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Hearsay evidence and the child witness

Summary

In terms of section 3(1)(c) of the *Law of Evidence Amendment Act* 45 of 1988 the court has, since 3 October 1988, been given a wide discretion to admit hearsay evidence if it would be in the interests of justice to do so. How this discretion is to be applied has given rise to difficulty. The question to be addressed here is whether it would be in the interests of justice to admit the hearsay statements of a child who is a complainant in a criminal matter and who is subsequently unable to testify. The courts are very wary of admitting hearsay statements emanating from children, due to issues of competency and the cautionary rule, and for this reason certain countries have created specific legistative provisions to regulate the admissibility of children's hearsay statements. In Namibia, the *Combating of Rape Act* 8 of 2000 admits hearsay via the backdoor. It is submitted that not legislation, but a common sense approach is needed to determine whether hearsy statements from child victims should be admissible. The fact that evidence is hearsay is a factor which should go to weight and not the admissibility thereof.

Hoorsê-getuienis en die kindergetuie

In terme van artikel 3(1)(c) van die *Wysigingswet op die Bewysreg* 45 van 1988 het die hof sedert 3 Oktober 1988 'n wye diskresie om hoorsêgetuienis toe te laat indien dit in die belang van geregtigheid is. Die toepassing van die diskresie is problematies. Die vraag is of dit in die belang van geregtigheid is om die hoorsê-verklaring van 'n kinderklaagster, wie nie kan getuig in 'n strafsaak nie, toe te laat. Die howe is lugtig om hierdie tipe verklarings toe te laat vanweë die kwessies rondom bevoegdheid en die versigtigheidsreël, en daarom het sekere lande spesifieke statutêre voorsorgmaatreëls ingestel wat die hoorsê-verklarings van kinders reguleer. In Namibië word hoorsê indirek toelaatbaar deur die *Combating of Rape Act* 8 of 2000. Die skrywers stel voor dat 'n "common sense" benadering gevolg moet word om te bepaal of die hoorsê-verklarings van kinderslagoffers toelaatbaar is. Die feit dat getuienis hoorsê is, is 'n faktor wat tersaaklik is by die waarde-evaluering en nie die toelaatbaarheid daarvan nie.

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1. Introduction

In *S v Holshausen* [1] hearsay evidence was defined as oral or written statements made by persons who are not called as witnesses to prove the truth of their contents. In terms of the common law, the general rule was that hearsay evidence was inadmissible.

The principal reason for excluding hearsay evidence is that it is unreliable. It is regarded as untrustworthy because it cannot be tested by cross-examination. There is the danger that the maker of the statement may be deliberately lying or may simply have made a mistake or the statement may have been misunderstood by the witness testifying in court. According to Hoffmann and Zeffertt,[2] the purpose of cross-examination is to expose these defects. If the maker of the statement is not available for cross-examination, then the evidence cannot be tested in this way. The court accepted this reasoning for the exclusion of hearsay evidence in *S v Mpofu*:

> The maker of the statement is by his absence not amenable to cross-examination. His limitations as a witness, whether by reason of falsity, inadequate opportunity for observation, suspect memory, faulty rendition or the like, cannot be tested.[3]

The court went further in *Harnischfeger Corporation and Another v Appleton and Another* [4] and held that the major factor against admission of hearsay evidence was the harm or risk of harm to the process of reaching an accurate conclusion where the objecting party was unable to test the reliability of the hearsay information. In *Mnyama v Gxalaba* [5] Conradie J held that a court should ideally be in a position to establish as closely as possible the mood of the speaker, the interests he was attempting to serve, and any reason he might have had for concealing his true sentiments from the witness or for exaggerating them. This, however, was very difficult when the court was examining not the speaker himself but only an account of what he is supposed to have said.[6]

