ARTICLES

The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act*

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Introduction

Namibia's history of gender activism in the non-government organisation (NGO) sector played a significant role in creating the context in which the Combating of Rape Act, 2000 (No. 8 of 2000) was promulgated.[1] The Act ushered in much-needed reforms to the legal framework regulating the prosecution of sexual offences, and was supplemented by the Criminal Procedure Amendment Act, 2003.[2] This paper focuses on the rules of evidence applicable in sexual offence cases, and assesses whether or not the apparent withdrawal of the Criminal Procedure Act, 2004[3] detracts from the advances made in 2000 and 2003.

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* The same subject material was considered in Horn & Schwikkard (2007) on the presumption that the Criminal Procedure Act, 2004 (No. 25 of 2004) was to be enacted.

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1 See Hubbard (2000:fn. 52): "For instance, numerous appeals for law reform in this area were made to the Ministry of Justice by a diverse spectrum of organisations over the years. In 1989, Women's Solidarity (an NGO which provides education on violence against women and counselling for victims) published a paper proposing law reform in this area, with specific recommendations backed up by comparative research. It continued to lobby relentlessly for these reforms, stating in 1994: 'We know of few other law reform issues which have received such a broad range of public support'.

A petition which included specific requests for the reform of the laws on rape was signed by ten different NGOs and presented to the Minister of Justice as part of the commemoration of International Women's Day in March 1993. Also in 1993, the Namibia Women's Agricultural Association made a formal request to the LRDC [Law Reform Development Commission] to consider the option of imposing a minimum penalty for convicted rapists. This proposal was supported by the Legal Assistance Centre, which provided the Government with detailed research on the constitutionality of such a step and on approaches to rape sentencing in other countries. Shortly, after this , the Namibian Law Society, which represents all practising attorneys, gave its official support to sentencing guidelines as well as a range of other rape law reforms. In May 1994 another petition on law reform, signed by representatives from five government ministries and ten NGO's and again including specific demands for reform of the law on rape was presented to the Ministry of Justice.

In 1995, in the wake of a brutal attempted rape of a woman journalist in Windhoek, the Namibia Media Women's Association presented a petition to the LRDC that included demands for stiffer sentences and the elimination of bail for accused sexual offenders. Violence against women in general has been the topic of a substantial number of grassroots demonstrations. In 1995 there was even a community-based group of *men* who called for law reform and made a broad range of recommendations on government and community strategies to combat rape."

2 Act No. 24 of 2003.

3 Act No. 25 of 2004.

Prior to 2000, the evidentiary regime applicable to sexual offences was determined largely by common law, with its roots in the English law of evidence and the Criminal Procedure Act, 1977,[4] which was a replica of a South African Act of the same name. Under common law, the law of evidence had developed specific rules to be applied where the commission of a sexual offence was at issue. Sexual offences were distinguished from other offences because of a belief that they had unique characteristics that gave rise to difficulties of proof and refutation.

These rules required the courts to make exceptions to the exclusionary rules applicable to previous consistent statements and character evidence. In addition, presiding officers had to apply a specific cautionary rule to the testimony of the complainant. If the complainant was a child, then the child would be subject to yet another cautionary rule applicable to children and to a competence inquiry.[5]

Previous consistent statements

There is a general rule of evidence which provides that, if a witness has previously made a statement out of court which confirms his or her testimony, evidence of such a statement is inadmissible.[6] The primary reason for the exclusion of such statements is their lack of relevance. Repetition does little to enhance an assessment of veracity and, obviously, if such evidence were admissible, it would be very easy to manufacture.[7]

In common law, there are a number of exceptions to this rule. One is the admission of evidence that the complainant in a sexual offence case made a complaint soon after the alleged offence. Although the content of the complaint is admissible, its probative value is restricted to showing consistency of conduct and absence of consent. However, it will never be considered as corroborative evidence as this would clearly infringe on the rule against self-corroboration.[8]

Before a prior complaint is admitted into evidence, a number of requirements have to be met. For one, the complaint must have been voluntary.[9] This does not exclude complaints elicited as a result of questioning. What amounts to an acceptable degree of prompting will depend on all the surrounding circumstances.[10] It is also important that the complaint be made at the first reasonable opportunity.[11] This does not necessarily mean that a complainant must blurt out her woes to the first person she encounters. What constitutes a

4 Act No. 51 of 1977.
5 See generally Hubbard (1991:134).
6 *Jones v South Eastern & Chatham Railway Co.'s Managing Committee*, (1918) 118 LT 802; *R v Manyana*, 1931 AD 386.
7 *R v Roberts*, [1942] 1 All ER 187 (CCA).
8 *R v M*, 1959 (1) SA 352 (A).
9 *S v T*, 1963 (1) SA 484 (A).
10 *R v C*, 1955 (4) SA 40 (N).
11 *R v Osborne*, [1905] 1 KB 551.

reasonable opportunity in the circumstances of the case will be determined by the exercise of judicial discretion.[12]

The complainant herself is also required to testify before such a prior statement will be admitted. Consequently, the admission of such evidence cannot be viewed as an exception to the hearsay rule.

The influence of English law on Namibia's law of evidence is clearly reflected in this exception to the rule prohibiting the use of previous consistent statements. The existence of the previous consistent statement rule has its roots in the old English law of 'hue and cry'. Its application to rape cases was recorded in the 13th century by De Bracton.[13] It required the victim to –[14]

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

The rationale for this antiquated evidentiary practice was rooted in the belief that it was a product of centuries of judicial experience, which had shown that the evidence of a complainant in a sexual offence case must be treated with suspicion. Consequently, in order to overcome this suspicion, the courts were permitted to take previous consistent statements into account.[15] The basis of the suspicion that pervaded the approach taken by the courts in dealing with sexual offences is critically discussed under the section entitled "Cautionary rule" below. There are, however, a number of other criticisms directed at the practice of admitting previous consistent statements in cases of a sexual nature.

