

**‘REMEMBER POTIPHER’S WIFE’:
THE ‘RULE’ ON CORROBORATION IN RAPE AND DEFILEMENT
OFFENCES. A SYSTEMATIC VIOLATION OF THE RIGHTS OF WOMEN
AND GIRLS IN MALAWI**

Abstract

The writer of this dissertation, a Magistrate, reveals that the failure of victims of rape and defilement (mainly women and girl children) to satisfy the requirements of the purported ‘rule’ (or practice or *modus operandi*) on corroboration is a significant common reason why so many sexual assailants (mainly men) escape legal punishment. Tracing the origins and history of the purported ‘rule’, she distinguishes it from the law which it apparently subverts throughout the entire investigative, prosecution, trial and appeal stages of these crimes. She does so using a wide range of evidence collected, analysed and presented using several gender-sensitive methodologies. They are guided overall by the Women’s Law Approach which uses the ‘lived realities’ of actual victims of the crimes as an ideal starting and reference point throughout her research. Her study exposes that the purported ‘rule’, invented and perpetuated by mainly male and strongly patriarchal judges to protect their male counterparts in society, is highly discriminatory against women and girl children against whom it is mainly enforced because they are the most common victims of these sex crimes, the only crimes to which the purported ‘rule’ applies. She shows that it violates the human right of women and girls to be treated as equals before the law because, *inter alia*, it demands that they satisfy a higher burden of proof than that which is required for proving other crimes (in which the standard of proof is “beyond a reasonable doubt”). It also violates their human rights to access justice and to privacy. All these human rights are protected by local, regional and international HR instruments which are enforceable against Malawi. In order to comply with its HR obligations, Malawi, she finally suggests, should follow the example of other countries and take the long-overdue step of abolishing the purported ‘rule’. For obvious reasons, however, she warns against entrusting this task to its own judges, the very same judges who still so zealously guard and uphold this discredited illegal practice (see, e.g., *Republic of Malawi vs. Spider Okhasha*, Confirmation Case No 1763 of 1980).

**BY
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DEDICATION

I dedicate this work to my daughter Otoma. Thanks mama for the company. I love you!!!!!!

ACKNOWLEDGEMENTS

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

To my supervisor, Rosalie Katsande, thank you for all your hard work to make this study a lived reality!!!!

To my lovely daughter, Otoma and my best friend and hubby Anthony, yours was the best contribution. You were always there through out the research period. I love you!!!

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To Anne, I am grateful for your help in raising Otto during the study and may God bless you.

To Rose, and all the girls who have been there, I appreciate the care and love you gave to Otoma.

To Dr. Ngeyi Kanyongolo, Thanks for always being there, your critical mind has always proved helpful.

To God be all the glory for the opportunity given to me to study I owe it up to You Father.

Amen!!!!

DECLARATION

I declare that this research paper, **‘The Rule on Corroboration in rape and defilement offences: A systematic violation of women and girls rights in Malawi’** is my own work and it has not been submitted at any other high learning institution for the award of certificates or any other form of assessment.

Signed:.....

Date 26-03-10

Bernadette Wangisa Malunga

LIST OF STATUTES

The Malawi Constitution of 1994

The Malawi Criminal Procedure and Evidence Code

The Sexual offences Act No. 29 of 2003 of Lesotho

LIST OF INTERNATIONAL INSTRUMENTS

The African Charter on Human and People's Rights of 1981.

The African Charter on the Rights and Welfare of the Child of 1999

The Convention on the Rights of the Child of 1989

The Convention on the Elimination of all forms of discrimination Against Women of 1979

The International Covenant on Civil and Political Rights

The Prevention and Eradication of Violence against Women and Children; An Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State and Government

The Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2003

The SADC protocol on Gender and Development

The Universal Declaration on Human Rights

LIST OF CASES

Canaan Sodindo Banana vs. The State SC 41/2000 Crim Appeal No. 12/99

Malawi congress Party and Others vs. Attorney – General and another (1996) MLR

Mariette vs. Rep (1966-68) ALR (MAL) 119

Msosa vs. Republic 7 MLR

Rep. vs. Banda 3ALR (Mal)

Republic vs. Kaluwa 3 ALR (Mal) 356

Rep vs. Stanford Yole Yole Chirwa, Confirmation case No. 51 of 1994)

Rep vs. Spider Okhasha, Confirmation case no.1763 of 1980

Rep vs. Patrick Sambani CC No. 392 of 1994.

Repvs. Magombani 3ALR (Mal).

R vs. Henry and Manning (1969) 53Crim App Rep 10.

S vs Jackson 1998 (1) SACR 470 (SCA)

S vs. K 2000 (4) BCLR 405 (NmS

S vs. D and Anor 192 (SA)513(Nm)

Seda vs. Republic (1997) 1 MLR

The State vs. Brian Matiya cc No 101/07

The State vs. Brian Matiya cc No 101/07

Twaibu vs. Republic 2 ALR (Mal).

Uganda vs Peter Matovu (Criminal Session Case No. 146/2001

Wesle vs. Rep [1995] 1 MLR

TABLE OF CONTENTS

DEDICATION.....	2
ACKNOWLEDGEMENTS.....	3
DECLARATION.....	4
LIST OF STATUTES.....	5
LIST OF INTERNATIONAL INSTRUMENTS	5
LIST OF CASES	6
TABLE OF CONTENTS.....	7
CHAPTER ONE.....	9
1.0 INTRODUCTION.....	9
1.1 STATEMENT OF THE PROBLEM.....	10
1.2 THE AIM OF THE STUDY.....	11
1.2.1 <i>The Objectives Of The Study</i>	11
1.3 THE RESEARCH ASSUMPTIONS AND QUESTIONS.....	12
1.3.1 <i>The Research Assumptions</i>	12
1.3.2 <i>The Research Questions</i>	12
1.4 JUSTIFICATION FOR THE STUDY.....	13
CHAPTER TWO.....	14
2.0 LITERATURE REVIEW.....	14
2.1 DEVELOPMENT OF THE ‘RULE’ ON CORROBORATION IN RAPE AND DEFILEMENT CASES	14
2.1.1 <i>Definition of Corroboration</i>	14
2.1.2 <i>Historical background</i>	15
2.1.3 <i>What needs to be corroborated</i>	16
2.1.4 <i>Cases with no corroborative evidence</i>	17
2.2 HUMAN RIGHTS AND THE ‘RULE’ ON CORROBORATION	17
2.2.1 <i>The ‘rule’ and the right to equality before the law</i>	18
2.2.2 <i>The ‘rule’ and the right to dignity and personal integrity</i>	19
2.3 THE ‘RULE’ ON CORROBORATION IN OTHER JURISDICTIONS.....	20
CHAPTER THREE.....	23
3.0 THEORETICAL AND METHODOLOGICAL APPROACHES.....	23
3.1 THEORETICAL FRAMEWORK.....	23
3.1.1 <i>The Liberal Feminist Theories</i>	23
3.1.2 <i>The Sex and Gender and Law Theory</i>	24
3.1.3 <i>The Radical Feminist Theories</i>	24
3.2 METHODOLOGICAL FRAMEWORK.....	25
3.2.1 <i>The Women’s Law Approach</i>	25
3.2.2 <i>The Dung Beetle Approach</i>	26
3.2.3 <i>The Legal Centralist Approach</i>	28
3.2.4 <i>The Human Rights Approach</i>	28
3.2.5 <i>The Actors and Structures Approach</i>	29
3.3 DATA COLLECTION METHODS.....	30
3.3.1 <i>Individual Interviews</i>	30
3.3.2 <i>Focus Group Discussions</i>	31
3.3.3 <i>Observation</i>	31

3.3.4	<i>Written sources</i>	32
3.4	SAMPLING METHODS	32
3.5	RESEARCH LIMITATIONS	33
CHAPTER FOUR		36
4.0	THE ‘RULE’ ON CORROBORATION AND WOMEN IN MALAWI	36
4.1	TYPE OF CORROBORATIVE EVIDENCE NEEDED IN RAPE AND DEFILEMENT CASES	36
4.1.1	<i>Penetration</i>	36
4.1.2	<i>Lack of consent</i>	37
4.1.3	<i>Identity of the accused</i>	38
4.2	CHALLENGES THAT WOMEN AND GIRLS FACE WITH THE ‘RULE’ ON CORROBORATION	39
4.2.1	<i>Social ties</i>	39
4.2.2	<i>Shame and stigma</i>	42
4.2.3	<i>Threats and trust</i>	43
4.2.4	<i>Planned offences</i>	44
4.2.5	<i>Ignorance of the corroboration ‘rule’</i>	45
4.2.6	<i>Other challenges</i>	46
4.2.6.1	Medical reports	46
4.2.6.2	Investigative challenges	49
4.3	THE ‘RULE’ ON CORROBORATION AND WOMEN’S AND GIRLS’ RIGHT TO ACCESS TO JUSTICE	52
4.3.1	<i>Definition of the Human Right to Access Justice</i>	53
4.3.2	<i>How the Right to Access Justice is violated</i>	53
CHAPTER FIVE		58
5.0	THE ‘RULE’ ON CORROBORATION AND THE MALAWI JUSTICE DELIVERY SYSTEM	58
5.1	JUSTIFICATION FOR THE ‘RULE’ IN THE MALAWI CRIMINAL JUSTICE SYSTEM	58
5.1.1	<i>False Accusations</i>	58
5.1.2	<i>Rape and defilement difficult to disprove</i>	64
5.1.3	<i>Moral standing of an accused</i>	66
5.2	IS THE ‘RULE’ ON CORROBORATION DISCRIMINATORY AGAINST WOMEN OR IN VIOLATION OF THE RIGHT TO EQUALITY BEFORE THE LAW?	68
5.3	WHY THE ‘RULE’ IS STILL IN OPERATION IN MALAWI DESPITE ITS INFRINGEMENT OF WOMEN’S AND GIRLS’ HUMAN RIGHTS	70
5.4	WAYS OF ELIMINATING THE ‘RULE’ ON CORROBORATION	73
CHAPTER SIX		76
6.0	CONCLUSION AND RECOMMENDATIONS	76
6.1	CONCLUSION	76
6.2	RECOMMENDATIONS	78
BIBLIOGRAPHY		82
APPENDIX 1: RAPE AND DEFILEMENT STATISTICS FOR 2009 (SEE PARA 3.5)		84
APPENDIX 2 (SEE PARA 4.2.6.1)		92
APPENDIX 3 (SEE PARA 4.2.6.1)		94
APPENDIX 4		96

CHAPTER ONE

1.0 INTRODUCTION

It has been a practice of Malawi courts (discussed in Chapter Two) to require corroboration to the evidence of a victim of a sexual assault in order, allegedly, to ascertain the truthfulness of that evidence. Corroboration (hereinafter referred to as '*the rule*' or *the rule*, is really a purported rule, as it is not a *law* but rather a *practice*) has been defined as independent evidence which supports the story of a complainant in a case of sexual assault. This practice was adopted by the Malawian courts from English courts since Malawian law developed through English law. The rule has received a lot of attention over the years with some arguing that the rule is relevant whilst others argue that the rule has lost its meaning in this time and age. In this discussion, the focus is on the sexual offences of rape and defilement and I shall contend that the rule is not relevant as it has a lot of negative effects on Malawian women and girls who are mostly victims of sexual assault particularly rape and defilement. I shall also be arguing that the rule violates a number of women and girls rights such as the right to equality before the law, the right to access to justice and the right to dignity provided for under the Malawi Constitution as well as in some international human rights instruments which Malawi is a party to. The study shall discuss data which was collected from research conducted in Malawi from various respondents in the Malawi criminal justice system as well as from some victims of rape and defilement.

I decided to do this study mainly because of the nature of my work. As a magistrate I have been applying the rule in offences of rape and defilement without question and it has never occurred to me that women and girls would find problems with the rule or that it may be infringing on some rights of women and girls. This lack of critique was partly attributed to my undergraduate studies which never taught me to question the effect that laws and rules have as they apply to various individuals and groups. Upon graduating from law school one rule which I learnt in my first year stuck with me; 'apply the law as

it is and follow precedent of higher courts.’ Indeed in my work I followed that to the letter which blinded me to the problems that the rule was posing to women. As I was studying the Women’s Law program, particularly, its ‘Women and Criminal law course’ I felt challenged when I learnt that the rule is in itself discriminatory against women. This aroused my interest and I decided to conduct my own research into the matter by finding out how Malawian women themselves felt affected by the rule. I knew that I would also need to find out the views of members of personnel in the Malawi criminal justice system who, at its various levels, are connected with the task of observing and enforcing the rule. Most importantly, I aimed at starting a debate around the same hoping that one day through this awareness the rule might be eliminated in Malawi.

1.1 STATEMENT OF THE PROBLEM

The requirement of corroboration, though only a practice in the Malawian courts, has almost become a rule of law and thus well established and almost a requirement in every sexual offence, including rape and defilement. Despite the rule on corroboration having received a number of criticisms and despite the move by other jurisdictions to abolish the rule, Malawi still upholds the rule at the expense of women’s and girls’ rights which are guaranteed under the Malawi Constitution as well as in some international human rights instruments. The rule originated in Malawi as a result of unfounded gender-biased reasons that women and girls often lie about these offences. The rule therefore violates women’s and girls’ right to dignity by presuming that they are liars in sexual offences unless proved otherwise. It is a well known fact that the practice of requiring corroboration also discriminates against women as the research proved that that the rule affects more females than it does males as the former are more likely to be victims of these offences than the latter. Furthermore, this research has revealed that the requirement for corroboration has been found to violate the right of Malawian women and girls to access justice. This is the case because women and girls find it difficult to produce corroborative evidence. Cases without corroborative evidence are (1) dropped by the police; (2) reduced to lesser charges or (3) lost in the law courts. All these

outcomes deny their female victims access to justice through the courts and, in the event of their perpetrators being acquitted for lack of corroborative evidence, they are denied an effective remedy. In addition, the enforcement of the rule in Malawi has also led to the infringement of the right of women and girls to privacy due to the police's insistence that all female victims of rape and defilement undergo a medical examination to secure corroborative evidence, even in cases where the victims are justifiably reluctant to undergo such medical examination.

Despite all these violations personnel in the Malawian criminal justice system continue uncritically to apply the rule. Therefore this discussion seeks to bring to light the rights being violated by the rule and also how Malawian women and girls are affected by its application. It shall be argued that there is a problem in the Malawi criminal justice system: it is upholding and giving precedence to a mere *practice* at the cost of breaching the inherent *human rights* of victims of serious sexual crimes, which human rights should only be limited according to *the law* under specific, properly justified and clearly circumscribed conditions.

1.2 THE AIM OF THE STUDY

To examine the effect which the rule on corroboration has on women and girls so as to ascertain whether there is any relevance (i.e., factual or legal need) for its continued applicability.

1.2.1 The Objectives Of The Study

1. To determine whether the rule on corroboration is in line with the right to equality before the law as provided for under the Constitution and in terms of various international human rights instruments which are binding on Malawi.
2. To find out the type of corroborative evidence that is needed in rape and defilement cases.

3. To assess whether women and girls are prone to lie in rape and defilement cases.
4. To determine whether the rule on corroboration has gender implications.
5. To assess whether the rule on corroboration complies with the law that provides for the number of witnesses that are needed to prove a case in criminal cases.
6. To determine whether the rule on corroboration is necessary in light of the fact that all criminal cases have to be proved beyond reasonable doubt.

1.3 THE RESEARCH ASSUMPTIONS AND QUESTIONS

1.3.1 The Research Assumptions

1. Evidence by a complainant in a rape and defilement trial has to be supported by other independent evidence.
2. The rule on corroboration is based on the assumption that women and girls are prone to lie in rape and defilement cases.
3. The rule on corroboration is a manifestation of gender bias in the justice delivery system.
4. The rule on corroboration violates the statutory law which provides that single witness evidence can suffice to attain a conviction in criminal cases.
5. The rule on corroboration is an unnecessary additional rule to the principle that criminal cases have to be proved beyond reasonable doubt.
6. The requirement of corroboration in rape and defilement cases violates the right to equality before the law as provided for in the Malawi Constitution as read with other rights provided for in international human rights instruments.

1.3.2 The Research Questions

1. What evidence is required to prove an allegation in rape and defilement cases?
2. What justification does the rule on corroboration have under law?
3. Is the rule on corroboration a manifestation of gender bias in the justice delivery system?

4. Does the rule on corroboration violate the statutory law as to the number of witnesses needed to attain a conviction in criminal cases?
5. Of what relevance is the rule on corroboration in the light of the existence of the principle that criminal cases have to be proved beyond reasonable doubt?
6. What are the human rights of women and girls which are violated by the rule on corroboration?

1.4 JUSTIFICATION FOR THE STUDY

When I was reading around the topic I realized that not much has been written on the subject, particularly about the application of the practice in Malawi. The only relevant literature I found comprised court judgments of rape and defilement cases. Thus it appeared to me that little attention has or is being paid to the practice which explains the fact that, despite its many shortfalls, ‘the rule’ is still being enforced. In view of this I thought it necessary to contribute to the literature in this area and, in particular, commence a discussion about whether ‘the rule’ has any gender implications; whether and to what extent it violates women/girls’ rights and, in general, whether it is still relevant in this day and age.