Despite the dangers inherent in the admission of hearsay evidence, the common law was nevertheless criticised as being too rigid. All hearsay evidence that did not fall within established exceptions was excluded, irrespective of how reliable the evidence may have been.[7] This was acknowledged by Schreiner JA in *Vulcan Rubber Works (Pty) Ltd v SAR&H* :

> There is no doubt that the exceptions to the rule against hearsay have come into existence mainly because there was felt to be a strong need for such exceptions if justice was to be done.[8]

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1 1984 4 SA 852 A.
2 Hoffmann and Zeffertt 1988:125.
3 1993 3 864 N.
4 1993 4 SA 479 W:483.
5 1990 1 SA 650 C.
6 At 654A.
7 Hoffmann and Zeffertt 1988:126.
8 1958 3 SA 285 A:296H.

The common law relating to hearsay evidence was replaced by the introduction of section 3 of the *Law of Evidence Amendment Act* 45 of 1988 which came into operation on 3 October 1988. In terms of this section, hearsay is now defined as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". Section 3 has introduced three main exceptions to the rule against hearsay. Hearsay may be admitted where the party against whom it is adduced agrees that the evidence can be admitted. In *Great River Shipping Inc v Sunnyface Marine Ltd*,[9] for instance, the court commented that "[c]ounsel were agreed that I should have regard to all the evidence, despite some of it being hearsay". Secondly, hearsay may be admitted where the original maker of the statement subsequently testifies at the same proceedings. If the original maker of the statement does not subsequently testify, the hearsay evidence will be excluded unless it becomes admissible under one of the other exceptions.

The third exception relates to the wide discretion which has been given to the court to admit hearsay evidence if it would be in the interests of justice to do so. In determining whether it would be in the interests of justice to admit hearsay, the court is entitled to take into account a number of factors. These factors would include the nature of the proceedings and the nature of the evidence; the reason why the evidence is being tendered; its probative value; the reason why the maker of the statement is not giving evidence; any prejudice that might be experienced by the other party; and any other factors which the court might need to take into account. In analysing these factors, the courts have made the following comments: In *Mnyama v Gxalaba and Another* [10] Conradie J explained that hearsay evidence could be excluded where the probative value was low. According to him, the evidence would have to be just about worthless for it to be excluded on this ground. It would probably have to amount to no more than idle chatter or empty gossip or fuzzy rumours. According to the same judge, the mere fact that hearsay evidence is against the interest of the opposing party does not mean that it would on that account alone be prejudicial. Prejudice in this context means that the party offering the evidence would obtain some unfair advantage by its admission. Conradie J illustrated this point with the following example:

> For example, if a party, for fear of having him cross-examined, failed to call the person on whose credibility the probative value of the evidence depended despite the fact that he was available and otherwise competent to testify this might be gravely prejudicial.[11]

In terms of subsection (1)(c) the court has been given a wide discretion to admit hearsay evidence. The question of how this discretion is to be applied has given rise to difficulty. In *Hlongwane and Others v Rector, St Francis College and Others,*[12] Galgut J admitted certain hearsay evidence

9 1994 1 SA 65 C.
10 1990 1 SA 650 C:653F.
11 1990 1 SA 650 C:653 E-F.
12 1989 3 SA 318 DCLD.

in terms of this section on the basis that it would be in the interests of justice to do so. The court came to this conclusion despite the fact that the hearsay evidence was "fundamental to the respondents' defence; indeed the success of the defence depends entirely upon it".[13] The court came to a different decision in *S v Cekiso and Another* [14] where Zietsman J held that the discretion afforded the court in section 3(1)(c) should not be exercised in favour of allowing hearsay evidence on controversial issues upon which conflicting evidence has already been given since it would not be in the interest of justice to allow such evidence which cannot be tested in the normal way. The question of the court's discretion was again raised in *Aetiology Today CC t/a Somerset Schools v Van Aswegan and Another*.[15] Here Cloete AJ examined the decisions in *Cekiso* and *Hlongwane*, and came to the conclusion that the decision in *Cekiso* should be followed. He held that where the evidence relates to one of the *facta probanda* in regard to which there is a dispute, the hearsay evidence should be excluded.

