
**STRENGTHENING THE EVIDENCE COLLECTION PROCESS IN RAPE CASES
IN ZIMBABWE INVOLVING CHILDREN BELOW THE AGES OF 12 YEARS**

BY

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Dedication

To all the child survivors of rape whose cries inspired me to undertake this particular research.

To my mother, Masimba Mupambireyi, you are a woman of steel! You deserve the credit of this work.

Abstract

This dissertation explores the evidence collection process for rape cases involving minors below the age of 12 years. The research was inspired by calls from advocacy groups which include women's organizations to enforce mandatory sentences against sex offenders. Their argument is that mandatory sentences will act as a deterrent to future sex crimes and reduce the sexual abuse of children. The research therefore focused on assessing the efficacy of Zimbabwe's rape laws and interrogated the role of each of the service providers involved in the process of collecting evidence for trial purposes in Victim Friendly courts which specialise in cases involving children who have survived sexual crimes including rape. The main research questions revolved around the efficacy of the evidence collection process conducted in rape cases involving minors below the age of 12. Each of the service providers was engaged in order to understand their mandate, their role in the evidence collection process and the challenges they face. The service providers ranged from community leaders, caregivers, victim friendly officers, prosecutors and counsellors. In gathering data, the researcher employed several methods which included case law reviews, in-depth interviews and observations. These grounded approach methods enabled the researcher to gain an in-depth understanding of the subject matter the findings of which challenged some of the research assumptions. The study showed the challenges faced by the actors and structures when they tried to implement the law according to local law and policy. Such challenges included the lack of resources, the absence of facilities crucial to the analysis of evidence (including an effective forensic laboratory) and a disjointed approach towards the evidence collection process. The overall conclusion is that while the law is clear it will remain ineffective unless and until it is properly implemented by the various actors and structures who are responsible for an effective and efficient evidence collection process on which the courts can rely to secure more convictions against child rapists. The study suggests a number of helpful recommendations to improve this process including developing closer collaboration and co-operation between stakeholders and building their capacity through the provision of resources and training to improve the capture and quality of the evidence demanded by child sensitive cases.

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Declaration

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

Signed.....

Date.....

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

Signed.....

Date.....

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List of abbreviations and acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
CCTV	Closed circuit television
CPEA	Zimbabwe's Criminal Procedure and Evidence Act [9:07]
CRC	Convention on the Rights of the Child
Criminal Law Code	Criminal Law (Codification & Reform) Act [Chapter 9:23]
DSS	Department of Social Services
MoHCC	Ministry of Health and Child Care
NORAD	Norwegian Agency of Development
NVFSC	National Victim Friendly System Committee
SEARCWL	Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe
UNESCR	United Nations Economic and Social Council Resolution 2005/20 on Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime
VF	Victim Friendly
VFO	Victim Friendly Officer
VFS	Victim Friendly Service
VFSCC	Victim Friendly System Committee and Subcommittee
VFU	Victim Friendly Unit
ZRP	Zimbabwe Republic Police

List of international human rights instruments

African Charter on the Rights and Welfare of the Child (ACRWC)

Convention on the Rights of the Child (CRC)

United Nations Economic and Social Council Resolution 2005/20 on Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (UNESCR)

List of local legislation

Children's Act [Chapter 5:06]

Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (the Constitution)

Criminal Law (Codification & Reform) Act [Chapter 9:23] (the Criminal Law Code)

Criminal Procedure and Evidence Act [Chapter 9:07] (CPEA)

Gender Commission Act [Chapter 10:31]

List of local policies

National Case Management System on the Welfare and Protection of Children in Zimbabwe

Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe (2012)

List of local cases

State v. Banana 2000 (1) ZLR 607 (S) (SC -1- 2000)

State v. Ivhurinosara CRB No.225/10

Mandeyi HH-34-13

State v. Mareya R601/18

State v. Mpande HB-43-11

State v. Sibanda 1994 (1) ZLR 395

Musasa 2002 (1) ZLR 280 (H)

State v. Musumhiri HH-404-14

Ncube 2014 (2) ZLR 297 (H)

Definition of terms

Aggravated indecent assault

This is the unlawful and intentional assault in an indecent way of either a male or female involving the penetration of any part of the person's body or of the perpetrator's body, as defined in Section 66 of the Criminal Law (Codification & Reform) Act [Chapter 9:23] (the Criminal Law Code).

Anatomically correct dolls

These dolls have the anatomy of a human body which helps to assist children to give clear and accurate testimony during interviews or when giving evidence in Court.

Child

Section 81(1) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (the Constitution) defines a child as every boy and girl under the age of eighteen years. However, for the purposes of this study, children refers to girls and boys under the age of twelve years.

Child Protection

This refers to a set of services and mechanisms put in place to prevent and respond to violence, abuse, exploitation and neglect which threaten the well-being of children.

Confidentiality

This refers to the duty to respect the privacy of information shared by and about children and families.

Consent

Consent is the outcome of making an informed choice to participate in an activity freely and voluntarily. This decision must be made with adequate and accurate information on the benefits and consequences of the person's participation and the person must have the developmental capacity to undertake their own analysis of this information. This must be done without the use of force, threats, coercion, manipulation, deception or misrepresentation, among other things.

Gender

Gender refers to the social construction of roles and responsibilities allocated to males and females and these are rooted in culture.

Intermediary

Intermediary refers to a specially trained interpreter who acts as a medium through whom the child communicates with the Court.

Perpetrator

Perpetrator refers to the person, group or institution that directly inflicts or otherwise supports sexual violence or abuse of another person.

Rape/Attempted rape

This is an act of non-consensual sexual intercourse. This can include the invasion of any part of the body with a sexual organ or the invasion of the genital or anal opening with any object or body part. An effort to commit rape that does not result in penetration is attempted rape. Attempted rape and rape involve the use of force, threat of force and/or coercion.

Rape kit

This is a large envelope containing instruments that are used by the doctor to obtain swabs and slides of blood, saliva, pubic hair, fingernails and scrapings. It includes detailed instructions on use and is obtained from the Police.

Survivor Friendly Clinic

This is a health facility that offers specialised care and support to survivors of violence, particularly sexual violence. The facilities provide medical care, psychosocial support services and ensure referrals to other services to ensure a continuum of comprehensive care.

Victim Friendly Court

This is a specialised Court that has been enacted by law to allow vulnerable witnesses to give evidence through closed circuit television (CCTV) and other special survivor sensitive measures.

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CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction and interest in the study

This chapter introduces the topic under study which is the strengthening of the evidence collection process in rape cases involving children below the age of 12. It briefly outlines my interest in the topic and analyses the case of *State v. Mareya* R601/18 which became central to this research. This chapter also covers the problem statement, aim of the study, research objectives, research questions as well as the theoretical framework.

My interest in the subject emanated from my past experiences working with vulnerable children in the non-profit sector. I served in a non-governmental organization for nine years in various provinces in Zimbabwe and whenever I met young children I was particularly moved by their vulnerability and susceptibility to all forms of abuse. The organization I worked for provided educational support to orphaned and vulnerable children across sub-Saharan Africa through the provision of scholarships and other ancillary support. While my organisation's mandate was to provide educational support, it was inevitable that we would deal with cases of abuse and particularly child sexual abuse. Several cases would come to our attention and because of our lack of experience and knowledge in this area we would refer them to better qualified supporting organizations. While we would follow some cases, others would be forgotten and lost in the piles of papers in the system.

I progressed with my career and was promoted to Team Leader for the Gender and Advocacy Department. In that capacity, I was responsible for setting up structures and systems that would enable the organization to effectively deal with child protection and girls' empowerment among other issues. Although it was now my responsibility to assist vulnerable children who had been raped or sexually abused, I still lacked experience, did not have an adequate understanding of the law and continued to refer such children to other organizations where they would receive the necessary support; once again, they continued to become statistics in our organizational records and reports.

It was during this tenure in my role that as Team Leader that I encountered the tragic story of a child called Reason.¹ She was a 12-year-old girl whose case had been transferred from one of our regional offices to the head office. She was critically ill and I need of medical assistance and we facilitated her admission to one of the local hospitals. We noted her case and ensured that our team at the head office would support her with all the necessary help that she required. It was after she was admitted to hospital that I learnt that she had stage 4 cervical cancer and too late to undertake chemotherapy. As the Gender and Advocacy office, we ensured that she received the best care possible while we prayed and hoped for a miracle. In the subsequent weeks, one of my team members would visit Reason in hospital and it was during such visits that she confessed to having been serially raped by her male cousins. This resulted in her contracting sexually transmitted diseases. At one time, the case had been reported to the police, however no action was taken. It was speculated that her guardian concealed the rape as she did not want her sons to be investigated by the law.

It was unfortunate that after a few days, after confiding this secret, she passed away. Her death pierced my heart as I believed it could have been avoided. As a trained sociologist, I questioned the role of society in protecting the vulnerable especially from abuse; the role of the police in undertaking their mandate in investigating crime and the courts in administering justice. Reason represents many girls in our society who have been failed its dysfunctional systems. Every time I think of Reason, I always ask myself:

- What if her case had been noted and reported earlier? What difference would it have made to her precious life?
- How could her family fail her to the point of covering up the serial rapes she endured and the evidence necessary to bring the culprits to book?
- What and where is the role of the law in protecting the most vulnerable in our society?
- What can organizations do to ensure that they play their role in protecting children from sexual abuse?

I ask these questions because of the psychological effect and trauma that rape has on young children. Child sexual abuse is a betrayal of childhood trust and the affirmation of how vulnerable these young children are at the hands of society (McFarlane, 1985). After studying

¹ Not her real name.

the Human Rights and Social Justice Courses at SEARCWL, I saw an opportunity to research the crime of rape and interrogate the robustness of the evidence collection process in cases involving children below the age of 12.

1.2 Analysis of the case of *State v. Mareya*

Initially during my research I wanted to focus on the multiple strategies used in the evidence collection process. However, about midway during my data collection process I came across the case of *State v. Mareya* R601/18. It immediately became key to my whole research process. The reason is that it amplified my research assumptions and affirmed that I needed to interrogate the effectiveness of the evidence collection process in rape cases of minors.

In *State v. Mareya* (above) Solomon Mareya (42) was charged with two counts of rape under Section 65(1) of the Criminal Law (Codification & Reform) Act [Chapter 9:23] (the Criminal Law Code).² The victims were his two daughters, aged 2 and 8, respectively. According to the court records, the accused was left with the care of his two daughters while his wife went to work. Upon her return, her 8-year-old daughter who also happened to have a mental disability complained that her genitals were sore and indicated that it was her father who had hurt her. Her mother was able to take the children for medical examination. Resulting from this process, the medical affidavits confirmed that dilation and penetration had occurred which confirmed that the children had indeed been sexually abused. In addition, three witnesses were called to testify and they included the mother of the children, the first person to whom the mother had confided and a medical expert. Owing to their minority and disability, the child victims were unable to give evidence as they were considered incompetent witnesses by the court. In passing judgement, the magistrate stated the following in his ruling:

“Medical evidence does not say who would have interfered with the complainant’s anal areas despite that³ had pointed to her “private area” having been hurt by the Accused-father.” There is, therefore, no *prima*

² Section 65(1) of the Criminal Law Code provides:
“If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse—
(a) the female person has not consented to it; and
(b) he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it;
he shall be guilty of rape and liable to imprisonment for life or any shorter period.”

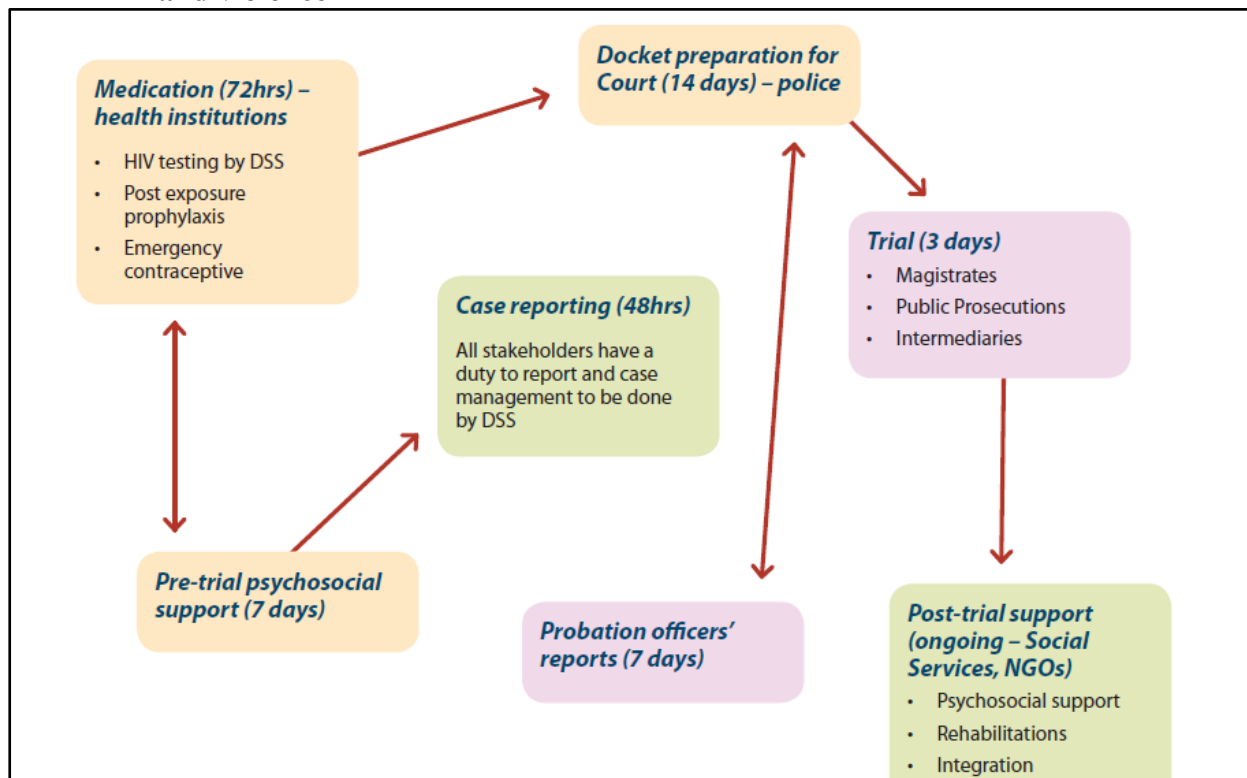
³ Name intentionally omitted.

facie case for Accused to meet at the close of the State Case. There is no evidence on which a reasonable Court, acting carefully, might properly convict the Accused. The evidence adduced on behalf of the State is so manifestly unrealizable that no reasonable Court can safely act on it” (*State v. Mareya* R601/18).