It can be argued that the admission of such evidence favours the complainant unfairly, in that the accused is prohibited from leading similar evidence. Conversely, this exception to the previous consistent statement rule is criticised on the basis that it enables the defence to exploit "the complainant's failure to complain timeously in order to cast doubt upon her credibility".[16] The negative inference that may be drawn from the complainant's failure to complain timeously reflects attitudes formulated in a time when there was little understanding of the psychology of the rape survivor. There are many psychological and social factors which may inhibit a rape survivor from making a complaint; consequently, the absence of a complaint can never be a reliable criterion in assessing credibility.[17]

12 *R v C*, 1955 (4) SA 40 (N).

13 See De Bracton (1968).

14 Ibid.:415.

15 This justification appears to have been received uncritically by the South African Law Commission in Project 45, *The Report on Women and Sexual Offences* (1985:53). See also *R v P*, 1967 (2) SA 497 (R).

16 See *R v M*, 1959 (1) SA 352 (A), which clearly established that a negative inference can be drawn from the accused's failure to complain timeously.

17 Brownmiller (1975:361ff); Burgess & Holmstrom (1974:37ff); Hall (1985); Medea & Thompson (1981:101ff); Temkin (1987); Toner (1982:225ff); Wilson (1978:62ff);

Sections 6 and 7 of the Combating of Rape Act, 2000[18] provide explicit recognition of the absence of any correlation between late reporting and unreliability, and of the strong body of social science evidence that indicates that victims of sexual offences may postpone reporting the offence for a considerable period. The sections read as follows:[19]

> 6. Evidence relating to all previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature: Provided that no inference may be drawn only from the fact that no such previous statement has been made.
>
> 7. In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent assault and the laying of a complaint.

The prohibition of the drawing of an inference from the absence of a previous consistent statement is a non sequitur in that, for the matter to have come before the court, there would always have been a previous consistent statement. A *previous consistent statement* refers to a statement made out of court that is essentially similar to the statement made by the witness in court. For the matter to have come to court, the complainant must have told somebody about the incident. The issue in each instance is not whether a previous consistent statement was made, but when it was made – and this is where section 7 of the Act may well have an impact on the evaluation of credibility by prohibiting the drawing of an inference "only from the length of the delay" in reporting. However, the word *only* leaves open the possibility that an adverse inference may be drawn against the complainant if delay in reporting is coupled with some other evidence suggesting, for example, recent fabrication.

It is possible that the same effect may have been achieved by abolishing the exception to the previous consistent statement applicable to complainants in sexual offence cases and simply retaining the general exception that applies to all types of case and allows previous consistent statements to be admitted when there is an allegation of recent fabrication. This is the approach adopted by the Canadian legislature.[20] Indeed, it can be argued that, if previous consistent statements are irrelevant in relation to other categories of offence, it is difficult to see why they should be relevant in sexual offence cases.

The Criminal Procedure Act left these sections of the Combating of Rape Act intact, and although section 7 of the latter Act was an improvement on the common law position, scope remains for greater clarity. The withdrawal of the 2004 Criminal Procedure Act creates a real possibility that the ambiguities

18 Act No. 8 of 2000.

19 Similar provisions are contained in sections 58 and 59 of the South African Criminal Law (Sexual Offence and Related Matters) Amendment Act, 2007 (No. 32 of 2007).

20 Section 275 of the Canadian Criminal Code.

inherent in sections 6 and 7 of the Combating of Rape Act may be more effectively aligned with both the interests of the complainant and the accused in future legislation.

The cautionary rule

Sexual offences

There are a number of cautionary rules to be found in the law of evidence, in terms of which the courts are instructed to exercise caution when dealing with the evidence of certain witnesses. One such category of witness at common law was the complainant in a sexual offence case.

Cautionary rules are not inflexible. There is no fixed criterion that has to be met before a court will be convinced of a witness's trustworthiness.[21] Corroboration is not essential, although the cautionary rule will most often be overcome if there is some corroborative evidence.[22] If the requirements of a cautionary rule are met, it does not necessarily mean that proof beyond reasonable doubt has been established.[23] Despite the flexibility of the cautionary rules, however, there is no doubt that the application of the cautionary rule to the testimony of complainants in sexual offence cases was taken seriously. In *S v S*,[24] the South African Appellate Division held that mere reference to the cautionary rule applicable in sexual offence cases would not suffice. Eksteen, JA, held that it was not sufficient that the presiding officer be satisfied that the cautionary rule applicable to single witnesses had been overcome; even the presence of corroborative evidence would not suffice if the court did not clearly show it was conscious of the inherent dangers of such evidence in sexual cases.

The problem with this cautionary rule was that it appeared to have no rational basis. Instead, it demeaned women, and contributed to secondary victimisation and the non-reporting of cases.[25] Traditional arguments in support of the cautionary rule assert that it must be applied to the complainant in sexual offence cases because sexual offences frequently occur in private and leave no outward traces, making it very difficult to refute an assertion that there was no consent. The accused's difficulties are allegedly compounded by the danger that

