just observed how he was handling such cases and 3 days later I got dockets allocated to me for trial without much knowledge learnt on handling such cases.'

The prosecutor who is in charge of the Victim Friendly Unit also expressed her dismay at how the department trivializes the need for such training to be done. She had this to say:

> 'There is lack of training for regional prosecutors on how to handle victim friendly cases; those at the top of management at head office do not even appreciate the need for such trainings to be done. There are certain times when local non-governmental organizations would want to partner with our department especially on issues to do with trainings and provision of resources but our bosses refuse to give the green light and often associate such gestures with politics. They turn a blind eye on such critical needs because they do not appreciate the importance as they would not be on the ground. It is us Regional prosecutors who see the need for such trainings.'

Due to a shortage of personnel in the prosecution department, other under qualified officers have been brought in from other departments to fill in the gap.

One degreed prosecutor had this to say:

> 'The government has frozen all new posts and most qualified prosecutors are resigning due to poor working conditions. The department as a result is taking in police prosecutors and other officers from departments like prisons and the army to fill in the gaps.'

There are three police prosecutors, and two from the army and two others who are prison officers. They have not received any form of training on how to handle rape cases. Allowing such under qualified and untrained personnel to prosecute serious offences like rape raises questions about their competence to interpret and apply the law effectively.

In general, the lack of training for all prosecutors handling rape cases compromises the quality of the performance of their work and this has a direct impact on the outcome of most cases. Proper prosecutorial training is needed to ensure that negative attitudes and stereotypes about rape victims are eliminated.

5.2.2 Training for magistrates

A survey carried out at Harare Regional Courts revealed that most of the magistrates on the Regional bench are not fully trained. Out of the six Regional magistrates, only one of them holds a degree in law as well as a Master's degree in Women's Law. Four of them obtained certificates after six months of training with the Judicial College of Zimbabwe which enabled

them to join the bench and they rose through the ranks with years of experience. One of the senior Regional magistrates obtained a certificate from the Community Court, Domboshava Training Centre which enabled him to join the bench and with years of work experience, he rose through the ranks.

Most of the Regional Magistrates interviewed however emphasised the need for continuous education and training in order to maintain a quality Regional Magistrates bench. One male magistrate commented:

> 'There is need for periodical formal training of all Regional Magistrates on how to handle sexual offences as there has been no such training for a long time. Such trainings are very necessary as they enable us to share ideas among ourselves which could be relevant to handling such cases.'

One female magistrate also stressed that the last time she received training was in 2012 when she attended a workshop on sexual cases. She however made it clear that it is not adequate:

> 'It's not enough because we are living in a changing environment. As such ongoing trainings are very critical and should be done periodically as they help us to cope with new trends. As you know behaviour is not static it keeps changing and as magistrates it is crucial that we keep abreast of what would be happening out there as this also assists us in decisions when writing our judgments.'

It also emerged during interviews with other magistrates that there have been plans to revive the Judicial College so that it could offer refresher courses to magistrates but due to a lack of resources that has not been done yet.

One male magistrate confirmed that he is new to the Regional bench and still sitting as an acting Regional Magistrate as his appointment is yet to be confirmed. He indicated that when he joined the Regional bench in 2014 he also did not receive any formal training but was just advised by his superiors that he was to go and work as a Regional Magistrate. This is what he had to day:

> 'Regional courts are quite different from Provincial courts where I worked for a very long time because here we handle more serious and sensitive offences which require more expertise to handle. As such you will find out that it is very crucial for new Regional Magistrates to receive some training on

> handling such matters as rape because at the end of the day we just end up doing what we think is best for such cases which in some cases might not be correct.'

He also pointed out that issues such as how to properly treat witnesses, especially rape victims, should be covered by such training:

> 'As magistrates we are not even sure if the way we treat them in court is the best. Trainings would assist us to know how best to handle victims in court and such trainings are very necessary for new magistrates who will be coming aboard.'

This research revealed that an impartial and effective justice delivery system can only be guaranteed through the proper training of magistrates as well as prosecutors. This would ensure that when these actors enter the courtroom and embark on their work they would leave behind any stereotypical thinking and negative attitudes about rape victims and deal with all rape cases sensitively and professionally. The formal legal training alone obtained at universities and local colleges is not enough as most colleges and schools of law do not teach issues concerning gender sensitivity. There is therefore a need for specific training in order to ensure the fair treatment of women, in particular teenage and adult victims of rape, throughout the trial process.

5.3 Effectiveness of forensic evidence in rape cases

This research established that there are no forensic examinations being done at the police forensic laboratory in respect of rape cases due to the critical shortage of equipment and other resources. The police department at the present moment does not have rape kits for the collection of biological samples from victims of rape.

