



**ZAMBIA INSTITUTE OF ADVANCED LEGAL EDUCATION**

**OPEN, DISTANCE AND FLEXIBLE LEARNING**

**CERTIFICATE IN PARALEGAL STUDIES IN ZAMBIA FOR**

**LEVEL I PARALEGALS**

**ZQF LEVEL 4 CERTIFICATE**

## **MODULE 3**

**STUDY MODULE: CRIMINAL LAW**

Module Code: 362-03-A

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## **ACRONYMS**

**CSO** Civil Society Organisations

**HC** High Court

**IRD** Industrial Relations Division

**SC** Supreme Court

**ZAWA** Zambia Wildlife Authority

## Acknowledgements

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## Module Overview

Welcome to the Criminal Law Module for Paralegals studies. This Module introduces you to general principles of criminal law, offences under the Penal Code as well as those sitting under other specific pieces of legislation.

## Module Purpose

The purpose of this module is to equip you with knowledge, skills and appropriate attitudes to effectively and efficiently apply knowledge you will acquire in the provision of legal aid services.



### Module Learning Outcomes

#### In this module you will:

1. Explain fundamentals of criminal law and institutions involved in criminal justice
2. Apply the law relating to juvenile cases and diversion mechanisms
3. Apply the law relating to offences against the person, against property and road traffic offences
4. Apply the law relating to white-collar crimes, drug-related offences, wildlife-related offences
5. Apply the law relating to Gender Based Violence (GBV) and child abuse



### Learning Tips and Study Skills

As an adult learner, your approach to learning will be different from that of your school days: you will choose what you want to study, you will have professional and/or personal motivation for doing so and you will most likely be fitting your study activities around other professional or domestic responsibilities.

Essentially you will be taking control of your learning environment. As a consequence, you will need to consider performance issues related to time management, goal setting, stress management, etc. Perhaps you will also need to reacquaint yourself in areas such as essay planning, coping with exams and using the web as a learning resource. Your most significant considerations will be time and space, i.e. the time you dedicate to your learning and the environment in which you engage in that learning.

We recommend that you take time now-before starting your self-study-to familiarize yourself with these issues. There are a number of excellent resources on the web. A few suggested links are:

<http://www.how-to-study.com/>; <http://www.ucc.vt.edu/stdysk/stdyhlp.html>;  
<http://www.howtostudy.org/resources.php>

The above links are suggestions to start you on your way. At the time of writing, these websites were active. If you need to look for more go to [www.google.com](http://www.google.com) and type “self-study basics”, “self-study tips”, “self-study skills”, or similar.

### **Minimum Module Duration**

In this module, you are expected to spend at least **230** notional learning hours spread across the full 12 months period.

### **Assessments and Progression Requirements**

In this module, your assessment will include exercises and assignments to test your understanding of the subject matter both orally and short quiz questions as required. You are therefore, expected to:

- Write one assignment out of 10 and sit for a test which will be out of 30 marks and one examination out of 60 marks.
- Pass your continuous assessment (CA) by scoring at least 50% marks.

### **Statement on Attendance Of Residential School**

This module is meant to be studied in three (3) terms. You are expected to fulfil the following expectations as regarding the subject:

- Attend all your residential schools and not less than **90%** of your scheduled residential sessions for a period of two weeks.

### **Certification Board**

This Module is just one of the Module requirements to be passed for the student be awarded the Certificate in Paralegal Studies for Paralegal Level I upon successful completion of the TEVETA Programme.

# UNIT 1 FUNDAMENTALS OF CRIMINAL LAW AND INSTITUTIONS INVOLVED IN CRIMINAL JUSTICE

## Introduction

In this unit you will learn various aspects of criminal law. The unit introduces you to the study of criminal law and its purpose, the difference between crime and a moral wrong, concepts of retributive and restorative justice, sources of criminal law, concept of double jeopardy, and common offences under the Penal Code. You will also understand the principles of law involved in the common offences, institutions involved in the criminal justice system, possible sentences and the role of paralegals in the criminal justice system will be covered in this unit.



## Unit Outcomes:

On completion of this Unit , the trainee will:

1. Explain the nature of criminal law and classification of crimes
2. Explain elements of criminal liability and capacity, defences and types of punishment
3. Explain the roles and jurisdiction of the institutions involved in criminal justice

## 1.1 The nature of Criminal Law and Classification of Crimes

### 1.1.1 Crimes *Basic Concepts of Criminal Law*

#### a) Definition of Criminal Law and its Purpose

Criminal Law is defined as a body of law that deals with conduct considered so harmful to society as a whole that it is prohibited by statute, and anyone involved can be prosecuted and punished by the government.<sup>1</sup>

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<sup>1</sup> See definition by Oxford Companion to law on page 316

Criminal law intervenes when someone does something which causes serious social impact forcing the state, rather than (in the case of breach of contract or trespass) the individual affected, to take on the case of the injured party.

### **b) Purpose of criminal law**

The purpose of criminal law is to:

- Protect the person and property of the members of the community; and
- Preserve order in society.

Criminal Law aims to:

- Forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
- Differentiate on reasonable grounds between serious and minor offences;
- Spells out acts which amount to crimes and appropriate punishments to be enforced on those who deserve punishment (convicted offenders). This is important in light of Article 20(8) of the Constitution of Zambia which states:

No person shall be convicted of a criminal offence unless the offence is defined and the penalty *therefore is prescribed in a written law.*

### **c) Purpose of sentencing**

You need to understand that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- Denounce or condemn unlawful conduct;
- Deter or discourage the offender from committing crimes in future and at the same time discourage persons other than the criminal from committing similar crimes for fear of incurring the same punishment. This justifies sentences which are harsher depending on the gravity of the offence in order to protect society and reduce crime by discouraging the convict and other people from engaging in the same activities;
- Remove or separate offenders from society where they pose a risk of reoffending or danger (for the protection of the society, oftentimes).
- Besides, while imprisoned, a criminal has fewer opportunities to commit acts causing harm to society;
- Rehabilitation provides the opportunity to mould or reform the criminal into a person who, upon return to society, will conform her/his behaviour to societal norms. This is done through education and training schemes and rehabilitation programmes while in detention;

- Impose retribution (revenge) to vent society's sense of outrage and need for revenge. Thus, time in detention serves to take out society's vengeance against a convict which finally serves as compensation for the harm done to victims or to the community;
- Educate the publicity attending the trial, conviction, and punishment of some criminals serves to educate the public to distinguish between legal and illegal conduct and to develop respect for the law.

#### **d) Sources of Criminal Law**

Like other branches of law in Zambia, the (primary) source of criminal law is the *Zambian Constitution*<sup>2</sup>. However, the most practical and basic source is the *Penal Code* which sets out most of the crimes that are recognised in Zambia (such as murder and robbery) and operates mostly through the other source of criminal law namely the *Criminal Procedure Code(CPC)*<sup>3</sup>. You should note that the CPC provides for the procedure relating to criminal proceedings in Zambia. Other sources include court decisions and scholarly works by eminent authors.

The sources of criminal law in Zambia may be classified into the following four broad categories namely the *Constitution*; *Statutory Law*; *Court Precedents*; and *Text Books*.

Now that you have covered the definition of criminal law and its purpose, you are encouraged to test your knowledge by answering the following activity.



#### **Activity 1**

Mutale visited a Correctional Facility upon completion his certificate course in Social Work. While discussing with some inmates he learnt that they were sentenced to serve various sentences. Mutale has come to know that you are pursuing a Paralegal Studies course and has to you to learn more about sentencing. Explain to him the purpose of sentencing.

<sup>2</sup> Constitution Amendment Act No. 2 of 2016

<sup>3</sup> Chapter 88 of the laws of Zambia

## 1.2 Definition of Crime and Distinction between Crime and a Civil Wrong

It is vital for you to understand the meaning of term “crime” as well as to differentiate crime from civil wrong. Most often people either find it difficult to tell whether the offence committed is civil or criminal, or they confuse the two. Besides, there is no precise definition of crime. It is for this reason that in this topic we will discuss in detail the difference between a criminal wrong and a civil wrong. We will also study the basics of each and bring out the difference with a few examples as well.

### a) What is a crime?

There is no universal definition of crime. Different scholars have given different definitions of what crime. From time immemorial certain conduct or norms were permissible but these vary with time and place.

According to Keeton<sup>4</sup>, “crime is an undesirable act which the state finds most convenient to correct by the institution of proceedings for the infliction of a penalty rather than leaving the remedy to the discretion of the injured person.” Therefore a crime is:

A wrong against the state, and not just against an individual;

Much more serious than civil wrongs because they are against the whole society, even if only one individual gets hurt.

Other definitions of a crime include but are not limited to the following:

- i. An unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment<sup>5</sup>; and
- ii. Conduct forbidden and regarded by the state as being criminal to which punishment has been attached;

Examples of criminal acts include the following:

- Murder
- Theft
- Fraud
- Rape
- Over speeding
- Driving without license
- Causing death by dangerous driving

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<sup>4</sup> Halsbury’s laws of England, 4 ed. Vol. II para 1. See also Prosser and Keeton on the Law of Torts., St. Paul, Minn.: West Pub. Co.1984.

<sup>5</sup> Halsbury’s Laws of England, 3rd ed, p. 271.

- Arson Assault
- Contempt of court
- Abortion-illegal termination of pregnancy

## **b) What is a civil wrong?**

A civil wrong is defined as a private dispute between individuals or between an individual and a group of people, an organization or institution, in which the plaintiff seeks redress:

- It is a wrong against a particular individual; hence the state does not come in;
- It is redressable which means the plaintiff (injured party) may claim damages from the defendant (party who inflicted the wrong);
- It is a wrong that is not recognised by the state as being criminal wrongs;
- It is a wrong that is pursued at the discretion of the injured party and his representatives.

Examples of civil wrongs include the following:

- Debt
- Divorce
- Adultery
- Land Disputes
- Insults
- Defamation of character
- Breach of contract
- Landlord/tenant disputes

## **c) Importance of the difference between criminal and civil wrongs**

The difference between civil wrongs and criminal cases is immensely important as it affects how the case will be started, who starts the case, in which court the case will be heard, and most importantly, which powers the judge will use. Sometimes the difference depends not in the nature of the act but on legal consequences which follow the act.

The offences which violate public peace, safety and interest, and the state are labelled as criminal wrongs, whereas wrongs that affect the interests of a particular individual are called civil wrongs.



## Activity 2

You are encouraged to assess your understanding of a crime and a civil wrong and their distinction by attempting the following activities.

1. Mariah pushes Joseph, her classmate, but there is no serious physical injury caused, except a small bruise on his ankle.

***What type of case is this? (Civil or criminal). Justify your response.***

2. Phillip was clearing his backyard and decided to burn the heap of grass and stick. Before the fire went out, he got into his house to answer a telephone call. He had a long chat with his new girlfriend which lasted one hour. He rushed outside the house when he heard screams and people shouting. He was shocked to see his neighbour's house in huge flames and a crowd of people watching helplessly.

***What type of case is this? (Civil or criminal). Justify your response***



### NOTE:

There are certain acts that fulfil the criterion for both civil and criminal wrongs. In these situations, the distinction between civil and criminal cases can be slightly blurred. Such acts can be classified as a civil wrongs as well as a crimes. Meaning the same single act, there can be crime as well as civil wrong. Some examples to these are assault, defamation, negligence, nuisance, reckless driving etc.



## Case Study

A couple's 3 years daughter was playing with a ball near a pond of water behind the house. The ball rolled into the pond and the child followed it without her parents realising it. As Mr. Zibazako was going for work, he saw the child walking towards the pond but did not tell the girl's parents. Two hours the parents were heard morning because the girl drowned and died. When the Mr. Zibazako heard about this, he told friends that he actually saw the girl walking to the pool when he was passing by the house not knowing what she was doing.

- a) Has Mr Zibazako committed any crime?
- b) What kind of a crime could this be?



## Summary

Law can be divided into many categories and two of the broader categories are civil and criminal law.

While civil law is private law, criminal law falls under public law. Criminal law is the body of statutory and common law that deals with crime “offensive to society as a whole” and the legal punishment of criminal offenses. Therefore, it deals with public interest e.g. the public has an interest in seeing that people are protected from being robbed or assaulted. We can also say that criminal law is about rules and statutes that:

- Define conduct prohibited by the state because it threatens and harms public safety and welfare; and
- That establishes punishment to be imposed for the commission of such acts

Finally, a single act may be treated as a civil or criminal act depending on the steps taken by the injured party, extent of the harm and the final remedy decided by the courts on the party which caused the damage or injury.

### **1.2.1 Classification of crimes**

Crimes are classified in two main categories namely Felonies and Misdemeanours

#### **a) Felonies**

Serious crimes are classified as felonies. A felony is defined in Section 4 of the Penal Code CAP 87 of the laws of Zambia as an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment with hard labour for three years or more.

#### **b) Misdemeanours**

The less serious offences are called misdemeanours and commission of offences stipulated as such are punishable with a fine or a term of year's simple imprisonment as stipulated by the Act<sup>6</sup>.

### **1.2.2 Elements of criminal liability and capacity, defences and types of punishment**

#### **1.2.2.1 The Elements of a crime**

In order for a person to be criminally liable there must be proof of the elements of crime. The elements of crime are:

- a) The unlawful act or omission (*Actus Reus*) e.g taking without consent, shooting, stabbing, etcetera.
- b) The blameworthy state of mind (*Mens Rea*) e.g. intention to permanently deprive, malice aforethought, intention to hurt or harm or maim.
  - i) ***Actus Reus*** – The illegal act complained of.
    - The accused must be proved to have perpetrated the act complained of. Sufficient evidence must be adduced to establish that fact. If he acted with others his role must be defined.
    - The act must be unlawful
    - The act complained of must be contrary to law. However, some acts which are not criminal might be deemed unlawful. For instance it is morally wrong for an expert swimmer to watch a child drown. It is justifiable for a person to kill somebody in self-defence or for a law enforcement officer to kill a

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<sup>6</sup> Section 4 of CAP 87

suspect in the process of enforcing the law or in executing a death sentence in extra-judicial executions.

- The act should be voluntary
- The act must be executed voluntarily in order for person to be held liable. If done involuntarily it would not be punished. Voluntariness is part of the *actus Reus*.

In *Bratty v A – G* (1963) AC 386 at p. 409 Lord Denning said:

**“No act is punishable if it is done involuntarily. An act done by the muscles but not by the mind is called automatism and it is no act at all.”**

## **ii) Mens Rea**

*Mens Rea* is the intent proscribed to the accused at time of commission of the offence. It is the blameworthy state of mind of the accused. The prosecution must prove that the accused intended to commit the crime. Thus, mens rea refers to the state of mind of the accused when committing the *actus Reus*. There are therefore four broad areas of *mens rea* that will be considered:

- Intention
- Recklessness
- Negligence
- Strict Liability (although this must be considered inside *mens rea*, it arises, as mentioned, where no *mens rea* is required.

### **Intention**

Intention is a word that is often given its ordinary meaning. That is, the accused will be found to have intended a consequence if they desire the consequence to follow their actions. This is the case irrespective of whether the consequence is very likely or extremely unlikely to occur.

### **Indirect/Oblique Intent**

The definition of intention (often defined as direct intent) is not limited to this simple definition. This is because the accused can be considered to intend a consequence of their actions if the consequence is one that the accused does not want but which he knows is virtually certain to occur as a result of their actions. This is known as indirect or oblique intent.

## **Ulterior Intent, Basic Intent and Specific intent**

A consideration of indirect or oblique intent is only really necessary where the offence is one that requires intention as the *mens rea* element. These types of offences are known as offences of specific intent – only intention will suffice. Where the *mens rea* is satisfied by intention or recklessness, the offences are defined as offences of basic intent.

Offences of ulterior intent are those that require proof of a second *mens rea* element.

### **Summary on Intention**

- Intention usually occurs where the accused desires the consequences of their actions.
- Indirect Intent may be found where the accused does not desire the consequences of their actions, but these consequences are virtually certain and the accused knows that they are virtually certain.
- Specific intent refers to offences where intention is necessary to satisfy *mens rea*.
- Basic intent refers to offences where either intention or recklessness will satisfy *mens rea*.
- Ulterior intent refers to offences where an additional it is necessary to show that the defendant intended to do something in addition to the basic *mens rea* of the offence.

### **Transferred Malice**

In certain circumstances, the accused will have the required *mens rea* against one victim, but will satisfy the *actus reus* of an offence against a person against whom the *mens rea* is not satisfied. The majority of texts refer to transferred malice, but you should be aware that the Supreme Court held in *R v Gnango* [2012] 2 WLR 17 that the term transferred *mens rea* is more appropriate and accurate.

### **Strict liability**

Strict liability offences are those types of offences where a defendant's blameworthiness is not a relevant consideration in relation to their liability. Under these types of offences, it will not be necessary to show that the accused possessed the relevant *mens rea* for at least one part of the *actus reus* of the offence.

#### **1.2.2.2 Regulatory offences**

These offences are purely regulatory where no moral issue is at stake. For example sale of unwholesome food is an offence.

In *Smedleys Ltd v Breed* (1974), the defendant company was convicted of selling food which was not of substance demanded by the purchaser. The House of Lords held the

defendant company liable even though no other practicable preventive measures could have been taken and the standard of care taken at the factory was extremely high.

### **1.2.2.3 Public danger Offences:**

On the protection of the public as this is of paramount importance to a state, the highest standard of care is felt necessary. This covers pollution cases, dangerous drugs and weapons.

In the case of **Steele (1993)** the defendant was convicted on a charge of possession of a firearm without a certificate under the British Firearms Act 1968. His defence was that he had been given a holdall containing a sawn-off short gun minutes before the police apprehended him. On appeal his conviction was confirmed as it was irrelevant that he did not know or even could not reasonably have known what the bag contained.

### **1.2.2.4 Dangerous drugs**

Dangerous drug offences are meant for protection of public safety. *Marriot (1971)* 1 ALL E R 595; (1971) 1 WLR 187; 55 Cr App Rep 82 in which the defendant was found in possession of a penknife which he knew had traces of a substance that turned out to be a prohibited drug. The court said the defendant needed the mens rea with regard to possession of a substance on the knife but no mens rea with regard to the circumstance that the substance was a prohibited drug. It was irrelevant that he did not know or could not reasonably have known that the substance was a prohibited drug. See Sweet and Parsley on the limits of this policy on dangerous drugs cases.

### **1.2.2.5 Road Traffic Offences**

Some road traffic offences where strict liability is imposed are of regulatory, quasi – criminal in nature. For example, careless driving and being in charge of a motor vehicle while under the influence of drink or drugs; sections 195 and 197 of the Roads and Road Traffic Act Cap 464.

### **1.2.3 Criminal Capacity**

It is important for you to understand that for any person to be held criminally liable they must have the capacity. Section 14 of the Penal regulates capacity to commit crimes. Infants under 12 years (with some exceptions) are exempted from criminal liabilities. The section divides them into three categories.

#### **a) Immature Age (*DoliIncapax*).**

In Zambia a person under 8 years of age is not responsible for any act or omission even though there is clearest evidence that the child caused the *actus reus* with the requisite *mens rea*. The child is therefore exempt from criminal liability until a day before his

eightieth birth day. This is an irrebuttable presumption. The rule is stated as a conclusive presumption that the child is “*doliincapax*.”