The study was also necessary to start a debate in the Malawi criminal justice system about the pros and cons of the rule so that necessary action may be taken to determine whether to maintain the practice, amend it or do away with it in its entirety. Thus, the relevance of this study cannot be overemphasized as it is hoped that it will go a long way towards critically evaluating purported rules and practices which are believed to be unchallengeable, immutable and permanent but which are no longer in tune with society.

To sum up, this chapter gave an introduction to the study, its aims and objectives, research assumptions and questions, a statement of the problem and the justification for the study. The following chapter will discuss the literature relating to the rule on corroboration and will also provide a point of departure for the research.

CHAPTER TWO

2.0 LITERATURE REVIEW

The prosecution of rape and defilement cases is unlike the prosecution of any other criminal offence. In rape and defilement there is an intense focus on the character and motivation of the complainant. Traditionally, this focus has translated into a preoccupation with aspects of the complainant's behaviour which are not immediately related to the circumstances of the offence. One example, is whether the complainant provided a 'recent complaint' after the assault. This focus also results in an extraordinary interest in the demonstration of proof of resistance by the complainant and the corresponding application of force by the perpetrator, though neither is an element of the crime. (Macfarlane, 1993.). This type of focus obtains in Malawian courts and below is a review of relevant literature on the subject and this study's point of entry.

2.1 Development of the 'rule' on corroboration in rape and defilement cases

2.1.1 Definition of Corroboration

The Malawian case of **Mariette vs. Republic** (1966-68) ALR (MAL) 119 defined corroboration as;

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

Tibatemwa, 2005 also defines corroboration as;

Independent evidence which supports the testimony of the complainant: confirmation from some other source that the witness (complainant) is telling the truth in some part of her story which goes to show that the accused committed the offence.

2.1.2 Historical background

‘The rule’ developed in the Malawian courts from common law, since Malawian law developed from English law. Under common law the evidence of a complainant in a sexual offence must be corroborated with either direct or indirect circumstantial evidence. At common law every judge was supposed to warn herself or himself and the assessors of the danger of convicting an accused person on the uncorroborated evidence of the complainant in a sexual offence. (Tibatema, 2005). The rule on corroboration was developed by the English courts and adopted by the Malawian courts mostly on the basis that women lie in sexual matters as stated in the English case of **R vs. Henry and Manning** (1969) 53Crim App Rep 10;

What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all.

In the Malawian case of **Republic¹ vs. Magombani** 3ALR (Mal), it was actually said that;

as a matter of practice in every case of alleged sexual assault *upon a female*, corroboration should be sought for the complainant’s evidence. (*My emphasis on words in italics*).

Thus the requirement for corroboration developed in Malawi on the basis that women and girls fabricate stories in sexual offences and ‘the rule’ was introduced to confirm the story of the woman complainant who is presumed to be a liar.

¹ All cases which are against (vs.) the Republic and also cited as ALR, MLR are Malawian cases.

2.1.3 What needs to be corroborated

‘The rule’ on corroboration in Malawi applies to all the elements of rape and defilement. The elements of the offence of rape are: penetration, lack of consent and identity of the accused. The elements of defilement are: penetration and identity of the accused. In the case of **Wesle vs. Republic**[1995] 1 MLR it was stated that;

Corroboration can be provided by circumstantial evidence. For rape the corroborative evidence must establish in some material respect that sexual intercourse has taken place, without the woman consenting and that the defendant is one who committed it.

What constitutes corroboration of these three ingredients differ from one case to another and the court decides each case according to its own facts. To show that there was no consent, the court usually looks at evidence showing a physical struggle between the complainant and the assailant such as scratches, torn clothes among others;

The evidence of the complainant corroborated by that of her friend who was in her company at the time of the event, her distressed condition, and the condition of her clothes leads to no other conclusion than that the sexual intercourse was without consent. Further more there were marks of violence which police found at the scene providing more corroborative evidence. (**Republic vs. Patrick Sambani** CC No. 392 of 1994)

Penetration can be shown and corroborated by medical evidence, the presence of semen, hairs in the victims’ vagina and in the case of a child a broken hymen confirms penetration. Medical evidence has been said to be the best evidence to prove sexual intercourse but of course it is not the only evidence that can confirm penetration;

Part of corroboration of the sexual assault was the presence of semen on the girls clothing; that semen and spermatozoa found in the vagina are very powerful corroboration of completed as opposed to attempted rape though proof of emission of semen into the vagina is not essential to prove a charge of rape. (**Mariette vs. Republic**1966-68) ALR (MAL) 119)

The identity of an accused person also needs to be corroborated (**Mariette vs. Republic**). This can be done through third parties who actually saw the assailant, or through the admission of the assailant himself.

2.1.4 Cases with no corroborative evidence

Thus it has become a practice and almost a ‘must’ in Malawian courts in rape and defilement cases to require corroboration. However, a court can still convict without corroboration provided it warns itself of the danger of so doing;

Corroboration is only required in exceptional statutory cases but it is desirable as a matter of practice that a court should warn itself of the danger of convicting without corroboration in sexual offences. (**Republic vs. Banda** 3ALR (Mal))

Conviction on uncorroborated evidence without warning by the trial court is **fatal** to the case when it goes for review or on appeal. An appellate court may overturn the conviction **even if** it is convinced that an accused person was guilty;

For the purposes of a sexual offence it is not necessary that such evidence should exist. It suffices if the court warns itself of the danger of so convicting. The conviction will not be overturned on appeal if, after warning itself of the danger, the trial court concludes that the complainant is telling the truth. A conviction without such warning is unsafe and will invariably be reversed on appeal. In this case, the FGM did not warn himself of the danger and in the absence of any evidence which is corroborative of the fact that the defendant committed the offence, the conviction is unsafe and thus it is set aside. (**Rep vs. Stanford Yole Yole Chirwa** Confirmation case No. 51 of 1994).

2.2 Human Rights and the ‘rule’ on corroboration

The rule on corroboration has been tested against the law of human rights. Various articles from various constitutions and international human rights conventions have been invoked to assess whether the rule is in compliance with the articles. Malawi has a

Constitution which contains a Bill of Rights and is also a signatory to a number of human rights Conventions. Below are some of the human rights articles that informed the study.

2.2.1 The ‘rule’ and the right to equality before the law

Section 20 of the Malawi Constitution provides for the right to equality before the law as follows;

Discrimination of persons in any form is prohibited and all persons are under any law, guaranteed equal an effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status

Malawi is also a party to various international Conventions which protect the right to equality before the law. Some of these instruments are as follows:

The Convention on the Elimination of all Forms of Discrimination Against Women (1979) defines discrimination against women as follows;

Discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, cultural, civil or any other field.

Article 7 of the Universal Declaration on Human Rights stipulates that;

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

Article 26 of The International Covenant on Civil and Political Rights stipulates that;

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to equality before the law is a fundamental right under the Malawi Constitution which can not be limited under Section 44(g) of the Constitution. A number of foreign cases and articles have held that the rule on corroboration is in contravention of this right and therefore discriminatory against women. For example in Uganda the rule was considered in the case of **Uganda vs Peter Matovu** (Criminal Session Case No. 146/2001, where the judge held that the rule was in contravention of the right to equality before the law under the Ugandan Constitution as well as other international human rights instruments which Uganda is a party to. The court declined to apply the rule on the basis that it was discriminatory against women and declared the rule unconstitutional.

2.2.2 The ‘rule’ and the right to dignity and personal integrity

Section 19 (1) of the Malawi Constitution provides that;

The dignity of all persons shall be inviolable.

The right to dignity entails a state of being dignified in mind, character or bearing whilst integrity is a state of wholeness; probity; honesty; uprightness. (Tanzanian Law Commission. 1991.) ‘The rule’ infringes on this right as it suggests that women are liars in all sexual matters.

2.3 The ‘rule’ on Corroboration in other Jurisdictions

‘The rule’ on corroboration has undergone some revolution over the years in a number of jurisdictions with some abolishing the rule while others have just simply modified it. These changes have been made mainly because of human rights law.

England

In England, from where Malawi derived its law, the Criminal Justice and Public Order Act (1994) abolished the rule which required trial judges to warn the jury of the danger of convicting the accused solely on the evidence of a woman who complains of a sexual assault (Tibatemwa, 2005).

Lesotho

The Sexual Offences Act No. 29 of 2003 of Lesotho abolished the rule on corroboration in section 18 of that Act and it reads as follows;

No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual nature with special caution on the basis that the accused is charged with that offence.

Namibia

The case of **S vs. D and Anor** 192 (SA)513(Nm) in Namibia considered the rule and its justification and held that the rule in sexual offences has no rational basis for its existence. It held that while a trial court must consider the nature and circumstances of the particular offence, in the end only one test applies, namely; ‘was the accused guilt proved beyond reasonable doubt?’ and that the test must be the same whether the crime is theft or rape.

In the year 2000 the Supreme Court of Namibia in **S vs. K** (4) BCLR 405 (NmS), held that the cautionary rule had outlived its usefulness. Further, that there were no convincing

reasons for its continued application and that it exemplified a rule of practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved.

Zimbabwe

In the case of **Canaan Sodindo Banana vs. The State** (SC 41/2000 Crim Appeal No. 12/99) the Supreme Court had this to say on the rule:

But having regard to the abrogation of the obligatory nature of the rule in such countries as Canada..., I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasize that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully.

South Africa

In South Africa the rule was considered in the case of **S vs Jackson** 1998 (1) SACR 470 (SCA) and the court held as follows;

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

In South Africa there is a move to have the cautionary rule abolished through their criminal law Sexual Offences Act.

To wrap up, the above is some of the literature on ‘the rule’ on corroboration. It has mainly shown the development and application of the rule on corroboration in the Malawi criminal justice system. Most of the literature has dealt with the rule focusing on the rights of women and girls which the rule is infringing upon particularly the right to

equality before the law and have gone further to pronounce the rule discriminatory against women. The literature also seems to suggest that ‘the rule’ should be abolished because it has no rational basis and also that it gives an additional burden to a victim of sexual assault and may lead to grave injustices against women and girls.

The account which follows (which is based on the research) will go further and show that ‘the rule’ is not only discriminatory against women and girls but, in Malawi, it also has other negative effects against women and girls in that it leads to a denial of their right to access justice. As can be seen, much of the literature emphasizes the discriminatory aspects of the application of ‘the rule’. Yet not much has been written about its other negative effects including the great difficulties it causes women and girls who are required to secure what is considered to be satisfactory corroborative evidence. It is this aspect which this dissertation seeks to investigate and reveal. The next chapter discusses the theories and methodological approaches that informed the research.

CHAPTER THREE

3.0 THEORETICAL AND METHODOLOGICAL APPROACHES

3.1 Theoretical Framework

There were a number of theories which helped me conduct the research and understand and analyze the data which was collected during the research. There was a continuous interaction between the theories that I used and the data collected during the research.

3.1.1 The Liberal Feminist Theories

Among the liberal feminist theories there are two schools of thought namely; classical liberal feminists and welfare liberal feminists. All these informed my study. The classical liberal feminists contend that law should apply equally without distinction to all people in society and this to be done without regard to similarities or differences which the people have. (Tong, 1989) This contention helped me to understand the data which I collected mainly from lawyers and judicial officers on their understanding of the word 'discrimination.' Most of the respondents were of the view that the rule is not discriminatory because it equally applies to both women and men. Thus the classical liberal feminists helped me understand the background and the basis of such respondents who were of this view that the rule is not discriminatory despite the different outcomes the rule was having on men and women.

The welfare liberal feminists hold that having a law which applies equally to all people might be discriminatory at times, that the law needs to treat differently people with different needs or in different situations. This thinking helped me to understand data from respondents who were challenging the rule. These respondents were of the view that though the rule applies to both men and women it is women who are affected the most

and thus the rule might be said to be discriminatory. Without the knowledge of the liberal feminist theories I would have been thrown into a state of confusion and would have had difficulties in collecting and interpreting this data which was giving different meanings on the same issue.

3.1.2 The Sex and Gender and Law Theory

This theory advocates for different treatment of men and women because of their sex and gender. Sex is based on the physical distinctions between men and women; whereas gender is a social and cultural construct. (Bentzon, 1998) The theory was informative as it enabled me to evaluate the implication of the rule for both men and women as regards their sex. Thus prior knowledge of this theory helped me to come up with proper questions to put to the respondents. For example I came up with specific questions on how the rule affects men and also specific questions on how the rule affects women in particular. The theory enabled me to come to the conclusion that there is a need to take sex into account when dealing with the rule due to the fact that it became obvious that men and women are affected differently by the rule. It was women and girls who were found to be mostly affected by the rule since they are the ones who are mostly victims of rape and defilement cases. Without the knowledge of this theory I would have framed general questions which could not have uncovered that one sex (female) is disproportionately disadvantaged by the rule.

3.1.3 The Radical Feminist Theories

Some radical feminists hold the view that women's oppression is so entrenched in society particularly in state institutions and they propose a restructuring of the state institutions so that the rights of women can be realized. (Tong, 1989). Most of the respondents especially the actors were insensitive to the needs of women. The actors at present apply laws and practices without questioning how these laws and practices are affecting women

on the ground and *even if* shown some rights which are being violated they *still* insist on its application. This following is an example of this attitude:

It's very easy to just put up a story that someone has been raped or defiled when it has not happened, then in those circumstances one would rather discriminate than doing away with the rule because as it is, the rule is a necessary evil. (*Voice of a Supreme Court Judge*)

Thus the radical feminists helped me understand the extent of the rigidity of attitude that might exist in state institutions which may be difficult to break and this understanding helped me to collect data with an open mind.

3.2 Methodological Framework

A lot of methodologies were employed to carry out this study. I developed this framework by looking at the nature of the topic as well as the type of respondents whom I wanted to interview. For example since I wanted to talk to people who reinforce the rule the actors and structures approach became relevant. The Women's Law Approach was chosen since my area of study focused on women and how the law was affecting them.

3.2.1 The Women's Law Approach

The Women's Law Approach is a woman-centered legal discipline which takes women's actual 'lived experiences' and life situations based in sexuality, birth, care and domestic work as a starting point for the analysis of the position of women in law and in society. (Bentzon, etal, 1998). This Approach made me realise how important the actual people who are affected by the rule are, that is, women and girl victims of rape and defilement and it put me in a positive and receptive state of mind to meet and interact with them. Without this approach I would not have considered it necessary to interview the women concerned as I would have been concerned with only the actors mainly, prosecutors and judicial officers. This approach enabled me to get the actual feel of the women concerned.

The women's law approach also enabled me to ask the 'woman's question' in conducting the research particularly in examining the practice of the rule on corroboration. This helped much in the research because without asking the 'woman's question' I would have ended up with another conclusion that the rule does not have a negative effect on women since it applies to both men and women. The 'woman's question' enabled me to unearth the problems that women are facing with the application of the rule and also to realize that the problems that women are facing is not due to their sex but rather a creation of law and personnel in the Malawi criminal justice system who systematically underestimate the problems that women are facing with the operation of the rule. For example though it was found that an accused person would still be accorded a fair trial in the absence of the rule which infringes on women rights, most personnel in the Malawi justice system still insist on maintaining the rule, with some regrettably arguing, entirely erroneously, that women gain nothing when an accused is sent to prison for a conviction of rape and defilement. Justice and holding wrongdoers to account is necessary to maintain and protect the inherent human qualities of morality and integrity, not just between the particular perpetrator/s and victim/s of a crime/s, but between all individuals, i.e., society as a whole. This is because these qualities and the right to enjoy them are held by all of society's members both collectively and simultaneously between one another. It is this understanding that lies behind the universally accepted expression: an injustice against one member of society is an injustice against all its members.

3.2.2 The Dung Beetle Approach

This Approach is a grounded research process in which the researcher collects data, sifts and analyses it, considers the implications of her findings, determines what to collect next to meet her needs and continues the collection and analysis cycle. (Bentzon et.al, 1998) After collecting data everyday I would sit down in the evenings and analyze the information collected. This helped me to detect the gaps and to be able to collect relevant data the next day. The dung beetle approach directed me to visit other respondents that were not on my list drawn up before the actual research. For example before the research, police investigators were not on my list of respondents but after collecting

information from prosecutors and analyzing it, it became relevant to also get the views of the investigators who are the first to come into contact with victims of rape and defilement.

Through this approach I was able to confirm my assumptions and to fill in the gaps that were created by information from other respondents. All the assumptions but one were sustained during the research. However, on some of the assumptions there was divided opinion and I had to make my own conclusions whether the assumption was challenged or not. For example on assumption six there was a disagreement on whether the rule violates the right to equality before the law. Some respondents were of the view that since the rule applies in all sexual offences, even in those in which men are also victims, it is not discriminatory and therefore does not violate the right to equality before the law. Others were of the view that since women are mostly victims in sexual offences, then the rule is discriminatory against women and therefore not in conformity with the right to equality before the law. I had to check all these arguments against human rights provisions and I came to the conclusion that the rule is not in conformity with the right to equality before the law. Thus I concluded that the assumption (six) was not challenged.

