THE CORROBORATION REQUIREMENT IN SEXUAL OFFENCES: A DISCRIMINATORY AND UNCONSTITUTIONAL EVIDENTIAL RULE IN THE MALAWIAN LAW

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in Criminal Justice in approved courses and a minor dissertation. The other part of the requirements for this degree was a completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of a Masters of Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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To Jesus Christ, my God and Saviour—I will have no other God.

To my Mum and Dad, the two Heroes, though not necessarily born in February.

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Vikochi Jane NDOVI

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CHAPTER 1

INTRODUCTION

1.1 General

Generally, the law in Malawi does not provide for any specific number of witnesses that are necessary to prove a fact. Section 212 of the Criminal Procedure and Evidence Code[1] states that:

> Subject to this Code and any other law for the time being in force, no particular number of witnesses shall in any case be required for the proof of any fact.

Thus in general, the testimony of a witness does not need to be corroborated. To this general rule, there are exceptions whereby there needs to be corroboration of a witness' testimony. In these instances corroboration is either required as a matter of law or as a matter of practice. Where corroboration is required as a matter of law, a conviction cannot be entered on the uncorroborated evidence of one witness.[2] Where it is required as a matter of practice, a conviction should be possible on the uncorroborated evidence of a single witness.

One of the instances whereby corroboration is required as a matter of practice is the testimony of a complainant in a sexual offence case.[3] The main justification for requiring corroboration in these sexual matters is the assumption that complainants most often fabricate these allegations.[4] As a result, independent evidence is sought to establish the veracity of the complainant's testimony.

Since corroboration is sought only as a matter of practice as opposed to as a matter of law, a conviction should be attainable on the uncorroborated evidence of the complainant, so long as the court is convinced that the complainant is telling the truth. That, however, has not been the approach of the courts. Case authority has consistently stated that it should only be in very rare

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[1] Act 36 of 1967

[2] For example, by section 6 of the Oaths, Affirmations and Declarations Act, a conviction cannot be made on the unsworn evidence of a child, if it is uncorroborated. An accused also cannot be convicted on the uncorroborated evidence of a single witness in sedition, perjury or procuring a woman for immoral purposes: sections 140, 51 and 101 of the Penal Code, respectively.

[3] *Regina v Mussa* 1 ALR Mal 84; *Tinazari v Republic* 3 ALR Mal 184 ; *R v Kaluwa* 2 ALR Mal 356; *Mariette v Republic* 4 ALR Mal 119; *Republic v Kapalepale* 6 ALR Mal 150

[4] *Regina v Kaluwa* supra note 3 at 364

cases that the uncorroborated testimony of a complainant should be accepted as truth.[5] This, has therefore, led to far fewer convictions in sexual offences than would have been otherwise if the rule had not existed. Naturally, this means that many guilty sexual offenders do not receive their just deserts. Deterrence, therefore, is not adequately realised. Further to that, women, who are for the most part,[6] victims of sexual offences, have as a result not been sufficiently protected from sexual predation.

The problem with the corroboration requirement in sexual offences is that it is based on an improper foundation. The proffered rationale, that most complainants lie about sexual offence allegations, cannot be verified from empirical data.[7] Regardless of this fact, due to the rule's existence, the standard of proof in sexual offence cases is unnecessarily raised above that which normally obtains in other criminal cases, causing convictions in sexual offences very hard to come by. The rule is found to be only premised on discrimination against women. Such being the case, the rule runs counter to the current Constitutional order which is founded on principles of equality before the law, non-discrimination and the dignity of all persons.[8] It is also against the Constitutional commitment of offering women full and effective protection.[9]

This paper advocates that such an evidential rule is undesirable for it serves no useful purpose in the adjudication of sexual matters and that the rule is unfairly discriminatory against women and unconstitutional in the present Malawi constitutional regime. It further advocates that the rule should be abolished both by judicial pronouncement and legislatively. Since the corroboration requirement is a common law rule, lessons will be drawn from comparative common law jurisdictions which used to have the rule but have now abolished it, such as South Africa, Namibia, the State of California, Canada and England. To these ends, Chapter 2 will consider how the Malawian courts have applied the corroboration rule in sexual cases and also the rationale behind the rule. Criticisms against the rule will also be considered. Chapter 3 will examine the constitutionality of such a rule in the present Malawian constitutional regime. Chapter 4 will look at the judicial and legislative reforms that comparable common law

[5] *Tinazari v Republic* supra note 2 at 192; *Regina v Kaluwa* supra note 2 at 360
[6] Note, 'The rape corroboration requirement: repeal not reform', (1972) 81 *Yale Law Journal* 1365 at 1372
[7] A Thomas Morris, 'The empirical, historical and legal case against the cautionary instruction: a call for legislative reform', (1988) 1 *Duke Law Journal* 154 at 164

[8] Section 12 of the Constitution of Malawi, 1994
[9] Section 24(1) of the Constitution of Malawi, 1994

jurisdictions have effected in the area of corroboration in sexual offences. Chapter 5 is the conclusion. Before the substance of the rule is considered, there is a need to take a brief look at how Malawi came to have such an evidential rule. At the same time, a brief look will be made at the jurisdiction of courts as regards sexual offences in Malawi and also the composition of such courts.

1.2 Common Law and Courts' Jurisdiction in Sexual Cases

Malawi was a British colony from 1892 until 1964, when Malawi gained its independence. All the statutory law and case law of England up to 1902 was stated to be binding on Malawi and to be part of Malawi law unless such law had been repealed by a Malawi Act of Parliament.[10] Thus the English common law became part of Malawi law. During the colonial era and even a few years after Malawi gained independence, almost all of the judicial officers in the magistrate's court, the High Court and the Supreme Court were from England. Therefore, even though the law from England that was to be part of the laws of Malawi was according to the British Order-in-Council to be the statutes and case law of England of up to 1902, the English judicial officers continued to look to the English case law of after the year 1902 for guidance and interpretation of the Malawi laws. They looked to decisions after 1902, not because of their binding force on Malawi, but for their persuasive quality. Once an English decision made after 1902 was applied in a Malawi decision by the Supreme Court of Appeal or the High Court, that Malawian case and by extension the English case became by the doctrine of precedent binding on the lower courts. In this way then, corroboration as a doctrine generally and also specifically in sexual cases, was inherited from the English common law and also developed in Malawi along the same English case law.

In Malawi, it is the magistrate's court that handles the bulk of the criminal cases. The magistrate's court has several strata. The magistrate court of a Resident Magistrate or of the first grade can try any offence under the Penal Code with the exception of homicides, treason and piracy; attempts and accessory offences linked to the excluded offences are also outside the jurisdiction of the magistrate's court.[11] These courts can, however, try any sexual offence.[12] The

[10] British Order-in-Council of 11th August 1902
[11] Section 13(1) of the Criminal Procedure and Evidence Code
[12] Section 13(1) and (2) of the Criminal Procedure and Evidence Code

court of a magistrate is constituted by a single magistrate sitting alone unlike the High Court, which has provision for jury trial.[13] Since a magistrate sits alone, any expression for the need of corroboration in a sexual offence case is articulated by the magistrate to himself; unlike in other jurisdictions like the United States and the United Kingdom, where these offences are mostly tried by jury trial, the corroboration warning is expressed by the judge to the jurors.

[13] Section 294(1) of the Criminal Procedure and Evidence Code

CHAPTER 2

THE CORROBORATION REQUIREMENT IN SEXUAL OFFENCES IN MALAWI

In this chapter, we will consider how the requirement for corroboration in Malawi has been understood, what it entails and how it has been applied. We will examine the definition and nature of corroboration. We will also look at what exactly in the complainant's story has to be corroborated. Furthermore, we will examine what have been the justifications for requiring corroboration in sexual offences in Malawi and elsewhere. Criticisms of the rule will also be considered. The chapter then concludes on the footing that the rule is baseless and that it only unfairly discriminates against women.

2.1 The corroboration requirement/warning

It has been held by the High Court in several sexual offence cases that in such cases, the trial magistrate should warn himself of the danger of convicting an accused on the uncorroborated evidence of the complainant.[14] This requirement is met by the magistrate recording in his written judgment that he is mindful of the need for corroboration in the sexual offence charge he is dealing with. The trial magistrate then is to proceed to look for corroboration. The High Court has further held that it is only in rare cases that the magistrate should accept the uncorroborated testimony of a complainant.[15] In such instances, the trial court must expressly record, firstly, that there is no corroboration; secondly, that it is well aware of the danger of convicting in such circumstances; and that despite this, it is nevertheless satisfied beyond reasonable doubt that the complainant is telling the truth.[16] It is a ground of appeal if the court convicts without taking into account the absence of corroboration.[17] The High Court also is likely upon review to set aside the conviction.[18]

The High Court has not required any particular form of wording to be used when the magistrate is warning himself of the need for corroboration. It also has not expressed the need for

[14] *Regina v Mussa* supra note 3 at 87; *Tinazari v Regina* supra note 3 at 192; *Mariette v Republic* supra note 3 at 133; *Republic v Kapalepale* supra note 3 at 152-153
[15] *Tinazari v Regina* supra note 3 at 192
[16] Ibid
[17] *Banda v Republic* 4 ALR Mal 316
[18] *Republic v Kapalepale* supra note 3 at 153; Section 15 of the Criminal Procedure and Evidence Code stipulates that the record of proceedings before a magistrate court in which a first offender has been sentenced to a term of imprisonment shall be transmitted to the High Court for review.

the justification for the corroboration requirement to be included in those words beyond stating that corroboration is needed of the complainant's evidence because it is a sexual offence case.

Tinazari v. Regina[19] was a case of indecent assault which came on appeal before the High Court. One of the grounds of appeal was that the trial magistrate had not adequately considered the question of corroboration. The High Court considered what the magistrate stated concerning his cognisance of the need for corroboration and affirmed the magistrate's dictum. Bolt, J quoted the magistrate court's judgment:

> I…direct myself that in this type of case it is established that I must warn myself of the danger of convicting on the uncorroborated evidence of the complainant; I will say at once that I am aware of the danger of convicting in any prosecution on the uncorroborated evidence of a complainant, and of the especial danger of doing so in a case where the basis of the charge is an alleged sexual impropriety.[20]

According to Bolt J, this expression for the need of corroboration was sufficient regardless of the fact that it never gave the rationale for making sexual offence an especial category for the corroboration requirement. In contrast, other jurisdictions that required the cautionary instruction to be given like the United States had embedded the justification for seeking corroboration in the instruction. In *State v. Smoot,*[21] the instruction given to the jury was that:

> A charge such as that made against the defendant in this case is one, which, generally speaking, is easily made, but difficult to disprove even though the defendant were innocent. Therefore, I charge you the law requires that you examine the testimony of [the complainant] with caution.[22]

Also in *Williams v. State,*[23] the judge said to the jurors that:

> You are instructed that the crime of second degree rape, of which [the accused] is charged, is a serious one, and such a charge is easily made and hard to contradict or disprove; that is a character of crime that tends to create a prejudice against the person charged; and for these reasons, it is your duty to weigh the testimony carefully, and then determine the truth with deliberative judgment, uninfluenced by the nature of the charge.[24]

In the same way, the English courts had required likewise that the justification be included in the warning for the corroboration warning to be a full warning as it was required that it be such in a sexual offence case. Thus in *Spencer v. Regina*[25] Lord Ackner stated that:

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[19] *Supra* note 3
[20] Ibid at 191
[21] 99 Idaho 855
[22] Ibid at 863
[23] 254 Ark. 940
[24] Ibid at 943
[25] (1987) AC 128

> Where there is no corroboration, the rule of practice merely requires that the jury should be warned of the danger of relying upon the sole evidence…of the complainant in the sexual case…*The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance...*[26]

One would understand why the judge has to at least explain to the jury the justification for seeking corroboration. This is important so that they can appreciate its need as they exercise their minds upon the question. It is, however, surprising that the magistrate is not called upon to include such justification in their judgment. After all, this judgment is read in open court, to all present, including the accused and complainant. It should not be hard to see why the complainant would want to know why his/her evidence is treated with caution other than the fact that it is a sexual offence charge.

2.2 Definition and the Nature of Corroboration

Tinazari v. Regina[27] defines corroborative evidence as evidence which confirms other evidence that an offence has been committed and that it is the accused who has committed it.[28] In that case, Bolt, J quoted Lord Reading, CJ in *Rex v. Baskerville*[29] for the definition of corroboration:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.[30]

Further to this, it was stated in *Rex v. Baskerville* that:

> The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of [the witness to be corroborated] that the accused committed the crime is true, not merely that the crime has been committed, but that it has been committed by the accused. What is required is some additional evidence rendering it probable that the story of [the witness to be corroborated] is true and that it is reasonably safe to act upon it.[31]

There thus needs to be shown a connection in the evidence said to be corroborative between the offence and the accused. In *Republic v. Kapalepale*[32] the accused was convicted of rape. On appeal, it was held that the torn clothing of the complainant could not amount to corroboration of

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[26] Ibid at 140
[27] *Supra* note 3
[28] Ibid at 194
[29] [1916] 2 KB 658
[30] *Supra* note 3 at 194, quoting Lord Reading, [1916] 2 KB 658 at 667
[31] *Supra* note 29 at 665
[32] *Supra* note 3

the complainant's evidence without a nexus being shown between the torn clothing and the accused. Since the evidence of the complainant was held to lack corroboration and since the trial magistrate had not warned himself of the need for corroborative evidence of the complainant's account, the High Court quashed the conviction. Below we consider some of the examples of what has been held to be corroborative evidence. These examples are shouts or screams of a complainant heard by a third party at the time of the alleged offence, the distressed condition of the complainant soon after the alleged offence, admissions made by the accused as to the alleged offence and also lies told by the accused in connection to the alleged offence.