Two decisions following after the *Aetiology* case have argued that the discretion afforded the courts to admit hearsay evidence should not be used sparingly or reluctantly. In *Metedad v National Employers' General Insurance Co Ltd* [16] Van Schalkwyk J argued that the purpose of amending the hearsay law had been to admit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. He commented as follows:

> The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value.[17]

In *Hewan v Kourie* [18] the court held that this subsection introduced into the hearsay rule a flexibility which should not be negated by introducing, in addition to the requirements of the subsection, reliability as an overriding requirement, or by falling back on the common-law rule against hearsay:

> By the same token it would not be in accordance with the intention of the legislature to categorise certain cases or certain issues and to hold that s3(1)(c) should be applied only sparingly in such cases or to such issues.

13 1989 3 SA 318 DCLD:324F.
14 1990 4 SA 20 Ec:22 A-B.
15 1992 1 SA 807 W.
16 1992 1 SA 494 W:498.
17 1992 1 SA 494 W:499.
18 1993 3 SA 233 T.

2. Hearsay evidence and the child witness

In terms of the common law, hearsay statements by child witnesses were excluded unless they fell within the clearly defined exceptions. This would arise most frequently in the situation where the child was the complainant of an assault and made a report to the mother or guardian. At the trial the child is unable to give evidence, either due to incompetence or fear. The report made to the mother or guardian will then be inadmissible as hearsay. The facts in *S v T* [19] are relevant. It was alleged that the five year-old complainant had been raped. At the trial, the child was frightened and unwilling to speak. Eventually the court called the mother, and the child whispered the answers to her mother, who in turn repeated them to the court. These statements were found to amount to hearsay.

The dangers associated with hearsay evidence have already been discussed in paragraph 1 above. As far as hearsay evidence emanating from children is concerned, there is a further danger relating to the competency (or lack of it) of the child. In *Chaimowitz v Chaimowitz(1)* [20] the court was presented with the hearsay statements of a child in an application for custody. Rosenow J highlighted the danger in respect of children at 819:

> In the first place we are asked to accept at face value, may I say, what appears to amount to the hearsay ramblings of an infant and we are asked to do that without having an opportunity of satisfying ourselves as to whether the infant is a competent witness at all. Before we allow a child to give evidence in this Court that child must either be sworn, or warned to speak the truth, and the Court must be satisfied that it has a sufficient degree of intelligence before any value can be placed on its evidence at all.

For these reasons he held the hearsay evidence to be inadmissible.

What effect does section 3 of the *Law of Evidence Amendment Act* have on the hearsay statements of children? In terms of the exceptions created by subsection (1), these statements would be admissible where both parties agree. It is submitted that there would be very few, if any, instances where an opposing party in a criminal case will consent to the admission of the hearsay statements of a child, especially where the child is the complainant.

The second exception afforded by section 3 is not applicable, and the third grants the court a wide discretion to admit hearsay in the interests of justice. The question to be addressed then is whether it would be in the interests of justice to admit the hearsay statements of a child who is a complainant in a criminal matter and who is unable to testify. In making such a decision the court would have to examine the factors set out in section 3(1)(c).

19 1973 3 SA 794 A.
20 1960 4 SA 818 C.

A factor that the court would have to take into account when determining whether the hearsay statements of a child complainant should be admissible, is the fact that the conviction rate is particularly low in cases of child abuse. The South African Law Commission[21] accepted that in South Africa the existing criminal procedure and rules of evidence made it exceedingly difficult to convict child abusers. They referred to a submission made by the Regional Court President of Natal who stressed that, as a result of problems regarding the rules of evidence, guilty child abusers were acquitted, "possibly to commit a second more serious aberration with other children".[22] The Commission's Report also provides details of a survey that was conducted on the incidence of convictions in cases of child abuse which were investigated by Addington Hospital during the period 1985 to 1986. According to these results, there were only 3 convictions out of 42 cases where the child witness was under the age of six. Dr Key of the Addington Hospital is quoted as follows:

> My experience leads me to believe that except in the unlikely event of an adult witness being able to testify to having seen a child being abused, it is almost impossible to secure a conviction in cases of abuse involving a child who is younger than six years.

