

SENTENCING OF SEXUAL OFFENDERS

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ABSTRACT

This paper examines the complex issue of sentencing of sexual offenders against the backdrop of the recent calls for mandatory minimum sentences in cases of sexual crimes. Some countries have introduced mandatory minimum sentences but the paper points out some of the problems in deciding upon appropriate minimum sentences for the different sexual crimes. It demonstrates inconsistencies in the sentencing patterns in Zimbabwe for sexual offences and explores the alternative of setting of sentencing guidelines to achieve more consistency in sentencing levels.

Key words: Sexual offences, mandatory minimum sentences, inconsistency in sentences

PART 1 – INTRODUCTION

SENTENCING

Sentencing in all criminal cases is a complex process as the penalty must fit the crime and the offender. Before coming to a conclusion on the appropriate sentence all the individual circumstances of each case must be considered. One very important factor which is perhaps not always given full weight is the impact of the offence on the victim. Justice demands that serious offences should not be trivialized by imposing sentences that are too lenient but, on the other hand, harsh sentence must not be automatically imposed without taking account of the specific circumstances of each case.¹

SEXUAL OFFENCES

There are various sexual offences, the most serious of which are rape and aggravated indecent assault, both of which carry a maximum sentence of life imprisonment. The offence of so-called “statutory rape” carries a maximum sentence of imprisonment for ten years.

¹ For a detailed analysis of the sentencing role of judges see *S v Mharapara* HH-26-17 p 4 and *S v Makucheche* HH-10-18 at p 12.

This paper concentrates on the offences of rape and statutory rape of girls. It examines the current patterns of sentencing for these two offences and looks at the reasons for the recent demand for the setting of mandatory minimum sentences for these offences.

What can be safely stated at the outset is that rape is obviously a dreadful crime which deserves to be punished severely. Statutory rape can border on the crime of rape, if not sometimes cross the line into rape. Sexual exploitation by men of young girls should attract severe punishment. Young girls need to be protected against older men who sexually groom and entice them with promises of rewards to allow sexual relations to take place. Those men who use their power and authority to pressure girls into submitting to sexual relations should be charged with rape and not statutory rape. Thus a teacher who threatens to fail a pupil unless she allows him to have sexual relations with her should be charged with rape.

AGE OF CONSENT

Recently there has been a lot of debate about raising the age of consent for the purposes of the crime of rape. It is of interest to note that France is intending to raise the age of sexual consent to 15.

Presently sexual intercourse with a girl who is 12 or below is automatically rape as the girl is deemed to lack capacity to consent. A girl who is 13 but under 14 is rebuttably presumed to lack the capacity to consent until otherwise proved. If the presumption is not rebutted, the male who has sexual relations with her commits rape.

A girl who is 12 or older but who is not yet 16 can consent to sexual intercourse but the male who has sexual intercourse with her still commits the offence under section 70 of the Code of having consensual relations with a young person. This offence currently requires that the sexual intercourse be "extra-marital". This needs to be amended deleting the word conditional "extra-marital" because in the *Mudzuru* case² the Constitutional Court ruled that marriage to a person under the age of 18 is prohibited and thus the fact that the accused purportedly married the girl cannot be a defence.

It is suggested that the minimum age below which the girl will be deemed to lack capacity to consent should be raised to 14 from the

² *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors* CC-12-2015

present 12 so that if a male has sexual intercourse with a girl under 14 he would be guilty of rape. It is also suggested that the upper age for statutory rape could be raised to 18.

MANDATORY SENTENCES FOR SEXUAL OFFENCES

The main justification for mandatory minimum sentences for serious crimes, such as rape, is to try to ensure that the sentences imposed fully reflect the gravity of these offences. By prescribing the maximum sentence only, the legislature has left it to the courts to decide on a case by case basis what sentence up to the maximum is appropriate. Where only maximum sentences are set, there are also likely to be inconsistencies in the sentences handed down by different judicial officers.

The clamour for mandatory sentences occurs when there is a public perception that some judicial officers are imposing woefully inadequate sentences for serious crimes, such as rape. The high incidence of rape and its devastating effects on victims has led to demands for far harsher sentences to be imposed for this crime and this then leads on to demands for minimum sentences. This has led various countries to introduce minimum sentences for sexual offences which sentences vary in accordance with the presence of certain specified aggravating factors. These include South Africa, Tanzania, Kenya and Lesotho. See Annexure 3 for details of the mandatory sentences that apply in these countries.

The courts tend to be resistant to mandatory sentences because they strongly believe that mandatory sentences deprive the courts of their discretion to decide upon appropriate sentences which take into account the wide range of various factors that may apply in different cases. This resistance remains even where the courts do not have to impose the mandatory minimum sentences where they find that there are special circumstances.

Opponents of mandatory sentences argue that these sentences have no additional deterrent effect and lead to overloading of the prisons with long term prisoners.³ What is more important in deterring criminals is to ensure that there is a high probability that they will be arrested and tried; the strong likelihood that they will be brought to book is more likely to deter them. In respect of rape, it is argued that we should encourage more reporting of such cases and we should also improve efficiency of investigation and evidence gathering to ensure

a better rate of conviction. The use of DNA evidence would greatly help in this regard. We should also have a register of all sex offenders so that when they are released from prison they can be kept under surveillance to deter them from repeating their crimes and to ensure that paedophiles are not employed in places where they would have access to children such as schools and similar institutions.