2.2.1 Shouts and distressed condition of the complainant

Screams from the complainant heard by an independent witness during the alleged time of the sexual assault have been held to be corroborative evidence of the complainant's account.[33] The distressed condition of the complainant after the alleged assault as observed by an independent witness has also in certain cases been held to be corroborative evidence.[34] In *Tinazari v. Regina*, the accused was convicted of indecent assault. The accused was a recent acquaintance of the complainant. He came round to the complainant's flat and the complainant invited him in. The accused pushed her on the settee, pinned her there and got on top of her and was removing his trousers. She fought him off, bit his arm and screamed. He jumped to his feet and walked out of the flat. Two neighbours appeared on the scene and asked the accused as to what had happened. These two neighbours testified to the screams they had heard, to the slight disorder of the flat and also to the distressed condition of the complainant at the time. On appeal, the High Court held that these facts were corroborative of the complainant's story since they were observed round about the same time the accused was present at the flat.[35] Of course as regards the distressed condition of the complainant, the High Court in the instant case held that trial courts must ascertain whether the alleged offence caused the hysterical condition or whether the hysteria gave rise to a false allegation.[36] In the present case, taking all the other circumstances into account, the High Court concluded that the offence gave rise to the complainant's distressed condition and not the other way round.

[33] *Tinazari v. Republic* supra note 3 at 197
[34] Ibid at 198
[35] Ibid at 197-198
[36] Ibid

The case of *Tinazari v. Regina* can be contrasted with the case of *Republic v Fredi.*[37] In the latter case, the shouts were held to have an ambiguous complexion and the complainant's unhappy condition was held to be insufficient corroboration. In that case the accused and the complainant were at a beer party. When the party was coming to an end, the accused ordered the people out of the house and closed the door behind him and the complainant. The owner of the house heard the complainant screaming and came and opened the door. The complainant alleged that the accused had indecently assaulted her. At this time, the accused was assaulting the complainant and he then also turned and assaulted the owner of the house.

The owner of the house testified that when he opened the house, he observed that the complainant looked not 'happy'. At confirmation, the High Court stated that the complainant's screams could not corroborate her story of indecent assault. This was so because the shouts were mere shouts which could be consistent with a common assault as well as an indecent assault.[38] The court contrasted these shouts with those heard in *Tinazari v Republic* which were to the effect that: 'Don't touch me; don't come near me.' The court also said that the unhappy condition of the complainant could have been simulated since she knew there were people outside.[39] Additionally, it was stated that it was reasonable for her to be unhappy since she was being assaulted.[40] The High Court substituted a conviction of common assault in the place of the lower court's conviction of indecent assault.[41]

In the light of this safeguard of ascertaining that the hysteria did not bring about the sexual assault allegation, it can be seen as will also be shown below, that it has been supposed that women fabricate sexual offence allegations from some other motives or out of hysteria, and hence the enunciation of the corroboration rules.

2.2.2 Admissions and Lies told by the accused

A confession can provide corroboration. In *Regina v. Magombani,*[42] the complainant was a girl whom the trial court recorded to be under twelve years of age. She testified that the accused had

[37] 8 MLR 48
[38] Ibid at 53
[39] Ibid
[40] Ibid
[41] Ibid at 54
[42] 2 ALR Mal 397

led her into the bush and indecently assaulted her. A police officer had testified that he had been shown a place, which place the girl said was where the accused had struggled with her. This was done in the presence of the accused. The accused admitted to the officer that this had indeed been so. The officer found signs of a struggle in that place. In his defence, the accused said he had nothing to say except that he admitted the offence. On the question of corroboration, it was held that the accused's admission would amount to corroboration.[43]

Lies told by the accused have also been held to amount to corroboration of the complainant's story in certain instances. In *Regina v. Kaluwa,*[44] the girl of about fourteen years of age had testified that while on a village path, she met the accused, who pushed her down and had sexual intercourse with her. On medical examination, the girl's private parts were found to be swollen and inflamed. The hymen was found to have been recently torn and there was bad bruising inside her vagina. The girl could hardly walk. There were semen-like stains on her underclothing.

The High Court, on review, stated that there was no doubt that the girl had had sexual intercourse for the first time.[45] What remained, the court stated, was corroborative evidence on whether, she had had it with the accused and also whether she had consented to it or not.[46]

On arrest, the accused made a statement after being cautioned and stated that: 'I agree that I got hold of the girl intending to have carnal knowledge of her'. The following day, as the accused was about to say something, the police officer cautioned him again. The accused then admitted to having raped a girl, but not the complainant.

The High Court, then, held that on the authority of *Credland v. Knowler,*[47] the first statement which was an admission of an incriminating fact would corroborate the girl both on identity and lack of consent.[48] It was stated that although a lie told by an accused person does not normally amount to corroboration of the complainant's evidence, it may do so if it is of such a nature and made in such circumstances as to lead to an inference in support of the complainant's evidence,

[43] Ibid at 399
[44] *Supra* note 3
[45] Ibid at 360
[46] Ibid at 362; The Penal Code makes a distinction in sexual offences between rape and defilement; defilement is where a man has sexual intercourse with a girl under 13 and consent by the girl is immaterial: section 137 of the Penal Code
[47] 35 Cr. App. R. 48
[48] *Supra* note 3 at 365

or if it gives to a proved opportunity a different complexion from what that opportunity would have borne if no lie had been told.[49] The accused's statement was held to be corroboration because it was consistent with the complainant's account even though the accused had not admitted to finally having sexual intercourse with the girl. The accused having later made a contradictory exculpatory statement showed that he was untruthful and that he was trying to hide what happened at the opportunity he had had with the complainant, which opportunity was proved by the complainant's evidence and his first statement.

2.3 The Extraneousness of Corroboration

Corroboration has been held to be extraneous to the complainant with the exception of where a witness testifies as to the distressed appearance of the complainant.[50] Thus if a complainant tells someone else of her having been sexually assaulted, the person to whom the complainant made her complaint can testify that the complaint was made, but such evidence does not amount to corroboration. It is only evidence showing her consistency. In *Mariette v. Republic*,[51] it was said that in a sexual case, where a complaint was made by a prosecutrix shortly after the alleged occurrence, the particulars of the complaint may be given in evidence, on the part of the prosecution, not as evidence of the truth of those facts but as evidence of the consistency of the conduct of the prosecutrix, that the story told by her in the witness-box could be accepted on trust and as negativing consent on her part. For as, it was stated in *Tinazari v. Regina:*

> A girl cannot corroborate herself, otherwise it is only necessary for her to repeat her story some twenty-five times in order to get twenty-five corroborations of it.[52]

These previous consistent statements in sexual offences are rather an exception to the rule against hearsay evidence. The rule stems from the old English law which required the complainant to have shown 'hue and cry':

> go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done to her to men of good repute, the blood and clothing stained with blood, and her torn garments.[53]

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[49] Ibid at 365
[50] *Tinazari v. Republic* supra note 3
[51] *Supra* note 3 at 134
[52] *Supra* note 3 at 194, Bolt J quoting Lord Hewart, C.J. in *Rex v. Whitehead* [1929] 1 KB 99 at 102

[53] H de Bracton cited in PJ Schwikkard, 'Getting somewhere slowly-The revision of a few evidence rules', in L Artz & D Smythe (eds) *Should we consent? Rape law reform in South Africa*, 72 at 87

It is because the courts feared the danger that a complainant in a sexual case may have fabricated the allegation that they began to allow previous consistent statements to show the complainant's consistency.[54] Of course the rule has been criticised for favouring the complainant unfairly over the accused since the accused cannot lead similar evidence.[55] On the other hand, the rule is criticised for giving the defence a loophole in the complainant's evidence if she did not complain at the first reasonable opportunity.[56] Yet it has been argued that these rules came up at a time when there was not enough understanding about the psychology of the rape victims. It was not understood at the time that there are 'many psychological and social factors which may inhibit a rape survivor from making a complaint such as fear for retaliation by the offender, self-blame and fear of having to testify'.[57] As such, it has been argued that not complaining at the first reasonable time is not a reliable way of assessing the complainant's credibility.[58]

2.4 What Needs to be Corroborated?

It has been stated that the requirement for corroboration does not mean that there should be independent evidence confirming the whole story of the witness who needs to be corroborated. This is because if there is another witness whose evidence covers the whole matter, then there is no need to call the witness whose evidence requires corroboration.[59] Where there is no question that the complainant had sexual intercourse or was indecently assaulted, the court has required that what needs to be corroborated is the lack of consent and the identity of the accused.[60] In *Tinazari v. Regina,*[61] a case of indecent assault, it was held that although the court was to look for independent evidence confirming that the full offence charged had been committed, it did not mean that a conviction was unattainable if there was no corroboration of the alleged indecency. The court reasoned that if the proposition of law was that there was to be corroborative evidence of the alleged indecency before a conviction could be arrived at, as defence counsel had argued, then there would be no conviction for indecent assault except 'in those rare cases where the court

[54] PJ Schwikkard, 'Getting somewhere slowly-The revision of a few evidence rules', *supra* note 53 at 87
[55] Ibid at 88
[56] Ibid
[57] Ibid
[58] Ibid
[59] *Credland v Knowler* supra note 47 at 56
[60] *Regina v Kaluwa* supra note 3 at 362; *Mariette v Republic* supra note 3 at 125
[61] *Supra* note 3 at 196

after proper warning accepted without corroboration the complainant's testimony'.[62] It therefore would be almost impossible in many cases to prove the case. It was stated that while a woman who has been raped after a struggle, may exhibit injuries on her body that may not be the case in most indecent assault cases. For example, where a man handles a woman's breast without her consent, there may not be marks afterwards to confirm the woman's testimony.[63]

The test therefore for corroborative evidence in *Tinazari* was stated to be whether there is independent evidence tending to confirm the truth of the account of the witness to be corroborated and tending to show that it is reasonably safe to act upon it.[64] It was stated in that case that what was crucial was the confirmation of the veracity of the witness for whom corroboration is required. The court, however in *Tinazari,* was quick to point out that this test does not derogate from the other elements of corroboration, which were that the corroborative evidence must show that a crime has been committed and also that, it is the accused who has committed it.[65] Thus on this test, the distressed condition of a woman soon after the alleged offence, can amount to corroboration, so long as it can be linked to the accused and even though such corroborative evidence does not necessarily confirm that any indecency has taken place.

In the latter case of *Mariette v. Republic,*[66] Cram J seems to have applied a more stringent test to the one in *Tinazari*. In *Mariette*, the complainant a sixteen year old girl testified that she was walking home when the accused gave her a lift in his car to take her to her house. She knew the accused lived in a neighbouring house to her house although the two had never spoken to each other before this day. The accused drove away from his house and then stopped the car in a solitary place. He forced her to lie down in the car. The complainant demonstrated to the trial court the position she was forced to lie. She said she saw the accused undo his trouser buttons and pull out his penis. He lay over her and put his penis into her vagina. She said she felt pain. She saw semen on her dress and petticoat. The trial court convicted the accused of rape.

[62] Ibid at 196
[63] Ibid
[64] Ibid at 197
[65] Ibid
[66] 3 ALR Mal 119

The accused appealed on the ground that penetration by the penis[67] had not been proved and also that the trial court had not given a full direction on corroboration. In his evidence, he stated that he had seen the girl earlier that day talking to a certain bicyclist whom he believed was the one with whom she had had the sexual intercourse. He also stated that at the solitary place, he had asked the girl to have sexual intercourse with him and that she had agreed to this. Yet when he told her to lie down, she refused. He said it became physically impossible to have sexual intercourse with her for his male organ was unable to reach beyond the middle of her thighs in her upright position. He stated that he therefore had to satisfy himself by external orgasm.

Cram J found that the medical evidence conclusively established the fact that the girl had had sexual relations for the first time from the injuries observed and the presence of semen on her clothes.[68] He ruled out the possibility that the girl had had sexual intercourse with the bicyclist. He stated that, should the girl's injuries have come after her intercourse with the bicyclist, she would not have wanted to have sexual intercourse with the accused an hour later, as the accused claimed.[69]

Cram J, however, said that since the girl had testified that the accused had held his one hand over her mouth and nose and that since she was lying at an awkward angle in the small car, the accused's hand would have interfered with her vision. He stated that she therefore could not see what was happening between her legs.[70] While she could have seen the accused unbutton his trousers and take out his penis, because of her inexperience, she could not have been able to tell what had actually penetrated her.[71] The medical officer had testified that while there was a possibility that a finger could have ruptured the hymen in the two places, he was of the opinion that the bruises he found on the inner and outer lips could not have been caused by a finger. Even though Cram J conceded that he could not know the position in which the girl was forced into by the accused in the car, for the girl had demonstrated this only to the trial court, he still concluded that the accused could not have achieved penetration with a penis in the car.[72]

[67] In Malawi, the only instrument of penetration in rape is a penis: *R v. Hill* (1781) 1 East P.C. 439
[68] *Supra* note 3 at 124
[69] Ibid
[70] Ibid at 128-129
[71] Ibid
[72] Ibid at 139

It was thus held, that while the accused's own admissions afforded corroboration of his identity and also that her bleeding nose spoke of her non-consent, penetration by the accused's penis was not corroborated.[73] Even though the court conceded that the slightest penetration of the male organ sufficed to constitute the offence, the court held that, in this case the complainant may have believed wrongly that she was penetrated by a penis. The appellate court thus substituted a conviction of attempted rape for the trial court's conviction of rape. The principle in this case can therefore be contrasted with the one in *Tinazari* in that in *Mariette*, corroboration of an element of the offence, that is the penetration, was sought. In *Tinazari*, the corroboration of the element of the offence, the indecency, was not sought.

