Enhancing The Protection Of Minors From Defilement In Botswana: Merits And Flaws Of The Law And The Process

Baboki Jonathan Dambe[1*]

Gosego Rockfall Lekgowe[**]

ABSTRACT

Adequate protection of minors from sexual exploitation by way of defilement should be the priority of every government. To this end, laws must be promulgated with the object of affording the required protection. The crafting of such laws is by no means an easy task. There are copious challenges that must be confronted in order to distil an effective law. These include deciding the appropriate age of consent by ensuring that all minors are protected whilst circumventing the pitfalls of criminalising non-exploitative sexual experimentation between adolescents. Moreover, there is the notable challenge of opting between making accommodations for the "mentally innocent" accused person by virtue of the mistake of age defence and rendering defilement a strict liability offence. Beyond the crafting of the laws, the criminal justice system must be sufficiently capacitated to achieve the effective prosecution of perpetrators of defilement. This entails the prosecution being fully alive to the elements of the offence and the nature of the evidence that is required to fruitfully prove the case against the accused person. On the other hand, judicial officers must be vigilant with respect to their duties in defilement cases principally where there is an unrepresented accused person. Any lapse in the system in this regard will regrettably result in the acquittal of persons who are otherwise guilty and this undercuts the protection that the law seeks to achieve. The essence of this paper is to assess the adequacy or otherwise of defilement laws in Botswana and the prosecution of defilement cases in light of the challenges highlighted above. Inspiration is drawn from how other jurisdictions have attempted to deal with the various challenges and recommendations are made in order to ensure that

1 [*] LLB (University of Botswana); LL.M (University of Edinburgh). Lecturer of Law, Department of Law, University of Botswana, P.O. Box 70003, Gaborone, Botswana. Email address: dambebj@ub.ac. bw
**LLB (University of Botswana) LL.M (University of Botswana) Lecturer of Law, Department of Law, University of Botswana. P O Box 70003, Gaborone, Botswana. Email address: lekgoweg@ub.ac.bw

the protection of minors is enhanced and the object of the defilement laws is achieved.

1. INTRODUCTION

Year in year out, statistics reveal that Botswana has a defilement problem. On the 24th November 2017, the then Minister of Nationality Immigration and Gender Affairs, Mr Edwin Batshu, revealed shocking statistics relating to teenage pregnancy in Botswana. Particularly that, in the preceding 22 months, a total of 728 births were reported for mothers aged 16 years and below. Moreover, that for the period between 2011 and 2015, statistics revealed that a staggering 5, 553 births had been registered for mothers aged 16 years and below.[2] It was against the backdrop of this scourge that, in April 2018, the parliament of Botswana amended the Penal Code in order to, amongst others, increase the age of consent from 16 to 18 years, and remove the protection previously afforded to accused persons married to persons below the age of consent and as well to introduce the gap in age defence. The then Minister of Health, Ms Makgatho, welcomed the amendments to the defilement laws and decried the prevalence of HIV/AIDS amongst young girls around 15 years. She noted that there was evidence that young girls were being infected through inter-generational sex.[3] In presenting the Bill that led to the amendment of the Penal Code[4] the then Minister of Defence, Justice and Security, Mr Kgathi, noted that the object of the Bill was to amend the Penal Code and to align it with the Children's Act by raising the legal age of consent from 16 to 18 years and as well to address incidences of defilement.[5] During the debate, the then Minister of Nationality, Immigration and Gender Affairs, Mr Batshu, highlighted that the number of school drop outs due to pregnancy of girls under the age of 18 years was alarming and a cause for genuine concern that called for appropriate legislative intervention.[6]

This paper assesses the amendments that were made to Section 147 (1) and 147 (5) of the Penal Code particularly in increasing the age of consent from 16 to 18 years as well as introducing a new special defence, respectively.

2 Sunday Standard Reporter, 26th November 2017, http://www.sundaystandard.info/defilement-rocks-botswana-crisis-get-worse-it-gets-better (accessed on the 28th July 2019).

3 Hansard, Parliament of Botswana, (28th March 2018) at p. 6.

4 Penal Code (Amendment) Bill, 2018, No. 7 of 2018.

5 Hansard, Parliament of Botswana, (28th March 2018) at p. 1.

6 ibid at p. 12.

In respect to the special defence, the paper notes that the mistake of age defence was substituted with the gap in age exemption, without making provision for *mens rea* for the offence of defilement. The paper examines whether the decision of the legislature in this regard was a deliberate legislative design to render defilement a strict liability offence or whether there was legislative oversight as relates to *mens rea*. The paper discusses the challenges that arise from the mistake of age defence as well as the innovations that have been implemented by some jurisdictions such as Canada and Zimbabwe in order to address such challenges and ensure that the protection of minors from sexual exploitation is not unduly compromised.

From a prosecutorial viewpoint, the paper highlights the challenges that are faced by the prosecution in proving the age of the complainant in defilement cases. It is argued that if the prosecution does not pay particular attention to the nature of the evidence required of them to prove the age of the complainant then the effective prosecution of perpetrators of defilement is severely undermined. It is undoubtedly undesirable for acquittals to result from failure by the prosecution to clear these rudimentary hurdles. The paper further notes that there are instances where persons convicted of defilement are ultimately acquitted on appeal on account of failures by magistrates to discharge their duties in respect of unrepresented accused persons. The paper particularly accentuates the duty of the trial court to inform an unrepresented accused person of the special defence under Section 147 (5) of the Penal Code and the effect that failure to do so has on the right to fair a trial and ultimately on the resultant conviction.

The paper further discusses the sentencing framework for defilement and whether there is a possibility of a person convicted of defilement being given a sentence below the minimum mandatory sentence of 10 years on account of the exceptional extenuating circumstances avenue under Section 27 (4) of the Penal Code.

2. THE RATIONALE OF THE INCREASE FROM 16 TO 18 YEARS

One of the significant changes brought about by the 2018 amendment to the Penal Code was an increase of the age of defilement from 16 to 18 years. As

indicated above, the primary determinant of setting the age at 18 years old was to achieve harmony between the Penal Code and various other laws dealing with children. By way of example, the Interpretation Act prescribes 18 years as the age of majority, being the age at which one can give legal consent.[7] Similarly, in terms of the Children's Act a child is defined as someone below the age of 18 years.[8] It is essential to highlight that Section 25 of the Children's Act grants every child in Botswana the right to be protected from sexual abuse and exploitation. Moreover, Article 19 of the United Nations Convention of the Rights of the Child places an obligation on state parties to, among others, take appropriate legislative measures to protect children from abuse and exploitation, including sexual abuse. To that end, the pre amendment law, which set the age of consent at 16 years, palpably excluded other children from the protection of the law, and this did not fully accord with the cardinal principle of the best interests of the child.[9]

The increase of the age of consent in the Penal Code was accordingly essential in order to resolve the incongruence, which obtained in Botswana for some time, where an individual was regarded as a child for all other purposes but deemed old enough to consent to sexual intercourse under the Penal Code.

It is noted that determining the appropriate age of consent is an exercise that presents challenges due to the potential dilemma of conflicting needs. Grauper acknowledges this dilemma as follows:

> If the age limit is set too high, the law can easily come into conflict with the need of adolescents for sexual liberty and could easily turn from a mean of protection to a threat itself for the sexual determination of juveniles. So, legislators have to find a reasonable and fair balance between the need for adolescents to protection from unwarranted sex and their equally needed freedom to engage in self determined sexual relationships.[10]

---

7 Section 49 of the Interpretation Act.

8 The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child both define a child as someone below the age of 18 years.