21 *S v Artman*, 1968 (3) SA 339 (A); *S v Snyman*, 1968 (2) SA 582 (A); *R v J*, 1966 (1) SA 88 (RA).
22 See *S v Katamba,* 2000 (1) SACR 162 (NmS) at 170g, where O'Linn, AJA, notes as follows: "Even if it is conceded that the rule does not require 'corroboration' as such, how then does a Court distinguish it from corroboration? Some Courts consequently simply require corroboration …".
23 *S v Hlapezula*, 1965 (4) SA 439 (A); *Borcerds v Estate Naidoo*, 1955 (3) SA 78 (A).
24 1990 (1) SACR 5 (A).
25 There is a plethora of local and international materials exposing the absence of a rational basis for the existence of a specific cautionary rule applicable to sexual offences and reiterating the discriminatory and misogynist nature of the rule. These include Adler (1987); Bienen (1983:235); Birch (1990:667); Bronstein (1992:588); Brownmiller (1976); Burgess & Holmstrom (1974); Dennis (1984:316); Estrich (1986:1087); Estrich (1987); Fryer (1994:60); Hall (1985); Medea & Thompson (1981); Samson (1994); Smart (1989); Temkin (1987); Thomas Morris (1988:146); Toner (1982); Vogelman (1990); Wilmot (1992:211); Wilson (1978).

a sexual offence complainant may have some improper motive for laying the charge. The counter-argument is simple: there is a cautionary rule applicable to single witnesses which is invoked for all categories of offence. In addition, presiding officers –[26]

> … will have available the usual criteria of demeanour and coherence of the witness under cross-examination and the evidence of surrounding circumstances …

to assist them in assessing mendacity. The absence of outward traces is not an obstacle for the accused but an additional hurdle that the prosecution has to overcome in proving guilt beyond a reasonable doubt. The accused does not have to prove anything, and merely has to raise a reasonable doubt in the event of the prosecution establishing a prima facie case. There is no empirical data showing that more false charges are laid in respect of sexual offences than in any other category of crime. Available data indicates that sexual offences are greatly underreported. All arguments supporting the cautionary rule other than those pertaining to the dangers of a single witness's testimony are based on a misogynist assumption that women are duplicitous, sexually and otherwise.

In *S v D*,[27] Frank, J, finding that there was no empirical data supporting the contention that in cases of this nature more false charges are laid than in any other category of crime, came to the conclusion that the reasoning behind the cautionary rule must be as follows:[28]

> All women are *prima facie* deceitful and act with hidden motives and all men are *prima facie* incorruptible and act without hidden motives.

The counter-argument was that the rule could not be discriminatory as it applied to both men and women. Frank, J, overcame this potential criticism by stating that the overwhelming number of total complaints of a sexual nature are laid by women and, therefore, the only purpose of the cautionary rule was to discriminate against women.[29] He then went on to conclude, in an obiter dictum, that the cautionary rule had no rational basis and was probably contrary to the Namibian constitutional guarantee of equality.[30]

A claim of gender neutrality is also difficult to sustain when the historical framing of the rule in terms of female psychology is taken into account. The traditional rationale is clearly expressed by Wigmore in the following passage:[31]

26 Dennis (1984:328).

27 1992 (1) SACR 143 (Nm). For further commentary on this case, see Wilmot (1992:211); Bronstein (1992:588).

28 At 146b–d.

29 See Hubbard (2007), who notes that between 2000 and 2005, 99% of reported rape victims were women. Summary of report accessed via 13/7/07:www.irinnews.org/Report.aspx?ReportId=72535.

30 Ibid.:146.

31 Wigmore (1970:para. 924A, p 736). This passage has often been quoted with approval by the

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

Glanville Williams found justification for the cautionary rule on the following grounds:[32]

> Sexual cases are peculiarly subject to the danger of deliberately laying false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed.

Schriener, JA, in the South African case of *R v Rautenbach*,[33] contributed the following:

> It is not only the risk of conscious fabrication that must be guarded against. There is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all.

The suggestion that the cautionary rule be jettisoned was adopted by the Namibian Supreme Court in *S v Katamba*.[34] However, the court reiterated that, although the cautionary rule should no longer be applied, this did "not mean that the nature and circumstances of the alleged offence need not be considered carefully".[35] The South African courts were a little slower than the Namibian courts in recognising the fallacious nature of this particular cautionary rule. The first change in the South African judicial tide occurred in 1997, in the case of *S v M*.[36] The court, assuming that it had no option but to apply the cautionary rule, held that "it is highly problematic to assume automatically that women lie about rape when approaching a court",[37] and held that the cautionary rule had to be applied in a way that did not undermine the unequivocal constitutional

South African courts. See e.g. *S v Balhuber*, 1987 (1) SA PH H22 at 40; *S v F,* 1989 (3) SA 847 (A) at 854. Bienen (1983) scrutinises the authorities upon which Wigmore relied for his assertions about the mendacity of young girls, and concludes that "Wigmore writes as a man convinced, apparently so convinced that he actually suppressed factual evidence contradicting his assertions".

32 Williams (1962:662); also quoted in *S v Balhuber,* 1987 supra and *S v F*, 1989 supra.

33 1949 (1) SA 135 (A) at 143.

34 2000 (1) SACR 162 (NmS).

35 At 177B–C, quoting from *S v D*, supra, at 146h.

36 1997 (2) SACR 682 (C).

37 Ibid.:685d.

commitment to gender equality.[38] Shortly after the decision in *S v M*, the Supreme Court of Appeal, in *S v Jackson*,[39] held that –

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

It expressly held that the cautionary rule had no place in South African law,[40] and made it clear that the only instance in which the testimony of a complainant or any witness could be treated with caution was when there was an evidentiary basis for doing so.[41] This qualification subsequently led to some ambiguity in the application of *Jackson*,[42] which was resolved when the Criminal Law (Sexual Offences and Related Matters) Amendment Act came into force.[43]

Fortunately, the Combating of Rape Act ensures that no such ambiguity exists in Namibian law. Section 5 of the Act provides as follows:

> No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.

This was not altered by the Criminal Procedure Act, 2004, and any problems encountered in the application of section 5 in the Combating of Rape Act are unlikely to be remedied by legislative fiddling: rather, judicial training is required.