Therefore, based on lack of evidence, the court found the Accused not guilty and acquitted him of the two counts of rape. The case caused a national outcry among the legal fraternity and women’s organizations based on the fact that the case represented the growing failure of the courts to administer justice and provide recourse for vulnerable children who through no fault of their own cannot testify on their own behalf and state what happened to them. Also the various actors mandated to ensure that their case was to exhaustively prosecuted failed them owing to the flaws in the justice system. This case opened a new vision for my research and directed me toward interrogating the evidence collection process in order to understand the challenges in the system and how to overcome them. Upon analysing the case of *State v. Mareya* (above) I realised that in order for the courts to properly administer justice based on the evidence brought before them, the process involved in collecting the necessary evidence must be robust and effective. This robustness and effectiveness cannot be realised unless each and every actor involved at the various stages of the evidence collection process fulfil their specific role efficiently. The diagram in Figure 1 is taken from the Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe (2012).

As depicted in Figure 1, there are various actors involved in the collection of evidence in rape cases involving minors and these include the police, community, civic society, the health institutions as well as the courts of law. In each of the stages of investigation and response to the alleged offence evidence must be gathered for use in the trials and if any of the actors is limited in their capacity to gather information and collect evidence, this in turn jeopardises the case. Looking at what occurred in the case of *State v. Mareya* R601/18 and comparing it with the diagram above, I noticed gaps or failures in the evidence collection process which this study seeks to analyse and address.

Figure 1: Diagram of the stages and stakeholders involved in managing sexual abuse and violence



(Source: Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe, 2012)

1.3 Aim of the Study

The aim of this study is to understand the evidence collection process for rape cases involving minors below the age of 12 years. It will look at the provisions of the law and policies and question if the law is being implemented accordingly. This comes after concluding that one of the reasons for the low conviction rate in rape cases flows from the lack of a robust evidence collection process. Overall it is purposed that the outcome of this research will be used for advocacy in policy, administrative and legal reforms that would promote efficiency and effectiveness in the justice system. These improvements will assist in ensuring that justice is realised for survivors of rape who are below the age of 12 years.

1.4 Problem Statement

Much research has been done on the subject of rape and sexual abuse of minors and different authors have quizzed the role of different players in the criminal justice system. Kudya (2006) focused on how the courts dealt with “rape matters that involved young victims, in particular victims below the age of eight years” while Mugebe (2016) focused on exploring

the causes of low conviction rates in teenage and adult rape cases in Harare. Their studies have become foundational in that they established the key challenges within the justice system from a legal practitioner’s point of view. Their lenses emphasised the challenges of implementation of the law, the culture in the justice system including the stereotyping and stigma that follow rape survivors. However not much has been studied on the effectiveness of the evidence collection process and hence the focus of this study.

1.5 Research Objectives

This study was informed by the following objectives:

- To investigate the relevant legislative and administrative measures that protect the rights and interests of children who have been raped.
- To assess the extent to which the criminal justice system is implementing appropriate procedures in the reporting and investigation of rape cases involving children below the age of 12 years.
- To establish the policies and procedures adopted by the State in promoting the best interests of the child in the evidence collection process in rape cases.
- To evaluate the efficiency of law implementation in the evidence collection process in rape cases involving minors below the age of 12 years.

1.6 Research assumptions and questions

Table 1: Showing research assumptions and questions

RESEARCH ASSUMPTIONS	RESEARCH QUESTIONS
(1) There are no legislative or administrative measures to protect the rights of children who have been sexually abused.	(1) Does Zimbabwe have legislative and administrative measures to protect the rights of sexually abused children?
(2) There is a lack of proper implementation of legal instruments in to ensure that criminal justice is being effectively administered.	(2) Is the criminal justice system implementing all the appropriate procedures that enable the effective reporting and investigation of rapes of minors below 12 years of age?
(3) The evidence collection process in rape cases involving minors is flawed with inefficiency and ineffectiveness.	(3) What policies and procedures have been adopted to ensure that ‘the best interests of the child’ are protected the collection of evidence in cases involving the rape of minors?
(4) The methods employed in the evidence collection process in rape cases are limited.	(4) How effective is the evidence collection process in cases involving the rape of minors below the age of 12?

1.7 Theoretical Framework

In carrying out this research, my study was anchored on the Dominance Theory. This is because rape must be recognized and understood as a tool of patriarchy. Johnson (2005) defines patriarchy:

“as a social system in which men disproportionately occupy positions of power and authority, central norms and values are associated with manhood and masculinity (which in turn are defined in terms of dominance and control), and men are the primary focus of attention in most cultural spaces.”

In the dominance theory radical feminists see rape as arising from patriarchal constructions of gender and sexuality within the context of broader systems of male power and emphasize the harm that rape does to women as a group. MacFarlane (2004) states that sexual assault is much more than a crime; it is a weapon of power, domination, control, invasion and humiliation. It is about losing control over safety, losing autonomy over one's body. Children often fall prey to this form of domination because of their intellectual and physical vulnerability. This is seen in the violation that occurs to their fragile bodies and as a result rape should be seen as a crime of violence and not sex. The core dynamic of patriarchal sexuality is the notion of the normalizing and sexualizing of masculine control and dominance over the feminine. This dynamic finds expression in a number of beliefs about what is natural, acceptable, and even desirable in male-female sexual interaction. In the end, sexual intercourse is an act of male conquest where women and children are men's sexual objects and/or possessions over which they exert unfettered domination.

1.8 Delimitations

The boundaries of this research were defined according to locality as well as content. Owing to the sensitivity of the subject matter, I narrowed the focus of my study to the evidence collection process. I therefore purposely excluded children from my research study as my main aim was to understand the criminal justice system and each of the players involved in the collection of evidence. The focus on such actors is also supported by MacFarlane (1985) who states that the institutions involved in the criminal justice system have a negative impact on the child and family which in turn traumatizes the child. This became a further justification for excluding children from this study. Upon further consideration, I intentionally focused on the evidence collection process in rape cases involving minors below

the age of 12 in terms of Section 64 of the Criminal Law Code.⁴ This is because cases that involve minors who are incapable of consenting are deemed much “easier” to handle while in actual fact it is the very complexity and sensitivity of these cases which call for particularly diligent treatment. Most prominently, the fact that the victim may be unable to explain what transpired places greater demands on the evidence collection process than cases in which the victims are not so challenged. Kudya (2006) notes this in her dissertation when she states:

“The victim who has been raped is supposed to tell the court what happened for it to conclude that she was raped since such offences usually occur without eyewitnesses. The dilemma arises when the victim cannot verbalize because she is too traumatized by the event or because she is too young to tell the court anything meaningful. Yet, for the accused to be convicted, evidence has to be led to show beyond reasonable doubt that he raped the child. Depending on the efficacy of the evidence gathering and presentation exercise there are some cases where we may still not be able to dispense with the evidence of the victim, notwithstanding the fears about her traumatization.”

In order to avoid traumatizing child rape victims, my study focuses solely on the actors involved in the evidence collection process as outlined in the Multi Sectoral Protocol (Figure 1). The study was further confined to Harare province where I am currently staying. As a result, I researched the actors which include employees of the Zimbabwe Republic Police, the Harare Magistrates Court and members of civil society, among others.

1.9 Conclusion

This chapter introduced the topic under research, the background of the study, the problem statement, research objectives, assumptions and questions. The important role played by the case of *State v. Mareya* (above) was briefly discussed in the context of the research and how relevant it was in setting its tone. The geographical extent of the research field and other delimitations were outlined as well as the theoretical framework upon which the study is based. The following chapter will focus on the human rights instruments adopted in this study.

⁴ A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person, or sodomy.

CHAPTER TWO

2.0 LITERATURE REVIEW

2.1 Introduction

This chapter focuses on literature on the subject of rape, its social construction as well as the various legal instruments available and applicable in Zimbabwe. Rape as a subject and a crime is located in the various instruments which include international, regional and local legislation. These instruments will be analysed and their intentionality and role in promoting an effective and efficient criminal justice system.

2.2 Social construction of rape

Sexuality has been defined as a social construction because it is contained in the culture, values and norms of a society. While sexuality has various meanings in society there are in each community generally accepted ideas and values which form the norm of the society. Tamale (2011) describes sexuality as:

“The various dimensions of sexuality include sexual knowledge, beliefs, values, attitudes and behaviours, as well as procreation, sexual orientation, and personal and interpersonal sexual relations. Sexuality touches a wide range of other issues including pleasure, the human body, dress, self-esteem, gender identity, power and violence. It is an encompassing phenomenon that involves the human psyche, emotions, physical sensations, communication, creativity and ethics.”

From Tamale’s point of view sexuality and sexual behaviour have to be understood and analysed in the context of society and culture and it is key to note that these experiences are different not only for women and men but also for children.

Ortner and Whitehead (1981) state that gender symbols, sexuality and sex have to be understood in the context of cultural beliefs, conceptions, assumptions, institutions and pertinent structures. Whilst child sexual abuse is a deviant form of sexuality, child rape has to be understood in the context of religion, societal values and norms. According to feminist theories, rape functions as a mechanism of social control in patriarchal societies (Brownmiller, 1975). This is because rape and the fear of rape enable men to assert power and control over women and children. It is also noted that rape helps in men’s maintenance of the existing system of social order and gender stratification. It is critical to understand that the

sexual abuse of children is the latent type of oppression of females inherent in patriarchal societies. MaCrann (2017) concurs in that the sexual abuse of children, who in most cases are female, by sexual offenders, who are predominantly male, is part of male dominated society which visibly and surreptitiously subjugates women.

This also leads to the understanding that rape is structural and individual in nature. This concept can be understood in that rape is an action committed not only against an individual but also against other segments of the wider community. So, in case of *State v. Mareya* (above), for example, the accused was charged with raping his two minor daughters, one of whom was disabled and neither received justice.

In line with this literature it is important to interrogate the criminal justice system and how each of the structures play a role in the protection against or perpetuation of sexual abuse. It is therefore vital to note that rape is a social construction carrying with it socio-cultural and stereotyping connotations. These connotations describe how and why the crime occurs and the expectation of how survivors of rape should behave and act. This can have a bearing on how individuals treat victims of rape and people working or interacting with the justice system are no exception when it comes to stereotyping people. Therefore personnel working in the system need to be aware of such influences.

In *State v. Musumhiri* HH-404-14 Mrs Justice Tsanga noted that society has stereotyped the expected behaviour of a rape victim which may have a bearing on how the case is handled and how evidence is collected. The expectation is that “she must scream – very loudly. She must show evidence of physical resistance. She must be battered and bruised if she is a genuine victim”. This stereotyping can have a bearing on the sentences given by the magistrates as they themselves are not exempt from the influence to stereotype people around them. Magistrates are bound to be influenced by their perception of what and how rape “occurs” and how it ought to be reported.

2.3 Cultural inhibitors to reporting sexual abuse

Research on cultural inhibitors to reporting gender-based violence and sexual assault indicates that silence cannot be equated with acquiescence. While this may be common for female victims, it goes without say that children being the most vulnerable in society also fall in the same cycle of silence. This is because children may be afraid, unsure of what would

have happened to them, lack the support of their family including the fear of the consequences that might befall them, especially if the accused is a relative or caregiver. In addition they may keep quiet about the abuse for fear of being blamed for the event and these become the hindrances to reporting. At times the silence may not be on the part of the child but on the part of the family who may sweep issues under the carpet for fear of backlash from their community. Since mothers are often held accountable as custodians of their children's chastity, they may also fail to report cases of a sexual nature.

The requirements to be met by a rape complainant should therefore not be divorced from the cultural context in which the crime occurs since it might contribute significantly to the fact that swift action was not pursued. In the case of *State v. Musumhiri* (above) Mrs Justice Tsanga observes:

“A young girl who has been raped may not make a voluntary report because her cultural context makes it difficult for her to do so without being re-victimised. She may fail to report without delay as expected by the law, because in her lived reality she has no idea if she will receive support or condemnation, if not eternal damnation. She may not report to the first person she could reasonably be expected to report for fear of being reduced to a liar and a tease. It is these realities that must therefore be considered in rape appeals.”

While the above relates to cases on review (where the superior courts review the handling of cases including judgements passed by magistrates in the lower courts) it should be considered in all rape cases involving minors. This is particularly important in view of the fact that the accused and their defence team often seek to discredit the survivor by emphasising issues such as late reporting of cases, etc. In other words, the late reporting of the crime should never serve as a deterrent to the realization of justice because delays in reporting of cases should be viewed in the context of socio-cultural lenses. Similarly, in dealing with rape cases involving minors a comprehensive appreciation of all these socio-legal and cultural inhibitors that have an effect on the collection of evidence and the administration of justice must be considered during the investigation and trial process.

Another issue of importance is the practice of judicial precedence which involves judicial officers making similar judgments in similar cases. Lower courts (e.g., magistrates courts) are also required to follow the law as interpreted and laid down by senior courts (i.e., the High,

Supreme and Constitutional Courts). So where problematic decisions are made (e.g., where there is strong apparent evidence of a guilty accused escaping justice) and become judicial precedent this pattern of judicial decision making is likely to continue to the detriment of the interests of justice and ultimately the public interest.

This danger is exacerbated by the fact that there are no sentencing guidelines and this makes the enforcement of the law inconsistent, unpredictable and open to justified criticisms of unfairness. Coltart (2014) correctly observes that there is no mandatory minimum sentence for the crime of rape in Zimbabwe although one can be sentenced to life imprisonment for the most serious examples of the crime. This unsatisfactory position is noticeable if the following two cases are compared and contrasted.