9 T. Jobeta and B.R Dinokopila, 'The Best Interests of the Child Principle in Botswana' (2018) *University of Botswana Law Journal*, 20.

10 H Grauper, 'Sexual Consent: The Criminal Law in Europe and Overseas' (2000) *Archives of Sexual Behavior* Vol 29 No 5, 415 at p. 418.

It has also been observed that the incapacity of a child is not static. Therefore, that the role of the state is to nurture and support the child as it progressively attains the capacity to avoid and manage the risks to sexual health in negotiating sexual development.[11] The increase of the age of consent to 18 years is a positive development and, the gap in age exemption which will be discussed below, shows that an appropriate balance has been struck between protecting children yet making provision for their growth and development.

3. THE SPECIAL DEFENCE UNDER SECTION 147 (5) OF THE PENAL CODE: THE OLD AND THE NEW

The other critical feature of the 2018 amendment to the Penal Code was to substitute the old special defence under Section 147 (5) of the Penal Code with a new gap in age exemption. This section of the paper examines the justifications and implications of the amendment of the special defence.
The old Section 147 (5) of the Penal Code couched the special defence as follows:

> It shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the person was of or above the age of 16 years or was such charged person's spouse.

In assessing the import of this special defence, in the case of *Madume v The State*[12] the Court held that in determining whether the accused person had reasonable cause to believe that the complainant was above the age of 16 the court had to look at the complainant's physical attributes and demeanour.[13] The trial magistrate in the court a quo had indicated that age is determined by the fat on the face, size of the body, height and demeanour. Consequently, the trial magistrate held that, apart from the developed size of the complainant's breasts, having observed her physique and demeanour she looked every bit a 13

11 G D Kangaude, 'Adolescent Sex and "Defilement" in Malawi and Society' (2017) 17 *African Human Rights Law Journal* 527.

12 1986 BLR 49 (HC).

13 *Kgopodithata v The State* 1990 BLR 663 (HC). *State v Ralengabi* 1988 BLR 1 (HC).

year old. Moreover, the Court cautioned that there was a responsibility on an accused person to have taken steps to enquire about the age of a complainant in satisfying himself that the person with whom he was engaging in sexual intercourse was of age. The Court quoted with approval the following passage by the East African Court of Appeal in the case of *R v Coetzee:*[14]

> A man who had carnal knowledge of a young girl whose appearance suggested that she was of or about the age of consent ran a decided risk and it was his business to address his mind to the question of age and assure himself on reasonable grounds that he was not committing a breach of the law.[15]

The Court further held that whether a sufficient defence to the charge had been established was a matter of fact and the appellate court was not to disturb the factual observations of the trial court.

In the case of *Keboseke v The State*[16] the Court held that the complainant had a "childish" appearance and she looked too young. Consequently, it was held that the accused person took a decided risk when he did nothing to establish her age before he had sexual intercourse with her. His conviction was accordingly upheld. Although the accused testified that he believed that the complaint was above the age of 16, the prosecution called a friend of the accused to refute this belief. The friend testified that, on the night the accused person had sexual intercourse with the complainant, he thereafter told him that he will never have sex with her again because she was too young. This was accepted as proof that, by his own estimation, the accused person believed that the complainant was too young and as such he could not be availed the benefit of the special defence.

The approach adopted by the *Madume* case in placing an obligation on an accused person to enquire and satisfy himself as to the age of the accused person before he can be availed the benefit of the special defence under Section 147 (5) of the Penal Code was criticised in the case of *Manewe v The State*.[17] The Court couched its criticism in the following terms:

14 1943 10 E.A.C.A 56.
15 Ibid at p. 58.
16 2007 (1) BLR 800 (HC).
17 2005 (1) BLR 276 (HC).

> To say that the accused person can only rely on the special defence if he has made deep investigations assuring himself of the age of the complainant would unnecessarily cut down and reduce the scope of the defence that parliament, in its wisdom, had conferred without the qualification of enquiry.

The High Court noted that, from the record of proceedings, it was apparent that after the accused person had testified that he believed that the complainant was of age, the magistrate had decided to re-call the complaint into the court in order to assess her physical appearance. After doing so the magistrate made a pronouncement that, in terms of physical appearance, the complainant looked mature and that if anyone was to be asked to estimate her age based on her physical attributes they might be bound to commit a mistake by overstating her age. The High Court set aside the conviction of the accused person noting that, having made the observations that she did, the magistrate had not properly applied Section 147 (5) of the Penal Code. The High Court accordingly afforded the accused person the benefit of the special defence.

It is to be noted that the criticism of the court in saying that Section 147 (5) of the Penal Code did not place an obligation of enquiry on the accused person is legally sound. To that end, although the court in the *Madume* case was well intentioned in saying that an accused person should not be allowed to rely on their own ignorance, indifference nor recklessness as to the age of the complainant, the requirement of a prior enquiry was not imposed by Section 147 (5) of the Penal Code. By way of example, in countries where an enquiry by the accused person is a precondition to relying on the mistake of age defence, the law is expressly clear to that effect. For example, Section 150. 1 (4) of the Canada Criminal Code provides as follows:

> It is not a defence to a charge under Section 151 and 152, subsection 160 (3) or 173 (2) or Section 271, 272 or 273 that the accused believed that the complainant was 16 years or more at the time that the offence is alleged to have been committed, unless the accused took all reasonable steps to ascertain the age of the complainant.

Many countries across the world recognize the mistake of age defence in relation to defilement.[18] The unfortunate reality is that the effect of the special defence in the manner it was couched excluded children who matured quickly and looked like they were of age from the protection of the law. Some countries such as Zimbabwe, whose special defence is in effect similar to Botswana's old Section 147 (5) of the Penal Code, have modified the defence to ensure that an accused is not able to successfully raise the special defence merely on account of the physical appearance of the complainant. Section 70 (3) of the Zimbabwe Criminal Code has a proviso to the effect that the apparent physical maturity of the complainant, on its own, shall not constitute reasonable cause for the accused to believe that she is of age. This therefore provides added protection in that it places an obligation on the accused person to conduct further enquiries into the age of the complainant beyond the developed physical attributes.

According to the 2018 amendment to the Penal Code, Section 147 (5) was substituted with the following new subsection;

> (5) It shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge is brought that the person so charged is-
>
> (i) less than two years older than the person so defiled,
>
> (ii) not in a position of trust or authority towards the person so defiled,
>
> (iii) not a person with whom the person so defiled is in a relationship of dependency, and
>
> (iv) not in a relationship with the person so defiled that is exploitative of the person so defiled.

All the conditions stipulated under Section 147 (5) must be conjunctively satisfied before one can successfully mount the special defence. Moreover, the requirements under Section 147 (5) (ii) to (iv) are not mutually exclusive. There may be instances where the relationship between the accused and the complainant falls between more than one and even all of those categories. The primary requirement of those subsections is that the accused person must not be involved in an exploitative relationship with the complainant, being

18 Section 138 of the Malawi Penal Code; Section 70 (3) of the Zimbabwe Criminal Code.

a relationship where they are taking advantage of the vulnerability of the complainant on account of their position. To the extent that the Penal Code has not defined the parameters of those relationships, it remains for the court to look at the circumstances of each case on its own merit and determine whether the nature of the relationship is one in which the complainant deserves protection from the accused person. Moreover, the mere existence of a relationship of the prohibited nature between the complainant and the accused person is sufficient to negate application of the special defence. The accused person cannot be absolved by proving that the said relationship did not have a bearing on the consent of the complainant.