2.5 Justification for Requiring Corroboration

The justification for the corroboration requirement in the Malawian cases has not been fully explained. The rule has to a great extent just been accepted as the legacy of the common law and not been questioned. In *Regina v Mussa,*[74] the High Court somehow gave that rationale when Seton CJ stated that:

> The objection to convicting a person charged with a sexual offence upon the uncorroborated evidence of the complainant is that it is a case of an oath against an oath in circumstances where experience has shown that there is a special danger in relying on the testimony of a single witness uncorroborated.[75]

The same justification for requiring corroboration was given in *Mariette v. Republic.*[76] In *Rex v. Kaluwa,*[77] Cram J, after agreeing with the rationale that corroboration is sought because it is a case of an oath against an oath went on to state that corroboration is also required because complainants are prone to lying. He stated:

> …the common practice from the experience of judges is to look for corroboration in sexual offences because of the great risk of false accusation.[78]

Cram J went on to state that a woman complaining of rape is in an analogous situation to an accomplice in terms of her propensity to fabricate the allegation:

[73] Ibid
[74] *Supra* note 3
[75] Ibid at 86
[76] *Supra* note 3 at 133
[77] *Supra* note 3
[78] Ibid at 363

> An accomplice is a witness against whom, a warning must be given because he is under a temptation to lie. The prosecutrix in a rape case, if a guilty woman, is under exactly the same temptation and the direction in her regard must be the same. That is, the possibility of false accusation should lead to a warning.[79]

The above quotation is no different from the justifications that have been put forward for the corroboration requirement in other jurisdictions where it has also been upheld. It is generally believed that sexual offences accusations are 'easily to be made and hard to be proved, and harder to be defended…'[80] It has also been stated that corroboration is required because the penalties especially of rape are severe.[81] Furthermore, it is also stated that, in sexual offence cases, the judge and the jury are often sympathetic towards the complainant and prejudiced against the accused.[82] Thus to avoid unjust convictions of innocent accused, the corroboration requirement is employed. We will now consider these justifications which can be grouped into two categories, that is, the frequency of false sexual offence charges and the difficulty in defending against a sexual offence charge. We will also consider the criticisms against these. In connection with these proffered justifications, we will consider whether the definition of corroboration as given in *R. v. Baskerville*[83] can be properly stated to tally with these justifications. Furthermore, we will look at the inflexible nature of the corroboration requirement. We conclude the chapter by drawing the conclusion that the corroboration rule serves no useful purpose other than being discriminatory against women.

2.5.1 The Frequency of False Sexual Offence Charges

It is believed that there are a number of different motives that can induce a complainant to fabricate sexual offence accusations. Glanville Williams states that sexual offences are particularly subject to danger of deliberate false charges 'resulting from sexual neurosis, fantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed of.'[84] It is also stated that a woman may have become pregnant and she may fabricate such charges against an entirely innocent man so that she shields the man who is really responsible for her condition.[85] Again, she can make up false charges for the purpose of

[79] Ibid at 364
[80] 1 M. Hale, Pleas of the Crown, at 63
[81] Note, 'The corroboration rule and crimes accompanying rape' (1970) 118 *University of Pennsylvania Law Review* 458, at 458; Section 133 of the Penal Code prescribes the maximum sentence of rape as death or life imprisonment.
[82] 'The corroboration rule and crimes accompanying rape' *supra* note 81 at 458
[83] *Supra* note 29
[84] G Williams, 'Corroboration-sexual cases', 1962 *Criminal Law Review* 418
[85] Note, 'Corroborating charges of rape', (1967) 67(6) *Columbia Law Review* 1137 at 1138

blackmail or out of revenge or for notoriety.[86] Furthermore, it is assumed that women peculiarly lie so well about sexual accusations and that it is almost impossible for the jury to detect the lies.[87]

It has, however, not been convincingly proved that sexual offence complainants are so good at lying that juries are unable to discern the falsehood.[88] Furthermore, it is argued that there are several deterrent factors that work against fabrication of sexual accusations. Firstly, there is the 'stigma that attach to an incident culturally defined as sordid, and the humiliation caused by some forms of publicity associated with such charges.'[89] It is actually believed that this is one of the very strong reasons why rape is highly underreported and especially in the African context as stated in the Botswana Emang Basadi Women Association report:

> Although one cannot state with certainty why some victims never report such crimes, it is widely believed that parents may want to prevent publicity, further ordeal and emotional injury to the young victim. A victim may fear being accused of provocation, active participation or irresponsibility. She may experience shame or a desire to protect her reputation. She may also fear the reaction of her husband, boyfriend or parent…or may feel that their lobola (sic) may be diminished and their chances of marriage marred if society gets to know they were once raped or sexually abused.[90]

The complainant also has to consider the difficulty of facing the accused in court in recounting the sexual assault and also the brutal cross examination of her sexual mores by the defence counsel.[91] There is also the fear of retaliation from the accused or his friends.[92]

It is asserted these factors are so strong as to discourage the reporting of sexual offences to the extent that statistics indicate that rape is one of the most under-reported crimes among the felonies.[93] Furthermore, even if the complainant reports the offence, she may refuse to go and testify, 'in large part to avoid having to relive a traumatic and humiliating experience for the

[86] 'The rape corroboration requirement: repeal not reform' *supra* note 6 at 1373
[87] J Temkin quoted in J. Jackson, 'Credibility, morality and the corroboration warning' (1988) 47(3) *Cambridge Law Journal* 428 at 445
[88] J Jackson *supra* note 87 at 437
[89] 'The rape corroboration requirement: repeal not reform' *supra* note 6 at 1374
[90] Quoted in EK Quansah, 'Corroborating the evidence of a rape victim in Botswana: time for a fresh look'(1996) 28 *Botswana Notes and Records* 231 at 235
[91] V Berger, 'Man's trial, woman's tribulation: rape cases in the courtroom' (1977) 77(1) *Columbia Law Review* 1 at 14; 'The rape corroboration requirement: repeal not reform' *supra* note 6 at 1374; L Edelstein, 'An accusation easily to be made? Rape and malicious prosecution in eighteenth-century England' (1998) 42(4) *American Journal of Legal History* 351 at 361-364
[92] 'The rape corroboration requirement: repeal not reform' *supra* note 6 at 1374
[93] Ibid

benefit of the judge and the jury.'[94] MacCahill et al quoted by Thomas Morris give an apt description of such humiliation:

> [The rape trial] meets all…conditions of successful degradation ceremonies. She [the victim] must testify (he [the defendant] need not) and thereby be confronted and transformed into something viewed as inferior in the local scheme of social types…Indeed it is before many witnesses that the victim is denounced and motives questioned…Fears and emotional turmoil that may have subsided earlier are once again aroused…It is not surprising, therefore, to find that it is in the realm of nightmares, heterosexual relationships, and social activities that adjustment difficulties are likely to develop for the victim who has been to trial.[95]

Of course, some may think that motives such as blackmail can be so strong as to overcome a complainant's fear of publicity and humiliation. It is, however, unlikely that a great number of women would rather fabricate a rape accusation and endure a rape trial ordeal than fabricate a non-sexual offence accusation, which will not expose them to such humiliation.[96] Further, such a 'number will almost certainly be so small that modern techniques of criminal investigation and traditional legal rules, other than the corroboration requirement, will effectively protect innocent defendants'.[97] Strangely enough, other physical assaults, which are also capable of being made the subject of false accusations are not ridden with the corroboration requirement.[98]

2.5.2 Difficulty in Defending Against a Sexual Offence Charge

It has been stated that sexual offences are easy to make and yet hard to disprove. As regards rape, it has been stated:

> If the defendant was never alone with the prosecutrix at all, he may be fortunate enough to have an alibi. But if he has not, or if the prosecution can show that he was with her when the crime allegedly occurred, how is he to show that he never achieved penetration, or that she consented.[99]

Of course, sexual encounters occur in private and may leave no trace of whether the act took place or not; or if it did, if the complainant consented or not. As such, indeed, the question of whether or not a crime took place may turn on the conflicting testimony of the complainant and the accused.[100] Yet the corroboration requirement is 'in effect…a prior determination that if the prosecution's case stands solely on the testimony of the complainant, the defendant shall win'.[101]

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[94] Ibid
[95] Thomas Morris *supra* note 7 at 159
[96] Edelstein *supra* note 91 at 361; 'The rape corroboration requirement: repeal not reform', *supra* note 6 at 1375
[97] 'The Rape corroboration requirement' *supra* note 6 at 1375
[98] Ibid
[99] 'Corroborating charges of rape' *supra* note 85 at 1139
[100] 'The rape corroboration requirement' *supra* note 6 at 1382
[101] Ibid

It is difficult to see why this should be the case when the presiding officer is privileged to 'have available the usual criteria of demeanour and coherence of the witness under cross examination and the evidence of surrounding circumstances',[102] just like in all other cases where the prosecution case turns on the evidence of one witness. In fact, it is argued that rape is easier to disprove than other violent offences for the victim is the focus in rape trials and not the defendant.[103] Thomas Morris states that unlike trials for other violent offences, the focus in rape trials is usually on the victim's behaviour rather than the accused. The defence counsel is set on blaming the victim and thereby destroying her credibility. She writes:

> The shifting of focus is accomplished through a lengthy and often explicit cross-examination of the victim. Typical subjects examined include the resistance of the victim to her attacker, their past relationship, the victim's sexual history and character, her emotional state, and the promptness with which she reported the rape. As a result, the jury may base its decision on the character of the victim rather than on the guilt of the defendant. If the victim dresses seductively or goes hitchhiking alone, the defendant may be acquitted regardless of the legal evidence.[104]

Studies done show that most jurors have false preconceptions about rape victims, such as, that women concoct stories about rape and that women invite rape by their physical appearance and by their behaviour.[105] Most jurors, therefore, rarely convict a male accused of rape in the absence of aggravating circumstances such as the use of a gun or physical violence.[106] It is actually this focus on the complainant and the blame that is ascribed to her that causes rape to have the lowest conviction rates among the felonies.[107] It is therefore not true that the nature of the offence such as rape or any other sexual offence causes the jury to be sympathetic towards the complainant as opposed to the accused. Actually, there are usually no jury trials in rape in Malawi and so the magistrate sits alone. It is, therefore, expected that such a magistrate should be a competent professional who will keep a level head and exercise sound judgment.[108] As such, a requirement that the magistrate should give a corroboration warning to himself is quite absurd. Even if there were jury trials in sexual offences in Malawi, as already shown above, the evidence does not show that jurors are more inclined to believe the complainant rather than the accused. It is

[102] Dennis quoted in PJ Schwikkard, 'Sexual complainants and the demise of the 2004 Criminal Act' (2009) 1 *Namibia Law Journal* 5, at 10
[103] Thomas Morris *supra* note 7 at 161
[104] Ibid
[105] Ibid
[106] Ibid
[107] Ibid; 'The rape corroboration requirement: repeal not reform' *supra* note 6 at 1375
[108] Quansah, *supra* note 90

therefore submitted that rape or any other sexual offence is not a crime that is difficult to disprove.

2.6 Criticisms against the *Baskerville* formula

From the rationales stated above, it can be observed that it is the complainant's credibility that is doubted in a sexual offence case. Thus it would seem logical that evidence which shows that she is a truthful witness would be the one that would be sought to avoid convictions on fabricated sexual offence accusations. Yet this has not been the legal approach. The law as embodied in *Baskerville* has gone over and above this simple requirement. Its effect is to seek 'confirmation of the accused's guilt, not of the truthfulness of the witness's testimony'.[109] The confirmation of the veracity of the suspect witness's testimony is only incidental and of little value unless it leads to the confirmation of the accused's guilt.[110] It has further been stated that after the English decision of *R v Beck,*[111] it can safely be argued that confirmation of the suspect witness's testimony is an irrelevant consideration and that all that is needed is independent evidence confirming the accused's guilt.[112] Bronitt makes this conclusion based on the fact that Lord Ackner in *Beck* had rejected defence counsel's submission that corroboration needed to confirm a piece of evidence given by the suspect witness.[113] Instead Lord Ackner had stated that a piece of evidence could amount to corroboration even though it did not relate to what the suspect witness had testified to.[114] Such being the case then, Lord Ackner's proposition on corroboration runs counter to the common law, which places emphasis on the quality of evidence rather than the quantity.[115]

The *Baskerville* test for corroboration has thus been criticised for being 'too stringent since there may be cases where although the circumstances may be such as to remove any doubt from the veracity of the witness, yet they cannot be regarded as sufficient corroboration under this

[109] S Bronitt, 'Baskerville revisited: the definition of corroboration reconsidered' 1991 *Criminal Law Review* 30 at 33
[110] Ibid
[111] [1982] 1 WLR 461
[112] Bronitt *supra* note 109 at 33
[113] Ibid
[114] *Supra* note 111 at 471
[115] Bronitt *supra* note 109 at 34; C Backhouse, 'The doctrine of corroboration in sexual assault trials in early twentieth century Canada and Australia' (2001) *26 Queens Law Journal* 297 at 306-307; CAB, 'Evidence: corroboration in criminal cases' (1932) 30(8) *Michigan Law Review* 1291 at 1293-1294

definition'.[116] Birch gives the example of a scenario where the prosecutrix makes a complaint of a sexual offence to her sister and which tallies with her account in court. She envisages that the jury could perfectly reason that the complaint though not corroborating the prosecutrix' testimony in court, satisfies them that it is safe to accept the truthfulness of the prosecutrix' uncorroborated account. She thus asks why there should be a distinction made between evidence which is 'strictly corroborative' and that which merely supports the prosecutrix' credibility?[117]

Indeed Dickson J in *R v Vetrovec*[118] called Lord Reading CJ's approach in *Baskerville* as 'over-cautious'. He reasoned that since we believe that the witness has good reason to lie, some other piece of evidence is sought to establish that the witness is telling the truth. He was of the view that, while evidence which implicates the accused does serve to accomplish this purpose, that is not the only kind of evidence that can establish the witness' credibility.