In the case of *State v. Ivhurinosara* CRB No. 225/10; HH-335-13 a 30 year old man accused of raping his wife's sister who was 15 years old at the time was sentenced to 8 months imprisonment which was fully suspended on condition that he married the young girl. Such sentences act as a deterrent to justice as these loopholes result in perpetrators being set free or being given lenient sentences. In the Bulawayo case of *State v. Mpande* HB-43-11, a child of 3 years was raped by their custodian and infected with syphilis. The man was sentenced to an effective sentence of 15 years which the appeal court ruled was too lenient (Feltoe, 2017).

While sentencing is a secondary issue that requires to be addressed especially on the need for consistent sentencing, the primary issue that needs to be addressed is the evidence collection process. Therefore it is important that evidence is thoroughly investigated, presented and adequately analysed in the courts of law to allow justice to prevail. If concrete evidence is presented in the courts and fair judgements are made based on such evidence, the quality of the practice of judicial precedent will improve.

2.4 Defining rape

Child sexual abuse is recognised as one of the commonest forms of violence against children that has been recognized internationally as a crisis that needs to be addressed. MacFarlane (1985) defines child sexual abuse as a “wide range of behaviour, from fondling and exhibitionism, to forcible rape and commercial exploitation through prostitution”. The Multi-Sectoral Protocol (2012) defines sexual abuse as “any act of actual or threatened physical intrusion of a sexual nature, whether by force or under unequal, exploitative or coercive

conditions.” In cases that involve children this refers to involving a child in sexual activities in which the child:

- Does not fully comprehend the sexual activity
- Is unable to give informed consent to engage in the activity
- Is not developmentally prepared for such sexual activity
- Is subjected to sexual activity that violates the law including the social taboos, norms and values of a society.

By its nature sexual abuse encompasses rape and inflicts varying degrees of trauma and violence on the victim. This is because a child’s bodily integrity and dignity are violated owing to their vulnerability. Therefore, rape is only but one component within a broader range of sexual violations. This study specifically focuses on rape.

In defining rape, section 65(1) of the Criminal Law Code⁵ clearly provides what it involves: sexual intercourse in which the female victim does not consent. Although rape is a crime which is based on the sex of the victim, it is more generally influenced by the gendered attitudes of society.

In addition Section 64 of the Criminal Law Code⁶ provides that sexual intercourse with a young person under the age of twelve years is termed as rape, aggravated sexual assault or indecent assault. The facts of the case determine which of the sexual crimes the accused is to be charged. An accused should be charged with the rape of a young person where the accused has had vaginal or anal intercourse with them without consent. It is important to note that because of their minority status, the issue of consent immediately falls away when one is dealing with victims below the age of 12 years. This is because according to the law, children below the 12 years of age do not have the capacity to consent to any sexual activity.

⁵ Section 65(1) of the Criminal Law Code provides:
“If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse—
(a) the female person has not consented to it; and
(b) he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it;
he shall be guilty of rape and liable to imprisonment for life or any shorter period.”

⁶ A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person, or sodomy.

2.5 International and regional human rights frameworks

The protection of a person's bodily integrity and the right to dignity of a human being are human rights that are enshrined in human rights protocols which include the United Nations Economic and Social Council Resolution Economic and Social Council Resolution 2005/20 on Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (UNESCR), the Convention on the Rights of the Child (CRC) and the African Charter on the Welfare of the Child (ARCWC). Human rights are entitlements for everyone irrespective of age. It is therefore important to recognize that children are human beings who also have rights that need to be observed and these rights include the right to be protected from any form of abuse including their right for dignity and bodily integrity.

2.5.1 *Convention on the Rights of the Child (CRC)*

The CRC is one of the human rights protocols that provides for the rights of children and there are a number of provisions laid out in the protocol. Zimbabwe is a signatory to the CRC and has ratified all of its provisions and therefore as a state it is bound by them. The following provisions of the CRC set out how to deal with issues relating to children.

Article 4 of the CRC states:

‘State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present convention.’

Article 12 of the CRC mandates:

‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

Article 19 of the CRC stipulates:

‘State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, **including sexual abuse**, while in the care of parents, legal guardians or any other person who has the care of the child.’

Article 34(a) of the CRC provides:

‘State parties shall undertake to protect the child from all forms of sexual exploitation and sexual abuse. State parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: the inducement or coercion of a child to engage in any unlawful sexual activity.’

Article 37(d) of the CRC provides:

‘State parties shall ensure that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.’

Each of the above provisions has a bearing on the rights of a child victimised by sexual abuse. Such cases must be dealt with quickly without prejudicing the best interests of the child. As a signatory to the instrument, Zimbabwe is bound to ensure that children are protected from sexual abuse. This ought to be realised by having appropriate legislation in place to combat such abuse and ensuring that laws on evidence collection are compliant with the provisions of the CRC. While the CRC does not explicitly deal with the rights of children as victims or witnesses in the criminal justice system, it is still a relevant instrument in recognizing the State’s obligations in promoting the best interests of such children. Therefore, this means that the State is mandated to ensure that all procedures involved in the collection of evidence involving the rape of minors comply with their best interests. Ndou (2018) concurs and states that:

“whatever situation in the family or public sphere in the courts of law or institutions, consideration should always be made bearing in mind what is best for the child. Article 12 of the CRC also states it is the state’s responsibility to ensure that alternative forms of communication that enable the child to express themselves. It can be noted that Zimbabwe has adopted a number of ways that include the use of ‘writing, drawing, sign language or even the use of anatomically correct dolls” (Ndou, 2018).

2.5.2 United Nations Economic and Social Council Resolution 2005/20 on Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (UNESCR)

The United Nations Economic and Social Council Resolution 2005/20 on Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (UNESCR) is an instrument adopted for use by member states and organizations working with children. The Resolution sought to provide model guidelines to use when dealing with children who come into contact with the criminal justice system. One the reasons for the adoption of the ECOSOC is that it recognises that:

“children who are victims and witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process.”

This emphasizes the need for procedures such as evidence collection to be thorough and effective and child friendly to avoid:

“serious physical, psychological and emotional consequences of crime and victimization for child victims and witnesses, in particular in cases involving sexual exploitation” (ECOSOC 2005).

Article 30(c) and (d) state that state parties should:

“ensure that trials take place as soon as practical, unless delays are in the child’s best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;

use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child’s testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child’s testimony.”

This specifically speaks to the rights of children and the importance of ensuring that the evidence collection process is sensitive and does not cause trauma to the children in question. In that regard, cases involving children ought to be investigated with expediency and given

priority by the courts of law unless the delay is to serve the best interest of the child. It is also important that children are well managed during the investigation process but also by the courts dealing with their cases and that protective measures are put in place to promote a free and fair conducive environment if the child is able to testify (Ndou 2018).

2.5.3 African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child (ACRWC) is the regional instrument that promotes the rights of children in the African context. Several articles stipulate the state's obligations in protecting and upholding the best interests of the child. The ACRWC notes the need to protect children from child abuse as enshrined in the following articles:

Article 16 of the ACRWC provides:

‘State parties to the present charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including **sexual abuse**, while in the care of the child.’

“Protective measures under this act shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for **identification, reporting, referral investigation, treatment, and follow up** of instances of child abuse and neglect.’

Article 27 of the ACRWC provides:

“State parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity.”

The above-mentioned articles mandate states to ensure that all forms of sexual abuse which include rape are to be curbed. This means that policies, laws and administrative mechanisms are adopted and in relation to this study it is important to note that the delays experienced in the collection of evidence in rape cases, the delays in the court system and the

dysfunctionality of the forensic lab are all impediments to the achievement of justice. Kudya (2006) notes that the:

“delays in conclusion of child rape cases interfere with the victim’s schooling and recreation time. The fact that facilities like the victim-friendly courts which are designed to assist the child in giving evidence are not operating up to standard detract from the efforts to have the accused effectively dealt with. If the accused is not dealt with properly that sends a wrong signal to would-be offenders.”

It is therefore critical that the provisions of the law are properly implemented to ensure justice is realised. This can be done by assessing the effectiveness of the various actors involved in the evidence collection process by determining their compliance with the international and regional instruments cited above.

2.6 National legislation

2.6.1 *Zimbabwean Constitution*

Zimbabwe, as signatory of the various international and regional instruments, has put in place various laws that protect children from sexual abuse. The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (the Constitution) as the supreme law of the country recognises the need to protect children. Section 19(1)⁷ and Section 81(2) and (3)⁸ emphasize the nation’s obligation to implement measures and policies that safeguard the child’s best interest by protecting them from maltreatment, neglect and from any form of abuse. However the claw back of this provision is that the state is bound to perform the role subject to the availability of resources which casts doubt on the state’s commitment to protecting children despite resource constraints. Section 81 of the Constitution states that a child is any person below the ages of eighteen years and this category of citizens has the right to equal treatment in the criminal justice system including the courts of law. This then leads to the question, ‘What support are these children entitled to receive in the courts of law and what levels of support are available in the Zimbabwean criminal justice system?’

2.6.2 *Children’s Act [Chapter 5:06]*

Zimbabwe has the Children’s Act [Chapter 5:06] which broadly focuses on and emphasizes the welfare of the child. The purpose of the Act is to make provisions that promote the

⁷ Constitution of Zimbabwe, 2013.

⁸ Constitution of Zimbabwe, 2013..

protection, welfare and supervision of the child in any setting. The provisions of this Act include the importance of having organizations and institutions that provide support in the chain of evidence collection. One of these institutions is the Department of Social Welfare which should provide a social worker to assist the child especially in the absence of a legal guardian. However, this seems to be a daunting task owing to the lack of funding and support to the department by the government. Makamure (2010) states that the Department of Social Welfare is extremely understaffed hence the system's inability to function effectively. The lack of social workers has a bearing on the evidence collection process which can be delayed especially in cases where the victims need support from the social welfare. Kudya (2006) notes that the inefficiency of this system has a bearing on the collection of evidence as the process can be marred especially when the child forgets the details of the rape incident.

2.6.3 Criminal Procedure and Evidence Act [9:07] (CPEA)

Zimbabwe's Criminal Procedure and Evidence Act [9:07] (CPEA) provides for witnesses in court cases. Section 244⁹ of the CPEA states that no person shall be excluded from giving evidence unless stated otherwise in the Act. Therefore children are not exempted from giving evidence in court. Children who have been raped may or may not be competent to speak about and articulate exactly what has happened to them. This then raises the importance of having qualified personnel who are trained to deal with children and assist them in giving the best evidence they can to the court. Section 245¹⁰ of the CPEA allows the court to exercise its discretion and exempt anyone from testifying on the basis of their lack of competence. While these above-mentioned sections are not child specific, it is assumed that they encompass children as well. They raise important questions about children's competence, compellability, their best interests and the need for trained professionals, e.g. psychologists, in helping the courts to determine such issues.

Section 319 of the CPEA provides for the protection of vulnerable witness. Witnesses are an important part of criminal proceedings. Mugebe (2016) concurs and states:

“witnesses in criminal proceedings occupy a central position within the criminal justice system. From the onset of investigations, their central role

⁹ “Every person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in Zimbabwe.”

¹⁰ It shall be competent for the court in which any criminal case is depending to decide upon all questions concerning the competency and compellability of any witness to give evidence.

revolves around assisting the police during investigations as well as giving evidence in court which assists in achieving effective prosecutions.”

It is important to note that vulnerable witnesses encompass all age groups and it is in the court’s discretion to ensure that evidence is obtained from witnesses in a safe and conducive environment. The protection of vulnerable witness is one of the determinants in the establishment of the Victim Friendly Unit (VFU) which seeks to protect victims during the evidence collection processes within the system. In accordance with Section 319 of the CPEA the provisions for the protection of vulnerable witnesses include:

- Assistance of a support person during court proceedings.
- Availability of closed-circuit television (CCTV) in all specialized courts or use of some other appropriate means.
- Use of an intermediary, a specialist interpreter to work with vulnerable witnesses.
- Establishment of the Multi-Sectoral Victim Friendly Court Sub-Committees, referred to in the Protocol as the National Victim Friendly System Committee (NVFSC) and Subcommittees (VFSCCs).
- Use of anatomically correct dolls for child survivors and witnesses.
- Provision of witness expenses by the Government.
- *In camera* trials (trials which are not held in public).
- Allowing judicial staff to behave less formally before and during trial.
- Awareness raising campaigns.¹¹

The provisions also led to the development of the Protocol on the Multi-Sectoral Management of Child Sexual Abuse in Zimbabwe (2012) which is relied upon as a guideline for the relevant actors in the criminal justice system. The Protocol states the mandate of each stakeholder, timelines and how best the evidence can be collected. All this is designed to ensure that the process is systematic and comprehensive in nature.

However, despite the above-mentioned legislation and Protocols in place, the system is not functioning in a coherent and systematic manner. The lack of coherence is a breeding ground for inefficiency and ineffectiveness in the system and this is due to a number of reasons,

¹¹ Multi-Sectoral Protocol, 2012.

including lack of funding, absence of requisite facilities such as rape test kits, dysfunctional systems such as the forensic lab and the centralization of services.

2.7 Best practices in evidence collection for rape cases involving minors

Evidence plays a central role in the proceedings of any case including cases of a sexual nature. Owing to the fact that in criminal trials the case or evidence against the accused has to be proven beyond reasonable doubt, there is a very clear need for the robust collection of appropriate evidence. There are various types of evidence upon which the courts rely. These include oral, documentary and real evidence, amongst others.

2.7.1 Oral evidence

The most common form of evidence is the oral evidence of witnesses and this is the case where the witness gives an account of the facts of the case. In stating these facts, the court has to ensure that the witness is a credible witness in accordance with the CPEA. Kleyn and Viljoen (1998) note that in evidence presented in court, caution and circumspection must be applied in the treatment of certain evidence when considering its credibility. This is called the cautionary rule and is applied in many cases including those of a sexual nature involving children. Kylen and Viljoen (1998) note that owing to the susceptibility, imagination and inexperience of children, they may be unreliable witness. While such is the case, it is noted that in rape and other cases of a sexual nature, such as aggravated indecent assault, indecent assault and sexual relations with a person under the age of 16, the Zimbabwean courts used to adopt the cautionary rule to avoid false incrimination. However, in the case of *State v. Banana* 2000 (1) ZLR 607 (S) the Supreme Court ruled:

“the cautionary rule in sexual cases is based on an irrational and outdated perception and has outlived its usefulness. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. There were no convincing reasons for its continued application. 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. It is no longer warranted to rely on the cautionary rule of practice in sexual cases.”