A controversial question that may arise, but is yet to be dealt with by courts in Botswana, is whether the mere fact that Parliament has substituted the mistake of age defence renders it inapplicable in Botswana. The argument in this respect is that defilement itself is a common law offence and the mistake of age defence is equally part of the common law. In trying to address this question Myres notes as follows:

> It would take little effort on the part of the legislature to carve out express exceptions to the common-law rule that mistake of fact is a defence; it is arguable that their failure to do so indicates an intention not to restrict the mistake of fact doctrine in this area.[19]

It is to be noted that the general principle of statutory interpretation applicable in Botswana is that where a provision does not indicate whether *mens rea* is a requirement for the particular offence then there is a presumption that *mens rea* is required.[20] The Court in *Korong v The State*[21] quoted with approval the following passage from the case of *Brend v Wood*:[22]

It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly, or by necessary implication, rules out mens rea as a constituent part of a

19 Larry W. Myres, 'Reasonable Mistake of Age: A Needed Defence to Statutory Rape' (1965) *Michigan Law Review*, Vol 64, Issue 1 105 at p. 113.
20 *Korong v The State* 2007 (1) BLR 714 (HC).
21 ibid.
22 1946 175 LT 306.

crime, the court should not find a man guilty of an offence unless he has a guilty mind.[23]

To this end, there remains a possibility that a court may be justified in applying the mistake of age defence, to the extent that it encapsulates the *mens rea* requirement for defilement. From a reading of Section 147 of the Penal Code, as amended, there is no clear exclusion of *mens rea* as an ingredient of the offence. The question then becomes whether it could be said that *mens rea* is excluded by necessary implication. The argument would be that, by removing the old Section 147 (5) of the Penal Code, the legislature intended to get rid of the *mens rea* requirement and render defilement a strict liability offence. Support for this argument can be drawn from the fact that other provisions that encompass the mistake of age defence as regards offences related to defilement were retained.[24] Unfortunately, however, an assessment of the parliamentary debates at which the amendments were dealt with does not in any way assist as to whether the specific intention of the legislature was to render defilement a strict liability offence. It does not appear that parliament averted particular attention to the implications of the removal of the old Section 147 (5) of the Penal Code on the *mens rea* requirement. It could be argued that the absence of any expression of the appreciation that removing the old Section 147 (5) of the Penal Code had the effect of getting rid of the *mens rea* requirement alongside with it, is an indication of legislative oversight on the legal implications of the amendment. The House of Lords has held that in order to come to the conclusion that the presumption in favour of *mens rea* had been rebutted by implication the evidence in that regard must be "compellingly clear".[25] Consequently, one would be guarded in concluding that the mere removal of the old Section 147 (5) of the Penal Code was an expression of legislative intent in favour of making defilement a strict liability offence.

In order to resolve this potential controversy, it is apposite for the legislature to clarify the position and insert an amendment that specifically addresses the *mens rea* aspect of defilement. If the position is that *mens rea* is not required then such should be clearly captured in a provision to that effect

23 This passage was quoted with approval in a number of cases in Botswana. See *State v Mbaiwa* 1988 BLR 315 (HC); *Ward and Another v The State* 1975 (2) BLR 22 (CA).

24 Section 151 and Section 152 of the Penal Code.

25 *B v DPP* 2000 (2) A.C 428. The Court also held that the more grave the offence the stronger the presumption in favour of *mens rea*.

in order to exclude application of the presumption in favour of *mens rea*. As matters stand, there is room for divergent application of the law and varying conclusions as to whether *mens rea* is required. This possibility of contradictory conclusions, both of which may be legally sound and defensible, is undesirable and must be addressed by the legislature.

By way of guidance, it is perhaps worthy to briefly highlight how courts in other jurisdictions have grappled with the issue of defilement as a strict liability offence and an absence of the mistake of age defence. In the case of *Garnett v The State*[26] the Maryland Court of Appeal had occasion to deal with the question as to whether a court could recognise and apply the mistake of age defence in defilement despite the fact that it was not specifically provided in the provision creating the offence.[27] The majority decision held that the statute creating the offence was a creation of legislature and therefore:

> Any new provision introducing elements of *mens rea*, or permitting a defence of a reasonable mistake of age, with respect to the offence of sexual intercourse with a person less than 14, should properly result from an act of legislature itself, rather than judicial fiat.

The majority therefore held that it was impermissible to apply the mistake of age defence thereby requiring *mens rea*. On the other hand, two judges, Bell J and Eldrigde J dissented. The crux of their argument was that a conclusion that the statute excused the state from proving the crucial *mens rea* offended fundamental principles of justice. The fact that the court was split 3-2 on the matter is a clear indication that the position on the matter is not a straightforward one and it may, at the end of the day, boil down to the inclinations of the individual judge.

The Supreme Court of Ireland, in the case of *CC* v *Ireland (No. 2),*[28] as well had occasion to deal with the issue whether it was constitutional to have defilement as a strict liability offence through the absence of the honest mistake of age defence. The Court held that the provision was unconstitutional to the extent that it made it possible to convict the "mentally innocent" for a serious offence carrying the possibility of a life sentence. Hardiman J, in delivering the

26 623 A.2d 797 (Md. 1993).
27 Section 463 (a) (3) of the Maryland Code.
28 2006 IESC 33 (SC).

judgment, had the following to say:

> I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or dignity of the individual or as meeting the obligation imposed on the State by Article 40.3.1⁰ of the Constitution.[29]

Immediately after the judgment, Ireland amended its law and included the mistake of age defence into their law through Section 2 and 3 of the Criminal Law (Sexual Offences) Act of 2006. The approach of the Supreme Court has been criticized by a number of commentators.[30]

Be that as it may, the discussion above highlights the frailties that attend to the *mens rea* requirement and the mistake of age defence. The issues that arise are of a policy nature and too weighty to be left to the interpretation of the courts. An expression of clear legislative intention is required in this respect and the hope is that the position will be clarified sooner rather than later.

It must be borne in mind that, although rendering defilement a strict liability offence has its inherent appeal in enhancing the protection of minors from sexual predators, there are instances where the ends of justice may not necessarily be served by that approach. It is not too farfetched to imagine a situation where a 20 year old girl meets a 17 year old boy and he lies to her about his age and says that he is 19 years old. Imagine as well that he looks every bit like a 19 year old and conducts himself like a 19 year old. The young woman, aware of the calamitous consequences that accompany a charge of defilement, decides to err on the side of caution and requests to see some identification as proof of age. He gladly produces an ID that says he is 19 years old- of course it is a fake ID, but she has no way of knowing. She is satisfied and they begin a relationship. If she is then charged with defilement, her legal culpability and moral reprehensibility will be the same as that of a 40 year old man who sleeps with a 16 year old girl fully aware that she is not of age. In terms of the express

---

29 Section 40.3.1º of the Irish Constitution provides as follows: The State guarantees in its laws to respect, and as far as possible, by its laws to defend and vindicate the personal rights of its citizens.

30 David Prendergast, 'Strict Liability and the Presumption of Innocence After CC v Ireland' (2011) Irish Jurist, Vol 46, 211; Finbarr McAulley, 'Statutory Rape and Defilement in Ireland: Recent Developments' in *Essays in Criminal Law in Honour of Sir Gerald Gordon*, edited by James Chalmers, Fiona Leverick and Lindsay Farmer (Edinburgh University Press, 2010) 178; David Prendergast, 'The Constitutionality of Strict Liability in Criminal Law' (2011) 33 *Dublin University Law Journa*l, 285.

provisions of the Penal Code, neither of them has a defence and they are both looking at the mandatory minimum of 10 years imprisonment. It could be that the residual effects of the occupational hazards of the authors' previous lives as defence counsels are showing, but it is difficult to imagine that this was the result that parliament intended to achieve through the amendment of Section 147 (5) of the Penal Code.