He also quoted Wigmore who writes:

> …whatever restores our trust in [the witness] restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever, then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not *how* our trust was restored, but whether it *is* restored at all…[119]

He further illustrated his point by citing the case of *R v Murphy.*[120] In that case, the two appellants had picked up the 16-year-old complainant in their car in the early hours of the morning and driven her to their basement apartment which comprised a sitting room and a bedroom. She alleged that it was there at the apartment that the two appellants had sexual intercourse with her without her consent. Murphy admitted having had sexual intercourse with the complainant but said that the complainant had consented to the act. Butt said he never even had sexual intercourse with the complainant and claimed that upon reaching the apartment, he had immediately retired to bed. Murphy then drove her to a bus station where she telephoned her cousin. Her cousin testified to her distressed condition. The complainant had also telephoned the

[116] AAS Zuckerman, 'Corroboration: judicial reform in Canada' [1984] *Oxford Journal of Legal Studies* 147 at 148
[117] DJ Birch, 'Corroboration in criminal trials: a review of the proposals of the Law Commission's Working Paper' [1990] *Criminal Law Review* 667 at 672
[118] 1982 CarswellBC 663
[119] Wigmore quoted in *R v Vetrovec supra* note 118 at para 31
[120] 1976 CarswellBC 205

police and the officer also testified to her distraught condition. The relevant portion of the provision requiring corroboration read:

> …the judge shall, if the only evidence that implicates the accused is the evidence , given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.[121]

The trial judge in that case then gave an instruction to the jury that the complainant's distressed condition was capable of amounting to corroboration against both accused:

> Now, I tell you as a matter of law that the only evidence capable of being considered by you as corroboration of the complainant's testimony with respect to each accused, if you believe that evidence of her distraught condition as described by her cousin…and the police constable who picked her up at the bus depot.[122]

The case then turned on whether the complainant's distressed condition was corroboration of her evidence against Murphy as well as against Butt. The above cited Canadian provision that required corroboration, on a strict interpretation, was along the *Baskerville* formulation of corroboration. Yet, the trial judge had not taken that approach. Since Murphy had admitted to having had sexual intercourse with her, his admission corroborated the complainant as to identity. The distressed condition could, on the *Baskerville* test, only show non-consent of the complainant as regards the sexual intercourse that took place between her and Murphy, and so Murphy could be implicated. It, however, by itself could not directly implicate Butt, for that evidence did not identify him as a rapist as well. On appeal, the court held that the trial judge's reasoning was correct in instructing the jury that the distraught condition of the complainant was capable of corroborating the whole of her evidence in respect of the guilt of both accused. The court stated that:

> It is a material particular of that evidence which must be corroborated. There is no requirement that the whole of her evidence be corroborated. Were that the requirement, there would be no need for even the evidence of the complainant. The so-called corroborative evidence would be sufficient for a conviction.[123]

With this reinterpretation of the *Baskerville* test, the court was able to circumvent the strict definition of what corroborative evidence was to constitute.

[121] Section 142 of the Canadian Criminal Code
[122] 1976 CarswellBC 205 at para 10
[123] Ibid at para 19

2.7 The inflexibility and complexity of the corroboration warning

The Law Commission in England in the proposals that led to the abrogation of the corroboration requirement pointed out that there was 'no justification for automatically applying the same rules to the evidence of all witnesses' who fall in the category of complainants in a sexual offence.[124] The corroboration requirement in sexual offence cases was there understood as 'patronising' and 'a particular slur on women'.[125] As Birch writes, the inflexibility of the rules meant that a direction was required 'whatever the trial judge's assessment of the reliability of the evidence or the assistance that the jury needs to be given in assessing it.'[126] In the context of a jury trial, the warning then had the capability of accomplishing the opposite of the trial judge's duty of giving the jury the assistance necessary to the facts and 'risked impairing the respect of the jury for the rest of what the judge might have to say.'[127] This was stated in *R v Chance:*[128]

> If he [the judge] is required to apply rigid rules, there will inevitably be occasions when the directions will be inappropriate to the facts. Juries are quick to spot such anomalies, and will understandably view the anomaly, and often, as a result of the directions with suspicion, thus undermining the judge's purpose.

In the Malawian context, the magistrate is not giving the warning to the jury but to himself. Yet, the inflexible nature of the corroboration warning is still problematic. It is imprudent for the court to mouth the warning as a ritual when the court is convinced of the credibility of the complainant's evidence. It serves no useful purpose.

The Law Commission also criticised the corroboration requirement for complexity.[129] It was pointed out that the *Baskerville* direction was very difficult to explain to the jury. As such, the rules as to what amounted to corroboration being complex were the 'cause of many actual or alleged errors and of many appeals.'[130] Dickson J thus saw no useful purpose in the 'welter of legal niceties which either goes over a jury's head and leaves them confused, or else is understood and then ignored as contrary to common sense'.[131]

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[124] Quoted in DJ Birch, 'Corroboration: goodbye to all that?' 1995 *Criminal Law Review* 524 at 526; *See* also MC Plaxton, 'What is (and what should be) the rule governing witness sufficiency in criminal cases' (2002) 7 *Canadian Criminal Law Review* 351
[125] Birch *supra* note 124 at 526
[126] Ibid
[127] Ibid
[128] [1988] QB 932
[129] Birch *supra* note 124
[130] Ibid
[131] *R v Vetrovec* supra note 118 at 95

2.8 Discrimination against Women

The rule finds no reasonable justification as to its existence and can therefore only be explained on the basis that it is based on the erroneous 'misogynist assumption that women are duplicitous, sexually and otherwise'[132] when there is no empirical evidence to support the assertion that more false accusations are made by in sexual assaults than any other crimes.[133] Thus it can safely be concluded that the only purpose of the corroboration requirement is to discriminate against women. Although it may be argued that the rule applies to both men and women, the fact is that the majority of sexual offence complaints are made by women.[134] Schwikkard also decries this argument by stating that 'a claim of gender neutrality is difficult to sustain…when the historical framing of the rule in terms of female psychology taken into account'.[135] She then quotes Wigmore and also Glanville Williams.[136] Wigmore wrote:

> Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, *distorted partly by inherent defect, partly by diseased derangements or abnormal instincts,* partly by bad environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste…mentality finds incidental but direct expression in the narrations of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[137]

Since the corroboration requirement is seen to be discriminatory against women, we will need to subject it to the current Constitution's enunciations of the right to equality before the law and also the right to dignity.

[132] Schwikkard *supra* note 102 at 9

[133] Ibid at 10; Thomas Morris *supra* note 7 at 164
[134] Schwikkard *supra* note 102 at 10
[135] Ibid
[136] *Supra* note 84
[137] Wigmore quoted in Schwikkard *supra* note 102 at 10

CHAPTER 3

THE UNCONSTITUTIONALITY OF THE CORROBORATION REQUIREMENT

During the colonial era, there was no proper legal instrument guaranteeing the human rights of the Malawian people. When the country became independent in 1964, there was made mention in the 1964 Constitution, in a cursory way, that the state would recognise the Universal Declaration of Human Rights.[138] Later on, with the establishment of a republic and the adoption of a Constitution that constituted such, as well as with the dictatorial leadership that was just beginning, the provision that spoke of human rights was strategically omitted from the Republican Constitution of 1964. It was only in 1994, when Malawi adopted a democratic type of governance that the country adopted a Constitution which enshrined a proper Bill of rights. This Constitution expressly states that it shall be the supreme arbiter and ultimate authority in the interpretation of all laws.[139] It goes even further to state that—

> In the application and formulation of any Act of Parliament and in the application and development of the common law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.[140]

Specifically, this entails that, in interpreting the Constitution, the court must seek to promote the values which underlie an open and democratic society.[141] It also must take full account of the fundamental principles upon which the Constitution is founded and also the Bill of rights.[142] One such fundamental principle underlying the Constitution is the issue that the inherent dignity and worth of each human being requires that the state and all people should recognise and protect fundamental human rights and also afford fullest protection to those rights.[143] As a principle of national policy, the state is obliged to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving gender equality between men and women.[144] Gender equality has been envisaged to be achieved through implementation of principles of non-discrimination and also the

[138] Section 2 (iii) & (iv) of the 1964 Constitution
[139] Section 10 (1) of the 1994 Constitution
[140] Section 10 (2) of the 1994 Constitution
[141] Section 11 (2)(a) of the 1994 Constitution
[142] Section 11 (2)(b) of the 1994 Constitution
[143] Section 12 (iv) of the 1994 Constitution
[144] Section 13 (a) of the 1994 Constitution

implementation of policies that address social issues like domestic violence.[145] The Constitution has also built its foundation on the principle of equality of status of all persons before the law.[146] As such, the only justifiable limitations to lawful rights have been stated to be those that are necessary to ensure peaceful interaction in an open and democratic society.[147]

The Constitution enshrines the right to equality before the law to all its citizens as well as the right not to be discriminated against.[148] The Constitution, however, has gone further than just guaranteeing rights to the general population. It has guaranteed specific rights for women.

Although Malawi has put in place the right constitutional framework, it is unfortunate that it has not been as diligent in developing its jurisprudence in the interpretation of these rights. As such, most of its laws especially those that deal with women have remained unchanged and are usually incompatible with the spirit of the Constitution. A good example of such legal rules is the corroboration requirement which is under consideration here.

Due to the lack of jurisprudence in the interpretation of the provisions on rights, recourse will be had to legal pronouncements from jurisdictions like South Africa, Namibia and Canada. The South African rights provisions are similar in their wording to the provisions in the Malawi Constitution. Further to that, the Constitution provides that, where applicable, the courts are to have regard to comparable foreign case law in the interpretation of the Constitution.[149]

3.1 The right to equality and the right of protection of women

The right to equality of all people before the law and hence the right not to be discriminated against is guaranteed in Section 20 of the Constitution which stipulates—

> (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of…sex…
> (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and may render such practices criminally punishable by the courts.

Additionally, women in particular, are recognised to be equal with all other citizens under Section 24(1) of the Constitution which stipulates—

[145] Section 13 (iii) and (iv) of the Constitution
[146] Section 12 (v) of the Constitution
[147] Section 12 (v) of the Constitution
[148] Section 20 of the Constitution
[149] Section 11 (2)(c) of the Constitution

> Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender…
>
> (2) Any law that discriminates against women on the basis of gender… shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as—
>
> (a) sexual abuse, harassment and violence;

In the Canadian case of *Andrews v Law Society of British Columbia,*[150] discrimination was defined as follows:

> …a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified.

The corroboration requirement is employed in the case of sexual offence complainants. Yet, in practice, it is female sexual offence complainants that the rule targets. *Rex v Kaluwa*[151] illustrates the point that it is actually the testimony of women that the rule aims at burdening with the further obligation of some other evidence from another witness before a conviction can be arrived at. In that case, in explaining the reason for requiring corroboration, the testimony of a woman who complained of rape was held to be analogous to that of an accomplice:

> An accomplice is a witness against whom, a warning must be given because he is under a temptation to lie. The prosecutrix in a rape case, if a guilty woman, is under exactly the same temptation and the direction in her regard must be the same. That is, the possibility of false accusation should lead to a warning.[152]

Thus women complaining of rape or sexual offences are singled out as being a category of people that are likely to fabricate sexual complaints. The qualification of 'if a *guilty woman*' does not help matters to show that it is only a specified category of women that are being targeted. From the court's reasoning, fabrication of rape cases seems to be so pervasive among women that the giving of the warning is to be made in all cases of rape. The inference is that there are more *guilty women* in sexual complaints than there are *innocent women.* The court did not go on to express what that *guilty woman* would be guilty of. It can safely be concluded, though, from the rationales that have been given for requiring the corroboration rule, that this guilt would be emanating from the fact that the woman is guilty of an improper motive which then spurs her on to lay a false rape allegation.

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[150] (2004) AHRLR 131 (Bwlc 2002) at para 13
[151] *Supra* note 3
[152] Ibid at 364

Since women complaining of sexual offences are characterised as having impure motives for laying sexual offence charges, a distinction is made concerning their evidence. It is treated with suspicion and corroboration is to be sought for it. That does place the women's evidence at a disadvantage for it is not treated on the same footing as evidence of other members of society, especially men. Of course, as it was held in *Republic v Chinthiti,*[153] the making of distinctions is not in itself illegal, but that there is need to demonstrate the illegality obtaining in the distinctions made.

Firstly, it must be pointed out that this discrimination is on a ground that section 20 of the Constitution specifically mentions, that is, the ground of sex. The court in *R v Kaluwa*[154] was very eloquent on what the corroboration requirement secures against, which was, guilty women. It might be argued that the corroboration requirement applies to all complainants of sexual offences, whether male or female, yet it must be noted that the overwhelming number of complainants in sexual offences are female and the majority of perpetrators of such are male.[155] Secondly, it is important to note that the assertion that women, for the most part, fabricate sexual offence charges cannot be supported by empirical evidence. As such, the treatment of women complainant's evidence as evidence of a suspicious nature is unjustified since the reason given for treating their evidence with suspicion is fallacious.

In the Namibian case of *S v D,*[156] Frank J, albeit obiter, made mention of how the corroboration requirement is contrary to the right to equality of persons before the law. He dismissed the notion that sexual offence allegations are easily made for the lack of empirical data validating that idea. In fact, he stated, that the data showed that the number of false charges being laid in respect of sexual offences is the same as those laid in other felonies.[157] Frank J further questioned why it was that the courts could only speculate on the various motives of laying a false charge in a sexual offence case despite there being no evidence to establish such a motive and yet courts were not doing likewise in other criminal cases. After all, as he found, false charges are laid in all offences and not just in sexual offences only. At the same time, as already stated, there was no evidence to show that more sexual offence charges are laid in sexual

[153] [1997] 1 MLR 59
[154] *Supra* note 3
[155] [1993] 4 SCR. 595; *S v D* 1992 (1) SACR 143
[156] 1992 (1) SACR 143
[157] Ibid at 146B

offences than in any other felony. He reviewed the 'stunningly imaginative approach' taken by the court in *S v Balhuber*[158] which stated as follows:

> In the present case, a number of possible motives for the complainant to have acted as the appellant alleged she did suggest themselves. She may have been overcome by shame, disgust or remorse (perhaps even alcoholic remorse) at the fact that she had consented to intercourse with the appellant; she may have been sexually frustrated because of the appellant's drunken state (he may have realised that they both did not enjoy the act); she may have been filled with revulsion at the unusual sexual acts to which the appellant had wanted had wanted her to submit, whether or not she was a willing party to such acts (as distinct from the act of intercourse); or she may have simply become afraid, with the coming of the morning, that her male friend would arrive at the flat. It is true that these possibilities are speculative and that a court is not usually required on possibilities having no foundation in the evidence placed before it…but if the appellant was telling the truth there was no way in which he could have offered any explanation in evidence for the complainant's conduct, and possibilities of the kind I have mentioned are inherently present in the circumstances of a case such as the present. It is precisely because of the difficulty of discerning hidden motives that cases of this nature require special treatment.[159]

It was Frank J's considered view that whether a hidden motive would be found in a given case would depend on the 'fecundity of the presiding officer's imagination'.[160] The fact that there was no empirical evidence to show that there are more false sexual offence allegations laid than false allegation in other felonies, but rather that there was a generalisation that most sexual assault allegations are false drawn from sporadic incidents of fabrication, and that most sexual offence complainants are women, led Frank J. to the conclusion that the corroboration requirement was discriminatory against women.[161] It offended the constitutional principle of all people being equal before the law regardless of sex. It discriminated against the women complainants who were the victims of crime perpetrated by men; it offered men the privilege of a higher than ordinary standard of proof in order to be found guilty of the sexual offence they had committed against women.