Despite the relinquishing of the cautionary rule, the courts are still required to carefully consider the nature and circumstances of alleged sexual offences. It should be noted that in the context of sexual cases, the strongest evidence which the State will lead is the medical evidence. While medical evidence which is gathered by observation of the condition of the

victim indicates possible penetration and supports the fact that the incident occurred, its greatest weakness is that it does not prove that the complainant is the culprit. This then calls for the use of forensic evidence to assist in ascertaining the identity of culprit or at least in exonerating the accused in cases where they are innocent. The lack of forensic evidence was apparent in the case of *State v. Mareya* (above) where the accused father of the victims was acquitted based on the medical evidence provided in the medical affidavit. While penetration was noted, it was inconclusive as to who raped his children hence he was set free.

In addition to medical evidence, corroboration often takes the form of testimony from the complainant's alibi witness or the person to whom they confided the rape incident. While it is an expectation to have corroborative evidence, its cumulative effect must be carefully considered by the court. However in *Mandeyi* HH-34-13 the court observed that in cases of a sexual nature, it is permissible for a court to convict the accused even without corroboration but this should only occur in cases where the merits of the complainant and the demerits of the accused are without question. It is further noted that in cases involving young children the degree of corroboration or other factors required to reduce the danger of relying on the child's evidence vary depending on the age of the child and other circumstances of the case.

2.7.2 Expert Evidence

Kylen and Viljoen (1998) note that expert evidence is a particular form of oral evidence that is given by an expert in a particular field. The expectation is that an expert is someone who has greater knowledge and experience in a particular field than the court. It is also expected that the court must be satisfied that the person is an expert in their field of operation. In cases of rape and indecent assault or any cases of a sexual nature, experts such as nurses, doctors, forensic scientists and trained counsellors are called in as witnesses to assist in the proceedings. There are often competing experts from both the prosecution and the defence teams in relation to whom the court exercises its discretion based the legal criteria, the reliability and credibility of the experts as well as the relevance of the evidence provided. However as stated by Kylen and Viljoen (1998), "the court is not obliged to follow the expert's opinion."

2.7.3 Documentary Evidence

In addition to oral evidence, documentary evidence may be presented in a court of law. Examples of documentary evidence include affidavits, sketch plans, drawings, letters, etc.

While this is supporting evidence and can be presented in the court of law, Kylen and Viljoen (1998) explain that this type of evidence has less force or weight than oral evidence because the witness cannot be cross-examined. However in exceptional cases, where required and at best feasible, a person involved in the creation or certification of the document may be called to give evidence.

2.7.4 Real evidence

Real evidence is evidence that is in the form of objects that include weapons, clothes and any other material that is relevant to the case at hand. Sometimes the court visits the place in which the incident took place to ascertain the evidence presented in court. In this category is also evidence obtained from DNA which may include blood samples, fingerprints and semen, amongst others. Sections 41B and 264 of the CPEA state that bodily samples may be collected for the purposes of investigation. It is in light of cases of a sexual nature that, where possible, sample evidence be collected for investigation purposes. Therefore, in accordance with these provisions, police stations ought to have rape test kits that are administered in the event of rape cases.

2.8 Evidence obtained from children

Rowland (1997) notes that children often have vivid imaginations and have a tendency to fantasize and imagine incidents and these may seem as reality to them. In cases of a sexual nature, it has to be noted that children may be prone to intimidation and suggestibility, especially from parents who may want to implicate innocent persons. In *State v. Sibanda* 1994 (1) ZLR 395 (S), the court set out the dangers inherent in testimony from children as follows. The court accepted that the 6 main objections to a child's evidence are:

- Children's memories are unreliable — particularly for detail;
- Children are egocentric and not likely to consider the effect of their statements on others — particularly pre-school children;
- Children are highly suggestible;
- Children have difficulty distinguishing fact from fantasy;
- Children make false allegations, particularly of a sexual assault;
- Children do not understand the duty to tell the truth.

Judge Beck advises that courts take the following steps to reduce the risks arising from evidence given by children:

- The judge and prosecutor must put the child at ease in the court. Efforts must be taken to make the child feel relaxed rather than intimidated by the atmosphere of the court; in other words it should not feel threatening and strange.
- The judge must use his or her authority to control the examination and especially the cross-examination of child witnesses. There must be no unfair questioning aimed at overbearing, overpowering or confusing the child or trying to prompt the child unduly. The child should be allowed to respond naturally and spontaneously.
- The child's mental development and maturity must be assessed very carefully. One has to be careful in applying the normal tests of credibility such as demeanour, consistency and probabilities to child witnesses. The child should not be expected to behave like a mature, adult witness.

In addition, in the cases of *Ncube* 2014 (2) ZLR 297 (H) and *Musasa* 2002 (1) ZLR 280 (H) Hlatshwayo J held that while the evidence of child witnesses must be approached with caution, such caution must be creative or positive caution, where a judicial officer uses knowledge of psychology or other relevant disciplines in order to maximise the value of such testimony:

”It is essential to note that psychological research has established that young children do not fantasize about being abused, raped or unusual horrific occurrences but have their fantasies characterized by their daily experiences. It is highly unlikely therefore that children can make allegations of that nature without any valid reason. To overcome the dangers which are inherent in testimony from children such as the danger arising out of their tendency to fantasize, the court should see whether from the evidence the events related by the child really did happen. The existence of corroborative evidence is the safest assurance against wrong conviction. There is, however, no rigid requirement that a child's evidence must be corroborated. The court can convict on the basis of the uncorroborated testimony of the child witness provided that the child can speak for themselves.”

2.9 How are the provisions enforced in the judicial process

The Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe (2012) was designed to enforce the legal provisions and the international instruments (Figure

1, above). This is a policy document which outlines the roles and responsibilities of the various actors stipulating the turnaround time for the management of cases as shown in Table 2. Figure 1 and Table 2 should be read together.

Table 2: Showing the time lines within which the stakeholders should complete their designated work during the management of cases of sexual abuse and violence.

ACTOR	SERVICE	TIMELINE
Medical Institutions/Civil Society	Medical Provision (Post exposure prophylaxis, Emergency Contraception)	72hrs.
Police Officers	Docket Preparation	14 days
Department of Social Services	Case Management	48 hrs.
Magistrates Court	Trial	3 days

While the Protocol is not legally binding, its provisions provide a benchmark on the best manner in which to handle cases of a sexual nature. One can therefore infer that if cases are to be handled in such timelines, the anticipation is that evidence ought to be collected within the timelines and in a comprehensive manner. While the above is the ideal, this however is not the case in practice owing to the challenges outlined in chapter four.

2.10 Conclusion

This chapter focused on reviewing relevant literature available on the subject matter. The social construction of rape was discussed and the requisite legal frameworks were explored. These frameworks include the international instruments which Zimbabwe has ratified which include the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The chapter also focused on the relevant laws available in Zimbabwe which include the CPEA and provisions of policies such as the Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe (2012).

CHAPTER THREE

3.0 RESEARCH DESIGN

3.1 Introduction

This chapter describes the research methodological approach undertaken in this study. The chapter commences with how the research was initiated and then deals with its methodological framework, how the data was collected and the ethical considerations raised by the research. In particular the grounded theory and human rights approach were used to understand the lived realities.

3.2 The Starting Point

My experience in the development sector has shown me that rape is an issue which requires to be addressed and managed using a multi-pronged approach. Organizations have run awareness campaigns lobbying for mandatory sentences of rapists following upon the advocacy work of women's organisations. In a bid to understand the feasibility of mandatory sentencing I started reading about the subject matter including important relevant cases as well as international and national legislation available in Zimbabwe. I designed my research questions and assumptions of the study and focused on the several approaches that can be used in the collection of evidence in rape cases involving minors. After working on the research design, I then mapped out my potential interviewees and these included organizations that are in contact with children in the criminal justice system.

At the outset of my research, I decided that although the findings of the research would benefit child victims of rape, I would interview the stakeholders who are responsible for managing them throughout the criminal justice process and beyond. It was in the course of the data collection process that my research evolved as my assumptions were challenged. In fact, Bentzon et al. (1998) encourage a researcher to be open-minded about the subject matter of their research and aware of their assumptions and reasons for them. As I progressed with the research I came to the conclusion that for the realisation of justice in rape cases involving minors an effective evidence collection process was of paramount importance and consequently made this the focus of my research. I therefore shifted my focus to the different agencies in the criminal justice system which include the police, magistrates, civic organizations, doctors, nurses, forensic scientists, psychologists among others and their role in the evidence collection process.

One of the reasons for engaging such stakeholders is that there has been concentrated advocacy on mandatory sentencing for rape cases and this has been spearheaded by women's organizations. Mandatory minimum sentences are designed to reduce crime and assuage public fear while establishing severe and consistent punishment for serious crimes. This call for mandatory minimum sentencing has been advocated after benchmarking with South Africa which enacted the mandatory minimum sentencing to crimes of sexual abuse. This came into effect with the passing of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No.32 of 2007. The sentences were divided into three categories ranging from ten years to life imprisonment for sexual crimes.

Despite such changes to the law, Baehr (2008) notes that "in the context of sexual violence, mandatory minimum provisions have failed to achieve their stated goals." This is because in spite of a decade of mandatory minimum sentencing, the reported rape cases remain relatively constant. This can be attributed to the fact that sentencing is merely the last step in the criminal justice process and no matter how proportionate, fair or punitive the sentencing may be, the crime still requires conviction based on solid evidence provided by the state prosecutor. It was therefore based on this understanding of mandatory minimum sentencing that I sought to interrogate the evidence collection process and the mandates required to be performed by the various co-operating and co-ordinated stakeholders involved in that process. This is because successful prosecutions rely on the evidence presented by the prosecutor to the court. I therefore focused on tracking the collection evidence process and the lived realities on the ground especially where it concerned children who have fallen victim to sexual abuse. I therefore engaged service providers in Harare, the capital, as they were the most accessible and convenient for me.

3.3 Research Design

Bentzon et al. (1998) refers to the research design as the process of "creating a systematically organized framework which guides and directs the collection, analysis and write up of the data that needs to be collected." For the purposes of the research, I undertook the qualitative approach to research as I sought to understand this social phenomena. I wanted to gain an in-depth understanding of the legal proceedings in rape cases involving young children below the age of 12 years. In mapping out my research I drew up a list of potential actors and interviewees that would be part of my study. After mapping the respondents, I took time to design the research instruments which include the interview guide, focus group discussion

guide as well as the observation guide. Once completed, I then planned and booked appointments for the research interview sessions. Table 3 shows the respondents who were engaged in this research.

Table 3: Showing details of the respondents

KEY INFORMANT	DESIGNATION	MALE	FEMALE	TOTAL
Ministry of Justice, Legal and Parliamentary Affairs	Regional Magistrate	-	1	1
Zimbabwe Republic Police	Victim Friendly Police Officer	2	-	2
National Prosecuting Authority	Prosecutor	-	2	2
Zimbabwe Women Lawyers Association (ZWLA)	Legal Officers	-	3	3
Family Support Trust	Doctor, Nurse, Counsellor, Director	2	3	5
Justice for Children	Legal Officer	-	1	1
Adult Rape Clinic	Nurse, Program Officer	-	2	2
University of Zimbabwe	Lecturer	1	-	1
TOTAL		5	12	17

3.4 Research Instruments

From the beginning of the research, I was cognizant of the fact that dealing with organizations would pose challenges. I therefore made use of the research letters targeted specifically to the possible respondents of the study and were signed by the senior member of the academic staff at SEARCWL. This helped in authenticating my research and removing any doubts associated with carrying out research in Zimbabwe. I also wrote emails to the relevant organizations including reaching out via the respective websites and social media pages. Some took a month to respond while I had to follow up on others several times before they referred from one office to another.

My research was assisted by a number of data collection instruments which included in-depth interviews, observations, case study reviews and focus group discussions. Below is a summary of how each of the instruments was utilised.

3.4.1 In-depth Interviews

I used in-depth interviews since my research was anchored in obtaining an in-depth understanding of the law and how those applying the law interact with children especially in the collection of evidence in rape cases involving minors. This is because the law is inert on paper and only becomes operational through the various actors and structures responsible for its implementation. Thus I sought to interview the stakeholders who have interacted with children or have an understanding of how to deal with children where there are allegations of rape. I had discussions with police officers, nurses and counsellors who deal with children who have been sexually abused. I was able to understand how the evidence collection process is undertaken and how best they observe the best interests of the child principle. These discussions helped to shape my research and my research narrative. While some of the assumptions were challenged, these interviews were the best way in which I was able to obtain data and gain insights into how rape cases of minors are handled and how evidence is collected.

One of my interviewees was the regional prosecutor who handles rape cases at the Magistrates Courts. I sought to understand how the courts handle rape cases and the evidence upon which they rely to convict persons accused with the rape of minors. I had to interview just after lunch in her office because mornings are reserved for court processes. Although the interview was disrupted by people coming into her office, I had an opportunity to see what a day in the life of a prosecutor was like. Papers, signatures, office visits, questions, judgements, pregnancy termination certificates and many other issues are the order of the day. This interview helped me to understand how the court system functions and how evidence is used in the criminal justice system. This method was beneficial as it created a rapport between the respondent and myself thereby creating a more natural form of exchange within a socially conducive environment (Stewart, 1997). After the interview, I could not help but ask her about her emotional and mental well-being seeing that, as a young lady, she was dealing on a daily basis with some of the most horrific violations against that could ever happen to children. She was very open and admitted that what she experienced at work had affected her marriage and sex life and made her quite apprehensive about who interacts with

her children. I sought to understand how the lived realities of working in the justice system affected women especially when they involve their having to carry burdens which are not their own.

3.4.2 Focus Group Discussions

I also employed focus group discussions as part of the research. They were held with the legal officers at one of the civic organizations that offers legal education to communities. My goal was to understand the challenges faced by practitioners who deal with vulnerable survivors in the criminal justice system. Building a rapport with them made these discussions enriching and also being a trained a sociologist, I gained insight from a legal practitioner and this added value to the purpose of my research.