Children

A cautionary rule applicable to the evidence of children provides that a presiding officer is obliged to be aware of the dangers inherent in assessing a child's evidence. Their evidence has to be considered in the same light as the evidence of accomplices.[44] As a consequence, the court will seek corroboration in order to assist in determining whether the witness is credible. However, corroboration

38 Ibid.:685e–j.
39 1998 (1) SACR 470 (SCA), at 476e.
40 Ibid.:476e–f.
41 In *S v M*, 2006 (1) SACR 135 (SCA), Cameron, JA, held that the constitutional right to dignity requires that any allegation of malicious motive for laying a complaint in a sexual offence case needs to be canvassed in the complainant's evidence (at para. [271]). As noted by Cameron, complainants in other criminal cases are not subject to such speculation (at para. [273]) and there is no rational reason for exposing a complainant to the indignity of such speculation.
42 See e.g. *S v Van der Ross*, 2002 (2) SACR 362 (C); for further discussion of this case, see Schwikkard (2003:256).
43 Act No. 32 of 2007. Section 60 expressly abolishes the cautionary rule applicable to sexual offences, as follows: "Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence".
44 *R v Manda*, 1951 (3) SA 158 (A) at 163D.

is not essential for the requirements of the cautionary rule to be met.[45] The cases are not altogether enlightening as to precisely what the inherent dangers in children's evidence are. In the South African case of *R v Manda*,[46] Schreiner, JA, states that –

> … [t]he imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion …[,]

but unfortunately he did not elaborate on the other 'numerous elements'. More guidance is to be found in the dictum of Diemont, JA, in *Woji v Santam Insurance Co Ltd*:[47]

> The question which the trial court must ask itself is whether the young witness' [sic] evidence is trustworthy. Trustworthiness … depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurred" while the capacity of narration or communication raises the question whether the child has the "capacity to understand the questions put, and to frame and express intelligent answers" … There are other factors … Does he appear honest[?] … [I]s there a consciousness of the duty to speak the truth[?] … At the same time the danger of believing a child where evidence stands alone must not be underestimated.

Although *Woji* should be applauded in that it recognises the individuality of children, it is clearly still based on the premise that children are inherently more unreliable than adults as witnesses. According to Spencer and Flin, this belief accords with societal and 'expert' views that were prevalent up until the 1960s.[48] However, subsequent research in cognitive psychology and child development has resulted in a reappraisal of earlier beliefs and a realisation that children's ability to give reliable evidence has been greatly underestimated.[49] This conclusion has been strengthened by research on the reliability of adult testimony, which has shown that adults' memories may be poor and susceptible to suggestion and misinformation.[50] The result has been awareness amongst

45 Ibid.; *Woji v Santam Insurance Co Ltd*, 1981 (1) SA 1020 (A).
46 *R v Manda*, at 163C–D.
47 Ibid.
48 Spencer & Flin (1990:286–287).
49 Ibid. It is interesting to note that this and other observations made by the author and first recorded in 1996 in *Acta Juridica* at 152 are reported verbatim as a record of counsel's submission in *S v Monday*, 2002 NR 167 (SC) at 192 and 194, with no acknowledgement of the source. See Schwikkard (1996).
50 Ibid.

social scientists that –[51]

> … the presumed gulf between the eyewitness abilities of children and adults has been seriously exaggerated.

It is not at all clear that the cautionary rule applicable to the evidence of children can withstand the test of social science evidence. The legal system's distrust of children's evidence has a discriminatory effect on an extremely vulnerable group. In the absence of a clear rationale it becomes difficult to justify this cautionary rule's inconsistency with a constitutional commitment to equality. It would seem to make much more sense to get rid of this cautionary rule and require, as articulated in *Jackson*,[52] that any cautionary approach to a witness must have an evidential basis, with a very clear proviso that the age or gender of the witness cannot provide the requisite evidential base. However, these arguments were unequivocally rejected by O'Linn, AJA, in *S v Monday*,[53] mainly on the basis that the relevant social science evidence had not been properly put before the court.[54]

The Combating of Rape Act was silent on the cautionary approach applicable to the evidence of children. Perhaps this was because it would not necessarily make sense to abolish the cautionary rule only in respect of children testifying in sexual offence cases. This lacuna in the rape reform provisions was remedied by the Criminal Procedure Amendment Act, 2003, which amended section 164 of the Criminal Procedure Act, 1977 by the addition of subsection (4), which read as follows:

> A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.

The corresponding section (s 185) in the Criminal Procedure Act, 2004 made no reference to the cautionary rule. Since the 2004 Act was set to repeal the whole of the Criminal Procedure Act, 1977 as well as the Criminal Procedure Amendment Act, 2003, the cautionary rule applicable to children would have been revived. This fortunately will no longer be the case, but it is clearly a danger that should be taken into account by future drafters.

51 Ibid. See also Melton (1981:73). For a variety of perspectives on children's evidence, see Ceci et al. (1987, 1989).
52 1998 (1) SACR 470 (SCA).
53 2002 NR 167 (SC).
54 See also *S v Katamba*, supra.

