2003 Journal for Juridical Science 28(1): 59-75

A Ellis

Baby rape: why does the law not protect them?

Summary

South African society has recently been confronted by an escalation of baby- and child-rape incidences which cry out for legal intervention. Research has shown that an innovative, multidisciplinary approach is called for to protect babies and young children as victims of violent crime in their quest for justice during investigation and subsequent legal process. Reference is made to the obstacles in the existing legal system confronting these victims, and the proposals of the S A Law Commission to address these shortcomings. A warning is sounded that the mere amendment of the law, extensive though it may be, will remain paper law without the means to implement investigation teams and special courts, supported by the necessary expertise, to investigate and adjudicate cases of this nature. To provide access in remote areas, the institution of special courts operating on a regional basis as circuit courts ought to be considered.

Baba-verkragting: Waarom beskerm die reg hulle nie?

Die Suid-Afrikaanse samelewing is die afgelope tyd geskud deur ’n toename in gevalle van verkragting van babas en jong kinders. Navorsing dui daarop dat die reg nie voldoende beskerming bied aan die slagoffers van sodanige misdade nie, veral met betrekking tot die ondersoek-proses, en die proses in die howe waar geregtigheid teenoor hierdie weerlose slagoffers dikwels ’n innoverende, multi-dissiplinêre benadering vereis. Daar word verwys na die struikelblokke in die regsproses waarmee die slagoffers gekonfronteer word, en die aanbevelings van die S A Regskomissie om die tekortkominge deur wetgewing aan te spreek. Daar word gewaarsku dat die blote daarstel van uitgebreide wetgewing, sonder die praktiese implementering van spesialis-ondersoekspanne en howe (ook in afgeleë gebiede), om sake van hierdie aard te ondersoek en te verhoor, van min waarde sal wees. Daar word aanbeveel dat die instel van spesialis-howe wat op streeksbasis as rondgaande howe funksioneer oorweeg behoort te word.

A Ellis, Senior Lecturer, Department of Mercantile Law, Faculty of Law, University of the Free State, Bloemfontein.

Children are the true connoisseurs,
What's precious to them has no price, only value.
(Bel Kaufman)

1. Introduction

Since 1994 the incidence of violent crimes in South Africa has escalated. Although such escalation was to be expected during times of rapid social change, the most vulnerable members of society (pre-school children or "babies"), in particular, increasingly became the victims of various acts of violent crime, especially sexual abuse and rape.

Available statistics and reports in the media bear witness to this. In a multi-cultural South African society the crime of rape is not confined to specific social or race groups. Many and varied reasons are put forward for the escalation in the rape of children, such as, among others, the breakdown in family life, a culture of violence in the country, the struggle for economic survival, and stress. According to Netshiombo[1] a rape surveillance conducted by Swart *et al* in 2000 revealed that in 88% of the reported cases the victims were raped by a perpetrator of their own race group. Furthermore, he refers to a government commission of enquiry into witchcraft conducted in the Northern Province before which allegations were made of ritual killings of young, sexually inexperienced children, and the myth that male adults infected with HIV/AIDS can be healed by having sex with a virgin. It is alleged that this notion in particular also accounts for the recent increase of child rape incidents.

Although recent statistics on the incidence of child rape are not available, according to statistics provided by the South African Police Services Crime Information Analysis Centre, 24 019 incidents of rape on children were reported during the first half of 1999. More than 30 000 cases of child abuse per year are reported. In the Free State Province alone 790 child abuse cases were reported to social services for the period March 2001 to April 2002, which included 209 sexual abuse and 340 rape cases. Of the 433 cases awaiting trial on the roll of the two Bloemfontein Courts for Sexual Abuse in May 2002, 210 children were involved.

A recent study indicated a general perception of reluctance to report rape cases to the police, ascribing it to fear or lack of confidence in the system. According to the study, this results in only 60% to 70% of rape cases being reported, and of these only 1 in 15 across the Southern Metropolitan Local Council Area (Johannesburg) are investigated and taken to court. According to the study by CIETafrica:[2]

> Some may be labelled as something else (indecent assault or domestic violence). The victim may decide, or may be persuaded, to drop the case. For one in roughly 20, the docket will be lost in a manner they

1 Netshiombo 2001:15.
2 As quoted in The South African Law Commission 2001:39.

> consider fraudulent. Of every 17 dockets that are opened, only five will be referred by the police. Of these, one will be convicted. This implies the average rapist in the South has less chance of conviction than he has birthdays in a full year.