3.4.3 Observations

I adopted this approach as a complementary instrument in a bid to observe details around infrastructural development, accessibility of services among other issues that may directly or indirectly affect the collection of evidence. I mainly looked at where the service providers are located and based on the lived realities if the vulnerable are able to access these resources on a timely basis. This is because such accessibility has a bearing on how evidence is collected and how it can be used in a court of law. In my observations I therefore took time to observe the Victim Friendly facilities at the police station and the courts, the accessibility of organizations that offer legal aid to the vulnerable as well as civic organizations that offer medical assistance to the victims. I also observed whether some of the facilities have child friendly corners or facilities that assist children in their interaction with the criminal justice system.

3.4.4 Case Law and Court Records

As I embarked on this study, my initial set of assumptions focused on how the current evidence collection models are not aligned with the international instruments that Zimbabwe has ratified. While these assumptions were challenged as my research evolved, I realised how important it was to find court records including cases that would support the new findings of my research. In researching and reading the newspapers, I came across the case of *State v. Mareya* (above) which one organization had taken up and was working to have the Magistrates Court judgement reviewed by a higher court. I immediately contacted the organization, set up a meeting and after a fruitful discussion, discovered the finer details

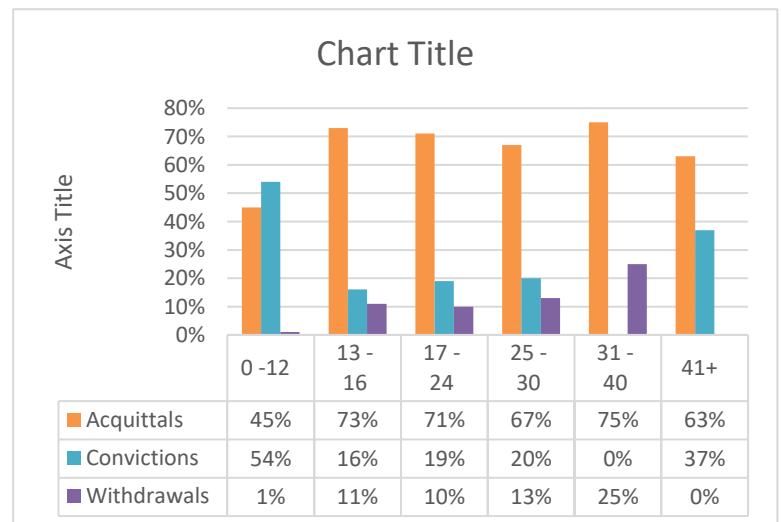
about how the case was conducted and how the judgement came to be passed. After the focus group discussion, I took the time to go through the case, analysing it in the best manner I could. Using all the knowledge gained from my social justice and family courses on the Masters programme at SEARCWL, I realised that there were issues I could investigate further and use as supporting literature for my studies. It was a refreshing moment as this case immediately summed up what my research was so much about and therefore it became the case which anchored my research.

As a support to my study, I also sought statistics on the cases and acquittals within the system. While I failed to access and get recent statistics, I opted to use literature that had been presented in previous research so as to give a pictorial view of how cases involving minors are handled in the criminal justice system. Mugebe (2016) provides a diagrammatical representation of data collected on the levels of case convictions and acquittals of cases of a sexual nature covering different age groups (Table 4 as read with the graph in Figure 2).

Table 4: Showing statistics of rape cases in the Harare Regional Courts (2015) (Source: Mugebe, 2016) (below, left – Read with Figure 2)

Figure 2: Graph reflecting statistics of rape cases in the Harare Regional Courts (2015) (Source: Mugebe, 2016) (below right – Read with Table 4)

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



I used these statistics to support my research as they gave me an appreciation of the court judgements and understanding of the levels of acquittals for rape cases involving minors. While these statistics were fairly recent, they give a general insight into some flaws within the justice system especially when one looks at the conviction vis-à-vis the acquittal rates. While the conviction rates for the 0-12 years age group is higher than other age groups, this can be attributed to the fact that the court system deals with children's cases with urgency. However one would want to know the reasons behind the acquittals as well as the withdrawals. Could this be as a result of families deciding to solve issues at a family level or could it be as a result of corruption within the court system? Whatever the reason may be, if the decision was made to withdraw the matter, we need to ask ourselves whether the best interests of the child were properly considered. Another flaw within the criminal justice system is that there is no record of the actual statistics of cases that are not reported nor of those that fail to proceed to prosecution after they have been received by the police. While some cases proceed to the courts others do not based on the discretion exercised by the prosecutors and this also has a bearing on the number of cases that are tried and recorded. In the following chapter discussions will centre on the potential flaws in the evidence collection process and what impact they can have on the rates of acquittals in the criminal justice system.

3.5 Ethical Considerations

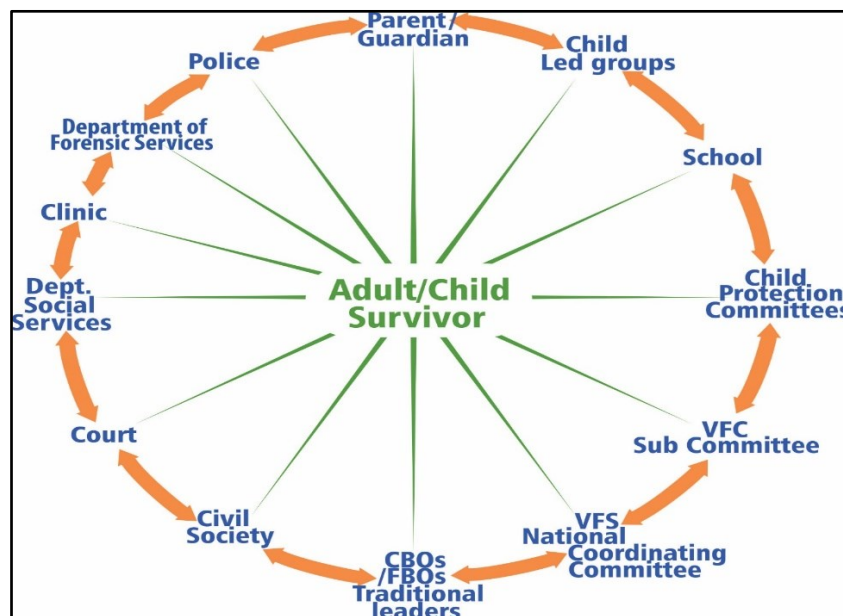
From the beginning of the research, I was cognizant of the fact that dealing with organizations would pose challenges. One of the organizations I visited required me to visit the office and book an appointment with the Director who was away on a field trip. Upon meeting the director, I was informed that he would need to consult the board as any research of any nature required the consent of the board of directors. I was then asked to come back the following week. When I returned approval had been granted and I was allowed to conduct my research.

Apart from consent, I also took the opportunity to share my research objectives and notified each of the respondents that they were free to pull out of any discussion or decline to answer any question if they felt so moved. I used a tape recorder to record the findings, but if the participants withheld their consent I relied on note taking. In addition, I also promised to share the findings with each of the organizations so as to edify their work processes.

3.6 The actors and structures analysis

In analysing the data, I employed the actors and structures approach as I sought to understand children's lived realities as they went through the justice system. The premise was to understand how the normative structures impinge on their lives (Bentzon et al., 1998). In particular, I traced actors involved in the case management process as reflected in the diagram in Figure 3 and in particular I focused on the actors responsible for the collection and maintenance of evidence.

Figure 3: Diagram depicting the various parties and organisations with which sexual abuse survivors interact



(Source: Researcher)

I therefore interviewed victim friendly police officers, prosecutors, doctors, nurses, counsellors and psychologists. I was not able to interview any magistrates although I did write a letter asking to do so. After hearing nothing I followed up on the letter and still received no response; I then assumed that my correspondence had landed on someone's desk and was ignored. However, that did not stop me from investigating other actors' roles, their obligations and the reality on the ground and noting if there were inconsistencies in relation to the law. The actors and structures approach was instrumental in the research because the reinforcement or change of gender boundaries through rights, obligations, freedoms and restrictions is seen as a continuous process of action, negation and augmentation (Hellum,

1995). This shows how important it is to focus on the actors and how they adopt processes, cultures and decisions that can promote or inhibit the collection of evidence.

In addition to the actors and structures approach, I utilised the grounded theory approach. Initially when I embarked on the research, I wanted to understand the different research methods being utilised as evidence collection. Of interest was whether the police use dolls, letters, drawings to extract evidence from children. As I gathered data, I realised that my initial assumptions were challenged and there was a need to gather more data. It was also from the data collection that I got referred to other stakeholders who became part of my study. As I interviewed these stakeholders, the dung beetle approach became the strategy for data collection. Bentzon et al. (1998) described:

‘The dung beetle method ... 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. Through this process new methodologies, perspectives are hatched.’

At the end of the research I had gathered a lot of data from the various actors and helped unearth a lot of challenges within the case management system.

3.7 Conclusion

This chapter introduced the research design that was used in the study which is the qualitative approach as the research focused on understanding social phenomena. The research instruments were discussed and these included focus group discussions, observation as well as in-depth interviews with various actors. In particular, the use of the grounded theory approach was used in the collection of data while the actor and structure analysis was also employed. The next chapter will focus on the presentation of the findings of the research.

CHAPTER FOUR

4.0 DISCUSSION OF FINDINGS

4.1 Introduction

The chapter focuses on the presentation of the data obtained during the course of the research. The main findings of the research are discussed in relation to the research objectives and the discussion will centre on how the various players within the criminal justice system are engaging in the evidence collection process effectively.

4.2 Legislative and administration measures

As part of my research I sought to understand if Zimbabwe has legislative and administration measures to protect children who have been raped, indecently assaulted or fallen victim to aggravated assault. I found that there are indeed such pieces of legislation. One piece of legislation is the Criminal Law Code (section 65(1)) which clearly defines what rape is and states as follows:

“If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse—

- (a) the female person has not consented to it; and
- (b) he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it;

he shall be guilty of rape and liable to imprisonment for life or any shorter period.”

In addition, Section 64 of the Criminal Law Code¹² provides that sexual intercourse with a young person under the age of twelve years is termed rape, aggravated indecent assault or indecent assault. These definitions help to establish with which criminal offence an accused should be charged and prosecuted. The law also provides that children under the age of 12 years are incapable of consenting to a sexual act and therefore the issue of consent is not considered in a court trial. By enforcing such laws Zimbabwe as a member country is complying with the provisions of international instruments such as the CRC and ACRWC.

¹² A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person, or sodomy.

Having functioning legal frameworks in place creates a solid basis upon which the evidence collection process can take place.

In addition to the Criminal Law Code, Zimbabwe has the Criminal Procedure and Evidence Act (CPEA) which has various sections including Sections 41B, 264 and 319B which all set out how evidence should be collected in criminal cases including cases of rape, indecent assault and aggravated assault. In addition, Section 319 of the CPEA Act has provisions aimed to protect vulnerable witnesses including the use of closed circuit television (CCTV) in all specialized Courts; other appropriate means of communication; intermediaries; anatomically correct dolls and support personnel. Such provisions are critical in the handling of cases and enables evidence to be collected in an efficient and child friendly manner. It is important to note that the Act does not limit vulnerable witness to any specific age/s which therefore means that anyone who faces intimidation in the criminal justice system is entitled to protection during court procedures.

In compliance with the international instruments which Zimbabwe has ratified, Zimbabwe has enacted the Children's Act which sets "provision of the protection, welfare and supervision of children". In accordance with the Act it is mandatory for the state to ensure that resources are provided to establish measures that promote the rights of children including protection from sexual abuse. The Act is administered by the Ministry of Public Service, Labour and Social Welfare and its Department of Social Services (DSS) is responsible for promoting the welfare of children. The DSS provides social workers to monitor and safeguard the interests of children who have been raped as they go through the criminal justice system

"This is because the DSS plays an important role in the protection of children who have experienced abuse or live in a situation where they are at risk"
(Multi-Sectoral Management of Sexual, 2012).

It is expected that when a case of a sexual nature is reported at the police station that the Department of Social Welfare is notified. In implementing the law, the DSS follows the National Action Plan for Orphans and Vulnerable Children which focuses on securing access to justice for vulnerable children including child survivors of violence. One of the administrative measures in place is the development of a national case management system, a function which is increasingly being recognised as an essential component of the Victim

Friendly Services (CFSs). These measures show that the criminal justice system has the right policies and frameworks in place to assist in the administering of justice for cases involving minors. In addition, the case management system is a critical instrument in determining how evidence is collected.

Having ratified various international protocols, Zimbabwe has formulated the Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe which is a guiding policy which is used in administering justice in which child sexual abuse has occurred. According to the Policy, each stakeholder has a mandate to fulfil in the handling of cases that involve children and there are set timelines for each stakeholder to perform their specific mandate in terms of the Protocol.

4.3 Effectiveness of the legislative and administrative measures

The legal frameworks, i.e., the legislation and the policies that are in place are important instruments which meant to be used in combating sexual crimes in Zimbabwe. Zimbabwe has developed its sexual offences laws by introducing improvements and reforms through the Criminal Law Code. In itself, the sexual offences provisions contained in Criminal Law Code are an improvement on those of the Sexual Offences Act which was more limited in its scope, definition and treatment of such offences. The enactment of the Criminal Law Code expanded the scope, definition and levels of sexual offences in that it recognised the crimes of rape, sodomy, indecent assault as well as aggravated indecent assault. Like the Sexual Offences Act, the Criminal Law Code also recognised that the act of non-consensual sex is a criminal offence. Therefore the Criminal Law Code should be welcomed as an attempt by the state to improve its fight against sexual crimes.

Another positive development is the removal of corroboration rule in rape trials, including those involving children. This came into effect as a result of the case of *State v. Banana* (above) and such a development is in accordance with acceptable regional standards.

This research has shown that the law on rape in Zimbabwe is developed in a structural manner. It is a positive development that there is adequate law in place to adequately cover the crime of rape against children. However, the question is whether this law is being effectively interpreted and implemented or enforced on the ground and in practice. Therefore, while the laws on rape have been improved such changes also need to be implemented by the

requisite structures, systems and actors responsible for delivering justice. In other words, positive changes to the substantive law will need to be coupled by changes in the implementation of the law in all sectors.