Getting rid of the cautionary rule applicable to children is by no means a novel idea. In England, the cautionary rule applicable to children's evidence was abrogated by section 34(2) of the Criminal Justice Act of 1988, and well over a decade ago, the Supreme Court of Canada rejected the cautionary rule together with the notion that children's testimony was inherently unreliable and, consequently, needed to be treated with special care.[55] Nevertheless, the Canadian courts have recognised that children are not miniature adults and this should be appreciated on a case-by-case basis when assessing the credibility of children. This approach, which is not based on the notion that children are inherently unreliable, implicitly calls for judicial awareness of children's cognitive development. There are two ways of attaining this: (a) by judicial training,[56] and (b) by providing expert assistance in the courtroom. The financial cost and availability (or not) of experts to assist the court, as well as potential administrative difficulties that might contribute to increased backlogs in the court, may result in (b) being unattainable. However, judicial training is not so easy to dismiss. It can be argued that the transformation of any judicial system requires social context training. The legal system is imbued with internalised beliefs drilled in textbooks, law school training, and tradition; these internalised beliefs are not easily dislodged. Without social context training, the formal jettisoning of the cautionary rules on their own is unlikely to improve the quality of fact-finding. It is more likely that the prejudices represented by these rules will become an unarticulated factor influencing judicial assessment of credibility.

Testimonial competence of children

At common law, age is not the determining factor in deciding whether a child is competent to testify. Children will be competent to testify if, "in the opinion of the court, they can understand what it means to tell the truth".[57] Children need not give sworn evidence if the court believes that they do not "understand the nature and import of the oath or affirmation".[58] The fact that a child's evidence is unsworn does not necessarily mean that it will be accorded less weight.[59] Hoffmann and Zeffert summarise the 'competency test' as follows:[60]

> In each case the judge or magistrate must satisfy himself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth – he is an incompetent witness.

55 *R v W (R)*, (1992) 74 CCC (3d) 134. See also *S v B (G)*, (1990) 56 CCC (3d) 200.

56 See Perry & Wrightsman (1991:56), who argue that "a working knowledge of the stages and issues of child development is essential to any person who interacts with children in the legal system".

57 Hoffmann & Zeffert (1988:375).

58 Section 164 of the Criminal Procedure Act, 1977 (No. 51 of 1977). See also section 41 of the Civil Proceedings Evidence Act, 1965 (No. 25 of 1965).

59 *R v Manda*, 1951 (3) SA 158 (A).

60 Hoffmann & Zeffert (1988:376). See also *S v T*, 1973 (3) SA 794 (A); *S v Monday*, 2002 NR 167 (SC).

In other words, a presumption of incompetence applies to children as they are required to pass a test before their evidence will be admitted.[61] No similar presumption applies to convicted perjurers or to other persons convicted of crimes involving an element of dishonesty. The effect of the 'competency test' is that there is the possibility that reliable testimony may be excluded and this may inhibit the effective prosecution of offences. *Truth* and *the duty to tell the truth* are abstract notions, which a young child may not be able to understand or explain; but this does not mean that they cannot give a reliable account of relevant events.[62]

Adults are presumed to be competent witnesses.[63] However, if their competence is placed in issue, there will be two inquiries: (i) the witness's ability to understand the nature of the oath,[64] and (ii) the witness's ability to communicate.[65] Where adults do not understand the nature of the oath, they may give unsworn evidence after being admonished to tell the truth.[66] The purpose of administering the oath or admonishing a witness to tell the truth is primarily to encourage the witness to tell the truth.[67] However, in assessing credibility, the court will place little weight, if any, on the fact that a witness took the oath or was admonished to tell the truth.[68] Instead, it will look to such factors as coherence under cross-examination, evidence of surrounding circumstances, and demeanour. The fact that a child cannot understand or articulate its understanding of the duty to tell the truth does not necessarily hinder a court in its assessment of credibility.[69]

The second leg of the competence inquiry is far more important. Clearly, a child who cannot communicate and who is unable to give an understandable account of the relevant events will be of little assistance to the court. On the other hand a child who does not understand the duty to speak the truth, but who is able to give an account of relevant events will be of great assistance. But does the court need to test a child's ability to communicate prior to the child testifying? Wigmore, recognising the difficulties and futility of assessing a child's credibility prior to the child giving evidence, wrote "it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may

61 See Birch (1992:265).

62 Spencer & Flin (1990:58).

63 See section 192 of the Criminal Procedure Act, 1977 (No. 51 of 1977) and section 42 of the Civil Proceedings Evidence Act, 1965 (No. 25 of 1965). A person who alleges that an adult is an incompetent witness bears the onus of proof.

64 Hoffmann & Zeffert (1988:372).

65 *R v Ranikolo,* 1954 (3) SA 255 (O).

66 Section 41 of the Civil Proceedings Evidence Act, 1965 (No. 25 of 1965) and section 164 of the Criminal Procedure Act, 1977 (No. 51 of 1977).

67 *S v Munn*, 1973 (3) SA 734 (W) at 734.

68 This is because the ability to reason morally does not mean that a person will behave morally. See Perry & Wrightsman (1991:129); Spencer & Flin (1990:334); Bussey et al. (1993:153).

69 See Melton (1981:79), where he persuasively argues that "[a]sking a child to tell the meaning of 'truth', 'oath' or 'God' probably tells more about his or her intellectual development than about the child's propensity to tell the truth".

seem worth".[70] In England, the Pigot Committee gave the following reasons for abandoning the competency requirements applicable to children:[71]

> In principle it seems wrong to us that our courts should refuse to consider any relevant understandable evidence. If a child's account is available it should be heard … Once this evidence is admitted juries will obviously weigh matters such as the demeanour of the witness, his or her maturity and understanding and the coherence and consistency of the testimony, in deciding how much reliance to place upon it … [T]he present approach … appears to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all. It follows that we believe that the competence requirement which is applied to potential child witnesses should be dispensed with and it should be not be replaced.