The realities of the possibility of the victim of defilement being the manipulative one who takes advantage of the ultimately accused, and the undesirability of not making provision for exculpation were long captured as follows in the case of *State* v *Snow*:[31]

> This wretched girl was young in years but old in sin and shame…The boys were immature and doubtless more sinned against than sinning. They did not defile the girl…Why should the boys, misled by her, be sacrificed? What sound policy can be subserved by branding them as felons. Might it not be wise to ingraft an exception in the statute?[32]

It is to be acknowledged that if the mistake of age defence is not couched in restrictive terms and it is not properly applied by the courts it may have consequences that defeat the very object of protecting children. The manner in which courts have applied the mistake of age defence has received scholarly criticism elsewhere. It has been argued that courts seem to be stereotypical in the application of the defence thereby leaving "bad girls" out in a lurch. Grant and Brendet capture the criticism accurately as follows:

> How a girl dresses, whether she wears make up, whether she is out late at night, whether she consumes alcohol or smokes cigarettes and whether she appears to have prior sexual experience are all considered relevant in the determination of whether a man was mistaken about her age. In some cases these stereotypes are so powerful that the accused is required to do absolutely nothing, beyond observing the

31 (1923), 252 SW 629 (Mo Sup Ct).

32 ibid at p. 632. The language adopted by the Court in describing the complainant in that case has been criticised as having the hallmarks of "judicial misogyny." See Vernon R Wiehe and Ann L Richards, Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape (SAGE Publishing, Inc, 1995) at p. 92.

complainant, to meet the requirement that he took *all* reasonable steps to ascertain her age.[33]

The authors proceed to observe that this stereotypical application of the defence leads to instances where it is difficult to prosecute perpetrators in cases involving the most vulnerable girls who lack adequate adult support and supervision. At the end of the day, the law should be able to afford even "unchaste" children protection from sexual exploitation by adults.[34]

4. LET CHILDREN BE CHILDREN: THE RATIONALE OF THE ROMEO AND JULIET EXCEPTION

As far back as 2005, Chinhengo J, in the case of *Boitumelo v The State*[35] recommended that defilement laws should be reformed in order for the age difference between the victim and the perpetrator to be taken into account. His Lordship opined as follows:

> I think that the law requires further reformation. Any such reform must give consideration to the difference in ages of the defendant and his victim when imposing sentence. The reform may for instance go even further as suggested by one academic writer and provide that it shall be a defence to a charge of gross indecency or sexual intercourse with a girl that the man was not more than three years older than the girl. More specifically, however, I would recommend that in cases of sexual intercourse the disparity between the ages of the defendant and his victim must be acknowledged as a factor, either of mitigation or aggravation depending on whether the difference in ages is small or great.

He further expressed concerns that to imprison for 10 years a youth of 19 years for having had sexual intercourse with a girl of 15 years 11 months may not be in the best interests of that youth as it might not be in the best interests of

33 Isabel Grant and Janine Brendet, 'Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law' (2019) *The Canadian Bar Law Review*, Vol 97, 1 at p. 6.

34 Eric A Johnson, 'Mens Rea for Sexual Abuse: The Case for Defining Acceptable Risk' (2018-2019) *Journal of Criminal Law and Criminology* Vol 99, 1 at p. 25.

35 2005 (1) BLR 317 (HC).

reforming the youth. Moreover, the Court held that such a punishment would not be seen to have taken into account the moral turpitude of the offender.[36] The Court quoted with approval the sentiments of Korsah JA in the case of *S* v *Five*[37] wherein his Lordship stated as follows:

> It is a matter notorious enough for judicial notice to be taken that at no time in life, other than in youth, are sexual passions more easily aroused. At the same time callow youth lacks insight and experience and therefore more readily acts in a foolish manner than a mature person.

The rationale of the close-in-age exemption as provided for under Section 147 (5) of the Penal Code is essentially to prevent prosecution of persons who may both be underage and are engaged in non-exploitative sexual intercourse. Commenting on the amendment during the debate of the Bill, the then Minister of Health and Wellness, Ms Makgatho, endorsed the gap in age defence and highlighted that if it is not introduced it would lead to the imprisonment of children although the intention is to protect them.[38] Invariably, if two people who are below the age of consent engage in sexual intercourse it is difficult to justify why one child must be treated as a perpetrator and the other one as an innocent victim.[39] In most instances, nothing logical informs this decision and it would simply boil down to which of the parties beat the other to the punch by reporting the matter to the police.

The challenge relating to the criminalization of consensual and non-exploitative sexual intercourse between adolescents is one that other jurisdictions have also grappled with. In Zimbabwe, in the case of *State v Masuku*[40] Justice Tsanga observed as follows:

> Ignoring the reality of consensual sex among teenagers and adopting an overly formalistic approach to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatization as a sex offender.

36 Ibid at p. 331.

37 1988 (2) ZLR 168 (S).

38 Hansard, Parliament of Botswana, (28th March 2018) at p. 6.

39 Henry Okwatch, 'The Problematic Jurisprudence on the Laws of Defilement of Adolescents in Kenya' (2019) *Strathmore Law Review*, 47. The author referenced the case of *GO* v *Republic* (2017) eKLR in which a 15 year old boy was convicted for defiling a 17 year old girl.

40 [2015] ZWHHC 106 (HC).

In Kenya, in the case of *P.O.O (A minor) v Director of Public Prosecutions and Another*[41] which involved a teenage complainant and a teenage perpetrator, the Court noted that both the complainant and the accused were children who needed guidance and counselling as opposed to criminal sanctions. The Court further highlighted that the criminalization of adolescent sex was a position that required to be re-examined in the criminal justice system. In South Africa, the Constitutional Court was called upon to determine the constitutionality of provisions that criminalized sexual conduct between adolescents in the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development*.[42] The Court emphasized that although there was a need to protect children on account of their vulnerability, there was also a duty to ensure that children are afforded the necessary support and assistance for their positive growth and development. To this end, the Court held that provisions which criminalise adolescent sex have the effect of harming the very adolescents they are intended to protect. In declaring the laws unconstitutional, the Court also indicated that the laws were contrary to the cardinal principle of the best interests of the child.

Having increased the age of consent to 18 years, thereby widening the scope of children who come within the purview of defilement laws, it was critical for parliament to introduce the age in gap exemption to avoid criminalisation of adolescent sex. Credit in this regard must be extended to UNICEF Botswana and UNFPA for their contribution in advocating for inclusion of the Romeo and Juliet exemption and favouring parliament with their input in that regard. Such stakeholder participation in the making of laws is highly encouraged and it is commendable when stakeholders in turn make invaluable contributions which positively shape the law.

5. CHINKS IN THE ARMOUR: CHALLENGES OF THE PROSECUTORIAL PROCESS

As highlighted in the introductory sections of this paper, some of the loopholes in the protection of children against sexual exploitation arise not from the base laws but from lapses in the prosecution of perpetrators. Two key areas of concern

41 2017 eKLR, Constitutional Petition No. 1 of 2017 (CC).
42 2014 (2) SA 168 (CC).

have been identified as avenues through which accused persons are ultimately acquitted, not because they have not committed the offence of defilement, but because of other lapses in the prosecution process. The first relates to the ability of the prosecution to prove the age of the complainant beyond reasonable doubt. The second is failure by presiding magistrates to inform unrepresented accused persons of the special defence. Both of these lapses are extensively discussed hereunder.