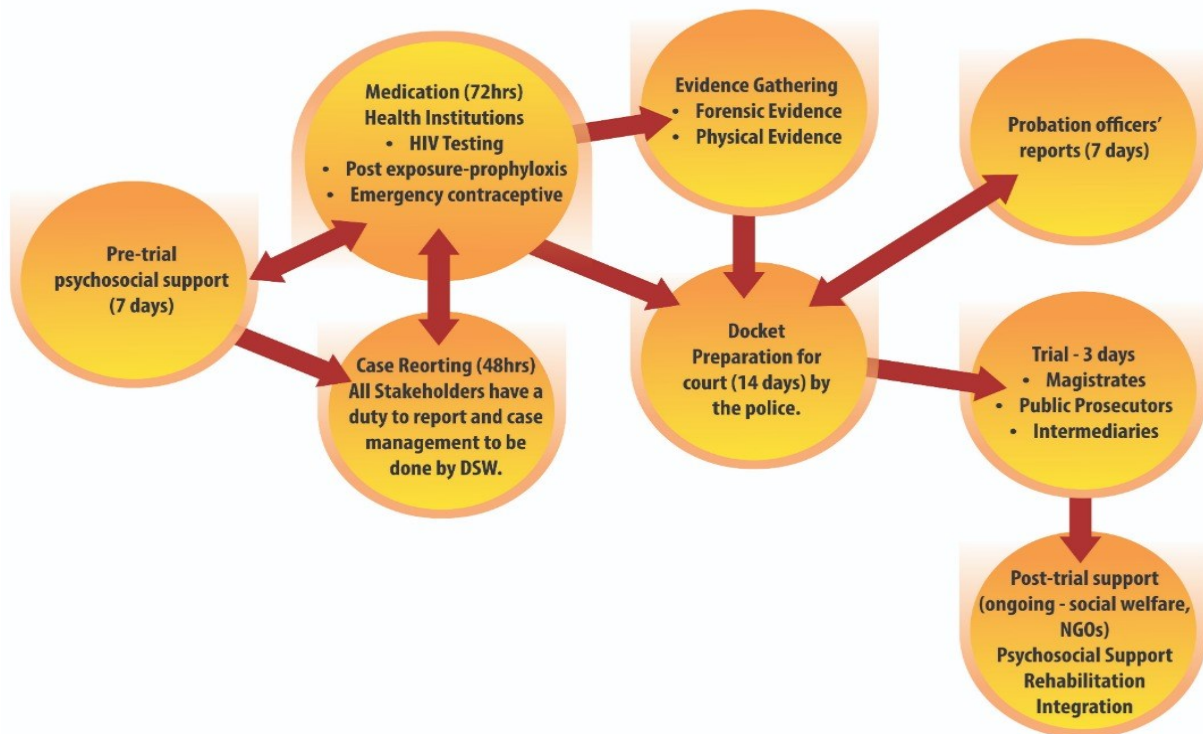
The diagram in Figure 4 shows each stakeholder in the chain of justice delivery has an obligation to ensure that evidence is collected, administered and submitted to the next level within a specific timeframe. For example, the community leaders and caregivers have an obligation to report all cases of sexual abuse within 48 hours to the responsible authorities. The danger here is that late reporting often occurs. Reporting early has its benefits on the collection of evidence and hence the fact that caregivers report the cases quite late compromises the quality of the cases presented in court.

In addition, the police have a responsibility to prepare the necessary docket within 14 days and this includes the collection and compilation of all evidence to be presented to court. This research unearthed that sometimes docket compilation can take more than the prescribed period owing to challenges such as the lack of resources, including fuel to visit the crime scene and stationery. At times police officers use their own funds to expedite the processing of dockets.

The diagram also shows that it is essential to collect physical and/or forensic evidence. This is a defunct procedure as there is no functional laboratory within the government structures. If cases require forensic evidence, services are outsourced to listed suppliers and thus further compromising the evidence collection process.

Therefore, while the Protocol is a welcome step towards the achievement of justice, the various stakeholders and service providers are facing serious challenges in fulfilling their mandate under the Protocol and thus undermining the quality of the important evidence collection process as well as the evidence itself. One of the shortcomings of the Protocol is that it was not legally binding on any of the stakeholders and no service provider is legally bound by its provisions. At most service providers can only be encouraged to comply with the Protocol.

Figure 4: Diagram depicting the evidence collection process and the timelines



4.4 The community's role in the evidence collection process

The community has a role to play in the protection and welfare of children including the welfare of children who have fallen victim to child abuse. The community is inclusive of all stakeholders which include parents, teachers, religious and traditional leaders among others. As a stakeholder, the community is a key component in the strengthening of evidence collection because rape occurs within the community. In addition, the community has an obligation to protect children from harmful practices while advocating for the prevention of any form of abuse and establishing links with service providers.

It is vital to note that in African societies both individual and communal rights exist which means that children's lived realities ought to be analysed within the context of the various relationships in which they live with others in their community. This reality often makes rape cases sensitive and complicated matters, especially when the accused is a relative or close family member of the victim as, e.g., in the case of *State v. Mareya* (above), where the accused was the father of the two young victims. All societies including African societies can be adversely affected by the nature of the relationship between victims and perpetrators in relation to addressing rape and sexual abuse within families.

One of the police officers I interviewed emphasised that he was dealing with a case where a 64-year-old had been arrested for repeatedly raping a 14 year old until she became pregnant. The matter only came to light when she was already five months pregnant and it was only upon being quizzed that she divulged the identity of the perpetrator. She said that she had been afraid to report the abuse because the accused was a respected member of the society to which she belonged and that he had told her that if she dared to report the crime no one would believe her. This shows how children's lived realities can be complicated owing to the communal situations and relationships in which they live and which can make them vulnerable to intimidation by powerful perpetrators.

It is therefore important that as the custodian of community values, the community leadership adheres to the provisions of the Children's Act that mandates that all cases are to be reported to the police within 48 hours. While this is complex because of the dynamics involved in the society, the responsibility ultimately lies with the leadership of the community to ensure that people within the community abide by the laws of the country. They have an obligation and mandate to ensure that cases are reported within the stipulated time.

In addition, giving their support to survivors and their families through their interaction with the criminal justice system is important. The timely reporting of cases is important in the collection of evidence as well as helping the case to be investigated while the child still remembers what has transpired and while evidence can be traced.

Kudya (2006) noted in her study how the delays in the reporting of cases had a bearing on the quality of the medical examination. These delays are attributed to the fact that children are minors who wait for their elders to report their cases. The child herself cannot articulate or understand the nature of the offence hence without caregivers who are vigilant, the matter may only surface at a later stage. Kudya (2006) states that:

“in nine out of ten cases the children that are brought to their attention would have been raped long back judging from the time they are brought to them. In such cases it was therefore difficult to conclude meaningfully as some of the evidence would have been lost, unless if it was a very bad case where there would be evidence of scarred tissue etc.”

This therefore presents a significant problem especially where the crime has been reported late and raises questions as to how survivors can be protected and how effective the evidence collection process can be conducted considering that most of it would have been lost or become irretrievable. In addition, the lack of knowledge on the part of the caregiver as to how to treat the child, e.g., coercing or beating the child to obtain evidence also has a negative bearing on the outcome of the case. In my discussion with one of the legal officers, she emphasised:

“Some of the cases we handle and assist lose credibility in the courts because parents/caregivers tend to examine the children. The defence lawyers tend to ride on this and state that evidence would have been tampered with. Or in some instances caregivers beat the children so that they speak and that also makes our cases to lose weight.”

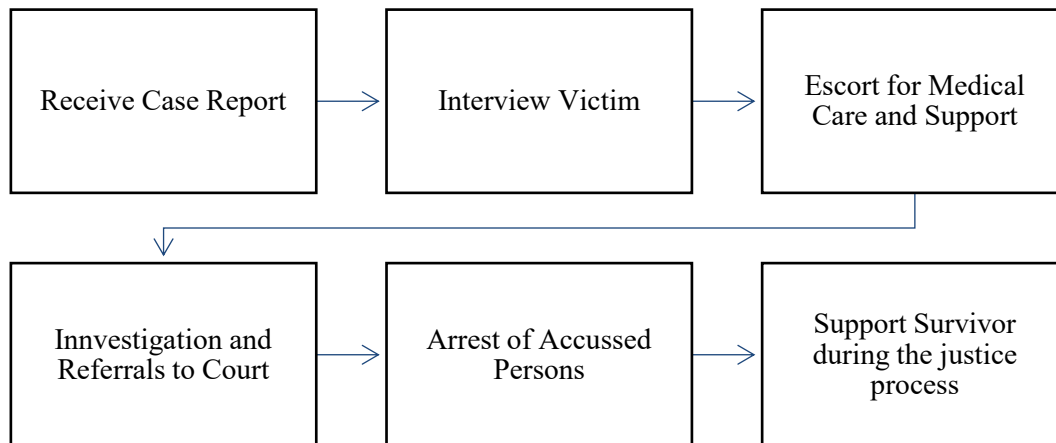
According to the medical affidavit in the *State v. Mareya* (above) the children’s clothing had been changed and this altered the evidence that was collected. Therefore it is essential that communities are educated on the importance of keeping evidence in tact and not tampering with it. Such actions by communities have a bearing on the evidence collected as they can undermine the testimony of witnesses and/or render inadmissible other forms.

In concluding, the late reporting of cases and the tampering of evidence present significant challenges for the law courts. Without credible evidence coupled with the inability of the child to articulate what transpired, the accused is likely to be acquitted resulting in low conviction rates. This may require further research on how protection can be administered for rape survivors even in the absence of recent evidence.

4.5 The Zimbabwe Republic Police (ZRP) and the Victim Friendly Services

The Zimbabwe Republic Police (ZRP) is another actor that plays a crucial role in the collection of evidence in rape cases involving minors below the age of 12 years. Their role extends from providing victim friendly services to the taking down of statements and escorting the victim through the evidence collection process all the way through the criminal justice system. The steps the ZRP take in the evidence collection process when compiling a docket on a reported rape are depicted in Figure 5.

Figure 5: Diagram showing the steps in the docket compilation process



During the research I compared the steps that the ZRP ought to take in Figure 5 with what I found taking place on the ground. These findings are as follows.

4.5.1 Victim Friendly Facilities are not decentralised

As I started my research, my first port of call was to approach the nearest police station and upon arriving there and asking about the procedures which are followed when one wants to report a rape case, I was told that the case would be referred to the main police post which is approximately 20 km away. This would mean that if anyone reports a case of a sexual nature, one has to find the money to travel to the nearest main police camp. I stay in a predominantly farming community in which the incomes of ordinary people are low yet cases of rape are reported to be quite rampant. This may mean that a number of cases may go unreported or their investigation may be delayed. Such delays prejudice the evidence collection process as evidence such as semen, blood samples etc. may lose efficacy or be tampered with and this may discourage victims and their supporters from pursuing the case under such circumstances.

The lack of decentralisation of victim friendly services among police stations may also result in perpetrators fleeing which in turn has a bearing on the outcome of the case. Makamure (2010) notes how in one case a mother reported a case of abuse at a police post which did not have a victim friendly unit and because there was no transport at the police station, the alleged perpetrator footed the bill for transport. By the time they arrived at the police post, the perpetrator was nowhere to be found. In such situations the police and/or the survivor's

family may lack the capacity or will to pursue the matter. I also know of a case in which a teenager aged 14 years was raped by her 20 year old neighbour and when the case was reported the neighbour left town and the case died a natural death. Neither the victim's family nor the police followed up on his whereabouts of the alleged perpetrator although there rumours had circulated as to his whereabouts.

4.5.2 Lack of a Child Friendly Facility

Upon visiting the main police post, the first thing I noticed was that there was one office where all visitors were waiting to see the Victim Friendly Officer (VFO). I inquired on where they would conduct interviews and the VFO informed me that interviews were conducted in offices in the adjacent room. My expectation was to find a child friendly room which has the various instruments such as toys and anatomically correct dolls (Figure 6B) that would allow children to share their ordeals in a relaxed manner. The only things I noticed in the victim friendly office were toys on the corner of the desk (Figure 6A) as well its curtains decorated with cartoon characters. I also learnt that the toys on the desk were used to help children narrate their stories as the police officer takes down their statements.

Figure 6: Photographs (below, left) of ordinary dolls used at one of the VF Police Posts (A) and (below, right) of anatomically correct dolls (B)



(Fig.6A) Ordinary dolls used at one of the VF Police Posts

(Fig.6B) Anatomically correct dolls

Although it reasonable to expect that the police provide child sex survivors with anatomically correct dolls in accordance with the provisions of section 319 of the CPEA, this I not the case owing to their lack of resources. This may be misleading in relation to the type of evidence that is given by the child and considering that the statements that they give the police are of such crucial importance to the whole evidence collection process, the provision of anatomically correct dolls should be ensured.

4.5.3 Delays in the Docket compilation process

One of the issues that came up in the interview session is that at times the police are not able to compile the docket within the stipulated time frame owing to a number of reasons. This included the lack of stationery and money for transport for both the police and complainants. Another cause of delays in the compilation of dockets is the proof of the age of the child victim, especially in cases where children do not have birth certificates. In such cases doctors have to examine the child and make an estimate of their age. This process may take time depending on the availability of the doctors as this estimation can only be done at a government institution. Another key factor is that police ought to conduct investigations which include visiting the crime scene and drawing a sketch plan/s which is/are used as exhibits in court. However, I discovered during the research that the drafting of sketch plans has become scarce in the investigation process. The VFO said:

“In towns we rarely use the sketch plans, but in the rural areas they visit the crime scene and develop a sketch plan of the site. This sketch plan is used as evidence in the courts to corroborate the victim’s story.”

However, in my interview with the prosecutor she shared about an incident where they had to visit a crime scene after a child had shared that she had been raped in an electricity booth. She stated:

“We had an incident where a child was raped in an electricity booth and she was able to describe what the booth looked like and all the cables inside the booth. We made a visit to the booth and this was presented in the courts as evidence. The victim’s clear show of remembering specific details of a crime scene and the follow up visit resulted in a successful prosecution.”