Of all forms of child abuse, it seems that sexual abuse has been the most prevalent. Studies conducted in as early as 1990 indicated that 90% of reported cases at the Transvaal Memorial Clinic in Johannesburg were of a sexual nature, while at Chris Hani Baragwanath it was 63%.[3]

Although the impact of political and social violence on youths and young adults has been extensively researched in South Africa, so far very little research has been done on the effects of violence on pre-school children.[4]

A recent spate of child rape cases reported in the press, especially that of six-month old baby Tsepang in the Northern Province, sparked off a public outcry for more stringent measures to protect these vulnerable members of society. The apparent inability of the law enforcement system to curtail the incidence of the rape of babies and very young children and of successfully convicting the perpetrators, has led to instances where communities have taken the law into their own hands, resulting in more violence.

It has become increasingly clear that an innovative multi-disciplinary approach, directed by appropriate legislation, has become necessary to afford the protection young child-rape victims deserve. This new approach should dictate the whole legal process, from the disclosure and reporting of the crime, to the investigation, the prosecution in court, the application of the rules of evidence and the sentencing of the offender. Traditionally, the adversarial criminal justice systems have exposed children to intimidation and to fear of the court, and often subjected them to secondary abuse by harsh cross-examination and the application of cautionary rules — all in aid of protecting the rights of the accused. Attempts have been made by the South African Legislature to address some of the problems, but whether they are adequate, will have to be examined.

In an attempt to codify the substantive law relating to sexual offences in South Africa, and *inter alia* to develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, with the aim of protecting the rights of victims and ensuring fair trials, the South African Law Commission has released three separate discussion papers with proposals on the law relating to sexual offences in South Africa.

The following two Discussion Papers are relevant to this discussion:

Project 107, Discussion Paper 85: Sexual Offences: The Substantive Law (12 August 1999),[5] and

3 De Villiers and Prentice 1990:18.
4 Netshiombo 2001:17, 18
5 Hereinafter referred to as Discusssion Paper 85.

Project 107, Discussion Paper 102: Sexual Offences: Process and Procedure (December 2001).[6]

The question, however, remains whether the proposed new legislation will offer real protection to the victims of baby-rape, or, without extensive multi-disciplinary support systems, will remain nothing but paper-law.

2. Constitutional and legislative protection of children in South Africa

2.1 Constitutional protection

Children's rights in South Africa are protected in general, together with the rights of adults, under the Bill of Rights in the Constitution of South Africa, Act 108 of 1996. More specifically, Section 28, which applies only to children, can be regarded as a mini-charter of rights created for children only.[7] Section 28 has the effect of enhancing the protection afforded to children in the remainder of the Bill of Rights.

Of specific importance for the purpose of this discussion are Section 28(1)(d) which provides that every child has the right "to be protected from maltreatment, neglect, abuse or degradation", and Section 28(2) which provides that "a child's best interests are of paramount importance in every matter concerning the child."

According to Subsection (3) a child means a person under the age of 18 years.

It is therefore clear that in terms of the Constitution the State has a legislative duty to introduce measures to protect children.

2.2 Legislation

The following legislation deals with the physical and sexual abuse of children in South Africa:

The *Sexual Offences Act* 23 of 1957 by which sexual intercourse with minors is criminalised;

The *Child Care Act* 74 of 1983, which provides for the obligation of dentists, medical practitioners, nurses or social workers, teachers or any person employed by or managing a children's home, place of care or shelter to report child abuse to specific health professionals and social workers.[8] Section 50 deals with the ill-treatment or abandonment of children; and section 50A with the criminalisation of the sexual exploitation of children and the obligation of certain persons to report incidents of such exploitation to the police.

6 Hereinafter referred to as Discussion Paper 102.
7 Davel 2000:173.
8 Section 42(1).

Section 4 of the *Prevention of Family Violence Act* 133 of 1993, retained with the implementation of the *Domestic Violence Act* 116 of 1998, provides for an obligation to report the ill-treatment of children.

2.3 International conventions

Further impact was given to the duty of the State to provide for additional legislative protection of children, by South Africa's ratification of the *United Nations' Convention on the Rights of the Child* (1989) on 16 June 1995. The domestic law of a signatory state has to comply with the requirements of the Convention, in this instance specifically with article 19(1) of the Convention.