Indeed the sentiments expressed by Frank J were also made by the American judge, Armand Arabian J., who in refusing to instruct the jury on the corroboration requirement in *People v Rincon-Pineda*[162] stated:

> I find that the giving of such an instruction in this case is unwarranted either by law or reason in that it arbitrarily discriminates against women, denies them equal protection of the law and assists in the brutalization of rape victims by providing an unequal balance between their rights and the rights of the accused in court.[163]

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[158] 1987 (1) PH
[159] Per Botha JA in *S v Balhuber* 1987 (1) PH H22 quoted in *S v F* 1989 (3) SA 847 (A) at 854H-855A
[160] *Supra* note 156 At 146D
[161] Ibid at 146F
[162] 14 Cal. 3d 864
[163] Ibid, in the court of first instance, quoted in J Hatchard, 'Abolishing the cautionary rule in sexual offences in Namibia' 1993 *Journal of African Law* 97 at 99.

In the above stated case, the accused then appealed to the Supreme Court solely on the ground that the trial court had not given the corroboration instruction to the jury. The appellate court, however, dismissed his appeal. It reviewed empirical data of sexual offences convictions and concluded that the data did not bear out the idea that those accused of rape are subject to capricious convictions. The court then held that the corroboration requirement had outworn its usefulness and that it was now a rule without a reason.

In another South African case of *S v M,*[164] even though the court did not take a bold enough stance to declare the corroboration requirement unconstitutional, it did recognise its discriminatory character. In that case, the appellant had appealed against his conviction on the ground that the court had not applied the corroboration rule in a satisfactory manner. The court there stated that 'it is highly problematic to assume automatically that women lie about rape when approaching a court'.[165]

3.1.1 Full and equal protection by the law for women

The Constitution in section 24 of the Constitution recognises the need for women not to be discriminated against as well as the need for the law to afford them full and equal protection by the law. Certain specific practices that oppress women like sexual abuse and violence are clearly pointed out as targets that the law should aim at eliminating. Yet the corroboration requirement stands in stark opposition to such a noble goal. Its discriminatory effect is seen in that it raises the standard of proof in sexual offences above that which ordinarily obtains in criminal cases and therefore making convictions in sexual offences fewer than warranted. It has been held that in sexual cases where there is no corroborative evidence, convictions should be arrived at sparingly. In *Tinazari v Republic*[166] the High Court said:

> After the [corroboration] warning has been given, an examination of the evidence must be carried out to determine whether or not there is material amounting in law to corroboration of the complainant's account. If none is found, two courses are open to a trial court. It can acquit the accused person on the grounds that it is dangerous to convict on the uncorroborated evidence of the complainant, or in a suitable case it can accept the testimony given notwithstanding the lack of corroboration. One would think, with respect, *that the latter course should be adopted only in rare instances* when the trial court must expressly record (i) that there is no corroboration; (ii) that it is aware of the danger of convicting in such circumstances; (iii) that despite the defect it is nevertheless satisfied beyond reasonable doubt that the complainant is telling the truth.

[164] 1997 (2) SACR 682
[165] Ibid at 685D
[166] *Supra* note 2 at 192 (emphasis supplied)

In *R v. Kaluwa,*[167] Cram J. stated that 'only exceptionally, in the absence of corroboration, does a reasonable doubt not arise'.

Even in the face of corroborative evidence, the court is instructed to still be cautious before it can find that the charge is proved and thus enter a conviction:

> In cases where corroboration in law is found a conviction is not necessarily automatic but the trial court, after giving itself the appropriate warning and after making a finding that there is independent material capable in law of corroborating the complainant's account, can convict if it is satisfied that the charge has been proved beyond reasonable doubt.[168]

Despite the fact that the court in *Tinazari v Republic* stated that the standard of proof in sexual offences is proof beyond reasonable doubt, it is arguable that the standard is higher than that, as shown by the stricter examination that a complainant's evidence is put to. In the South African case of *R v. W,*[169] the court expressly admitted that the standard of proof in sexual offences was higher than in the other criminal cases. In that case the court had this to say concerning the convicting of an accused on the uncorroborated evidence of a complainant in a sexual offence case:

> A conviction is competent. But what is required is that a trier of facts should have clearly in mind that these cases of sexual assault require special treatment, that charges of this kind are generally difficult to disprove and that various considerations may lead to their being falsely laid…*Had the charge against the appellant been, for instance, one of theft, requiring no more than the ordinary high but not exceptional standard of careful scrutiny…the verdict of guilty must have stood.*[170]

Yet this high standard is required in types of cases where corroboration is so hard to find. As the court rightly pointed out in *Tinazari v Republic*, 'people who commit [sexual offences] normally refrain from doing so in the full view of the public'.[171] Bronstein quotes Estrich and also Vogelman about the difficulties in finding corroboration in rape cases.[172] Estrich writes:

> In a rape, corroboration may be difficult to find. In most cases there are no witnesses. The event cannot be repeated for the tape-recorder as bribes or drug sales are. There is no contraband, no drugs, no marked money, no stolen goods. Unless the victim actively resists, her clothes may be untorn and her body unmarked…On the surface, at least, rape seems to be a crime for which corroboration may be uniquely absent.

Vogelman quotes a rapist who explains how he makes sure that the complainant is left with no outward marks of violence after the rape. He writes:

> If one or two smacks don't help, then kick her in the ribs, so that she feels the pain inside and there are no marks or scars. That's why I never use a knife on a cherry…I will tell you my approach—I walk with her and talk with

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[167] *Supra* note 3 at 360
[168] *Tinazari v Regina* supra note 3 at 192
[169] 1949 (3) SA 772
[170] Ibid at 780 and 783. (emphasis supplied)
[171] *Supra* note 3 at 189
[172] V Bronstein, 'The cautionary rule: an aged principle in search of a contemporary justification' 8 *South African Journal on Human Rights* 556 at 557

> her. I always have an alibi and no one can see me dragging her and pulling her. We walk past the shopping centre, walking and talking and everyone can see I'm not dragging her.

In the final analysis then, unwarranted acquittals take place, as observed by the court in the South African case of *R v M,*[173] that the corroboration requirement was 'securing the acquittal of many a wrongdoer'. There can be no effective deterrence where the law impliedly condones the misdeeds of sexual offenders and therefore no effective or full protection of women against such predation can be achieved. Acquittals come about because trial courts become disinclined to convict in the absence of corroborative evidence. At the same time, the High Court on review or appeal is likely to acquit an accused where the trial court did not show on the record that it appreciated the need for corroborative evidence.[174] Thus the High Court will acquit based on the single mistake committed by the trial court--of having completely believed the complainant's account without acknowledging the need for careful scrutiny of the complainant's evidence in a sexual case.[175]

3.2 The right to dignity

The corroboration requirement also offends the right to dignity for women. The Malawian Constitution expressly states in Section 19 that:

> (1) The dignity of all persons shall be inviolable.
>
> (2) In any judicial proceedings…respect for human dignity shall be guaranteed.'

The right to equality is inextricably connected to the right to dignity. This can be seen in the Canadian case of *Law v. Canada*[176] where the court said:

> Human dignity means that an individual or group feels self-respect and self-worth. It is harmed when individuals and groups are marginalised, ignored, devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society. Hence dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all the circumstances regarding the individuals affected and excluded by the law?[177]

[173] 1947 (4) SA 489 (N) quoted in Bronstein *supra* note 172
[174] *Regina v Mussa* supra note 3 at 87; *Republic v Kapalepale* supra note 3 at 153; *Republic v Phiri* 7 MLR 65 at 68
[175] Ibid
[176] 1999 CarswellNat 359
[177] Ibid at para 53

The corroboration requirement demeans women as it ascribes to them the status of 'unreliable witnesses' in sexual offences and that without justification. This devaluing of women occurs in judicial proceedings and thus is contrary to section 19(2) of the Constitution quoted above.

In the South African case of *S v M,*[178] Cameron JA stated that the constitutional requirement to dignity demands that if the possibility of malicious motive is to be used as a defence in a sexual case, that motive should be canvassed in the complainant's evidence.[179] He stated that other complainants in other criminal cases are not subjected to such free-ranging speculations about malicious motives for making a false sexual offence accusation. He gave the example of 'a commercial director in a commercial setting, who seeks to establish that a gain was of a commercial nature, rather than income' as being 'spared the indignity of *ex post facto* imputations of and about free-ranging speculations about motive'.[180]

In this case of *S v M*, the complainant alleged that she had been indecently assaulted by the appellant on a number of occasions since she had been 15 years old. She also alleged that later on the appellant had raped her. After the rape, the two had had sexual intercourse on a number of occasions in which she never offered any resistance and in which she said she just submitted herself to the appellant or maybe gave her consent. The complainant had been a babysitter to the appellant's two children during the period of the alleged crimes. She only reported the allegations to the police when she was 18 years old. As the court considered the appeal, it also had to examine the possible motive the complainant might have had for laying the charge for at the trial, suggestions had been made that the complainant could have had jealous motives against the appellant. It was also suggested that the complainant might have felt that she had been misled by the appellant that the two were in a relationship and that therefore she was now filled with embittered chagrin. Such a jealous motive was said to arise from the incident that the complainant had testified to about the appellant having fondled his wife in her presence. He then had left the marital bedroom door open while the complainant lay in bed in the next room with the children so that the complainant could hear the appellant and his wife's love-making. She had also testified that the following morning the appellant had told her that he had done that deliberately so that she could hear since she had rebuffed his advances the previous day.

[178] 2006 (1) SACR 135 (SCA)
[179] Ibid at 272
[180] Ibid at 273

Cameron JA said that the appeal court could not deal with the questions of a jealous motive or embittered chagrin at that appeal stage since the complainant had not at the trial been cross examined on these as regards them being motives for laying a false charge and that therefore she had had no opportunity to deal with them; nor had they been mentioned in argument. All she had been asked is whether the open-door incident made her jealous but that this had not been put to her as a motive for laying a false charge. Cameron J stated that, at the end, all that was put to her at the trial was that she was filled with an *unspecified* hatred against the appellant and that she just wanted to ruin him. Without the malicious motives allegations having been properly substantiated by evidence, Cameron JA said, such jealous motives could not be attributed to the complainant unless one were to 'regard women as incipiently inclined to destructive jealousy'.[181]

3.3 The rights limitation provision and the discriminatory effect of the corroboration requirement

The corroboration requirement has been shown to discriminate against women and subjecting them to indignity. We will therefore pass it under the limitation clause to see if the limitation it brings to the right women have to equality before the law and also to dignity is justified. Under section 44(1) (g) of the Constitution, it is stated that there is to be no derogation, restriction or limitation with regard to the right to equality and recognition before the law. Chirwa believes that the framers of the Constitution made a mistake when they stated that this right and others in the same section are not to be limited or restricted.[182] This is so because, among other things, he envisages that the right to equality can justifiably be limited on account of age and mental capacity. He believes the correct view is to see the rights in this section as non-derogable and only to be derogated from during a state of emergency. Still, he considers these rights limitable whenever the occasion justifies it.

That being a convincing argument, we will proceed on the footing that the right to equality before the law and the right to dignity are limitable. Section 44(2) and (3) of the Constitution prescribes the requirements that need to be satisfied before a limitation on a right can be sanctioned as legal. Section 44(2) states:

[181] Ibid at 267
[182] Danwood Chirwa, *Human Rights under the Malawian Constitution* (2011)

> …no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

Then section 44(3) states:

> Laws prescribing restrictions and limitations shall not negate the essential content of the right or freedom in question, shall be of general application (sic).

Further still, one of the principles of national policy in section 12(v) states that:

> as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society;

As such, there is need to pass the corroboration rule under the tests of: whether it is prescribed by law; whether it is of general application; whether it is reasonable; whether it is recognised by international human rights standards; whether it is necessary in an open and democratic society; and whether it does not negate the essential content of the right to equality before the law and the right to dignity.

3.3.1 Prescribed by law

The corroboration requirement is a common law rule. By section 200 of the Constitution, all the common law rules in force at the commencement of the Constitution were to continue to have the force of law unless repealed by an Act of Parliament or declared unconstitutional by a competent court. The corroboration requirement was a common law rule at the time the Constitution came into force and no law has been enunciated to abolish it since that time. It therefore continues to have the force of law.

3.3.2 General application

What the element of general application entails is that laws must apply impersonally to everyone equally and must not target specific persons without proper justification.[183] There may be instances where a law may be targeted at specific persons and the situation can be perfectly just. In *Railway Express Agency v New York,*[184] the Police Commissioner of New York had promulgated a regulation that no person was to operate an advertising vehicle on any street if the vehicle was merely being used to advertise commodities on its exterior sides and if such advertising space was being sold to the owners of those commodities for advertising purposes.

