

age of sixteen years. Upon his own unequivocal plea of guilty, Chikane Phiri was convicted of the offence in question.

Mr. Banda in his written submissions dated 9th February, 2011, submitted that the case record does not reveal any aggravating circumstances, to warrant imposition of a sentence in excess of the minimum prescribed sentence of 15 years. Mr. Banda therefore urged me to exercise leniency because Chikane Phiri is a first offender who readily pleaded guilty to the offence charged.

Mr. Masempela in his submissions dated 11th February, 2011, submitted that Chikane Phiri is aged 28 years old, and was convicted of defilement of E. P. aged 12 years. Mr. Masempela also drew my attention to the case of *Siakalonga v The People [1977] Z.R. 61*, where the Court is said to have stated that:

"It is perfectly proper to refer to the prevalence of an offence, and to use that prevalence as a basis for imposing a deterrent sentence."

Mr. Masempela argued that the offence of defilement is prevalent in Zambia. Mr. Masempela also pointed out to the dangers of defilement cases in transmitting sexually transmitted infections, such as HIV/AIDS; genital warts; general herpes; or hepatitis B. Mr. Masempela notes that in the instant case the HIV test result was non-reactive. Mr. Masempela however argued that the test was done after four days of commission of the offence. Wit on 20th September, 2010. And the HIV in the blood may only show after the window period of three months. Mr. Masempela submitted that there is need to deter would be offenders in order to avoid ruining young girls. Thus Mr. Masempela urged me to impose a deterrent sentence.

In a reply dated 14th February, 2011, Mr. Banda noted that I have been urged to impose a deterrent sentence because the offence of defilement has become prevalent in Zambia. Mr. Banda continued that whilst the offence of Defilement has become prevalent, it is not the basis upon which the Court may impose a deterrent sentence as argued by Mr. Masempela. Mr. Banda stressed that the minimum sentence of 15 years is the set standard when imposing a sentence in an ordinary case of defilement of a child below the age of 16 years. Mr. Banda urged that the

Court should only mete out a deterrent sentence if there are aggravating circumstances. For instance, where a convict infects a child with a sexually transmitted disease (STD); where the victim is an imbecile; or where the victim is an infant. In the instant case, Mr. Banda argued that there are no aggravating circumstances. Mr. Banda pressed that the convict is a first offender who readily admitted the charge, and therefore deserves maximum leniency.

In aid of his submissions, Mr. Banda drew my attention to the case of *Sikaonga v The People SCZ No. 20 of 2009*, (to be reported in the 2009 Zambia Law Reports), where the Supreme Court gave guidelines for the approach to be taken when imposing sentences in defilement cases as follows:

“The law, as enacted, is that the minimum sentence for defilement is 15 years and the maximum is life sentence. The range in sentence means that the legislature has given the Courts the freedom to impose different sentences according to the facts of each case. An ordinary case of defilement will ordinarily attract the minimum sentence of 15 years imprisonment. However, where an accused is found to have infected the victim with a sexually transmitted disease STD, the sentence will certainly attract a more severe sentence above the minimum sentence of 15 years”.

Thus Mr. Banda urged me to impose a minimum sentence of 15 years imprisonment.

I am indebted to counsel for their submissions in this matter, and in particular for highlighting the guidelines by the Supreme Court in the *case of Sikaonga*. I also recognize the force in the argument by Mr. Masempela that not only is the scourge of defilement prevalent; and therefore warrants deterrent sentences, but that it also presents a practical problem in administering the guidelines laid down in the *Sikaonga* case in relation to HIV, because it may not be possible to determine conclusively whether or not HIV has been transmitted at the time the offence is committed, or indeed shortly thereafter. In that regard, it is therefore in my considered view difficult to determine whether or not a particular case is an ordinary case of defilement as defined or envisaged by the *Sikaonga* case.

Be that as it may, in the instant case, there is no proof or evidence before me of any aggravating circumstances as outlined in the *Sikaonga* case. That being the case, I will therefore impose the minimum statutory sentence prescribed by s. 138 (1) of the Penal Code. Accordingly, I sentence Chikane Phiri to 15 years imprisonment with hard labour, with effect from the date of arrest.

**Dr. P. Matibini, SC
HIGH COURT JUDGE**