- b) Section 14 (2) stipulates that a person under 12 years is not criminally liable unless it can be shown that he knew or ought to have known that what he was doing was wrong. This is a rebuttable presumption. The presumption can be rebutted by showing mischievous discretion. Proof of mischievous discretion can be achieved by showing that the child could “discern between good and evil at the time of commission of the offence”. This is a category of over 8 and under 12 years.

In *R v FC* (a juvenile) 2 N R L R 185 A boy aged 10 years stole a watch and sold it. At the time of selling he **told a lie** that he had been authorised to sell it. From the lie it showed that he knew that what he was doing was wrong.

- c) A male person aged 12 years is incapable of having carnal knowledge. This is a rule of law and no rebuttable evidence is allowed. See Section 14 (3).

### **1.2.3.2 Burden and Standard of Proof**

#### **a) The burden of proof**

This is the onus of proving a criminal charge beyond reasonable doubt against the accused and it always rests upon the prosecution to i.e. he who alleges must prove. This is also known as the legal burden. The accused is innocent until proven guilty, article 18 (2) (a) of the Constitution<sup>7</sup>. However, in exceptional circumstances the law requires the accused to prove his assertions i.e. where accused pleads insanity but proof in this case is on a balance of probability.

The principle of the burden of proof was discussed in the celebrated case of *Woolmington v DPP*<sup>8</sup>. The issue brought to the House of Lords was whether the statement of law in *Foster's Crown Law* was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise.

Delivering the judgment for a unanimous Court, Viscount Sankey made his famous "Golden thread" speech:

*"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what*

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<sup>7</sup> Part III of Chapter one of the Laws of Zambia

<sup>8</sup> (1935) HL, read detailed summary of the case at page 7 of the Case book on Criminal Law (1983) Gvt Printer Lusaka

*the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

## **b) The standard of proof**

This is the degree to which the prosecution must prove its case against the accused. In criminal cases proof beyond reasonable doubt is not proof beyond a shadow of doubt.

In this case of **Miller v Minister of Pensions [1974] 2 ALL ER** Lord Denning tried to explain what reasonable doubt would mean he said 'the degree is well settled. It need not reach certainty, but it must carry a high degree of probability. He continues 'proof beyond reasonable doubt does not mean proof beyond a shadow of doubt the law would fail to protect the community if it admitted fanciful probabilities or possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility, in his favour which can be dismissed with a sentence 'of course it is possible but not in the least probable', then the case is proved beyond reasonable doubt.'

Lord Denning continues "it must carry a reasonable degree of probability but not as high as is required in criminal cases. If the tribunal can say 'we think it more probable than not,' the burden is discharged but if the probabilities are equal, the burden is not discharged. Degree of cogency in burden of proof required is less than in criminal law.

In criminal cases where the accused bears the burden of proof, the standard of proof is on a balance of probability whereas the standard of proof in civil matters is on a balance of probabilities. Where you have cases of fraud for instance if the allegation involves criminal conduct, the degree required is going to be higher.

## **c) The concept of Double Jeopardy**

This is the act of ***prosecuting a defendant a second time for an offence for which s/he has already been tried***<sup>4</sup> and acquitted or convicted.

In other terms, it is a ***criminal procedural defence*** that prevents a criminal defendant from being tried for the same criminal act twice after an acquittal or conviction. The evil sought to be avoided by prohibiting double jeopardy is double trial and double conviction, not necessarily double punishment.

Constitutional prohibition against double jeopardy is found in Article 18(5) of the Constitution which states that ***a person cannot be tried again for an offence of which he has been acquitted***, or an offence of which he would have been convicted at her/his first trial. For example, a person acquitted of murder cannot later be charged with a lesser offence such as manslaughter, or attempted murder. Even if the offence is not one which an accused could have been convicted further trial is barred if the offence is substantially the same. The test is whether the evidence is the same as that on the charge of which s/he was acquitted or of which s/he could have been convicted.

Section 20 of the Penal Code says a person cannot be prosecuted twice on the same facts. The only exception is where death results. This is an exception to the rule against double jeopardy – where death occurs i.e. X is successfully prosecuted for assaulting Y at a bar. Two weeks later the victim died. X can be again prosecuted and cannot use double jeopardy as a defence. This is because the charge is now murder not assault.

However, double jeopardy only applies to criminal court cases and ***does not protect people from being brought back to trial in civil proceedings***. This means that if a person is found not guilty of manslaughter, he cannot be tried in criminal court again. However, the family of the slain victim can sue the defendant in civil court for a wrongful death suit to recover damages.



### Activity 3

Discuss exceptions to the concept of autrefois acquit.

## 1.2.3 Some Common Specific Offences

You will note that the offences discussed hereunder are not covered in the syllabus but have been included for your knowledge only as you are likely to come across them during your course of work as a paralegal.

### 1.2.3.1 Unlawful Assembly



### Activity 4

- a) List the elements of unlawful assembly.
- b) Is unlawful assembly a felony or misdemeanor?

Section 74(1) of the Penal Code creates this offence and section 75 prescribes the punishment therefor. For this offence to be established the prosecution must prove the following elements:

- Three or more persons must be present;
- They must intend to commit an offence or to carry out some common purpose;

- They must conduct themselves in a manner that causes persons in the neighbourhood to fear that the assembled persons will commit a breach of the peace, or will by such assembly needlessly and without reasonable occasion provoke other persons to commit a breach of the peace.

It must be noted that an assembly, which was initially lawful, becomes unlawful when the persons assembled conduct themselves in the manner hitherto described. The offence of unlawful assembly is a misdemeanour for which the maximum sentence that can be imposed is five years imprisonment.

- *Wise v. Denning* (1902) 1 KB 267
- *Beatty v. Gillbanks* (1882) 9 QBD 308

### **1.2.3.2 Riot**

This offence is under section 74(2) of the Penal Code and it is said to have been committed when an unlawful assembly has begun to execute a common purpose by a breach of the peace and to the terror of the public. The maximum sentence for the offence of Riot is seven years imprisonment (section 76 of the Penal Code). It is more serious than unlawful assembly. The elements of a riot are:

- An unlawful assembly (i.e. the elements of unlawful assembly must be present);
- Beginning to execute a common purpose (whether lawful or unlawful);
- By a breach of the peace; and
- To the terror of the public.

The phrase 'to the terror of the public' has not been defined by the statute but the English Courts have interpreted it as meaning that at least one person of reasonable firmness and courage must be put in fear (see the case of *Field v. Receiver of Metropolitan Police* (1907) 2 KB 853).

Read sections 77 – 83 of the Penal Code. These sections deal with such matters as the making of a proclamation for rioters to disperse, dispersion of rioters after a proclamation has been made, effect of rioting after proclamation, prevention or obstruction of the making of a proclamation, effect of rioters demolishing buildings or injuring them, and riotously interfering with railway.

### **1.2.3.3 Rape**

In terms of section 132 of the Penal Code any person is guilty of rape who has unlawful carnal knowledge of a woman or girl;

- 1) Without her consent, or
- 2) With her consent, if the consent is obtained
  - a) By force or by means of threats or intimidation of any kind, or by fear of bodily harm, or

- b) By means of false representations as to the nature of the act, or
- c) In the case of a married woman, by personating her husband.

## **The Elements of Rape**

### ***Actus Reus***

This is twofold, i.e. there must be carnal knowledge (sexual intercourse) and lack of consent on the part of the victim. To prove rape it is necessary to prove penetration or partial penetration by the penis into the vagina. Therefore, penetration of the vagina using any object other than the penis is not rape but is indecent assault. Further complete sexual intercourse is not necessary to prove rape; the critical point is that there must be penetration of the vagina fully or partially by the penis. However, rubbing against the vagina entrance does not amount to penetration even if the emission of semen results therefrom; and there is no rape in such a case but indecent assault should suffice. It should also be noted that the fact that no semen was emitted is immaterial as long there is penetration as described above. It must be noted that medical evidence of sexual intercourse must be adduced to corroborate the claim of rape.

R v. Mporokoso 2 NRLR 152 – one of the questions that arose in this case was proof of penetration and medical examination.

The other limb of the actus reus of rape is absence of consent at the time of the sexual intercourse. In fact this is the element which transforms the sexual intercourse into rape. The woman must show signs of resistance to the act. There is no real consent if the woman yields to sexual intercourse under physical coercion or due to fear. Consent obtained by false representations as to the nature of the act is no consent.

Similarly there is no consent where a man gets into bed with a married woman who gives him her body under the mistaken belief that the man is her husband. There is also no consent where a man has or attempts to have sexual intercourse with a woman while she is asleep and it is no defence that she did not resist.



### **Activity 4**

- 1) On a charge of rape based on absence of consent on the part of the victim, can an accused person successfully raise the defence of mistake?
- 2) On a charge of rape based on Personation of husband, can the prosecution secure a conviction if the man personated is a boyfriend?

Under the Zambian criminal law system, an accused person can plead the defence of mistake of fact to a charge of rape based on having carnal knowledge of a woman or girl without her consent. See section 10 of the Penal Code – the requirement for a successful plea of this defence being that the mistaken belief should be reasonable. It is interesting to note that the claim of reasonable mistake is no longer available in England.

It appears that rape charges based on personation of a husband are quite restrictive. Given a literal interpretation an accused person who personates the boyfriend of a woman or girl and thereby has sexual intercourse with her would escape liability. Therefore the Courts would do well, if justice is to be done, to place a wider interpretation on the terms ‘married woman’ and ‘husband’ to include unmarried women with boyfriends. The Court of Appeal in *Elbekkay* (1995) Crim. LR 163 dismissed the appeal where the accused was convicted of rape after he had sexual intercourse with a lady by impersonating her boyfriend. Furthermore, it has been noted that “[t]here was no difference between the case where D obtained [sexual] intercourse by personating the husband or where it was by personating of a boyfriend or partner” (Smith & Hogan (1996): 494 - 5).

It is also interesting to note that under the Zambian law a husband cannot commit rape on his wife. The rationale appears to be that arising out of her marital obligations, the woman is deemed to consent to sexual intercourse with her husband provided they not separated by a Court order or a separation agreement. Whether this position should be maintained in this day and age is debatable. However, under English law a husband can rape his wife.

### ***Mens Rea***

The prosecution must prove that the accused intended to have sexual intercourse without the victim’s consent, and that he knew the victim was not consenting or was reckless as to whether she was consenting or not. The case of *DPP v. Morgan* (1976) AC 182 is a leading authority on recklessness whether the victim is consenting or not. Note also that medical evidence and corroboration are insisted on in the law of rape.

### **1.2.3.4 Defilement**

In the year 2005, Parliament passed Act No. 15 of 2005 which amended the Penal Code by repeal and substitution of certain sections. The sections relating to defilement were repealed and substituted. Sections 138 and 139 of the Penal Code create two types of defilement. Section 138 creates and prescribes the punishment for defilement of a child. ‘Child’ is defined under the Penal Code (Amendment) Act 2005 as any person below the age of sixteen years. It will be noted that prior to the amendment only a girl child was capable of being defiled; a boy child could only be indecently assaulted. It is clear however from the use of the word ‘child’ that this offence can be committed against both male and female children. The minimum sentence for defilement of child is fifteen years imprisonment and the maximum is life imprisonment.

Defilement of idiots and imbeciles is under section 139. Any person who has unlawful carnal knowledge (in circumstances not amounting to rape) of a child or other person

knowing such child or person to be an idiot or imbecile is guilty of a felony and liable to imprisonment of not less than fourteen years. The prosecution must prove beyond all reasonable doubt that the accused person knew the victim to be an idiot or imbecile at the time he/she committed the offence. Note that the repealed section 139 effectively excluded idiots or imbeciles of the male gender from the class of persons who could be defiled. The amendment makes it provides for a situation where a man or male child can be defiled provided he is an idiot or imbecile.

It is not generally unlawful for a man to have carnal knowledge of a girl under the prescribed age if he is lawfully married to her. It would be interesting though to see how the Courts would decide on this matter in this day and age in light of public opinion vis-à-vis early marriages.

Proof of age is vital to a conviction for defilement; age must be strictly proved. The question of age is of utmost importance in a charge of this sort. Age may be proved by production of a birth certificate or evidence of a person present at birth. It is not sufficient for the magistrate to rely on his own observation of the girl's age, nor may he take judicial notice of purely local events.

As with other sexual offences, it is dangerous to convict for defilement without corroboration. The magistrate must always direct himself to this danger; and failure to do so will usually result in the conviction being quashed on appeal.

Until the passage of the Penal Code (Amendment) Act 2005, a limited defence to a charge of defilement of a girl under the age of sixteen years (now simply defilement of child) was available if an accused person showed, on a balance of probabilities that he reasonably believed the girl to be of the prescribed age or more. However, section 138 of the Penal Code was amended; the proviso to that section which availed this defence was removed by the said amendment. The effect of the amendment is that the offence is now one of strict liability, that is to say, as long as it is proved that the accused person had unlawful carnal knowledge of a child, the accused must be convicted irrespective of his belief as to the age of the child.

### **1.2.3.5 Indecent Assault**

An indecent assault is an assault accompanied by circumstances of indecency. The accused person must have assaulted the victim; and the assault must be indecent by the standard of an ordinary, reasonable and right-minded person of the community. It is a general rule that the assault must have occurred without the consent of the victim. In other words consent of the victim to the assault is a defence. However, consent to the assault is no defence where the victim is a child. See section 137(2) of the Penal Code (Amendment) Act 2005. The minimum sentence for this offence is fourteen years imprisonment and the maximum is life imprisonment.

It must be noted that indecent assault covers a variety of activities. It is not restricted to purely sexual indecency. Thus, a security guard who undressed a woman suspected of having stolen something from the shop was convicted of indecent assault. It would

necessarily follow that with the 2005 amendments, a man undressed in similar circumstances would have been indecently assaulted.

In a nutshell, the prosecution has a duty to prove:

- i) That the accused had the mens rea for assault (or battery); and
- ii) That the accused intended to commit an assault which right-minded people would consider indecent.

Indecent practices between persons of the same sex are criminalized by section 158 of the Penal Code (Amendment) Act 2005 and the punishment prescribed therefor is a minimum of seven years imprisonment and a maximum of fourteen years imprisonment where the offender(s) is/are sixteen years old or older; where the offender(s) is/are child(ren) the punishment is either community service or counseling.

It must also be noted that the Penal Code (Amendment) Act 2005 has created an offence called Sexual harassment. See section 137A of the said Act. The interesting point about this offence is that only a child in a work place, institution of learning or elsewhere can be a victim. In other words a person aged sixteen years or above cannot suffer sexual harassment but can commit the offence. A child can also commit this offence. Where the offender is sixteen years or older, the minimum sentence is three years imprisonment and the maximum is fifteen years imprisonment; for a child offender the punishment is community service or counselling.



### **Summary**

Rape and defilement fall under offences generally referred to as offences against morality. The existence of the offences seem to be predicated on the need to protect and uphold individual right to dignity/integrity. The understanding that no one has the right to involve himself sexually without the consent of the female partner. Further, with respect to defilement, we notice that consent is immaterial as the child below the age of 16 is incapable of giving valid consent owing to the fact that the mental capabilities of such a female person would not have fully developed.

#### **1.2.3.6 Drug and alcohol abuse**

This is the use of illegal drugs or the use of prescription or over-the-counter drugs and alcohol for purposes other than those for which they are meant to be used, or in excessive amounts. It is worth noting that drug and alcohol abuse may lead to social, physical, emotional, and job-related problems and occurs in both urban and rural communities.

### **1.3 The Criminal Justice System**

Criminal Justice is the delivery of justice to those who have committed crimes while Criminal Justice System refers to the system of practices and government institutions working to maintain social control, deterring and mitigating crime, or punishing those who violate laws with criminal penalties and rehabilitation efforts.

#### **1.3.1 Roles and jurisdiction of the institutions involved in criminal justice**

There are a number of institutions are involved in the criminal justice system and each of them has specific roles and jurisdiction. In order to increase efficiency and effectiveness of the criminal justice system the five key justice institutions namely the Judiciary, National Prosecutions Authority (NPA), the Legal Aid Board (LAB), the Zambia Correctional Service (ZCS) and the Zambia Police Service (ZPS) and some CSOs started working together to improve communication, cooperation and coordination aimed at improving “Easier access to justice” for the poor and vulnerable groups such as women, children and accused persons.

Each law enforcement agency has its own roles and jurisdiction in the criminal justice system as discussed below.

##### **1.3.1.1 Zambia Police Service**

Zambia Police Service (ZPS) which is part of the Ministry of Home Affairs is established as an institution in the Zambian Constitution and regulated by the Zambia Police Act as amended by Act no. 14 of 1999. The ZPS is headed by the Inspector General who is deputised by two Commissioners and supported by several Deputy Commissioners of Police. Under the command of an Inspector General of Police, ZPS has divisions in each of Zambia’s ten provinces, each with responsibility for their respective police districts, police stations and police posts. ZPS has a total of 24 police districts, 148 police stations and 294 police posts nationwide. The ZPS faces serious operational capacity problems<sup>31F6</sup> for instance it only has a total of 13 000 officers which is less than half of the required strength.

According to Article 104 of the Constitution the role of the ZPS is to prevent, detect and investigate crime. The generally responsibilities of the police in Zambia include:

- i) Maintaining law and order;
- ii) Protecting life and property;
- iii) Investigating complaints;
- iv) Detecting and preventing crime;
- v) Co-operating with the local authorities and other security organs as well as with the citizens;
- vi) Receiving complaints of crime;
- vii) Identifying and arresting offenders and ensure they are brought to court;

- viii) Transporting accused persons from police custody to court for their first appearance.

### **1.3.1.2 National Prosecution Authority**

The National Prosecution Authority (NPA) is an autonomous body established by the National Prosecution Authority Act No. 34 of 2010. It is headed by the Director of Public Prosecutions (DPP), who is appointed by the President subject to ratification by Parliament. Article 56 of the Constitution creates the office of the DPP.

The NPA is in charge of prosecuting people charged with criminal offences. The following are some of the functions of the NPA:

- a) To appoint state advocates and prosecutors and promote appropriate standards of practice by state advocates and prosecutors in criminal prosecution;
- b) To process all dockets, prepare charges and prosecute criminal cases and appeals in courts of law;
- c) To implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime;
- d) To cooperate with the police, the courts, the legal profession and other government agencies or institutions so as to ensure the fairness and effectiveness of prosecutions.

The DPP is responsible for instituting and undertaking all prosecutions in Zambia. The same Constitution gives power to the DPP to exercise the following powers:

- a) To prosecute any person before any court, other than a court martial, in respect of any offence alleged to have been committed by that person;
- b) To take over and discontinue any criminal proceedings that have been instituted or undertaken by any other person or authority;
- c) To discontinue at any stage before judgment is delivered such criminal proceedings as may have been instituted or undertaken by NPA or any person or authority.