[183] Ibid at 46
[184] 336 US 106

The owners of commodities who had advertisements on their vehicles and were operating the vehicles on the road for the owners' usual business and not merely for advertising were expressly made exempt from this regulation. The justification for the regulation was said to be that the advertisements were distractions that posed a danger to road users. Railway Express Agency contravened the regulation and was fined. It argued that the advertisements on the owners' vehicles were equally a distraction just like the advertisements Railway Express Agency had put on the space of the exteriors of its vehicles by selling this space to the owners of the commodities. The appellate court held that the application of the regulation to the class of vehicle operators who were only advertisers and not owners of the commodities was justified in the circumstances even though both cases posed equal dangers, as it was feared that more and more people would venture into the business of advertising space. What the court said would be objectionable, was if the regulation was applied differentially on arbitrary grounds, like the type of commodity advertised on the space, within the class of those who were advertising by selling advertising space. The court thus affirmed that laws may apply to a particular group only, if there is justification for such, and that within that group, the law was to be applied equally without arbitrary distinctions. The court stated:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to ensure that laws will be just than to require that laws be equal in operation.[185]

Looking at the corroboration requirement, it is a rule that applies to a certain category of people, namely, complainants of sexual assaults. It is a rule that on the face of it, applies to all complainants in sexual offence cases, whether male or female. In practice, however, it applies more to women than men since the majority of sexual complainants are female. This type of discrimination is what is termed indirect discrimination.[186] This is a type of discrimination which appears neutral on the surface but which in practice discriminates against a person or class of

[185] Ibid para 112
[186] Chirwa *supra* note 182 at 146

persons based on a prohibited ground. Chirwa[187] quotes the dictum in the Botswanan case of *Moatswi & Another v Fencing Centre (Pty) Ltd*[188] where the court stated that:

> Indirect discrimination is harder to identify. It occurs where an employer applies a rule which ostensibly applies neutrally to all employees; but the application of the rule has a disproportionate negative effect on one group. It may occur by way of occupational segregation where women are concentrated in sectors which are 'traditionally' female and that are less well paid. It may occur by way of the provision of a 'head of household' allowance or benefit, when 'head of household' is defined as men in the relevant legislation or policy. It may manifest when ostensibly neutral criteria are required for a vacancy or promotion.[189]

Thus the seemingly neutral criterion which is to the effect that the corroboration rule applies to all complainants in sexual cases regardless of their sex has a disproportionate effect on women. Therefore we have to enquire if such an action is justified.

3.3.3 Is it reasonable?

Reasonableness is understood to mean firstly, that the law must not be arbitrary in that it must aim at achieving a specified purpose.[190] Secondly, it means that the limitation must be proportional to the desired end; the limitation must not overly restrict the right than is needed to achieve the purpose intended by the limitation.[191]

The corroboration requirement is stated to exist for the purpose of lessening wrongful convictions in sexual offence cases. Yet there are less stringent measures already in place that assure an accused of a fair trial, whether in a sexual offence or otherwise. For example, the court must acquit an accused person at the close of the prosecution case, if there is insufficient evidence implicating the accused.[192] The accused has the right to challenge and adduce evidence in his trial.[193] The corroboration requirement, however, as already pointed out is essentially a prior determination that where there is no corroborative evidence, the accused will have to be acquitted.

3.3.4 Recognised by international human rights standards

[187] Ibid
[188] (2004) AHRLR (Bwlc 2002)
[189] Ibid at para 16
[190] *Maggie Kaunda v Republic* Criminal Appeal No. 8 of 2001 (Unreported)
[191] Ibid
[192] *Chidzero v Republic* 8 MLR 23
[193] Section 42(2)(iv) of the Constitution

Chirwa states that recognition by international human rights standards can either mean recognition of the limitation in international human rights law or by legal systems of democratic countries.[194] This requirement that the limitation should be recognised by international human rights standards accords with one of the principles of the interpretation of the Malawi Constitution, which is to the effect that courts are obliged to have regard to current norms of public international law and comparable case law.[195]

Apart from the provisions in the Constitution, Malawi has obligations in the international community, to ensure that women are not discriminated against and also that they have equal status with any other person before the law. The Constitution provides that binding international agreements entered into before the commencement of the Constitution shall continue to be in force unless otherwise provided by an Act of Parliament.[196] Among those instruments that Malawi is still a party and to which it acceded to before the present Constitution came into force is the Convention on the Elimination of all forms of discrimination against women. Malawi acceded to this convention on 12th March 1987.[197] The convention enjoins state parties to abolish laws that discriminate against women.[198] The call for member states to ensure that women are not revictimised by violence through laws insensitive to gender considerations is also to be found in the UN Declaration on the Elimination of violence against women.[199]

The corroboration requirement is a creature of the common law which Malawi inherited from England. The UK, however, jettisoned the rule more than a decade ago.[200] Other common law countries have also abolished the rule like the State of California,[201] Canada,[202] Australia[203] and

[194] Chirwa *supra* note 182 at 42
[195] *Supra* note 149
[196] Section 211(2) of the Constitution
[197] Available at http://www.un.org/womenwatch/daw/cedaw [accessed 5th February 2012]
[198] Article 2(f) of the Convention on the Elimination of all forms of discrimination against Women
[199] Article 4(f) of the UN Declaration on the Elimination of Violence against Women at http://www.un.org/documents/instruments [accessed 5th February 2012]
[200] Section 32 of the Criminal Justice and Public Order Act 1994
[201] *People v Rincon-Pineda* supra note 162
[202] Section 274 of the Criminal Code
[203] Section 164(3) of Evidence Act (N.S.W.); section 164 of Evidence Act (Tas.); section 50 of Evidence Act (W. Aust.)

New Zealand.[204] Even within Africa, common law countries like South Africa[205] and Namibia[206] have abrogated the rule.

3.3.5 Necessary in an open and democratic society

The limitation must be necessary in an open and democratic society. The Canadian limitation of rights provision uses the phrase 'free and democratic society'[207] which essentially equates with the 'open and democratic society' phrase in the Malawi Constitution. This free and democratic society is described as one which possesses the values and underlying principles of

> respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[208]

It is stated that when a person feels equal before the law, he feels that his dignity is respected and therefore his sense of self-worth is reinforced. He then becomes a useful and contributing member of social and political institutions which enhances the participation of individuals and groups in society.[209]

The corroboration requirement, therefore, has to be shown to be addressing a need that is necessary in such an open and free society. Yet the actual effect of it is not to lessen wrongful convictions but to sanction unwarranted acquittals of sexual offenders and hence affording less protection for women against sexual offences. The sense of women's self-worth is undermined such that women are hindered from being productive members of society. Women cannot participate fully in the advancement of societal goals if they are oppressed by sexual predation and also if the law itself endorses stereotypes and prejudices.

3.3.6 Essential content of the rights to equality before the law and right to dignity

The corroboration requirement strikes at the heart of the rights to equality before the law and dignity for women and denies those rights to them. This law perpetuates the stereotype in society against women which is to the effect that women are not worth of belief in the sexual assault

[204] Evidence Amendment Act (No. 2) of 1985
[205] Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007
[206] Section 5 of the Combating of Rape Act 2000
[207] Section 1 of the Canadian Charter of Rights and Freedoms
[208] *R v. Oakes* (1986), 50 C.R. (3d) 1 at 28
[209] *Kask v. Shimizu* [1986] 4 WWR 154

accusations that they make. It denies them protection of their physical and psychological integrity in sexual violations. Women are physically and psychologically victimised in the sexual assault and they are further psychologically victimised by the law which will not readily believe their victimisation account. Thus they are exposed to further sexual victimisation since they are seen as having no effective protection.

4. A case for reform

From the above analysis, it can doubtless be observed that the corroboration requirement is unconstitutional. It is a quintessential example of such laws that are discriminatory and degrading to women. It is also detrimental to women as it perpetuates their oppression through sexual violations. Section 24(2) of the Constitution which provides for the invalidation of any law that discriminates against women should therefore be invoked in regard to the corroboration requirement. This provision specifically speaks of legislation being passed to eliminate practices that discriminate against women and mentions sexual abuse as one of such practices. Before even such laws can be passed, the abolition of the corroboration requirement would be the easiest starting point. Additionally, Malawi will thereby be complying with its obligations on the international scene in relation to the protection of the rights of women.

CHAPTER 4

ABOLISHING THE CORROBORATION REQUIREMENT

From the last chapter, we have seen how the corroboration requirement is an unconstitutional rule with its discriminatory and devaluing effect on women. The only plausible option therefore would be to do away with it. The Constitution states that any law that is inconsistent with it should be declared invalid by a competent court.[210] Additionally, as a principle of national policy, it is stated that the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving such goals as gender equality.[211] Gender equality is to be achieved, among other things, by the implementation of principles of non-discrimination.[212]

Therefore current laws that discriminate against women can either be invalidated by the court or they can be repealed by Parliament. In their stead, new laws can be enacted which are premised on non-discrimination.

The corroboration requirement is judge-made law and therefore, it would seem quite logical that it should be overruled by the courts themselves. While a declaration of the rule as unconstitutional would be a very important step towards abolishing the rule, it is also desirable to have a law specifically outlawing it. Indeed that has been the approach of most of the common law countries that have abolished the rule: the wave of reform started with judicial invalidation of the rule and culminated in statutory enactment.

In this chapter, we will consider the judicial reform of the rule in the three jurisdictions of the United States, Canada and South Africa and the bases for the reforms. We will then turn to the UK statutory reform of the rule. Further, we will consider how the statutory reform has taken effect in the notable case authority of *R v. Makanjuola; R v. Eaton*.[213] It is our recommendation that in addition to the judicial declaration of the rule as unconstitutional and therefore invalid, Malawi should take lessons from this legislative reform of England with its application structure in the above stated case authority.

[210] Section 5 of the Constitution
[211] Section 13(a) of the Constitution
[212] Ibid
[213] [1995] 1 WLR 1348

4.1 Judicial Reform

4.1.1 United States

The earliest judicial reform of the corroboration requirement is that of the state of California in the case of *People v Rincon-Pineda*.[214] In that case, the trial judge had acknowledged the mandatory nature of the corroboration warning in sexual cases but then expressed the view that the warning had not come under proper scrutiny for ages.[215] He therefore refused to give a corroboration warning to the jury on the ground that it discriminated against women and did not afford them equal protection of the law.[216] The appellate court did point out that the corroboration requirement was still law up to that time and that the accused was entitled to the benefits of the law existing at that particular time. Nevertheless, the appellate court found that the accused had not suffered any prejudice by the trial judge's omission to give the corroboration requirement warning.[217] It was stated that the accused had been granted a trial of due process, for he had been accorded a jury trial and had been represented by counsel.[218] He had also been accorded the presumption of innocence until he was proven guilty. Further, his guilt could only be established beyond reasonable doubt.[219] The court then went on to examine the history of the rule, its historical legal context, its rationale and the efficacy of its continued application in the present day legal context. The court came to the conclusion that the corroboration requirement had outworn its usefulness and that it was not to be given mandatory application.

The court traced the origins of the corroboration rule in sexual offences to the writings of Hale published in 1736 from which came the oft-quoted statement for the justification of the corroboration warning that, 'rape is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent'.[220] The court, however, put Sir Hale's writings in both their textual and historical context for a correct interpretation and observed that the writings showed that Sir Hale himself did not regard every rape as a potential

[214] *Supra* note 162
[215] Ibid at 871-872
[216] See *supra* note 163 and accompanying text
[217] Ibid at 872-873
[218] Ibid at 873
[219] Ibid
[220] *Supra* note 80

fabrication.[221] Further, it was stated that the writings revealed that Sir Hale was convinced that the jury were the best judges of a complainant's credibility.[222] The court also stated that there was nothing in Sir Hale's writing that was to the effect that the trial judge should as a matter of course instruct the jury that sexual offence complainants are worthy less of belief than victims of other offences.[223] The credibility of a witness was to be judged by the 'circumstances of the alleged crime and the narration of it by the witness' and 'that these circumstances vary markedly from case to case'.[224]

Further to this, Chief Justice Wright stated that even if Hale's writings were to be construed as directing a mandatory corroboration warning to the jury, there had taken place major improvements in the criminal justice system since Sir Hale's days so that the rule lacked validity in the present world.[225] In Hale's days, an accused could not testify in his own defence; he could only make an unsworn statement.[226] Although it was recognised then, that an accused was to be presumed innocent until proven guilty beyond reasonable doubt, that proposition had not forcefully been enshrined as a right. The accused's right to summon witnesses and to compel them to attend trial was not sufficiently recognised. One accused of a felony such as rape was not allowed to have the services of legal counsel. The Chief Justice contrasted the position of an accused in Hale's day with the scenario in modern days. In that day, the accused in a rape trial had to defend himself against the accusation on the conviction of which he would face a death penalty. He had to do this without counsel or witnesses and without being 'clothed in the presumption of innocence' or 'shielded by the need of his guilt to be proved beyond reasonable doubt ere he could be convicted'.[227] In modern society, all the due process requirements are accorded to the accused.

On the issue of a rape allegation being easy to make and hard to be defended against, the court considered the statistics and established that rape is a highly underreported crime.[228] Additionally, the court noted that among the FBI's four violent crimes, the rate of acquittals is

[221] *Supra* note 162 at 878
[222] Ibid at 877
[223] Ibid
[224] Ibid
[225] Ibid at 878
[226] Ibid
[227] Ibid
[228] Ibid at 879

the highest for rape.[229] The said four violent crimes are murder, forcible rape, robbery and aggravated assault.

Thus considering the rule's origin, it could not be proved from Sir Hale's writings that there was to be a corroborative warning in every sexual case. The rule's rationale found no support in the rape data for the statistics of reporting and convictions did not correlate with the claims of easiness of fabrication and difficulty in defending of rape charges. Further, the criminal justice system of the modern world granted an accused a wide range of rights that ensure a fair trial. The risk of convicting innocent accused was thus seen to be extremely slim. The rule thus served no useful purpose.

4.1.2 Canada

In Canada, there were three prominent cases with regard to the reform of the corroboration requirement in sexual cases. All of them were Supreme Court decisions. These cases are *R v Warkentin,*[230] *R v Murphy and Butt*[231] and *R v Vetrovec*.[232] The first two cases were rape cases. The third one involved accomplice evidence which was also a category of evidence requiring a corroboration warning prior to the abolition of the rule with regard to accomplice evidence. Although this case did not involve a sexual offence, the court expressly stated that the dictum was applicable to all other instances where corroboration was required under the common law. Additionally, this case endorsed the approach adopted in the other two earlier cases.