5.1 The challenges of proving of the age of the complainant

One of the essential elements that must be proved in a case of defilement is that the complainant was under the age of 18 years at the time of the sexual intercourse. The onus rests upon the prosecution to prove this element beyond reasonable doubt.

It is significant to note that the complainant cannot testify as to his or her own age. This was confirmed in the case of *Tsheko v The State*[43] wherein the Court held that evidence by a person as to when she was born constituted inadmissible hearsay evidence. The Court cited with approval the following *dicta* from *R v Kaplan:*[44]

> In certain circumstances, evidence of such reputation is receivable so that I am not prepared to hold that a witness may in no circumstances testify as to his own age. But obviously such evidence is in the nature of hearsay and where it is tendered to prove a crucial fact affecting the innocence or guilt of an accused person and not merely collateral, I know of no exception in favour of its admissibility to the rule against hearsay.

To this end, the prosecution has to produce credible and admissible evidence of the complainant's age. In the case of *Monate Elias Mosotho v The State*[45] the Court held that:

> The best evidence of age is an official birth certificate based upon

43 2004 (1) B.L.R 80 (HC).
44 1942 OPD 232 at p236 per Van der Heever J.
45 2007 (3) BLR 755 (HC).

hospital records, or where there is none, and it was a home delivery, the evidence of the mother, midwife or other eyewitness of the birth.

This position was endorsed by the Court of Appeal in the case of *Raphure v The State*.[46] The Court of Appeal went a step further and held that even in instances where a birth certificate is produced as evidence it is not to be treated as the Holy Grail. The court is still called upon to exercise a measure of care and interrogate the circumstances under which the birth certificate was issued. To that end, a birth certificate that was issued within a week or two of the birth might be considered more reliable than one which was issued years after birth. In the case of *Modisaemang v The State*[47] the prosecution sought to prove the age of the complainant by relying on a copy of a birth certificate that had alterations that had not been countersigned. The said copy was certified as a true copy by the office of the prosecutor. The Court held that, on account of the alterations on the copy, the document was unsafe to rely upon and it could not be used to prove the age of the complainant. The Court also observed that the names stated as being those of the complainant on the copy of the birth certificate did not correspond with the names stated on the charge sheet. It was held that the age of the complainant had not been proven beyond reasonable doubt as required and the accused was acquitted.

In instances where there is no birth certificate, the prosecution may find itself with an insurmountable hurdle in proving the age of the complainant. In the *Monate Elias Mosotho case* the prosecution sought to rely on the school admission card of the complainant which reflected her date of birth as "10th November 1988" and was produced by the school headmaster. On appeal, it was held that such evidence was hearsay and therefore and inadmissible. The Magistrate in the court a quo had also made an observation that the complainant was "young" and that the medical report recorded her age as 14. The appellate court held that this was also inadmissible hearsay evidence upon which the age of the complainant could not be said to have been proven beyond reasonable doubt. To aggravate the challenges that were faced by the prosecution, the mother of the complainant had testified, unequivocally, that the complainant was born in "1985" though she could not recall the date. The Court held that

46 2009 (2) BLR 97 (CA).
47 2013 (2) BLR 609 (HC).

to the extent that the complainant's mother was a state witness and she had not been impeached, her evidence was the best evidence of her daughter's date and year of birth. Consequently, the Court concluded that the age of the complainant had not been sufficiently proved and there was reasonable doubt as to her age. The accused was acquitted and discharged.

In the *Raphure case*, the prosecution had produced the complainant's passport as evidence of her age. The Court rejected the passport as hearsay evidence on account of the fact that it was not aware of the information that the passport issuer requires as proof of such age. The Court highlighted the possibility that the passport issuer required the mere *ipse dixit* of the applicant. The complainant was an orphan from a young age and therefore had no parents who could be called upon to testify as to her age. The prosecution had called the complainant's aunt who stayed with her. Her evidence was also rejected as hearsay to the extent that she had no primary knowledge of when the complainant was born. The Court of Appeal also rejected as inadmissible hearsay evidence the indication of age on the medical records of the doctor who examined the complainant on the basis that the age that the doctor puts on the medical report is simply based on what the complainant would have told him. In the *Tsheko* case, the prosecution had called the complainant's father to testify as to her age. Upon appeal, the Court observed that the father had not been asked how he knew the age of the complainant nor was he asked to state her date of birth. The Court concluded that the reliability of his recollection of the date of birth was consequently not tested and therefore the age had not been proven beyond reasonable doubt. It was held that the conviction by the court a quo was unsafe and the accused was acquitted.

Be that as it may, it is essential to note that the mere fact that there is no birth certificate does not make it a foregone conclusion that the state will be held to have failed to prove the age of the child complainant beyond reasonable doubt. In the case of *Sekai v The State*[48] the Court held that, in many cases, the court will consider it unsafe to rely on the evidence of the mother alone without the production of further evidence such as a birth certificate. This is especially so in cases where the child complainant is of an age that is close to the legal age and the mother appears unreliable on the dates. However, the Court held that the case it was dealing with did not fall within such category because the child

48 1985 BLR 34 (HC).

complainant was 7 years old and there was no way a child of that age could be mistaken for a 16 year old. Consequently, the Court accepted that the evidence of the mother as to the year of birth of the child, although she could did not testify as to the exact date of birth, was proof beyond reasonable doubt of the age of the child.

In order to give efficacy to the laws and afford children the protection that is intended by such laws, it is crucial for the prosecution to be alive to what is required to prove the age of a complainant. Obviously, and regrettably, if there are prosecutorial blunders in failure to adduce the requisite proof as to age, the standard of beyond reasonable doubt is not discharged and courts are left with no option but to acquit perpetrators. This appreciably affects the practical efficacy of the defilement laws.

5.2 The duty of the Court to inform of Special Defence

Irrespective of the objectionable nature of the offence of defilement, a person so charged is still entitled to all the rights and protections that accrue to an accused particularly those that are entrenched in the constitution. Every accused person in Botswana has the right to a fair trial.[49] To this end, when a court is dealing with an unrepresented accused person charged with defilement, the court has a duty to inform the accused person of the special defence.[50] Failure by the trial court to inform the unrepresented accused person of the special defence may amount to a denial of the right to a fair trial and the conviction may subsequently be set aside. This was crisply captured by Dingake J as follows:

> Judicial guidance to the unrepresented accused was now firmly embedded in our adversarial criminal justice system and was central to the right to a fair trial. By failing to assist the appellant, the trial court committed a serious misdirection that vitiated its judgment on the merits of the case.[51]

49 Section 10 of the Constitution of Botswana.

50 For a comprehensive discussion of the duties of judicial officers in relation to unrepresented accused persons in Botswana see R.V.J Cole, 'Between Judicial Enabling and Adversarialism: The Role of Judicial Officers in the Protection of the Unrepresented Accused in Botswana in a Comparative Perspective' (2010) *University of Botswana Law Journal*, Vol 11, 81.