The assumption which could not hold was number two which was that '*the rule on corroboration is based on the assumption that women and girls are prone to lie in rape and defilement cases*'. From the data which I collected none of the respondents were able to confirm or substantiate the assumption that women and girls are prone to lie in sexual matters. For example, no clear example of a case in which a woman or girl deliberately lied to implicate an accused person was given, nor was there any scientific evidence given to substantiate that women are prone to lie in these cases. Due to this challenge I decided to ask for the justification behind the rule in rape and defilement cases. (Discussed in Chapter 5).

3.2.3 The Legal Centralist Approach

This is a process where the researcher gets information from law books, statutes and case law for a critical investigation of women's legal position. (Stewart ed., 2002) This approach was relevant because it enabled me to determine entitlements that women have under the law and I compared it with the information I gathered to see if the two were in tandem. For example I found out that the law provides equality before the law between men and women but in practice women and girls were not enjoying this right due to the requirement of corroboration developed by court practice.

The approach also helped me to identify the gaps which are in the law and to explain the failures of the law to meet women's needs based on the empirical data. This approach was complimented by the Women's Law Approach due to the fact that after assessing what the law provides through this approach I went to meet the women and girl victims to get their stories through the women's law approach to assess whether they enjoy the entitlements which the law is intended to provide them.

3.2.4 The Human Rights Approach

The human rights approach involves asking what human rights aspects are being affected by an issue under examination. This approach helped me to collect relevant data and to assess whether the rule is in line with the bill of rights in the Malawian constitution and also whether it is in line with some articles prescribed in international human rights instruments.

The approach was also useful in uncovering aspects of human rights which are being violated by the operation of the rule, including those rights which I did not consider as being violated before carrying out the research. For instance, before the research and as a result of reading the literature available, I thought the rule violates only the right to equality before the law of women and girls. During the research, however, I discovered

that the rule violates a number of rights of women and girls, such as the right to access to justice and the right to privacy.

Further, this approach assisted in assessing whether the Malawi government is fulfilling its duty under international human rights law to promote and protect the rights of women in criminal proceedings especially when trying the offences of rape and defilement and the answer was in the negative.

3.2.5 The Actors and Structures Approach

The actors and structures approach assumes that social and legal change takes place through interaction between human beings as individuals or groups and not through some seemingly abstract medium such as the law. (Bentzion, etal, 1998). This approach therefore involves following up issues with people who make decisions at various levels. This approach required that I interview all actors concerned with the application of the rule on corroboration in order to find out their point of view. Without this approach I would have left out some actors which were important.

The approach also helped me to identify normative structures that impinge on women's rights and enabled me to understand that a society can have a good law but if the actors' attitude is contrary to that law realization of rights can be a far fetched dream. For example though Malawi has a bill of rights which promotes the rights of women, the actors such as the judicial officers reinforces the infringement of these rights by their attitude and beliefs towards the way women act in sexual matters. Thus the approach revealed the norms, beliefs and attitudes that are contrary to the realization of women and girls' rights among the actors.

3.2.6 The Semi-Autonomous Social Field Perspective

This is an approach which recognizes that there are regulatory or normative systems other than the formal law that affect and control people's lives and influence the choices that they can make. (Bentzion, 1998) Thus the approach was important to my research as it enabled me to pin point various institutions that affect the decision of a woman to report or not to report a rape or defilement. It was found in this research for example that in Malawi, the family and church come into play in influencing a decision which a rape or defilement victim can take. For example in one case a father was restrained by church authorities from reporting the defilement of her child on the basis that he was supposed to forgive the perpetrator who was of the same church; in the process the corroborative evidence was destroyed. In another case a prosecutor reported that a woman whose child was defiled by her husband refused to provide evidence which could have acted as corroboration after marriage advocates² of both sides had discussed the issue and resolved that she should protect her husband.

3.3 Data Collection Methods

Various methods were used to conduct the study and these were; Individual interviews, Focus group Discussions, Observation and Written sources.

3.3.1 Individual Interviews

This was a method where I would go out and meet an individual to collect data. This method was mainly used when talking to victims of rape to give them the privacy that they needed. This therefore enabled me to collect more information as the victims were free to talk about personal matters in private. The individual interview strategy was also

² These are mediators present in every marriage in Malawi to resolve disputes.

employed when meeting key people such as judicial officers whom it was difficult to secure a group interview due to the respect that society accords them.

3.3.2 Focus Group Discussions

I also had interviews with a number of people in one place. This method enabled me to collect more information from a number of people at one time. Thus the method was efficient and not time consuming. The only disadvantage was that some people were not free to express their views that I had to again and again ask the silent ones to contribute.

Below is photograph of a focus group discussion with female police investigators and prosecutors



3.3.3 Observation

This was one of the major methods used in the study. This involved visiting courts and listening to the court proceedings where there was a rape or defilement case. This method enabled me to verify the stories of the victim since some of them I would have talked to before they gave their testimony in court. It also helped me to appreciate the difficulties which the victims face in court as regards the rule on corroboration. For example I witnessed a medical report being challenged in court by the defence due to what was

written on it which was contrary to the findings of another medical report on the same issue. The medical report was the only evidence which could have corroborated the story of the victim and the accused was acquitted for lack of corroboration of the victim's version of events.

3.3.4 Written sources

This method involved reading materials relating to the topic of study. I read court records, books and articles. The court records were of assistance in verifying stories from different respondents. The only setback was that I could not find most of the court records which I needed due to poor filing system and also due to the fact that at the court where I conducted most of the study, they were moving into another building and records were already packed, thus making it hard to access them. Some of the court records had also been forwarded to the High Court for review and appeal which I could not access and I resolved to deal only with new cases which were easier to follow and trace.

3.4 Sampling methods

In conducting the study the grounded approach and purposive sampling were employed. Using the grounded approach I selected respondents who were key subjects of the research to give information. And because I was looking at rape and defilement cases I followed up cases of this nature to meet the actual victims of the cases.

Purposive sampling was also used in the research. Some respondents were sampled by looking at their importance to the research. For example I chose judicial officers as key informants as they are the ones who developed the rule and apply it, defence lawyers because they are the ones who represent accused persons, police investigators as they are the ones who investigate the cases and also first come into contact with the victims when

the matter is reported at police and prosecutors due to the fact that they prosecute these cases in court.

Below is a table of my respondents;

Title of Respondents.	Total number of Respondents	Female sex	Male sex
Judges Of The High Court And Supreme Court	5	0	5
Magistrates	4	3	1
State Lawyer Prosecutors	2	1	1
Police Prosecutors	5	2	3
Police Investigators	3	3	0
Defence Lawyers	4	0	4
Law Lectures	3	1	2
Law Commission	1	0	1
Ngos (Women Lawyers Association)	1	1	0
Women And Girl Victims Of Rape And Defilement	7	7 (4 for defilement and 3 for rape.)	
	35	18	17

3.5 Research limitations

The study met some challenges but these challenges were not fatal to the research. Firstly, it was not easy to get to some respondents. Women and girl victims whose cases had been concluded were hard to find. I overcame this challenge by waiting for new cases at various courts and following them to their conclusion. Judicial officers and lawyers were also difficult to interview. This was so due to their nature of work and all the appointments which I booked with them were not honored. I managed to interview them

by just going to their offices without an appointment and fortunately they gave me the interviews even though I was not on their schedule.

Secondly, I also had problems in finding proper written records as the institutions I visited do not have proper filing systems and also the court which I concentrated on had most of its court records packed away as the court was moving to new premises. There was little I could do about this problem as it was a matter under the control of the respondents' organizations.

Thirdly, in some institutions when they heard that I was doing a Masters in women's law they thought the research was a women's issue and though they had some men who deal with the issue under study they only gave me women to interview.

Fourthly, I had difficulties to talk to some defilement victims as they were too young to comprehend the issues and in place I had to talk to their mothers or guardians.

Fifthly, there are a few women human rights organizations in Malawi that deals with criminal law issues and the few that are there are, are not active in issues of representing women in court and some do not even appreciate that women have problems with the rule on corroboration. For example I interviewed one member of the Women lawyers association and was of the opinion that the rule is not discriminatory against women. This posed a challenge to my research as in my recommendation I proposed a 'class action' to be facilitated by these organizations and if they are not available and those that are available do not appreciate the problem then the proposal is almost not going to be acted upon.

Lastly, I had a challenge in computing statistics of offences of rape and defilement which had been withdrawn or ended up in acquittal due to lack of corroboration. At the court they do not keep such statistics and they only indicate what the final verdict is and thus one cannot adduce from that whether the case which ended in acquittal was due to lack of corroboration or other issues unless one gets hold of the court file which in this case I

could not get. At the police stations they only gave me statistics of cases of rape and defilement which had been reported at the police stations in Blantyre and other districts for the whole year of 2009 (See Appendix 1). These statistics were not helpful as they did not indicate what had happened to the cases which had been reported and I was told that they do not keep records to that effect. Due to this I failed to compute on average of the number of cases which might be lost due to lack of corroboration in a month or in a year. I only based my findings on court judgments which I found of different years and my findings were also based on the responses which I got from various respondents especially from victims of rape and defilement who were seven in number and out of the seven three cases were disadvantaged due to lack of corroboration.

In a nutshell, this chapter looked at theories, methodologies and methods adopted during the study. All methodologies and methods used in the study proved useful as they assisted to collect data which was relevant. The theories employed helped me to collect data with an open mind and without much difficulty. The methodologies and methods were used collectively as one methodology or method needed to be complemented by another. The next chapter will look at the effect that the rule on corroboration has on women and girls.

CHAPTER FOUR

4.0 THE 'RULE' ON CORROBORATION AND WOMEN IN MALAWI

This chapter will discuss the findings of the main aim of this research which was to examine the effect which the rule has on women and girls so as to ascertain whether there is relevance for its continued applicability in Malawi. It is also going to discuss objective two of the research which was to find out the type of corroborative evidence that is required in rape and defilement cases and this covers assumption one which said that *'Evidence by a complainant in a rape and defilement trial has to be supported by other independent evidence'*.

4.1 Type of corroborative evidence needed in rape and defilement cases

As discussed in chapter two it is a practice of Malawi courts to require corroboration on all the ingredients of rape and defilement which are penetration, lack of consent in rape and the identity of the perpetrator. I shall discuss the various types of corroboration that are needed on these three aspects according to what the respondents said.

4.1.1 Penetration

There has to be evidence in support of the victim that the penis of the suspect penetrated the vagina of the victim otherwise if this is not corroborated the case may turn into an acquittal or reduced to indecent assault. In the case of **Twaibu vs. Republic** (2 ALR (Mal)), slight penetration was said to be sufficient and it was held that there is no need that there should be rupture of the hymen or emission of semen. It came out clearly from the respondents that medical evidence though not the only evidence is what personnel in the criminal justice system look for and considers to be the best evidence to prove penetration. Thus when an offence of rape and defilement happens after getting the

complaint from the victim, the victim is immediately sent to hospital to find out mainly whether there was penetration;

Most of the times medical evidence is the one which is crucial to prove sexual intercourse. This is so because sometimes it is difficult to find corroboration due to the fact that the offence often happen in secret and what helps us most is medical evidence and if people don't go to hospital it is difficult to find corroboration of the actual sexual intercourse. (*Voice from a state prosecutor*)

Similarly, it was emphasized by police investigators and prosecutors that in cases of defilement they rely mostly on the reports from medical personnel to prove penetration;

In defilement cases corroboration evidence from medical evidence is very relevant so that indeed one is sure that the child was defiled. This is so because in our culture it is not normal for a child below 13 years to have sexual intercourse and medical evidence really acts as a certification that the child has been defiled. (*voice from a female police investigator*)

Further, the presence of semen, hairs and fluids in the vagina of the victim after report can also act as corroboration to her story that the suspect penetrated her vagina. In the case of **Seda vs. Republic** (1997) 1 MLR, the victim had washed herself after the unlawful sexual intercourse and medical evidence was thus not corroborating penetration, the court held that there was corroboration of penetration since after the act the sister of the victim had examined her and had seen blood and semen inside the vagina which indicated penetration.

4.1.2 Lack of consent

This is only an essential element in rape cases and one need not prove consent in defilement cases for consent is not a defence for sexual intercourse done with a girl under 13 years in Malawi (**Republic vs. Kaluwa** 3 ALR (Mal) 356). For rape the prosecution has to bring evidence to corroborate the story of the victim that she did not consent to the rape. To dispel consent the victim has to bring more evidence to support her story usually the evidence has to show signs of physical struggle between her and her assailant and without that it would be very suspicious to believe that she did not consent. Lack of

consent was therefore said to be shown by scratches, bruises on the body of the victim, immediate report of the rape to the first person they encounter after the incident, signs of trauma and distress among others. The respondents who agreed with the rule were of the view that it is easy to get corroboration of lack of consent and therefore if the complainant does not have any she might be fabricating the allegations.

I don't think it's hard to find corroborative evidence of consent because in these cases immediately after they have happened the victims are traumatized, sometimes they have scratches, bruises on their body. (*Voice from a defence lawyer*)

Similarly, a supreme court Judge echoed as follows;

I don't think it is difficult to get corroborative evidence torn clothes, bruises all these acts as corroboration of lack of consent. I don't know maybe as a judicial officer I have lowered the standard of corroboration but I think it's easy to get it. May be am just being naïve because I have always thought that if a lady is refusing there will be evidence to show the same.

However, other respondents especially those who disagreed with the rule were of the view that sometimes it is not easy to get corroborative evidence of lack of consent;

The question of lack of consent also gives challenges in securing corroborative evidence to it because the offence happen in secret and most of the times the court looks at scratches or signs of struggle which might not be there in some cases due to fear or undue influence which may cause the victim not to struggle and hence in such cases there will be no scratches or bruises to show lack of consent. (*Voice from a state prosecutor*)

4.1.3 Identity of the accused

Lastly, the victim's mention of the name of the assailant has also to be corroborated by independent evidence in cases of rape and defilement. This was said by most of the respondents to be the most difficult element to be corroborated due to the fact that the offences do take place in secret. The nature of corroborative evidence required was said to range from opportunity such as; where the assailant was seen immediately before or

after the occurrence of the offence with the victim, if the assailant was caught in the act and also if the assailant admitted somewhere to have committed the offence;

The corroborative evidence of the identity of the accused can be evidence from; eye witnesses, opportunity, that is, where the victim was seen prior or immediately after the incident with the defendant. (*Voice from a magistrate*)

In the case of **Seda vs. Republic**, (1997) 1 MLR it was held that the admission of the accused person at the party chairman that he had raped the victim and his asking for forgiveness acted as corroboration of his identity as the offender.

The above are examples of what the court looks as corroboration in rape and defilement cases. However corroboration of the above aspects is not easy to find and women face a lot of challenges in bringing the same. We shall now consider these challenges.

4.2 Challenges that women and girls face with the ‘rule’ on corroboration

Women face a number of challenges with the operation of the rule on corroboration. These challenges militate against their case in and outside the court of law. The challenges that women face are not those that they have generated themselves but arise due to social and cultural set up and also some reasons which are unseen to the women themselves. The following are the challenges;

4.2.1 Social ties

Women face challenges with social ties. Social ties are those factors that hinder someone from reporting a wrong which another person of the same community has done on him or her for fear of losing support and benefits of the community they live in. (Tanzanian , law reform commission, 1991) When a rape or defilement case happen some women would not report it for fear of losing social ties. It was discovered from the research that in Malawi religious and social institutions come into play when an offence of rape or

defilement has happened. They may pressure the victim or guardians of the victim not to report a rape or defilement. Sometimes women may be threatened to lose any support they could have got in a community or with someone if they report the offence. This has led to cases not being reported at police in time thus destroying any type of corroborative evidence that might be there and if in future the case gets to be reported she is disbelieved and with no corroboration the case is either dropped at investigations stage or ends in acquittal at court. An example is the case of attempted rape which I followed up, the case has failed to proceed in court because the victim is unwilling to testify in court. After the suspect attempted to rape her and the matter was reported at police, relations of the suspect pressed the victim as people who live in the same community to drop the charges against their son;

Ndili okonzeka kupita ku khoti kukaperekera umboni, koma abale anyamatayo akundivutitsa kuti ndikatsekese mulandu. Monga mwachikhalidwe chathu anthu timathandizana, tsiku lina ndidzafuna chithandizo kwa anthu omwewo monga mmene anenera munthu sumasekerera nzako akakhala pa mavuto ndipo ndikudziwa kuti kundende sikwabwino akavutika mnyamatayo. Nanga sizimene amafunazo sizinachitike ndiye palibe chifukwa choti mwana wawoyo apitire kundede palibe nkhani yoti ndiwonengere chibale pakati pathu.