This means that the inclusion of critical elements as sketch plans and site visits have a huge bearing on the outcome of the court cases. This therefore calls for a thorough and effective

approach to the investigation process by the police, ensuring that no stone is left unturned as they collect evidence. Every tiny detail that can be obtained from the child, crime scene and collaborators must be noted down and presented as evidence in court.

4.6 The Ministry of Health and Child Care – Health institutions

The Ministry of Health and Child Care (MoHCC) is another actor in the evidence collection process and is responsible for ensuring that all survivors of sexual violence and abuse receive free medical care and support. The medical support includes HIV testing, PEP within 72 hours and emergency contraception within 5 days. This is done to mitigate the negative health effects child victims suffer as a result of the sexual violence and abuse they have experienced (Multi Sectoral Protocol, 2012). In the evidence collection process, the health institutions provide emergency medical examinations enabling survivors to secure a medical affidavit to support the criminal prosecution of the perpetrator. In cases where the appropriate referral point is unknown or unclear, the survivor is to be accompanied directly to the responsible practitioner who may be a doctor or a nurse who is qualified to carry out a forensic examination on child or adult survivors as provided by section 278 of the CPEA. In addition, a thorough medical investigation has to be undertaken to ensure that evidence which is admissible in court is collected. While rape cases are treated as a priority by the various health institutions, I noted the following challenges which need to be addressed if evidence collection is to be improved.

4.6.1 Donor-funded institutions

Specialised Survivor Friendly Clinics such as the Adult Rape Clinic, Family Support Clinic and Edith Opperman are donor funded. This helps the smooth facilitation of their projects and programs as they are able to support survivors of sexual abuse. Through their funding programs, they are able to provide training sessions on the best practices in evidence collection to various stakeholders such as the police, nurses and community leaders. While they receive support and extra services from the government such as medication, the government itself is economically stressed. One of the doctors I interviewed emphasised how they have not administered any rape test kits for a long time because police stations do not have any. In addition, the limitations of funding to these institutions have a bearing on how effectively they can perform their duties. In all the interviews I conducted I noted that organizations are still yet to adopt inclusive approaches in the performance of their duties as they lack training on how to assist victims with disabilities. In addition, I noted that the

specialised survivor friendly clinics are only based in the major hospitals and the question arises as to how accessible these services are to children in less privileged urban or rural areas? Are similar services available in remote areas? Will a child in the rural areas be able to access the same quality service if she has been raped? Kudya (2006) also raises questions about whether the design of these centres is adapted to suit the lived realities of the African child.

4.6.2 Medical affidavits are often inconclusive and inadequate

Although a medical examination is conducted on a rape survivor, no DNA is taken to ensure that the accused is the perpetrator. In *State v. Mareya* (above) the accused was acquitted because the medical affidavit and the expert evidence were not sufficient despite the testimony of one of the complainants that the accused had hurt her. In the judgement the magistrate stated:

“Medical evidence does not say who would have interfered with the complainant’s anal areas despite that¹³ had pointed to her “private area” having been hurt by the Accused-father”. There is, therefore, no *prima facie* case for Accused to meet at the close of the State Case. There is no evidence on which a reasonable Court, acting carefully, might properly convict the Accused. The evidence adduced on behalf of the State is so manifestly unrealizable that no reasonable Court can safely act on it.”

This shows the weakness of the medical affidavit in that while it covers captures some medical evidence relating to a rape, the absence of forensic evidence will weaken the child’s testimony and this calls for the need to strengthen the evidence collection process. In addition I also noted that in the medical affidavit in the case of *State v. Mareya* (above), the nurse had stated that the medical condition of the children as “stable”. I then questioned what stable means in the case that a child had just been violated and gone through a traumatic and horrific experience. With my limited knowledge of psychology, the word stable has different connotations and can be a misleading term especially if it is not properly explained. Furthermore, if the child survivor’s condition is described as stable, how will this be interpreted by the court? Such statements have the potential to dilute the evidence presented in the medical affidavit. One thing that was consistent with the interviewees was that the medical affidavit only captures the medical aspect of the crime while rape has major

¹³ Name intentionally omitted.

psychological implications on the growth and well being of the child. In this regard, how can that psychological assessment be captured and also used as evidence in a court. Mugebe (2016) agrees that evidence presented in medical affidavits is limited because it does not provide adequate space for doctors to fully explain pertinent details about the effect of rape on the victim; in addition, judicial officials have no training in interpreting medical evidence. She states:

“Magistrates and prosecutors are not equipped to evaluate medical evidence and doctors rarely come to court to testify considering their busy schedules except in cases where accused is represented and the defence lawyer would have insisted on the doctor’s presence at court. Detailed medical evidence is important to rape cases as it helps to explain some of the problematic issues with interpreting evidence. For example, such evidence can explain the possibility of having someone sexually abused yet there would be no visible evidence like injuries and bruises. Such expert evidence would also be useful in eliminating some of the rape myths and biased opinions found within the courts. Efforts towards improving quality of evidence presented in court also ensure that more convictions are secured against perpetrators of rape.”

4.7 Ministry of Home Affairs and Cultural Heritage – Department of Forensic Science

The Department of Forensic Science is another actor in the evidence collection process as the department was established with the mandate to provide impartial, independent, objective and non-biased forensic services to the justice system (Multi Sectoral Protocol, 2019). The obligation that the forensic lab has in relation with rape cases is to scientifically analyse exhibits and physical evidence from criminal acts including rape and sexual assault cases. This role is meant to help to prove or disprove physical contact between the victim/perpetrator and the crime scene. In this field of forensic science, their analysis will assist in identifying the persons associated with a crime and help establish the manner in which the crime was committed. Such components are important as they help in the administration of justice on behalf of the child. Various challenges result in the failure to collect appropriate evidence, all of which contribute to the failure of prosecutions. During the study, I was able to unearth the following system dysfunctions:

4.7.1 Unavailability of rape test kits

Rape test kits (Figure 7) are supposed to be administered during medical consultations/examinations of rape victims following which the samples are sent to the forensic laboratory.

Figure 7 Photograph of a rape test kit



The absence of DNA evidence especially in cases involving minors might have a bearing on the outcome of the case especially when the child is unable to recall the incident or speak for themselves. In *State v. Mareya* (above), while penetration was definite, no forensic samples were collected. I identified that this was one of the obstacles to effective evidence collection in rape cases and all cases of a sexual nature: that no DNA evidence can be presented as evidence in the courts of law. This is because the rape test kits have not been available because of lack of government funding. Mugebe (2016) notes in her research that the lack of such evidence is an obstacle to the successful prosecution of rape cases. The lack of good forensic evidence such as DNA evidence which helps to link the suspect to the offence is one of the reasons for low rape conviction rates by the courts. As technology improves, so should the tools used in the evidence collection process by the criminal justice system. Yet, judging from the research conducted by Kudya and Kabasa in 2006, Mugebe in 2016 and Ndou in

2018, the government of Zimbabwe is yet to establish a fully functional forensic lab that can be utilised in the administration of justice. This therefore presents a systemic problem that requires to be addressed through lobbying and advocacy. This is because forensic evidence is an important component in most crimes such as murder, arson and sexual abuse cases.

4.7.2 *Dysfunctional forensic laboratory*

The forensic lab manned by the ZRP exists but it is obsolete because it either lacks equipment or the equipment it does have is out of date. This has meant that cases are tried in court relying mainly on children's evidence and corroboratory evidence from witnesses. In the interviews the respondent stated:

“Currently our lab is not functional as there is no equipment to conduct tests and analysis with. Machines in the lab have been dysfunctional for the past 15 years and the department relies on outsourcing services from (*sic.*) NUST and AFRI Lab located at Wilkins Hospital. However these service providers can only work on DNA such as blood and semen samples but cannot use hair samples.”

This makes it difficult to obtain conclusive and concrete evidence against alleged perpetrators because of the the government's lack of forensic resources. While rape kits may be provided, funds permitting, the evidence can never be of any conclusive use without forensic evidence to support it. This lack of forensic support has caused further delays in the finalisation of cases. This problem is exacerbated by the lack of specialized staff at the forensic lab. In my discussion with the regional prosecutor she emphasised that some of the cases are delayed in the courts since they are pending (*i.e.*, postponed) awaiting evidence from the forensic lab. She stated:

“We actually have one case that is still pending where we have been waiting for forensic results from the forensic lab. It was a case of a young boy who was assaulted by the maid and the blankets that had blood are still at the forensic department. Unfortunately, the accused who was the maid was released on bail and a year after (*i.e.*, later) the case is yet to be finalised.”

The effect of this failure or weakness in the evidence collection process is amply summed up by Mugebe (2016)

“Forensic evidence is needed (to) make it easy to link the suspect to the offence and non-use of it has led to gross miscarriages of justice in the most

deserving rape cases involving teenage and adult victims. This also helps to explain why we have such low conviction rates particularly in sexual violence matters.”

The advancement and adoption of forensic evidence is critical especially in helping children who may struggle to give evidence in court. In the case of *State v. Mareya* (above), the children were unable to give evidence due to their ages as well as disability. It is hoped that if Zimbabwe restarts and updates its forensic lab it can come to reap the benefits of the latest developments in forensic science to the point where the victim need not testify or even be present in court.

4.8 Ministry of Justice - The Court and VFC Facilities

The courts are charged with protection of the legal rights of both victims and accused perpetrators of crimes. In cases involving children and witnesses they must be given:

“opportunity to give their statements in a separate room, protect the child from undue pressure or aggressive questioning during examination and cross examination including the protection of the child from further contact with the perpetrator” (Multi Sectoral Protocol, 2012).

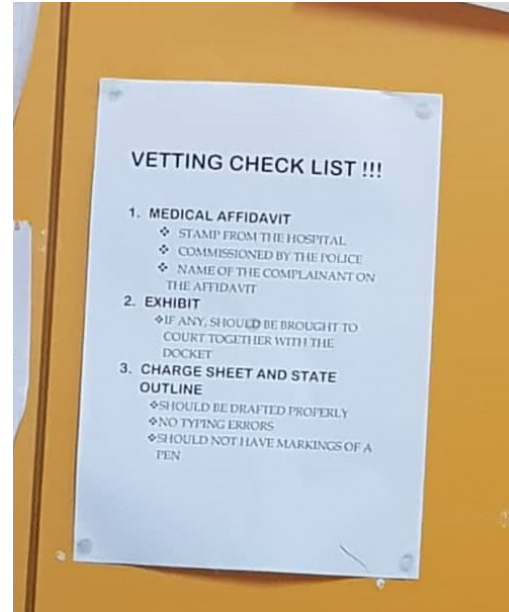
In cases where the child survivor has a disability specific measures must be taken to ensure that they are supported so that they can actively participate in the justice process. When I went to the Magistrates Courts in Rotten Row, Harare (Figure 8A), I could not help but notice how overwhelming the environment could be to children as well as adults. For example, there was a continuous noisy stream of human traffic including court officials and police officers continually passing through the building. There were congested halls, corridors, courts and waiting areas. This can be a very intimidating environment in which to expect a witness to give good evidence and I was interested to find out how the courts created an enabling environment for children to do so.

When I entered the prosecutor’s office, I noticed lists on the wall, one of which was a Vetting List Check List (Figure 8B) and the other a Docket Check List (Figure 8C) to remind investigating police officers and prosecutors alike about the documentation which should be included in a prosecutor’s brief for court and upon which they will present the evidence in chief against the accused who has been charged with a crime including the rape of a minor.

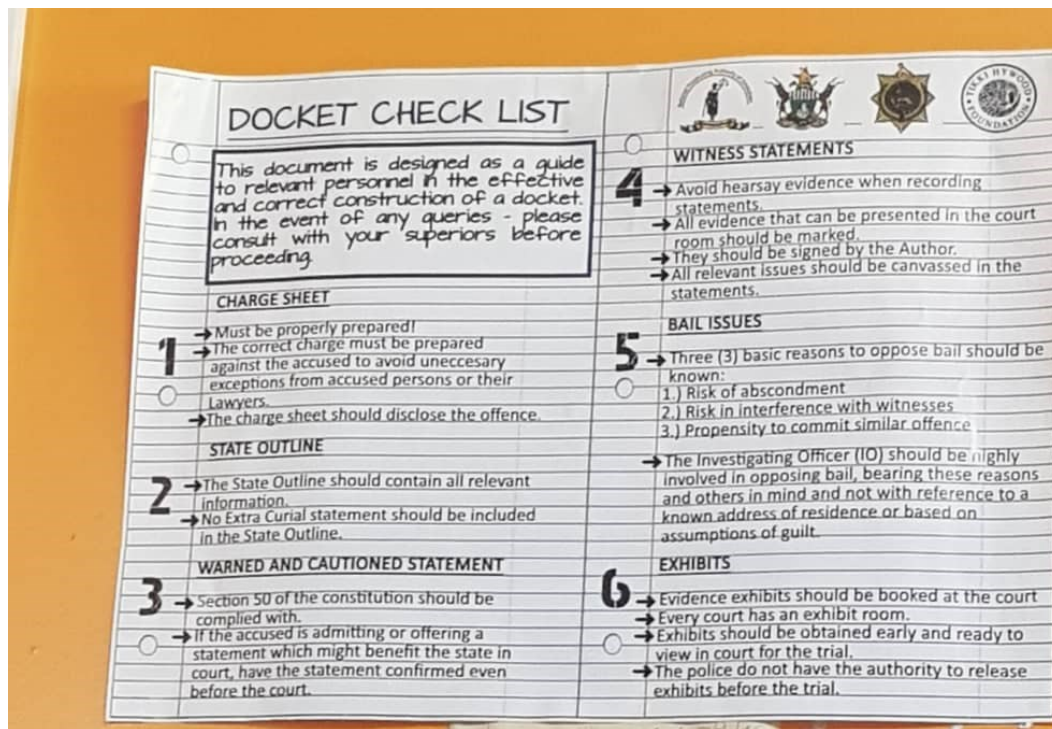
Figure 8: Photograph (A) of Rotten Row Magistrates Court, Harare (below, left); (B) Vetting Checklist (below, right) and (C) Docket Checklist (below, bottom)



(Fig. 8A) Rotten Row Magistrates Court, Harare



(Fig. 8B) Vetting Checklist



(Fig. 8C) Docket Checklist

The significance of these lists is that they serve as a reminder to the stakeholders of what the courts require for the successful handling of criminal cases. Courts expect that the criminal investigation and evidence collection has been properly performed and the correct

documentation properly completed. For example, the charge sheet should contain the correct charge against the accused. If the charge is wrongly outlined, this may have a negative impact on the handling of the case. Also all the material details of the incident or elements of the crime must be captured correctly. Apart from the details of the state outline, the docket must include the witness statements if available. These statements must be clearly captured and if possible contain no hearsay evidence (i.e., what another person told the witness making the statement). The docket should also comprise all the evidence collected and in rape cases these could include exhibits such as stained underwear, knives or any material collected in relation to the case. The expectation is that the evidence presented to the court must be clearly labelled for the benefit of the court.