An interview with a top police official from the Provincial Victim Friendly Police Department confirmed that there is a shortage of resources at the police forensic laboratory which means that no forensic evidence is being brought to court. She added:

> 'Currently there are no rape kits at police stations as most of them have expired. This is mainly due to lack of resources and it is hindering the carrying out of police investigations on rape cases. This also affects quality of evidence that is sent to court as well as outcome of most cases.'

One Senior Regional Magistrate made similar observations when addressing the reasons why most teenage and adult rape cases fail:

> 'Police should go an extra ordinary mile when investigating rape cases. Tools like DNA should be used but because of lack of resources all that is not being done. As magistrates we end up with no other choice but to just go by the credibility of witnesses and where such witnesses fail to put forward their cases we end up acquitting. Zimbabwe is still miles back in terms of resources for investigating rape cases.'

A senior female Regional Prosecutor confirmed this and emphasised that ever since she joined the prosecution team, she has only handled a single trial in which forensic evidence had been tendered and that was more than 10 years ago. She also stated:

> 'The government does not have resources and it is very expensive to carry out forensic analysis. Some victims foot their own bills and samples are sent to South Africa but it is not all victims who can afford [to do that].'

It was discovered that in 2015, only one victim managed to finance the examination of forensic samples in South Africa but by the time of the completion of this research in January 2016, the results of such examination had not yet been sent back to Zimbabwe. The accused person had to be removed from remand pending the receipt of the forensic results which seem to be taking forever to be obtained.

Such a state of affairs compromises the quality of evidence presented in courts in particular in cases where the identity of the suspect is in issue.

Forensic evidence makes it easy to link the suspect to an offence and its non-use has led to gross miscarriages of justice in most deserving rape cases involving teenage and adult victims. This also helps to explain why we have such low conviction rates particularly in matters involving sexual violence.

5.4 Lack of resources at police departments hampering effective investigations of rape cases

Effective investigations and prosecutions have also been crippled by the lack of resources for the victim friendly police officers to carry out thorough investigations. It was discovered that

police officers are using their own finances to visit crime scenes and to transport victims to courts. Due to their poor remuneration, police officers have lost enthusiasm to carry out investigations thoroughly in rape cases. The three police officers interviewed revealed that they deal with victims and witnesses who cannot afford to pay for their transport or even buy their lunch when they go to court. One police officer from Chinamhora pointed out:

> 'At the end of the day, we end up forking out our hard earned money to cater for such expenses each time we bring rape cases to court. This also applies to accused persons and with the shortage of resources; the government cannot afford to buy food for them.'

One of the officers from Dzivarasekwa also added that:

> 'We have heard that victims and witnesses are supposed to get their transport and food allowance here but at the end of the day they are just given bus fare which in most cases would not be enough and they would spend the whole day here waiting for that little money because of the long process involved. Also they only get this money when they come to testify on the trial date and not on the first day accused is brought to court for initial appearance.'

This shows that witnesses are not being fully catered for at the courts despite the Criminal Procedure and Evidence Act clearly spelling out under section 239 that these witnesses should be given a monetary allowance when attending court or criminal proceedings.

It also emerged during the interviews that most of the time police officers fail to investigate rape cases thoroughly due to a lack of resources. In most cases where there they need to visit crime scenes, police officers fail to do so citing the lack of transport costs and money to carry out such investigations. As a result police officers end up bringing poorly prepared cases to court which result in acquittals or withdrawals. The entire police department must be properly equipped with sufficient resources if conviction rates in rape cases are to be improved.

5.5 Adequacy of medical forms and examining doctor's opinion in teenage and adult rape cases

The medical affidavit form is the key document used to record medical evidence crucial to rape cases. It carries with it written evidence indicating that the offence of rape may have been committed. The study revealed, however, that the medical form is defective in many ways.

The affidavit form does not provide sufficient space for the examining doctor to record all relevant details pertaining to the examination of the victim and as a result there is the risk that important information is omitted. For example, no provision/space is given in the form to allow the doctor to comment on whether the complainant/victim was under the influence of alcohol or drugs and this may be relevant to the issue of whether the victim was capable of giving consent to sexual intercourse. Commenting on this issue, one female magistrate had this to say:

> 'The information provided on the medical report is so little. There is no enough space for the examining doctor to thoroughly comment on his observations and at times it would be necessary to call the doctor to come to court which is not always practical considering their busy schedules.'

Magistrates and prosecutors are not equipped to evaluate medical evidence and doctors rarely come to court to testify considering their busy schedules except in cases where the accused is represented and the defence lawyer insists on the doctor's presence at court.