(Am willing to go to court to testify but the accused relations are troubling me, they say I should not pursue the matter. Anyway, it is our custom to help each other and they rightly said that I should not rejoice in seeing other peoples' children going to jail. And because the actual rape did not happen I have no reason to worsen the relations with the accused and his people because one day they might offer help to me somehow. (An old lady who was victim of attempted rape)

In another case after a father learnt that his child had been defiled by a friend and also of the same church he referred the matter to church authorities whose resolve was that the parties forgive each other and that the matter be not reported at police. In the words of the father during court proceedings;

After hearing that my daughter was defiled by the suspect I was disturbed and I reported to my pastor. We then had meetings with our Apostle and the accused; during all these meetings the accused vehemently denied defiling my daughter. Due to this the apostle suggested that we leave the issue in the hands of God that he reveal to us the whole truth. We were then asked to forgive each other.

The research also found that social ties make some crucial witnesses not to testify in a court of law who could have offered corroboration to a complainants' story in a rape or defilement trial. These witnesses may refuse to testify due to their close relationship with the suspect and also due to economic dependence to the suspect. The price of justice to women is not only financial but may lead to the ostracisation of the woman and a difficult life for the children of the marriage and such social factors militate against women making complaints. Women therefore when it is a husband or a close relation who has committed a rape or defilement are caught in between and for a woman to report her husband for defilement she lays herself open to divorce and social exclusion and also the fear that reporting one's husband will result in him being put in prison and the children will lose their father and the family bread winner. (Banda, 2005)

One prosecutor had this to say which explains the strength of social ties in destroying corroborative evidence especially in defilement cases;

When you are dealing with defilement, it is the guardian who complains and they usually have their own interest for example economic reasons which do not take into account the interest of the victim. For example we had a case where a father defiled his step daughter, the mother of the child who could have corroborated the evidence of the child refused to testify which disturbed the case of the state. The mother was afraid of so many things, her husbands' relations kept on telling her to withdraw and she also considered that she would be left with no economic support if the husband was imprisoned. The case was withdrawn in court because a crucial witness who could have corroborated the story of the child declined to testify.

These are just few cases giving examples of social ties which militate against the story of a complainant by making it hard to secure corroborative evidence. There are so many cases which have been reported late at police with all corroborative evidence gone due to the fear of souring social relations. Victims of rape and defilement therefore are meant to choose between getting justice or facing social exclusion and in most cases they sacrifice justice.

4.2.2 Shame and stigma

Secondly, the research found that women and girl victims in Malawi often are shy to report a case of rape or defilement when it has just happened. This cause them not to report and to erase all traces of evidence connecting a suspect to the rape or defilement and thus if the case is ever reported it is more probable that there will be no corroborative evidence available. The shame of the victims emanates from the stigma that is attached to people who have ever been raped or defiled. It has also been documented world over that women and girls are hesitant to report crimes of sexual violence because of the stigma and trauma attached to such crimes. (Temkin, 1987) This is so because often, it is the victims of sexual violence themselves who are judged, and sometimes blamed for these traumatic events. This is perpetuated by longstanding myths about the issue of rape, which include the idea that women provoke acts of sexual violence by their dress or behaviour, or that men rape because of sexual frustration. (UNFPA, 2008) Women who have been raped therefore, fear not being wanted by men and also fear the public blaming them for causing the rape or inciting the rapist. A case in point is that of a 14 year old girl who was a victim of rape and she explained as follows;

Ndinayesetsa kukuwa koma ndinakanika chifukwa anali atandigwira pakamwa. Nditapita kunyumba ndinafotokoza koma m'malo mondivera anayamba kundimenya ndi kundinena akuti ndinamuyambira dala kuti andigwilire.

(I was trying to shout but failed because he had covered my mouth and when I went home and reported to my relations they started insulting me for being stupid and deliberately inciting the suspect to rape me and they beat me up).

In other cases it may not be the woman or girl herself ashamed of reporting but other people such as husbands or parents who might not wish the society to know that their wife or daughter was raped. On this point one prosecutor gave an example of a case as follows;

'...because of the stigma which is attached to these cases people are not willing to report. For example I had one case where rape was actually committed together with burglary. Only the burglary was reported. When the case went into court and the victim and the husband met the accused persons they were so angry at the suspects and revealed that at the time of the robbery

they had also raped the woman. A charge of rape was added on the charge sheet but it ended up being an acquittal because there was no corroborative evidence such as a medical report that the rape had actually happened. These revelations came after four months of the incident.

For some women who are raped therefore, there is the danger that their family will reject them to preserve the family from shame. In another interview a judge of the high court commented on the stigma that is attached to rape and defilement cases as follows;

In our society not many people would want to come out and report a sexual offence because of issues of shame and stigma and I remember when I was still a young man a sister to my friend was raped and she stayed a long time without marriage because us men who knew of the incident shunned her.

Thus due to shame and the stigma that is attached to rape and defilement cases, some cases might take long to be reported and when they are reported corroborative evidence might not be there which is fatal to the victim's case.

4.2.3 Threats and trust

Thirdly, the research found that in some cases victims of rape and defilement do not report immediately due to fear and some due to trust that they have in the suspect especially in defilement cases in the process decreasing the chances of securing corroborative evidence. Fear comes when the victims are threatened with something that will cause them not to report the incident and without some intervening factor for example pregnancy the case might never be reported. In one case the victim was raped by a witch doctor and he threatened her with sudden death if she ever reveals the incident. In another case a girl who was raped by a shop owner when she went to buy items at the shop was threatened that she would be killed if she ever reveals;

Poyamba nditanena kwa azimayi za kugwiliridwako sindinatchule dzina la munthu amene anandigwilirilayo chifukwa anandiopseza kuti andipha ndikawulura. Ndidapereka dzina la munthu amene anali wozerezeka mmudzi mwathumo. Zinali zolakwika kutelo koma ndimaopa.

When I first reported the rape I did not disclose the one who had raped me, i mentioned another person who was kind of mad from our village because I was so afraid of the person who raped me as he had threatened to kill me. I

was so afraid to mention him, it was wrong on my part but I did this because I was afraid.

Most of the times it is children of tender age in defilement cases who are threatened not to reveal when defiled and all the cases which i followed up it is only in one case where a defilement victim came out to reveal on her own to her father but even in this case it was after so many incidents of defilement on her;

Most of the times in defilement cases, children are threatened by the defendant and they don't report to their parents because they are scared and if the parent do not discover in time it's difficult to find corroborative evidence. For example I had a case of **Republic vs. Chingaipe** where the defendant a policeman continued to defile a girl for over two months and the child was threatened to be killed if she revealed and was only discovered by her mother. The case was reported late when all the evidence, which could have corroborated defilement was gone such as the presence of semen, hairs and we only charged him with indecent assault. (*Voice from a police prosecutor*)

The position of trust between a suspect in a defilement case and the victim in Malawi may also defeat the presence of corroborative evidence. Most prosecutors in the research reported that children who are defiled by people whom they trust do not report the offence until an adult notices something strange on them. Further, it was found that people in position of trust do not defile the victims using force and this often defeats availability of corroborative evidence. This explains why in most defilement cases the state relies on medical reports and if the medical reports are not indicative of anything the state automatically loses its case.

4.2.4 Planned offences

Fourthly, there may not always be evidence to corroborate a victim's story of rape and defilement even if it is a recent offence, some offences are well planned which makes them difficult to find corroborative evidence. (Tanzanian, Law Reform Commission, 1991). This is further worsened by the fact that, acts of rape and defilement, are simply not done in public. They are among the most clandestinely committed offences. The

difficulty to assemble one's witnesses to such type of offences can thus be easily appreciated.

Further, the research found that offences of rape and defilement that are planned in Malawi are combined with threats which prevents the victims from struggling which defeats the presence of corroborative evidence. In such cases if the victim does not report immediately no evidence may be found to corroborate her story later. This is so because in such cases investigators and prosecutors rely on medical reports which will show recent sexual encounter. For example one prosecutor provided an example of a case he handled as follows;

...we had this case where a police officer raped a married woman in his office. The woman did not struggle but she did not consent because she was threatened. Soon after the incident she met a person she knew on her way and narrated the whole incident. She was advised not to bath and she went to hospital before she reached her home and thus the case was corroborated by her imminent report to the friend and the medical report. If she had not made a prompt report and bathed herself there could have been no corroborative evidence and we could not have believed her as there was no signs of struggle defeating lack of consent.

In other cases even if it is immediately reported there might not be evidence to corroborate the victim's evidence. The case in point is that of one old lady who was a victim of attempted rape. The case was reported soon after its occurrence. She suffered neither scratches nor injuries on her body; nobody witnessed the attempted rape and it was only her story against that of the accused person. Thus in such cases if the court insist on corroborative evidence the case may not be won by the state.

4.2.5 Ignorance of the corroboration 'rule'

Fifthly, due to ignorance of what is required in offences of rape and defilement, victims in Malawi have also been known to erase all the evidence that might have corroborated their story. For example it was reported that some victims immediately after the offence wash themselves to disconnect themselves from any attachment with the offender. This

removes substances such as fluids which would have corroborated the story of the complainant. One victim reported as follows when giving evidence in court;

After he raped me, later I saw white staff on my private parts which I wiped out immediately with my blanket; the accused then left the house.

Investigators and prosecutors reported that preservation of evidence is what they find problematic with most of the victims who do not appreciate the need to do so. One investigator reported as follows;

We have had a lot of problems with victims destroying all the evidence for example most victims wash or bath after the act without being examined first by a medical practitioner or some other person.

4.2.6 Other challenges

Apart from the social and cultural reasons (explained above) there are also other challenges that hinder the availability of corroborative evidence in rape and defilement cases. These reasons are more connected with irregularities in the Malawi criminal justice system itself. These challenges also at the end of the day deny women and girls their right to access to justice.

4.2.6.1 Medical reports

It was found out from the research that in Malawi the state rely so much on medical reports to prove an allegation of rape or defilement. In the absence of a medical report most prosecutors feel that they have no case and they may either change the charge to that of indecent assault or withdraw the case;

In defilement cases corroboration evidence from medical evidence is very relevant so that indeed one is sure that the child was defiled. This is so because in our culture, it is not normal for a child below 13 years to have sexual intercourse and medical evidence really acts as a certification that the child has been defiled. (*Voice from a police Investigator*)

It must be noted that the importance of medical reports is much emphasized by the prosecutors but corroboration need not only come from medical reports alone but can also be obtained from other factors. It was stated in the case of **Republic vs. Wesle**, that a court could convict without medical evidence in a case of defilement as sexual intercourse is not exclusively proved by medical evidence alone. However, though the court can convict without a medical report most prosecutors are reluctant to go to court with a case which has no medical report or with a medical report which has results not to their expectation such as reports where it is not found that there was evidence of sexual intercourse or penetration. For example there was one case where the examining doctor found and recorded as follows;

When examined, Ms(*name withheld*) appeared well. Her body systems were normal, and there were no overt signs of injury. Examination of the genitalia showed no abnormalities. There were no spermatozoa found.

The prosecutor in that case thought that he would not win with this unfavorable medical report and though the doctor said in his conclusion that absence of physical injury to the genitalia is not implicit evidence that no sexual attack occurred (see appendix 2), the prosecutor withdrew the case from the court. From this therefore it can be concluded that women and girls lose some cases due to prosecutor's insistence to have a medical report in all cases of rape and defilement.

Secondly, it was found that in Malawi medical reports are problematic in that most medical personnel do not know what to include on the medical report. It was reported by the respondents that most medical reports are written as if they are making a judgment instead of just recording on what the medical personnel found on the victim's private parts. Further, it was reported that the language on medical reports is most of the times difficult to understand and the handwriting not eligible;

We also have problems with medical personnel, they do not record clearly and properly on the medical evidence document which most of the times destroys our case because courts use medical evidence as corroboration and we end up changing the charge to indecent assault. Medical personnel do not see the case as a police/crime case. In some instances the report goes like

this; 'The victim shows that she is used to having sexual intercourse' instead of recording what they are seeing at the time. This destroys the state's case in court. The other problem is that the handwriting most of the times is difficult to read and one often wonders what they were trying to say. (*Voice from a police investigator*)

Indeed from the reading of the various medical reports in the court records it would seem that medical personnel are not thorough with their examination and in their recording of the findings. Most of the times they would not indicate whether there was penetration or not and penetration is the essential element of rape and defilement and due to this prosecutors are forced to reduce these offences to indecent assault where penetration is not a requirement. In the case of **Republic vs. Brian Matiya** cc No 101/07, a medical report was under contention (see appendix 3). The defence alluded to the fact that the medical evidence indicated that there was no bruising or swelling seen in the genital area. The court in that case discarded the medical report and relied on other evidence to find that there was corroboration and convicted the suspect. The court pointed to the fact that the medical report was not helpful as it did not state any findings on whether there was or there was no recent sexual activity on the complainant's genital area. Thus due to complications of medical reports most cases of rape do not reach the courts as they are disposed of at police and if they reach the courts there is usually a contention because of the manner in which medical reports are written and if a case has no other corroborative evidence apart from a medical report which is badly written, the state often lose the case.

In addition to the above, though prosecutors rely so much on medical reports it was found that in Malawi most rural victims have problems in accessing medical help. It was reported that sometimes hospitals are located far and not reachable by the victims and in other cases even if the victims go to the hospital in time they find no medical personnel to do the examination and are told to wait sometimes for days to be examined;

Ku police anatumiza kuchipatala ndi chikalata. Mtsikana wangayu anali ndi umuna and tsitsi kumaliseche kwakeku. Kuchipatala titapita kunalibe a dokotala oti angamupime ndipo anatiuza kuti tipitenso tsiku linzakelo kuti tikakumane ndi a dokotala. Anatiuzanzo kuti mwanayu tisakamusambitse ndipo tinamveradi. (*Voice from a mother of a 5 year child*)

(At the police we were sent to the hospital. There were sperms and hairs in my daughter's private parts. At the hospital they told us to come the following day for the doctor and we were advised not to bath the girl.)

In those instances it would be unreasonable and unhealthy to expect a victim not to bath just to preserve corroborative evidence whilst waiting examination though in this case they did abide by the advice of not bathing the child.

Further, the insistence of corroboration by the courts has led to the Malawi investigators and prosecutors to insist on medical reports in every case which might be argued to be a violation of the right to privacy as provided for under section 21 of the Malawi constitution and article 17 of the ICCPR. This is so because it was found that in Malawi some women may not wish to be examined by medical practitioners for personal reasons such as beliefs and also fear and shame of being examined by a doctor who are most of the times male. A good example is a case of defilement which I followed where a mother of a victim reported that they had difficulties to have the child examined by a male doctor as she thought that he was going to do the same act which the suspect did to her. That they had to force the child to still be examined by the doctor because the police had insisted on the document otherwise it was said that they will have no case in its absence;

Titapita kuchipatala, mwanayu amakana kuti a muone a dokotala omwe anali amuna. Anali ndimantha ndipo amangolira kumanena kuti; kodi akufuna kundipanga zomwe anandipanga ajawazi? (Voice from a mother of a four year old victim)

(When we went to the hospital the child was being examined by a male doctor and we had problems because she was afraid and kept on saying; does he want to subject me to the same treatment which the suspect did?)

4.2.6.2 Investigative challenges

It was also found that sometimes corroborative evidence is not present in rape and defilement cases due to lack of due diligence in the local investigators in investigating these cases. It was reported by prosecutors that most investigators are not thorough with their investigations and also that they take time to commence investigations when a case

has been reported. That most investigators regard rape and defilement like any other case forgetting that in these offences they have to go beyond the ordinary to secure corroborative evidence. This has led to cases reaching the prosecution stage with no corroborative evidence due to delays in investigations and also lack of thorough investigation;

I have a particular case in mind where a girl was raped by six men, she reported to the village chief and the chief referred the matter to police, the police took time in investigating the case and they did not refer the girl to a hospital. When the parents of the girl saw that the police was delaying they took the matter to our regional police office and that was after a month and we had a debate whether in light of no corroborative evidence the case had to be taken to court. The majority said we drop the case but I insisted that we take it to court so that it be up to the court to discard the case or not. The unfortunate thing is that the girl fell pregnant due to the incident. (*Voice from a state prosecutor*)

Thus for there to be corroborative evidence the diligence of the investigator matters which most of Malawi investigators were said not to have. In most cases investigators rely on the evidence of the complainant and the medical report. When the complainant reports the rape or defilement they just record her story and send her to the nearest hospital for examination and in some cases they are not even sent to hospital and thus if the medical report is not indicative of any corroborative evidence the case may be lost. This defeats the whole purpose of corroboration because corroborative evidence can be gotten from other sources for example the crime scene which is often not visited. An example to this is the case of one woman who was a victim of attempted rape. She confessed that when she reported the matter to police the police did not visit the scene of crime nor sent her for medical examination for detection of any bruises or scratches or any evidence which could have corroborated her story;

A chairmani ananditengera ku police kuti ndikafotokoze zomwe zinachitika. Kupolice anangonditenga sitetimenti yokha. Kuchipatala sindinapite chifukwa sindinapweteke ndiponso chifukwa sanakwanitse kundigwililira panalibe chifukwa chopitira kuchipatala, a police sananenenso zopita kuchipatala. Sindinapite ndi a police pamalopomwe amafuna kundigwiririlapo chifukwa sanafunse kuti ndiwalondolere. (*Voice from a victim of attempted rape*)

(We went to police with the chairman and they took my statement. At the police they did not refer me to any hospital. There was no reason to go to hospital as I had suffered no injuries and because the actual rape had not happened. The police did not visit the scene of the crime nor did they ask me to escort them to the scene).