51 *Modisaemang v The State* 2013 (2) BLR 609 (HC). The Court observed that the record of proceedings revealed that the accused person was at sea and did not understand how he had to cross examine. Moreover, it appeared that the accused person was under the impression that he was charged with rape and he asked questions relating to consent. The conviction by the trial court was set aside and the accused

In the case of *Gare v The State*[52] the Court of Appeal dealt with the issue as to whether failure by a Magistrate to inform an unrepresented accused person of the special defence in a defilement trial amounted to denial of a fair trial. The Court reiterated that the trial court has a duty to inform an accused person of the existence and meaning of the special defence. Looking at the circumstances of the case, the court observed that the accused person conducted his defence ineptly and had little understanding of the issues let alone the special defence. The accused person did not cross examine on the issue of the age of the complainant but rather concentrated on cross examining on the issue of consent. Consequently, the court held that, in the circumstances, failure by the Magistrate to inform him of the special defence had resulted in an unfair trial and therefore the accused person was discharged and acquitted.[53] Moreover, in the case of *Dihitora v The State*[54] the High Court noted that the accused person was an 'untutored and unsophisticated herd boy' and that he was ignorant of the special defence. Consequently, failure by the Magistrate to inform him of the special defence amounted to denial of a fair trial and his conviction was quashed.

It is disconcerting that there are numerous cases in which convictions of defilement were set aside simply because the Magistrate had failed to inform the accused person of the existence of the special defence thereby resulting in an unfair trial.[55] This points to the fact that in some instances Magistrates are not alive to their duties particularly with respect to unrepresented accused persons. The unfortunate consequence of this is that, in some instances, it results in a miscarriage of justice for the victim as an otherwise guilty accused is freed on account of the shortfalls of the Magistrate.

It is important to highlight that the mere fact that an unrepresented accused person was not informed of the existence of the special defence does not automatically mean that he was denied a fair trial and is entitled to an acquittal. The court looks at the particular circumstances of each case and

---

was acquitted.

52 2001 (1) BLR 143 (CA).

53 The Court relied on the South African cases of *S v Andrews* 1982 (2) SA 269 (NC); *S v Moeti* 1989 (4) SA 1053 (O); *S v Rudman* 1989 (3) SA 368 (E) and *S v Hlongwane* 1982 (4) SA 321 (N).

54 2010 (2) BLR 296 (HC).

55 *Ramabe v The State* 2002 (1) BLR 523 (HC); *Gaosenkwe v The State* 2001 (1) BLR 324 (HC); *Ntopi v The State* 2010 (2) BLR 615 (HC); *Sefo v The State* 2007 (2) BLR 562 (HC); *Matlakadibe v The State* B.L.R 44 (CA); *Galebonwe v The State* 2002 (1) B.L.R 46 (CA).

determines whether the failure by the Magistrate to inform the accused of the special defence was prejudicial to him. Consequently, there will be instances where failure to inform an unrepresented accused about the special defence will not amount to denial of a fair trial. This is best illustrated by the decision of the Court of Appeal in *Mothoemang v The State*.[56] The Court confirmed that, in making a determination as to whether failure to inform the accused of the special defence violated his right to a fair trial, an assessment must be made of the circumstances of the case. Central to this enquiry is addressing the question whether the accused was prejudiced. In this case, the Court noted that, on the evidence, there was no indication that the accused suffered any prejudice. He displayed knowledge of court procedures and was not inept in the manner he conducted his defence. The accused person, in his defence, had testified that the complainant had told him that she is 21 years old and was doing Form Four. The Court concluded that, at the very least, it was an acknowledgment that he was aware that it was an offence to sleep with an underage girl. Finally, the Court held that the evidence that had been led established that the accused did not believe, and did not have reason to believe that the complainant was above 16 years. His appeal was accordingly dismissed.

The position that a conviction for defilement must stand where an unrepresented accused was not informed of the special defence provided there was no substantial miscarriage of justice was reiterated by the Court of Appeal in the case of *Morupisi v The State.*[57] In this case the trial court had failed to explain the special defence to the accused person. The Court of Appeal held that, from the record of proceedings, it was clear that there was no prejudice occasioned to the accused person and that substantial justice was served. The reasoning of the Court was premised on the fact that the defiled complainant was the accused person's niece and as such he would have known his age. The Court of Appeal further observed that the defence that was advanced by the accused person had simply been that he had not had sexual intercourse with the complainant. To that end, he would not have relied on the special defence anyway. His conviction was accordingly upheld.

56 2011 (1) BLR 176 (CA).
57 2013 (1) BLR 340 (CA). See also *Mompe* v *The State* 2013 (3) BLR 166 (CA).

5.3 Sex with a minor: defilement or rape?

It is to be noted that there was a time when there were conflicting decisions of the High Court in relation to when sexual intercourse with an underage person should be charged as defilement and when it is to be charged as rape.

In the case of *Sethunthwane Keidilwe v The State*[58] the Court noted that a child who is underage is legally incapable of giving or withholding consent to sexual intercourse. Therefore, that, where an accused person had sexual intercourse with an underage complainant, the appropriate charge was always to be defilement and never rape. This approach was also adopted in the case of *Motlhale and Another v The State*[59] wherein Justice Dibotelo lamented the "undesirable" practice of charging accused persons with rape when they are alleged to have had sexual intercourse with girls under the age of 16. The learned judge maintained that the appropriate charge should be that of defilement.[60]

Be that as it may, a contrary position was adopted in the case of *Boitumelo v The State*.[61] The Court held that when a man ravishes a girl of 8 years or younger then the charge must always be of rape because such person is *doli incapax* and cannot give effective consent. Further that, any consent that she may be alleged to have given is without legal consequence. In this respect, the Court criticised the approach adopted in the case of *Morebodi v The State*[62] wherein the High Court upheld a conviction for defilement when the child complainant was only 8 years old.

The Court of Appeal in the case of *Ketlwaeletswe v The State*[63] had occasion to deal with the question whether if an accused person has sexual intercourse with a young girl capable of consenting to the act, is the proper charge rape or defilement. In settling this question, the Court held that lack of consent is an essential element for the offence of rape and not so for defilement. Consequently, that if the complainant is under the age of 16 and she has not given her consent then the proper charge is rape. On the other hand, if the complainant is under the age of 16 but she has consented then the appropriate

58 Criminal Appeal Number 181/2000 (Unreported) (HC).

59 Criminal Appeal Number 112/2001 (Unreported) (HC).

60 See also *Molefe and Others v The State* Criminal Appeal Number 17/2003 (Unreported) (HC) wherein the appellants had been convicted of raping a girl of around 13 years and, on appeal, the High Court altered their conviction from that of rape to defilement.

61 2005 (1) BLR 317 (HC).

62 Criminal Appeal Number 41/2002 (Unreported) (HC).

63 2007 (2) BLR 715 (CA).

charge is defilement.

It is critical to note that an accused person who is charged with the rape of an underage complainant may ultimately be convicted of the offence of defilement in the event that the prosecution is unable to prove lack of consent.[64] In such an instance, the court is under an obligation to inform the accused person of the possibility of a conviction for defilement and allow him to cross examine on the additional issues such as the age of the complainant.[65]

Application of Section 192 of the Criminal Procedure and Evidence Act was authoritatively dealt with by the Court of Appeal in the case of *Molefe v The State* (2).[66] In that case the accused had been convicted of defilement when he had been charged with raping an 8 year old. The evidence presented before the trial court indicated that the accused person had told the complainant to undress and she did so. The Magistrate held that from this evidence it could not be conclusively said whether she consented or not and as such the prosecution had failed to prove lack of consent. Consequently, the Magistrate acquitted the accused of rape and then invoked Section 192 of the Criminal Procedure and Evidence Act and convicted the accused of defilement. The accused person appealed on the grounds that, once the Magistrate acquitted him of rape, he could not be convicted of defilement because the complainant was an 8 year old who is presumed to be incapable of consenting to sexual intercourse. The Court of Appeal agreed with the contention of the accused person that indeed the complainant was so young that she was incapable of giving consent and as such the appropriate conviction should have been for rape. However, the Court noted that the Magistrate was entitled to convict for defilement in terms of Section 192 of the Criminal Procedure and Evidence Act. The Court highlighted that, from the evidence before it, it was clear that the Magistrate had correctly warned the accused of the possibility that he may be convicted of defilement though he was not charged with it. In the premises, the Court held that there was no prejudice occasioned to the accused person and it accordingly dismissed his appeal.