In accordance with the Committee's recommendations, section 33A was inserted into the Criminal Justice Act.[72] In terms of this section, the English courts were no longer required to inquire into the competency of children as a class, although they retain the power to declare a child incompetent.[73] This has subsequently been replaced by sections 53 and 54 of the Youth Justice and Criminal Evidence Act 1999. In terms of section 53, all witnesses – whatever their age – will be presumed to be competent, provided they can understand the questions that are put to them and are able to give answers which can be understood. Section 53 is subject to section 54, which provides, inter alia, that when competency of a witness is put in issue, the party calling the witness needs to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings.[74]

Provided an accused is afforded the opportunity of challenging the evidence of a child witness, it is difficult to see how the abandonment of the competence inquiry could in any way diminish trial fairness. On the other hand, the requirement that a judge be satisfied that a child understands the duty to speak the truth before that child is considered a competent witness "singles out some of society's most vulnerable members for treatment that effectively deprives them of the protection and vindication of the criminal justice system".[75]

Birch comments that "child abuse occurs in part because of the inequalities between child and adult in size, knowledge and power", and that these

70 Wigmore (1970:509, 601).
71 Pigot Committee (1989).
72 Inserted by virtue of section 52(1) of the Criminal Justice Act 1991.
73 According to Birch (1992:268), the correct interpretation of section 33A is that a child will only be declared incompetent when he or she cannot communicate effectively.
74 In the United States, the Federal Rules of Evidence do not distinguish between children and adults. Consequently, a child can testify without a preliminary testing of competency; see McGough (1994).
75 Harvison Young (1992:19).

inequalities "have been institutionalised by one-sided rules of evidence".[76] It would appear that there are strong grounds for arguing that the abandonment of the 'competency test' is necessary for effective equality. It will also increase the potential for successful prosecutions, and will buttress a child's constitutional right to security and freedom from abuse.

The Combating of Rape Act was silent as regards the testimonial competence of children. However, the Criminal Procedure Amendment Act, 2003 introduced some significant changes – the effect of which made the ability to communicate with the court the sole criterion for competency in respect of children.[77] The amended section 164 does not require an inquiry into the child's ability to understand the nature and import of the oath and affirmation, and simply requires the presiding officer to admonish the child to speak the truth. Subsection (3) was inserted and provides as follows:

> (3) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of any witness required to be admonished in terms of subsection (1) shall be received unless it appears to the presiding judge or judicial officer that that witness is incapable of giving intelligible testimony.

These amendments were retained in section 185 of the Criminal Procedure Act, 2004. However, as withdrawal of the 2004 Act simply means that section 164 remains intact, it appears that, in this respect at least, there will be no negative consequences for the child complainant.

However, the ability of children to give evidence was further facilitated by the incorporation of provisions similar but not identical to those contained section 5 of the Criminal Procedure Amendment Act, 2003,[78] into section 245 of the Criminal Procedure Act, 2004. This section effectively departed from the principle of orality and provided another route[79] for the admission of hearsay as well as previously recorded statements (when the child testifies) to be admitted into evidence – provided the presence of requisite safeguards was established. Section 245 reads as follows:

> 245.(1) Evidence of a statement made by a child under the age of 14 years is admissible at criminal proceedings as proof of any fact alleged in that statement if the court –
>
> (a) is satisfied that –
>
> (i) the child who made the statement is incapable of giving evidence relating to any matter contained in the statement; and

76 Birch (1992:269).

77 See section 2 of the Criminal Procedure Amendment Act, 2003 (No. 24 of 2003).

78 Inserting section 216A into Act 51 of 1997.

79 The other route is to be found in section 244, which applies to all hearsay evidence.

(ii) the statement, considered in the light of all the surrounding circumstances, contains indications of reliability; and

(b) having regard to any prejudice to a party to the proceedings that the admission of such evidence might entail, it is of the opinion that such evidence should be admitted in the interests of justice.

(2) If a child under the age of 14 years gives evidence in criminal proceedings, evidence of the statement made by that child is admissible as proof of any fact alleged in the statement if that child gives evidence to the effect that he or she made that statement.

(3) Evidence of a statement contemplated in subsection (1) or (2) may in criminal proceedings be given in the form of –

(a) the playing in court of a videotape or audiotape of the making of that statement if the person to whom the statement was made gives evidence in such proceedings;

(b) a written record of that statement if the person to whom the statement was made gives evidence in such proceedings;

(c) oral evidence of that statement given by that person to whom the statement was made, but only if it is not possible to give evidence in the form contemplated in paragraph (a) or (b).

(4) This section does not render –

(a) admissible any evidence that is otherwise inadmissible;

(b) inadmissible any evidence that is otherwise admissible under section 244 as hearsay evidence.

The withdrawal of the 2004 Act means that this aspect of children's testimony remains covered by section 216A of the Criminal Procedure Act, 1977. Section 216A does not contain a provision corresponding to section 245(1)(b), which requires the court to take into account prejudice to all parties in admitting the evidence in the interests of justice. This provision, which is directed at ensuring trial fairness, is an unfortunate loss. Section 216A also has no provision corresponding to section 245(4), which would have played an important role in retaining consistencies in evidentiary standards, as well making it clear that the more principled and flexible approach to hearsay set out in section 244 of the Act was also applicable to statements made by children.

The advantages of allowing the pre-recorded evidence of a child to be admitted into evidence is that it has the potential of enhancing the truth-seeking function of the court by providing evidence of a better quality. Trial delays mean that witnesses frequently have to testify months or even years after the incident in

question. In all witnesses, the ability to recall diminishes with time – but this is particularly acute with young witnesses. It also allows evidence to be made available to the court when a child is incapable of giving evidence. However, it is only when the child is incapable of testifying that they will be exempt from the trauma of testifying at trial. If they are capable of testifying, then they need to enter the witness box and confirm that they made the earlier statement. They are then inevitably obliged to be subject to cross-examination, both on the prior statement and any discrepancies that might arise between their prior statement and their testimony in court. This scenario has the potential of being extremely stressful for the child. This would have been the case under the amended 1977 Act as well as the 2004 Act. However, section 244 of the 2004 Act may well have provided the needed flexibility. Section 244 offered another route for the admission of hearsay evidence and allowed hearsay to be admitted –

- where the party against whom it is adduced consents to its admission
- the person on whose credibility the probative value of such evidence depends testifies, and
- if it is in the interests of justice that the hearsay be admitted.