The Constitution guarantees the independence of the DPP from external interference. Both the Constitution and the Criminal Procedure Code empower the DPP to delegate its functions. In this regards the DPP has delegated its power to public prosecutors which include:

- a) Police prosecutors;
- b) State advocates;
- c) Prosecutors appointed by the DPP;
- d) Prosecutors from:
  - i) The Zambia Revenue Authority;
  - ii) The Anti-Corruption Commission; and
  - iii) The Drug Enforcement Commission.

The role of Public Prosecutors is to ensure that all reported criminal offences are brought before the courts of law and are properly prosecuted. This can be achieved by providing an independent, effective, efficient and fair prosecution service.

### **1.3.1.3 Other law enforcement agencies**

The NPA does not work in isolation because it only has limited jurisdiction. For instance, NPA does not have investigative powers. It is the law enforcement agencies such as the Zambia Police Service, the Drug Enforcement Commission, Immigration Department and Anti-Corruption Commission who have the mandate to investigate crimes. In turn the NPA may provide legal advice to law enforcement agencies during investigations of complex cases. This means that it is important for NPA to work in partnership with the courts, police and other law enforcement agencies, and correctional facilities to ensure efficient delivery of Justice.

#### **a) The Judiciary**

The judiciary is one of the three arms of government. It is established under Part VIII of the Constitution of Zambia and vested with judicial powers. The Judiciary consists of:

1. The Supreme Court;
2. The Constitutional Court;
3. The Court of Appeal;
4. The High Court and specialised courts;
5. The Small Claims Courts;
6. The Subordinate Courts; and
7. The Local Courts.

The Judiciary is an independent institution. The day-to-day affairs of the Judiciary are in the hands of the Chief Administrator, who is answerable to the Chief Justice. The independence of the Judiciary is expressly guaranteed by the Constitution and the Judicial Code of Conduct Act. Apart from the courts there are tribunals such as the Lands Tribunal, the Revenue Appeals Tribunal, the Town and Country Planning Tribunal, etc. which specialise in specific cases. See Unit 1.1 (1.1.3 Court Hierarchy and Jurisdiction in Zambia) for further details on the Judiciary.

**b) Zambia Correctional Service**

Zambia Correctional Service is a department under the Ministry of Home Affairs. The Correctional Service is established under Part VIII, Articles 106 and 107 of the Constitution of Zambia and legislated by the Prisons Act (Cap 97 of the Laws of Zambia) of 1965 and is charged with the following aims:

- i) To provide custody for prisoners;
- ii) To provide correctional services to inmates. Hence, prisons are now called Correctional Facilities;
- iii) To manage prisons generally; and
- iv) Reintegration of offenders into society.

There are 90 correctional facilities, 54 of them standard correctional facilities and 36 open air/farm correctional facilities<sup>32F7</sup>. Zambia's correctional facilities were built prior to 1964 to accommodate 5,500 inmates<sup>33F8</sup> but in May 2018, they housed over 25,000, almost three times the holding capacity, which stands at 8,250 out of which 7,000 are remandees.<sup>34F9</sup> Women constitute 2.6 percent of the total convicted prison population in Zambia.<sup>35F 10</sup> There are correctional facilities where women and children are detained but in different sections from men. The remandees awaiting trial are kept in overcrowded prisons and are held together with convicted criminals<sup>36F11</sup> under inhumane conditions.

The legal framework regulating the Zambia Correctional Service is established by the Constitution, the Prisons Act, the Prisons (Amendment) Act, No. 16 of 2004, the Prison Standing Orders (1968), the Prison Rules (1966), and the Prison Service Principle Guidelines which set out in detail the service's goal and the overall mission of the Ministry of Home Affairs, under which the prison service falls.

The main constitutional functions of ZCS are elaborated under article 193 (4) of the Constitution, supported by Prisons Act, No. 56 of 1965. Some of the functions of the Zambia Correctional Service include the following:

- Manage, regulate and ensure the security of correctional facilities; and
- Punishment of wrongdoers - ensuring that the convicted individual pays some sort of price for their crime;
- Rehabilitation – is the encouragement of prisoners to abstain from criminal behaviour by providing them with social, educational and vocational facilities to such an extent as to enable them to conform to social and economic patterns of life outside prison. This is achieved through discipline, treatment, education and teaching of skills. Rehabilitation aims to restore the individual to a prior

- state by undertaking special programmes that focus on the needs of the inmates so that they are able to reunite with society;
- Parole – is a conditional release of a prisoner from detention to serve the remainder of her/his sentence, subject to prescribed conditions, in the community where s/he comes from;
- Perform other functions as prescribed.

**Note:** Remandees held under correctional facilities are under the responsibility of the facilities and they have to be taken to court as required so that their cases can be heard.

#### 1.4 Punishment

This is the infliction of some kind of pain or loss upon a person for a misdeed (i.e., the transgression of a *law* or command). Theories of punishment include the Retributive theory and the restorative theory.

#### Differences between Retributive and Restorative Justice and their Application

It is necessary for you to consider the differences between retributive and restorative Justice at this point. **Retributive justice**<sup>9</sup> refers to a system of justice that ***focuses on the punishment*** of the offender as opposed to her/his rehabilitation. Retributive justice ***views punishment as the best response to crime*** or the morally acceptable response to crime.

**Restorative justice**<sup>10</sup> is a ***participatory process*** wherein all persons affected by a particular offence, such as the victims, offenders, and the community come together to participate ***collectively resolve the situation that follows the aftermath of a crime***, generally with the help of a facilitator:

Restorative justice is achieved through the process of either negotiation between the parties concerned or mediation;

Restorative justice practices are applied through traditional practices and customary law.

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<sup>9</sup> <http://www.differencebetween.com/difference-between-restorative-justice-and-vs-retributive-justice/>  
Accessed 16 March 2018

<sup>10</sup> Handbook on Restorative Justice Programmes: Criminal Justice Handbook Series, UN, New York, 2006

Restorative justice focuses on the harm done to the victim by healing the wounds and restoring the offender to the community that has been affected by the crime. This is done by implementing the following four tenets of restorative justice:

<b>Process</b>	<b>Application</b>
<b>Inclusion</b>	Seek participation of all those involved: victim(s), friends of victim, police, first responders, lawyers, correction personnel, and anyone in the community who felt affected by the harm.
<b>Encounter</b>	Meet with those willing to participate.
<b>Amends</b>	Offender seeks forgiveness and issues apologies, agrees to pay for damages or works to restore with the community
<b>Reintegration</b>	The entire process will hopefully allow the victim to return to pre-Harm

The difference between retributive and restorative is striking and has been summarised below as tabulated:

<b>Retributive Justice</b>	<b>Restorative Justice</b>
Crime is an act against the state, and a violation of a law	Crime is an act against another person and the community
The criminal justice system controls Crime	Crime control lies primarily in the community
Offender accountability defined as taking punishment	Accountability defined as assuming responsibility and taking action to repair harm
Crime is an individual act with individual responsibility	Crime has both individual and social dimensions of responsibility

<p>Punishment is effective:</p> <ul style="list-style-type: none"> <li>• Threats of punishment deter Crime</li> <li>• Punishment changes Behavior</li> </ul>	<p>Punishment alone is not effective in changing behavior and is disruptive to community harmony and good relationships</p>
<p>Victims are not part of the process</p>	<p>Victims are central to the process of resolving a crime</p>
<p>The offender is defined by deficits</p>	<p>The offender is defined by capacity to make amends</p>
<p>Focus on establishing blame or guilt; on the past (did he/she do it?)</p>	<p>Focus on the problem solving, on liabilities/obligations, on the future (what should be done?)</p>
<p>Emphasis on adversarial relationship</p>	<p>Emphasis on dialogue and negotiation</p>
<p>Imposition of pain to punish and deter/prevent</p>	<p>Restitution as a means of restoring both parties; goal of reconciliation/restoration</p>
<p>Community on side-line, represented abstractly by state</p>	<p>Community as facilitator in restorative process</p>
<p>Response focused on offender's past Behaviour</p>	<p>Response focused on harmful consequences of offender's behaviour; emphasis is on the future</p>
<p>Dependence upon lawyers</p>	<p>Direct involvement by participants</p>

## 1.5 Possible Sentences

- 1.5.1 Imprisonment** (with or without hard labour - the latter being simple imprisonment - SI): where a person is convicted of a felony as opposed to a misdemeanour, he must usually receive a period of imprisonment (or one of its equivalents) whether or not he is sentenced to a fine in addition. He may not merely be fined for a felony but, in addition to a fine, he must at the least be sentenced to a “nominal” custodial sentence (1-day simple imprisonment which he serves the day he is in court before the magistrate) to satisfy the requirements of the law. Women can only be sentenced to SI. Custodial sentences can be suspended.
- 1.5.2 Fines:** there is no use imposing a fine unless the court is satisfied that the accused can pay. The court may allow the accused time to pay and the time allowed should be recorded in the record. The accused may be imprisoned in default of payment where such imprisonment is SI. The period in prison in default of payment should not exceed 9 months unless the law under which the conviction was made expressly authorises a longer sentence. A mere fine may not be awarded for a felony but a fine can be joined with a suspended sentence or a “nominal” sentence - see above.
- 1.5.3 Forfeiture:** may only be ordered under a specific statutory power. The power may be obligatory e.g. on conviction of the unlawful possession of dangerous drugs (psychotropic substances) or discretionary.
- 1.5.4 Compensation:** may be made to the victim out of the fine imposed - see s. 177 of the CPC. Also compensation may be paid under s.174 (compensation in case of frivolous or vexatious charge) and 175. Costs: under s.174 the complainant may be ordered to pay the costs of the accused. In a private prosecution the complainant pays the costs, in a public prosecution, costs will be paid from the general revenues of the Republic. Thus:

When any person is convicted of any offence under Chapters XXVI to XXXI, both inclusive, of the Penal Code, the power conferred by subsection (1) shall be deemed to include a power to award compensation to any bona fide purchaser of any property in relation to which the offence was committed for the loss of such property if the same is restored to the possession of the person entitled thereto.

Any order for compensation under this section shall be subject to appeal and no payment of compensation shall be made before the period allowed for presenting the appeal has elapsed or, if an appeal be presented, before the decision of the appeal.

The sums allowed for costs or compensation shall, in all cases, be specified in the conviction or order, and the same shall be recoverable in like manner as any penalty may be recovered under this Code; and, in default of payment of such costs or compensation or of distress as hereinafter provided, the person in default shall be liable to imprisonment with or without hard labour for a term not exceeding three months, unless

such costs or compensation shall be sooner paid. Costs and compensation to be specified in order; how recoverable.

177(1) Whenever any court imposes a fine, or confirms on appeal, revision or otherwise a sentence of fine, or a sentence of which a fine forms part, the court may, when passing judgment, order the whole or any part of fine recovered to be applied-

- (a) in defraying expenses properly incurred in the prosecution;
- (b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by civil suit.

At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any compensation paid or recovered under section 175 or this section.

**1.5.5 Binding Over:** a person convicted of an offence not punishable by death may, instead of, or as well as, any other punishment, be bound over to keep the peace and to be of good behaviour for a stated period on his own recognisance, with or without sureties.

**1.5.6 Absolute Discharge:** a person convicted of an offence, the punishment of which is not fixed by law and the court considers it appropriate in view of the nature of the offence or the character of the accused, and a probation order is not appropriate, may be absolutely discharged. The accused is unconditionally set free and the discharge does not rank as a previous conviction. [Done where an accused is “technically” guilty but no or minimal moral culpability].

**1.5.7 Conditional Discharge:** the accused is released for 12 months on condition that he does not commit any offence (c.f. suspended sentence where he must not commit specified or similar offences).

**1.5.8 Probation Orders:** are governed by the Probation of Offenders Act and the Juveniles Act. A probation order is made where the court, having regard to the youth, character, antecedents, home surroundings, health, mental condition of the offender, or the nature of the offence or any extenuating circumstances, it considers appropriate. The period is one to three years and the court will explain the order to the accused.

**1.5.9 Approved School Order (at Nakambala):** made under the Juveniles Act and the young offender to committed to an approved school for training.

**1.5.10 Reformatory Order** (at Katombola): made under the Juveniles Act ordering the accused to Katombola Reformatory. This is for recidivist young offenders. A young offender does not go to Katombola directly: first a probation order, then approved school and only then reformatory if the youth continues to offend.

**1.5.11 Community Service:** Instead of going to prison, the accused does some community service - can be embarrassing and humiliating.

**1.5.12 Corrective Training:** Done in prison under the Prisons Act

**1.5.13 Deportation:** In addition to, or in lieu of any other sentence or punishment, the accused may be deported. The High Court recommends to the president that the accused be deported to any part of Zambia as the President may direct.

**1.5.14 Disqualification/Suspension/Endorsement:** this form of punishment involves disqualification, Suspension, endorsement or cancellation of licence such as a driving licence.

**1.5.15 Capital Punishment:** Refers to the death penalty, the ultimate penalty. Imposed for murder, treason and aggravated robbery. Sentence directs that the accused shall be hanged by the neck until dead. Where a woman is convicted of a capital offence and she claims to be pregnant, the question of if she is or not is determined by the court. Evidence will be called either by the defence or the prosecution and the court will presume she is not pregnant unless it is firmly proved that she is pregnant. A finding of not pregnant by a subordinate court is appealable to the High Court. If the High Court is satisfied, it will quash the finding and pass the sentence of life imprisonment on the woman.

### **1.3 Role and Limits of Paralegals in the Criminal Justice System**

As already discussed, the criminal justice system is complex and proper advice should be sought when one is charged with a criminal offence.

Paralegals level 1 have limited roles in the criminal justice system (**refer to Module 5 for further details**) and some of the important ones include the following:

- (a) Conducting awareness raising on key topics under criminal law and procedure such as:
- Distinction between crime and a moral wrong, and between crime and a civil wrong;
  - Common offences experienced by community members, in particular:
    - Sexual offences;
    - Assault;
    - Theft;
    - Other common offences occurring at community level.

- Institutions involved in the criminal justice system and their roles/jurisdiction;
- Steps followed in criminal procedure in particular in relation to arrest and pre-trial detention;
- Rights of suspects, detainees and even those already convicted;
- How community members can still make a civil claim after the offender has been prosecuted.
- In terms of awareness raising, paralegals can also play the following key roles:
  - Talk about myths about sexual assault and its victims and perpetrators so
  - that community members can open up and start reporting those crimes;
  - Develop key messages about common offences;
  - Sensitise community members and stakeholders so that they realise that:
    - It is important to report crimes to the police;
    - As with any crime, police rely on help from the public to detect offences and prosecute offenders;
  - Work with communities and police to establish Community Crime Prevention Units.
- (b) Providing legal information;  
 Providing orientation, referrals and accompaniment services – where clients will be directed where to find certain offices or institutions; and referrals – either to their supervisors or other justice institutions like the Legal Aid Board or CSOs working with lawyers or running Legal Services Units or legal desks based in correctional facilities or police stations. As need arise, paralegals may accompany their clients to relevant justice institutions such as police and social welfare;
- (c) Providing legal advice;
- (d) Providing legal assistance including basic legal drafting and follow ups on matters, e.g. locating family members of remanded persons within their communities under instruction.

It is important for paralegals level 1 to seek support from supervising officer when unsure about the law or when confronted with a difficult or complex question or situation



## Summary

It is important to recognise that when we talk about institutions involved in the criminal justice system, we refer to the systems and institutions put in place for purposes of enforcing criminal laws that we have put in place. Hence, for the criminal justice system to bear fruits, each and every institution must play an effective role thereby feeding into criminal justice system as a whole.



## Assessment 1

Cleopatra was so furious when she heard that her neighbour Mary was telling others that she was a witch in the compound. Finally, the two met and Cleopatra decided to teach Mary a lesson and gave her four quick blows which left Mary defaced as two of her front teeth broke off.

What kind of a case is this?

Where should Mary report this matter and for what?

Who should decide to deal with this matter as a crime or as a civil matter?

### **Suggested response:**

From the legal point of view, what Cleopatra has committed is a criminal offence of assault. However, there are times, when the same act can give rise to both civil and criminal liability. For example, in an assault case as above, the attacker may face both, criminal charges for the crime of assault and a civil lawsuit in which the victim may claim for damages or compensation for broken tooth, the medical bills, lost work time and/or emotional distress of the victim.

Mary can report the matter to the Police so that the state can institute criminal proceedings. The Police will decide how to deal with the matter.

# UNIT 2 LAW RELATING TO JUVENILE CASES AND DIVERSION MECHANISMS

## Introduction

In this unit you will learn, understand, apply the law relating to Juveniles in Zambia. You will also learn what diversion of juveniles is, the components of diversion, available diversion mechanism and the institutions involved in the diversion programme.



## Unit Outcomes:

**On completion of this Unit, the trainee will;**

1. Explain steps followed in the juvenile justice system
2. Explain diversion of juveniles from the criminal justice system
3. Explain available diversion mechanisms

## 2.1 Steps followed in the Juvenile Justice System

### 2.1.1 Juveniles Act Cap 53

Section 2 of the Juveniles Act defines a juvenile as one who has not attained the age of 19. The court procedure in respect of a juvenile is set out in part 3 which provides for the establishment of juvenile courts.

### 2.1.2 Juvenile Court

Juvenile Offenders to be dealt with by Juvenile Court. Section 63 of the Act establishes the juvenile Court (JC). A JC is a subordinate court sitting for the purposes of: hearing any charge against a juvenile; or exercising any other jurisdiction conferred on juvenile courts by or under this or any other Act. The High Court has no jurisdiction to hear a case which section 64(1) requires to be tried by a juveniles court the High Court has jurisdiction where a juvenile is jointly charged with an adult and in cases relating to homicide.

### 2.1.3 Procedure before a Juveniles Court

The procedure in the Juvenile Court is similar to that in other courts except the Subordinate Court must state that it is sitting as a juvenile court and follow the procedure set out for sitting as a juvenile court.

1. The Court has a duty to ascertain age at the earliest opportunity. Section 118 provides that where a person charged with an offence is brought before any court and it appears to the court that he is a juvenile, the court shall make due inquiry as to the age of that person.
2. Section 119 (1) requires the juvenile court to sit in a room other than that in which any courts other than juvenile courts ordinarily sit, unless no such other room is available or suitable, and if no such room is available or suitable, the juvenile court shall sit on different days or at different times from those on or at which ordinary sittings are held.
3. Section 119(2) limits persons who can be present at any sitting of a juvenile court, or at any sitting of the High Court when hearing charges against a juvenile jointly charged with a person who is not a juvenile, these are:
  - members and officers of the court; parties to the case, their legal advisers, and witnesses and other persons directly concerned in that case;
  - bona fide representatives of newspapers and news agencies; and
  - such other persons as the court may specifically authorise to be present.
4. Section 127- requires that the parent or guardian must be present. The requirement is intended to prevent the juvenile being prejudiced. A Parent or guardian must attend throughout proceedings although can be dispensed with where such parent or guardian-
  - Cannot be found and does reside within a reasonable distance and the court is satisfied that it would be unreasonable to require his attendance.
  - where the juvenile was, before the institution of the proceedings, removed from the custody or charge of his parent by order of a court.
5. Where a juvenile is arrested or taken to a place of safety, the parent must be informed.
6. If any parent or guardian who has been required to attend as aforesaid, having received reasonable notice of the time and place at which he is required to attend, fails to attend accordingly, and does not excuse his failure to the satisfaction of the court, he shall be liable to a fine not exceeding three hundred penalty units.
7. Section 64 subsection (2) -after explaining the substance of the alleged offence, the court shall ask the juvenile whether he admits the offence.
8. Section 64 Subsection (3) provides that where a juvenile admits the offence, a juvenile court, other than a court presided over by a senior resident magistrate, resident magistrate or such other magistrate as the Chief Justice may designate for the purposes of this section, shall in any case where the juvenile is not legally represented then hear the evidence of the witnesses in support thereof.