This case clearly shows lack of diligence on the part of investigators. The victim was not sent to hospital where corroborative evidence might have been found on her body such as scratches. The police did not even do an initiative of following up the crime scene which could have shown some signs of struggle. The problem of lack of diligence is coupled with shortage of resources in the state police which makes the investigators not to visit crime scenes in time for lack of transport.

Below is a diagram summarizing the challenges faced by a rape or defilement victim;



The diagram above summarizes the so many challenges that women face with the corroboration requirement ranging from social/cultural reasons as well as some challenges in the criminal justice system itself. Social / cultural challenges most of the times leads to none prompt report to police by the victims. This makes them to lose their

case if it ever goes to court at some time. Some may argue that these challenges are generated by the women themselves for not reporting immediately after the rape or defilement. However, it is my argument that women and girls are forced sometimes not to report immediately after the offence due to social and cultural reasons and other reasons which are justifiable as explained above. Further, the argument that if there is no recent complaint then the woman must be making a false complaint has been challenged by recent evidence and indeed common sense which indicates that women react differently to rape. That some express their emotion immediately, while others have a controlled reaction in which they restrain their emotions. (Stewart and Armstrong, 1996). The effect of these challenges on Malawian women and girls is examined below.

4.3 The ‘rule’ on corroboration and women’s and girls’ right to access to justice

Due to the challenges that women face in bringing corroborative evidence before the courts it is my contention that some women and girls who have suffered rape and defilement in Malawi are denied the right to access to justice and therefore the Malawi state is in violation of this right which is guaranteed under the Malawi constitution as well as in other international human rights instruments which Malawi is a party to.

Section 41(2)(3) of the Malawi constitution stipulates as follows;

Subsection 2; Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.

Subsection 3; Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution.

Article 8 of the Universal Declaration of Human Rights stipulates as follows:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

4.3.1 Definition of the Human Right to Access Justice

The right to access to justice refers to the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards. Traditionally, the term refers to opening up the formal systems and structures of the law to disadvantaged groups in society. This includes removing legal and but also social barriers for people to access the formal systems and structures of the law.

(GAATW International Secretariat, (n.d),). Achieving access to justice for victims of rape and defilement therefore requires comprehensive social and legal support, as well as constant analysis of the legal structures in place that make it more difficult for victims of rape and defilement to be empowered by the law. It was found from the research that the requirement for corroboration is not met most of the times by women and girls due to challenges which in most cases are beyond their control and thus are denied the right to have their matters adjudicated in court and if the matters ever reach the courts the right to receive an effective remedy is not realized because in most cases their cases are lost for lack of corroborative evidence.

4.3.2 How the Right to Access Justice is violated

Firstly, the right is violated when the police during their investigations insist on finding corroborative evidence in a case which shows none. Due to this insistence some cases which show no corroborative evidence are dropped at investigation stage before they reach the court. In that way some women and girls are denied their right to seek redress in the formal courts. All the investigators whom I interviewed were of the view that they only send a file with no corroborative evidence for prosecution if it is an exceptional case. (As explained in Chapter five) To qualify as an exceptional case, firstly, it has to be a case which if they do not forward for prosecution will raise public alarm and the investigators accused of corruption and secondly, it must be a case where the victim has been certified as a believable witness.

When a case shows no corroborative evidence, there is no need to send it for court because it will end up in an acquittal. We only send such cases when the case is one which the public is interested in. For example we had this

case where a famous musician was accused of defilement of a child. From the start we knew that the parents had just cooked up the story because previously the parents had a quarrel with the musician and there was no evidence connecting him to the offence, such as a favorable medical report confirming the defilement. We only sent it for prosecution to satisfy the public and at the end of the day he was acquitted. (*Voice from a police investigator*)

Thus with this attitude among investigators coupled with the challenges which women and girl victims do face in securing corroborative evidence, one can safely conclude that a lot of cases are dropped at investigations stage and thus denying women and girls their right to access to justice in the formal courts. One can not begin to imagine of the number of cases which would have been dropped at the police before they reached the courts for lack of corroboration.

Secondly, the right to access to justice is also denied to some victims of rape and defilement at the hands of state prosecutors. Almost all the prosecutors whom I interviewed reported that if a case shows no corroborative evidence they have three options, firstly either to send the file back to the investigators but this they said does not happen often due to the fact that they know the investigators would not reopen the investigations. Secondly, they may opt to drop the case which they said is the most probable option since they do not want to be embarrassed with an acquittal. And lastly, they may proceed with the case especially where the victim is pressing them much that they go to court or if the case is in the public interest;

An acquittal embarrasses a prosecutor and you look as if you don't know your job and thus in the absence of corroboration many prosecutors just drop the case. And if a case shows no corroborative evidence ideally we are supposed to send it back for investigations which we don't often do due to the fact that our investigators are incompetent and do not always look for corroborative evidence when they go for investigations. (*Voice from a state prosecutor*)

Thus for fear of being labeled incompetent after an acquittal prosecutors are forced not to take matters with no corroborative evidence to court in so doing denying women and girls their right to access to justice. This information was buttressed by a case which I followed up where a prosecutor withdrew a case from prosecution due to lack of

corroboration. In this case the prosecutor had a medical report which indicated no signs of harm in the victim's vagina, and no signs of struggle on her body. And it was his view that there was no sense of proceeding as he could not see the court convicting without corroboration which in this case corroboration was supposed to come from the medical report.

Lastly, even if some cases with no corroborative evidence pass through the investigations stage and are prosecuted chances of them receiving an affective remedy in the Malawian courts is almost negligible. There are two types of judicial officers; some are more liberal who can convict an accused person in a case where there is no corroboration evidence as long as the victim proves credible in the eyes of the court. However, though these liberal judges have convicted in some cases without corroboration they still insist that corroboration is required in sexual offences, thus they have not gone further to challenge the rule as unconstitutional and they still recommend trial courts to look for corroboration. In the case of **Wesle vs. Republic** [1995] 1 MLR the court convicted an accused based on the lone evidence of a victim of rape but the court also emphasized on the importance of corroboration and held as follows;

...if a court believes that she is telling the truth and is also proved that consent was lacking, the court can properly convict of rape without corroboration but a court should as a matter of practice, not law, warn itself of the uncorroborated evidence of the complainant in a sexual offence case. In a case where there is no corroboration, the court on appeal will examine the whole judgment for the evidence and reasons given by the trial court to tell whether the conviction should be upheld. If there is no evidence so clear and convincing that a miscarriage of justice has arisen because of lack of the omission of a warning, the court will not interfere on appeal.

On the other hand we have in Malawi conservative courts and these are in the majority and they insist on the strict requirement of corroboration and in its absence the sounding of a warning and if a lower court convict without corroboration even when the victim is proved to be credible the conviction is always set aside on review or appeal. In the case of **Republic vs. Spider Okhasha** CC case no.1763 of 1980, though the court believed that the victim was telling the truth, it overturned the decision of the lower court on the

basis that there was no corroboration and that the magistrate did not specifically warn himself of the danger of convicting without corroboration;

Unfortunately, the magistrate did not warn himself of the need for corroboration in this type of case, nor did he look for corroborative evidence of the complainant's story. The complainant's friends did not give evidence but the magistrate apparently believed her because she reported the incident and was distressed. The magistrate failed to warn specifically on corroboration, the conviction is wrong in law on that ground alone.
(Republic vs. Spider Okhasha)

Here what it means is that if the magistrate had warned himself the conviction would have been sustained. The court thus emphasize on technicalities by insisting on a warning in a case which has no corroborative evidence instead of wanting to achieve justice and hence women and girls are denied an effective remedy from the courts. It also came out from the respondents that most magistrates especially those who are not lawyers and these are in the majority do not usually warn themselves in a case where there is no corroboration which can only mean that their convictions stand a high chance of being overturned on appeal or review;

However the cases that come from the magistrates' courts are quite problematic because most magistrates especially lay ones do not usually sound a warning and there is need to emphasize the importance of sounding a warning in these type of offences when we are training them at Mpemba.
(Voice from a High Court Judge)

The sounding of a warning in a case which has no corroboration is just a technicality which the courts have developed and in as far as some cases end up in acquittal for lack of warning it can be argued to be in conflict with section 5 of the CP and EC which is to the effect that justice must be done without undue regard to technicalities.

Therefore for a victim to receive justice in a case where there is no corroborative evidence it has always depended on the kind of judicial officer who is presiding in that case and his views on such cases. This is not a good position due to the fact that most judicial officers at least from those I interviewed are of the view that corroborative evidence should always be there. The situation is rather sad considering that all the three

Supreme Court judges whom I interviewed were of the view that corroborative evidence in a rape and defilement case should always be there. Of course one Supreme Court judge relented his earlier position after our discussion. This only means that it is more probable that if a case with no corroborative evidence goes on appeal it will be overturned and thus infringing on women and girls' right to an effective remedy.

In summary, the above chapter looked at the challenges that women face with the requirement of corroboration in rape and defilement cases. Some of these challenges are lack of prompt report of cases due to social and cultural reasons and also the problems in securing medical reports which are reliable among others. The chapter also discussed the effect that these challenges present to women and girls which mainly is a violation of their right to access to justice. The following chapter is going to discuss the rule on corroboration and the Malawi criminal justice system mainly looking at the justification of the rule and the attitudes and beliefs that personnel in the justice system have on cases of rape and defilement.

CHAPTER FIVE

5.0 THE ‘RULE’ ON CORROBORATION AND THE MALAWI JUSTICE DELIVERY SYSTEM

This chapter discusses the justification for the rule on corroboration in the Malawi criminal justice system. I decided to get information on the justification mainly because assumption two which as explained in Chapter 3 on section 3.2.2 was challenged due to the fact that none of the respondents were able to justify the allegation that women lie in sexual matters and also that there has never been any scientific research in Malawi to prove that women are prone to lie in sexual matters. Due to this challenge I decided then to ask for the justification of the rule in the Malawi criminal justice system. The discussion shall show that the justifications of the rule mainly arise from attitudes and beliefs of personnel in the system towards victims of rape and defilement cases. The chapter shall also discuss assumption 3, 4, 5 and 6.

5.1 Justification for the ‘rule’ in the Malawi criminal justice system

5.1.1 False Accusations

It was found out from the research that some personnel in the Malawi criminal justice system believe that women and girls do simply make false accusations against men when it comes to rape and defilement cases. For example some judges in Malawi were of the view that they base their decisions on the story in the Bible of a wife of an Egyptian ruler (Potipher’s wife) who falsely accused Joseph her household worker of rape whilst in fact it was her who made sexual advances on him and because he had refused she put on a story against him which made him to suffer a long prison term sentence;

Some of our decisions are based on Potiphar's wife but I can see now that it is generalizing to do so. That should no longer be the basis for our decisions nowadays, it is outdated. (*Voice from a Supreme Court judge*)

Potiphar's wife story has contributed very much to the retention of the rule in Malawi so much that during the recently reviewed Criminal Procedure and Evidence code some quarters had proposed that the statute should abolish the rule. However, most of the members on the review commission were of the view that the rule be retained to protect men from false sexual accusations and that the majority kept on saying that 'we should always remember Potiphar's wife in the bible';

The rule was considered during our deliberations on the review of the Criminal Procedure and Evidence Code. I do recall we ended up coming to the same position. It was a heated debate. What I recall vividly is what Justice(*name withheld*) said, he kept on reminding us of the Joseph issue in the bible that we should always remember potiphar's wife and in the end we agreed to maintain the position as it is. (*Voice from a Supreme Court of Appeal Judge*)

What came out clearly therefore is that personnel in the system have a belief that women and girls make false allegations in rape and defilement cases and thus there is need for the women to explain themselves and to provide backing of their allegations. This belief is manifested at all levels in the system, starting when the woman first reports her ordeal to police investigators and at prosecutions stage. Most investigators were of the view that when a woman reports of a sexual assault which shows no corroborative evidence, they only proceed if they think the woman is believable if not they drop the case;

If a case has no corroborative evidence some of them we still send them for prosecution after assessing the demeanor of the witness if we believe the victim then it proceeds but if we think the defendant is the one telling the truth we then close the case. (*Voice from a police Investigator*)

Same sentiments were shared by the prosecutors saying that they drop a case which shows no corroboration unless they truly believe that a victim is telling the truth;

If we have a case that shows no corroborative evidence we rely on the demeanor of the victim. If we trust that the victim is saying the truth we still take the matter to court. The victim shows that she is telling the truth even by

looking at her whether she is showing signs of grief, distress. Yes, it is up to the court to believe her story or not but if we suspect that the victim might not be telling the truth we drop the case. (*Voice from a police prosecutor*)

One then would tend to wonder with these types of statements of how many cases the police have dismissed before they reach the courts. In this research I managed to interview seven victims of rape and defilement and two cases among these cases were actually dropped before the court heard evidence for lack of corroborative evidence. In one case, the victim who was 14 years of age was raped by a man of over 30 years. She was threatened to be killed by this man if she ever revealed his name. The girl resolved not to mention the name of the actual defiler and mentioned the name of a person who was mad in their village for fear of the man who had raped her. It is my argument that if this case had gone through the courts, the reason why she mentioned two men would have been uncovered. As discussed in Chapter three victims of rape and defilement sometimes do not report the offences due to fear and it should be up to the court to determine that one is lying or not according to the evidence before the court.

Furthermore, the research uncovered that in the Malawian culture it is a taboo for people to discuss about sex in public and therefore sexual matters are not easily, freely and openly discussed. This has led to a closed up society where children and parents find it difficult to tell each other about sex. Thus even if a child was defiled they would not find the courage to inform their parents;

Our society is made in such a way that we are not brought up with freedom of discussing sexual matters in the open. (*Voice from a High court Judge*)

Similarly one prosecutor had this to say;

The rule on corroboration also assumes that people are open to discuss sexual issues in public, but due to our culture women find it difficult to do so. We expect the victim to say things which we don't talk about in our culture. People are not open to discuss such issues with total strangers and in public. The law should reflect our culture. (*Voice from a Police prosecutor*)

It is my contention that in such a society where culture does not permit people to discuss freely about sexual matters women and girls would not find it easy to just make false

accusation against men and the opposite would be true and therefore a benefit of doubt should be accorded to them when they report such cases. Further it is the duty of police investigators to investigate matters and not to adjudicate the same. With this we can correctly assume that a lot of cases don't reach courts due to the fact that most of the police investigators and prosecutors have an attitude that women do fabricate stories when it comes to rape and defilement;

However we have problems with rape cases because most complainants frame up their story to implicate the defendants. (*Voice from a police Investigator*)

The attitude and belief that women fabricate stories is demeaning to women and girls and thus violates their right to dignity and integrity as provided for in Section 19(1) of the constitution which says that the dignity of all persons is inviolable. It also violates Article 4 of the African Charter on Human and peoples' Rights which clearly states that every human being is entitled to respect for his life and the integrity of his person. It is clear that the purpose for the operation of the rule in Malawi was and still is to single out all women as liars which takes away their dignity and integrity.

Undue influence in defilement cases

The justification for the operation of the rule on corroboration in defilement cases in Malawi was also the belief of false accusation. However for children the false accusation was said to be originating from influence of adults. It was said by most respondents that the mind of children is easily persuaded and that in defilement cases most children are sent by adults to implicate accused persons;

Children most of times are influenced by adults to lie against someone and it will be dangerous to have uncorroborated evidence of children so the rule should still be there when it comes to children in all cases. (*Voice from a defence lawyer*)

From my assessment, it would seem that children suffer double accusation of making false accusation in defilement cases. Firstly, in all cases involving children who are

witnesses, the law is that they should always be assessed first if they are fit to give testimony, if they know the difference between telling the truth and lies. (**Marriette vs. Republic**). Once they are declared competent by a court they can give evidence which the court may rely upon even on itself to reach a conviction. However, in cases of defilement despite the girl child being assessed and declared fit to differentiate between truth and lies, her evidence is still treated with caution and when she comes to give evidence the court still requires corroboration to her story. This has led to girl children being denied justice and protection from the law and the Malawi state can be held to be in violation of Article 19 of the UN Child Convention and Article 16 of the African Child Charter which mandates states parties to take all measures to protect the child from all forms of abuse including sexual abuse.

Is the justification of false accusation reasonable?

This discussion covers assumption 5 which was that *'the rule on corroboration is an unnecessary added rule to the principle that cases have to be proved beyond reasonable doubt.'*

None of the respondents in the system were able to justify their claim on women making false accusations in rape and defilement cases and it is also important to say that such crucial accusation needed to be substantiated with viable evidence and to my knowledge and from the information of the respondents there has never been a research in Malawi which has confirmed the fears that Malawian women and girls do fabricate stories in rape and defilement offences. It is my contention that such kind of allegations label all women as liars yet women are used as witnesses in other cases not of sexual nature where their evidence is taken without being backed by other external evidence. This in my view is a violation of women and girls' right to dignity and personal integrity and Malawi need to adopt and implement measures to ensure the protection of every woman's right to respect for her dignity and protection from all forms of violence, particularly sexual and verbal violence according to Article 3 of the Women's protocol.