On the other hand, mandatory lengthy prison sentences for sex offenders at least ensure that the public is protected against these sexual predators during the time they are locked up.

PROBLEMS IN DECIDING UPON MINIMUM SENTENCES

The setting of the level of mandatory sentences for the various categories of sexual offences is not easy and can turn out to be fairly arbitrary. The circumstances surrounding the commission of the offences can widely vary within the different categories of sexual offences. Care has to be taken when drawing guidance from other countries in the region on the levels of mandatory sentence that they have set because the nature of the crimes concerned may differ from country to country.

If we rush to impose mandatory sentences without giving proper consideration into what levels are appropriate, and the implications of imposing these may be, the whole enterprise may prove to be counterproductive as we may open the way to a succession of constitutional challenges to the new provisions. Mandatory minimum sentences have been ruled to be constitutional under the pre-2013 Constitution provided that a lesser sentence may be imposed if there are special circumstances.⁴ However, the reasoning in one of these cases suggests that although the legislature is best placed to decide what sentences are appropriate for serious crimes, it might still be possible to argue that a mandatory sentence that has been set is so excessive and disproportionate as to constitute an inhuman punishment in violation of the Constitution. Although mandatory minimum

³ In a lecture in 2017⁴ Edwin Cameron, a judge in the Constitutional Court in South Africa cogently set out the reasons why he opposes the imposition of mandatory minimum prison sentences. See "Imprisoning the Nation: Minimum Sentences in South Africa" Dean's Distinguished Lecture Programme delivered at University of Western Cape on 19 October 2017. www.groundup.org.za/article/minimum-prison-sentences-must-go-says-constitutional-court-judge/

⁴ See *S v Arab* 1990 (1) ZLR 253 (S) and *Chichera v A-G* 2005 (1) ZLR 307 (S)

sentences have been upheld in South Africa⁵, the majority of the Constitutional Court ruled that it was unconstitutional to impose mandatory sentences on juveniles over 16 but under 18.⁶

SENTENCING COUNCILS

In some jurisdictions the alternative to minimum mandatory sentences imposed by the legislature has been to establish a Sentencing Council along the lines of the one in England. This Council is composed of judicial officers and lawyers and its function is to promote greater consistency in sentencing, whilst maintaining the independence of the judiciary. The Council produces guidelines on sentencing for the judiciary and criminal justice professionals and aims to increase public understanding of sentencing. The courts must follow these guidelines unless it is in the interests of justice not to do so.

PART 2 – RAPE

EFFECTS OF RAPE

Rape has been described as involving the ultimate invasion of a female's body, her sexual autonomy and her privacy leading to extreme humiliation and degradation of its victims. This crime grossly violates many of the most fundamental constitutional rights of women, such as their rights personal security, bodily and psychological integrity, freedom from violence⁷ and inherent dignity⁸ freedom from cruel and degrading treatment⁹ and the right to equality and non-discrimination.¹⁰ Rape victims are terrorized by rapists. The rapist may enter the house or room occupied by a female and use physical force or threats against her life to rape her. He may waylay her in an open place, drag her into some bushes and forcibly rape her. Not only is the woman or girl subjected to the appalling ordeal of rape but she will often fear that her attacker will kill her after the rape. Where the rapist uses physical force to overcome her resistance, she will suffer bodily injury including vaginal injury which may result in later gynaecological complications. The rapist will often further terrify the

⁵ *S v Dodo* 2001 (3) SA 382 (CC)

⁶ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (2) SACR 477 (CC).

⁷ Section 52

⁸ Section 51

⁹ Section 53

¹⁰ Section 56

victim after the rape by threatening to come back and kill her if she reports the rape to the authorities. The rape victim is at risk of contracting HIV and other STDs. She may also be impregnated and unless she is able to obtain emergency contraception to prevent pregnancy or a lawful abortion, she will then have to give birth to a child who is the product of rape.

But the dreadful effects of rape extend well beyond the act of rape itself. The long-term psychological effects of rape can last for the rest of the survivor's life and can amount to a living hell for some survivors. These after-effects can include post-traumatic stress, depression, vivid flashbacks and recollections of the trauma, low self-esteem, difficulty in forming relationships with others and eating and sleep disorders. Depression may become so acute that she may become suicidal.

In *S v Phiri* HH 195-15 the court had this to say:

The general public has rightly demanded that rapists should be severely punished. Rape is a crime of violence rather than passion. It dehumanises and traumatizes the victim. It is even worse when the victim is potentially exposed to the lethal infection of the HIV virus and other sexually transmitted infections. The courts should, in my view, play their role by punishing such offenders in a manner which acknowledges the serious nature of the offence and the interests of justice.

The long term damage done to a child who is raped can be even worse. According to one author:¹¹

...childhood sexual abuse is considered one of the worst forms of trauma, and its effects, long term signs and symptoms are now found to span a large range of conditions. Sexual abuse is considered 'soul murder' as it literally robs the child victim of their innocence, severely disrupts their developing ego structure and sense of Self, and will later distort the then adult's ability to function and form healthy relationships with others.