In cases where the child witness was between six and twelve years, there were only 11 convictions out of 49 cases, mainly due to lack of corroboration. Where the child witness was between twelve and sixteen years, the conviction rate rose to 73%. In conclusion, the Commission[23] posed the question whether the State's burden of proof was not too high in the case of child abuse.

The court, as the upper guardian of children, has a duty to protect children. This duty has been entrenched by the *Constitution*, Act 108 of 1996, which provides that a child has a right to be protected from abuse and neglect. This places a positive duty on the state — it is not only the right not to be abused, but goes further and includes the right to be protected from abuse. In addition, it provides that in all matters relating to children, the child's interest shall be paramount. Therefore, it can be argued that the court, in deciding matters relating to children, must have access to all relevant information. This approach was already followed before the introduction of the new hearsay provisions. In *Zorbas v Zorbas* [24] the court was called upon to make an order of custody in favour of the mother. The defendant (the child's father) alleged, on the basis of hearsay evidence, that the man with whom the mother was co-habiting was a man of bad character who allegedly had murdered his wife and whose business, a bar-restaurant, was a source of drugs. Van Schalkwyk AJ made the following comments:

21 Republic of South Africa 1989:9-11.
22 Republic of South Africa 1989:10.
23 Republic of South Africa 1989:11.
24 1987 3 SA 436 W.

> All the evidence supporting the defendant's allegation that Mr Moumtzis is a man of bad character is unquestionably inadmissible. To that extent there is no evidence before me upon which a finding adverse to Mr Moumtzis's character can be made. But does that mean that these allegations, vague and inconclusive as they are, are to be ignored altogether? If, for instance, inadmissible evidence were to be placed before a Court that one of the parties to a custody action had been convicted of infanticide would the court, sitting as upper guardian, ignore such evidence on the grounds of its admissibility? I think not. It seems to me that the concept of guardianship involves a responsibility which transcends the strictures of the law of evidence.[25]

Although this case relates to civil matter and to a custody dispute where the courts are bound to find in the best interests of the child, the Constitution has extended the standard of best interests to all matters concerning children. In *Shawzin v Laufer* [26] Rumpff JA also came to the conclusion that the court as upper guardian in issues of custody applied only one norm, namely "the predominant interests of the child". He went on at 662H-663A to find that in cases relating to the predominant interests of the child, the court was not bound by the contentions of the parties and could depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties. Accordingly, Van Schalkwyk AJ held in *Zorbas v Zorbas* that it would be undesirable for him to make an award of custody where there was "the merest hint of serious misdemeanours",[27] even if these were based on hearsay.

If, in deciding the best interests of children, the concept of guardianship is more important than the rules of evidence, as was found in the above two cases, then this line of thinking should be extended to criminal proceedings since the court's role as upper guardian has been reinforced by the Constitution. The court's role as upper guardian would now, in terms of the Constitution, include the protection of children from abuse and neglect, and ensuring that children's interests are paramount. This role of the court in protecting a child's best interests should then also "transcend[s] the strictures of the law of evidence" as has been the case in civil matters. Cachalia *et al* [28] have even gone so far as to say that the exclusion of the hearsay statements of children may be unconstitutional since the interests of children are paramount in all matters relating to children.

However, despite this argument, the admission of hearsay remains within the discretion of the presiding officer, and courts may be very wary of admitting hearsay statements, especially those which emanate from children, due to issues of competency and the cautionary rule. For instance, the decisions in *Cekiso* and *Aetiology Today* held that where hearsay evidence relates to controversial issues, it should be excluded.