Further, it came out from the research that courts have rules and procedures that ably protect the accused person from being falsely convicted. Firstly, in all criminal cases there is a principle that cases have to be proved beyond reasonable doubt. If there is any kind of doubt hovering on the mind of the judicial officer on whether an accused person is guilty of an offence or not the law is to the effect that such doubt has to be exercised in favour of an accused person. (**Msosa vs. Republic** 7 MLR). It is my argument that this principle is enough safeguard to an accused person even in rape and defilement cases to protect him from false accusation. The requirement of corroboration in these cases therefore is just an unnecessary added rule which just gives more burden to the prosecution and also disadvantages those cases which have no corroborative evidence which without the rule some would have ended in a conviction. All my respondents including defence lawyers were in agreement that the right to fair trial of an accused would not be compromised in the absence of the rule where the principle of proof beyond reasonable doubt is in operation;

Without the rule I think we will still have a fair trial in light of the principle of proof beyond reasonable doubt, the rule does not bring something new really if we look at it from a critical angle what is needed in all cases is for the court to evaluate the evidence before it and if it is of good quality to convict if not to acquit. (*voice of one of the defence lawyers*)

Further, in support of the principle of proof beyond reasonable doubt there is a process of cross examination in court where a witness is subjected to questions by the defence to disprove on what she has testified in court. Most respondents were in agreement that witnesses who lie in court are easily caught through this process and the court may discredit their evidence basing on what is coming out in the process of cross examination;

Most of the times it is easy to find out that a witness is lying from simple cross examination. The accused through this can unearth the reason why a woman may allege. (*voice from a Supreme Court Judge.*)

Therefore, the justification for corroboration in rape and defilement cases basing on the ground that women and girls do make false accusation is unfounded and unreasonable and a clear manifestation of gender bias in the Malawi criminal justice system.

5.1.2 Rape and defilement difficult to disprove

Another justification for the rule was said to be that the nature of the offence of rape and defilement is hard to disprove so unless the complainant puts more on the evidence than all the accused persons will be convicted. In England the writings of Sir Mathew Hale facilitated the birth of this argument that rape is difficult to disprove but easy to allege;

It is true rape is most detestable crime, and therefore ought severely and impartially to be punished with death: but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent. (Bruce A. Macfarlane)

This is one of the justifications that some personnel in the Malawi criminal justice system were giving. It was felt that since the offences occur in private then the victim must show signs that she did not consent to the sexual intercourse.

The secrecy in which the offence happens requires the victim to say more and show real evidence of what happened. If it happened in a lift e.g a taxi the victim has to show that she is affected after getting out of the lift eg by reporting immediately or showing some signs of distress. (*voice from a Supreme court Judge*)

That without the victim's evidence corroborated, men are at a risk of being implicated in issues they were not involved in. This was said to be mostly important when there is an allegation of rape between people who are not strangers such as persons in an intimate relationship or from a sex worker;

Where two people are related such as boyfriend and girlfriend the rule may be relevant because how do you prove that there was no consent. In rape consent can be withdrawn at any time when the act has already started so we need corroboration to prove that there was no consent or that it was withdrawn. (*Voice from a defense lawyer*)

I would tend to agree with the respondents where they say that the secrecy in which the offence happens would render it more difficult to disprove. However, the burden of proof

in every criminal case lays on the prosecution not the accused person (Section 187 of the Criminal Procedure and Evidence Code). The accused in a criminal trial is not supposed to prove his/her innocence and he/she can remain quiet if he/she chooses through out the whole trial. Thus it is up to the prosecution to show that an accused is guilty of an offence and if the court is not convinced then it can acquit the accused. This argument also fails to take into account that the secrecy in which the offence occurs would also produce difficulties to a victim to secure corroborative evidence and why should one argue that it is difficult to disprove by an accused and deny saying it is also difficult for a victim to produce corroborative evidence.

In addition to this there is a statutory law that stipulates as follows;

Subject to this code and any other law for the time being in force, no particular number of witnesses shall in any case be required for the proof of any fact. (*Section 212 of the CP&EC*)

One wonders why in rape and defilement cases the courts require the testimony of more than one witness in contravention of this statutory law in as far as it requires the testimony of the complainant to be corroborated with other independent evidence. When presented with this section there were different views from the respondents, others arguing that by the reading of that section the rule on corroboration is part of law and therefore is covered under that provision;

The way section 212 of the CP and EC is drafted, I think the rule is in line with the section because it says subject to any law and the rule fall in the category of the law of evidence. (*Voice from a Supreme Court Judge*)

Whilst others argued that the rule on corroboration developed from court practice and therefore can not be said to fall under the section.

A practice is not a law so the rule on corroboration is in contravention of section 212 of the CP and EC. (*High court judge*)

I agree with those who say a practice is not law and hold that the rule on corroboration is in violation of Section 212 of the CP and EC since statute ranks higher than a practice of

the court. (Bentzon, 1998). In the case of **Uganda vs Matovu** Criminal Session Case No. 146/2001, the judge considered the rule against a statutory provision which is in paramateria (similar) to the Malawian provision under Section 212 of the Criminal Procedure and Evidence Code and the judge held as follows;

Firstly, court is of the opinion that the said rule is in conflict with section 132 of the Evidence Act (Cap.43) which provides as follows; 'subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.' In essence, the above provision lays down a general rule and an exception. In simple terms, the general rule is that where 'any other law in force' provides so, the evidence of more than one witness may be required, in any case to prove any fact. In Courts opinion the exception to the general rule in section 312 of the Evidence Act only covers any 'other law in force' which is the creature of the legislature; and certainly it does not cover a mere rule of practice that courts may wish to observe...

It is contended herein that the Malawian courts can take this judgment as an example in dealing with the rule on corroboration and Section 212 of the CP&EC. Although the Ugandan case is not binding on Malawi courts, the courts can still have regard to it as part of comparable case law.

5.1.3 Moral standing of an accused

Rape and defilement were said to be the most shameful offences that one can ever be accused of by some respondents. These respondents were of the view that these offences tend to tarnish the moral image of a person whether they are found guilty in court or acquitted. Thus it was felt that due to this risk to the good moral standing of men in society there should be a higher standard accorded to women and girls who allege that one has raped or defiled them.

A sexual offence is a serious offence; it touches upon a person's reputation for the rest of his life. In these offences we have the integrity of a person at issue which a person value so much. The accusations also go against a person's freedom in society. If one is convicted it kills the person because one can not stand in public again, they can no longer be ministers or be heard by anyone in society and are treated as outsiders. This goes to show how serious a sexual offence is. The law should not leave careless women to

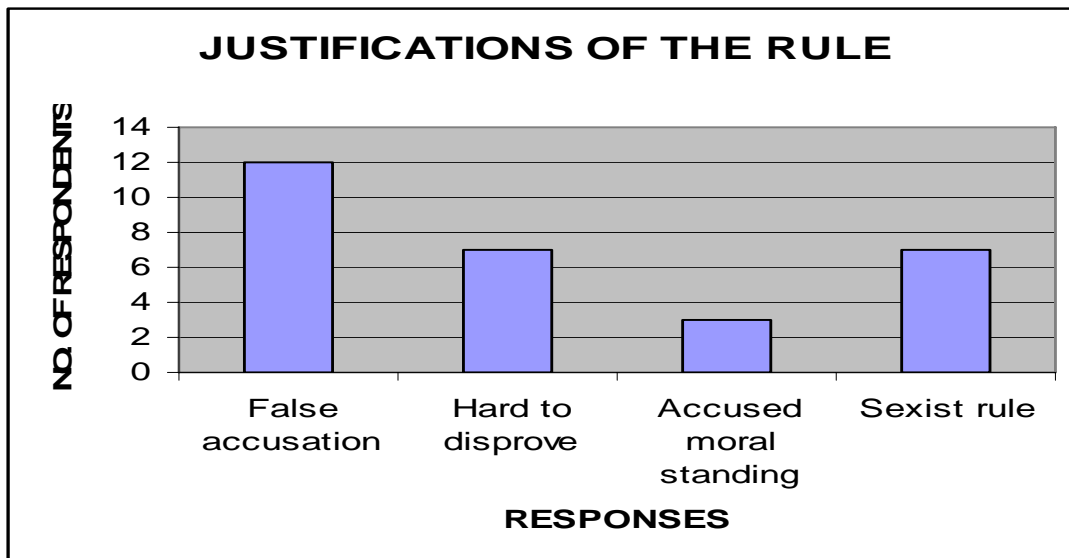
implicate innocent men. (a lady lawyer from the Women Lawyers Association).

Similarly another lady magistrate contributed as follows;

Another justification is the nature of the offences involved. These cases have been taken to be more immoral, as they attack the personal dignity of people than other offences like theft which only violates someone's property. Those that never did the act, those that are presumed innocent have their reputation to preserve and maintain.

This reasoning explains why the offences of rape and defilement are still regarded as offences against morality under the Malawi newly revised Penal Code and not offences against the person. In this way the rights of victims are easily sacrificed to protect the moral standing of men in society. However, if one takes into account the violence and trauma these victims of rape and defilement go through we would all agree that there is need to balance the rights of an accused person as well as those of the victims.

Below is a graph summarizing the responses on the justification of the rule in Malawi, it also covers the responses of those who were against the rule and labeled it as sexist.



5.2 Is the ‘rule’ on corroboration discriminatory against women or in violation of the right to equality before the law?

This discussion covers assumption 6 which was that *‘the requirement of corroboration in rape and defilement case violates the right to equality before the law as provided for in the constitution as read with other rights provided for in international instruments.’*

Most of my respondents were divided on this with some holding that the rule is not discriminatory against women and girls due to the fact that it applies in all sexual offences even those in which men are also victims;

It will be very difficult for me to say that the rule is discriminatory against women because men are also affected in some sexual offences which also attract the rule on corroboration. *(Voice from a lady lawyer prosecutor).*

Similarly a Supreme Court judge said as follows;

To say that the rule is discriminatory because the majority of the victims are women is not true; the issue of majority is immaterial because the rule applies across the board.

Others were of the view that the rule is discriminatory against women and girls since they are the ones who are mostly affected by the rule;

That argument that since men are also affected by the rule then it is not discriminatory is weak because in real sense and in our society it is women who are affected the most so in practice one can safely conclude that it is discriminatory. *(Voice of a High Court judge)*

Definition of Discrimination

Article 1 of CEDAW defines the word ‘discrimination against women’ as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, cultural, civil or any other field.

Section 20 of the Malawi constitution provides for the right to equality and prohibits discrimination of any form to persons. It also guarantees equal and effective protection against discrimination on grounds of sex. Section 20 was interpreted in the case of **Malawi congress Party and Others vs. Attorney – General and another** (1996) MLR as follows;

Equality before the law is a cardinal aspect of our law. Now our courts will, therefore, shoot down any Government action or law which results in unequal treatment before the law. The discrimination of all persons is proscribed and all persons should under any law, be guaranteed equal and effective protection against discrimination...the equality before the law provisions in our Constitution prohibit impermissible criterion for classification or a classification arbitrarily used to burden a group of individuals.

Similarly the case of **Andrews vs. Law Society of British Columbia (Supreme court of Canada.)** held on the right to equality as follows;

That at the application of equality to similarly situated groups or individuals, that is the ‘similarly situated should be similarly treated’ approach, did not afford a realist test for a violation of equality rights. This approach might in fact result in inequality. A bad law would not be saved merely because it operates equally upon those to whom it has application...A central concern for the application of equality had to be the impact of the law on the individual or group concerned, and on those individuals or groups it might exclude. The ideal was that a law intended to bind all should not because of irrelevant personal differences have a more burdensome impact on one group than another.

It is my contention that the practice of bringing corroborative evidence in rape and defilement cases on the face of it can not be said to be discriminatory since the rule applies to all sexual offences even those in which men are also victims. However, it impacts more on one sex, which is the female sex since they are the ones who are mostly victims in sexual offences. Thus the requirement for corroboration has a more burdensome impact on females than males and according to the cases cited above this is discrimination and should accordingly be eliminated. This will also be in accordance with Section 24(2) of the Malawi constitution which provides that any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women.

Malawi is also under an obligation to review and reform the criminal laws and procedures applicable to cases of sexual offences, to eliminate gender bias and ensure justice and fairness to both the victim and the accused under The Prevention and Eradication of Violence Against Women and Children; An Addendum to the 1997 Declaration on gender and Development by SADC Heads of State and Government.

Further, Section 5 of the Malawi constitution provides that any act of government or any law that is inconsistent with the provisions of the Constitution shall, to the extent of such inconsistency be invalid. It is my argument that the corroboration requirement is inconsistent with Section 20 of the constitution and hence should be declared invalid by the courts of law. In addition, the right to equality in Section 20 is also a non derogable right under Section 44(1) of the Constitution.

Malawi can also follow best practices from other countries that have abolished the rule such as Lesotho which abolished the rule in Section 18 of its Sexual Offences Act of 2003.

5.3 Why the ‘rule’ is still in operation in Malawi despite its infringement of women’s and girls’ human rights

This covers assumption three which was that *‘the rule on corroboration is a manifestation of gender bias in the justice delivery system.’* The points below will explain why the rule is still in operation in Malawi despite its many shortfalls.

a) **Gender insensitivity**; Some personnel in the Malawi criminal justice system were aware that the rule is discriminatory against women but chose to give the rule an upper hand on the basis that it is a necessary evil;

All we are interested in is to do justice and if justice can be done with an amount of discrimination then it is good. Its very easy to just put up a story that something has been done when it has not, then in those circumstances one would rather discriminate than doing away with the rule because it is a necessary evil (*Voice from a Supreme court Judge*).

What came out clearer is that some personnel in the Malawi criminal justice system are gender insensitive to the problems that women face. It would appear that the rights of women are regarded of less value than those of men who are accused of sexual assault that most personnel are willing and ready to sacrifice these rights of women just to protect an accused person;

I agree that there are a few women who are disadvantaged by the rule where the circumstances would not disclose any corroborative evidence but we can manage to sacrifice that because the victim gains nothing in sending the suspect to prison and it is better to acquit the guilty than to send an innocent man to prison. (*Voice of a Supreme court Judge.*)

It is my argument that in as far as the rights of an accused have to be promoted, there is also a need to balance those rights with the rights of the victim. In my view discriminatory laws and practices should not be promoted as they have an effect of impairing the enjoyment of rights by certain groups of people in this case women and girls.

b)Socialization; some personnel in the system alluded to socialization for them not to question the rule on corroboration as being gender bias. Some reported that once a person joins the system they are trained to look for corroborative evidence in every rape and defilement case and to treat the evidence of women and girls with caution.

When I was a student I used to question the rule, but when I graduated and joined the system I have been brainwashed and with the issues you are raising and thinking with a sound mind I think the rule is not necessary and it creates a lot of injustice. (*Voice from a High Court Judge*)

Thus socialization makes personnel in the Malawi criminal justice system not to question the rule but just to conduct matters as they found them. Criminal law rules are thought to be static and people just apply them as they are;

It is good to have people writing on topics like this one, because here in Malawi people think that criminal law is settled and thus has remained static though times have changed and the rules are not reflecting change in society. (*Voice from a law lecturer*)

c) **Lack of awareness**; it came out clearly from the research that some personnel are gender unaware of the implications of the rule on women and girls. It was actually news to some respondents that women find it hard to secure corroborative evidence;

You have made me think twice here there might be indeed cases where the rape happened in secret or under threat and in those scenarios corroboration would not be there. I have never thought about it, I always thought it's easy for a woman to bring corroborative evidence. (*Voice from a Supreme Court Judge*)

There is a need therefore to raise awareness in the Malawi criminal justice system of the implications of the rule on women and girls. Personnel in the justice system need to be made aware of gender bias rules so that they have the capacity to question the same. It was the response of most personnel in the system that they have never gone to a gender training which specifically addressed rules in criminal law that are biased. Here I would give an example of myself, I only got the information that the rule is gender bias when doing the women's law course and before that I saw nothing problematic with the rule.

d) **Culture**; It came out from the research that some personnel are influenced by culture in the way they think women behave in sexual matters. Some personnel in the system think that women and girls pretend in sexual matters and therefore it is often pretence when they come out and say that they have been raped or defiled. That in the Malawian culture women are shy in sexual matters that they often don't come out clearly and mostly their 'no' is often a 'yes' therefore most women actually agree to have sex with the one they accuse to have raped them;

Our society's way of thinking is that women lie in matters of sexual nature and that when they say 'no' they mean 'yes' so the rule on corroboration has a purpose of verifying the 'no' part whether she really meant it. A lot of us men believe so, that women pretend to be refusing when actually they want what they are refusing. This was also mentioned in a case which Justice.....(*name withheld*) decided that most of the times when a woman says 'no' she actually means 'yes'. (*Voice from a defence lawyer*)

Cultural notions therefore on how women behave in sexual matters have infiltrated in the Malawi criminal justice system which have in turn enhanced the rule. Further, it is a

popular belief in Malawi and the research confirmed this that women deliberately provoke rapists with their manner of dressing which is foreign and not reflecting the Malawi culture.