It has been found that the risk of lasting psychological harm to the child victim is greater if the perpetrator of the sexual assault on the child is a close relative such as a father or someone in a position of

¹¹ Linda Callaghan *In rage: Healing Rage of Child Sexual Abuse*, Tyrone Hill Publishers, New Jersey 2007

protector and guide, such as a teacher.. Victims of child sexual abuse may sometimes themselves become abusers in later life.

It is therefore vitally important in determining the appropriate sentence for rape to take full account of the nature of this crime and its short and long-term consequences. In England the sentencing guidelines for sexual offences have been amended so that the courts will fully consider the impact of sex offences on victims. As well as physical harm, the new approach reflects more fully the psychological and longer term effects on the victim, enabling courts to pay heed to the true extent of what the victim has been through.¹²

INADEQUATE SENTENCES FOR RAPE

Section 65(2) of the Code provides a non-exhaustive list of factors that the court should take into account in imposing sentences in rape cases. Unfortunately the lack of proper sentencing guidelines for this offence has led some regional magistrates to impose woefully inadequate sentences that fail to reflect the seriousness of this offence and generally their sentencing patterns for this offence are erratic and inconsistent. This is most apparent in cases of rape of children. Review and appeal courts have tried to correct these anomalies where they occur.

For instance, in *S v Phiri* HH 195-15 a 54 year old accused was convicted of 5 counts of the rape of his step-daughter, a 14 year old. All 5 counts were treated as one for sentence and the accused was sentenced to 16 years, 4 years conditionally suspended. The magistrate sentenced him to an effective sentence of imprisonment of 12 years. The review court said this was far too lenient and totally inadequate for his repeated transgression. An effective term of 20 years to 25 years imprisonment would have been appropriate.

GENERAL SENTENCING GUIDELINES IN RAPE CASES

There is one case which purports to give some general guidelines for sentencing in rape cases is that of *S v Ndlovu* 2012 (1) ZLR 393 (H). In this case a 43 year old man was convicted of five counts of raping his own daughters aged 4 and 7. The magistrate imposed a total effective sentence of 40 years imprisonment. Although he characterised rape

¹² "New sex offence guidelines to overhaul sentencing" By Kathleen Hall in The Law Society Gazette 12 December 2013 <https://www.lawgazette.co.uk/law/new-sex-offence-guidelines-to-overhaul-sentencing/5039178.article>

as traumatising, humiliating and abominable, the review judge reduced this sentence to a total effective sentence of 18 years. The judge said that the sentence for rape should not exceed the sentence ordinarily imposed for murder with extenuating circumstances and culpable homicide. Working from this comparison with homicide sentences, the judge concluded that a single count of rape should attract a sentence from 5 to 10 years. Only in a rare, very serious case should the sentence go beyond 10 years and the very worst cases should attract life imprisonment.

It is respectfully submitted that the crime of rape is of a very different nature to homicide and causes drastic immediate and long-term harm of a different character to that of homicide. It is a truly abominable crime. Surely a sentence well in excess of 5-10 years is appropriate for a single count of a young child rape by a father or a brutal rape of an elderly woman. Although the appropriate sentence must be assessed on the facts of each case of rape it is certainly arguable that the magistrate's sentence in the *Ndlovu* case took into account properly the despicable nature of the offence committed by a father on his own very young daughters.

SOME HIGH COURT CASES

There are various cases involving adult men raping child victims where the High Court found the sentence imposed was too lenient or where it could be argued that the sentences imposed were too lenient or the reduced sentence was too lenient.

In *S v Ncube* HB-136-17 the appellant was convicted of two counts of rape upon a 12 year old after dragging her into some bushes and sentenced to 12 years imprisonment of which 4 years imprisonment was conditionally suspended, making an **effective sentence of 8 years**. His appeal against sentence was dismissed.

In *S v Mafuwa* HH-664-17 a 40 year old teacher raped a 4 year old pre-school after luring the girl to his office. After raping the complainant, appellant threatened to cut her head off with a knife if she disclosed the offence to anyone. He also told her that if asked by anyone she should say she was raped by school pupils. After the rape, complainant went home and reported to her mother that she was in pain, after which her mother examined her private parts and noticed bruising on her genitals and later the rape was reported to the police. The teacher was sentenced to 12 years imprisonment of which 3 years'

imprisonment were conditionally suspended, making an **effective sentence of 9 years**.

In *S v Nemukuya* HH-102-09 the accused was 59 at the time of conviction. He raped his 12 year old grand-daughter.. Rather than protecting the child he took advantage of being in *loco parentis* over her. He overpowered the girl “without using much physical force”. The complainant suffered a lot of psychological trauma. The accused threatened her with death if she reported the rape. When she did report, her report was suppressed by the family. Only later was the matter reported to the police. The magistrate sentenced him to 18 years’ imprisonment of which 4 years were suspended. On appeal, the court substituted a sentence of 12 years’ imprisonment with 4 years suspended, which was an **effective sentence of 8 years**.

In *S v Murehwa* HH-41-2004 the accused was convicted of 2 counts of rape on a 9 year old school girl as she was coming from school. He was sentenced to 7 years imprisonment on each count. Of the total of 14 years imprisonment of which 4 years were conditionally suspended, making an **effective sentence of 10 years**. This sentence was confirmed on appeal.