In all these cases, the Supreme Court of Canada was forced to go back in history to see how the term 'corroboration' had been understood in its early development in order for it to create a justification for relaxing the strictness of the corroboration requirement that the *Baskerville* formula prescribed. It felt compelled to do this because of the facts that presented themselves in the cases before them and the difficulties that the corroboration requirement posed to those facts. The first case was of *R v Warkentin.*[233] In that case, four men had grabbed an eighteen year old Indian girl who was on her way to a dance at a hotel and who was already within the vicinity of the hotel. They threw her into a red Mustang car and drove to a secluded place. There they forced

[229] Ibid
[230] 1976 CarswellBC 204
[231] *Supra* note 120
[232] *Supra* note 1118
[233] *Supra* note 230

her out of the car and threw her to the ground. Two men held her arms to prevent her from struggling. The third had sexual intercourse with her and the fourth stood nearby laughing.

There were five pieces of evidence identified by the trial judge which he considered could amount to corroboration. The four men had made written admissions that they had been together at the dance and also that they had been together earlier in the evening. They also admitted that the red Mustang belonged to one of them. Further, they admitted that the red Mustang was parked outside the dance with no one in it at the time of their arrest. Secondly, there was the distraught condition of the complainant when she was picked up by her friend along the road. The police officer and the doctor also testified about her distraught condition at the time they spoke to her. The third piece of potential corroborative evidence was the semen found in her vagina and on her panty. Fourthly, there was the Caucasian scalp hair found on her jeans, which hair was similar to that which was found on the clothing of one of the accused. Finally, there were also pine needles found in the crotch of the complainant's clothes.

Only three of the accused were the appellants in this appeal. It was argued on their behalf that there were three issues involved in the case, which were, intercourse, lack of consent and identity. Thus, it was argued that the corroborative evidence had to confirm each of these three issues in relation to each accused person if the corroborative evidence was to be of the standard required, which was that it should implicate the accused in a material particular.

De Grandpre delivering the judgment for the majority stated that corroboration was not a term of art but a matter of common sense.[234] He turned to the English cases that had just been decided in the three years prior to the present case. These were *DPP v Hester*[235] and *DPP v Kilbourne.*[236] In both these cases, the courts had stated that in the early days, corroboration had been a term of common sense and that it simply meant evidence that confirmed other evidence. He also stated that the Supreme Court of Canada had in some recent years prior to this case refused to apply the more restrictive meaning that was based on *R v Baskerville.*[237]

[234] Ibid at 23
[235] [1973] AC 296
[236] [1973] AC 729
[237] *Supra* note at 29

He thus held that what was needed was that the corroborative evidence relate to the people in the group.[238] It did not matter that all the four people in the group did not actually have sexual intercourse with her. The law would treat the one who actually had the sexual intercourse with the girl as a principal. The other two holding her arms in order to enable the principal to have sexual intercourse with her were stated to be aiders. The one laughing while the principal had sexual intercourse with her was abetting the offence. Still, aiders and abettors suffered the same consequences as the principal.[239] Thus it did not really matter that it be pointed out who actually had had the sexual intercourse with her so long as the corroborative evidence taken together confirmed that this was the group of the four who were party to the rape. De Grandpre therefore stated that:

> When the indictment alleges, as in the case at bar, that a gang rape has been committed, the same common sense approach must be adopted. To insist that nine separate issues be submitted to the jury, namely, intercourse, absence of consent and identity, in relation to each of the accused individually, is to forget the realities of life; rape being a crime of the shadows, the Crown would never be in a position to adduce evidence of such a quality as to satisfy the criteria when applied separately to nine different issues. On that basis, one can well imagine the difficulties in the way of the Crown if the rape had been committed by six, eight or ten persons. It is no answer to state that in the light of s. 142 a conviction could always be entered on the basis of the complainant's evidence; Parliament had not enacted that corroboration would not be available in the case of gang rape.[240]

The court thus had recourse to the meaning of corroboration as 'confirmation' as it has been used in the earliest legal development of the term in order to relax the application of the corroboration requirement. Only with this relaxed definition did the court hope to have the corroboration requirement fulfilled, which requirement went beyond the common law but was actually expressed in a statutory enactment.

This relaxed approach was also employed in the case of *R. v. Murphy and Butt*[241] which was discussed earlier,[242] whereby it was held that so long as the corroborative evidence confirmed one part of the complainant's story, the whole of her evidence would be believed. The reasoning was that if it could be shown that she had told the truth in one part, she then established herself to be a credible witness. In that case, it was held that so long as the corroborative evidence showed that she was telling the truth that one of the accused had had intercourse with her without her consent, she would be believed, without further corroborative evidence supporting the rest of her

[238] Ibid at 28
[239] Section 21 of the Canadian Criminal Code
[240] *Supra* note 199 at para 26
[241] *Supra* note 120
[242] *See* Chapter 2

story which stated that the other accused too had had sexual intercourse with her without her consent.

These difficulties of a law that prescribes that the corroborative evidence should implicate each accused where there are more than one accused also arose in *R v. Vetrovec.*[243] This was a case of heroin trafficking and the two appellants and seven others had been charged in the offence. An accomplice testified in the matter. Although his evidence implicated both appellants, the corroborative evidence that was found only implicated one appellant. Dickson J drew on *Warkentin* and *Murphy* for the proposition that corroboration meant confirmation and that once a suspect witness' evidence was confirmed in one part of the story, then the whole of his/her story was to be accepted as true. He further went on to examine the justification for having such a special rule of evidence applying to a particular class of witnesses such as accomplices and found such justifications to be lacking in merit. He stated that a judge is not required in all cases to warn the jury in regard to evidence of 'witnesses with disreputable and untrustworthy backgrounds'.[244] He therefore stated that:

> There is nothing inherent in the evidence of an accomplice which automatically renders it untrustworthy. To construct a universal rule singling out accomplices, then is to fasten upon this branch of the law of evidence a blind and empty formalism. Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantantion, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the truth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically "an accomplice" no warning is necessary.[245]

The court thus outlawed the mandatory corroboration warning with regard to evidence of an accomplice. Dickson J also stated that his comments extended to all cases where corroboration was required by the common law. Therefore the comments were applicable to the evidence of the other class of witnesses, namely complainants of sexual offences, even though the court did not specifically abolish the corroboration requirement with reference to them in this particular case.

Zuckerman comments that this was a very bold step for the court to take in the way of judicial reform of the common law, for courts are hesitant to be seen as usurping the legislature's prerogative of making laws. He explains that the Supreme Court of Canada was encouraged to

[243] *Supra* note 118
[244] Ibid at para 18
[245] Ibid at para 24

take the step because 'it had in front of it the report of the Law Reform Commission of Canada which contained a thorough survey of corroboration and which recommended the abolition of the…rules'.[246] The court also had support from the 11th Report of the English Criminal Law Revision Committee.[247]

4.1.3 South Africa

In South Africa, the corroboration requirement was abolished in *S v. Jackson,*[248] for lack of a legitimate justification as to its very existence and being found only to be premised on discrimination against women.[249] In that case, the accused had been convicted of attempted rape. On appeal, the defence counsel contended that the trial court had not properly directed itself as to corroboration. The prosecution argued that the corroboration requirement was not to be sanctioned anymore by the courts for it was discriminatory against women and that it was raising the burden of proof in sexual offences above the usual standard of proof in criminal cases.[250] The court therefore examined the rationale for the rule's existence, which rationale claims the easiness with which false sexual offence accusation can be made and the difficulty of refuting them. The court found this idea to be insupportable with empirical research.[251] Actually the court found that bringing a rape accusation is taxing on the complainant:

> Few things may be more difficult and humiliating than for a woman to cry rape: she is often within certain communities, considered to have lost her credibility; she may be seen as unchaste or unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross examination in court, where the intimate details of the crime are transversed *ad nauseam*; she (but not the accused may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their back on a 'soiled' wife.[252]

The court agreed with the prosecution that the corroboration requirement does indeed unnecessarily raise the standard of proof in a sexual case above that which is ordinarily applicable in criminal cases. The court considered legal trends in comparable jurisdictions of the UK, Canada, New Zealand, United States and Namibia and saw that the corroboration requirement had been abolished there. Olivier JA therefore finding no proper justification for the

[246] Zuckerman *supra* note 116 at 151
[247] Ibid
[248] 1998 (1) SACR 470 (SCA)
[249] Ibid at 475A
[250] Ibid at 473I-474A
[251] Ibid at 475A-D
[252] Ibid at 475E-F

rule's existence nor its retention concluded that it was discriminatory against women and thus needed to be abrogated. He stated:

> The cautionary rule in sexual assault cases is based on irrational and outdated perceptions. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.[253]

According to him, the only instance where a witness' testimony was to be approached with caution was when there was an evidential basis for doing so. He went on to endorse the approach of England in regard to the reform it had made in the area of the common law requirement of corroboration. After its legislative abolition of the corroboration requirement in sexual offences and other evidence, the English courts were still to exercise caution with regard to a particular witness' testimony if there was an evidential basis for such. They were not, however, to exercise caution merely on the basis that the witness belonged to a class of witnesses of which the corroboration requirement had been applied in the past. This approach was based on the English authority of *R v Makanjuola,*[254] a case which was decided after the legislative abrogation of the corroboration requirement. Olivier JA therefore stated that the courts should look to this case for guidance on the circumstances in which the court would be justified to examine a witness' testimony more carefully.

Although *S v Jackson's* message was clear that the corroboration requirement was abrogated, some later cases interpreted it to mean that a general corroboration rule was not to be applied to the evidence of a complainant in a sexual offence case, but that caution, was still to be applied before convicting of a sexual offence. *S v Van der Ross*[255] is a case in point where such an interpretation was made. The headnote reads:

> The judgment in *S v J*...does not mean that trial courts are free to convict in an indiscriminate and reckless manner and reckless manner where the charge is of a sexual nature. It also does not mean that in those cases courts no longer have to be cautious. On the contrary, criminal courts should be encouraged to exercise extreme caution before they convict people on serious charges, such as rape…All that the judgment in *S v Jackson* means is that a general, immutable cautionary rule does not have to be applied to the evidence of the complainant in such cases. The evidence in a particular case may call for a cautious approach. It will depend on the facts and the circumstances of each individual case.[256]

The South African Law Commission had feared these kinds of misinterpretations of *S v Jackson* and therefore had proposed the express abolition of the corroboration requirement through

[253] Ibid at 476E
[254] *Supra* note 213
[255] 2002 (2) SACR 362 (C)
[256] Ibid at 363

statute.[257]The result was the unequivocal legislative abolition of the corroboration requirement which stated that the evidence of a complainant in a sexual case was not to be treated with caution on account of the nature of the offence.[258]

4.2 Bases for judicial reform within the jurisdictions

Having examined the judicial reforms that were effected in California, Canada and South Africa, the observation to be made is that the courts came to the realisation that the corroboration requirement had no rational basis other than the discrimination of women. The South African court made that plain. The trial court in *Rincon-Pineda*[259] had expressly given the reason of discrimination against women for its refusal to apply the corroboration requirement. The appellate court may not have put the reason for abolition in the language of discrimination against women, but that essence is implicit in the approach the court took of confronting the rationale for the rule's existence and establishing it to be baseless. Thus the court could not sanction the retention of a rule that made distinctions between complainants of sexual offences and those of other criminal cases when there were no reasonable grounds for making the distinctions.

As regards the Canadian reforms, there is also the tacit acknowledgement that the corroboration requirement is irrational and also discriminatory. The relaxation of the *Baskerville* test showed that the courts saw no reason for doubting the sexual complainant's testimony merely on the basis that they complained of a sexual offence. Such a baseless distinction was uncalled for and yet, the courts could not just easily abolish it, arguably because in Canada unlike other jurisdictions the rule was not just embodied in judicial pronouncements but was also expressed in a statutory enactment.[260] The courts therefore might have felt that they would be encroaching on Parliament's territory as explained by Zuckerman. Only when the court felt such support for reform did it abolish it in *Vetrovec.* It was only at that stage that the court expressed the view that the reason for abolition was not merely that the *Baskerville* formula was stringent but that the differentiation that was being made with regards to the testimony of certain classes of witnesses was irrational.

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[257] PJ Schwikkard, 'Getting somewhere slowly', *supra* note 53
[258] Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
[259] *Supra* note 162
[260] Section 142 of the Canadian Criminal Code (now repealed)

After these judicial reforms, all these three countries still went on to enact statutory provisions for the abrogation of the corroboration requirement.

4.3 Legislative Reform

In almost every country where the corroboration requirement has been abolished, whether the abolition was first effected through judicial pronouncement, there has also followed the legislative abolition of the rule.[261] Below we consider the UK legislative abolition of the rule as a model which Malawi can follow. The English approach is a good example for Malawi because Malawi used to be a British colony and also because it inherited the corroboration requirement from England as well. Much of the common law is until now still part of the laws of Malawi. The British, therefore, having moved away from the rule, Malawi can learn lessons from them on how such a move can be made. Additionally, the English approach has not just stopped at abrogating the rule statutorily. It has gone further through the case authority of *R v Makanjuola; R v. Eaton*[262] to set out the ambit of the reform and to explain that there could still be instances where the evidence of a witness may need to be examined more carefully, though not just on the basis that the witness belongs to a class where corroboration requirement has been stated to apply in the past. Therefore for the reason that the corroboration rule is a rule Malawi inherited from the British and that the common law still applies to Malawi and also for the satisfactory way in which they have applied the reforms without at the same time, being oblivious to the fact that some witnesses' testimonies need to be viewed with caution, we proceed to consider the British reform.

In UK, the corroboration requirement was abrogated by section 32 of the Criminal Justice and Public Order Act 1994 which states that:

> (1) Any requirement whereby at trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is—
>
> (b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed, is hereby abrogated.
>
> (2) Any requirement that—
>
> (a) is applicable at the summary trial of a person for an offence, and

[261] See *supra* notes 202-206 and accompanying text
[262] *Supra* note 213

(b) corresponds to the requirement mentioned in subsection (1) above…is hereby abrogated.