Section 244(1)(c) sets out a number of factors that a court has to take into consideration in determining whether it is in the interests of justice to admit the hearsay evidence. Consequently, it is possible that, if there were sufficient guarantees of reliability at the pre-trial recording – such as the presence of the accused's legal representative and cross-examination, the child's pre-recorded evidence may have been admitted in terms of section 244 although the child was capable of testifying.[80] This may well have been a path worth pursuing, when testifying would clearly create significant trauma for the child. It would indeed be unfortunate if the much-needed amendment to the common law hearsay rule, which would have occurred if section 244 had been enacted, is further delayed by legislative indecision.

Evidence of psychological effects of rape

Section 8 of the Combating of Rape Act remains intact. It is an interesting section in that it would seem superfluous if the ordinary rules of relevance where consistently applied by presiding officers. The section reads as follows:

> 8.(1) Evidence of the psychological effects of rape shall be admissible in criminal proceedings at which an accused is charged with rape (whether under the common law or under this Act) in order –
>
> (a) to show that the sexual act to which the charges relate is likely –

80 For a general discussion of pre-recorded child testimony, see Simon (2006:56), where she notes that there are a number of jurisdictions that permit pre-recorded statements to be admitted, and that, in Canada and America, such provisions have passed constitutional muster – provided the appropriate safeguards are in place.

(i) to have been committed towards or in connection with the complainant concerned;

(ii) to have been committed under coercive circumstances;

(b) to prove, for the purpose of imposing an appropriate sentence, the extent of the mental harm suffered by that complainant.

(2) In estimating the weight to be attached to evidence admitted in terms of subsection (1), the court shall have due regard to –

(a) the qualifications and experience of the person who has given such evidence; and

(b) all the other evidence given at the trial.

It must be presumed that a legislative need was identified as a consequence either of presiding officers failing to admit such relevant evidence or legal representatives failing to tender such evidence (or both). Although in principle superfluous, hopefully section 8 will continue to serve an educational function.

Evidence during criminal proceedings of similar offences by accused

An equally puzzling addition was made by section 16 of the Combating of Rape Act, which inserted section 211A in the Criminal Procedure Act, 1977, and was replicated in section 237 of the Criminal Procedure Act, 2004. In essence, the addition simply states that the general rule and the exceptions applicable to similar fact evidence also apply when similar fact evidence is sought to be admitted against an accused charged with a sexual offence. The addition reads as follows:

237.(1) Subject to subsection (2), in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, evidence of the commission of other similar offences by the accused must, on application by the prosecutor, be admitted by the court at such proceedings and may be considered on any matter to which it is relevant, but such evidence must only be so admitted if the court is satisfied that it has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused.

(2) Evidence of previous similar offences by an accused is not admissible only to prove the character of the accused.

(3) The court's reasons for its decision to admit or refuse to admit evidence to previous similar offences must be recorded and those reasons form part of the record of the proceedings.

Section 237 is a useful codification of the common law similar fact rule applicable in all cases, but is inexplicably restricted to sexual offence cases. If there is indeed reluctance on the part of presiding officers to apply the similar fact rule to evidence adduced against the accused, subsection (3) in particular will play an important role in ensuring that judicial minds are properly focused in determining the admissibility of such evidence.

Prior sexual history

In all criminal cases where the complainant testifies, he or she may be cross-examined; and the cross-examiner may ask questions that are pertinent to exposing the witness's credibility or lack thereof. However, the general rule is that the character or disposition of the complainant is not relevant to credibility. Consequently, evidence which is solely directed at establishing that the complainant is of bad character is prohibited – as is evidence of good character. But once again, there is an exception to the general rule: in a case involving a charge of rape or indecent assault, the defendant may adduce evidence as to the complainant's bad reputation for lack of chastity.

Prior to the Combating of Rape Act, 2000, section 227 of the Criminal Procedure Act, 1977 provided that, in sexual offence cases, the admissibility of evidence as to "the character of any female" would be determined by the application of the common law. This enabled the defence to question the complainant as to her previous sexual relations with the accused.[81] The accused was prohibited from leading evidence of the complainant's sexual relations with other men.[82] However, she could be questioned on this aspect of her private life in cross-examination as it was viewed as being relevant to credibility. Evidence to contradict any denials could only be led if such evidence was relevant to consent.[83]

Evidential rules permitting the admission of evidence of prior sexual history appear to have been adopted by the English courts in the 19th century,[84] the underlying assumption behind these rules being that no decent women engaged in sexual intercourse outside of marriage.[85] One of the strongest criticisms of the rule permitting evidence of prior sexual history is that, while cross-examination concerning prior sexual history traumatises and humiliates the victim, the evidence it elicits is irrelevant. At most, this evidence may establish a general propensity to have sexual intercourse. Evidence of this nature is held to be inadmissible in other cases, and there are no grounds for admitting it where the case is of a sexual nature. The admissibility of this evidence deters victims from reporting the offence.[86]

81 *R v Riley*, (1887) 15 QBD 481.
82 *R v Adamstein*, 1937 CPD 331.
83 *R v Cockcroft*, (1870) 11 Cox CC 410; *R v Cargill*, [1913] 2 KB 271.
84 Temkin (1987).
85 South African Law Commission (1985:50).
86 South African Law Commission (1985:49–50); Temkin (1987:120).