In *S v Tafirenyika* HH-441-13 a 70 year old man raped an 11 year old girl. He was sentenced to 15 years imprisonment of which 7 years were conditionally suspended, an **effective sentence of 8 years**. The man was married to the aunt of the girl. She was staying at their house. After the rape he threatened that if she told anyone about what had happened he would throw into a crocodile infested pool. The appeal against sentence was dismissed.

On the other hand more severe sentences was handed down in the following cases:

In *S v Mpande* HH-43-11 appellant raped a 3 year old girl left in his care and infected her with syphilis. He was “in a protective relationship” with complainant. The appellant therefore abused the trust of both the complainant and her grandmother who employed the appellant. That together with the age of the child made this “a very bad case of sexual abuse.” He was sentenced him to 18 years imprisonment of which 3 years was conditionally suspended making an effective sentence of 15 years. The appeal was dismissed. The court commented that he was lucky not to get a harsher sentence.

In *S v Mukarati* HH-323-14 a prophet took advantage of a so-called cleansing ceremony of a 13 year old girl and was sentenced to 20 years imprisonment of which 2 years was conditionally suspended, an effective sentence of 18 years. This was a well calculated offence by a cunning appellant. Those who commit heinous offences of this nature must accept that they cannot avoid being removed from society for a fairly long period of time. Such sentences are a desperate response by these courts to the continued and almost unabated occurrences of such offences. The appeal against sentence dismissed.

In *S v Nyathi* 2003 (1) ZLR 587 (H) a man forcibly raped his 16 year-old daughter 10 times over a period of 18 months. The magistrate imposed an effective total sentence of 30 years' imprisonment. The review judge considered this sentence to be excessive and reduced it to an effective total sentence of 18 years' imprisonment.

In *S v Chirembwe* HH-162-15 the accused was convicted of 30 counts of unlawful entry into domestic premises and 21 counts of rape. On review the sentence was changed to a total of 73 years imprisonment of which 18 years is suspended, making an effective sentence of 55 years.

SURVEY OF REGIONAL COURT SENTENCES

The Legal Resources Foundation has surveyed recent rape cases in the regional courts from around the country. This survey has revealed considerable inconsistencies in sentences imposed in what appear to be very similar cases. Some of the sentences in serious rape cases involving rape of child victims by adult males appear to be too lenient. See Annexure 1 for a sample of sentences from the Harare Magistrates Court.

ADULT RAPE VICTIMS

The Legal Resources Foundation survey has also revealed considerable inconsistencies in sentences imposed in what appear to be very similar cases. The sentences in rape cases involving rape of adult women by adult males appear to be too lenient. See Annexure 2 for a sample of sentences from the Bulawayo Magistrates Court.

One particularly bad case which attracted a long term of imprisonment was that of *S v Ndebele* HB-131-10. In this case the appellant was convicted of 3 counts of rape and 2 counts of aggravated indecent assault on two heavily pregnant women, one of whom was 9 months

pregnant. The complainants were walking with their 9 year old cousin in a bushy area. The accused man ordered the women to go behind a bush and when they resisted he assaulted them with a stick to get them to comply. Once in the bush, the man slapped the first complainant twice and forced her to lie down ordering her to remove her panties. He ordered the second complainant and the 9 year old boy to sit down nearby as he raped the first complainant once. When the man finished raping the first complainant the first time, he ordered the second complainant to suck his penis before raping the first complainant a second time. When the man finished raping the first complainant the second time, he demanded that she should thank him for what he had done which she did. He then ordered the second complainant to suck his penis the second time before ordering the first complainant to bend over and raping her for the third time. All this happened in the full view of the 9 year old boy who had been ordered to sit down a short distance away.

The court pointed out that this was an extreme case of rape and aggravated indecent assault where the Appellant exhibited callousness of the highest order and appeared to derive sadistic pleasure in abusing heavily pregnant women in the full view of a 9 year old child. He was sentenced to 18 years imprisonment for the 3 counts of rape and 15 years imprisonment for the 2 counts of aggravated indecent assault. Of the total 33 years imprisonment, 8 years imprisonment was conditionally suspended. The overall effective sentence was 25 years was confirmed by the appeal court.

In *S v Zakeyo* HH-142-12 a prophet had called a married woman to his house and had overpowered her and raped her. She was instructed not to tell anyone about the rape otherwise she would die or the severity of her illness would increase. Appellant was convicted on a charge of rape and sentenced to 17 years' imprisonment, 4 years conditionally suspended, making an effective sentence of 13 years. The appeal against sentence was withdrawn.

In *S v Machingura* HH-236-12 a man raped a woman in his car at knife point. After the rape he threatened her with death and the death of her husband if she disclosed the rape. The court held that the sentence of 10 years of which 3 years was conditionally suspended, an effective sentence 7 years, was not too harsh.

CHILD RAPISTS

A recent study into sentencing patterns in regional magistrates' courts in Zimbabwe has disclosed that a significant percentage of rapes are committed by persons under the age of 18. This is a social problem that needs to be addressed urgently. Many of the offenders come from poor families and some have themselves been the victims of sexual abuse and have developed disturbed personalities. However, rape remains an extremely serious offence even though the offence has been perpetrated by a person under the age of eighteen. For this reason the courts are obliged to impose sentences that do not trivialise the serious crimes committed.