9. Section 64 Subsection (4)-At the close of the evidence in chief of each witness, the magistrate shall, if the juvenile is not legally represented, ask the juvenile, and the juvenile's parent or guardian if present in court, whether he wishes to put any questions to the witness.
10. Section 64 Subsection (5) where a juvenile who is not legally represented instead of asking questions by way of cross examination, makes assertions, the court shall then put to the witness such question as it thinks necessary on behalf of the juvenile and may for this purpose question the juvenile in order to bring out or clear up any point arising out of such assertions.
  - The prosecution shall have the right to re-examine the witness upon the answers to such questions.
11. Section 64 subsection 6 where a prima facie case is made out, the evidence of any witness for the defence shall be heard and the juvenile shall be allowed to give evidence or make a statement.
12. Section 68 provides for the abolition of the terms "conviction" and "sentence" in respect of juveniles Instead it will be a finding of guilty, or an order
13. Section 64 Subsection (7) If the court is satisfied that the offence is proved, juvenile shall be invited to say anything in extenuation or mitigation of the penalty or otherwise.
  - Before deciding how to deal with him, the court shall, if practicable, obtain such information as to his general conduct, home surroundings, school record, and medical history as may enable it to deal with the case in the best interests of the juvenile, and may put to him any question arising out of such information. For the purpose of obtaining such information or for special medical examination or observation, the court may from time to time remand the juvenile on bail or to a place of detention so, however, that he appears before a court at least once in every twenty-one days.
14. Section 67 provides that any court by or before which a juvenile is found to have committed an offence other than homicide may transfer the case to a juvenile court in the place where the offender was committed for trial, or for the place where the offender resides; and, where any such case is so transferred, for sentencing
  - No appeal shall lie against an order of transfer made under this section,
  - The appeal against the order of the juvenile court shall as if juvenile was tried by that court
15. Section 72 limits punishments that may be imposed on juveniles in the following terms:

- No child shall be sentenced to imprisonment or to detention in a detention camp.
- No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other manner.
- A court shall not order a child<sup>11</sup> to be sent to a reformatory unless the court is satisfied that having regard to his character and previous conduct, and to the circumstances of the offence, it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a reformatory.

16. Section 73- sets out the methods of dealing with offenders;

- by dismissing the charge;
- by making a probation order in respect of the offender;
- by sending the offender to an approved school;
- by sending the offender to a reformatory;
- by ordering the offender to pay a fine, damages or costs;
- by ordering the parent or guardian of the offender to pay a fine, damages or costs;
- Section 74-can order fine, damages, costs, security for good behaviour whether the juvenile has been convicted or acquitted
- by ordering the parent or guardian of the offender to give security for the good behaviour of the offender;
- where the offender is a young person, by sentencing him to imprisonment;
- by dealing with the case in any other manner in which it may legally be dealt with.

#### **2.1.4 Subordinate Courts Act Cap 28 of the Laws of Zambia**

Juveniles can be dealt with by Subordinate Courts sitting as Juvenile Courts. Section 3 of Cap. 28 of the laws of Zambia establishes Subordinate Courts. It provides as follow:

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<sup>11</sup> A child is defined by section 2 of Cap 53 as a person who has not attained the age of sixteen years

*“There shall be and are hereby constituted courts subordinate to the High Court in each District as follows:*

- a) a Subordinate Court of the first class to be presided over by a principal resident magistrate, a senior resident magistrate, resident magistrate or a magistrate of the first class;*
- b) a Subordinate Court of the second class to be presided over by a magistrate of the second class;*
- c) a Subordinate Court of the third class to be presided over by a magistrate of the third class.”*



### Activity 1

- 1) Is there justification for the establishment of Juvenile Courts?
- 2) Outline the procedure observed by the Juvenile court.
- 3) What role is played by the subordinate courts in Child Justice?

## 2.1.5 Criminal capacity of juveniles

Section 14 of the Penal Code sets out the age of criminal responsibility of persons. It provides that a person below 8 is not criminally responsible, one below 12 is responsible only when they know and is incapable of having carnal knowledge.

### Situation of young offenders

#### ***a) Arrest***

The Zambia Police play an important role in the dispensation of child justice. They are usually the first stakeholders to come in contact with the alleged child offenders. During Arrest the Police must act in the best interest of the child offender by: ensuring that the age of the offender is ascertained, explaining the rights of the child offender, ensuring that there is guardian or social welfare officer during the questioning, separating the child offender from adult offenders and granting Police Bond.

#### ***b) Trial***

Trial of Juvenile Offenders must be conducted in accordance with the procedure set out in the Juveniles Act. The proceedings must be held in camera in the presence of a parent or guardian or Social Welfare Officer. Trial of a child offender must be held in a child friendly court. The best interest of a child offender should be the overriding principle. Juvenile Offenders must be tried by the Juvenile Court except in cases where they are jointly charged with adults.

***c) Sentence and confirmation orders***

Sentences to be meted out on child offenders is restricted by section 73 of the Juveniles. A Child Offender should only be given a custodial sentence only when such offender cannot properly be dealt using other methods. Confirmation of certain orders made by the Juvenile Court is done by the High Court. Approved school orders and Reformatory School orders require confirmation by the High Court. This should be done quickly.

***d) Child friendly courts***

These are courts specifically designed to deal with child offenders. They are equipped with facilities aimed at providing a comfortable environment during proceedings.

***e) Role of the Department of Social Welfare***

The department of social welfare is the principal agency in the promotion and protection of the rights of children in the criminal justice system. When it comes to dealing with child offenders, social welfare officers are usually brought into the child justice system as law enforcement agents as they get cases referred to them for the purpose of conducting social investigations and submitting reports and recommendations to the courts. Depending on the order made by the courts, social welfare officers may be called upon to implement such orders e.g. probation orders which give them the power to provide counselling and education services to probationers. The role of the Social Welfare Department is to: assist the child from the moment of arrest; prepare a social inquiry report; organize diversion; supervise child offenders in the community; and support (Rehabilitation) of incarcerated child offenders.



## Activity 2

- 1) Discuss the capacity for criminal liability?
- 2) Explain the situation of juvenile with regard stages in the criminal justice system and institutions involved.

## 2.2 Diversion of Juveniles from the criminal justice system

### 2.2.1 Definition

Diversion is defined as the channelling of young people from the criminal justice system into programmes that make them accountable for their actions.

### 2.2.2 Components of diversion programme

Diversion programs serve as an alternative to law enforcement or court involvement and include a range of initiatives, such as intensive supervisory probation, restitution, mandatory community service, and specialized courts. Diversion may occur before or after the filing of the criminal charge. Successfully completing diversion requirements usually results in a charge being dropped or reduced, while failure may result in the restoration or heightening of the original penalties.

An ideal juvenile justice system must provide measures, where appropriate, that ensure that children in conflict with the law are not subjected to criminal proceedings. The system must also provide a variety of alternatives to institutional care. The use of diversion seeks to resolve the case of a child in conflict with the law without recourse to a formal hearing before the relevant competent authorities. Diversion may range from an informal police caution to a reconciliation scheme between victim and offender run by social welfare department.

Art. 40(3)(b) of the Convention on the Rights of a Child provides that whenever appropriate and desirable, states-parties shall seek to promote measures for dealing with children without resorting to judicial proceedings provided that human rights and legal safeguards are fully respected. A key principle of diversion is that the child and/or his or her parents or guardians must consent to the diversion of the child's case. Typically, this means that the child accepts responsibility for the offence.

In Zambia, there is no specific law that provides for diversion programmes for children in conflict with the law other than s.73(1)(j) of the Juveniles Act which provides for dealing with the juvenile's case in any other manner in which it may legally be dealt with. This provision by the inclusion of the word 'legally' may imply that unless there is a specific way of disposing of a juvenile's case as provided by statute, a court may not deal with the juvenile's case in any other manner.

## 2.3 Available diversion mechanisms

There are various diversion mechanisms which can be employed in ensuring that child offenders are channelled away from the Criminal justice system.

### (a) Pre-trial

Diversion should include a decision by law enforcement agents like Police to take no further action, issue a caution and or refer to social welfare department. Diversion should occur before a charge is entered. It should involve an educational component on dangers of committing crime. Resolution of juvenile cases in accordance with African customary law should be encouraged unless the observance of such customary law would not be in the interests of such juveniles.

### (b) Diversion during trial

Cases involving juvenile offenders should be resolved through plea agreement pursuant to the Plea Negotiations and Agreement Act No. 20 of 2010. Further, reconciliation of minor criminal cases in accordance section 8 Criminal Procedure Code should be utilized.

### (c) Post-trial diversion

The juvenile court can met out orders other than custodial sentence when dealing with juvenile offenders. Punishment by imprisonment should be the last resort. Orders such as approved school order and the reformatory school order provided for in the Juvenile Act is preferred in dealing with the juvenile offender which essentially removes the child from the rigorous custodial punishment. Further, the provisions of the Criminal Procedure Code under section 306A relating to community service and counselling are useful diversion mechanisms.



### Activity 3

What diversion mechanisms are available?

## **2.4 Institutions and organisations mandated to provide counselling and other diversion services**

The key service providers that make up the criminal justice of Zambia include

### **2.4.1 Zambia Police**

The Police Service is established in pursuant to Article 193 of the Constitution of Zambia and its operations are regulated by the Zambia Police Act, (Cap. 107 of the Laws of Zambia). The police play an important role in the dispensation of child justice especially that they are usually the first stakeholders to come in contact with the alleged child offender.

### **2.4.2 Subordinate Courts**

In terms of child criminal justice, the Juveniles Act establishes every subordinate court as a juveniles/children's court for the purpose of hearing any charge against a child; or exercising any other authorities conferred on it by or under the Juveniles Act or any other Act. A juvenile court is empowered to hear and dispose of any case against a child offender other than homicide or attempted murder.

### **2.4.3 The Zambia Correctional Services**

The Zambia Correctional Service is established in pursuant to Article 193 of the Constitution of Zambia. It is entrusted with the management and control of prisons and prisoners lodged therein in conformity with the provisions of section eight of the Prisons Act.

### **2.4.4 The Department of Social Welfare**

The department of social welfare is the principal agency in the promotion and protection of the rights of children in the criminal justice system. When it comes to dealing with child offenders, social welfare officers are usually brought into the child justice system as law enforcement agents as they get cases referred to them for the purpose of conducting social investigations and submitting reports and recommendations to the courts. Depending on the order made by the courts, social welfare officers may be called upon to implement such orders e.g. probation orders which give them the power to provide counselling and education services to probationers. The department is mandated to provide counselling to Juveniles.



#### **Activity 4**

Discuss the institutions involved in the diversion process?



#### **Summary**

Diversion is the process of channeling away child offenders from the justice system. Several components are involved in diversion. Various institutions play key roles in the diversion programmes.

# **UNIT 3      LAW RELATING TO OFFENCES AGAINST THE PERSON, AGAINST PROPERTY AND ROAD TRAFFIC OFFENCES**

## **Introduction**

This unit is designed for you to learn, understand, apply and evaluate various aspects of the criminal law.. It introduces you to the offences against the person, property, and road traffic offences. The unit further introduces you to the minimum sentences that the court can impose, potential defences and mitigating circumstances in relation to the offences in question.



## **Unit Outcomes**

On completion of this unit, you will:

1. Understand and apply knowledge acquired with respect to offences against the person, including minimum sentences, potential defences, and mitigating circumstances.
2. Understand and apply knowledge acquired in relation to offences against property, including minimum sentences, potential defences and mitigating circumstances
3. Understand and apply knowledge acquired in relation to road traffic offences, including minimum sentences, potential defences and mitigating circumstances.

## **3.1 Types of offences against the person, including minimum sentences, potential defences and mitigating circumstances**

### **3.1.1 Offences against the Person**

#### **3.1.1.1 Non-Fatal Offences Against the Person Introduction**

You will note that there are offences which may result in death, serious injuries or lesser harm. These offences have been broadly classified into two categories, namely fatal offences against the person and non-fatal offences against the person. The offences in the first category are murder and manslaughter; and those in the other category are doing grievous bodily harm, unlawful wounding, assault occasioning actual bodily harm, and common assault.

Under this head you will begin by looking at offences non-fatal offences. The main ones include doing grievous harm, unlawful wounding, assault occasioning actual bodily harm, and common assault.

### **(a) Doing Grievous Harm**

The offence is created by section 229 of the Penal Code and the maximum punishment is seven years imprisonment. Grievous harm is defined in section 4 of the Penal Code. It would appear that the omission of the word 'bodily' from the term 'grievous harm' points to psychiatric injury being had in contemplation under this offence

#### **(i) Actus Reus**

It is basically the doing (inflicting) of grievous harm. The Penal Code defines 'grievous harm'. Note that in *DPP v. Smith* (1961) AC 290, the House of Lords defined grievous harm as really serious harm. Such harm includes broken limbs, severe internal injuries, or anything which significantly disables the victim, whether permanently or temporarily. As stated earlier, psychiatric injury is also included.

#### **(ii) Mens Rea**

The prosecution must prove either intention to do grievous harm or recklessness. The accused person must be shown to intend some harm, be it physical or psychiatric, serious or otherwise.

Television Chibuye v. The People (1978) ZR 43



### **Activity 1**

1. What is your understanding of the offence of grievous harm?
2. What are the elements that constitute the offence of grievous harm?

### **(b) Unlawful Wounding**

This offence is created by section 232 of the Penal Code and its maximum penalty is three years imprisonment. A wound is defined in section 4 of the said code and from this

definition, you would note that a wound can only be caused by some instrument or weapon with a cutting edge or point. It is also necessary that both the inner and outer skin are broken if a wound as defined by law is to be suffered. The prosecution needs not prove any assault.

You must also understand that intention is of the essence in this offence. The prosecution must prove either that the accused intended to wound or that he must have realized that some harm might result from his acts.



## **Activity 2**

John, who is an active member of your community overheard police officers discussing amongst themselves, to the effect that, a wound is only a wound when caused by a sharp instrument. John comes to you to find out whether this is true or not. He further wants to find out from you the justification as to why a wound is linked only to a sharp instrument.

### **(c) Assault Occasioning Actual Bodily Harm**

This is under section 248 of the Penal Code. It is a misdemeanour and the maximum penalty is five years imprisonment. 'Actual bodily harm' is not defined in the Penal Code. However, it must be noted that it includes any harm or injury whether physical or mental calculated to interfere with the health or comfort of the victim. The harm or injury needs not be permanent nor need it amount to grievous harm. Whereas this kind of assault includes psychiatric injury, mere fear or hysteria or emotions of panic or distress do not qualify. Proof of psychiatric injury is by expert evidence.

The actus reus of this offence is an assault which causes or occasions actual bodily harm. The mens rea is proof of the mens rea for assault or battery (which we shall consider under the succeeding head). No mens rea needs be proved in respect of occasioning of harm.

#### **(i) Common Assault**

This is the least serious of the offences against the person. Section 247 of the Penal Code creates this offence which is a misdemeanour with a maximum penalty of one year's imprisonment. This is one of the offences in which the Subordinate Court is empowered to promote reconciliation and settlement by amicable means under section 8 of the Criminal Procedure Code.

The expressions 'assault' or 'common assault' are often generally used to cover both a technical assault and battery. Thus, common assault is considered here in light of technical assault and battery.

## **(ii) Technical Assault**

A technical assault is a threatened battery. Thus, to pick up a stone and throw it at another or to point an unloaded gun at him provided he does not know that it is unloaded, is an assault. The actus reus of technical assault is causing the victim to apprehend immediate force or violence being applied to his person. Physical contact between the accused person and the victim is not necessary to prove this assault. The capacity of the accused person to use force will be taken into account by the courts. The rationale for this appears to be that there can be no apprehension of immediate personal violence where the accused lacked capacity to implement his threats. Thus, an angry motorist who shakes his fists at another motorist for bad road manners is not guilty of assault.

The mens rea consists in proof of either an intention to create in the victim the expectation of application of immediate unlawful force or violence on his person, or recklessness to that effect. Therefore, an act without intention or recklessness is not an assault.

## **3.2 Types of offences against property, including minimum sentences, potential defences and mitigating circumstances**

### **3.2.1 Actus Reus of Theft**

#### **3.2.1.1 Taking**

This refers to appropriation or assumption or carrying something. The assumption of the right of the owner of the thing may imply the carrying of the thing. For this reason the taking in theft must be factual. The taking should not be understood to involve movement of the thing to a very distant place; it is sufficient that the thing has been completely removed from where it originally was in the owner's possession. There cannot be a theft where the taking of something is with the consent of the owner of the thing unless the consent has been obtained by fraud or false pretences.

#### **3.2.1.2 Anything Capable of Being Stolen**

Section 264 of the Penal Code is instructive on the question of things capable of being stolen. It should be noted that from the wording of this section only movable property is capable of being stolen and this includes money and all other property personal or otherwise as well as intangible property. Land is incapable of being stolen.



### Activity 3

List the things that are capable of being stolen.

#### 3.2.1.3 Belonging to Another

Obviously one cannot steal one's own things and therefore, there can only be theft of another person's property. The property must belong to another at the moment of the taking. The owner may be a general owner or special owner. It must be pointed out that the person who has possession or control of the thing, or has a proprietary right or interest, is deemed to be the owner for present purposes.

#### 3.2.1.4 Mens Rea of Theft

The prosecution must prove that the accused person took the thing fraudulently and without claim of right. Section 265(2) of the Penal Code is instructive on what amounts to acting fraudulently. Suffice to say though that it includes intent permanently to deprive the general or special owner of his property.

It must be added that where the accused has a bona fide belief that he has a right to keep or deal with somebody else's property or believes the property to be his, there is no theft.



### Activity 4

- (a) What do you understand by the term theft?
- (b) What are the elements of theft and how do you prove them?
- (c) What do you understand by the phrase 'things capable of being stolen'?

#### 3.2.2 Robbery

Robbery is a felony and is created under section 292 of the Penal Code. Its essence is that there must be a theft and threatened or actual use of violence at the time of the theft, or immediately before or immediately after the theft. It is more serious than theft. Therefore the actus reus of robbery is theft and threatened or actual use of force. The mens rea for theft applies to robbery but the element of an intention to use force is added.



### Activity 5

What do you think are the major differences between theft and robbery?

#### 3.2.2.1 Aggravated Robbery

Aggravated robbery is created by section 294 of the Penal Code is more serious than robbery; in fact the law regards it as the most serious offence relating to property. A minimum punishment of fifteen years imprisonment is prescribed for this offence; but where a firearm was used in the robbery there is a mandatory death sentence to be imposed. There must be a theft obviously but this time around the threat or force required for robbery must be accompanied by the accused being armed with an offensive weapon. The mens rea for theft applies but intention to use force is added.