Content for the "best interests" standard in the South African Constitution is provided by article 3 of the Children's Convention, which provides that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

An optional *Protocol to the Convention on the Rights of the Child*, adopted by the General Assembly on 16 May 2000,[9] dealing with the prohibition of the selling of children, child prostitution etc, provides for improvement in proceedings regarding children. Without prejudicing the rights of an accused to a fair trial, Article 8 aims to protect the rights of child witnesses and victims by requiring States to inform children of their rights, the proceedings to protect their privacy, and to provide 'appropriate support services to child victims.

Section 170A of the South African *Criminal Procedure Act* 1977, which provides for cross-examination through an intermediary, is an example of an effort aimed at meeting this requirement.

The *African Charter on the Rights and Welfare of the Child*, ratified by South Africa on 7 January 2000, identifies 'the best interests of a child' as the yardstick criterion against which a State Party has to measure all aspects of its law and policy regarding children.[10] Because all children may potentially be targets of physical, sexual, substance, or economic abuse, it is provided

9 UN Doc. a/54L84.
10 Article 4.

that States Parties should take steps to protect children against all forms of abuse.[11]

In the interpretation of rights, including children's rights, under the South African Constitution, it is important to note that Section 39 requires a court, tribunal or forum to consider international law and allows the consideration of foreign law.

Whether it can be said that South African legislation and policy regarding the protection of child-victims of (specifically) rape meets with the above criteria will be investigated by examining the progress of the child-rape-victim through the legal process.

3. Reporting the crime

Section 42(1) of the *Child Care Act*,[12] provides that dentists, medical practitioners, nurses and social workers who examine, attend to or deal with any child in circumstances giving rise to the suspicion that such child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might be deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the director-general or any officer designated by him for the purposes of the section of those circumstances.

Section 4 of the *Prevention of Family Violence Act*,[13] provides that any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury, the probable cause of which was deliberate, shall immediately report such circumstances to a police official; or to a commissioner of child welfare or a social worker referred to in section 1 of the *Child Care Act*.[14]

Different reporting authorities are involved here. It is submitted that this is not conducive to speeding up the process of the investigation of the crime, and, as such, in the best interests of the child it is proposed that one authority should be designated a reporting authority.

4. Police investigation

According to reports made to the S A Law Commission, considerable efforts have been made to improve practices and procedures for reporting sexual offences. This includes national instructions, increased training, formulation and implementation of guidelines and the development of Child Protection Units (now FCS Units).

11 Articles 15, 16, 27, 28 and 29.
12 74/1983.
13 133/1993.
14 74/1983.

However, lack of resources and infrastructure impact negatively on the practical application and implementation of training, instructions and guidelines. Among the main problems the S A Law Commission identified as negatively impacting on very young victims of rape were:[15]

- the filtering out of cases at police-station level;
- police corruption;
- cumbersome procedures in the taking of statements;
- lack of provision of information to victims and their care-takers;
- delays in organising medical examinations for victims.

In practice the police have the discretion to proceed with an investigation, or at the request of the victim or the victim's parents, not to do so. This "discretion" leaves the door wide open for possible intimidation and corruption, thus frustrating the prosecution process of alleged rapists even before it has commenced (see footnote 2).

The S A Law Commission recommends that the prosecuting authority (not the police), should have sole discretion to decide not to proceed with an investigation; that charges may not be withdrawn at police stations, even at the request of victims or victims' families. These proposals are to be commended, and will hopefully be implemented.[16]

It is also important that if an identification parade is deemed necessary it should be held as soon as possible,[17] preferably after arrest, and that in sensitive cases (such as child-victims or witnesses) the use of a two-way mirror should not only be recommended,[18] but be obligatory.

5. Post-exposure prophylaxis, HIV testing, and counselling for victims

The S A Law Commission also recommends the enactment of legislation to provide for HIV testing, the best possible medical care, treatment and counselling.[19]

The state has a duty to protect its citizens, and should cover all costs for treatment and counselling required by the victim of a rape as a result of the assault, including the provision of PEP, HIV antibody testing and counselling.

The State's obligation to prevent further harm has recently come to the attention of the courts in *Carmichele v Minister of Safety and Security and another*.[20]

15 Discussion Paper 102:131
16 Discussion Paper 102:131.
17 *S v Dhlamini* 1997 1 SACR 54 W 61B.
18 *S v Leepile* 1986 4 SA 661 W.
19 Discussion Paper 102:121.
20 2001 4 SA 938 CC.