The courts have understandably been most reluctant to incarcerate children in ordinary prisons. The general policy has been to keep children out of prison wherever possible. The Constitution in section 81 provides that children accused of crimes should not be detained except as a measure of last resort and if they are detained, they should be detained only for the shortest period of time. In South Africa the Constitutional Court has ruled that mandatory minimum sentences for juveniles between 14 and 16 are unconstitutional: see *Centre for Child Law v Minister of Justice and Constitutional Affairs* CCT-98-08.

The problem here is the limited range of sentencing options available in such cases. The regional courts have usually adopted the expedient device of sentencing juvenile offenders to receive corporal punishment. There are two drawbacks of this approach. First, if the offender already has a disturbed personality, corporal punishment administered in the prisons may well make the youth more disturbed and more likely to commit further crimes. Secondly, this sentencing alternative may well become unavailable if the Constitutional Court upholds recent rulings by the High Court¹³ that this form of punishment is unconstitutional.

In a serious rape case such as where the victim is a very young child, a community service order is certainly not appropriate. What would be far more appropriate would be to order, on the basis of probation

¹³ *S v Chokuramba* HH-718-14 and *Pfungwa & Anor v Headmistress of Belvedere Junior Primary School & Others* HH-148-17. These decisions still await confirmation by the Constitutional Court according to section 175(1) of the Constitution.

officers, that the offenders be held in institutions for the training and rehabilitation of juvenile offenders. However, the places in such institutions are very limited and there is currently a shortage of probation officers. This issue must be urgently addressed.

In *S v Tsingano* HH-279-11 a 17 year old juvenile first offender raped a 14 year old who had been asleep after throttling her. Disregarding the probation officer's recommendation, the trial magistrate sentenced the juvenile to 9 years imprisonment of which 2 years were conditionally suspended. Whilst acknowledging that rape is a disturbingly prevalent serious offence and also that *in casu* the accused showed perseverance and determination in the commission of the offence, in view of accused's age and personal circumstances it was a gross error of judgment to sentence him to an effective term of imprisonment let alone one of 7 years. The accused was sentenced to 3 years imprisonment the whole of which was conditionally suspended.

In *S v Marufu* HH-298-11 a 17 year old was convicted by a regional magistrate on 4 counts of rape. He was sentenced to 12 years imprisonment of which 4 years were conditionally suspended. The appeal court substituted a sentence of 4 years imprisonment of which 2 years 8 months was conditionally suspended.

STATUTORY RAPE

What makes the issue of sentencing for this offence a complex matter is that there are a wide range of differing circumstances that fall within its ambit. This has been pointed out in various case such as *S v Mutowo* 1997 (1) ZLR 87 (H) at p 88 and *S v Tshuma* HB-70-13. There is, for instance, a vast difference between a situation where a 60 year old man entices a naïve 13 year old girl to have sexual relations with him by giving her money or gifts and a situation where a 17 year old youth and a 15 year old girl who is nearly 16 years old fall in love and mutually agree to have sexual relations after the girl tells him that she wants to have sexual relations with him. The problem is that between the most blameworthy and the least blameworthy situations postulated above there are many variations and different factors that have to be weighed in deciding upon the appropriate sentence.

ADOLESCENT SEXUAL ACTIVITY

It is inevitable that some teenage boys will have sexual relations with teenage girls with their consent. If they do not use protection, the result can be transmission of sexually transmitted diseases and

pregnancy. Teenage pregnancy carries serious health risks and some pregnant girls may resort to dangerous illegal abortions. Because of this, the criminal law under section 70 thus tries to discourage boys over 16 from having sexual relations with girls under 16.

A boy who is only 16 or 17 years of age commits the offence under section 70 of the Code if he has sexual relations with a consenting girl who is only a few years younger than him. But in sentencing the boy the court must obviously take full account of the age of the accused. This will also apply to some extent to a male only a year or so over 18 who has consensual sexual relations with a girl of 15 where there is no evident sexual exploitation involved.

In the case of *S v Masuku* HH-106-15 a boy aged 17 had sexual relations with his girlfriend who was 15. This resulted in the girl falling pregnant. The judge said that the court must not impose unnecessarily punitive sentences for such boys. She was of the opinion that even a suspended prison sentence was inappropriate in the present case and instead decided that a direct sentence of community service would be "sufficiently rehabilitative and more in tune with a policy approach towards juvenile justice, which places emphasis on rehabilitation rather than branding such a youth as a criminal." She then went on to observe that the law can only do so much to discourage teenage sexuality and prevent the dangers for girls that it poses. Society and policy makers need to accept the social reality of prevalent teenage sexuality and devise appropriate social interventions. She suggest interventions such as availing contraceptive protection and a more rigorous and open approach to sex education in schools. These interventions are necessary "since the dominant message of abstinence has obviously not succeeded in keeping the youth from having sex among their group."

MALE SEXUAL PREDATORS

There should be common agreement that severe sentences must be imposed on men who sexually prey on young girls. Situations where older men induce immature girls to have sexual relations with them can be characterised as sexual exploitation. Where magistrates have handed down lenient sentences upon men who have sexually exploited girls, judges dealing with such cases on review or appeal have severely criticised the magistrates. Some of these judgements are summarized below.