In *R v. Makanjuola*[263] the two appellants had been charged separately with indecent assault and they had had separate trials. Makanjuola was charged with indecent assault on a girl aged seventeen years and Eaton was charged with indecent assault on a sixteen year old girl. Makanjuola appealed on the ground that since the offence was alleged to have been committed before the above provision came into force, the trial judge ought to have given the corroboration direction to the jury. Subsection (4) of the above quoted provision stated that the abolition section would not apply to trials that had started before the provision came into force. Eaton appealed on the ground that even though the provision had abolished the obligation of a trial judge to give the corroboration warning, the judge still retained the discretion to give the full corroboration direction, and that in this case the discretion ought to have been exercised in his favour. His counsel argued that the rationale that complainants lie concerning sexual accusations could not vanish overnight. As such, while the requirement to give a warning had been abolished, judges were still to exercise their discretion in giving the warning. The appellate court held that since both trials started after the abolition came into force, the new law would apply to the appellants. The fact that the offences were alleged to have been committed before the abolition came into force would not be cause for the new law not to apply retrospectively. The court stated that retrospective application of the new law was possible because generally a statutory change in procedure does apply to pending as well as future proceedings and the court stated that section 32 was a procedural provision.[264] On the question of discretionary warnings, the court was emphatic that the corroboration requirement had been abolished and there was never even to be discretionary warnings based on the fact that the witness belonged to a certain class of witnesses. The only time the judge was to give a direction to the jury to have the evidence of a particular witness viewed with caution was when there was an evidential basis for such.[265] An evidential basis was not to be just a mere suggestion by counsel to the effect that the witness was unreliable. Even in those kinds of situations, it was a matter for the judge to determine how to couch the warning, 'depending on the circumstances of the case, the issues raised and the content and quality of the witness's evidence'.[266] The

[263] Ibid
[264] Ibid at 1351
[265] Ibid at 1350
[266] Ibid at 1351

judge was not to give a warning in the way of *Baskerville* formula for as pointed out by the court, the enactment of this provision was actually Parliament's way of getting rid of that formula that was more of a source of confusion for the jury than a source of guidance. Finally, it was stated that the appellate court would be slow to interfere with the judge's exercise of discretion unless it was *Wednesbury* unreasonable.[267]

Lord Taylor giving the judgment for the court stated:

> Given that the requirements of a corroboration direction is abrogated in the terms of section 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.[268]

Lewis has noted that there are two categories of cases that have been distinguished in the above dictum.[269] The first category involves cases in which there is an evidential basis for suggesting that the evidence of the witness may be unreliable and a second category where the witness has plainly been shown to have lied in her evidence or to have made false complaints. In the first category, caution is urged, for example, where a witness' evidence is inconsistent within itself or where a witness makes a statement inconsistent with an earlier statement[270] or where there is evidence that the complainant is psychologically disturbed.[271]In *R v Terry G,*[272] the complainant who was aged eight, was taken into care. At that time, she stated on video when interviewed, that the appellant had been beating her and her other siblings. She made no

[267]*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223

[268] Ibid at 1351
[269] P Lewis, 'A comparative examination of corroboration and caution warnings in prosecution of sexual offences' 2006 *Criminal Law Review* 889
[270] *R. v Walker* [1996] Crim. L.R. 742; *R v Terry G* [2002] EWCA Crim. 2352
[271] *R v Doheny* [1997] 1 Cr. App.R. 369
[272] *Supra* note 270

allegations about the appellant sexually assaulting her. She was asked if there was anything else that was bothering her but she said there was not. On an earlier occasion, she had told a social worker that no one had indecently assaulted her. Three months later, she was interviewed again and made allegations that the appellant had indecently assaulted her. The trial judge did not make a direction to the jury about her evidence being treated with caution for her inconsistent statements. On appeal, it was held that the trial judge would have given such a direction had he turned his mind to the question. Therefore, the conviction was quashed and a retrial was ordered.

In *R v. Jobe*,[273] one of the complainants had stated that she had been a virgin previous to the rape. The evidence called showed that she had lied about this and a strong warning was urged for her evidence because of the lie.

4.4 Recommendation

Our recommendation is that Malawi should abolish the corroboration requirement both by case law and statutorily. At the same time, sight should not be lost that there are occasions when the evidence of a witness in a sexual offence case or in any other case may be seen to be unreliable. In those cases, caution should be exercised and *Makanjuola* can provide the necessary guide. Since Malawi does not have jury trials in sexual offences, it is up to the trial magistrates themselves to weigh up the evidence of a particular witness. They can therefore apply caution in instances where the witness' evidence seems unreliable.

[273] [2004] EWCA Crim. 3155

Chapter 5

CONCLUSION

This paper considered the corroboration requirement in sexual offences in Malawi. This evidential rule requiring that the evidence of a complainant in a sexual offence case be supported by some other evidence before a safe conviction can be reached has been shown to be the legacy of the common law that Malawi inherited from England. Such a requirement has been shown to place an increased burden on the prosecution that they need to discharge for them to prove their case in sexual offence matters. This increased burden is over and above that which normally obtains in all other criminal cases, which is, simply proof beyond reasonable doubt. Therefore, the accused in sexual cases has been afforded protections that are not given to accused persons in other criminal matters, making it virtually impossible for him to get convicted.

The justifications for its existence have been found to be extremely wanting. One of the justifications which is to the effect that sexual offence accusations are easily fabricated and yet are hard to be defended against has been examined and has been found to lack any merit, for empirical research has shown the contrary. Empirical research has debunked the myth that more false accusations are made in the realm of sexual offences than any other felony. Furthermore, it has actually been found that sexual offences are quite easy to disprove since the victim is made the focus of the trial and a target for blame by the defence team. Instead of the jury being sympathetic towards the complainant as it is usually claimed, research shows that the jury are also quick to blame the victim, such that they are unlikely to convict the accused in the absence of aggravating factors. To this end, rape and sexual offences in general, have been found to have the lowest conviction rates among the felonies.

Even if it may be argued that there may have been some justification for the corroboration requirement in the days when it was enunciated, such justification has completely vanished in the modern criminal justice system. While in the days of its enunciation the accused's rights to fair trial may have been few and not well-recognised, in the present era, his/her rights are paramount and due process abounds. In the modern system, the accused is entitled to be presumed innocent until proven guilty; his guilt must be proved beyond a reasonable doubt; he has the right to

testify in his own defence; he is entitled to call witnesses and even to compel their attendance. The corroboration requirement therefore has no place in that kind of setting.

While the corroboration requirement has been found to have no legitimate reason for its existence, it has been observed that the rule is only premised on discrimination against women. Such being the case, the rule was subjected to the principles of the current Malawian Constitution, which principles entail the right to equality before the law, the right to dignity and the right of women to be effective protection by the law. The rule could not be defended under these principles for the distinction it makes between complainants of sexual offences, who are mostly women, and complainants of other criminal cases, was shown to be unreasonable. In the final analysis, the rule has been shown to perpetuate sexual violence against women since the perpetrators of it are not inadequately dealt with under this rule.

England, which had given birth to the rule, abrogated it. The other common law democratic countries of United States, Canada and South Africa that had inherited the rule have abolished it as well on the basis that it is discriminatory against women. Since the rule serves no useful purpose in Malawi and also looking at the trend on the international scene, it is only sensible that Malawi should abrogate it too. It has been advocated that the Malawian courts should outlaw the rule as unconstitutional and therefore invalid. At the same time, it is also expedient that there be legislative reform of the rule for the clear and unmistakable dealing away of the rule.

The paper makes the suggestion that Malawi should adopt the English legislative approach in the abolition of the rule. It is further suggested that the courts should take a firm stance in the interpretation of such a law abolishing the rule as did the court in *Makanjuola* so that the corroboration requirement in sexual offences should be completely dealt away with. Such abolition of the rule will mean that the accused in sexual offences will not be entitled to special treatment which is not afforded accused persons in other criminal matters and a sexual offence complainant will no longer be subjected to the 'demeaning presumption against her truthfulness'.[274] A complainant's evidence will only be doubted if there is an evidential for such and not simply because he/she is a complainant in a sexual matter.

[274] C Hill, 'Recent Decisions' (1976-1977) 15 *Duquesne Law Review* 305 at 312-313

BIBLIOGRAPHY

Primary Sources

Cases

Andrews v Law Society of British Columbia (2004) AHRLR 131

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 K.B .223

Banda v Republic 4 ALR Mal 316

Chidzero v Republic 8 MLR 23

Credland v Knowler 35 Cr. App. R. 48

DPP v Hester [1973] AC 296

DPP v Kilbourne [1973] AC 729

Kask v Shimizu [1986] 4 W.W.R. 154

Law v Canada 1999 CarswellNat 359

Likaku v Republic 4 ALR Mal 83

Maggie Kaunda v Republic Criminal Appeal No. 8 of 2001

Mariette v Republic 4 ALR Mal 119

Moatswi & Another v Fencing Centre (Pty) Ltd (2004) AHRLR (Blwc 2002)

People v Rincon-Pineda 14 Cal. 3d 864

R v Beck [1982] 1 WLR 461

R v Hill (1781) 1 East P.C. 439

R v Doheny [1997] 1 Cr. App. R. 369

R v M 1947 (4) SA 489 (N)

R v Makanjuola; R v Easton [1995] 1 WLR 160

R v Murphy 1976 CarswellBC 205

R v Oakes (1986), 50 C.R. (3d) 1

R v Terry G [2002] EWCA Crim. 2352

R v Vetrovec 1982 CarswellBC 663

R v W 1949 (3) SA 772

R v Walker [1996] Crim. L.R. 742

R v Warkentin 1976 CarswellBC 204

Railway Express Agency v New York 336 US 106

Regina v Kaluwa 2 ALR Mal 356

*Regina v Ma*gombani 2 ALR Mal 397

Regina v Mussa 1 ALR Mal 84

Republic v Banda 5ALR Mal 96

Republic v Chinthiti [1997] 1 MLR 59

Republic v Fredi 8 MLR 48

Republic v Kapalepale 6 ALR Mal

Republic v Phiri 7 MLR 65

Rex v Baskerville [1916] 2 KB 658

Rex v Whitehead [1929] 1 KB 99

S v Balhuber 1987 (1) PH

S v D 1992 (1) SACR 143

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

S v M 1997 (2) SACR 682

S v M 2006 (1) SACR 135 (SCA)

S v Van der Ross 2002 (2) SACR 362 (C)

Spencer v Regina (1987) AC 128

Stand v Regina 2 ALR Mal 426

State v Smoot 99 Idaho 855

Tinazari v Regina 3 ALR Mal 184

Williams v State 254 Ark 940

Statutes

Canada

Canadian Charter of Rights and Freedoms

Criminal Code

England

Criminal Justice and Public Order Act 1994

Malawi

British Order-in-Council of 11th August 1902

The Constitution 1964

The Constitution 1994

Criminal Procedure and Evidence Code

Penal Code

Namibia

Combating Rape Act 8 of 2000

South Africa

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

International instruments

Convention on the elimination of all forms of discrimination against women

UN Declaration on the elimination of violence against women

Secondary Sources

Artz, L & Smythe, D (eds) *Should we consent? Rape law reform in South* Africa (2008) Juta, Cape Town

Backhouse, C 'The doctrine of corroboration in sexual assault trials in early twentieth century Canada and Australia' (2001) 26 *Queens Law Journal* 297

Berger, V 'Man's trial, woman's tribulation: rape cases in the courtroom' (1977) *Columbia Law Review* 1

Birch, DJ 'Corroboration in criminal trials: a review of the proposals of the Law Commission's Working Paper' 1990 *Criminal Law Review* 667

Birch, DJ 'Corroboration: goodbye to all that?' 1995 *Criminal Law Review* 524

Bronitt, S 'Baskerville revisited: the definition of corroboration reconsidered' 1991 *Criminal Law Review* 30

Bronstein, V 'The cautionary rule: an aged principle in search of a contemporary justification' 8 *South African Journal on Human Rights* 556

CAB, 'Evidence: corroboration in criminal cases' (1932) 30(8) *Michigan Law Review* 1291

Chirwa, D *Human Rights under the Malawian Constitution* (2011) Juta, Cape Town

Edelstein, L 'An accusation easily to be made? Rape and malicious prosecution in the eighteenth-century England' (1998) 42(4) *American Journal of Legal History* 351

Hatchard, J 'Abolishing the cautionary rule in sexual offences in Namibia' (1993) 37(1) *Journal of African Law* 97

Hill, C 'Recent Decisions' (1976-77) 15 *Duquesne Law Review* 305

Jackson, J 'Credibility, morality and the corroboration warning' (1998) 47(3) *Cambridge Law Journal* 428

Lewis, P 'A comparative examination of corroboration and caution warnings in prosecution of sexual offences' 2006 *Criminal Law Review* 889

Note, 'Corroborating charges of rape' (1967) 67(6) *Columbia Law Review* 1137

Note, 'The corroboration rule and crimes accompanying a rape' (1970) 118 *University of Pennsylvania Law Review* 458

Note, 'The rape corroboration requirement: repeal not reform' (1972) 81 *Yale Law Journal* 1365

Plaxton, MC 'What is (and what should be) the rule governing witness sufficiency in criminal cases?' (2002) 7 *Canadian Criminal Law Review* 351

Quansah, EK 'Corroborating the evidence of a rape victim in Botswana: time for a fresh look' (1996) 28 *Botswana Notes and Records* 231

Schwikkard, PJ 'Sexual complainants and the demise of the 2004 Criminal Act' (2009)1 *Namibian Law Journal* 5

Schwikkard, J & Van der Merwe, S *Principles of Evidence* (2009) Juta, Cape Town

Thomas Morris, A 'The empirical, historical and legal case against the cautionary instruction: a call for legal reform' 1998 *Duke Law Journal* 154

Williams, G 'Corroboration-Sexual Cases' 1962 *Criminal Law Review* 418

Zuckerman, AAS 'Corroboration: Judicial Reform in Canada' 1984*Oxford Journal of Legal Studies* 147