Most of the arguments against reform were based on the assertion that cross-examination is an essential component of the adversary system, all relevant information has to be put before the court, and the rights of the accused have to be protected. These arguments ignore the fact that such evidence of general propensity is inadmissible in other cases, and that such evidence is irrelevant to proving guilt or innocence.

The Combating of Rape Act amended section 227 so as to make it applicable only to the accused's character, and inserted section 227A. These sections were repealed by the Criminal Procedure Act, 2004 but substantially re-enacted in section 258 of the 2004 Act. The withdrawal of the 2004 Act consequently makes no substantial difference, as section 227A remains in force. It reads as follows:

> 227A (1) No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, [sic] shall be adduced, and no question regarding such sexual conduct or experience shall be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave shall only be granted if the court is satisfied that such evidence or questioning –
>
> (a) tends to rebut evidence that was previously adduced by the prosecution; or
>
> (b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to the fact in issue; or
>
> (c) is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused:
>
> Provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.
>
> (2) No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, [sic] shall be admissible in such proceedings.
>
> (3) Before an application for leave contemplated in subsection (1) is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, [sic] shall not be present at such application proceedings.
>
> (4) The court's reasons for its decision to grant or refuse leave under subsection (1) to adduce such evidence or put such question shall be recorded and shall form part of the record of the proceedings.

Under this section, evidence of the sexual reputation of a complainant is prohibited in all circumstances. Evidence as to prior sexual conduct may be admitted in only three circumstances, namely –

- to rebut prosecution evidence
- where it is necessary to explain a physical condition of the complainant, and
- where it is constitutionally required for the accused's defence.

Even where the evidence fits into one of the above three categories, relevance has to be established by the defence and, in assessing relevance, the court has to take into account any potential prejudice to the complainant's dignity and right to privacy. An application has to be made to lead the evidence, and the court may direct that the complainant is not present when the application is made. Significantly, the court is required to record its written reasons for its decision to grant or refuse an application made in terms of section 227A.

Section 227A leaves the court with a significant degree of discretion in determining relative prejudice and whether or not the evidence "is fundamental to the accused's defence".[87] This is no doubt in deference to the constitutional right to a fair trial and the Canadian experience, which saw legislation that placed significant constraints on the court's discretion being struck down as it allowed the possibility of evidence that was relevant to the accused's defence being excluded.[88] However, this means that there is the danger of old practices continuing. Nonetheless, subsection (4) provides an extremely important safety net in requiring judicial officers to give reasons for allowing such evidence.

Vulnerable witnesses

Section 1 of the Criminal Procedure Amendment Act, 2003 amended the Criminal Procedure Act, 1977 by inserting section 158A. The latter section contained special provisions for vulnerable witnesses. These provisions were repealed by the Criminal Procedure Act, 2004 but substantially re-enacted in section 189 of the 2004 Act: so, again, the withdrawal of the 2004 Act is of no particular significance. Section 158A is an extremely long section that makes special provision for vulnerable witnesses. The definition of *vulnerable witness* is broad (and specifically excludes the accused), and includes –

- children under the age of 18[89]
- complainants in sexual offence and domestic violence cases, and[90]
- witnesses suffering from a mental or physical disability or who may be intimidated or otherwise suffer undue stress and as a consequence be unable to give reliable evidence.[91]

87 Section 227A(1)(c).

88 *R v Seaboyer*, [1991] 2 SCR 577. Section 276 of the Canadian Code was consequently amended and now confers a more flexible discretion. English law also contains legislation restricting the admission of character evidence in respect of complainants and other witnesses, but this, too, confers a relatively wide discretion on presiding officers (section 100 of the Criminal Justice Act 2003).

89 Section 158A(3)(a).

90 Section 158A(3)(b) and (c).

91 Section 158A(3)(d).

Subsection (2) sets out the various steps that the court may take in attempting to put the vulnerable witness at ease in order to facilitate the most coherent form of testimony. These include creating an informal environment, ensuring that the intimidatory presence is out of sight of the witness, which may include the use of such devices as closed-circuit television. Whatever steps are adopted, the court and defence must be able to see and hear the vulnerable witness and any 'support person' who may be present. A court may allow an appropriate support person to accompany the vulnerable witness while he or she gives evidence. The support person's role at this stage is restricted to giving physical comfort and alerting the court should the witness experience undue stress.[92]

This section can be viewed as ameliorating the inevitable disadvantages suffered by vulnerable witnesses in an adversarial criminal justice system. However, the effective protection of vulnerable witnesses will have significant resource implications, and it will be interesting to see how frequently these protections materialise. The legislature was clearly aware of the resource implications; this is reflected is section 158A, which requires the court to take the following factors into account before ordering that special arrangements be made for a vulnerable witness:

(a) the interests of the State in adducing the complete and undistorted evidence of a vulnerable witness concerned;

(b) the interests and well-being of the vulnerable witness concerned;

(c) the availability of necessary equipment and locations; and

(d) the interests of justice in general.

Conclusion

The withdrawal of the Criminal Procedure Act, 2004 will not significantly disadvantage complainants in sexual offence cases. The 2004 Act, in most instances, simply consolidated the gains made by victims of sexual offences in the Combating of Rape Act and the 2003 Amendment Act and, in one instance, appeared to take a step backwards, namely in apparently reinstating the cautionary rule applicable to children. The withdrawal of the Act leaves scope for the clarification of the rule applicable to previous consistent statements in sexual offence cases, and the abolition of the cautionary rule applicable to children by the 2003 Act intact. However, the loss of the reforms to the hearsay rule contained in the 2004 Act does deprive vulnerable witnesses of potential relief.

Hopefully, the legislature will continue to pursue the hearsay reforms, and future legislative interventions will take the opportunity to consolidate all the procedural provisions applicable to sexual offences in one Act.

92 Section 158A(4) and (5).

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