In *S v Virimai* 2016 (1) ZLR 533 (H), the review judge decried the prevalent practice of imposing inappropriately lenient sentences for this offence. In that case a 28 year old soldier had consensual sexual relations on a number of occasions with a girl aged 14 years. The magistrate sentenced him to a fine of \$300 or in default of payment of the fine to 2 months imprisonment and in addition 2 months imprisonment wholly suspended on conditions of good behaviour. He also considered imposing community service but found that this would not fit in with the soldiers' work schedule. The review judge concluded that the sentence imposed was both manifestly and shockingly lenient. She said the soldier had taken advantage of a vulnerable young girl. A substantial custodial term of imprisonment would have been appropriate with a portion of the custodial sentence suspended. The option of accused performing community service should never have entered into the mind of the magistrate for public policy reasons.

In *S v Nyirenda* 2003 (2) ZLR 102 (H) a 37 year old man had sexual intercourse with a 15 year old neighbour. The age difference between the two was regarded as an aggravating factor although the complainant's closeness in age to 16 was held to be mitigatory. The sentence imposed was two years imprisonment of which 16 months was suspended on condition of good behaviour which meant that the effective sentence was a paltry 6 months' imprisonment.

In *S v Mbulawa* 2006 (2) ZLR 38 (H) the accused was convicted of committing an immoral or indecent act with or upon a young person. He was aged 30 and the female complainant was aged 12.¹⁴ He had fondled her breasts, kissed her and fondled her private parts on a number of occasions over a period of a month. The court held that sexual abuse of children is viewed by the courts in a serious light and paedophilia has to be dealt with effectively. The courts have to drive home the message that such conduct will not be tolerated as it has grave consequences on the youths. Self-gratification of adults should not be at expense of debauching young persons. The accused had offended against morality by not only gratifying his own sensualities, but by also exciting, encouraging and facilitating the illicit gratification of the 12 year old complainant. The sentence should not be such that it gives the impression that the court is condoning sexual abuse of children. The accused's moral blameworthiness was so high that an effective sentence in the region of two years was appropriate.

¹⁴ If the girl was indeed only 12 surely she was below the age of consent and the correct

In *S v Girandi* HB-55-12 a male aged 23 had sexual intercourse with a form one girl aged 13. The accused person was sentenced to 14 months imprisonment of which 4 months was suspended on condition of not further offence committed and 10 months was further suspended on condition of performing community service. The review judge said that the sentence was disturbingly lenient and inappropriate. He said that this offence is prevalent and there was the need to send a signal to society that courts will descend heavily on child sexual abusers. The accused was an adult who was 10 years older than the girl and he had manipulated the girl to have sexual intercourse with her. His moral blameworthiness was high and a non-custodial sentence was not reasonable under the circumstances. It trivialises the offence and rewards the offender. In this case sentence of not less than 2 years imprisonment should have been imposed.”

In *S v Matare* HH-410-16 a 36 year old married man had sexual intercourse with a 15 year old girl on several occasions and he was sentenced to 18 months imprisonment all of which was suspended for good behaviour and community service. The review judge concluded that the sentence was far too lenient. The accused showed no remorse but instead denied any wrongdoing and “quite incredibly” claimed that the girl had seduced him. The review judge said this and other factors should have outraged the trial court.

In *S v Banda*, *S v Chakamoga* HH-47-16 two accused, both of whom were over 30 years, were convicted, in unrelated trials, of having sexual relations with a young person. In both matters the girls were aged 15. They both impregnated the young girls. Fortunately, neither of the girls contracted a STI or HIV. The only difference was that one accused took the young girl for his wife. The other gave the young girl two small sums of money after he had had his way with her. In each case, the accused was sentenced to 24 months’ imprisonment, half of which was suspended. The review judge, Charewa J, said that “sentencing a man of over 30 to an effective 12 months imprisonment for having sexual intercourse with a young person of 15 can hardly be aimed at deterring other older men from preying on young and immature persons, who are swayed by the offer of \$1 or \$2, in these harsh economic times. The very fact that a young person ‘agrees’ to sexual intercourse with a much older man for such a paltry amount is clear evidence of her immaturity and incapacity to make an informed choice or decision. Nor can a promise to marry, or even eventual marriage of the child be mitigating.”

At page 9 the judge pointed out:

It is up to judicial officers to show that the courts will not tolerate predatory older men who prey on young persons by handing down appropriately severe sentences. The prevalence of these type of offences, the consequential incalculable damage they cause in preventing young persons from attaining their full potential, the damage to the social fabric, coupled with its impact on national development and the need to conform to international standards in the protection of children ought to be additional grounds for handing down deterrent sentences.

The judge advised that an effective sentence of not less than three years should be imposed in these cases, on an incremental basis for those accused who are twice the victims' ages, are married with children of their own, and impregnate the girls or infect them with sexually transmitted diseases other than HIV.

All of these cases involved men who were considerably older than the girls and who were found to have exploited the young girls and who must or should have known that what they were doing was not only immoral but also unlawful.