6. Medical examination

The Uniform National Health Guidelines for Dealing with Survivors of Rape and Other Sexual Offences state that irrespective of the reasons for the victim approaching the health care facility, the medical examination and the health examination should be provided at the point of entry into the system.

In terms of Section 42 of the *Child Care Act*,[21] every dentist, medical practitioner, nurse or social worker has to notify the Regional Director of Health and Welfare of that district in which the child happens to be of any suspected child-abuse.

In terms of Section 4 of the *Prevention of Family Violence Act* [22] any person who treats, examines, attends, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from injury — the probable cause of which was deliberate, is obliged to report such circumstances to a police official or commissioner of child welfare or social worker.

Police Departmental National Instructions: Sexual Offences: Support to Victims and Crucial Aspects of the Investigation,[23] indicate the steps that should be taken by the police at this stage:

- The victim has to be taken to an accredited health care practitioner for medical examination;
- The docket must be registered and permission obtained (form SAP 308);
- In terms of the Instructions, the investigating officer is obliged to assist with the forensic analysis of the exhibits by establishing whether the victim had any sexual contact less than 72 hours prior to the alleged sexual offence — if so, samples must be obtained from the partners;
- Samples must be obtained and clearly marked and forwarded to the Forensic Science Laboratory in Pretoria or Cape Town.

The medical examination of minors towards or in connection with whom certain offences have been committed is regulated by Section 335 B of the *Criminal Procedure Act* [24]:

> (1) If a police official charged with the investigation of a case is of the opinion that it is necessary that a minor in respect of whom it is alleged that an offence of an indecent or violent nature has been committed be examined by a district surgeon or, if he is not available, by a registered medical practitioner, but that the parent or guardian of such minor —
>
> (a) cannot be traced within a reasonable time;
>
> (b) cannot grant consent in time;

21 74/1983.
22 133/1993.
23 22/1998.
24 51/1977.

> (c) is a suspect in respect of the offence in consequence of which the examination must be conducted;
>
> (d) unreasonably refuses to consent that the examination be conducted;
>
> (e) is incompetent on account of mental disorder to consent that the examination be conducted; or
>
> (f) is deceased,
>
> a magistrate may, on the written application of that police official and if he is satisfied that the medical examination is necessary, grant the necessary consent that such examination be conducted.

Section 335B(2) further provides that if a magistrate is not available, a commissioned officer as defined in the *Police Act*,[25] or police official in charge of the local police station, may in writing grant consent provided that a police officer in charge of the investigation declares under oath that the consent of the magistrate cannot be obtained within a reasonable period of time and the district surgeon or registered medical practitioner declares under oath that the purpose of the examination will be defeated if the examination is not conducted forthwith.

In Gauteng Province, the *Provincial Government Policy and Protocol on the Treatment of Child Abuse Victims*,[26] allows children above the age of 16 who have personally laid a charge to sign the necessary consent because of the various conflicting laws regarding the age at which minors can consent to a medical examination.

The investigating officer is obliged to supply the J88 form and the necessary crime kit to the accredited health care practitioner before the examination and must ensure that the required samples have been taken.

The apprehended suspect is also taken to an accredited health care practitioner to establish whether there is any evidence relating to the alleged sexual offence. In terms of Section 37 of the *Criminal Procedure Act*, a member of the police has authority to request medical samples and to use force to obtain such samples should the suspect refuse to co-operate.

Although the *Policy and Protocol on the Treatment of Child Abuse Victims* provides for primary health care facilities, district and regional hospitals, as well as private practitioners, to treat injuries accordingly, take comprehensive history, medical notes and full particulars, it happens that in the event where a victim presents him/herself for an examination (whether the police have been notified or not), they are only responsible for gathering medical evidence to confirm a sexual offence and not tasked with providing medical treatment. This will also be the case where a child is brought in by a parent or caretaker. In practice, the victims are then referred to a local hospital for treatment. Often additional unnecessary trauma is caused to the small patient in having to be subjected to a different practitioner to obtain treatment for injuries sustained as a result of the rape.

25 Act 7/1958.
26 Circular 67/1998.

Although Uniform National Health Guidelines provide for a systematic and victim-friendly approach, the guidelines have not been nationally implemented, and not officially accepted as policy, so there is no obligation on medical practitioners to comply with the guidelines.