### Activity 6

1. Discuss the ingredients that must be proven by the prosecution in order to secure a conviction with respect to the offence of aggravated robbery.
2. What do you understand by the phrase “offensive weapon” ?
3. Distinguish robbery from aggravated robbery

#### 3.2.2.2 Housebreaking and Burglary

The Penal Code in section 301 creates two distinct offences relating to breaking into a dwelling house or building. Each one of them requires a breaking into or entry. All other elements of these offences are the same; the only difference is the time at which they can be committed. Housebreaking happens during the day time whereas burglary happens in the night. In terms of punishment housebreaking attracts a maximum sentence of seven years imprisonment whereas burglary attracts a maximum of ten years imprisonment.

The essence of these offences is that they are committed either by entering a building as a trespasser with intent to steal, or by stealing after entering a building or part of a building. The reference to 'intent to commit a felony therein' makes the section somewhat vague. However, the phrase ought to be understood to include a myriad of felonious offences such as theft, rape, doing grievous harm on any person in the house or building.

### ***Actus Reus***

The prosecution must prove that the accused entered a dwelling house or a building or part of it as a trespasser. As regards entry there is no need to show that the accused broke into the building but merely that he entered.

The accused must have entered as a trespasser or remained in the building as a trespasser. Therefore, where the accused entered the building without permission, or having entered with permission but remains in the building when the time for his stay has elapsed, he is a trespasser.

As to what constitutes a building, it is noteworthy that the term should be understood in its natural and ordinary meaning. Suffice to say that some degree of permanence is required; and thus a tent may not be classified as a building for purposes of these offences. Buildings cover dwelling houses, shops, warehouses and factories. Sometimes, the question may arise as to whether a certain structure can be classified as part of a building such as a dwelling house. Read the case of *Mumba v. The People* (1971) ZR 125 for guidance on the point.

### ***Mens Rea***

The prosecution must prove that the accused person intended to enter the building or part of it knowing of the facts which render his entry a trespass in law, or at least realizing that such facts may exist (recklessness). There must also be an intention to steal from the building or part of it, or to commit any felony therein.



### **Activity 7**

- 1) How is the offence of house breaking distinguishable from burglary?
- 2) What are the constituent elements of each one of these two offences?
- 3) What do you think is the reasoning for Burglary to carry a higher maximum sentence than house breaking?

### **3.2.2.3 Obtaining Goods by False Pretences**

The offence is created by section 309 of the Penal Code. It is a misdemeanour for which a maximum sentence of three years imprisonment is prescribed. The prosecution ought to prove that the accused obtained or induced delivery of anything capable of being stolen and belonging to another person by false pretences. This is the actus reus of this offence. The prosecution must also satisfy the court that the accused person acted fraudulently with intent to permanently deprive the owner, or that he deliberately or recklessly made a false representation.

The concepts of ‘anything capable of being stolen’ and ‘belonging to another’ as well ‘fraudulently’ and ‘intent permanently to deprive’ have been considered above under the head of theft. The concern here therefore is to briefly consider what is meant by ‘false pretence’ and ‘obtaining or inducing delivery...’ It is essential to prove that the accused person made a false representation to the victim and the latter believed it to be true; and as a result of such belief the accused obtained goods, or the victim was induced to deliver goods.

As to obtaining or inducing delivery of anything capable of being stolen, the prosecution must show that the accused person obtained ownership or possession or control by false pretences.

### **3.2.2.4 Receiving Property Stolen Or Unlawfully Obtained**

Offences involving receiving and disposal of stolen or unlawfully obtained property are regarded as being more serious than theft because the recipient of such property provides the thieves with incentives to continue the practice.

The Penal Code does not define ‘stolen goods.’ However, to secure a conviction it must be proved that the goods were stolen and that this fact was known to the accused person or he must have had reason to believe that they were stolen. It would appear that stolen goods include those obtained by false pretences, among others. It must be noted that goods cease being stolen goods when they are restored to the owner or are taken over by the police or when they are bought by a bona fide purchaser for value without notice (as where one buys a stolen car in a market overt). The actus reus of the offence consists of receiving and retaining stolen goods or goods unlawfully obtained. Retention means keeping possession of the property; it is a continuing activity.

The mens rea consists of receiving or retaining the goods fraudulently and knowing or believing them to have been stolen or unlawfully obtained. The test is a subjective one and the accused must have actually known or believed the goods to have been stolen or unlawfully obtained. It may not be sufficient to say that it would have been obvious to any

reasonable person that the goods were stolen or unlawfully obtained. Mere suspicion that the goods were stolen or unlawfully obtained is not enough.



## Activity 8

Hambija was charged with the offence of being in possession of stolen property contrary to Section 319 of the Penal Code, Chapter 87 of the Laws of Zambia. It was alleged that on 2<sup>nd</sup> of June 2017, Hamabija's seven-year-old nephew entered Mwanakalongo's house, (Hambija's neighbour) and returned with a sum of K4000 wrapped in an envelope. Hambija grabbed the money from the boy and encouraged him to go and look for more money in the house. When his nephew returned empty handed, Hambija threatened to beat him, until his nephew succeeded in bringing a further K2000 and handed it over to Hambija. Upon arrival from the field, Mwakalongo was informed by his vigilant neighbours that they saw Hambija's nephew carrying something from his house and handing it to his uncle. Mwakalongo reported the matter to the police, who searched Hambija's house and recovered a total of K6000. The police have since forwarded the file to the National Prosecution Authority for prosecution of Hambija.

The Director of Public Prosecution has requested you to draft a legal opinion on the prospects of securing convictions in respect of Hambija and his son.

### 3.2.3 Defences

#### 3.2.3.1 Infancy (Criminal Capacity)

Section 14 of the Penal regulates capacity to commit crimes. Infants under 12 years (with some exceptions) are exempted from criminal liabilities. The section divides them into three categories;

- a) **Immature Age (*DoliIncapax*)**. In Zambia a person under 8 years of age is not responsible for any act or omission even though there is clearest evidence that the child caused the *actus reus* with the requisite *mens rea*. The child is therefore exempt from criminal liability until a day before his eightieth birthday. This is an irrebuttable presumption. The rule is stated as a conclusive presumption that the child is "*doliincapax*."

- b)** Section 14 (2) stipulates that a person under 12 years is not criminally liable unless it can be shown that he knew or ought to have known that what he was doing was wrong. This is a rebuttable presumption. The presumption can be rebutted by showing mischievous discretion. Proof of mischievous discretion can be achieved by showing that the child could “discern between good and evil at the time of commission of the offence”. This is a category of over 8 and under 12 years.

In *R v FC* (a juvenile) 2 N R L R 185 A boy aged 10 years stole a watch and sold it. At the time of selling he **told a lie** that he had been authorised to sell it. From the lie it showed that he knew that what he was doing was wrong.

- c)** A male person aged 12 years is incapable of having carnal knowledge. This is a rule of law and no rebuttable evidence is allowed. See Section 14 (3).

### **3.2.3.2 Ignorance of the Law**

S. 7 PC. States that Ignorance of the law does not afford an excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence. All men are presumed to know the law of their country and of other jurisdictions.

The general rule is that ignorance of the law is no defence. The Latin maxim for this is “*ignorantia juris quod quisque scire tenetur non excusant*” which means “ignorance of the fact excuses, but ignorance of the law does not excuse.” If it were to be an excuse no one will be convicted.

In *Bilbie v Lumley* the judge said,

***“Everyman must be taken to be cognizance of the law; otherwise there is no knowing to what extent the excuse of ignorance might be carried. It would be argued in almost every case”***

In *R v Bailey* (1800) Russ & N 1, a sailor was charged and convicted of contravening an act of Parliament enacted while he was away at sea. He pleaded ignorance of the law but his defence failed. Bailey was found guilty of contravening the law enacted while he was at sea. An exception to this rule is when the law makes knowledge an element of the offence. For example if the statute states that: ‘Any person who knowingly...’

*R v Esop* (1836) *m 7 C & P 436*.  
All men are presumed to know the law.



## Activity 9

Discuss the applicability of the defence of ignorance of the law and immature age.

### 3.2.3.3 *Bona fide Claim of Right* (s. 8 of the PC)

This defence only relates to crimes involving property. It is usually applied in cases of theft; however there is judicial authority that it can apply to malicious damage as well. S.8 of the Penal Code CAP 87 provides that:

***“A person is not criminally responsible of an offence relating to property, if the act done or omitted to be done by him was in the exercise of an honest claim of right and without intention to defraud.”***

There must be *bona fide* belief held in good faith. He must have belief that he had a right to do as he did not a belief that his act is no crime. Thus the act must be done with an honest claim of right and with not intention to defraud.

There must be some belief in a right against which the person holds the property on condition that the right will be met. In *R v Malamula (1962)* R & N 553; two people, accused and the complainant were involved. Accused owned an oxcart which he hired to the complainant at a fee. When complainant brought back the oxcart he paid the hire fee, but a pump was missing from the oxcart. Accused demanded compensation which was not forthcoming so he went to complainant's house and collected a bicycle belonging to the complainant. He was convicted of theft and the High Court quashed the conviction for the reason that the public prosecutor had failed to negative the accused's defence of claim of right to keep the bicycle to enforce payment.

*R v Halford (1868)* 11 Cox C C 88

The holding in this case was that where an accused has a claim of right he could not be held responsible of an offence.

***In R v Wade (1869)*** 11 Cox C C 549; the accused kept umbrella until he would be paid. He retained an umbrella he had repaired until upon being paid for his labour.

In ***Matiya Mwachilama v TP C.A.Z. Appeal No. 61 of 1972***; the accused was convicted of stock theft in the High Court after he had kept cattle that had strayed on to his land and eaten his crops. He believed that he had right to keep them as he could not find the owner and he had lost his maize. He detained cattle in order to be compensated for his crops that were eaten.

With malicious damage this defence can be proved that:

- (a) the accused acted in bona fide exercise of a supposed right;
- (b) did no more damage than would reasonably be necessary for its assertion.

Look up *Webb v Stanfield* [1966] Crim. L. R. 449; *R v Benard* (1938) 2 K B 264; *R v Smith* (1974) 1 ALL E R 632; *R v Clem* (1898) 1 Q B 566 and, *Soko v R* [1961] R & N 847

### **3.2.3.4 Intention and Motive**

Unless an intention to cause a particular act is expressly declared the reason or motive for causing result intended by the act or omission is immaterial unless the statute that creates the offence makes it an element of that offence.

Intention and motive is a defence where an act occurred independent of his will except where negligence is an element of the offence. *R v Matengula* 5 N R L R 148;

Under section 9 (3) the reason or motive for causing result intended by the act or omission is immaterial unless the statute that creates the offence makes it an element of that offence. For example, section 137 (3) (a) provides for an offence where indecent curiosity is an element of the offence.

Section 9 of the Penal Code CAP. 87, ***R v Serne (1887) 16 Cox C C 311***;

Under Section 9 (2) Intention and motive is a defence to cases of specific or ulterior intent or omission stated as an element of the offence.

*R v Smith (1960) 2 Q B 423*;

In *R v Windle (1952) K B 826* motive was irrelevant.

### **3.2.3.5 Mistake of Fact - section 10 of The Penal Code CAP. 87**

For this defence to succeed the accused must show that he/she acted or omitted to act under an honest and reasonable but mistaken belief in the existence of the state of affairs. The mistake must be of fact not law. It must be an honest belief and it must be reasonable and on the existence of the facts as he saw them it would not amount to a crime. See *Fabiano Kinene & Ors.*, (1941) (EACA) Belief in witchcraft is unreasonable and cannot be taken as a reasonable belief for defence of mistake of fact to succeed. See also *R v*

*Matengula* 5 N R L R 148; *Chabijana Kajuna s/o Mbake v R* 12 EACA 104; *Younghusband v Luftig* [1949] 2 ALL E.R. 72 P. 80 or [1949] 2 KB 54. Read *Wilson v Hiyanga* (1951) 2 ALL E R 237

The accused must have a 'BELIEF IN THE EXISTENCE OF THINGS' which was held 'HONESTLY AND REASONABLY.'

*DPP v Morgan* (1976) AC 182, it was held that a mistaken belief that the woman he had raped consented was not a mistake of fact at all. The question of public importance was 'whether in rape a defendant can properly be convicted notwithstanding that he in fact believed the woman consented, if such belief was based on reasonable grounds.'

Mistake of fact is not unlimited but a qualified defence. The section states that the accused is not criminally responsible "**to a greater extent than if the real state of things had been such as he believed to exist**". That is if the accused has made a mistake but committed a crime on the facts **as he thought existed**, he will be convicted.

The mistake must be reasonable and must be a mistake of fact not law.

### **3.2.3.6 Insanity**

Accused person's sanity may become relevant at two stages in the criminal proceedings which one of them may be termed as defence of insanity. At the first stage which a person's sanity may be questioned is when an accused person brought before court may be found unfit to plead to the charge. The question at the stage is whether he is able to understand the charge and the differences between pleas of guilty or to be able to give proper instructions to the counsel as the evidence is being given before court or in short he is not capable of making up a proper defence because of unsound mind the issue may be raised by the prosecution or the defence and then the court may on initiative raise that particular issue section 160 of CPC. Then at that stage the court may inquire insanity of that particular evidence from the people who are familiar with him and will be sent to specialist and they are supposed to be two in number who should submit a report. If those specialists confirm that he is insane and not able to make a proper defence the court may enter that fact and order the accused to be detained during the president's plea and have to be sent to mental institution or any prison. Then the case record of that particular court will have to be submitted to the High Court for confirmation and then the officer in charge of the institution will be required to make reports to the president and while the person is detained the president will require reports at certain intervals that where he finds fit to release that man on certain conditions he may do so and if the man released on conditions fails to do those conditions he may be arrested back or the president may release the person which means the order fails to operate. If that person is now able to make a defence through the records he will then go back to court. Where he will be taken to plead to the charge and then the criminal matter will begin. SEC 161 – 165 of CR.P.C However, the sub. Court is not empowered to enquire the issue of sanity when it is holding a preliminary inquiry see 166-cpc.

The case of *Malita Banda v the People* (1978) ZR 223 explains the procedure which courts adopt when presented with a person who appears unfit to plead. The procedure entails the court inquiring into the alleged fitness to plead. Where the court satisfies itself that the accused person is unfit to plead, a plea of not guilty is recorded and the hearing begins. If the evidence suggests that the accused person did not commit the offence, the court shall acquit. If, however, the evidence received may just a conviction, the court will order that the accused person be detained during the president's pleasure. When the accused recovers, trial will then have to commence denovo. At this stage, if evidence demonstrates that the accused person was insane at the time of committing the offence, a special finding would be entered namely 'not guilty by reason of insanity'. Other cases on this subject matter include *Mutapa Tobo v the People* (1985) ZR, *Edward Sankalimba v the People* 1981 ZR 258

### **a) Meaning of Defect of Reason**

A disease of mind should affect the capable of understanding of his act and the quality of the act which he has caused and should also affect his knowledge of understanding the probable consequences of his act but it will not include the aspect of absent mindless which result from depression even if it might be true that he is suffering from the disease of mind.

### **b) Nature and Quality of Act**

**Nature and quality of act** – the accused person in order to successfully cause the offence of insanity should show that his mental capacity was so affected that he was not able to appreciate the physical and quality of his action in the sense that he could not distinguish to an act that may be dangerous to other persons but not that he was not able to distinguish it from moral aspect. Knowledge that his act is wrong – when considering the action of the accused under this defence we do not concern ourselves to whether in general terms the accused person was able to distinguish between right and wrong but the consideration should whether the accused person able to approximate the wrongness of his act in particular terms which means whether he was able to know that his act was a wrongful act

### **c) Diminished Responsibility**

Section 12 – This act has now created a new section known as section 12A. This new section is a reproduction of a word to word section 2 homicide Act and it has brought in a defence of diminished responsibility. This is a defence to murder in the same way as the defence of provocation where a person would be convicted of manslaughter if the defence is successfully raised. Under this section an accused to raise his defence and to have it successful by proving that at the time of committing was suffering from abnormality of mind and secondly that abnormality was by arrested or retarded development of mind or any inherent causes or was induced by disease or injury and thirdly it must be shown that these causes have substantially caused the killing. The abnormality of mind must be contracted with the expression used in insanity in the

McNaughton rules defect of mind which means a state of mind so different from that of ordinary human beings that a reasonable man will call abnormal. This appears to be wide enough to cause the minds activities in all aspects not only the perception of physical acts and matters and the ability to form rational judgement where an act is right or wrong but also the ability to exercise will power to control physical acts in accordance with rational judgement.

This may be said that the defence of irresistible impulse is at last admitted in Penal Code only as it relates to murder charge. A man may know the nature and quality of his act perfectly well and be aware that and yet unable to prevent himself from doing it. Such a person in no way borders on insanity within the McNaughton rules or Penal Code yet he should be able to rely on the defence of diminished responsibility.

People may rely on this defence than insanity especially those who kill others in state of depression mercy killers. The accused under this bears a burden of proof on the balance of probabilities and this defence is only applicable to murder charge. In other words, if the offence is other than murder, the defence of diminished responsibility would not be available, but may only be raised as a mitigation factor.



### Activity 10

- (a) What do you understand by bonafide claim of right?
- (b) In what instances does mistake of fact apply?
- (c) Discuss how the insanity pleaded at trial
  1. What do you think are the differences between the defence of insanity and diminished responsibility?

#### 3.2.3.7 Automatism

Automatism is a defence based on an abnormal state of mind or consciousness of the accused. Either he is acting under confusion, delusion or disassociation that is regarded as incompatible with the existence of mens rea but does not amount to insanity. Automatism was defined in the case of *Bratty v A-G for Northern Ireland* (1963) AC 386; (1961) Cr. L. Review 829. The court said:

*“No act is punishable if it is done involuntarily and an involuntary act in this context –some people speak of it as automatism – means an act done by the muscle without any control by the mind such as a spasm, reflex action or a*

*convulsion or an act done by a person who is not conscious of what he is doing; such an act done while suffering from concussion, or while sleepwalking”*

The facts, in *Bratty v Attorney General for Northern Ireland*, (1963) AC 386; (1961) Cr. L. Review 829, were that the defendant had been convicted of murder by strangulation of an 18-year-old girl. In a statement made to the police he said that when he was with the girl he had a terrible feeling and a sort of blackness came over him. Three defences were raised including insanity and automatism. The court held that there were types of automatism -INSANE – and NON-INSANE. Insane automatism occurs where there is unconsciousness through defect of reason of mind and must be considered under the rules relating to insanity. With non-insane the burden of proof is on the prosecution to show that the defence was controlling his acts and with insane automatism the defendant has to show that it's the defendant that was suffering from some form of insanity. Main areas of automatism may include, sleep walking, concussion, and epilepsy.

### **3.2.3.8 Intoxication**

Under section 13 (1) of the Penal Code Intoxication is not a defence. However, under sub –section 13 (2) intoxication is a qualified defence. Intoxication can be caused an alcoholic drink, narcotics or drugs.