There are thus a whole multiplicity of factors that can come into play in deciding the appropriate sentence on the specific facts of a case. These have been set out in a series of cases¹⁵ and are detailed in re *S v Tshuma* HB-70-13. Some of the stated mitigatory factors must be considered with caution. For example, the fact that the accused comes from a community where it is not well known that it is impermissible to have sexual relations with a girl under the age of 16 and was unaware that child marriage violates the constitutional rights of girls. In *S v Nyamande* HH-719-14 a 54 year old man had sexual relations with a girl aged 14 years over a period of 6 months resulting in the girl becoming pregnant. He was sentenced to a wholly suspended term of imprisonment. The accused said in mitigation that at his church they are allowed to marry as many wives as they want and he wanted the complainant to be his third wife. The court said that an effective custodial sentence was called for in this case. This was required to protect young girls from sexual abuse and to deter abusers who acted under the guise of marrying the girls when such marriages are now prohibited.

¹⁵ For instance, *S v Nare* 1983 (2) ZLR 135 (H)

The weight to be attached to the fact that the girl is not a virgin and has had sexual relations previously also needs to be carefully considered. As is pointed out in the *Tshuma* case above the fact that the girl is sexually experienced is certainly not a defence and the offence is still committed. If a much older man sexually entices a girl of 14 to have sexual relations with him, the fact that the girl has previously had sexual relations on one occasion with her boyfriend should not detract from the seriousness of the offence.

The fact that the offender is married already should be treated as aggravating as a mature married man who seeks sexual gratification by enticing a young girl must be seen as irresponsible and he deserves to receive a severe punishment.

Sexual exploitation of girls under the age of 16 must be condemned by imposing severe sentences. Fines, wholly suspended prison sentences and community service orders are inappropriate for men who sexually prey on young girls. We also need a criminal offence to punish men who sexually groom young girls through the Internet so they can sexually exploit them or induce them to supply naked pictures of themselves. There should also be a sex offenders' register which can be used to monitor the activities of paedophiles on their release from prison to try to prevent them from re-offending.

On the other hand, we should be careful about imposing mandatory minimum sentences for this offence because of the widely differing situations which can fall within the ambit of this offence. It would be better to compose detailed sentencing guidelines for magistrates to ensure that they impose appropriate sentences for the different types of this offence.

ANNEXURE 1**Sample of Rape Sentences Imposed in Harare Regional Court 2016-2017 on Rapists at least 18 Years of Age Raping Children****NOTE**

This sample reveals substantial differences in sentencing for what are apparently similar rape cases. Of course, to do a full comparison the individual facts of the case and the circumstances of the accused would have to be factored in. All these cases were listed as rape but it would need to be checked whether some of those involving children over 12 are not statutory rape cases.

| Age of offender | Age of victim | Actual sentence | Effective sentence |
|------------------------|----------------------|-----------------------------------|---------------------------|
| 35 | 11 | 30 years, 5 years c/s | 25 years |
| 27 | 5 | 12 years, 4 years c/s | 8 years |
| 19 | 9 | 18 years, 4 years c/s | 14 years |
| 30 | 6 | 8 years, 3 years c/s | 5 years |
| 20 | 8 | 8 years, 2 years c/s | 6 years |
| 24 | 8 | 18 years, 5 years c/s | 13 years |
| 30 | 9 | 20 years 2 years c/s (2 counts) | 18 years |
| 37 | 4 | 16 years 3 years c/s | 13 years |
| 22 | 3 | 12 months, 6 months c/s | 6 months |
| 33 | 13 | 36 months, 12 months c/s | 24 months |
| 20 | 12 | 12 months 6 months c/s | 6 months |
| 26 | 14 | 6 years, 2 years c/s | 4 years |
| 32 | 13 | 7 months c/s | 7 months wholly suspended |
| 26 | 14 | 24 years, 4 years c/s (3 counts). | 20 years |
| 35 | 13 | 5 years, 2 years c/s | 3 years |
| 27 | 15 | 30 months, 10 months s c/s | 20 months |
| 33 | 15 | 2 and a half years, 1 year c/s | 1 and a half years |
| 28 | 15 | 24 months, 6 months c/s | 18 months |
| 18 | 14 | 24 months, 6 months c/s | 18 months |
| 20 | 13 | 24 months, 6 months c/s | 18 months |
| 24 | 15 | 4 years, 1 year c/s | 3 years |
| 50 | 15 | 30 months, 12 months c/s. | 18 months |

ANNEXURE 2**Sample of Rape Cases 2016-2017 in Regional Court Bulawayo Involving Accused and Complainants over 18**