Problems encountered with district surgeons are identified as:

- examinations which are not conducted accurately;
- lengthy delays in conducting examinations; and
- a lack of information or referrals.

Ideally, when a victim is presented at a medical facility, a medical procedure practitioner should, as standard procedure, automatically collect forensic samples at this point. The police should be summoned to the hospital, and if unable to come, a case number should be obtainable telephonically. Because sexual abuse of children is subject to mandatory reporting, the medical practitioner should be enabled to proceed immediately with the examination as well as treatment — so that a child need not be exposed to the medical trauma twice. Crime kits should be available at all hospitals.

However, in a resource-impaired society such as South Africa, district surgeons and practitioners are not always adequately trained to conduct sexual abuse examinations of children. In contrast, in first world countries cases are often referred to specially trained medical practitioners or paediatricians. Expert evidence obtained inaccurately by untrained practitioners is obviously prejudicial to the conviction rate in rape cases, especially where young victims or babies are involved and medical evidence is often the only evidence available.

7. Forensic genetic typing (DNA) as a method of human identification

Very often in the case of very young children or babies, in the absence of corroborating witnesses, the only means of linking the perpetrator to the crime of rape (or exonerating a falsely accused person), is by employing forensic biological analysis methods, in particular DNA profiling. The initial collection of biological material (eg. seminal fluid, hair on clothing, blood, etc), is of the utmost importance, demanding meticulous care in the process of collecting as well as documentation of evidence at the crime scene and from the victim. According to forensic experts, the methods of evidence collection and preservation are rigorously scrutinised and challenged for admissibility in court. Of critical importance is:

- the technique of collection, the documentation and the type of evidence collected;
- the proper handling and preservation of the evidence samples to prevent degradation; and
- the absolute sterility of instruments used to collect evidence because of the sensitivity of DNA-analysis methods.

The overall reliability of DNA testing may be adversely influenced by excessive degradation of the samples taken. For this reason both the investigator and the medical practitioner should be fully trained in the requirements of collecting and preserving evidence. Delays in obtaining results from the Forensic Laboratory also adds to the trauma of drawn out criminal proceedings involving small children. According to recent information, a backlog of eight months (at present) causes inordinate delays in the finalisation of DNA testing at the Pretoria Forensics Laboratory. The impact is especially detrimental to young victims of rape in whose interest it is not to prolong their traumatic experience of the criminal justice process.

8. Expert witnesses

Because of the importance of expert evidence in sexual offence cases, the prosecutor must be able to lay the foundation for the expert witness' testimony. Basic specialised knowledge on a variety of topics is required, for example child witness trauma, child development and the effect of trauma on the child's memory and perceptions, DNA and forensic analysis, forensic interviewing and assessment etc. Training must be made available to prosecutors.

9. The child witness in court — the victim of an adversarial system?

> The game of adversarial litigation has no point when one is trying to deal with fragile and vulnerable people like small children. Every other consideration must come second to the need to reach the right conclusion if possible.[27]

In court, the child-victim of rape is the State's main witness, and as such exposed to proceedings in an open court presided over by a judicial officer, where legal rules dictate which evidence is to be excluded on the grounds of inherent unreliability, irrelevance or prejudice to the accused. Sometimes the victim is submitted to rigorous cross-examination regarding a traumatic experience by, or in the presence of, the accused.

The prosecutor represents the state in its quest to prove the guilt of the accused beyond reasonable doubt, and does not *per se* represent the child-victim or witness. The accused, on the other hand, is afforded Constitutional protection by *inter alia* the right to remain silent, the right to be presumed innocent, the right to legal representation, the right to have access to parts of the police docket, to all information the State may have in the case against him/her etc.[28]

Although understandable in the historical context of the human rights approach in South Africa, the scales seem to be unevenly tipped in favour of the rights of accused persons in rape cases.

27 Cobley1995:141. *Re D and M(minors)* (1993) 18 *BMLR* 71.
28 The *Constitution of the Republic of SA*, Act 108/1996, Chapter 2.