Detailed medical evidence is important to rape cases as it helps to explain some of the problematic issues with interpreting evidence. For example such evidence may explain why a victim who has been sexually abused carries no evidence of visible injuries or bruises. Such expert evidence would also be useful in eliminating myths and biased opinions surrounding rape which are found within the courts. Efforts towards improving the quality of evidence presented in court also ensure that more convictions are secured against perpetrators of rape.

CHAPTER SIX

6.0 DISCUSSION AND CONCLUSIONS

6.1 What does the future hold? Suggestions for improving low conviction rates in adult and teenage rape cases

This chapter will present a set of recommendations based mainly upon the findings of this study as a whole. The formulated recommendations are intended to be applicable in a broader way and are not specifically directed to the area of study alone.

This particular research suggests that the law on rape in Zimbabwe although well developed remains to a larger extent a theoretical construct with very limited benefit for victims in particular adult and teenagers. There can be no doubt therefore that addressing challenges relating to rape requires more than just reforming the law. Changes to substantive law alone cannot make any significant difference to the problems facing victims of rape and the low level of convictions in cases involving adult and teenage victims. The underlying factors that gave rise to low conviction rates should therefore be carefully unearthed and confronted head on.

6.1.1 The need for training to instil gender sensitivity

As has been emphasised throughout this research, the major problem affecting conviction rates in teenage and adult rape cases has emerged is more to do with negative attitudes and stereotypes centred on the victim's behaviour before, during and after the rape incident. There is therefore a need to interpret the law correctly and use it effectively and to leave personal beliefs and opinions outside the courtroom. This can only be attained through the sensitization of prosecutors and magistrates by offering the periodic training aimed at countering gender bias. This type of training is long overdue and is essential in order to address attitude problems.

This research also suggests that training for prosecutors and magistrates should focus on detailed considerations on how problematic issues that emerge during rape trials can be tackled. These issues include the handling of rape victims in courts as well as the assessment of evidence in an impartial manner and without any influence from outside forces like gender

biases and myths. Education programmes should be aimed at eliminating bias and negative attitudes towards victims in court.

The Judicial College of Zimbabwe needs to be resuscitated for purposes of offering refresher courses and training on gender sensitivity in sex related crimes and issues. To compliment this it is also suggested that there is a need for judicially appointed taskforces to be put in place within the criminal justice system whose duties among others should include investigating the extent to which gender bias exists within the criminal justice system. The taskforce will also assist in developing training programmes aimed at addressing any gender biases and negative attitudes within the criminal justice system as a whole. Such forms of training are necessary in developing gender sensitive courts thus creating enabling environments and legal minds which are alert to women's needs and expectations.

In addition to the abovementioned suggestion, the Zimbabwe Gender Commission could also play a very crucial role in ensuring gender sensitive courts. This commission was established in terms of The Gender Commission Act (Chapter 10:31) which was gazetted in February 2016. Its main roles in terms of the Act are to advocate for laws, policies and practices in all sectors which seek to promote gender equality as well as investigating and recommending changes to practices which lead to discrimination based on gender. This commission could also be useful in monitoring practices at courts in relation to rape cases and ensuring that all practices based on stereotypes about rape victims are addressed and eliminated through its investigative function in terms of section 5 of the Act.

It has to be stressed further that thinking beyond the courtroom when assessing women's experiences in rape cases is a skill which can only be achieved through training. Most prosecutors and magistrates who trained at local universities and at the Judicial College of Zimbabwe were taught only the substantive law. I recall when I trained at the University of Zimbabwe law school, issues of gender sensitivity were not part of the core courses that formed part of the undergraduate degree program. There was however an optional course, Women's Law, which I never thought necessary to take. I think that course should have been made compulsory course to ensure that all legal professionals are equipped with gender sensitive minds before joining their different professions.

As emphasised earlier however, most regional magistrates and prosecutors are not degreed. The situation is worse on the prosecution side where most of the prosecutors are under qualified police officers, soldiers and prison officers. This is mainly due to the shortage of qualified personnel as most degreed professionals in the public arm of the justice delivery system are leaving in search of greener pastures. The main reasons have been poor remuneration and working conditions. There is therefore a need for the government to allocate more resources to the justice delivery departments so as to ensure that qualified personnel are retained within the system. This also ensures effective interpretation and implementation of the law on rape thereby addressing the problems to do with low conviction rates in adult and teenage rape cases.

6.1.2 Improving the treatment of victims and witnesses

The need to give victims a greater sense of confidence in the criminal justice system should be stressed if conviction rates in adult and teenage rape cases are to be improved. This can only be achieved through efforts by prosecutors and magistrates as well as the government towards implementing measures aimed at protecting vulnerable witnesses. The starting point should be to treat all victims of rape, whether child or adult victims, as vulnerable and in need of protection. All elements of discrimination based on the ages of victims should be addressed and eliminated and regard should be strictly given to the provisions of the Criminal Law (Codification and Reform) Act. It is further suggested that prosecutors should have time to discuss with victims in particular adult and teenage victims to verify whether they would be comfortable testifying in an open court. Prosecutors should also inform the court if the victim needs to testify from the Victim Friendly Court. This ensures that victims testify in an environment which is as free as possible from intimidation or any other negative influences and it increases the chances of obtaining quality and if necessary detailed evidence from them.