64 Section 192 of the Criminal Procedure and Evidence Act.

65 *State v Bareki* 1979-1980 BLR 35 (HC).

66 2008 (3) BLR 103 (CA).

5.4 The sentencing framework for defilement

The Penal Code imposes a minimum mandatory imprisonment of 10 years and a maximum of life of imprisonment in relation to the offence of defilement.[67] A person convicted for defilement is required to undergo a Human Immunodeficiency Virus (HIV) test before they are sentenced by the court.[68] If the person turns out to be HIV positive, but they were unaware of their HIV status, then they are liable to a mandatory minimum sentence of 15 years and a maximum of life imprisonment with or without corporal punishment.[69] However, if the person turns out to be HIV positive, and it is proved on a balance of probabilities that they were aware of their HIV status, then they are liable to a minimum mandatory sentence of 20 years imprisonment and a maximum of life imprisonment with or without corporal punishment.[70]

The court had occasion to interpret the sentencing framework for defilement in relation to HIV status in the case of *State v Lejony*.[71] It was held that in order for the HIV positive status of an accused to be taken into account in sentencing, the prosecution must prove that the convicted person was HIV positive at the time of the commission of the offence. The court emphasised that the intention of the legislature in Section 147 (3) (a) of the Penal Code was to punish those people who were HIV positive at the time of the commission of the offence but were unaware of their status. The Court emphasised that the intention of the legislature was not to punish every person who was found to be HIV positive after conviction. The approach to be adopted in relation to Section 147 (3) (b) of the Penal Code is that the prosecution has to prove that the accused person was aware of his HIV positive status at the time of committing the offence. Consequently, where the prosecution is unable to prove that the accused person was HIV positive at the time of the commission of the offence, even though he ultimately tests positive after conviction, the appropriate sentence is the minimum of 10 years and maximum of life imprisonment as prescribed by Section 147 (1) of the Penal Code. This position was reaffirmed

67 Section 147 (1) Penal Code.
68 Section 147 (2) of the Penal Code.
69 Section 147 (3) (a) of the Penal Code.
70 Section 147 (3) (b) of the Penal Code. See the case of *State* v *Makhaya* 2012 (2) BLR 452 (HC) wherein the mandatory minimum sentence of 20 years imprisonment was confirmed as being appropriate for an accused person who was aware of his HIV positive status at the time of the commission of the offence.
71 2000 (1) BLR 326 (HC).

by the Court of Appeal in the case of *Gare v The State*.[72]

The justification behind this approach is that there exists a possibility that the accused person may have been infected by the complainant. Moreover, there is the possibility that the accused person may have been infected in unrelated sexual encounters after the commission of the offence but before conviction.

5.5 The possibility of exceptional extenuating circumstances in defilement cases

It is to be noted that Section 27 (4) of the Penal Code gives the court discretion to impose a sentence that is below the prescribed minimum mandatory sentences where there are exceptional extenuating circumstances that render the mandatory sentence totally inappropriate. It is inconceivable to imagine the context within which exceptional extenuating circumstances will arise in relation to the offence of defilement. Be that as it may, exceptional extenuating circumstances were found to exist in the case of *Piet v The State.*[73] The evidence presented before the court indicated that the complainant's aunt had failed to adequately take care of the child born out of the relationship between the accused and the complainant. Consequently, the complainant had taken the child to stay with the accused person who took great care of the child thus allowing the complainant to go back to school. The High Court held that this amounted to exceptional extenuating circumstances which warranted imposition of a sentence less than the prescribed mandatory minimum of 10 years. To this end, the Court reduced the sentence from 10 years imprisonment to 5 years imprisonment.

On the other hand, in the case of *Marumo v The State*[74] the appellant sought to have his sentence reduced from the minimum mandatory 10 years on account of the fact that he contended that there were exceptional extenuating circumstances. His argument was that there was a child born out of his relationship with the complainant and he was taking care of the child. In dismissing that argument the court noted as follows:

72 2001 (1) BLR 143 (CA); See also *Makuto* v *The State* 2000 (2) BLR 130 (CA); *Qam Nqubi* v *The State* Criminal Appeal No 49/2000 (Unreported) (CA) in which cases the Court of Appeal affirmed this approach in relation to the similar sentencing framework for rape.

73 2007 (2) BLR 460 (HC).

74 2011 (2) BLR 1048 (HC).

> It was contended on behalf of the appellant that the fact that the appellant had a child with the complainant was an exceptional extenuating circumstance. I cannot for the life of me see how the very act for which the appellant was being prosecuted, that is, having sexual intercourse with a person under the age of 16 years can become an extenuating let alone exceptional circumstance just because the act resulted in the birth of a child.

It is important to note that the decision in the case of *Piet* has not been appealed nor overruled. Moreover, there is no decision of the Court of Appeal which conclusively decides the point as to whether the fact that there was a child born out of the relationship and that the accused person is taking care of the child can be considered an exceptional extenuating circumstance. That notwithstanding, it is implausible that the decision of the High Court in *Piet* can be considered good law. With all due deference, it is humbly submitted that the Honourable Court terribly misdirected itself, at the very least, on what extenuating circumstances are. By their elementary nature, extenuating circumstances are circumstances which existed at the time of the commission of the offence which affect the moral blameworthiness of the accused person.[75]

In the context of defilement therefore, for a factor to be considered as having an extenuating effect, it must have been one that existed at the time that the accused person had sexual intercourse with the complainant. Consequently, the fact that a child is eventually born out of that sexual intercourse, and the accused person is taking care of the child, does not fall within the purview of extenuating circumstances. At the very most, if at all, it could be considered a mitigating factor. Although it may have an effect on the sentence that the accused person ultimately receives, it should not have the effect of lowering such sentence to below the mandatory minimum sentence of 10 years. In any event, it may be argued that the fact that the accused person impregnated a minor, and essentially burdened a child with the responsibilities and challenges of motherhood, is an aggravating factor that should expose the accused person to a stiffer penalty. Furthermore, the fact that a child is born out of the sexual encounter points towards unprotected sexual intercourse which would have also exposed the minor to sexually transmitted diseases. This should also be

75 *Baoteleng* v *The State* 1972 BLR 82 (HC).

treated as an aggravating factor. The Court of Appeal has held that in order for a factor to constitute an exceptional extenuating circumstance within the context of Section 27 (4) of the Penal Code, it must be one that is out of the ordinary and should not be a typical circumstance that courts are regularly faced with.[76] There is nothing exceptional about a minor being impregnated in the context of the commission of defilement. For a court to take that into an account as an exceptional extenuating circumstance entitling the perpetrator to a lesser sentence is to make a mockery of the essence of the minimum mandatory sentence attaching to defilement. One can only hope that the decision of the court in *Piet v The State* is an unfortunate error which will not be replicated.