I heard on the radio a certain chief from Rumphu district complaining that cases of rape are on the increase and urging women to dress properly in accordance with our culture to minimize these cases. He blamed women's dressing for the increase of these offences. (*Voice from a High Court Deputy Registrar*)

d) **Men protecting fellow men;** Some of the personnel who disagreed with the rule attributed the continuation of the rule as being part of men protecting fellow men with others arguing that if the rule was affecting men most it would not have been in operation by now.

I don't agree with the rule. It is a sexist rule because if it were men who were victims I don't think the rule would have been there, it is just men who are mostly the abusers protecting fellow men. (*Voice from the deputy registrar of the High Court*)

Whilst others who agreed with the rule thought that since it is only men who can be accused of rape and defilement (in Malawi a woman can not be guilty of rape unless she is an accomplice) women also have to find it hard in proving that a man raped or defiled them.

I would not say the rule is discriminatory taking into account that the rule is not one sided. The accused can also be said to be discriminated against as a man because they are the ones who are accused of these offences. (*Voice from a Supreme Court judge*)

5.4 Ways of eliminating the 'rule' on corroboration

There were mainly two suggestions on how to do away with the rule from the respondents who were against the rule. There were those respondents who proposed total abolition of the rule through statute, the argument was that despite the rule being just a practice developed by the courts it has stayed longer and has almost become a rule of law which can only cease to apply with a statutory provision forbidding its application;

The rule should be subjected to law reform and that change has to be reflected in a statute for an advantage of clarity because to wait for the court to abolish the rule might be indefinite due to the fact that the court waits to be moved, the best way is through legislation and where this fails then we have to go through the constitutional court to challenge the rule. (*Voice from a law lecturer*)

However, some respondents thought that abolishing the rule through statute has its own disadvantages namely that it takes long and parliament being political and male dominated might not think that the rule should be abolished;

It would not be good for the rule to be abolished by parliament because looking at the conduct of our parliament it can take ages to do so. Firstly, the majority in parliament are men and would definitely oppose abolition to the rule. Secondly in parliament unlike the courts they do not often operate with reason but other things cloud their mind like political reasons. Parliamentarians are elected and would want to please their electorates and most electorates would be in favour of the rule. (*Voice from a High Court Deputy Registrar*)

The other disadvantage of statute was that since the rule was developed by the courts, parliament which makes statute would be seen to be interfering with the independence of the judiciary. Thus to maintain separation of powers the rule has to be dealt with by the courts and not parliament;

The solution to this is through the courts that generated this rule they must remove it themselves. There is need for someone to move the constitutional court so that judicial independence should not be seen to be undermined by the executive and parliament by abolishing it through statute. (*Voice from a Supreme court Judge*)

Thus apart from statute most of the respondents were of the view that the rule be abolished by the courts. That this may be done by challenging the rule through the constitutional court and others also suggested that the Chief justice might also make a practice direction that the rule ceases to operate. The option of the courts was also said to have its own challenges such as the fact that the courts only make decisions when they have been moved to do so and also the fear that when the matter goes to court one might find a conservative judge who may not want to part ways with the rule;

There are differences between conservative judges and liberal judges but if a judge is more in tune with society he or she will be more concerned with unlawful interference with the person and if not in tune one might interpret the rule to the detriment of the complainant. (*Voice from a Supreme court judge*)

In summary, the chapter has looked at the justifications for the development of the rule on corroboration in rape and defilement cases in Malawi. It further discussed why the rule is still in operation despite its being against women and girls rights and opted for the elimination of the rule.

CHAPTER SIX

6.0 CONCLUSION AND RECOMMENDATIONS

This chapter will provide a summary of the discussion above and shall make some recommendations on the topic of study.

6.1 CONCLUSION

The discussion above has shown that women and girls face a lot of challenges in securing corroborative evidence due to social and cultural factors as well as other factors such as irregular medical reports. These challenges militate against their case in that most of the cases reported do not reach the courts and if they do they end in acquittal for lack of corroboration. It has been shown that the difficulties in securing corroborative evidence in rape and defilement cases impinges on women and girls' right to access to justice.

Further, it has also been shown that the Malawian courts developed the practice of corroboration and that its justification was and still is that judges (the majority of whom were and are men) fear that because women and girls make false accusations in sexual matters, the so-called moral standing of men in society needs to be protected. All these justifications have been shown to arise from attitudes and beliefs which have not been substantiated but arise out of the gender bias of personnel within the system. It has also been shown that these apparent justifications violate women's and girls' rights to dignity and they discriminate against them because men made the rule enforceable only against women (the victims of most sexual attacks) in order to protect men (the perpetrators of those sexual attacks) from women whom they falsely labelled as liars.

The justifications for the development of the rule have also been shown to serve no purpose as their main purpose was protect an accused person from being wrongly accused. In this respect it has been clearly shown that there are already existing

safeguards in place to protect accused persons from being wrongly convicted and ensuring that they receive a fair trial. One such safeguard is the principle that every criminal case has to be proved beyond reasonable doubt. The rule has also been shown to be in contravention of the Section 212 of the Criminal Procedure & Evidence Code which provides for the number of witnesses required to prove any criminal offence, including rape and defilement charges.

In a nutshell the requirement of corroboration has the effect of impairing the enjoyment of rights by women and girl victims under the Malawi Constitution as well as under relevant international human rights instruments. Malawi, as a country, has an obligation to eliminate laws and practices that discriminate against women and that are unconstitutional in nature. The requirement of corroboration is an example of such a practice and needs to be invalidated by the courts or abolished by statute according to section 5 of the Constitution which clearly invalidates any law that is inconsistent with the provisions of the Constitution. Also, according to section 20(2) and 24(2) of the Constitution, the government should propose the enactment of laws that eliminate discriminatory laws and practices in general and specifically discriminatory laws and practices against women. Malawi also has an obligation under Article 7(d) the SADC Protocol on Gender and Development which obligates state parties to put in place legislative and other measures which promote and ensure the practical realization of equality for women. These measures should, among others, be positive, practical and ensure equality for women complainants in the criminal justice system.

Therefore, the nation of Malawi has, by allowing the purported rule on corroboration to continue in force, failed in its duty under the Constitution, other statutory provisions and relevant international human rights law to promote and protect the rights of women and girls and is now clearly in breach of them.

6.2 RECOMMENDATIONS

1. Abolition through Parliament

It is recommended that Malawi abolish ‘the rule’ through an Act of Parliament for purposes of permanency and clarity. Ordinarily I would have proposed that the rule be abolished by the courts since they ‘created’ it. In view of the fact, however, that the rule is so old and has become so universally accepted and applied to the point that it is now wrongly perceived as a rule of law, statutory abolition would ensure that it die immediately and without trace, leaving as little room as possible for its ‘resurrection’ through a repetition of spurious arguments of judge-made or common law. The only drawback with this proposition is that it takes quite a long time to enact a statutory provision. Furthermore, the ideal vehicle through which to abolish the practice, the Criminal Procedure and Evidence Code Act, has just been recently reviewed. Unfortunately its reviewers resolved that the rule still serves a purpose and thus remains in operation for the time being. Therefore it may take time for government under the Ministry of Justice which initiates the review of the Act to consider moving Parliament again to review the statute.

2. Abolition through the Courts

It is also recommended that the rule be abolished by the courts through case law as we await statute abolition. The rule can be challenged as being unconstitutional at the Constitutional Court. However, for this to happen a complainant needs to come forward and institute an action to move the court to make such a decision. This might only be possible if a women’s human rights organization takes up the issue and sues on behalf of women and girls. This course of action is also problematic because the court’s decision will only be as gender sensitive as its judges. Furthermore, there is also the risk that the Constitutional Court may follow the example of South Africa, in which case the judges did not abolish the rule completely but reserved room for its operation. A final

consideration is that it would be ideal for court action to be taken in the Constitutional Court because if it ‘the rule’ is abolished in a lower court it could be overturned by a higher court. The decisions of the Constitutional Court, however, are binding on all of Malawi’s courts.

3. Practice direction

The Chief Justice who is head of the Malawi Judiciary has powers to issue a direction on how some matters should be conducted. This is also another avenue which Malawi can explore. The Chief Justice therefore could issue a direction that ‘the rule on corroboration’ should no longer be a requirement in rape and defilement cases and that all sexual offences must be conducted in the same manner as all other criminal cases. However, this will depend on the gender sensitivity of the Chief Justice.

4. Gender Training

Some personnel in the system reinforce the rule due to the fact that they are unaware of its gender implications and some due to the fact that they are just gender insensitive. Thus there is a need for such personnel to be trained on gender issues so that negative attitudes and beliefs against women and girls might be addressed. Gender is a new concept to some personnel in the system and they need to be taught to question rules, practices and laws that are gender-biased. Judicial officers also need to be refreshed on the use of human rights instruments in challenging laws and practices that are outdated and discriminatory. Gender training will therefore promote judicial activism and will help to eliminate wrong attitudes and beliefs of most personnel in the criminal justice system.

5. Class action

Women and girls who have been affected by ‘the rule’ should organize themselves through the help of women right’s organization to challenge the rule as a group in the Constitutional Court.

6. Mass sensitization

There is a need for the government and non state actors to sensitize the public on the importance of reporting offences of rape and defilement as soon as they happen. Negative attitudes and beliefs towards victims of rape and defilement which stigmatise them also need to be confronted and eliminated so that victims are not ashamed to attend police stations, report their ordeals and lay charges against their attackers.

7. Naming and shaming

There is need for non state actors to come out and begin to name and shame those who enforce ‘the rule’ on corroboration. This will expose the challenges the rule poses to women and highlight the human rights aspects which the rule violates. This approach will also expose the negative attitude and beliefs among personnel in the justice system. As a result the state will be encouraged to take urgent steps to eliminate the rule.

8. Shelter and support

The state should create shelters for victims who are ostracized by their community when they report a rape or defilement. Furthermore, those victims who fear losing financial support from their attackers who threaten them if they dare to report a rape or defilement must be assisted by the government in every way possible (including financially) so that they may be empowered to pursue their human right to seek justice against their attackers

and enjoy their human right to the effective remedy of witnessing their attackers being convicted and punished according to the rule of law.

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APPENDIX 1: Rape and Defilement statistics for 2009 (see para 3.5)

January to March 2009												
	BT	CK	NE	TO	CZ	MJ	MW	PE	CA	NO	LB	SR
HOMICIDE CASES												
Murder	8	1	2	1	3	3		3	1	1	1	24
Mob Justice	0	0	0	0	0	0	0	0	0	0	0	0
Manslaughter	0	0	0	3	0	0	0	0	0	0	1	4
TOTAL												
SEXUAL OFFENCES												
Rape	12	1	0	1	0	1	0	1	1	0	1	18
Defilement	8	4	0	3	1	6	1	4	1	0	11	39
Indecent Assault	1	2	1	2	3	0	0	0	0	1	3	13
Sodomy	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL												
ROBBERY CASES												
Robbery	0	0	0	0	0	0	0	0	0	0	0	0
Armed Robbery	6	1	1	0	0	0	0	0	2	0	5	15
Robbery with Violence	291	29	10	15	10	19	0	3	28	1	94	500
TOTAL												
BREAKING OFFENCES												
B/I/B/C/F/There In	141	39	43	33	12	34	14	22	25	4	87	454
H/B/Theft	228	45	41	64	34	64	23	27	26	6	106	664
B/Theft	456	107	44	78	43	119	29	14	28	6	184	1108
TOTAL												
THEFT CASES												
Theft of Motor Vehicle	3	1	0	0	1	0	0	0	1	0	1	7
Theft from Motor Vehicle	16	0	1	6	0	0	9	0	0	0	6	38
Theft of Cattle	2	59	14	1	4	0	0	2	2	5	6	95
Theft Of Bicycle	7	76	20	52	7	51	14	12	9	1	17	266
Theft by Public Servant	68	9	3	5	5	2	1	10	7	0	0	110
Theft by Servant	0	7	2	1	0	0	0	0	12	0	15	37
Theft of Goat	0	0	0	1	0	0	0	0	0	0	0	1
Other Thefts	271	56	26	59	36	10	22	25	13	1	147	666
TOTAL												
THEFT GENERAL												
General Theft	1109	320	114	302	93	175	41	50	146	17	684	3051
TOTAL												
ASSAULT CASES												
Greivous Harm	12	2	5	4	1	5	1	4	1	1	12	48

Unlawful Wounding	237	69	27	100	22	66	8	37	26	4	134	730
AOABHarm	136	47	15	48	14	32	6	19	24	5	89	435
Common Assault	117	36	9	210	9	8	3	10	5	1	26	434
TOTAL												
Arson	2	4	2	4	1	3	1	1	0	1	2	21
Other Criminal Offences	577	172	136	39	61	69	43	63	68	7	332	1567
TOTAL CR'S	579	176	138	43	62	72	44	64	68	8	334	1588
Dangerous Drugs	0	0	0	0	0	0	0	6	0	0	0	6
Possession of Indian Hemp	6	4	2	9	2	0	2	4	7	0	3	39
Growing of Indian Hemp	0	0	0	0	0	0	1	3	0	2	0	6
Illegal Possession of Firearms	0	1	0	0	0	0	0	0	0	1	0	2
Other Acts	432	444	141	327	385	376	397	82	243	1	882	3710
TOTAL SR'S	438	449	143	336	387	376	400	95	250	4	885	3763
APRIL TO JUNE 2009												
HOMICIDE CASES	BT	CK	NE	TO	CZ	MJ	MW	PE	CA	NO	LB	SR
Murder	3	1	0	2	2	1	1	0	3	1	4	18
Mob Justice	5	3	3	2	2	6	1	5	3	0	6	36
Manslaughter	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL												
SEXUAL OFFENCES												
Rape	9	1	0	2	3	1	0	0	1	0	4	21
Defilement	12	7	0	7	4	6	1	6	5	0	9	57
Indecent Assault	6	4	1	1	1	0	1	2	2	0	0	18
Sodomy	0	1	0	0	0	0	0	0	0	0	1	2
TOTAL												
ROBBERY CASES												
Robbery	0	0	0	0	0	0	0	0	0	0	0	0
Armed Robbery	4	0	0	0	1	1	0	0	0	0	5	11
Robbery with Violence	211	16	5	18	15	14	3	9	31	1	105	428
TOTAL												
BREAKING OFFENCES												
B/I/B/C/F/There In	123	26	21	21	12	8	13	7	22	1	82	213
H/B/Theft	155	33	14	56	26	27	10	10	18	6	80	280
B/Theft	425	75	43	49	48	84	32	14	39	4	182	570
TOTAL												
THEFT CASES												
Theft of Motor Vehicle	0	0	0	0	0	0	0	0	0	0	0	0
Theft from Motor Vehicle	15	0	0	1	0	2	5	0	1	0	5	29
Theft of Cattle	0	82	12	4	0	0	0	4	0	0	1	103
Theft Of Bicycle	10	79	16	27	9	27	7	32	5	1	6	219

Theft by Public Servant	22	9	4	6	7	0	0	4	0	0	0	52
Theft by Servant	19	4	1	0	0	0	0	0	14	0	3	41
Theft of Goat	0	0	0	0	0	0	0	0	0	0	0	0
Other Thefts	212	30	14	18	35	3	3	15	13	2	127	472
TOTAL												
THEFT GENERAL												
General Theft	856	205	65	187	93	130	31	51	138	12	571	2339
TOTAL												
ASSAULT CASES												
Greivous Harm	11	2	7	9	4	6	0	1	1	0	7	48
Unlawful Wounding	191	91	20	98	47	68	11	49	30	9	116	730
AOABHarm	89	54	15	43	16	34	6	29	23	6	91	406
Common Assault	91	31	8	15	16	20	4	23	14	4	32	258
TOTAL												
Arson	4	16	9	4	7	4	3	8	7	3	3	68
Other Criminal Offences	409	159	90	167	81	81	42	81	61	9	271	1451
TOTAL CR'S												
Dangerous Drugs	4	2	0	0	0	0	0	2	0	0	1	9
Possession of Indian Hemp	8	15	12	1	1	0	2	7	1	0	4	51
Growing of Indian Hemp	1	1	0	1	0	0	1	0	0	0	5	9
Illegal Possession of Firearms	0	0	0	0	0	0	0	0	0	0	0	0
Other Acts	300	350	211	263	538	233	316	87	296	0	244	2838
TOTAL SR'S												

JULY TO SEPTEMBER 2009												
HOMICIDE CASES	BT	CK	NE	TO	CZ	MJ	MW	PE	CA	NO	LB	SR
Murder							0					
Mob Justice							0					
Manslaughter							0					
TOTAL												
SEXUAL OFFENCES												
Rape							1					
Defilement							1					
Indecent Assault							3					
Sodomy							0					
TOTAL												
ROBBERY CASES												
Robbery							0					
Armed Robbery							0					
Robbery with Violence							1					
TOTAL												