The S A Law Commission has recommended that the viability of the introduction of victim representation be assessed.[29]

- Bail

The first duty of the prosecutor in the adversarial system (in South Africa the National Director of Public Prosecutions), is to decide whether a matter should be referred for trial. If it is decided to prosecute, an application for bail usually follows. The *Criminal Procedure Second Amendment Act* [30] provides *inter alia* that rape and indecent assault of a child under 16 years[31] require an accused to remain in custody unless he or she satisfies the court that exceptional circumstances exist which permit his or her release.[32] Generally prosecutors oppose such applications. In granting or refusing bail it is therefore in the discretion of the court to protect the child against exposure to the accused, in the absence of exceptional circumstances. Certain vulnerable witnesses may also be jeopardised by the release on bail of an accused, and it is important that expert witnesses be allowed to assist the court in reaching a decision in this regard.

- Competency of the child

The competency of a child to give evidence is governed by the common law and is decided by the presiding officer who must be convinced that the child has the intelligence and ability to distinguish between the truth and a lie. This duty rests on the presiding officer, as well as the additional duty to explain the nature of the oath should the court find the child competent to testify. If the court is of the opinion that the child, because of ignorance arising from youth, does not understand the oath, but is intelligent enough to testify, and understands the duty of speaking the truth, the court may permit the child to give evidence "without taking the oath, or making the affirmation. The witness must be admonished to speak the truth, the whole truth and nothing but the truth."[33] The burden rests on the presiding officer to follow the correct procedure and to be able to communicate with children of a tender age and to be able to establish their level of intelligence. Presiding officers are rarely experts in these areas, and small children may be severely prejudiced as a result. Recently, the ignorance of presiding officers of the procedure prescribed in Section 164(1) of the *Criminal Procedure Act* regarding the administering of the oath to very young children, has led to dismissals on appeal which, according to the judges on appeal, should not have happened.

The introduction of a multi-disciplinary approach and inquisitorial elements in certain areas of the present South African criminal procedure system is not new. However, the need for further revision of the rules of evidence and

29 2001:230.
30 85/1997.
31 As they are offences listyed under Schedule 5 of the *Criminal Procedure Act* 51/1977.
32 Section 11(b).
33 Section 164(1) of the *Criminal Procedure Act* 51/1977.

procedures to accommodate and protect young victims of rape in the Sexual Offence Courts has been identified. The South African Law Commission has made certain recommendations to improve the system.[34]

- *In camera* and publication

In camera trials and a prohibition of publication regarding witnesses under eighteen are provided for in Sections 153 and 154 of the *Criminal Procedure Act*, respectively. However, according to evidence submitted to the S A Law Commission, the *in camera* procedure is not always strictly adhered to in courts.

- The intermediary system

An Intermediary system is provided for in the *Criminal Procedure Act* [35] whereby, at the discretion of the presiding officer, a witness under the age of 18 years may give evidence through an intermediary if it appears that the witness would be exposed to undue mental stress and suffering if he/she were to testify. The court may direct that the witness gives evidence at a place informally arranged, out of sight of any person whose presence might be upsetting, through the use of electronic or other devices (by using signs or dolls), but still within sight or hearing of those that need to hear and see the witness. Categories of persons were identified as suitable intermediaries.[36]

The constitutionality of the said Section 107A of the *Criminal Procedure Act* was challenged in the case of *K v The Regional Court Magistrate*.[37] The court held that the procedure does not infringe on the constitutional right of the accused to a fair trial, in particular to cross-examine a witness, and his right to a public trial.

In *S v Stefaans* [38] certain guidelines were laid down for the application of the intermediary system.

Valid criticism of the intermediary system is that although the procedure is implemented according to certain guidelines, which eases the plight of (especially) child-witnesses, it is still not obligatory in the case of certain witnesses. In addition, special courts, equipped for such hearings, are not readily available, especially in rural areas.

The S A Law Commission recommended that an intermediary should automatically be provided for a child witness in criminal proceedings involving a sexual offence unless exceptional circumstances exist that justify the non appointment of an intermediary, in which case such circumstances must be specified by the court.[39]

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34 2001:229.
35 S 170 A, inserted by section 3 of the *Criminal Law Amendment Act* 135 of 1991.
36 GN No R1347 of 30 July 1993; amended by GN R360 of 28 February 1997 and GN R597 of 2 July 2001 Pretoria: Government Gazette.
37 1996 1 SACR 434 E.
38 1999 1 SACR 182 E.
39 2001:420.

This still does not solve the problem that very few trained intermediaries are available. Given the crucial role of the intermediary as communicator between the child-witness and the court, the point was also mooted that such a person could assist to establish pre-trial rapport between the prosecutor and the witness, and should therefore be trained and available from the beginning of the process.