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25 1987 3 SA 436 W:438 F-G.
26 1968 4 SA 657 A.
27 1987 3 SA 436 W:439 E.
28 Cachalia *et al* 1994.

For this reason Zieff[29] argues that an additional statutory provision should be introduced, creating a general exception to the hearsay rule in the case of the statements of children in sexual abuse cases. In making this proposal, Zieff refers to similar legislation in the United States which has been introduced in an attempt to make the criminal justice system more sensitive to the plight of the child victim. Zieff[30] explains that since 1982 there has been a rapid adoption of the new hearsay exceptions for statements made by child victims of abuse in the United States, based on the fact that these statements are often the only evidence available and also that a child's early statements are considered to be more reliable than in-court testimony since they are made closer in time to the event. He uses the Washington Statute as a model. Washington enacted a statutory provision in 1982 which formed the basis for statutes in a number of other states.[31] The wording of the Washington Statute is as follows:

> 9A.44.120 Admissibility of child's statement — Conditions. A statement made by a child when under the age of ten describing any act of sexual conduct performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings by the courts of the state of Washington if:
>
> 1. The court finds, in a hearing, conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> 2. The child either:
>
> 1. Testifies at the proceedings; or
>
> 2. Is unavailable as a witness; Provided, that when the child is available as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

In terms of this statute, if the child is unavailable as a witness, the hearsay can only be admitted if the evidence is reliable and there is corroborative evidence of the act. According to Myers,[32] the following factors would amount to corroboration: evidence by an eyewitness, evidence given by another child victim, an admission or confession by the accused, medical evidence that supports the child's submission, psychological evidence, and any other evidence which would corroborate what the child said. In *State v Gitche* [33] the medical finding that partial penetration had occurred was used to corroborate

29 Zieff 1991:32.
30 Zieff 1991:32
31 Whitcomb *et al* 1985:72-3.
32 Myers 1987:377.
33 41 Wash. App. 820, 706 P.2d 1091 (1985).

the child victim's statement and in *Runion v State* [34] the accused's confession was sufficient corroboration of the victim's statement.

The Washington Statute requires that a hearing must first be held to determine whether the statement is sufficiently trustworthy. The kind of evidence admissible at such a hearing would include an interview with a person who is going to repeat the child's statement, any other person who may have witnessed the making of the statement, any person who has knowledge of the alleged sexual assault, and, where possible, the child himself.[35] According to Petersen,[36] the hearing should focus on the amount of time that has elapsed between the act and the statement and whether the statement was made in response to a leading question. The court must question the witnesses to determine whether the child or the witness has any bias against the accused or any motive for lying, and whether any event occurred between the alleged act and the child's statement which could have accounted for the contents of the statement.

In the recent decision in *State v D'Andrea* [37] the appeal court found that the trial court had not abused its discretion in holding that the hearsay statement of the child victim was reliable. The court found the statement reliable because there was no motive on the part of the child to lie, the child had a reputation for truth-telling, more than one person heard the statement, the statements were spontaneous, there was no possibility of faulty recollection and there were no circumstances suggesting misrepresentation. In *State v Dutton* [38] the hearsay statement of the child witness was found to be reliable on the basis that the child had no apparent motive to lie, appeared to be of truthful character and was able consistently to distinguish between different perpetrators, orifices and whether or not force had been used. She differentiated amongst her friends, telling the court who had lied and who had not. She also made similar statements to several people concerning her contact with the defendant. Further disclosures about abuse occurred spontaneously without prompting from adults, and the timing of her statements and the persons to whom she made them were indicative of reliability.