BREAKING OFFENCES															
B/I/B/C/F/There In															
H/B/Theft															
B/Theft															
TOTAL															
THEFT CASES															
Theft of Motor Vehicle															
Theft from Motor Vehicle															
Theft of Cattle															
Theft Of Bicycle															
Theft by Public Servant															
Theft by Servant															
Theft of Goat															
Other Thefts															
TOTAL															
THEFT GENERAL															
General Theft															
TOTAL															
ASSAULT CASES															
Greivous Harm															
Unlawful Wounding															
AOABHarm															
Common Assault															
TOTAL															
Arson															
Other Criminal Offences															
TOTAL CR'S															
Dangerous Drugs															
Possession of Indian Hemp															
Growing of Indian Hemp															
Illegal Possession of Firearms															
Other Acts															
TOTAL SR'S															

HOMICIDE CASES	JUL													
	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT	
Murder	0	0	0	0	2	0	1	0	2	1	0	1	1	
Mob Justice	0	0	0	0	0	0	0	0	0	0	0	0	0	
Manslaughter	0	0	0	0	0	0	0	0	0	0	0	0	0	
TOTAL														

SEXUAL OFFENCES

Rape	0	0	1	0	2	0	1	0	0	1	1	0	1
Defilement	3	0	0	0	0	0	0	1	0	1	0	1	1
Indecent Assault	1	0	1	0	0	0	0	0	0	0	1	0	1
Sodomy	0	0	0	0	0	0	0	0	0	0	0	0	0

TOTAL**ROBBERY CASES**

Robbery	0	0	0	0	0	0	1	0	0	0	0	0	0
Armed Robbery	1	0	0	0	0	0	0	0	0	0	0	0	2
Robbery with Violence	14	4	4	0	2	1	2	0	1	1	6	3	35

TOTAL**BREAKING OFFENCES**

B/I/B/C/F/There In	15	4	3	0	9	2	3	0	3	3	6	4	24
H/B/Theft	7	8	17	0	1	2	5	0	5	4	1	2	18
B/Theft	14	12	44	3	7	9	12	1	9	9	20	4	14

TOTAL**THEFT CASES**

Theft of Motor Vehicle	1	0	0	0	0	0	0	0	0	0	0	0	1
Theft from Motor Vehicle	3	0	1	0	0	0	0	0	0	0	0	0	1
Theft of Cattle	0	1	0	0	1	0	1	0	0	14	6	7	0
Theft Of Bicycle	1	1	0	0	0	1	2	0	6	11	13	3	1
Theft by Public Servant	0	0	0	0	0	0	0	0	0	1	5	0	1
Theft by Servant	19	0	9	0	0	0	0	0	0	0	0	0	18
Theft of Goat	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Thefts	22	11	3	2	8	1	11	0	51	8	2	4	44

TOTAL**THEFT GENERAL**

General Theft	94	38	30	7	10	9	44	1	26	25	37	20	125
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TOTAL**ASSAULT CASES**

Greivous Harm	1	1	0	0	2	0	2	0	0	0	2	0	0
Unlawful Wounding	7	8	14	4	10	2	10	4	7	18	6	7	23
AOABHarm	13	7	9	3	2	1	7	1	5	4	10	4	19
Common Assault	8	4	2	0	3	1	4	1	3	4	0	1	5

TOTAL

Arson	1	1	0	0	1	1	0	1	0	1	2	2	0
Other Criminal Offences	41	14	32	3	18	2	20	3	58	24	18	10	66

TOTAL CR'S

Dangerous Drugs	0	0	0	0	0	0	1	0	0	0	0	0	3
Possession of Indian Hemp	4	0	0	0	0	0	2	0	0	0	0	0	1
Growing of Indian Hemp	0	0	0	0	0	0	0	0	0	0	0	0	0
Illegal Possession of Firearms	0	0	0	0	0	0	0	0	0	0	0	0	0

Other Acts	574	0	22	0	151	76	74	0	30	61	63	34	7
TOTAL SR'S													

AUG

HOMICIDE CASES	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
Murder	1	0	1	0	1	0	0	1	0	2		1	0
Mob Justice	0	0	0	0	0	0	0	0	0	0		0	0
Manslaughter	0	0	0	0	0	0	0	0	0	0		0	0
TOTAL													

SEXUAL OFFENCES	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
Rape	0	0	0	0	1	0	1	0	1	1		0	0
Defilement	1	0	0	0	1	0	1	1	1	0		1	1
Indecent Assault	0	1	0	0	1	0	1	0	0	1		0	0
Sodomy	0	0	0	0	0	0	0	0	0	0		0	0
TOTAL													

ROBBERY CASES	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
Robbery	0	0	0	0	0	0	0	0	0	0		0	0
Armed Robbery	1	0	0	1	0	0	0	0	0	0		0	0
Robbery with Violence	17	1	11	1	4	0	3	0	3	1		0	39
TOTAL													

BREAKING OFFENCES	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
B/I/B/C/F/There In	8	1	4	0	1	0	4	1	2	1		1	37
H/B/Theft	7	1	5	0	0	0	4	1	5	1		0	35
B/Theft	15	7	39	0	5	7	10	0	3	4		4	39
TOTAL													

THEFT CASES	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
Theft of Motor Vehicle	0	0	0	0	0	0	0	0	0	0		0	3
Theft from Motor Vehicle	1	0	2	0	0	0	0	0	0	0		0	0
Theft of Cattle	0	0	0	0	0	0	0	0	3	13		3	0
Theft Of Bicycle	0	4	0	1	0	0	8	0	0	5		2	0
Theft by Public Servant	0	0	0	0	0	0	0	0	3	0		0	0
Theft by Servant	25	0	3	0	0	0	5	0	0	0		0	12
Theft of Goat	0	0	0	0	0	0	0	0	0	0		0	0
Other Thefts	14	6	7	1	9	5	7	0	0	6		4	13
TOTAL													

THEFT GENERAL	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
General Theft	111	38	30	8	7	11	32	5	26	21		11	148
TOTAL													

ASSAULT CASES	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
Greivous Harm	2	1	0	0	0	0	4	0		4		3	0
Unlawful Wounding	27	6	15	3	9	1	28	4	15	15		10	23
AOABHarm	16	5	11	0	3	1	6	1	23	6		4	7
Common Assault	14	3	6	2	0	1	7	2	6	4		4	13

TOTAL

Arson	2	1	0	0	0	0	3	3	3	5	1	2
Other Criminal Offences	59	30	29	4	13	7	19	4	28	35	10	79
TOTAL CR'S	321	109	161	21	54	34	143	23	126	126	59	451
Dangerous Drugs	0	0	0	0	0	0	0	0	0	0	0	0
Possession of Indian Hemp	4	0	0	0	0	0	1	0	0	0	1	2
Growing of Indian Hemp	0	0	0	0	0	0	0	0	0	0	0	0
Illegal Possession of Firearms	0	0	0	0	0	0	0	0	0	0	0	0
Other Acts	77	0	0	0	71	0	65	0	32	62	46	23
Total SR's	81	23	19	0	79	57	66	0	32	62	46	25

SEPT

HOMICIDE CASES	LB	BV	BG	MKL	CZ	NMDZ	TO	MN	LC	CK	NL	NG	BT
Murder	1					0	0		1				0
Mob Justice	0					0	0		0				0
Manslaughter	0					0	0		0				0
TOTAL													

SEXUAL OFFENCES

Rape	1					0	1		0				0
Defilement	3					0	2		0				2
Indecent Assault	0					0	1		0				0
Sodomy	0					0	1		0				0
TOTAL													

ROBBERY CASES

Robbery	0					0	0		0				0
Armed Robbery	3					0	0		0				0
Robbery with Violence	17					0	3		1				34
TOTAL													

BREAKING OFFENCES

B/I/B/C/F/There In	14					0	1		3				25
H/B/Theft	7					2	3		6				15
B/Theft	29					4	15		6				42
TOTAL													

THEFT CASES

Theft of Motor Vehicle	1					0	0		0				1
Theft from Motor Vehicle	6					0	0		0				3
Theft of Cattle	0					0	1		0				0
Theft Of Bicycle	0					0	2		12				1
Theft by Public Servant	0					0	0		0				0
Theft by Servant	23					0	3		0				23
Theft of Goat	0					0	0		0				0
Other Thefts	5					1	7		0				27

TOTAL

THEFT GENERAL

General Theft	90	5	32	25	118
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TOTAL

ASSAULT CASES

Greivous Harm	7	0	0	0	1
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Unlawful Wounding	28	1	21	19	27
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AOABHarm	16	6	9	9	12
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Common Assault	5	0	3	4	16
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TOTAL

Arson	1	0	6	3	0
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Other Criminal Offences	60	10	22	33	62
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TOTAL CR'S

Dangerous Drugs	0	0	0	0	0
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Possession of Indian Hemp	1	0	0	0	0
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Growing of Indian Hemp	1	0	0	0	0
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Illegal Possession of					
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Firearms	0	0	0	0	0
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Other Acts	88	95	81	9	14
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Total SR's

APPENDIX 2 (see para 4.2.6.1)

Appendix 2.



UNIVERSITY OF MALAWI

Principal
Prof. R.L. Broadhead MBBS, FRCP, FRCPC, DCH.

Our Ref.:

Your Ref.:

College of M
Private I
(
Bla

Telephone: 01
01
Fax: 01
Telex

16th November, 2009

The Officer Incharge
Chilomoni Police Station
PO Box 101
Blantyre.

Dear Sir/Madam,

RE: ALLEGED SEXUAL ASSAULT – [REDACTED] – 19 YEARS OLD.

Reference is made to your letter dated 20th October, 2009, requesting medical review and assistance for [REDACTED]. [REDACTED] was reviewed at Chatinkha Maternity at 10:15am on 20th October, 2009.

ACCOUNT OF EVENTS

[REDACTED] informed the attending clinician that she was raped by a man known as "Ngoni" who owns a kiosk, about 50-80m from her home. The attack happened around 8pm. She had gone to the kiosk to buy groceries. At the kiosk, Mr. Ngoni who has previously made advances towards [REDACTED], forced her into the kiosk and having forcibly undressed her had unconsented and unprotected penile-vaginal intercourse with her. During the attack, Mr. Ngoni gagged [REDACTED] mouth, and threatened to beat her up.

EXAMINATION FINDINGS

When examined, [REDACTED] appeared well. Her body systems were normal, and there were no overt signs of injury.

Examination of the genitalia showed no abnormalities. There were no spermatozoa found.

CONCLUSION

~~_____~~ account of events is very suggestive of inappropriate and forced penile-vaginal intercourse. Please be advised that the absence of physical injury to the genitalia is not implicit evidence that no sexual attack occurred. In the majority of documented sexual attacks, no physical injury/trauma is ever found. The physical findings must be interpreted in the context of the nature of events.

I hope that you will find this information useful.



Dr. B. Makanani
Head of Obstetrics and Gynaecology Department

BSM rtp

APPENDIX 3 (see para 4.2.6.1)

Appendix 3 ECP I

REPORT OF MEDICAL ASSESSMENT FOR SUSPECTED DEFILEMENT EX 1

COPY must be filed with paediatric dept. secretary. ORIGINAL - must be stamped and given to guardian

NAME: <u>[REDACTED]</u>	AGE <u>11 YRS</u> DOB <u>17-09-1997</u>
ADDRESS: <u>Mbagani</u>	

CONSENT: I <u>MRS E. Tuthuni</u> being the mother/father/guardian of the above named child hereby give consent for him/her to be examined and for a written report of the findings to be given to the police and/or social welfare. Signature <u>[Signature]</u>	
Witness Name: <u>R Banda</u>	Witness Signature <u>[Signature]</u>

DETAILS OF EXAMINING CLINICIANS	
CLINICIAN 1:	CLINICIAN 2:
Name <u>R Banda</u>	Name <u>G Banda</u>
Position <u>consultant</u>	Position <u>Medical Intern</u>
Qualifications <u>Paediatrician</u>	Qualifications <u>MBBS</u>

DATE OF EXAMINATION 20/12/07 TIME 2000 PLACE QECH Blantyre

EXAMINATION FINDINGS:

girl is very frightened by examination
There is no bruising or swelling seen in the genital area
There is some vaginal discharge

CONCLUSION: Vaginal discharge

University of Malawi
COLLEGE OF MEDICINE
20 DEC 2007
Medicine Department

REPORT WRITTEN BY: R Banda Signature [Signature]

Complete this section if the patient was seen and examined by a second clinician:

Please circle I AGREE / I DISAGREE WITH THE ABOVE DOCUMENTED FINDINGS AND CONCLUSION

Name of 2nd Clinician G BANDA Signature [Signature]

Any additional comments/findings (please use additional sheet if needed):

The accused person Brian Matiga thumbprinted the medical document on 28/12/07 (1819hrs) Sealed by Prof. St. Khuge

The Officer In-Charge
Kabula Police Unit
20 DEC 2007
P.O. Box 101
Blantyre

The medical officer
Awech
Box 95
Blantyre
20-12-07

Dear Sir,

~~_____~~ ~~_____~~

The bearer of this note has been raped by unknown person, please help us so that we can take police action after law findi-ns.

Yours,
~~_____~~
(Mwandaime)
for etc

The accused person Brian Matiy thumbprinted the medical document on 28/12/07 (1019hw) Sealed by Prod Sgt Khwaga

The Officer In-Charge
Kabula Police Unit
20 DEC 2007
P.O. Box 101
Blantyre

APPENDIX 4

RESEARCH TOOLS: INTERVIEW QUESTION GUIDELINES

JUDGES/MAGISTRATES

1. What is the justification for the rule on corroboration in rape and defilement cases?
2. Is the justification relevant according to you? And why?
3. What type of corroborative evidence do you look for in rape and defilement cases?
4. Do you think the rule is necessary in light of the fact that in all criminal cases matters have to be proven beyond reasonable doubt?
5. Does the rule conform to the right to equality before the law provided under Section 20, 24, 44 of the constitution and other international instruments such as Article 1 of CEDAW?
6. In your view do you think the rule is discriminatory against women? If so how? If not why not?
7. Does the rule on corroboration violate the statutory law that provides that even one witness can suffice to attain a conviction?
8. If not in agreement with the rule, what reforms would you like to see in the law?

LAW COMMISSION

1. What do you think of the rule on corroboration in rape and defilement cases, is it justified under law? If so what is the justification?
2. If the rule is not justified do you have any intentions of reforming the law on corroboration? If so what type of reforms?
3. Is the rule on corroboration in conformity with Section 20, 24, and 44 of the Constitution and some international instruments such as Article 1 of CEDAW?
4. Do you think the rule is discriminatory against women?
5. In general what do you look at to have a particular law under reform process?

NGOs

1. What views do you have concerning the rule on corroboration in rape and defilement cases?
2. Of what relevance is the rule (if any)?
3. Do you think the rule conforms to the right to equality under law provided for under section 20, 24 and 44 of the Constitution and other international instruments such as Article 1 of CEDAW?
4. Do you think the rule is discriminatory against women? If so how? If not why not?

5. If you think it is discriminatory what action can your organization take?
6. If the rule was to be reformed what reforms would you like to see and why?

PROSECUTORS

1. What is your view on the rule on corroboration in rape and defilement cases?
2. What corroborative evidence does the court require in cases of rape and defilement?
3. What do you do with a case that shows no corroborative evidence and why?
4. Does the rule work for or militate against the prosecutions case?
5. Is it easy to find corroborative evidence? Why?
6. if you compare rape/defilement with other cases which ones do you find easy to prove?
7. How do the women victims feel if told to bring out corroborative evidence?
8. Do you think the rule is justified under law? If yes what is the justification? If not why not?
9. Do you think the rule is in need of any law reform? If so what reforms would you like to see?

DEFENCE LAWYERS

1. What is the justification of the rule on corroboration in rape and defilement cases?
2. If it has any justification, do you agree with the justification? If yes why? If not why not?
3. Is the justification in conformity with the right to equality before the law, provided under section 20, 24 and 44 of the Constitution and other international human rights instruments such as Article 1 of CEDAW?
4. Is it possible to have a fair trial in rape and defilement cases in the absence of the rule?
5. What purpose does the rule serve in light of the fact that in all criminal cases matters have to be proved beyond reasonable doubt?

LAW LECTURERS

1. What's your view on the rule on corroboration in rape and defilement cases?
2. What is the justification of the rule?
3. Do you think the rule is in conformity with the right to equality provided under Section 20,24 and 44 of the constitution and some international instruments such as Article 1 of CEDAW?
4. Do you think the rule is discriminatory against women? If so how? If not why not?
5. Do you think the rule is necessary in light of the fact that in all criminal cases matters have to be proved beyond reasonable doubt?

6. Does the rule violate the statutory law that says that even one witness can suffice to attain a conviction?
7. Do you think the rule is in need of any reform? If so what reforms would you like to see?

WOMEN VICTIMS

1. What was (is) your court experience?
2. Did you find it easier to bring out evidence before the court?
3. How long did it take to report the offence after its occurrence? (why such a period of time).
4. Did you have any evidence apart from your word showing that you did not consent the act? (If not why?)
5. Did you have any evidence apart from your word of the identity of the accused? (if not why?).
6. Did you have any evidence apart from your word showing that the accused had sexual intercourse with you? (if not why?)
7. Did you visit the hospital (not after bath) after the occurrence of the offence? (if not why?)