**(a) Intoxication as a defence negatives intent to commit a crime.**

In murder if the intent to kill anyone is not there the killing becomes manslaughter. It is objective standard as the accused is acting below a reasonable man standard and the offence of murder is reduced to manslaughter. Intoxication therefore negatives *mens rea*.

**(b) Intoxication producing insanity**

When one takes alcohol the alcohol gets to the brain after being absorbed in the stomach then to the brain and gets into the brain cells nullifying and damaging brain cells which may result in shakes or madness.

In *DPP v Majewski* (1976) the defendant was drunk. He became violent and assaulted 3 policemen and owner of premises. He was convicted of a crime of basic intent. The House of Lords held that evidence of voluntary intoxication cannot negative *mens rea* in a crime of basic intent.

**(c) Voluntary intoxication for Dutch courage**

If the accused gets drunk for **Dutch courage** to commit an offence and he proceeds to do so; he will not be allowed to claim lack of intent. Intoxication can come about through alcohol of any kind and through drugs. Self – Induced Intoxication to get “Dutch Courage’ is not a defence.

Lord Denning in *Gallagher v A-G of Northern Ireland* (1963) AC 349; (1961) 3 WLR 619 stated that:

***“If a man, whilst sane and sober forms an intention to kill...and the gets himself drunk so as to give himself drunk so as to give himself Dutch courage to do the killing... he cannot rely on his self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter...the wickedness of his mind before he got drunk is enough to condemn him coupled with the act which he intended and did do”***

(d) **Involuntary intoxication**

Where a defendant is reduced to a state of intoxication through no fault of his own (because for example his drinks were ‘laced’) he cannot be ‘blamed’ for his actions and will accordingly have a defence to any criminal charge. However, this protection extends only to the defendant who is so intoxicated that he does not form mens rea. If one is made drunk without his knowledge or consent and he commits an offence because:

- i) He did not know what he was doing;
  - ii) He did not know that what he was doing is wrong;
- then intoxication becomes a defence.

See also *DPP v Beard* (1920) A C 479; 14 Cr App R 159; in which the accused raised a defence of drunkenness to a charge of murder of a thirteen year old whom he raped. In *Mulonda v TP* (1978) ZR 89; and, *Kalaluka Musole v. T P* (1963-1964) Z AND N.R.L.R. 173 (C.A.) the accused raised defences of mistake, intoxication and provocation. The Court held that:

***“That the defences of mistake, intoxication and provocation advanced on behalf of the accused could not succeed for the reasons set out in the judgments.”***

Intoxication – as a general rule intoxication is not a defence to a criminal charge. In fact it is an offence to be drunk and capable in a road or licensed bar and even to be found drunk in charge of a criminal in a high way or in a van and under sub-section 2.

However, in certain circumstances intoxication can arise as a defence where the accused person can show to the court that at the time of the offence he was not able to understand what he was doing or even to understand what he was doing was wrong or that intoxication was caused by a malicious conduct or neglect act of another person he will be said to raise the defence of intoxication under section 13 (2)(a) of the Penal Code and he will be entitled to dismissal.

Sub 2 (b) Intoxication amounting to Insanity where a person can show to the court that he did the act and at the time of the act he was not able to understand that what he was doing was wrong or if he knew, but did not know that he was wrong because of intoxication and that intoxication has led him to reach a state of insanity which means in short he came insane temporary. If the court finds that he raise issue under 2(b) the court will have to enter a special finding under 167 CPC. Under this (b) what the courts decides is a defence of insanity which means the accused person will have to adduce evidence as if he is proving defence of insanity under sec 12.

**(e) Intoxication Negating Mens Rea**

Section 13(4) under this sub sec, the court will have to consider the evidence before it to consider the evidence before it to find out whether the accused person was intoxicated. The court has to answer the question whether the intoxication for the accused person affected intent or any intention to that particular offence. If it finds that taking in consideration of all circumstances. The accused was intoxicated to the extent that he could not form a required intent he will have to found not guilty. But if the offence is one of basic intent the court will find offence is one of basic intent the court will find him guilty because intoxication is not a defence to manslaughter as assault and certain wounding.

You are further instructed to read the following Zambian cases on intoxication:

- i. Musole v the People (1964) ZR 173
- ii. Katundu v the People (1967) ZR 181

**3.2.3.9 Duress or Compulsion - SEC 16**

Under this section it creates a defence of duress which is associated with the defence of necessity where a person is faced with a choice of evil whether to break the law or submit himself or herself to the threats which are put to him. Under this section a person will need to prove that he with another person committed an offence and that other person subjected him to dangerous threats in the sense that he was threatened to be killed or BH was threatened to be inflicted on him – He has to prove that during the time of carrying the criminal act the threats continues to accompany the act. The threats should be the future injury to be inflicted on him: It must be noted that the threats do not include threats of injury to member of that family who raised the defence. This defence does not apply to the offence of murder or treason.

### **3.2.3.10 Self Defence**

This section is not clear enough to create a defence of self-defence as it refers to the common law rules to be considered when a person claims to have acted in defence of his person or another person or his property, however looking at the common law rules.

Under felonies attack a person is entitled to repel the violent action which is aimed at him. He is entitled to use force to repel the attack and if in the process of using the force the attacker is killed that killing will be excusable or justifiable as long as that person has to show that there was reason for the killing or honestly believe that his life was in danger and there was no other way he would have preserved his life other than the action that he did.

#### **a) Non-Felonious Attack**

A person who is attacked or faced with violence and that violence is not a felony attack he is supposed to retreat or withdraw from the attack if it is safe to do so and if the attacker to continue after he has withdrawn, he is entitled to use reasonable force to repel the attacker. The retreat here does not mean he has run away but he must show the desire of not requiring fighting or the willingness to disengage the fight. If he does that and attacks the attacker who dies he will be considered unreasonable to the attacker – if he was charged of murder, he will have to be charged of manslaughter.

#### **i) Defence of Another Person**

Under common law the defence of self-defence was extended to certain relationships the accused person stood with e.g. master and servant the master was justified to defend his servant and if a fatal injury is inflicted, he was relieved because his fact was to be justified. The justification was based on the stand of preserving the life of the father or child where it was legitimate danger or where the accused believed the person stood in special relationship that her life was in danger.

RV Rose (1884) 15 Cox CC 540

However, the law has changed it has extended to any other person is entitled to intervene in a fight with object of preventing a felony to be committed is entitled to use reasonable force to repel the attacker if the sole purpose is to prevent a felonies attack on another person but not for the purpose of revenging or forming in the fight 'COS' a person being attacked is a relative.

#### **ii) Defence of Property**

As a general rule a person is entitled to protect his property and it's reasonable for him to remove trespassers on his property, but he is not justified to use force on anybody to anybody who comes to his property. If any person comes to his property with some

form of force. But is a trespasser coming as a heartbreaker or bur. The owner of the property is entitled to use reasonable force to have the burglar leave his place. If the trespasser has taken his property, he is entitled to use force or gain such courage he will not be excused from crime. Liability even if that drunkenness goes to extent of causing insanity he will have to be convicted. A/G NI V Gallagher (1961) 3 ALLER 299

You are further directed to read the following case so that you clearly appreciate how courts approach self-defence when it is raised.

(a) Malume Tembo v. The People 1980 ZR

(b) The People v. Mudewa (1973) 147

### **iii) Necessity**

Has been held under common law as defence although it is not yet settled to where it can be applicable to all offences. It can be raised where an accused person commits an offence where you are faced with two alternatives. The first alternative is to act in a way that will be the breach of law and second alternatives will be whether he should undergo that evil which is against him meaning he should face the evil consequence and that the consequences could be so grave and threaten his life. That evil fact should be not an enmity happen, but it was reasonable to believe that it has occurred. The accused would be justified to commit a crime act in order to avoid the evil against him. The evil aspect should not only pertain to the accused person but even if it was against another person the accused person would be justified to do so. This defence does not apply to murder or treason



### **Activity 11**

1. What factors does an accused person need to plead in order to successfully put up the defence of self-defence?
2. In what instances can one raise the defence of insanity?
3. What is automatism?

### **iv) Provocation**

Provocation is defence created by section 205 of the Penal Code. This defence entails that if a person kills another in the 'heat of passion' when he is not the master of his own mind, due to things done or said or both and subject to certain requirements,

that is, he is said to have committed unlawful homicide. The accused can raise the defence of provocation. A successful plea of this defence will entail that the accused would be convicted of manslaughter rather than murder. Provocation therefore is a defence to murder only. In offences other than murder, provocation is only taken into account at sentencing stage as a mitigating factor. In order for the defence to be successfully pleaded, the accused must be able to demonstrate that he/she was provoked, whether a reasonable person would have been provoked to act as the accused did, and whether the response of the accused could be said to bear, 'reasonable relationship to the provocation'. The court also considers whether the accused person had time to cool between the act of provocation and the response of the accused. Time to cool entails the period between the provocative act and the time that the provoked person killed the deceased. It is reasonably expected that a reasonable lapse of time affords the accused person to calm down and reflect on the consequences of his impending action. What this entails is that time to cool deflects the defence of provocation in murder offences. In the case of *Mupota v the People* (1976) ZR 212, the court discounted the defence of provocation since the accused had time to cool. The same case stands as an authority on the reasonable relationship between the act of provocation and the response of the accused.

You are expected to read the following Zambian cases on provocation:

- (a) *Thandiwe Zulu v. the People* (1981) ZR 343
- (b) *Esther Mwiimbe v the People* (1986) 15
- (c) *Kalinda v the People* (1966) ZR 29
- (d) *John Milambo v the People* (1977) ZR 103

### **3.3 Types of road traffic offences, including minimum sentences, potential defences and mitigating circumstances**

The law that provides for Road Traffic offences is the Road Traffic Act, No 11 of 2002. This law provides for, the establishment of the Road Traffic Transport and Safety Agency, and to define its functions, to provide for the protection of road safety. As already mentioned, the Act creates a number of traffic offences, however, for our purposes, only a few will be looked at.

Section 154 of the Act creates the offences of careless driving. What needs to be proven under this offence by the prosecution is the fact that the accused drove a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road. If a conviction is secured, such an accused person shall be liable to a fine not exceeding twenty thousand penalty units or to imprisonment for a period not exceeding five years, or to both.

Section 157 creates the offence of driving or attempting to drive under the influence of intoxicating liquor or narcotic drugs. Under this offence the prosecution must prove that the accused person was intoxicated to the extent that he/she was unable to have proper control of the vehicle. Upon conviction, such a person would be liable to a fine of twenty thousand penalty units or to imprisonment for a term not exceeding five years, or both.

Section 161 provides for the offence of causing death by reckless or dangerous driving. The Act provides to the effect that a person who causes the death of another person by the driving of a motor vehicle on the road recklessly, or at a speed, or manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or might reasonably be, expected to be, on the road commits an offence and shall be liable, upon conviction, to a fine not exceeding thirty thousand penalty units or to imprisonment for a period not exceeding five years, or both

Section 158 requires that a person arrested under section 156 or 157, to subject oneself to medical examination conducted by a medical practitioner to determine whether in the opinion of the medical practitioner, the person was, at the time when in charge of a motor vehicle on a road or when the person was driving or attempting to drive a motor vehicle on a road, the person was under the influence of intoxicating liquor or narcotic drugs to such an extent as to have been incapable of having proper control of such vehicle.

The section further enacts that it is a criminal offence for any person to fail or refuse to submit oneself to medical examination. Before requiring the accused to give a specimen, the police officer must warn the accused that failure or refusal to submit to medical examination is an offence. If there is no such a warning by the police officer administered to the accused, the court during trial of the accused must acquit.

Section 170 provides that (1) Subject to subsection (3) and unless otherwise directed by a road traffic inspector in uniform or police officer, no person shall fail to comply with any direction conveyed by a road traffic sign displayed in the prescribed manner. Any person who fails to comply with any direction conveyed by a road traffic sign commits an offence. Further the section enacts that in any prosecution for an offence under subsection (1), it shall be presumed, in the absence of evidence to the contrary, that the road traffic sign concerned was displayed by the proper authority and in accordance with the provisions of this ct.

Section 148 relates to speed limitation. It enacts as follows;

The general speed limit—

- a) in respect of every public road or section thereof situated within the area of a local authority;
- b) in respect of every public road or section thereof situated outside the area of a local authority; or;
- c) in respect of every freeway;

shall be as prescribed by the Minister, on the recommendation of the Agency.

An appropriate road traffic sign, set by the Agency, may be displayed on any public road indicating a speed limit other than the general speed limit which under subsection (1) applies in respect of that road:

However, a speed limit on vehicles shall not apply to any vehicle on an occasion when it is being used for fire brigade, ambulance or police purposes, or by a road traffic inspector in the execution of road traffic inspector's duty, if the observance of those provisions would be likely to hinder the use of the vehicle for the purpose for which it is being used on that occasion:

*Provided that the driver shall drive the vehicle concerned with due regard to the safety of other traffic and such vehicle shall be fitted with a device capable of emitting a sound or with a bell and with an identification lamp, as prescribed, and such device or bell shall be constantly sounded and such lamp shall be in operation while the vehicle is driven in excess of the applicable speed limit.*

Section 30 provides for licencing of vehicles and it states; No person shall use, or being the owner shall cause or permit to be used upon a road, any motor vehicle or trailer unless there is in force in relation to that vehicle or trailer a licence issued in accordance with the provisions of this Part, and no person shall use or cause or permit to be used a motor vehicle or trailer for a purpose not authorised by, or in contravention of any condition or other provision contained in any licence in force in relation to such motor vehicle or trailer under this Part.

Any person who contravenes the provisions of section 30 (1) commits an offence, and shall be liable, upon conviction, to a fine not exceeding treble the amount of tax payable on an annual licence for exceeding treble the amount of tax payable on an annual licence for the motor vehicle concerned.

The Proviso, however, which does appear like a defence is that a person shall not be convicted of an offence under this section by reason of not holding a valid licence if that person proves that such person has not had a reasonable opportunity of obtaining such licence and that the vehicle was being used for the purpose of obtaining such licence.

Any motor vehicle or trailer on which no valid licence is displayed may be impounded by any road traffic inspector in uniform or by any authorised officer.

Section 56 (1) provides for in mandatory the need for every driver of a motor vehicle to be obtain a licence. It provides;

No person shall drive a motor vehicle unless that person is the holder of a driving licence authorising such person to drive a vehicle of that class or description. Further,

no person shall permit or employ any person to drive a motor vehicle on a road unless that person is the holder of driving licence issued under this Act.

Any person who acts in contravention of any provision of subsection (1) or (2) commits an offence and shall be liable, upon conviction, in the case of a first offence, to fine not exceeding one thousand five hundred penalty units, and in the case of the second or subsequent offence, to a fine not exceeding one thousand penalty units:

Provided that this section shall not apply to any person who is the holder of an international driving permit or of any other driving licence or permit issued outside Zambia, or of a military driving licence, or of the equivalent of such licence or permit, which is deemed, by regulation under this Act to have effect within Zambia as though it were a driving licence issued under section fifty-nine or sixty-one.

Subject to the provisions of subsection (1) or (2), any motor vehicle which is driven on a road by any person who is not the holder of a valid driving licence authorising that person to drive a vehicle of that class or description, may be impounded by any road traffic inspector in uniform or by any police officer.

Section 86. (1) provides for compulsory insurance of motor vehicle in respect of third-party risks. The said section provides as follows;

No person shall use or cause or permit any person to use a motor vehicle or trailer on a road unless there is in force in relation to the use of such vehicle or trailer by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

Any person who contravenes the provisions of this section commits an offence and is liable, upon conviction, in the case of a first offence to a fine not exceeding three thousand penalty units or to imprisonment for a period not exceeding twelve months, and in case of a second or subsequent offence, to a fine not exceeding seven thousand five hundred penalty units or to imprisonment for a period not exceeding twelve months, or to both.

Notwithstanding the provision of any other written law, there shall be in respect of all Government vehicles such policy of insurance of such a security in respect of third-party risks referred to in sub-section (1) as the Minister, in consultation with the Agency, may prescribe. 121. The vehicles to which this Part applies shall be public service vehicles, heavy trailers, contract cars, and motor vehicles used for gain for the teaching of driving.

Part IX of the Act provides for the examination of vehicles for purposes of issuing certificate of fitness. In this regard, section 22 provides:

No vehicle or trailer to which this Part applies shall be used on any road unless there is in force in respect of such vehicle or trailer a valid certificate of fitness, issued by a vehicle examiner, and no licensing officer shall issue a motor vehicle or trailer licence for any

vehicle or trailer to which this Part applies unless there is produced to that licensing officer such evidence as may be prescribed that either on the date when the licence comes into operation there will be in force in respect of that vehicle or trailer a valid certificate of fitness, or that such vehicle or trailer will be exempt from the need to hold such a certificate:

The proviso or the defence under this section is that no person shall be liable to a penalty for a breach of this section if that person proves that such person has not had a reasonable opportunity to obtain a certificate of fitness.

### **3.3.1 Admission of guilt in road traffic offences**

Where an offender admits guilty to an offence, a guilty form is signed. The police officer may require that the offender deposits some money or property after signing the admission of guilty form. The amount to be deposited is at the discretion of an officer who has drawn a charge but must not exceed the maximum amount to be paid for that offence. In addition, the police officer should tell the accused when a case will be called court.

The law allows a person who has admitted guilty to withdraw the admission of guilty by writing a letter to a clerk of court or may write a letter containing mitigating factors that must be considered before it can impose a sentence. Where the accused person withdraws the admission of guilty, the case is called like any other case and it proceeds normally.



### **Summary**

Defences are can either be regarded as excusatory or justificatory in nature. What this implies that a defence maybe an excuse that one put for having done an act the law considers as criminal or it may be a justification for having done a wrongful act. It is important to note that some defences, if successfully pleaded would lead to an acquittal while other may simply lead to reduction from one severe crime to one which is less severe. Defences that lead to acquittal are referred to as complete defence such as incapacity, self-defence etc. while those that may just reduce the offence, particularly murder to manslaughter are referred to as partial defences, for instance the defence of provocation.

With respect to Road traffic offences, it is important to recognise that the essence of the Road Traffic Act is to ensure road safety. It is therefore imperative that regular assessments are made to see the effectiveness of this piece of legislation in terms of how it has achieved its role (road safety) so that where there are gaps the law can be amended to respond to specific and emerging needs of road safety.



## Assessment

- 1) Discuss whether the penal provisions of the Road Traffic Act has achieved its purpose of improving road safety.
- 2) Kingsley Chambeshi was on 25<sup>th</sup> of May, 2018 convicted and sentenced to death by the Lusaka High Court for the offence of Murder. Facts before the court were that the accused picked an argument with his ex-girlfriend, which escalated into a physical fight. During the altercation, it is alleged that the accused picked a half brick and smashed the head of the deceased causing her to bleed profusely. Compounded with lack of quick medical attention, she unfortunately bled to death. The accused person informed the court he had for a long time been a victim of the Deceased's abusive words. He narrated to the court that on the material day, the deceased called him 'a good for nothing man.'