As has been noted from this research, victims are prone to intimidation from the way the court buildings were set up. Currently it is likely that victims and the accused, their family and friends will bump into and mingle with each other in waiting areas and refreshment rooms within court buildings. The criminal justice system should make it standard practice that victims of rape who are prone to vulnerability use alternative entrances and spaces when they come to court. This will reduce the chances of their facing intimidation and interference from the accused, his friends and relatives.

It is further suggested that specialist court rooms should be introduced in all jurisdictions with Regional Courts. These will ensure a redesign of witness areas as well as the court rooms so that the chances of the accused and the victim meeting before, during and after court sessions are minimized. This will also create a less formal and intimidating environment for victims. It is also suggested that the possibility of having a separate public gallery from the main court would also assist in preventing the victim from being intimidated by large public gatherings seated in court. It has to be stressed however that these changes need more commitment, political will and significant investment from the government itself. There is a need to raise, set aside and channel funds to the areas of the greatest need. Therefore, priority should be given to redesigning court rooms and ensuring separate entrances, refreshment facilities and waiting rooms in the Regional Courts, especially those at the Harare Magistrates Courts, which handle a great many rape cases.

The Government also needs to allocate more funds towards improving the investigation of sexual offences since it has been noted that the lack of resources especially at the police department is hampering effective investigations as well as their prosecution. The police forensic laboratory needs to be refurbished and fully equipped in order for it to start functioning efficiently. All police stations should be equipped with adequate rape kits for easy collection of samples from victims which should be sent for examination to the laboratory. Forensic evidence is one of the ways of proving that an accused committed the offence for which he is charged and the efficient functioning of the police forensic laboratory will go a long way in improving rape conviction rates especially in cases involving adult and teenage victims.

The effective use of expert evidence in courts could also assist in improving the quality of evidence and clarifying some of the grey areas which magistrates might not be in a position to deal with in an informed way. The medical affidavit form should be improved by making provision for more space for the examining doctor of a rape victim to clearly explain his or her findings. It should further have specific questions on the form to ensure that crucial information is not omitted. Expert evidence in the form of psychological opinion could also assist courts in understanding why rape victims responded in a certain way before, during or after the rape. These measures will also reduce the chances of magistrates relying on rape myths and stereotypes when dealing with teenage and adult victims.

The prosecution department should exercise more commitment towards ensuring that enough and useful evidence has been obtained before a case is heard in court. They should play their part and keep in constant communication with witnesses as well as help victims prepare for trial as all this has an influence on the outcome of cases. It would be more effective if rape cases are handled by specially trained prosecutors to ensure they are prosecuted effectively in a bid to improve the conviction rates in teenage and adult rape cases.

6.2 Conclusion

This research has proven that a range of factors are responsible for and associated with low conviction rates in cases involving teenage and adult victims of rape. They include, among others, the relationship between the victim and the accused, evidence of victim's resistance, evidence of injuries, delay in reporting the offence, inconsistencies within a victim's evidence and a poorly resourced criminal justice system as a whole. All of these listed factors have been blamed as having contributed to the low conviction rates in rape cases.

Working towards increasing the very low conviction rates should be the key focus for the criminal justice system as a whole. The failure by the system to effectively implement the law on rape is a clear sign of its grossly unacceptable failure to protect citizens and respond to the problem of rape. It is no use therefore to continuously praise the adequacy of rape laws in Zimbabwe without effectively putting them into practice on the ground. This study shows that there is a yawning gap between the law as it ought to be practised and women's lived realities which proves that it is not. The only way to bridge this gap is for the government to fulfil its commitments under the law and make its actions speak as loud as its words.

There is a need therefore for the criminal justice system to serve as a protector of rape victims of all ages and not to act as a system formed to reiterate and reinforce traditional gender roles and male domination (Powell, 2013). This can only be achieved through political will from the government towards the implementation of all the recommendations proposed by this research. This will ensure that victims of rape increase their confidence in the criminal justice system by increasing their reports of sexual abuse.

I am hopeful that this piece of work as well as its findings will go a long way to increasing the sensitivity and awareness among the important stakeholders within the criminal justice

system to the difficult experiences rape victims go through in trying to have their cases heard in the courts and this specifically applies to teenage and adult victims who have for a long time been subjected to multiple exclusions by the system as a whole.

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