In contradiction, child hearsay statements were found to be inadmissible by Washington courts in the following cases on the basis that they were unreliable. In *State v Ryan* [39] the court held that the time, content, and circumstances of the statements did not bear adequate *indicia* of reliability. Several factors were used to determine reliability namely, the motive to lie, the defendant's character, the number of persons hearing the statements, the spontaneity of the statement, the relationship between the declarant and the witness, the possibility of faulty recollection, and reasons to suspect faulty misrepresentation. When these factors were applied to the hearsay

34 180 Ga.App. 440, 349 S E.2d 288 (1986).
35 Petersen 1983:829.
36 Petersen 1983:827.
37 1998 WL 251829 (Wash. Ct. App. Div. 1 1998).
38 1997 WL 219789 (Wash. Ct. App. Div. 2 1997).
39 103 Wash. Zd 165, 691 P.2d 197 (1984).

testimony, it was noted that the statements were not reliable and the defendant's conviction was reversed. The appeal court in *State v Karpenski* [40] determined that the child was incompetent to testify since he lacked the capacity to distinguish truth from falsehood, and at the time of his hearsay statements the child was younger and less mature than he was at the time of trial. Thus the only reasonable inference available from the record was that the child's lack of capacity at trial also existed when he made his various hearsay statements. It is clear then that even though a hearsay statement falls within a hearsay exemption or exception, it cannot be reliable according to the court if the declarant was incompetent when it was made. Thus, when the competency of a declarant is at issue, the proponent must demonstrate not only circumstances described on the face of a hearsay exception, but also circumstances showing that at the time of the hearsay statement the child was describing an event that the child had the capacity to accurately perceive, recall and relate.

In view of the difficulties with regard to hearsay and the child witness in South Africa, Zieff[41] proposes that the South African legislature create an additional statute regulating the admissibility of the hearsay statements of children. He suggests that the Washington statute provides a sound model. When the hearsay statements of children are tendered as evidence, the court must conduct a full enquiry into the statement's reliability. In so doing, the court must consider all the relevant factors, including the reason why the child is not testifying and the possibility that other external influences might be the source of the child's allegations. Only reliable hearsay should be admitted.

However, it is our submission that the weighing up of all relevant factors in evaluating the reliability of the hearsay evidence in terms of the Washington statute, sounds very similar to the factors the court must take into account when exercising its discretion in terms of section 3(1)(c) of the *Law of Evidence Amendment Act* 45 of 1988. The difficulties which the courts have in exercising a discretion of this nature and determining what is meant by probative evidence and prejudice have already been highlighted. Therefore, the introduction of a statutory provision which will enable the hearsay evidence of children to become admissible in certain circumstances will no doubt give rise to the same problems that have arisen from section 3(1)(c). The only real advantage of the introduction of such a statutory provision would be the emphasis it placed on the admissibility of children's hearsay statements, in other words the intention of the legislature would be that the hearsay statements of children should, where reliable, be admissible. There will be a stronger duty on the court to make these statements admissible.

According to Milton *et al* [42] the fact that an accused is accorded a right to cross-examine in terms of section 25(3)(d) of the Constitution could possibly impact on the admission of hearsay evidence. However, there are already

40 94 Wah. App. 80, 971 P.2d 553 (Div. Z 1999).
41 Zieff 1991:33.
42 Milton *et al* 1994:431.

exceptions to the hearsay rule where the accused is deprived of his right to cross-examine. These exceptions have also been held, in the United States for instance, not to interfere with an accused's rights to cross-examine, provided the hearsay evidence is reliable. Milton *et al* [43] makes the further statement:

> Although the admission of hearsay obviously makes severe inroads into the right of cross-examination, it is permitted in many jurisdictions where it is sufficiently reliable and does not prejudice the accused.

The accused's right to cross-examine will, therefore, have to be borne in mind when evaluating hearsay exceptions. However, the accused will nevertheless be entitled to cross-examine the person in court who is giving the hearsay evidence and can then raise any doubt or inconsistencies regarding possible misunderstandings or mistakes relating to the hearsay evidence.