Based on the evidence adduced by the prosecution, the trial Judge expressed satisfaction that the accused had a case to answer and was accordingly put on his defence. This was despite the submission from the defence to the effect that the accused had no case to answer owing to the incongruities in the evidence led before the court by the prosecution. Spiritedly excited about the ruling of the court, the prosecution submitted:

My Lord, since the evidence led by the prosecution before this Honourable remains impeccable, we urge this Honourable to convict the accused person of the offence charged without any need for further evidence. My Lord, we are of the firm view that such an approach does not only prevent the waste of the court's precious time, but also ensures that justice is dispensed expeditiously.

The court readily accepted the submission from the prosecution and convicts the accused accordingly.

- a. Advise whether this conviction is safe or not.
- b. Discuss whether it is possible for the prosecution to secure a conviction upon discharging the evidential burden.
- c. Advise the accused as to the availability and sustainability of a defence on appeal, if any.

# UNIT 4: LAW RELATING TO WHITE-COLLAR CRIMES, DRUG-RELATED OFFENCES

## Introduction

This unit introduces you to the study of white-collar crimes, wildlife-related offences, and drug related offences. The unit further introduces you to the minimum sentences, potential defences and mitigating circumstances.



## Unit Outcomes

On completion of this unit, you will:

- 1) Apply knowledge relating to white collar crimes, including sentences, potential defences, and mitigating circumstances.
- 2) Apply knowledge relating drug abuse and trafficking offences, including minimum sentences, potential defences and mitigating circumstances
- 3) Apply knowledge relating to wildlife related offences, including minimum sentences, potential defences and mitigating circumstances.

### 4.1 White collar crimes including minimum sentences, potential defences and mitigating circumstances

#### 4.1.1 Fraud and counterfeiting

It is important for you to understand that fraud is generally defined in law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of falsity and for the purpose of inducing the other person to act, and upon which the other relies with resulting injury or damage. There are various crimes that may involve an element of fraud falling under a number of pieces of legislation. However, for your purposes, attention is given to the provisions of the Penal Code.

Section 374 of the Penal Code has extensive provisions that touch on both counterfeiting involving elements of fraud. These provisions have been highlighted to show generally what may constitute counterfeiting.

Section 374 provides: Any person who, without lawful authority or excuse, the proof of which lies on him-

- a) makes or mends, or begins or prepares to make or mend, or uses, or knowingly has in his possession, or disposes of any die, plate, or instrument capable of making an impression resembling that made by any die, plate or instrument used for the purpose of making any stamp, whether impressed or adhesive, which is used for the purposes of the public revenue or of the postal administration in Zambia, or in any foreign country, or capable of

producing in or on paper any words, figures, letters, marks or lines resembling any words, figures, letters, marks, or lines used in or on any paper specially provided by the proper authority for any such purpose; or knowingly has in his possession or disposes of any paper or other material which has on it the impression of any such die, plate, or instrument, or any paper which has on it or in it any such words, figures, letters, marks or lines as aforesaid; or fraudulently, and with intent that use may be made of any such stamp as aforesaid, or of any part of it, removes the stamp from any material in any way whatever; or fraudulently, and with intent that use may be made of any part of such stamp, mutilates the stamp; or fraudulently fixes or places upon any material or upon any such stamp, any stamp or part of a stamp which has been in any way removed from any other material, or out of or from any other stamp; or fraudulently, and with intent that use may be made of any such stamp which has been already impressed upon or attached to any material, erases or otherwise removes, either really or apparently, from such material anything whatever written on it; or knowingly has in his possession or disposes of anything obtained or prepared by any such unlawful act as aforesaid; or fraudulently or with intent to cause loss to the public revenue, uses for any purpose a stamp issued by Government for the purposes of revenue which he knows to have been previously used; is guilty of a felony and is liable to imprisonment for seven years, and any die, plate, instrument, paper or other thing as aforesaid which is found in his possession shall be forfeited.



#### Activity 1

As way of ensuring that you understand practically the offence of fraud and counterfeiting, you are required to read five cases on fraud and counterfeiting. What are the essential elements that the prosecution require to prove in court in order to secure a conviction relating to fraud and counterfeiting?

#### 4.1.2 Impersonation

Impersonation under the Penal Code takes two forms; there is personating a public or public officers and personation in general. Section 102 of the Penal Code provides for personating a public officer and it enacts.

Any person who-

- personates any person employed in the public service on an occasion when the latter is required to do any act or attend in any place by virtue of his employment; or
- falsely represents himself to be a person employed in the public service, and assumes to do any act or to attend in any place for the purpose of doing any act by virtue of such employment;

is guilty of a misdemeanour and is liable to imprisonment for three years.

In this chapter, "public service" means service of the Government or a local authority, or of a statutory board or body including an institution of higher learning, corporation or company in which the Government has majority interest or control.

Personation in general is provided for under section 378 and it states;

- Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour.

If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years.



## Activity 2

What are the main differences between the offence of personation as provided under section 102 and the one provided for under section 378 of the Penal Code?

### 4.1.3 Cybercrimes

The surge in the growth in the information and communication technology sector has created unprecedented opportunities for accelerated development in interactions by individuals and corporate entities facilitating the establishment of knowledge based digital societies. Information, Communication and Technology (ICT), has no doubt improved the ability for people to communicate, connect, share, learn, access information and express their opinions on matters that affect their lives and their communities has been enhanced enormously. However, this welcome development is not without challenges. Many unscrupulous individuals have used the avenue of cyber space to commit crimes. Given this undesirable state of affairs, Zambia has come up with a legal framework to regulate the use of the cyberspace.

The Computer Misuse and Crimes Act is the principal legislation that directly addresses cyber-crimes. The short title of this legislation brings out the objectives that the Act seeks to achieve. The Act in question prohibits and criminalises unauthorised access, use or

interference with a computer. The Act also seeks to protect the integrity and confidentiality of the computer systems, integrity and availability of data. The is further meant to prevent the abuse of computer systems. Finally the Act is a tool for the facilitation of gathering and use of electronic evidence.

Section 3 of the Act provides for the scope of application of the Act. The Act confers jurisdiction on the Zambian Court and other relevant security wings to deal with Cyber Crimes under this Act whether committed by a Zambian national or not. Further, the Act applies whether the offence under this Act is committed outside Zambia or not. It is fair to say that, with respect to this offence, the Zambian courts appear to have been clothed with extra-territorial jurisdiction.

Specific provision under this Act provide for specific offences. Section 4 of the Act criminalises unauthorised access to a computer. In this a regard, any person who knowingly and without authority causes a computer to perform any function for the purpose of securing access to any program or data commits an offence. Such a person, is on conviction liable to a term of imprisonment not exceeding five years or to a fine not exceeding sixty thousand penalty units.

What must be appreciated as a basic import of this provision is that any access to a computer for purposes accessing any program or data is unlawful unless such access is authorised. To constitute a crime, the authorised access must be accompanied by the requisite state of mind, which in this case is knowledge. In other words a person must knowingly access cause a computer to perform a given function without authorisation.

Further, section 5 creates an offence where a person a causes a computer to perform any function for purpose of securing access to any program or data held in that computer or any other computer with intent to commit or facilitate the commission of an offence involving property, fraud, dishonesty or which causes bodily harm. Such a person who performs the above act, is on conviction, liable to a term of imprisonment not exceeding seven years or to a fine not exceeding three hundred thousand penalty units. It is important to note that the offence created under section 5, it is immaterial whether the access is authorised or unauthorised. In other words, it is not a defence to the offence under section 5 that the access to the computer is or was authorised. Where, however, the access to the computer was unauthorised in commission of the offence under section 5, a person would be deemed to have committed two separate offences; that is under section 4 and 5 respectively.

Section 6 provides for the offence of unauthorised modification of program or data. A person under this section commits an offence if he/she does an act which directly or indirectly causes modification to the data or program held in that computer. This act must be accompanied by the requisite state of mind, being knowledge. The person must act knowing that such an act will bring about modification of data or program held in that computer.

You are also encouraged to read the other provisions of this Act so that you have a complete and comprehensive understanding of the other specific offences created under this Act and their prescribed punishment.



### **Activity 3**

- 1) What are some of the most prevalent forms of cybercrimes in your area?
- 2) What do you think can be done to curb these offences in your area?

#### **4.1.4 Corruption**

The crime of corruption is provided for under the Anti-Corruption Act No.3 of 2012. The Act, among other things, provides for the continued existence of the Anti-Corruption Commission and provide for its powers and functions, provide for the prevention, detection, investigation, prosecution and punishment of corrupt practices. As you will note from the above the Anti-Corruption Commission is mandated under the Anti-Corruption Act No. 3 of 2012 to spearhead the fight against corruption in Zambia. The functions are provided under Section 6 of the same Act. In summary the Commission mandate is to undertake the following:

- i) Investigating and prosecuting cases of suspected corruption
- ii) Conducting public sensitization on the dangers of corruption and fostering public support in the fight against corruption
- iii) Putting in place mechanisms for preventing the corruption scourge

Specific offences under this Act are created under Part III of the Act. Part III of the Act runs from section 19 to 50. You will note that for it is not practical to discuss all these provisions within the scope of this document. In this regard, only selected provisions shall form the discussion. You are, however, as stated before, directed to look at the rest of the provisions of part III to enable you have an adequate understanding of the crimes under this Act.

Section 19(1) of the Act provides: A public officer who, by oneself, or by, or in conjunction with, any other person, corruptly solicits, accepts or obtains or agrees to accept or attempt to receive or obtain, from any person for oneself or any other person, any gratification as an inducement or reward for doing or forbearing to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, commits an offence.

Section 19(2) of the Act provides: A person who, by oneself, or by, or in conjunction with, any other person, corruptly gives, promises or offers any gratification to any public officer, whether for the benefit of that public officer or of any other public officer, as an inducement or reward for doing or forbearing to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, commits an offence. Section 20.

From the wording under Section 19 (1), you will observe that the offence created therein relates to corruption by a public officer. Generally speaking, this provision deals with a situation where a public officer asks for a bribe, or accepts from another person his benefit or for the benefit of another. Such a public officer commits an offence. The offence here is against a public officer who conducts himself in a corrupt manner. On the other hand, section 19(2) addresses a situation where a person corrupts a public officer. This may come in the form of a promise or offering of any gratification. The point to appreciate here is that this offence is against a person who corrupts or seeks to corrupt a public officer.

Section 20 provides: A person who, by oneself, or by, or in conjunction with, any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for oneself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for and having done or forborne to do, anything in relation to any matter or transaction actual or proposed, with which any private body is or may be concerned, commits an offence.

Section 20 deals with corruption in private bodies. What this entails is that corruption does not only involve public officers working in public institutions as you may have noted under section 19, but also extends to private persons working for private bodies. As a matter of example, if you are working for a private college as an accountant, and a student offers or you offer a student to pay only half in full settlement of full amount on condition that you share the other half with a student, the act you will have done in this case constitutes corruption, notwithstanding that you are working for a private college, which is not a public body.

Section 21 of the Act is a very interesting provision. This provision relates to the abuse of office by a public officer. It is an expansive provision that you are instructed to read in full. The gist of the provision, however, is that a public officer who does an act or directs an act to be done, in abuse of that public officer's position or any arbitrary act prejudicial to the interests of government or person, commits an offence. As you read section 21 (2), you will note that the burden of proof is on the accused, and not the prosecution, a radical departure from the general principle of criminal law. You must therefore take this position as an exception where the accused bears the burden of proof.

Section 22, which you are required to read in full to get its full flavor, provides for the offence of being in possession of unexplained property. In this regard, where a public officer maintains a standard of living way beyond what his income can reasonably support, or is in possession or control of pecuniary resources or property disproportionate to the public officer's present or past income; or is in receipt of a benefit of any service that the public officer may reasonably be suspected of having been corruptly acquired is liable for the offence of having property reasonably suspected to have been corruptly acquired. Similarly, as we saw under section 21, the offence under this section casts the burden of proof on the defence to prove the reasonable satisfaction of the court that the property in question have are not ones which can be reasonably said to have been corruptly acquired.



### Activity 3

Having dealt with the offence of corruption, you must be aware by now that the law Anti-Corruption Act No 3 of 2020 addresses both corruption in public and private bodies.

- i) With the aid of examples, discuss a minimum of four provisions dealing with corruption in private bodies.
- ii) Do you think different considerations arise both during prosecution and sentencing by courts when dealing with cases of corruption relating to private

#### **4.2 Drug abuse and trafficking offences, including minimum sentences, potential defences and mitigating circumstances**

The legislation governing drugs generally in Zambia is the Narcotic Drugs and psychotropic Substances Act Chapter of the Laws of Zambia. While you are encouraged to get a copy of this Act and ensure that you familiarize yourself with the Act, in this discourse, only a few key provisions shall be highlighted and discussed. The objectives of the Act is encapsulated in the short title, which include: the incorporation into Zambia law certain international conventions governing illicit drugs and psychotropic substances; control the importation, exportation, production, possession, sale, distribution and use of Narcotic and psychotropic substances; seizure and forfeiture of property in connection with illegal activities involving Narcotic and Psychotropic substances.

Specific offences and penalties under this Act are created under Part III of the Act. Part III of the Act runs from section 6 to 22. Some of the salient provisions are now discussed hereunder.

Section 6 provides to the effect that any person who traffics in a narcotic and psychotropic substance shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding twenty-five years.

The operative term in under this offence is “trafficking.” Under section of this Act, trafficking means being involved directly or indirectly in the unlawful buying or selling of the Narcotic and Psychotropic substances. The second meaning relates to possession of the substance. When it comes to possession, there is a certain amount that the president declares in a statutory instrument as amounting to trafficking. Therefore, what you need to understand about the offences of trafficking is that it is committed when one is involved directly or indirectly in the illegal sell or where one is found in possession of the substance in amounts as prescribed by a statutory instrument.

Further, section 8 provides for the offence of possession. In this regard, any person, who without authority has in possession or under his control any Narcotic or psychotropic substance shall be guilty of an offence and shall, on conviction, be liable to term of imprisonment not exceeding fifteen years. it must be noted that the offence of possession created under section 8 is different from the one under section 6. Under section 6, one can be convicted with the offence of trafficking relating to possession in accordance with the prescription relating the amount by the president contained in the statutory instrument. In other words conviction for possession under section 6 of the Act is subject to the amount that one is found with. The guiding factor in this case, is the statutory instrument. With respect to section 8, the amount that one is found with is immaterial as long as one is possession of the substance, a crime is said to have been committed.

Section 9 criminalises the cultivation of plant which can be used or consumed as narcotic or psychotropic substance or tree from which this substance can be extracted, without lawful authority. On conviction, one is liable to term of imprisonment not exceeding ten years or fine of not less than five-hundred penalty units or both. An accused person under section 9 can escape conviction if the plant is cultivated for medicinal purposes or is not a substantial or commercial scale.

Section 10 of the Act prohibits the use of narcotic and psychotropic substances. In this regard, any person who chews, injects in his body, sniffs, smokes or drinks the substance without any lawful authority commits an offence and is liable on conviction to term of imprisonment not exceeding ten years.

Section 14 criminalises the inducing of another person to take narcotic and psychotropic substances. The inducing may be through may be through force, deceit or other means. A person found guilty under this section is laible to imprisonment for a term not exceeding ten years.



## Case Study

You are required to carry a research through institutions that are tasked to deal with drugs related offences, to ascertain the prevalent rate of these offences in your area.

What do you think should be done to further bring down the rate of drug offences in your area?

### **4.3 Wildlife related offences, including minimum sentences, potential defences and mitigating circumstances**

Wildlife in Zambia is regulated principally by the Zambia Wildlife Act of 2015. The objectives of the Act reflect in the short title of the Act. These include: establishment of the National Parks and Wildlife in the Ministry responsible for tourism; establish the wildlife management and licencing committee; provide for establishment, control and management of national parks, bird and wildlife sanctuaries and for the conservation and enhancement of the wildlife ecosystem.

Offences and penalties are provided under Part XIV of the Act. The offences run from section 126 to 144. As you were told in the preceding topics and units, not all the provisions in this Act will be discussed. Therefore, you are instructed to get a copy of this Act and read for yourself, especially Part XIV, which creates offences.

Section 126 prohibits the causing wildfire without the authority of the Director in writing, and it is worded in the following terms: A person, other than a person authorised in writing by the Director, who causes a bush or grass fire in any public wildlife estate commits an offence.

Section 127 criminalises hunting and wounding of a rhinoceros, and provides for imprisonment on conviction, for a term not exceeding five-years without the option of a fine, for a first offender. For a second or subsequent offences, the term of imprisonment shall be not less than ten but not exceeding twenty-five years without the option of a fine. This provision is worded in the following terms:

A person who hunts, wounds, molests or reduces into possession an elephant or rhinoceros in contravention of any provision of this Act commits an offence and is liable, upon conviction— (a) for a first offence, to a term of imprisonment of not less than five years but not exceeding twenty years, without the option of a fine; and (b) for a second or subsequent offence, to a term of imprisonment of not less than ten years but not exceeding twenty-five years, without the option of a fine

Section prohibits hunting in a National Park, Community Partnership Park, Bird, or wildlife sanctuary. A person convicted of this offences as a first offender is liable to imprisonment for a term of not less than three but not exceeding ten years, without the option of a fine. For a second offender, upon conviction is liable to imprisonment for a term of not less than five but not exceeding eighteen years.

Section 129. (1) enacts: Subject to section one hundred and thirty, a person who is in possession of, sells, buys, imports or exports or attempts to sell, buy, import or export a trophy or meat of a wild animal in contravention of this Act is liable, upon conviction, to a fine of not less than three hundred thousand penalty units but not exceeding six hundred thousand penalty units, or to imprisonment for a term not exceeding seven years, or to both. (2) A person who commits an offence under subsection (1) for the purpose of, or in connection with, illegal trafficking of trophy is liable, upon conviction – (a) for a first offence, to a fine of not less than one hundred and fifty thousand penalty units but not exceeding five hundred thousand penalty units or to a term of imprisonment of not less than three years but not exceeding five years, or to both; and (b) for a second or subsequent offence, to a fine of not less than two hundred thousand penalty units but not exceeding six hundred thousand penalty units or to a term of imprisonment of not less than five years but not exceeding seven years, or to both.

As you have noted this section is about illegal possession, purchase or sale of meat of wildlife animal or trophy. This act is criminalized. You will note that both the seller and the buyer will have committed an offence by dealing in wildlife meat or trophy. The penalty is a fine not exceeding six hundred thousand penalty units or imprisonment for a term not exceeding seven years or both. You will however observe that there is a higher penalty if the offence in question is committed in connection with illegal trafficking of a trophy.

Section 132 provides: A person who, without authority, wears or is in possession of any uniform or part of a uniform or any badge, mark or identity document issued by or on behalf of the Director to be worn or possessed by an authorised officer commits an offence

As you may have noticed, this section prohibits a person from wearing a uniform or identity meant to be worn or used by an authorized officer. You must therefore appreciate that uniforms and other forms of identification to be worn by authorized officer, cannot be used by other members of the public. This is to ensure that individual law breakers do not disguise themselves and escape the law as they commit offences.



#### Activity 4

Based on your knowledge of the Zambia Wildlife Act of 2015, discuss whether and how the Act addresses the animal/human conflict.