In addition, in cases of a sexual nature, the docket must contain a medical affidavit which contains an official stamp from the hospital. The expectation is that having an official stamp authenticates the information proffered to the court. This will give an indication that the evidence being presented before the courts has been obtained by a trained professional and certifies that it has been done in accordance with proper procedures. In cases relating to children, the medical affidavit also indicates that the trained professionals have taken consideration of the best interests of the child.

Therefore when the police submit a completed docket for prosecution to a public prosecutor it is the duty of the latter to ensure that all the requisite documents are present to form part of the court file or record against the accused in accordance with the court's requirements. The police address any gaps in dockets detected by prosecutors. The failure to rectify weaknesses in dockets drags out the finalisation of cases, compromises the quality of the evidence collected and has a negative impact on the minor who continues to be reengaged in the whole cycle again.

4.8.1 The use of Victim Friendly Courts

In the research, I found out that the judicial officers were very diligent in adhering to the victim friendly processes when dealing with young children. They ensure that in all their interactions the best interests of the child is observed. In my interview with the regional prosecutor, she indicated that for matters dealing with children, they made use of the victim friendly courts (VFCs) that have cameras in place. In addition to the VFCs, the court also makes use of intermediaries who help the children in narrating their case and these

intermediaries are court officials and interpreters who *may* have specialised training. The Rotten Row Magistrates Courts have two VFCs only one of which was functional at the time of the interview. This meant that with one functional court, this can have a delay in cases being handled as people would have to wait to utilize the VFC. However the regional prosecutor indicated that they also have alternative methods which they employ where they use the trial in camera session and this is where the gallery is cleared and only the court officials remain.

As judicial officers they try to create an enabling environment which is child friendly to enable the child to speak. The trial-in-camera is normally used for children who are competent to speak. The incorporation of such methods is to expedite court processes and ensure that the cases are concluded within the 3 day stipulated time limit.

In cases involving minors who cannot talk, they are still taken to the courts, and the courts see to it that the child is declared an incompetent witness. As per the case of *State v. Mareya* (above), the children were declared incompetent because of their age and disability. In such cases the court relies on the evidence of other witnesses, the medical affidavit and specimens/exhibits provided. Arguably if the evidence collection process is properly handled the inability of the child to give evidence ought not to adversely affect the prosecution. This is because the evidence will prove that the crime was committed and implicates the perpetrator resulting in the courts administering justice on behalf of the child. Although fabrication can occur in such cases, the court relies on the evidence it has on the ground hence the requirement that due process is made in the handling of rape cases. Such cases are handled with caution.

One thing I noted was that while the courts pay special attention to children as vulnerable witnesses, there is need to consider witnesses in rape trials as vulnerable witnesses in accordance to Section 319 of the CPEA. This is because in cases where the child is an incompetent witness, there is heavy reliance on medical affidavits and witness statements. Now in cases where the accused is related to the witness, there can be intimidation as noted in *State v. Mareya* (above) where the mother revealed that she was unable to tell the father about the abuse because he was 'harsh'. According to the court records she kept referring to the accused as "harsh" which can mean that there may have been a history of domestic violence. The expectation of the court to hear testimony and use the testimony to make its

determination resulted in the accused being acquitted on the basis of inconsistent evidence; put differently, the state failed to prove its case because of the inadequacy of the evidence gathering process.

4.8.2 Availability of Child Friendly Facilities

As I walked along the corridors of the Rotten Row courts, I also noted that Childline has facilities in the building. Their office is spacious with a waiting area where children are placed as they await trials to commence. The room is child friendly with toys to play with and a TV to watch and this helps children to relax and be at ease as they wait to give testimony in the court. In addition, the VFC also makes use of anatomically correct dolls to enable the child to relay what transpired and this helps in the naming of the private parts as well as illustration of the ordeal. In such instances cases the court also has to note the terminology of the children. The regional prosecutor shared how in one of the cases the child referred to sex as “tonye” because that was the play language that she knows. This therefore calls for the court to fully adapt itself to understanding the different variations and play language that children know. In addition the consistency of using anatomical correct dolls has to be realised from the police station all the way through to the courts. This it to ensure that the child is not confused in the whole process of the criminal justice system. While the court ensures all such practices are done, due diligence must be observed in also ensuring that interaction between the child and the accused is minimized. In one of the interviews with a counsellor she noted how negligence on the part of police officers can intimidate the children and in particular she gave reference as to how one of her child clients failed to testify in court after seeing the perpetrator in the corridors. The child was petrified to the extent that no testimony could be adduced from her. This is supported by Mugebe (2016) in her research as she noted that this seems to be a system weakness even when dealing with rape cases involving adults. She states that:

“It is at this stage that irregularities in the way rape cases are handled by the criminal justice system were noted. The police officers do not separate victims from accused when bringing their matters to court. Police officers interviewed indicated that this is primarily due to financial constraints as victims would not be having other means to proceed to court on their own. At the end, police officers are left with no choice but to facilitate their travelling together with accused persons. The same problem also extends to the courts. Prosecutors seem not to be concerned about separating victims of rape from contact with the accused person”.

Such irregularities need to be addressed if evidence collection is to be addressed and strengthened.

4.8.3 Lack of specialised training for Intermediaries

Intermediaries are mostly court interpreters who assist the children to open up and narrate their stories to the court. Trained professionals such as psychologists are the best at ensuring that the best methods of handling cases involving children are observed. This lack of training even extends to judicial officers that include the regional prosecutors and magistrates. Mugebe (2016) states in her research:

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

This therefore means that in order to create a conducive victim friendly court atmosphere during judicial proceedings which will encourage children to give their evidence truthfully and fearlessly, there is a need to provide judicial officers with the necessary child-sensitive training.

4.9 Department of Social Welfare

The Department of Social Services (DSS) is the primary Government department responsible for implementing the Children’s Act which aims to protect children from all forms of abuse. Therefore the DSS plays an important role in the protection of children who have experienced sexual violence and the development of the national case management system has become an essential component of the VFS. The mandate of the DSS is to treat all cases of child sexual violence and abuse as priority cases and therefore they must take precedence over other referrals. In addition, the DSS must ensure that sufficient social workers are available to support children throughout the process. However the reality is that the DSS is extremely understaffed hence it is not able to present and offer as much support as required (Makamure, 2010).

4.10 Non-governmental organisations

Civil society organizations are critical in the case management system in complimenting government efforts through the provision of specialist child protection services. The expectation is that the civil society organizations work within the case management system guidelines. The organizations I researched on work in the field of advocacy, research and training as well as offering free legal aid to children who are victims of sexual violence. One thing I noted is that these services are centralised in the urban centres which raises the questions: How can this legal education be brought to underprivileged communities? How can children access these services if they are located in remote parts of the country? How can communities and guardians access legal information concerning the importance of safeguarding evidence especially in cases involving children?

4.11 Strengthening the evidence collection process

Throughout the research, I could not help but notice the existence of a blame game going on between the stakeholders as to who was responsible for the weaknesses in the evidence collection process. The police, health institutions and the civic organizations blamed the courts while the courts stated that they could only work with the evidence provided to them by those in the system. What was clear was that none of the actors wanted to be accountable for any faults within the system. However, what is critical is that if the evidence collection process is to be strengthened, there is a need for each and every one of the stakeholders involved in the process to be sincerely committed to the principles of collaboration, accountability and due diligence.

CHAPTER FIVE

5.0 CONCLUSION AND RECCOMENDATIONS

5.1 Relook, Review and Redress

Zimbabwe has adopted various pieces of legislation in its bid to fight sexual abuse and these include the adoption of the Criminal Law Code. The Code expanded the scope, definition and levels of sexual offences through the recognition of rape, sodomy, indecent assault as well as aggravated indecent assault. In light of the above, it is vital to note that the legal elements are in place in terms of the appropriate legislation but the system continues to fails for a variety of reasons. This is because the law does not operate in isolation as it requires actors and structures to enforce it through application and implementation. Throughout the research, what has been a consistent finding is that legal frameworks regarding sexual abuse cases in Zimbabwe are to a large extent little more than an intention expressed in words on paper or a theoretical framework which requires implementation. There is no doubt that an effective evidence collection process is necessary in order to secure higher conviction rates and the successful implementation of the mandatory minimum sentencing system for rape cases. Each of the service providers must therefore be able to carry out their mandate in the collection of evidence in accordance with the timelines set out in the Protocol using their available resources. This research unearthed challenges in the evidence collection process which include the lack of forensic evidence, the lack of training of court professionals and the unavailability of key resources such as rape test kits. While the laws on rape and sexual violence have proved their adequacy especially on existence, there are still challenges on the implementation .The study helped me to understand the three concepts above. If the evidence collection process is to be addressed and strengthened, there is greater need for the actors involved in the process to continuously to do the following:

- **Relook** – To make a conscious effort to analyse their activities and processes in line with the law and policies in place. This ought to be done periodically and questioned as to whether these procedures are helping to tackle the challenges of rape and low convictions in the law courts.
- **Review** - Once the evaluation is processes is done, review has to be done either through policy formulation and enforcing the implementation of the law. This is because the

adoption of mandatory minimum sentencing and effective prosecution is only achievable when actors and structures are committed to the implementation of the law. This is where partners need to collaborate and push for changes within the entire system.

- **Redress** – This will be a process of redressing the implementation of the law by ensuring that activities being conducted by the service providers are in line with their mandate and that evidence is collected thoroughly.

5.2 Conclusion and Recommendations

The criminal laws that deal with child abuse require strengthening through their rigorous enforcement and this enforcement should be realised throughout the criminal justice system. The courts of law must impose deterrent sentences upon the perpetrators of sexual abuse but this requires a functional and effective evidence collection process. There is also a need to address other societal factors that lead to the upsurge of cases of a sexual nature. This research was premised on the fact that the criminal justice system is not functioning effectively in the collection of evidence for rape cases involving minors below the age of 12 years. It therefore focused on how each of the service providers acts in the process of evidence collection throughout the criminal justice system. The anchoring assumption was that the courts require the submission of evidence that allows them to prove beyond reasonable doubt that indeed rape occurred and that the accused is responsible. It may therefore be a daunting task for a child who has experienced abuse to be competent enough to relive and tell the story hence the need for effective evidence collection procedures. If the challenges addressed by the service providers could be addressed coupled with the resuscitation of medical and forensic evidence, the testimony of the child can be irrelevant in the process. Ultimately, the research has shown that the handling of rape cases of children below the age of 12 years by the criminal justice system is beset with a number of problems from an evidentiary point of view, starting with the law as a system and how it is implemented on the ground as well as the attitudes of the service providers mandated to deal with the collection of evidence. I therefore present the following recommendations based on the findings of the study:

5.2.1 Collaboration and Partnership

There is a need for collaboration between the key players, i.e., civil society, the police, hospitals, forensic departments and the court system who should work together to ensure that the evidence collected in rape cases involving minors is relevant and thorough for use in court. It is important to check that the players involved do an effective and thorough job to avoid such evidence being ruled inadmissible by the court owing to negligence or inefficiency. The Multi-Sectoral Protocol provides an excellent framework as to how actors can collaborate if the evidence collection is to be comprehensive and strengthened. It stipulates the projected timelines and how the cycle of evidence collection can be effectively managed and if all stakeholders could work co-operate effectively with each this would improve the evidence collection process.

5.2.2 Research & Development

Research and development is an essential component in the growth of any institution and therefore the criminal justice system should set up its operations to promote the use of advanced methods and measures in the promotion of justice. There is a need for the criminal justice system to continually research the best practices in evidence collection, investigation and handling of cases. This will ensure that the various departments are proactive in their approach leading to better service delivery. The use of research and development can result in the **digitalization** of court processes as a way of tracking repeat offenders which helps in the expediting of cases within the courts of law. This initiative can be coupled with the establishment of a sex offender registry which contains all material details of all child sex offenders. This will help in the monitoring and tracking of sex offenders upon release from prison to ensure that they are not employed by institutions where there are children, such as schools; and to keep them under surveillance in an attempt to prevent them from re-offending (Feltoe, 2017).

5.2.3 Capacity Building and Training

This refers to equipping the relevant stakeholders with relevant skills and equipment that is required in making the evidence collection process relevant. This can be done in partnership through training sessions for the police, judicial officers, intermediaries, magistrates, nurses and the community at large on how evidence is collected. There is also the need for incorporating a module on evidence collection as a component in police training so as to equip all officers with knowledge on how to collect evidence effectively and efficiently.

5.2.4 Devolution and Decentralization

There is a need to decentralise the services that are needed such as the VFU facilities, clinics, forensic services and judiciary services. This has an impact on the evidence collection as well as the serving of justice for minors. Child case workers, child protection as well village health workers should be equipped with knowledge on how to assist people within communities in cases of the rape of minors. The resuscitation of the government forensic services is critical because the use of DNA evidence helps to expedite the trying of cases in the law courts. This is essential in cases involving minors as they may struggle to give evidence, and the use of forensic evidence becomes an enabler to the administration of justice to the point where the victim may not even need to testify or even be present in court. The effective use of forensic services can further be enhanced through the use of mobile labs that are dispatched to the country's various districts to ensure that exhaustive investigations are done.

5.2.5 Advocacy and Awareness

Legal education is required especially among the country's under-served communities. This may be done by promoting awareness and education through access to information for vulnerable groups. This includes running workshops, seminars, conferences and training aimed at different players at different levels of society. The target group should include traditional leaders, members of parliament, policy makers, magistrates, lawyers and prosecutors.

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