The necessity of thorough judicial training in respect of all parties involved with child witnesses was illustrated in *S v T*[40] where a conviction of raping two children aged six and seven was overturned because of procedural irregularities. It was found that the requirements of section 170A of the *Criminal Procedure Act* were not met, in that, *inter alia*, the intermediary appointed by the court was not competent, the court could not properly observe the child witnesses and the intermediary at the hearing, and the magistrate failed to properly place the children under oath or to admonish them to speak the truth.

The appointment of a support person to be seated next to the child-witness in order to lend emotional support is also recommended by the S A Law Commission.[41]

- The cautionary rule

The common law cautionary rule of evidence applicable to child witnesses, has been questioned by experts who have argued that it has a discriminatory effect against children.[42] The child-witness may also be a single witness and the complainant in a sexual offence case, with the result that two further cautionary rules are applicable.

In *S v Ngxumsa* [43] the judge said:

> One should guard against the imagination of a young child. A child can be passionate after dreams and unconcerned with realities. The court has come to assess the power of observation, recollection and narration of the child witness. That is of course, the case to a greater or lesser extent with all witnesses, not only children. In my view the important aspect of a child's evidence is whether the child has a proper appreciation of what reality is. For a child the distinction between reality and fantasy is more likely to be blurred than in the case of an adult. A child, through strong imagination, has the power to escape into fantasy away from reality much easier than an adult.

However, the application of the cautionary rule in sexual abuse cases involving children has in recent years been successfully challenged by empirical studies in the fields of psychology and psychiatry. It was found that there is no reason to believe that a child's evidence is less trustworthy than that of an adult.

40 2000 2 SACR 658 CkH.
41 Discussion Paper 102 2001:452.
42 Schwikkard 1996:148.
43 2001 1 SACR 408 Tk:411 E-G.

In *S v Jackson* [44] the rule was dispensed with on the grounds that it stereotyped women in sexual assault cases and was based on irrational and outdated perceptions.

The S A Law Commission makes the point that where you have a case involving child sexual abuse, where the child is a single witness, these rules are applied cumulatively, making it well nigh impossible to obtain a conviction. The Commission has recommended that all cautionary rules relating to child complainants in sexual cases and single witnesses should be scrapped.

10. A brief summary of some of the changes proposed by the S A Law Commission[45]

Proposals to take note of are *inter alia*:

A redefinition of the crime of rape, so that it will read:

> Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully compels, induces or causes another person to commit such an act, is guilty of the offence of rape.

The proposed Bill provides that sexual penetration with a child below the age of 12 years constitutes rape.

In an attempt to address the problems associated with the adversarial system of criminal procedure and evidence in the prosecution of sexual offences involving particularly children, it has been recommended that:

- a special category of vulnerable witnesses be created which will include all complainants in sexual offence cases to whom additional protective measures will apply in addition to those provided by the *Criminal Procedure Act* (for instance the appointment of expert assessors to assist a presiding officer);
- The abolition of the cautionary rule regarding children and other complainants in sexual offence cases;
- Hearsay evidence of children to be more readily admitted.

The following were also proposed regarding sentence and post-trial procedure:

- the possibility of providing compensation to victims for physical, psychological and other injuries;
- the possibility of reviewing all aspects of criminal procedure regarding victims so that legislation appropriate to victims' rights can be incorporated in general criminal procedure;

44 1998 1 SACR 470 SCA:476 E-F.
45 Discussion Papers 85 and 102.

- long-term supervision for dangerous sexual offenders released from prison; and
- orders to prohibit convicted sexual offenders from causing harm to others.

11. Conclusion

The proposed changes to the law relating to sexual offences will benefit the victims of baby rape if implemented and applied as envisaged. However, the good intentions of the legislature may fall by the wayside if the process is not driven by research, expertise and the commitment of adequately trained and motivated investigators, prosecutors, judicial officers and supporting personnel in a court system that is also accessible to victims in the most remote rural areas of South Africa. A solution to this problem may be the institution of special courts operating on a regional basis as circuit courts. The need for the state to honour the constitutional right of affording protection to small children against this form of abuse has become an urgent priority in the South African legal system. Finally, mere changes to the law, without the means to effectively apply and enforce its provisions in order to protect child victims from rape will remain paper law. The means to implement the proposed reforms will have to be made available.

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