### **4.3.1 Fishing Ban**

The law governing matters to do with fisheries in Zambia is the Fisheries Act, No 22 of 2011. The preamble to the Act provides;

An Act to provide for the appointment of the Director of Fisheries and fisheries officers and provide for their powers and functions; promote the sustainable development of fisheries and a precautionary approach in fisheries management, conservation, utilisation and development; establish fisheries management areas and fisheries management committees; provide for the regulation of commercial fishing and aquaculture; establish the Fisheries and Aquaculture Development Fund; repeal and replace the Fisheries Act, 1974; and provide for matters connected with, or incidental to, the foregoing.

The minister exercises the power to impose fish bans under Part VI of the Act, and in particular section 36. The said section 36 provides as follows:

36. (1) The Minister may, by statutory order, declare any area of water to be a commercial fishing area.

(2) The Minister may, in respect of any commercial fishing area declared as such under subsection (1), make regulations—

(a) prohibiting, restricting or regulating fishing;

(b) controlling the methods of fishing;

(c) prescribing that during any period of the year it shall be an offence to fish whether generally or for any particular species of fish;

(d) prescribing the licences to be held by any person fishing in a commercial fishing area; and

(e) prescribing the records to be kept, and the information to be provided, by any person fishing in a commercial fishing area

You will see from the wording of this section that the minister in accordance with has the power to impose a fish ban to fish generally or for any particular species of fish. This imposition of fish ban is implemented through the issuance of a statutory instrument that specifies the nature of a ban; whether it is a general ban or one affecting a particular species of fish. The statutory instrument would also prescribe the penalties or punishment to be meted out to offenders upon conviction. You must realize that a fish ban is an important tool in the regulation of fishing, but more importantly, it is imposed

during the breeding period so that the population of fish is not endangered and possibly risk extinction.



### **Activity 5**

As you may be aware, fish ban is usually met with hostility, especially by the fishing communities because of its negative effects it tends to have on the livelihood of the communities that depend on fishing as a means of earning a living.

#### **Question**

In your capacity as a paralegal, discuss ways that you can employ to ensure community participation in the enforcement of fish ban as way of ensuring the success of the fish ban exercise.

#### **4.3.2 Illegal export of goods**

Curbing of illegal export and importing of goods is governed under the Customs and Excise Act, Chapter 322 of the Laws of Zambia. The preamble to the Act is instructive in terms of what the objectives of the Act;

An Act to provide for the imposition, collection and management of customs, excise and other duties, the licensing and control of warehouses and premises for the manufacture of certain goods, the regulating, controlling and prohibiting of imports and exports, the conclusion of customs and trade agreements with other countries, forfeitures and for other matters connected therewith or incidental thereto.

Offences under this Act are created under Part XII. This part runs from section 140 to 174. As you have done before, you are encouraged to read this part in order for you to get a full understanding of the scope of offences covered. A few offences will, however, be discussed to give you an idea of the nature of these offences.

Section 140. provides; Any person who, on or after arriving in Zambia, is questioned by an officer as to whether he has upon his person or in his possession any goods, whether dutiable or otherwise, or goods the importation of which is prohibited or restricted, and who denies that he has any such goods upon his person or in his possession, or fails to mention any dutiable, prohibited, or restricted goods which he has upon his person or in his possession, shall be guilty of an offence if such goods are discovered to be or, at the time of denial or of the statement, to have been upon his person or in his possession.

This offence addresses the aspect of disclosure of goods that a person who arrives in Zambia is carrying for purposes of assessing whether duty should be charged in respect of such good. The duty of the person arriving in Zambia has a duty, upon being questioned, to disclose any goods on his body. It is immaterial whether such goods are dutiable or not. This non-disclosure is criminalized under this section.

Section 142 provides: Any person who, without lawful excuse, the proof of which shall lie upon him, brings into Zambia or has in his possession any blank or incomplete invoice or other similar document capable of being filled up and used as an invoice for goods from outside Zambia shall be guilty of an offence.

This offence covers a situation where a person brings into Zambia or has in possession blank or incomplete invoice which can be filled up and used as an invoice in respect of the goods from outside Zambia. As you can see from the wording of this offence, the burden of proof on the person in whose possession such a document is found to prove to the reasonable satisfaction of the court that the document is not intended to be used in the manners criminalized by the Act.

Section 144 provides: Any person who wilfully removes any customs seal from any ship, aircraft, pipeline, vehicle, or package without the authority of an officer or otherwise than in accordance with this Act or any regulations or rules made thereunder, or who wilfully alters, defaces, obliterates, or imitates any mark placed by an officer on any package shall be guilty of an offence

This section proscribes the removal of any custom seal from ships, pipelines, vehicle, or package without authority. It further criminalizes wilful alteration, defacing, obliterating or indeed imitation of any mark by an officer on any package. The idea is that these marks impressed on goods help in the identification of the nature of the goods, their value and other important information essential for the purpose of determining the duty payable.

Section 149 provides; Any person who - (a) smuggles or attempts to smuggle any goods; or (b) aids, assist, or connives at the smuggling or attempted smuggling of any goods; shall be guilty of an offence.

This provision proscribes act of smuggling or an attempt to do so, or indeed assisting anyone. It goes further to criminalize the act of one assisting the other to smuggle or an attempt to do so. According to this Act, smuggling refers to the importation or exportation of goods with intent to defraud the government or to evade any other regulation. This conduct is illegal under the Act.



## **Summary**

These offences relating to drugs, wildlife and white collar crimes are simply an illustration of offences that sit under specialised pieces of legislation. You are encouraged to look at the pieces of legislation referred to in this unit. You must also understand that there is no legislation that provides for principles of sentencing and mitigation. These principles have been developed overtime through practice and usage in the criminal justice system.



## **ASSESSMENT**

- 1) Discuss the effectiveness of the legal framework governing white collar crimes, wildlife, drug related offences.
- 2) Do you think the legal framework governing the above spheres is adequate or requires enhancement? Give reasons for your position.

# UNIT 5 APPLYING THE LAW RELATING TO GENDER BASED VIOLENCE AND CHILD ABUSE

## Introduction

This unit introduces you to the study of Gender Based Violence (GBV) and child abuse. The importance of gender consideration and the various types of violence and forms of abuse are discussed.



## Unit Outcomes

On completion of this unit, you will:

- 1) Discuss various forms OF GBV and domestic violence
- 2) Discuss applicable legal provisions on GBV
- 3) Discuss various forms of child abuse

## 5.1 Forms of GBV and Domestic Violence

Gender based violence is violence against women or men. Anyone can experience violence based on the gender whether female or male. Domestic violence is violence experienced in the home.

### 5.1.4 Gender Concepts

Gender is the state of being male or female. It is typically used with reference to social and cultural differences rather than biological ones.

Social norms - that shape authority, male and adult in most cases, over women and children. This authority includes the legitimacy to teach, discipline and control, and to use violence to maintain that authority.

Go on to define gender as a categorization based on sex that places people into two groups: male and female. These two groups are often biologically, sociologically, psychologically, and physiologically influenced.

#### a) Defining Gender Concepts

- i) **Sex:** Sex describes whether or not we are male or female. Our sex is determined by a combination of chromosomal, hormonal and genital factors. For example, a baby's sex is first determined by checking out whether he or she has a penis or a vagina.
- ii) **Gender Role:** Gender roles are socially prescribed by society. Although our sex defines whether we are male or female, our gender role describes how we act out our maleness or femaleness (femininity). For example, a traditional gender role for men is to be competitive, athletic and aggressive. A traditional gender role for women is to want to have and take

care of children. Gender roles have expanded in recent years for both men and women.

- iii) Gender Identity:** Gender identity is the gender you feel yourself to be. Most children grow up with a gender identity that is the same as their sex. The few who feel their gender is the opposite of their sex are called "transgendered."

Gender roles vary greatly in different societies, cultures and historical periods as well as they depend also on socio-economic factors, age, education, ethnicity and religion. It is important to take gender into consideration as both male and female are equal before the law. Encouraging people to consider gender role enables them to make informed choices about their futures and broaden their opportunities.



### Activity 1

1. What are the similarities and differences between the male and female gender?
2. Why do you think male and females have such different experiences about their genders?
3. Where did the strongest messages about your gender come from (family, community, religion, or media)?
4. What are some of the negative messages about gender that you do not want to accept?

### 5.1.5 Domestic Violence

Violence is force intended to harm, damage or kill someone or something. Depending on the act of force, violence may be physical, verbal, sexual, mental, psychological or economical. Gender violence, also known as Gender-Based Violence (GBV) or gendered violence, is the term used to characterise pain or harm inflicted upon individuals and groups that is connected to standard or norm understanding of their gender. Section 3 of the Anti- Gender Based Violence Act No. 1 of 2011 defines gender-based violence as:

*“any physical, mental, social or economic abuse against a person because of that person’s gender, and includes— (a) violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to the person, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life; and (b) actual or threatened physical, mental, social or economic abuse that occurs in a domestic relationship”*

### 5.1.5.1 Common examples of Violence

- i) **Physical:** A husband hitting his wife for not having dinner ready when he wants it.
- ii) **Verbal:** Young men calling out mean comments to another man because he seems feminine.
- iii) **Psychological:** A male threatening to damage the reputation of a girlfriend if she does not do as he wants.
- iv) **Sexual:** A man forcing a woman to have some form of sexual contact with him against her wishes.
- v) **Economic:** A husband preventing his wife from having access to the family finances

Gender-based violence is violence that targets people on the basis of their gender. It can affect anyone, but it is most often experienced by people who do not conform to gender norms. It can go unnoticed because it is seen as part of the gender norm to use violence against those who do not conform to gender expectations. You can work against gender violence by learning to identify it in all its forms. Naming it as a wrong action can be a first step in efforts to prevent or respond appropriately to the problem. Any act that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to someone (male, female or transgender people) based on gender role expectations and stereotypes is GBV.



### Activity 2

Abigail is aged 13 and lives with her father and step mother. She has 3 older sisters and an older brother. Each time her father is away, her step mother gives her a lot of household work to do. Since the work is too much for her to complete in a short time, she is always verbally and sometimes physically abused (beaten) by her step mother. This has been going on for a long time now. Abigail is not able to tell anyone not even her father about this as her step mother has made it clear that if she tells anyone about it she will ensure that she leaves home.

#### Questions

1. What would you do to help Abigail?
2. How would you help Abigail's step mother to realise that what she was doing is a form of domestic violence?
3. What would you do to put a stop to this form of violence?

Domestic violence can further be described as the power misused by one adult in a relationship to control another. It is the establishment of control and fear in a relationship

through violence and other forms of abuse. This violence can take the form of physical assault, psychological abuse, social abuse, financial abuse, or sexual assault. The frequency of the violence can be on and off, occasional or chronic.

#### **5.1.5.2 Causes of Gender-Based Violence**

It is widely understood that GBV – be it in the form of isolated acts or systematic patterns of violence - is not caused by any single factor. Rather, it is a combination of several factors that increase the risk of a man committing violence and the risk of a woman experiencing violence or vice versa. WHO gives an illustration of the ecological model on gender-based violence adapted from Heise (1998).

Justifications for violence frequently are based on gender norms that is, social norms about the proper roles and responsibilities of men and women. These cultural and social norms socialize males to be aggressive, powerful, unemotional, and controlling, and contribute to a social acceptance of men as dominant.

Similarly, expectations of females as passive, nurturing, submissive, and emotional also reinforce women's roles as weak, powerless, and dependent upon men. The socialization of both men and women has resulted in an unequal power relationship between men and women.

#### **5.1.5.3 Harassment in the workplace**

Harassment in the workplace manifests in many forms. It can present itself online or in person, and be verbal, physical or sexual in nature. Abusive behaviour like this creates a toxic work environment, but many workers feel uncomfortable reporting harassment to their bosses or HR managers.

It may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

Harassment can occur in a variety of circumstances, including, but not limited to, the following: The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker or a non-employee. The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct. Unlawful harassment may occur without economic injury to, or discharge of, the victim



### Activity 3

Monde is an employee in a private firm. Before this she used to work in a public institution. At her current work place, the one of the male supervisors has always been passing offensive jokes towards her which relate to her gender. Other times she is touch on her bums in an offensive manner. Monde has told her boss on several occasions that she does not like his jokes and touches. He repeatedly tells her that if she needs a promotion she has to allow him to play with her. This has been bothering Monde and she does not know what to do.

1. If you were Monde, what would you do to stop this form of behaviour?
2. What would you advise Monde to do?
3. What advice would you give to Monde's boss?

### Examples of Work place harassment

- a) Repeated hurtful remarks or attacks, or making fun of your work or you as a person (including your family, sex, sexuality, gender identity, race or culture, education or economic background).
- b) Sexual harassment, particularly stuff like unwelcome touching and sexually explicit comments and requests that make you uncomfortable.
- c) Excluding you or stopping you from working with people or taking part in activities that relates to your work.
- d) Playing mind games, ganging up on you, or other types of psychological harassment.
- e) Intimidation (making you feel less important and undervalued).
- f) Giving you pointless tasks that have nothing to do with your job.
- g) Giving you impossible jobs that can't be done in the given time or with the resources provided.
- h) Deliberately changing your work hours or schedule to make it difficult for you.
- i) Deliberately holding back information you need for getting your work done properly.
- j) Pushing, shoving, tripping, grabbing you in the workplace.
- k) Attacking or threatening with equipment, knives, guns, clubs or any other type of object that can be turned into a weapon.
- l) Initiation or hazing - where you are made to do humiliating or inappropriate things in order to be accepted as part of the team.

## **5.1.6 Applicable Legal Provisions on GBV**

### **5.1.6.1 Anti-GBV Act and Penal Code**

The anti- GBV Act provides that a single act may amount to gender-based violence. It also sets out the procedure for dealing with GBV cases. Section 5 identifies various stakeholders who may act for or assist the victim of GBV. Section 6 provides for the filing of complaints about gender-based violence. Section 7 enjoins a police officer to respond promptly to a request by any person for assistance from gender-based violence and to offer such protection as the circumstances of the case or the person who made the report requires even when the person reporting is not the victim of the gender-based violence. Section 8 sets out what a police officer who receives a complaint under subsection (4) of section six, must do. Section 248 A of the Penal Code provides for creates the offence of assault on a child.

### **5.1.6.2 Various forms of child abuse**

#### **a) Child abuse and sexual offences**

The constitution defines a child a person who has attained, or is below, the age of eighteen years. Child abuse is an act or omission that endangers a child's physical or emotional health or development. This abuse is not an accident, but it is always the intention of the person to inflict harm or injury. Child abuse may be physical, sexual or emotional, and may occur through neglect and in some cases harm may be accumulative. Child sexual abuse, also called child molestation, is a form of child abuse in which an adult or older adolescent uses a child for sexual stimulation. Forms of child sexual abuse include engaging in sexual activities with a child (whether by asking or pressuring, or by other means), indecent exposure (of the genitals, female nipples, etc.), child grooming, or using a child to produce child pornography.



#### **Activity 2:**

Mwenya is girl aged 13 years. He lives with his father and mother and other family members. Recently, one of the young men in their neighbourhood asked that Mwenya can help him with some chores at his home. In the process of assisting with the work the neighbour called Rob and started to touch Mwenya's breasts. When she protested and said she would report him, he threatened to tell the whole neighbourhood that she begged him to do that to her.

#### **Questions**

- What should Mwenya do?
- If you were Mwenya, what would you do?
- What should Mwenya's parents do?



### Activity 3

False statements about sexual offences are part of the reason sexual offences happen. False statements like these may explain why so many people are reluctant to talk about their experience and seek help. You are required to state whether the following statements are **TRUE or FALSE**.

SN	Statement	TRUE	FALSE
1.	Sexual offences only happen to attractive, young Women		
2.	Sexual offence only occurs in dark, isolated Places		
3.	If sexual offence is not reported to the police right away, nothing can be done.		
4.	Once a person starts to engage in a sexual offence, he or she cannot change his or her mind.		
5.	If a person who commits sexual offence is drunk or high they cannot be charged with sexual offence.		
6.	It's only sexual offence if someone has physical injuries or was threatened with a weapon.		
7.	When sexual offence occurs, it is usually committed by a stranger.		

#### b) Corporal punishment

Corporal punishment is defined as the use of physical force towards a child for the purpose of control and/or correction, and as a disciplinary penalty inflicted on the body with the intention of causing some degree of pain or discomfort, however mild. Punishment of this nature is referred to in several ways, for example: hitting, smacking, spanking, and belting (Cashmore & de Haas, 1995). Although most forms of corporal punishment involve hitting children with a hand or an implement (such as a belt or wooden spoon), other forms of corporal punishment include: kicking, shaking, biting and forcing a child to stay in uncomfortable positions (United Nations Committee on the Rights of the Child, 2006).

It may also be Corporal punishment when a person in authority uses physical force with the intention of causing pain for disciplinary purposes. Corporal punishment of children usually includes things like smacking, slapping, spanking or beating with the hand or with

some implement (like a stick or a belt). It can also involve other things, like kicking, shaking, pinching or burning.

Spanking is a type of corporal punishment. Spanking and similar corporal punishments are often effective in the short-term. Spanking children is a way of modelling violent behaviour for children.

### **c) Harmful Practices**

Cultural and social norms are highly influential in shaping individual behavior, including the use of violence. Rules or expectations of behavior or norms within a cultural or social group can encourage violence. For instance, cultural acceptance of violence, either as a normal method of resolving conflict or as a usual part of raising a child, is a risk factor for all types of interpersonal violence which can expose children to abuse and sexual offences.



#### **Activity 4**

**Read the passage and answer the questions below.**

Chilombo is a 14-year-old boy. He is not keen to go to school. Every time he goes to school he is reminded of the consequences of his performance. Unfortunately, his performance has not been so good. Each time results of a test or examination are released his father punishes him. The punishment can be anything from spanking to being denied food. Sometimes he is given a few stokes with a stick. Other times he is pushed to the ground to inflict pain on him. He is punished in the presence of family and neighbours. This causes him pain and he is slowly losing his self-esteem.

#### **Questions**

1. What kind of punishment is Chilombo given?
2. Is there any other way in which Chilombo can be punished?
3. What can be done to put a stop to corporal punishment?



## Activity 5

State whether each of these statements is a practice that exposes children to abuse and sexual offences by ticking **True or False**

Statements	True	False
Communities adhere to harmful traditional cultural practices		
A man has a right to assert power over a woman and is socially Superior		
Reporting abuse is disrespectful and shameful		
Girls are responsible for controlling a man's sexual urges		
Sexual violence is an acceptable way of putting women in their place or punishing them		
Sex and sexuality are taboo subjects to discuss		
Sexual violence such as rape is shameful for the victim, which prevents disclosure		
Reporting youth violence or bullying is unacceptable		



## Unit Summary

Gender based violence is violence against women or men. It takes the form of physical, mental, social or economic abuse against a person because of that person's gender and includes violence that may result in physical, sexual or psychological harm and suffering to the victim.



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A Safer Zambia GBV Training Manual A Safer Zambia (ASAZA) Knowledge, Attitude and Practice (KAP) Survey Report, May 2010.

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## **Legislations**

Anti-Gender Based Violence Act No. 1 of 2011

Criminal Procedure Code Chapter 88 of the Laws of Zambia

Juveniles Act Chapter 53 of the Laws of Zambia

Penal Code Chapter 87 of the Laws of Zambia