3. The Namibian position

The position in Namibia regarding the admissibility of hearsay statements has been regulated by the same laws that are in force in South Africa since Namibian independence only took place on 21 March 1990. In June 2000 the *Combating of Rape Act* 8 of 2000 came into operation in Namibia. Various rules of evidence were introduced to change the way the courts deal with offences of a sexual or indecent nature. The aim was to remove evidentiary provisions based on the myth that false charges of rape are common, including the cautionary rule, the 'hue and cry' rule and the negative inference drawn from a delay between the incident and the laying of a charge. Although none of the amendments deal with hearsay specifically, it would appear that there may be an indirect influence on the admission of hearsay statements. Section 6 of this Act reads as follows:

> 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 statements have been made.

It is clear from the above section that the court's discretion has been removed as far as the admissibility of previous consistent statements made by complainants are concerned. All statements have to be admitted and will only be evaluated at the stage of weighing the evidence. Section 1 of the *Namibian Criminal Procedure Act* of 1977 was also amended by the insertion of the definition of 'complainant'. The new definition of 'complainant' reads as follows:

> 'complainant', in relation to an offence of a sexual or indecent nature, means a person towards or in connection with whom any such offence is alleged to have been committed, irrespective of whether or not that person has actually laid a complaint or gives evidence in the criminal proceedings in question.

43 Milton *et al* 1994:431.

The Namibian definition of 'complainant' raises the issue of admission of hearsay evidence. In terms of this definition, the complainant does not have to testify, yet any previous consistent statement made by that person will be admissible, thus admitting hearsay via the backdoor. This has dramatic implications for cases of sexual assault involving very young children. For instance, a child may make a report to a parent, guardian or child interviewer in which she alleges that a particular person has sexually assaulted her. At the trial the child may refuse to testify or the court may find the child incompetent to testify. The traditional approach has been to exclude from the evidence any report the child may have made, since this would amount to hearsay and thus be inadmissible. As indicated earlier this approach has often been criticised since it excludes very relevant evidence and some countries, like the United States in the Washington State example above, created special statutory sections in terms of which evidence of this nature could be admitted. In terms of the new *Combating of Rape Act* 8 of 2000, the report made by the child in the above illustration would be admissible. The presiding officer would simply have to decide what weight should be attributed to the child's report in the light of the surrounding evidence in the particular case. The reliability should be determined according to the time, content and circumstances of the statement and existing corroborative evidence of the act.

4. Conclusion

What is needed, it is submitted, is a common sense approach. In order to convict an alleged perpetrator in a criminal case, the accused's guilt must be proved beyond a reasonable doubt. To determine whether the guilt has been proved beyond a reasonable doubt, the court must evaluate the evidence that has been placed before it. If the evidence is unreliable, the court will be unable to convict. Surely, in order to determine whether guilt has been proved beyond a reasonable doubt, all relevant evidence should be placed before the court. The court, in evaluating the evidence, will accord the necessary weight to the evidence. It is unforeseeable that a court would convict an accused on the basis of a hearsay statement made by a child without any other evidence to corroborate this. However, where the court is faced with medical evidence that a child has been assaulted, there is evidence from a witness that the accused was seen with the child at the relevant time, a child's hearsay statement would carry far more probative value. Obviously, in assigning the weight to be attached to the evidence, the court would have to look at the source of the evidence, the age of the child, his possible competence and the reasons why the child is not giving evidence.

It is our submission, therefore, that all hearsay statements emanating from child victims should be admissible. This is the position in other inquisitorial countries, and it has not been alleged that accused are wrongfully convicted in this system as opposed to the accusatorial system. The ordinary rules of evidence would apply. The evidence would have to be relevant in order to be admissible. The mere fact that the evidence will be admissible does not mean that the accused will automatically be convicted. There will have to be

evidence before the court which proves the accused's guilt beyond a reasonable doubt. The fact that evidence is hearsay is a factor which should go to weight and not to admissibility. This approach has already been hinted at by Van Schalkwyk J in *Metedad v National Employers' General Insurance Co Ltd*.[44]

> The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value.

44 1992 1 SA 494 W:499.

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