| Offence | Age of Offender | Age of Complainant | Actual sentence | Effective sentence |
|----------------|------------------------|---------------------------|------------------------|---------------------------|
| Rape | 49 | 20 | 10 years, 3 years c/s | 7 years |
| Rape | 45 | 19 | 7 years, 4 years c/s | 3 years |
| Rape | 35 | 21 | 12 years, 3 years c/s | 9 years |
| Rape | 29 | 21 | 5 years, 2 years c/s | 3 years |
| Rape | 38 | 21 | 10 years, 3 years c/s | 7 years |
| Rape | 38 | 18 | 12 years, 4 years c/s | 8 years |
| Rape | 26 | 18 | 9 years, 3 years c/s | 6 years |
| Rape | 35 | 24 | 10 years, 2 years c/s | 8 years |
| Rape | 32 | 21 | 9 years, 3 years c/s | 6 years |
| Rape | 30 | 24 | 10 years, 4 years c/s | 6 years |
| Rape | 25 | 21 | 10 years, 5 years c/s | 5 years |
| Rape | 32 | 22 | 14 years, 4 years c/s | 10 years |
| Rape | 47 | 31 | 10 years, 5 years c/s | 5 years |
| Rape | 30 | 24 | 6 years, 3 years c/s | 3 years |
| Rape | 55 | 31 | 7 years, 2 years c/s | 5 years |
| Rape | 60 | 30 | 10 years, 4 years c/s | 6 years |
| Rape | 49 | 25 | 14 years, 4 years c/s | 10 years |
| Rape | 60 | 17 | 15 years | 15 years |
| Rape | 46 | 70 | 10 years, 4 years c/s | 6 years |
| Rape | 27 | 21 | 12 years, 3 years c/s | 9 years |
| Rape | 23 | 18 | 7 years, 4 years c/s | 3 years |
| Rape | 32 | 24 | 12 years, 4 years c/s | 8 years |
| Rape | 32 | 21 | 15 years, 5 years c/s | 10 years |

ANNEXURE 2 (cont)**Sample of Rape Cases 2016-2017 in Regional Court Bulawayo Involving Accused and Complainants over 18**

| Offence | Age of Offender | Age of Complainant | Actual sentence | Effective sentence |
|----------------|------------------------|---------------------------|------------------------|---------------------------|
| Rape | 50 | 21 | 13 years, 4 years c/s | 9 years |
| Rape | 44 | 26 | 6 years, 3 years c/s | 3 years |
| Rape | 45 | 21 | 10 years, 5years c/s | 5 years |
| Rape | 42 | 23 | 12 years, 2 years c/s | 10 years |
| Rape | 54 | 24 | 20 years | 20 years |

ANNEXURE 3**South Africa**

| Offence | Criminal Law Amendment Act 105 of 1997. Mandatory Minimum Penalty |
|--|---|
| Rape | First offence: 10 years Second offence: 15 years Third offence 20 years |
| Gang rape; Where the complainant was raped more than once; Complainant was under 16; Complainant was physically disabled or mentally ill; Where the accused knew that he was HIV positive at the time of the rape. | Life imprisonment (25 years) |

Kenya

| Offence | Offence Sexual Offences Act No 3 of 2001 | Mandatory Minimum Penalty | Maximum Penalty |
|--|---|----------------------------------|------------------------|
| Rape | § 3 | 10 years | Life imprisonment |
| Attempted Rape | § 4 | 5 years | Life imprisonment |
| Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities | § 7 | 10 years | |

ANNEXURE 3 (cont)

Kenya

| Offence | Offence Sexual Offences Act No 3 of 2001 | Mandatory Minimum Penalty | Maximum Penalty |
|----------------------------------|--|--|-------------------|
| Defilement | §8 | Age 0-11: Life Imprisonment | |
| Gang Rape | §10 | 15 years | Life imprisonment |
| Indecent act with child or adult | §11 | Age 0-18: 10 years Maximum Adult: 5 years | |

Tanzania

| Offence | Penal code amended by Sexual Offences Special Provisions Act of 1998 | Mandatory Minimum Penalty |
|--|--|--|
| Rape | § 131 | Against victim age 0-18: First offence: imprisonment for two years and corporal punishment Second offence: life imprisonment Third offence and recidivism. Against victim age 19+: 30 years, corporal punishment and fine |
| Gang rape | § 131 | Life imprisonment |
| Attempted rape | § 132A | 30 years with or without corporal punishment 10 years if rape attempt is based on false representations or deceit for purposes of obtaining consent |
| Defilement of wife under the age of 15 | § 138 (1) | 10 years |
| Guardian Allowing defilement of child under the age of 15 by her husband | § 138 (2) | 10 years |

ANNEXURE 3 (cont)**Tanzania (cont)**

| Offence | Penal code amended by Sexual Offences Special Provisions Act of 1998 | Mandatory Minimum Penalty |
|---------------------------------|---|--|
| Sexual exploitation of children | § 138B | 5 years |
| Grave sexual abuses | § 138 (1) | Against victim age 0-15: 20 years Against victim age 15+: 15 years |
| Sodomy and bestiality | § 154 (1) | Against victim age 0-10: Life imprisonment Against victim age 10+: 30 years |
| Incest by woman | § 160 | Against victim age 0-10 30 years |

Lesotho

| Offence | Sexual Offences Act | Minimum Penalty for first offence | Sexual Offences Act | Minimum Penalty for second or subsequent offence |
|--|------------------------------------|--|------------------------------------|---|
| Offence of persistent sexual abuse of a child | § 32(a) | 15 years | 32(b) | Life imprisonment |
| Unlawful sexual act where the convicted person was infected with HIV or another life threatening disease at the time of the offence but did not at that time know or have a reasonable suspicion of being infected | § 32(a) | 10 years | 32(b) | Life imprisonment |
| Sexual offences against a child; commercial Sexual exploitation of a child; sexual offences against disabled persons committed by a person of age 18 or above | § 32(a) | 10 years | 32(b) | Life imprisonment |