In the case of *Batlhamile v The State*[77] the accused, a 19 year old girl, was convicted for defiling a 14 year old boy. The Court was called upon to consider whether her age could amount to an exceptional extenuating circumstance. The Court observed that the age difference between the accused and the complainant was too wide to a point that they fell in different age categories and, if the court was to hold that the age of the accused was an exceptional extenuating circumstance, it would be too indulgent and fail to adequately protect the young and vulnerable. Based on the reasoning of the court, it would appear that in instances where the accused person and the complainant are in the same age category the court might be inclined to hold that to be an exceptional extenuating circumstance justifying the imposition of a sentence that is below the minimum mandatory of 10 years.

Courts have to be alive to the fact that they have a duty to impose the minimum mandatory prescribed for the offence of defilement save for circumstances that fall squarely within the purview of Section 27 (4) of the Penal Code. It is not open for the court to simply ignore the minimum mandatory sentence and impose a sentence that is purely guided by the court's discretion.[78] This was confirmed by the Court of Appeal in the case of *Katchatah v The State*.[79] The accused person was convicted for defilement by the Magistrates' Court. However, although the magistrate indicated that there were no exceptional extenuating circumstances, the court imposed a sentence of 5 years imprisonment instead of the prescribed

76 *Maphosa* v *The State* 2010 (3) BLR 413 (CA).

77 2017 (2) BLR 116 (HC).

78 For a discussion on judicial discretion and minimum mandatory sentences, see Dambe B.J, 'Legislative Erosion of Judicial Discretion in Relation to Murder with Extenuating Circumstances in Botswana: A Critique of the Amendment of Section 203 (2) of the Penal Code' (2021) *Criminal Law Forum* 32 (2), 285

79 2016 (1) BLR 475 (CA).

minimum of 10 years. The accused person appealed his conviction to the High Court. The High Court upheld his conviction and set aside the sentence imposed by the magistrate for being *ultra vires* and replaced it with 10 years. The accused person appealed to the Court of Appeal stating that, since his appeal to the High Court was merely for his conviction and the state had not made a cross appeal relating to the sentence, it was improper for the High Court to increase his sentence. The Court of Appeal held that, by imposing a sentence below the minimum, the Magistrate had acted contrary to the principles of legality which requires that the exercise of public power should be in accordance with the law. The Court accordingly dismissed his appeal and upheld the decision of the High Court to impose the prescribed minimum of 10 years imprisonment.

5.6 Withdrawal and reconciliation of defilement cases

Concerns have been raised in relation to the reality that in certain instances, cases of defilement are subsequently withdrawn. This is usually at the insistence of either the complainant herself or sometimes with the involvement of parents and relatives. Such settlements are usually said to be anchored on the payment of money by the accused person.

It is therefore essential to briefly interrogate the propriety or otherwise of settling defilement cases out of court. Botswana's criminal law encourages and promotes reconciliation and settlement of cases in an amicable way. This is statutorily provided for in terms of the Criminal Procedure and Evidence Act. Section 321 (1) thereof provides as follows:

> In criminal cases a magistrate's court may, with the consent of the prosecutor, promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of proceedings for assault or for any other offence of a personal or private nature not aggravated in degree, on terms of payment of compensation or other terms approved by such court, and may, thereupon, order the proceedings to be stayed.

In the case of *Thuto v The State*[80] the Court of Appeal dealt with whether it was a misdirection on the part of a magistrate to refuse to withdraw a rape case when

80 2008 (1) BLR 146 (CA).

the complainant intimated that she wanted to withdraw the case since she had forgiven the accused. Moreover, there were indications that the accused person had paid the complainant the sum of P1 000.00 as part of the settlement. The Court noted that Section 321 (1) of the Criminal Procedure and Evidence Act was intended to promote reconciliation for minor assaults or minor offences of a personal nature and not for serious offences. The Court further stated that it was not in the interests of society that criminal offenders should be able to buy their way out of serious offences and offences that are aggravated in degree. The position that reconciliation under Section 321 (1) of the Criminal Procedure and Evidence Act is not permissible in respect of serious offences was also confirmed by the Court of Appeal in the case of *Magotho v The State*.[81] It is submitted the Section 321(1) of the Criminal Procedure and Evidence Act must be made more clear and specific to avoid any confusion as to the nature of crimes that fall within its ambit. This may entail a general indication of excluded crimes based on the imprisonment term applicable to the offence, or it may entail providing a schedule that specifically enumerates the crimes to which the provision is not applicable.

Either way, there is no doubt that defilement is indeed a serious offence. It is for that reason that it carries a maximum sentence of life imprisonment. Consequently, it would be impermissible to settle a defilement case by way of reconciliation, irrespective of the terms that the parties have agreed upon.

5.7 Obligation to report cases of defilement

It should be briefly highlighted that the law in Botswana places an obligation on every person to report cases of child abuse or exploitation once they become aware of them. In terms of the Children's Act, if one fails to make such a report, without a reasonable excuse, they are guilty of an offence and are liable to a fine of not less than P10 000.00 but not more than P30 000.00 or to imprisonment of not less than two years but not more than three years, or to both.[82] Moreover, Section 151 and Section 152 of the Penal Code make it an offence for the owner, occupant or manager of premises to induce or knowingly suffer a minor to be

81 2013 (3) BLR 67 (CA). In the case the Court was dealing with the offence of robbery, which also carries a minimum mandatory sentence of 10 years imprisonment.

82 Section 25 (2) of the Children's Act.

on such premises for the purposes of sexual intercourse, whether with any particular person or generally.

6. CONCLUSION

The amendment of the Penal Code to increase the age of consent from 16 to 18 years is a welcome development. It is equally commendable that the legislature found it apposite to amend the special defence under Section 147 (5) of the Penal Code to the extent that the law excluded from its protection minors who were married. It is hoped that the amendment will bring incidences of child marriages to an end. The paper has demonstrated the challenges that arise from removal of the mistake of age defence provision and the potential confusion it presents as to whether defilement has now been rendered a strict liability offence. The recommendation in this regard is for the legislature to cause a further amendment with the specific effect of clarifying the position on the *mens rea* requirement for defilement. If it was indeed the intention of the legislature to exclude application of the mistake of age defence then a provision must be inserted in the Penal Code to that effect. This will ensure that courts do not nonetheless apply the mistake of age defence under the common law. However, if the mistake of age defence is to be retained, it will have to be with adequate safeguards aimed at placing an obligation on an accused person to take all reasonable steps to ascertain the age of the complainant. The paper has further highlighted the challenges that arise in relation to catering for the growth and development of minors and avoiding the criminalisation of consensual and non-exploitative sexual experimentation between adolescents. The amended Section 147 (5) of the Penal Code adequately addresses this challenge by introducing the gap in age exemption. This is also a welcome development. The paper has shown that proof of the age of the complainant beyond reasonable doubt is a critical requirement in the prosecution of a defilement case. Consequently, the prosecution must ensure that they tender adequate evidence in this regard to avoid instances where perpetrators are acquitted simply because the prosecution failed to produce the required evidence. Moreover, the paper has highlighted that, where an accused person is unrepresented in a defilement case, the court has a duty to assist such accuse person particularly in bringing their attention to the special defence. Magistrates must ensure that they adequately discharge

this duty so that their convictions are not ultimately overturned on fair trial concerns. All in all, it is unquestionably critical that everyone involved should conscientiously discharge their mandate to ensure that the protection of minors from sexual exploitation is enhanced and that the laws passed in that regard are given practical efficiency.